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Erie County for the Year

1998

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ERIE, PA

JUDGES
Of the
Courts of Erie County
during the period covered
by this volume of reports

COURTS OF COMMON PLEAS

HONORABLE JOHN A. BOZZA ---------- *President Judge*
HONORABLE WILLIAM E. PFADT ---------- *Senior Judge*
HONORABLE GEORGE LEVIN ---------- *Senior Judge*
HONORABLE FRED P. ANTHONY ---------- *Judge*
HONORABLE ROGER M. FISCHER ---------- *Judge*
HONORABLE SHAD A. CONNELLY ---------- *Judge*
HONORABLE STEPHANIE DOMITROVICH ---------- *Judge*
HONORABLE WILLIAM R. CUNNINGHAM ---------- *Judge*
HONORABLE ERNEST J. DISANTIS ---------- *Judge*

Volume 81

TABLE OF CASES

-A-

Abbate v. Zoning Hearing Board of Millcreek Township ---------- 33
Aluminum Waste Technology, et al.; Szymanowski, et al. ---------- 101
Armstrong v. Strong Vincent Health Center, et al. v. ---------- 49

-B-

Bennett v. Brew and McClure & Miller ---------- 174
Boetger v. Sauro ---------- 134
Boetger v. Sipos-Geissinger ---------- 134
Brew and McClure & Miller; Bennett v. ---------- 174

-C-

C.F. Zurn & Associates; Fedorko Properties v. ---------- 39
Calvert v. Greater Erie Industrial Development Corp., et al. ---------- 8
Camilo; Commonwealth v. ---------- 1
Carlson; Cole v. ---------- 18
Carter; Podluzne v. ---------- 41
Church v. Welch ---------- 180
Cole v. Carlson ---------- 18
Cole v. Lundmark ---------- 63
Colecchia; Lombardi v. ---------- 110
Collins, et al.; Vazquez v. ---------- 141
Commonwealth v. Camilo ---------- 1
Commonwealth v. Cosnek ---------- 68
Commonwealth v. Himes ---------- 27
Commonwealth v. Hurst ---------- 168
Commonwealth v. Kantorowski ---------- 145
Commonwealth v. Stonewall ---------- 123
Commonwealth v. Tomko ---------- 21
Cosnek; Commonwealth v. ---------- 68
Cristea, et al.; NMC Limited Partnership I ---------- 98

-D-

Dibble and B&L Wholesale Supply, Inc.; Presta Contractors
Supply, Inc. v. ---------- 155

-E-

Elgin E^2, Inc.; Friedman v. ---------- 13

-F-

Fedorko Properties v. C.F. Zurn & Associates ---------- 39
Ferguson v. Ferguson ---------- 16
Fichthorn v. Karr ---------- 132
Friedman v. Elgin E^2, Inc. ---------- 13
Fulton v. Saint Vincent Regional Rehab Center, et al. ---------- 4

-G-

Greater Erie Industrial Development Corp.; et al., Calvert v. ---------- 8

-H-

Heberle v. YMCA of Erie ---------- 80A
Himes; Commonwealth v. ---------- 27
Household Realty Corp. v. King ---------- 36
Hurst; Commonwealth v. ---------- 168

-I-

In Re: Trust of Henry Orth Hirt ---------- 150
In the Matter of the Adoption of K.U.J. ---------- 184

-J-

Jones, Marsh, Masterson, Lyons & Smith Committee; Woolslare v. ------ 53

-K-

Kantorowski; Commonwealth v. ---------- 145
Karr; Fichthorn v. ---------- 132
King; Household Realty Corp. v. ---------- 36
Klopfer v. Terra Erie Associates, et al. ---------- 72
Klopfer v. Terra Erie Associates, et al. ---------- 75

-L-

Lombardi v. Colecchia ---------- 110
Lundmark; Cole v. ---------- 63

-M-

Merski and General McLane School District; Sargent v. ---------- 128
Millcreek Township, et al.; Terella v. ---------- 88
Moir v. Moir ---------- 95
Moir v. Moir ---------- 159

-N-

NMC Limited Partnership I v. Cristea, et al. ---------- 98

-P-

Podluzne v. Carter ---------- 41
Presta Contractors Supply, Inc. v. Dibble and
B&L Wholesale Supply, Inc. ---------- 155

-S-

Saint Vincent Health Center, et al.; Armstrong v. ---------- 49
Saint Vincent Regional Rehab Center, et al.; Fulton v. ---------- 4
Sargent v. Merski and General McLane School District ---------- 128
Sauro; Boetger v. ---------- 134
School District of the City of Erie, Pennsylvania; Smith v. ---------- 113
Sipos-Geissinger; Boetger v. ---------- 134
Smith v. School District of the City of Erie, Pennsylvania ---------- 113
Stonewall; Commonwealth v. ---------- 123
Szymanowski, et al. v. Aluminum Waste Technology, et al. ---------- 101

-T-

Talkish, et al. v. Zoning Hearing Board of Harborcreek Twp., et al. -------- 46
Terella v. Millcreek Township, et al. ---------- 88
Terra Erie Associates, et al.; Klopfer v. ---------- 72
Terra Erie Associates, et al.; Klopfer v. ---------- 75
Tomko; Commonwealth v. ---------- 21

-V-

Vazquez v. Collins, et al. ---------- 141

-W-

Welch; Church v. ---------- 180
Woolslare v. Jones, Marsh, Masterson, Lyons & Smith Committee -------- 53

-Y-

YMCA of Erie; Heberle v. ---------- 80

-Z-

Zoning Hearing Board of Harborcreek Twp.; et al., Talkish, et al. v. ------- 46
Zoning Hearing Board of Millcreek Township; Abbate v. ---------- 33

Volume 81

SUBJECT MATTER INDEX

-C-

Causation ---------- 128
Civil Procedure
- Collateral Estoppel ---------- 75
- Commencement of Action ---------- 41 & 110
- Declaratory Judgment ---------- 88
- Mandamus ---------- 88
- Motion for More Specific Complaint ---------- 80A
- Points for Charge ---------- 4
- Post Trial Motions ---------- 4
- Post Trial Relief ---------- 134
- Preliminary Injunction ---------- 150
- Proper Parties ---------- 80A
- Real Party in Interest ---------- 18 & 63
- Rule 3132 ---------- 98
- Service ---------- 41

Constitutional Law
- Equal Protection ---------- 113
- State Action ---------- 88
- Taking Without Compensation ---------- 88

Consumer Law
- Statutory Notice of Default ---------- 36

Contracts
- Restrictive Covenants ---------- 155

Corporate Plaintiffs
- Claims for Economic Damages ---------- 101

Criminal Law/Procedure
- Appeals
  - Sentencing ---------- 1
- Arrest Warrant ---------- 168
- Constitutional Rights ---------- 168
- Ineffective Assistance of Counsel ---------- 123
- Pretrial Procedures
  - Suppression Hearings ---------- 68
- Probable Cause ---------- 168
- Prostitution ---------- 21
- Search and Seizure ---------- 27
- Search Warrant ---------- 168
- Sentencing
  - ---------- 1
  - Discretionary Aspects ---------- 123 & 145
  - Post-Sentence Relief ---------- 123
  - Standard of Review ---------- 123

-E-

Equity
Injunction ---------- 39
Evidence
- ---------- 134
Discovery Rule ---------- 68
Expert Testimony
Medical Testimony ---------- 4
Psychiatric Testimony ---------- 68
Motion in Limine ---------- 132
Privileges
Peer Review Protection Act ---------- 49

-F-

Family Law
Adoption ---------- 184
Child Support ---------- 180
Divorce
Conditional Gift (Burden of Proof/Clear & Convincing Evidence) 95
Enforcement of Marital Property Settlement ---------- 16
Equitable Distribution ---------- 159

-G-

Governmental Immunity
42 PA.C.S.A §8541 ---------- 128

-I-

Insurance
Motor Vehicle Financial Responsibility Law ---------- 75

-J-

Judgment of Non Pros ---------- 8
Judgments ---------- 72
Justiciable Questions ---------- 141

-M-

Motion for Judgment on the Pleadings ---------- 141
Motion for Summary Judgment
Coordinate Jurisdiction Rule ---------- 174

-N-

Negligence ---------- 88

-P-

Pennsylvania Uniform Fraudulent Transfer Act ---------- 13
Pennsylvania Deficiency Judgment Act
Fair Market Value ---------- 98
Personal Jurisdiction ---------- 101
Pleadings
Preliminary Objections ---------- 41
Preliminary Injunction
Proof of Damages ---------- 155
Requirements for Issuance ---------- 155
Privileges
Professional Responsibility ---------- 174
Punitive Damages ---------- 101

-R-

Real Estate
Easements ---------- 39

-S-

Statutes
School
Rules ---------- 113
Damages ---------- 132
Election Code ---------- 53
Local Agency Law
Standard of Review ---------- 113
Strict Liability
Abnormally Dangerous Activity ---------- 101

-T-

Torts
- ---------- 174
Intentional Infliction of Emotion Distress ---------- 88
Loss of Consortium ---------- 80A
Negligent Infliction of Emotional Distress ---------- 80A & 88
Slander ---------- 174
Trespass ---------- 88
Wrongful Death-Survival ---------- 80A

-Z-

Zoning
Appeal ---------- 88
Procedure ---------- 33 & 46
Variance ---------- 33

COMMONWEALTH OF PENNSYLVANIA

v.

CAONABO CAMILO

Standard for review of sentencing decision is manifest abuse of discretion - sentence will not be distrubed unless outside the statutory limits or "manifestly excessive" - allegation of failure to consider mitigating evidence does not raise substantial question for review absent extraordinary circumstances

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 654 of 1996

OPINION

Joyce, J., May 19, 1997.

The Defendant, Caonabo Camilo, was charged with one count of criminal conspiracy (18 P.S. 903), one count of theft by unlawful taking or disposition (18 P.S. 3921) and one count of criminal mischief (18 P.S. 3304). On November 1, 1996, the Defendant plead guilty as charged before the Honorable Judge Michael T. Joyce to Count 1. On that date, this Court nolle prossed Counts 2 and 3. On December 10, 1996, the Defendant was sentenced by this Court at Count 1 to 2 years of intermediate punishment beginning with 1 year of intensive probation, followed by 3 years of probation. On December 20, 1996, the Defendant filed a Motion to Reconsider/Modify Sentence, which this Court subsequently denied. On January 29, 1997, the Defendant filed his Notice of Appeal. The issues are now before this Court.

Before this Court can reach the merits of the Defendant's contentions, a determination must first be made as to whether a substantial question has been presented for review. *Commonwealth v. Urrutia*, 439 Pa.Super. 227, 653 A.2d 706 (1995), appeal denied, 541 Pa. 625, 661 A.2d 873 (1995). A substantial question is presented if the Defendant "advances a colorable argument that the trial judge's actions were: (1) inconsistent with a specific provision of the sentencing code; or (2) contrary to the fundamental norms which underlie the sentencing process." *Commonwealth v. McKiel*, 427 Pa.Super. 561, 564, 629 A.2d 1012, 1013 (1993).

In his Statement of Matters Complained of on Appeal, the Defendant first argues that there were no sufficiently specific reasons stated for the sentence. This claim does raise a substantial question as to the propriety of sentence. *Commonwealth v. Jones*, 418 Pa.Super. 93, 613 A.2d 587 (1992). The Court would note that "sentencing is a matter within the sound discretion of the trial court and will not be disturbed unless it is outside the statutory limits or manifestly excessive so as to inflict too severe a punishment." *Commonwealth v. Phillips*, 411 Pa.Super. 329, 601 A.2d 818 (1992), citing *Commonwealth v. Gee*, 394 Pa.Super. 277,

575 A.2d 628 (1990). Where the court's sentencing colloquy "shows consideration of the defendant's circumstances, prior criminal record, personal characteristics and rehabilitative potential, and the record indicates the court had the benefit of a presentence report, an adequate statement of the reasons for the sentence imposed has been given." *Phillips, supra*, citing *Commonwealth v. Fenton*, 388 Pa.Super. 538, 566 A.2d 260 (1989), allocatur denied, 525 Pa. 662, 583 A.2d 792 (1990). A sentencing decision will only be reversed where an appellant can prove a manifest abuse of discretion on the part of the sentencing judge. *Commonwealth v. Koren*, 435 Pa.Super. 499, 504, 646 A.2d 1205, 1208 (1994).

In the present case, this Court heard testimony from defense counsel that the Defendant is 19 years of age, that the Defendant has no prior criminal background, and that the Defendant was rejected for ARD disposition. (N.T., Sentencing, 12/10/96, p.5). Defense counsel argued to this Court that the Defendant was in the presence of two other individuals at the time of the crime and that the Defendant was motivated by the actions of these individuals. (N.T., Sentencing, 12/10/96, p. 5). Defense counsel went on to point out that those two individuals received probationary sentences. (N.T., Sentencing, 12/10/96, p. 5). The Assistant District Attorney informed the Court that the case had been rejected for ARD disposition at the request of at least one victim. (N.T., Sentencing, 12/10/96, p. 5). This Court acknowledged on the record that it was always the position of this Court to honor the victim's request on that issue. (N.T., Sentencing, 12/10/96, p. 5-6). In response to questions posed by this Court, the Defendant admitted that he is not currently employed, had not been employed for a "few months", and was living with his mother who was supporting him. (N.T., Sentencing, 12/10/96, p. 6-7). The Court noted that the Defendant had demonstrated that he had no responsibility and that he was likely to get in trouble again. (N.T., Sentencing, 12/10/96, p. 7). Accordingly, because the Court took all factors into consideration, including the Defendant's background, current situation, and rehabilitative potential, the sentence of the Court was appropriate and the argument of the Defendant should be denied.

The Defendant further argues that any presumption of mitigating factors should be deemed rebutted. The Defendant is essentially claiming that the Court failed to properly consider mitigating evidence presented at sentencing. To begin with, as previously discussed, this Court did consider mitigating factors such as the Defendant's age and lack of prior background. Further, "an allegation that a sentencing court 'failed to consider' or 'did not adequately consider' certain factors does not raise a substantial question that the sentence was inappropriate. Such a challenge goes to the weight and will not be considered absent extraordinary circumstances." *Commonwealth v. Hoag*, 445 Pa.Super. 455, 458, 665

A.2d 1212, 1213 (1995); See also *Commonwealth v. McKiel, supra*. This Court finds no extraordinary circumstances. Accordingly, the Defendant's argument does not raise a substantial question and he is not entitled to a consideration of this issue on the merits.

Lastly, the Defendant argues that the sentence was disproportionate to other sentences contemplated by the sentencing code and thus violated the fundamental norms which underlie the sentencing process. The Defendant's argument, which challenges the weight accorded sentencing factors and the excessiveness of the sentence, does not present a substantial question. *Commonwealth v. Johnson*, 446 Pa.Super. 192, 197, 666 A.2d 690, 693 (1995). "A challenge to the weight accorded sentencing factors does not raise a substantial question absent extraordinary circumstances." *Id*. This Court finds no extraordinary circumstances. In addition, a challenge to the excessiveness of a sentence fails to state a substantial question where the sentence is within the statutory limits. *Id*. As this sentence is within the statutory limits, this Court finds no substantial question.

Based on the foregoing reasons, the Defendant's Statement of Matters Complained of on Appeal are without merit and the judgment of sentence should be affirmed.

BY THE COURT:
/s/MICHAEL T. JOYCE, JUDGE

c: District Attorney
Joseph P. Burt, Esq.

WILLIAM R. FULTON, an individual; and WILLIAM R. FULTON as Administrator of the Estate of Paula A. Fulton, deceased, on behalf of the Estate of Paula A. Fulton, Plaintiff

v.

SAINT VINCENT REGIONAL REHABILITATION CENTER, a Pennsylvania non-profit corporation; SAINT VINCENT HEALTH CENTER, a non-profit corporation; CHONG PARK, M.D., an individual; JOSEPH HINES, M.D., an individual, Defendants

Scope of registered nurse's expert testimony controlled by Professional Nursing Law, 63 P.S. §211 et seq. - cautionary instruction adequately cured any prejudicial effect of opening remarks - no error in permitting defense to recall plaintiff as on cross - Plaintiff's motion for new trial denied

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 8647 - 1993
Nicholas F. Lorenzo, Jr., Esq., on behalf of Plaintiff
John M. Quinn, Jr., Esq., on behalf of Defendants

OPINION AND ORDER

Joyce, J., April 11, 1997.

This matter is before the Court pursuant to the Plaintiff's Post-Trial Motions in the nature of a Motion for a New Trial. For the following reasons, the Motion for a New Trial is denied.

The relevant facts and procedural history of this case are as follows. On October 14, 1993, William R. Fulton as an individual and William R. Fulton as Administrator of the Estate of Paula R. Fulton, deceased (hereinafter "the Plaintiff") filed his Complaint. The Plaintiff alleged that the decedent, Paula R. Fulton, received insufficient quality of hospital care during her hospital stay at the Saint Vincent Regional Rehabilitation Center (hereinafter "Saint Vincent") from November 21, 1991, to December 13, 1991. The Plaintiff alleged that during the decedent's stay at St. Vincent, she developed a decubitus ulcer on her heel which went unnoticed and undocumented until three days after her discharge from St. Vincent, by which time the ulcer had developed to a point which required the amputation of her right lower extremity. The case proceeded to trial and on February 12, 1996, the jury found in favor of Saint Vincent. On February 21, 1996, the Plaintiff filed Post-Trial Motions. On June 6, 1996, a Rule to Show Cause was granted, and thereafter a hearing was held. The issues are now before the Court.

The Plaintiff presents the following five arguments in support of its Motion for a New Trial: this Court erred in granting the Defendant's Motion to Strike Portions of Testimony of Narayano Subramany, M.D.; this Court erred in granting the Defendant's Motion to Limit Testimony of Catherine A. Morris, R.N., which included limiting the testimony of Jacqueline

Costanzo, R.N.; that the nursing opinion of the Plaintiff's expert witness, Catherine A. Morris, R.N., relating that the self-described "bruise" that Mr. Fulton observed on December 14, 1991, was actually a decubitus ulcer; that the trial was tainted from the beginning, due to defense counsel's improper remarks in his opening statement to the jury to the effect that intervening and/or superseding causes resulted in Mrs. Fulton's amputation; and that it was improper to permit defense counsel to recall Mr. Fulton to the witness stand following direct examination, and to read to the jury portions of Mr. Fulton's deposition and portions of the trial transcript of Mr. Fulton's testimony.

The Plaintiff's first, second, and third arguments shall be addressed together. This Court finds that *Flanagan v. Labe*, 446 Pa.Super. 107, 666 A.2d 333 (1995), aff'd, slip op. J-179-96 (Feb. 20, 1997, No. 16 E.D. Appeal Docket 1996) [547 Pa. 254, 690 A.2d 183 (1997)], is squarely on point with this case. In *Flanagan*, the plaintiff brought a medical malpractice action, alleging that he received inadequate care when he went to the defendant hospital for treatment of a collapsed lung on December 2, 1991. *Slip op.* at 2. The treatment involved the insertion of a tube into his chest wall. The plaintiff claimed that he received substandard nursing care after insertion of the tube and this led to progressively worsening subcutaneous emphysema. The plaintiff planned to offer testimony of a nurse as an expert witness at trial. The trial court, however, granted a motion in limine of the defendant hospital which precluded the nurse from testifying as to the identity of the plaintiff's medical condition and the causes thereof. The trial court concluded that the nurse's testimony went not only to the proper standard of nursing care, which was an appropriate subject for her testimony, but also to a medical opinion regarding the ultimate effect of that care. *Slip op.* at 3. "The court reasoned that the latter called for a medical diagnosis which a nurse is precluded by statute from making." *Id.* Finding that the exclusion of this testimony prevented the plaintiff from stating a prima facie case of malpractice, the court granted summary judgment in favor of the hospital. In *Flanagan*, the Court acknowledged that the nurse was qualified to offer opinion testimony as to whether the nursing procedures followed in the case were substandard; the issue, however, was her competency to testify regarding the identity and cause of the plaintiff's medical condition. *Id.* The *Flanagan* Court went on to state:

> The decision to permit a witness to testify as an expert rests with the sound discretion of the trial court, and, absent an abuse of that discretion, the decision will not be disturbed on appeal. *Miller v. Brass Rail Tavern, Inc.*, 541 Pa. 474, 481, 664 A.2d 525, 528 (1995). To be qualified to testify in a given field, a witness normally needs only to possess more expertise than is

> within the ordinary range of training, knowledge, or experience. *Id.* at 481, 664 A.2d at 528. Ordinarily, therefore, the test to be applied is whether the witness has a reasonable pretension to specialized knowledge on the subject matter in question. *Id.* at 480-481, 664 A.2d at 528; *Ruzzi v. Butler Petroleum Co.*, 527 Pa. 1, 10, 588 A.2d 1, 5 (1991). Here, however, the normal test of competency is constrained by a statutory provision limiting the deemed competency of nurses.

Slip op. at 3-4. The Court stated that although the statute permits nurses to diagnose human responses to health problems, it prohibits them from providing medical diagnoses. The Court found that the nurse's opinion testimony regarding the specific identity and cause of the plaintiff's condition would clearly have constituted a medical diagnosis, and therefore the trial court's exclusion of the testimony was proper. *Slip op.* at 7. In this case, Saint Vincent's Motion to Limit Testimony was based upon the proposition that the nurses' testimony goes to one of ultimate causation in this case and involves the making of a "medical diagnosis" and that therefore, the nurses were not legally qualified to render those opinions. The Plaintiff argues that the Court erred in granting the Motion to Limit Testimony because the nurses received training the observance, evaluation, and grading of decubitus ulcers, and were therefore competent to testify as to the development and age of such ulcers. The Plaintiff argues that the nurses possessed the requisite education, training, knowledge, and clinical experience on this problem, and that as such they were qualified to testify on the subject of the applicable standard of nursing care as well as giving their nursing opinions as to the age of the subject ulcer. This Court finds that *Flanagan* is squarely on point with this case. Accordingly, this Court, pursuant to the Supreme Court of Pennsylvania's decision in *Flanagan*, properly granted Saint Vincent's motion. The Plaintiff's Motion for a New Trial is therefore denied.

The Plaintiff also argues that the trial was tainted from the beginning, due to defense counsel's improper remarks in his opening statement. The Plaintiff claims that during his opening statement, defense counsel made reference to inappropriate home care which was allegedly provided to Mrs. Fulton following her discharge from Andrew Kaul Hospital on December 24, 1991, intimating that this supposed inappropriate home care caused the amputation rather than the development of the ulcer. The Plaintiff argues that this "intervening/superseding causation argument" was improper. After the comment was made, the Plaintiff's counsel moved for a mistrial, which request the Court denied. The parties agree that the Court, however, did give a cautionary instruction to the jury. This Court, as the trial court, was in a position to observe the atmosphere at trial and determine whether a statement made by counsel had a prejudicial effect on the jury. *State Farm Mut. Auto. Ins. v. Moore*, 375 Pa.Super. 470,

472, 544 A. 2d 1017, 1018 (1988), *appeal denied*, *State Farm Mutual Auto. Ins. Co. v. Ohio Cas. Ins. Co*., 521 Pa. 622, 557 A.2d 725. This Court's instruction adequately cured any prejudicial effect that counsel's remarks may have had on the jury. *Id.* Accordingly, the prejudicial effect, if any, was de minimis, and this argument is without merit.

Lastly, the Plaintiff argues that the Court erred in allowing defense counsel to recall Mr. Fulton to the witness stand following direct examination, and to read to the jury portions of Mr. Fulton's deposition and portions of his trial transcript. The Plaintiff claims that during cross-examination of Mr. Fulton, defense counsel attempted to examine the Plaintiff with an unproduced newspaper article which allegedly quoted comments the Plaintiff made at a basketball game on the evening of his wife's discharge from St. Vincent. The Plaintiff admits that his objection to this line of questioning was sustained. However, the Plaintiff argues that it was error for the Court to allow the defense to recall Mr. Fulton to the witness stand as on cross-examination and confront him with the newspaper article. This Court finds that St. Vincent was entitled to call Mr. Vincent as a witness in its own case. Accordingly, this argument is without merit.

In conclusion, for all the foregoing reasons, the Plaintff's Post Trial Motions in the nature of a Motion for New Trial are hereby denied.

ORDER

AND NOW, to-wit, this 11th day of April, 1997 it is hereby **ORDERED**, **ADJUDGED and DECREED** that the Plaintiff's Post Trial Motions in the nature of a Motion for New Trial are **DENIED**.

BY THE COURT:
/s/ MICHAEL T. JOYCE, JUDGE

JOHN A. CALVERT and SHARON CALVERT, his wife, Plaintiffs

v.

GREATER ERIE INDUSTRIAL DEVELOPMENT CORPORATION and ERIE COUNTY INDUSTRIAL DEVELOPMENT AUTHORITY, Defendants

Judgment of Non Pros

Defendant obtained a Judgment of Non Pros due to Plaintiffs' delay in pursuing their cause of action. Plaintiff filed Petition to Open.

Held: Petition to Open Judgment of Non Pros granted. To open a Judgment of Non Pros the moving party must show prompt filing of the Petition, a reasonable explanation or excuse for the default or delay that caused the non pros and sufficient facts to establish the moving party's underlying cause of action. Plaintiffs took action to undo the non pros within 30 days of it's entry, a reasonable period of time. As non pros is an equitable remedy it may be denied if the moving party comes before the Court with unclean hands. In this case Defendant contributed to the delay which formed the basis of the non pros by filing a Motion for Summary Judgment and, thereafter, initiated significant settlement negotiations which included an actual, substantive settlement proposal and an unsuccessful mediation of the parties dispute. Consequently, Plaintiffs could reasonably have expected the case to settle and their lack of docket activity is excusable. Finally, the denial of Defendants' prior motion for Summary Judgment establishes that Plaintiff's have a viable cause of action.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW NO. 4899 - A - 1990
Andrew J. Conner, Esq., on behalf of Plaintiffs
Mark E. Mioduszewski, Esq., on behalf of Defendants

OPINION

Joyce, J., September 19th, 1997.

This matter is before the Court pursuant to Plaintiffs' Petition to Open Judgment of Non Pros. For the following reasons, the Plaintiffs' Petition is granted.

The relevant facts and procedural history of this case are as follows. On November 13, 1990, the Plaintiffs commenced this action by filing a writ of summons against Defendants. On October 23, 1991, the pleadings were closed with the filing of Plaintiffs' reply to new matter. On October 13, 1993, the Plaintiffs filed a praecipe for status conference. The Honorable Judge Levin entered an order dated October 27, 1993 concluding discovery by January 15, 1994, and scheduling the filing of the parties' pre-trial narrative statements. The Plaintiffs' pretrial narrative

statement was due on January 30, 1994, and the Defendants' statements were due on February 15, 1994. Subsequent to this order, the Defendants filed a motion for summary judgement on February 1, 1994. On May 27, 1994, this Court entered an order granting the motion for summary judgment for one of the Defendants, Erie County Industrial Development Authority, (ECIDA) but denied the motion for summary judgment for the other Defendant, Greater Erie Industrial Development Corporation, (GEIDC).

On July 15, 1994, ECIDA filed a praecipe to enter judgment in favor of ECIDA. On July 18, 1994, a notice for entry of judgment was sent to the Plaintiffs by the Prothonotary. In a letter dated August 2, 1995, defense counsel reiterated a settlement offer and proposed taking the case to a professional mediator. On March 8, 1996, counsel for both parties participated in a mediation conference. Apparently, the mediation conference was unsuccessful for the Plaintiffs filed a praecipe for status conference/proposed filing schedule on April 22, 1996. On June 21, 1996, the Defendant moved for Non Pros. On July 12, 1996, the Plaintiffs filed a brief in opposition to the Motion to Dismiss for Non Pros. On July 26, 1996, the parties had reached a settlement, but, on September 6, 1996, Plaintiffs' counsel advised defense counsel that the Plaintiffs withdrew their acceptance of the settlement. On October 3, 1996, the Defendant GEIDC filed a motion for an order enforcing this purported settlement agreement. On December 11, 1996, Defendant filed a praecipe to list the motion to dismiss for Non Pros for argument and the Non Pros was granted on June 4, 1997. The Plaintiffs filed a direct appeal on June 30, 1997, but praeciped for discontinuance on August 8, 1997. Plaintiff filed a Petition to Open Judgment of Non Pros on August 7, 1997.

Before a Petition to Open a Judgment of Non Pros may be granted, the moving party must 1) promptly file a petition to open, 2) present a reasonable explanation or excuse for the default or delay that precipitated the non pros, and 3) establish that there are sufficient facts to support a cause of action. *Dorich v. DiBacco*, 440 Pa.Super. 581, 585, 656 A.2d 522, 524 (1995). (Citations omitted); Pa.R.C.P. 3051, 42 Pa.C.S.A. A request to open a judgment of non pros is by way of grace and not of right and its grant or refusal is peculiarly a matter for the trial court's discretion. *Id.*

In reviewing the Plaintiffs' actions subsequent to the judgment of Non Pros, this Court finds that the Plaintiff acted reasonably prompt. The Plaintiff filed a direct appeal within thirty days of the Order granting the Non Pros. On August 8, 1997, the Plaintiff praeciped to discontinue the appeal after having filed the petition to open on August 7, 1997. Although pursuant to Rule 3051, the Plaintiffs' proper course should have been to file the Petition before filing an appeal, the Plaintiff rectified this error within a reasonable time.

The main issue before the Court is the second prong of the tripartite test for opening a judgment of Non Pros: The moving party must present a reasonable explanation or excuse for the default or delay that precipitated the Non Pros. *Dorich*, 656 A.2d at 524.

The Supreme Court has given some guidance as to what constitutes compelling reasons for delay. Delays which would denote a per se determination of a compelling reason are delays caused by bankruptcy and liquidation proceedings, and stays attributable to awaiting significant developments in the law. Other compelling reasons must be determined on a case by case basis. *Penn Piping, Inc. v. Insurance Company of North America*, 529 Pa. 350, 603 A.2d 1006 (1992). Any delay properly chargeable to the defendant constitutes a compelling reason as well. *Herb v. Snyder*, _ Pa. Super. _, 686 A. 2d 522 (1995).

A close review of the instant case reveals that the combination of events that occurred during the time in question constitutes a reasonable explanation for the amount of delay. The pleadings were closed on October 23, 1991, and the next docket activity precipitated by the Plaintiffs, was Plaintiffs' filing a Praecipe for Status Conference on October 13, 1993. The Defendant's Motion to Dismiss for Non Pros implies that the Plaintiffs' filing of the Praecipe on the "eve" of the two years is prejudicial, but the presumption of prejudice does not arise until after two years of docket inactivity has lapsed. *Penn Piping, supra.* While Judge Levin ordered the Plaintiffs to file a pre-trial narrative, the Defendants' filing of its motion for summary judgment on February 1, 1994 effectively delayed the case being set for trial. This Court granted the motion for summary judgment in favor of Defendant ECIDA, but denied relief for Defendant GEIDC. The Order granting this summary judgment was entered on May 27, 1994, and the docket was inactive until April 22, 1996 when the Plaintiffs filed another praecipe for status conference/proposed filing schedule. At first blush, it would appear that even though the motion for summary judgment delayed the case from being set for trial, the Plaintiffs did not diligently proceed with their case after the entry of summary judgment. However, a close look at the facts which ensued support the finding that the Plaintiffs acted reasonably prompt in pursuing their case.

The potential impact of a Motion for Summary Judgment on a plaintiff's case is significant. The granting of the Summary Judgment Motion combined with ongoing settlement negotiations delayed substantive docket activity. Although the Superior Court has held that settlement negotiations are insufficient to justify docket inactivity, the case at bar is distinguishable from these cases.

In *Pennridge Electric v. Souderton School*, 419 Pa. Super 201, 615 A.2d 95 (1992), the trial court concluded that the ongoing settlement negotiations were insufficient to justify the lack of docket activity on the part of the plaintiff. The negotiations were sporadic over a period of four

years, and it was admitted by both attorneys that settlement was unlikely. During these sporadic negotiations, there were no reasonable offers of settlement, and there was no written communication between the parties from December 1983 and March of 1988 that references a settlement proposal. *Id*. The trial court found that based upon the testimony of counsel that it was unreasonable to conclude that settlement would occur. In *Pennridge,* the Superior Court affirmed the granting of the Non Pros, labeling the settlement negotiations as "too protracted" to constitute a "compelling reason for delay in this case." *Id*. at 99. "Absent extraordinary circumstances, it is hard to imagine any reason to permit settlement negotiations to continue without result for this long at the expense of any activity on the docket." *Id*. At 98. The Court based this holding on the fact that the negotiations lasted for over four years and that both attorneys acknowledged that the case would not settle.

In the case at bar, defense counsel proposed mediation in a letter dated August 2, 1995. In addition to the mediation proposal, defense counsel made an offer to settle the entire case in the aforementioned correspondence. Both parties agreed to schedule a mediation conference. For reasons that are unclear, the mediation did not take place until March 8, 1996. Unable to resolve the issue at mediation, the Plaintiffs filed a praecipe for a status conference on April 22, 1996.

Because there was an actual settlement offer on the table, and a mediation conference scheduled, the Plaintiffs could have reasonably expected that the case would settle at mediation. After settlement did not occur at mediation or shortly thereafter, Plaintiffs promptly filed a praecipe for a status conference to set the case for trial. The case *sub judice* is distinguishable from *Pennridge* in that there was actual written correspondence and serious settlement negotiations taking place. Furthermore, participation in mediation suggests that counsel on both sides reasonably believed that the case would settle prior to trial. Additionally, on October 3, 1996, the Defendant filed a motion to enforce a settlement agreement. The case did not settle and hence the Non Pros was granted.

A judgment of Non Pros is an equitable remedy, and a party seeking equitable relief must come before the court with clean hands. If a party by his acts or representations induces another party to rely upon those representations, and thus refrain from producing docket activity, the inducing party cannot seek the equitable remedy of Non Pros claiming prolonged inactivity. *Mudd v. Nosker Lumber Inc*. 443 Pa.Super. 483, 662 A.2d 660 (1995). In *Mudd* the defendants on the eve of trial asked for a continuance. The defendants represented to the plaintiffs that they wished to enter into settlement negotiations. Four weeks later, the defendants filed a motion for non pros. The trial court granted the non pros, but was reversed. "We cannot, in good faith, affirm a judgment

based on principals of equity when (defendant's) own behavior raises fundamental questions of fairness." *Id*. at 664.

The Superior Court reaffirms that a defendant's acts can comprise a compelling reason for delay in its recent opinion, *Amper v. Tsucalas*, slip op. (Docket No. 840 Pittsburgh 1996, Decided August 13, 1997). The *Amper* Court held that the defendant's motion for non pros should have been granted, for the plaintiff had no compelling reason for a three and 1/2 year delay on the docket. The plaintiff's attorney admitted that the delay was due to oversight and inadvertence, but asserted that the defendant was not prejudiced. The court found that the presumption of prejudice is irrebutable absent a compelling reason for a delay in excess of two years. *Id*. Attorney oversight is not compelling. But the court opined, "as previously stated, delay attributable to the subterfuge of the opposing party cannot be charged against a plaintiff and, therefore, represents a compelling reason for that period of inactivity." *Amper*, slip op. at 7.

In defense counsel's letter dated August 2, 1995, counsel proposes mediation. The plaintiffs in agreeing to take their case through mediation could have reasonably refrained from commencing further docket activity while in the midst of concrete settlement negotiations. The law favors settlement, and when there is a scheduled mediation conference precipitated by the defendant, the plaintiffs' inactivity on the docket can reasonably be explained. Furthermore, once it became evident to Plaintiffs' counsel that the case would not settle, the Plaintiff filed a praecipe to set the case for trial.

Because this Court finds that there were reasons sufficient for the delay in question, and the delays were in part due to the Defendant's actions, this Court finds that the Plaintiffs have presented a compelling reason for the delay that precipitated the Non Pros and that the Defendant has not been prejudiced.

The third prong required to open a Non Pros requires that the Plaintiffs establish that there are sufficient facts to support a cause of action. Because this Court reviewed this issue in Defendants' Motion for Summary Judgment and denied the Defendant GEIDC relief this Court finds that the Plaintiffs have satisfied the three prongs necessary to open the judgment.

BY THE COURT:
/s/ MICHAEL T. JOYCE, JUDGE

MELVIN FRIEDMAN, Plaintiff

v.

ELGIN E², INC., Defendant

Pennsylvania Uniform Fraudulent Transfer Act

Plaintiff, a creditor of a corporation whose assets were sold to Defendant by a bank having a blanket security interest on corporation's assets, alleged the sale was a fraudulent conveyance under the Pennsylvania Uniform Fraudulent Transfer Act (UFTA), 12 Pa.C.S.A. § 5101 et seq. Defendant filed Preliminary Objections claiming Plaintiff had failed to state a claim upon which relief may be granted because he did not allege actual fraud in his Complaint.

Held: Preliminary Objections denied. Proof of an intent to defraud is not required to maintain a cause of action under the UFTA §5104, 5105. A cause of action is complete under the UFTA upon a showing by Plaintiff that the transferor of the assets was in debt at the time of the transfer and the conveyance was for inadequate consideration.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 15483 - 1995

Jeffrey T. Morris, Esq., on behalf of Plaintiff
Alexandre C. Halow, Esq., Guy C. Fustine, Esq. and
Richard A. Lanzillo, Esq., on behalf of Defendant

OPINION AND ORDER

Joyce, J., September 18th, 1997

This matter is before the court pursuant to the Defendants' Preliminary Objections. For the following reasons, the Preliminary Objections are denied.

The relevant facts and procedural history of this case are as follows. The Plaintiff was a creditor of Hyperion Power Technologies, Inc. ("Hyperion"). In the Fall of 1993, the Bank of Boston ("Bank") was Hyperion's principle lender and the possessor of a blanket security interest in all of Hyperion's assets. The Plaintiff alleges that Bank repossessed Hyperion's assets pursuant to a $1.9 million Revolving Credit Note dated March 25, 1994, and a second Mortgage Note for $350,000 dated May 30, 1994. Bank subsequently sold the assets to Defendant Elgin E², Inc. ("Elgin") for $150,783 plus 5% of all accounts receivable generated from the sale, but, in any event, not less than $35,000.

The Plaintiff further alleges that as a result of Bank's repossession and sale to Elgin, all or substantially all of the assets of Hyperion were transferred to Elgin for consideration substantially less than the reasonable equivalent value, and that the transaction was not bona fide in nature between parties dealing at arms length. Plaintiff alleges that these transactions were orchestrated by Elgin to hinder, delay, and defraud the

creditors of Hyperion by giving Elgin control of all of Hyperion's assets, property, and business without any concurrent liability to Hyperion's creditors, and rendering Hyperion insolvent.

The Plaintiff possesses a judgment entered on July 18, 1995 against Hyperion Power Technologies, Inc. ("Hyperion") for $166,911.20, and docketed at No. 94-4414 in the Superior Court of Suffolk County, Massachusetts. This judgment of record was transferred to the instant Court and docketed at No. 15136-1995. The Plaintiff originally filed a complaint on this matter on December 18, 1995, alleging a cause of action against Elgin based on the Hyperion judgment under the Pennsylvania Uniform Fraudulent Transfer Act, 12 Pa.C.S.A. § 5101, et seq. ("Pa. UFTA").

Following argument on the Defendant's Preliminary Objections to this Complaint, the Court granted the Plaintiff further discovery in order to file a more specific complaint. The Plaintiff filed an Amended Complaint on November 22, 1996.

The Defendant filed Preliminary Objections to the Plaintiff's Amended Complaint on December 12, 1996, and a Brief in Support thereof on January 2, 1997.

The Plaintiff filed a Brief in Opposition to the Defendant's Preliminary Objections on January 13, 1997.

The content in pleadings in Pennsylvania is governed by Pa.R.C.P. Rule 1019, which states that the material facts on which a cause of action or defense is based shall be stated in a concise and summary form. A pleading must define the issues, and thus every act or performance essential to that end must be set forth in the complaint. Pa.R.C.P. 1019, 42 Pa.C.S.A.; *Santiago v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 418 Pa.Super. 178, 179, 613 A.2d 1235, 1236 (1992). In reviewing preliminary objections, only facts that are well-pleaded, material, and relevant will be considered as true, together with such reasonable inferences that may be drawn from those facts, and preliminary objections will be sustained only if they are clear and free from doubt. *Id.* Preliminary objections should be sustained only where it appears with certainty that, upon the facts averred, the law will not allow the plaintiff to recover. *Id*. When ruling on preliminary objections, the court must generally accept as true all well and clearly pleaded facts, but not the pleader's conclusions or averments of law. *Id.*

The Defendant argues that Plaintiff has failed to state a claim upon which relief may be granted. This Court agrees with Plaintiff that they have set forth a cause of action with particularity under §§5104 and 5105 of the Pa.UFTA. Therefore, this preliminary objection is denied.

The Defendant next argues that the Complaint fails to aver fraud by particularity. This Court agrees with Plaintiff that as Plaintiff's Complaint is a statutory, rather than common law-based cause of action under the

Pa.UFTA, Plaintiff's cause of action can and has been made out by offering proof that the transferor of the fraudulent conveyance was in debt at the time of the conveyance and that the conveyance was made for inadequate or nominal consideration, in which case the conveyance is presumptively fraudulent as to the creditors of the transferor. The burden of proof, unlike a common law fraud action, then shifts to Defendant to establish through clear and convincing evidence either that the transferor was solvent at the time of the conveyance and not rendered insolvent thereby or received fair consideration for the conveyance. *State Standardbred v. Seese*, 417 Pa.Super l5, 611 A.2d 1239 (1992). This Court finds Defendant's argument without merit and therefore, this preliminary objection is denied.

Defendant's last three arguments will be addressed together and are as follows: the Amended Complaint fails to state grounds to support Plaintiff's argument that Elgin should be declared a trustee for Plaintiff's benefit; the Amended Complaint fails to state grounds sufficient to support the appointment of a receiver for Elgin; and the Amended Complaint fails to state a valid claim for preliminary and/or permanent injunction. As this Court now denies the Defendant's preliminary objection to state a claim upon which relief may be granted, it follows as a matter of law that declaring a trustee for the Plaintiff's benefit, appointing a receiver, and granting a preliminary and/or permanent injunction are available remedies to the Plaintiff under 12 Pa.C.S.A. § 5107(a)(3)(iii), 12 Pa.C.S.A. § 5107(a)(3)(ii), and 12 Pa.C.S.A. § 5107(a)(3)(i) respectively. As such, these preliminary objections are denied.

ORDER

AND NOW, to wit, this 18th day of September, 1997, for the reasons set forth in the foregoing Opinion, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that Defendants' Preliminary Objections are dismissed.

BY THE COURT:
/s/ MICHAEL T. JOYCE, JUDGE

JANET FERGUSON

v.

ROBERT A. FERGUSON

ENFORCEMENT OF MARITAL PROPERTY SETTLEMENT

A subsequent marital property settlement agreement does not alter a pre-existing irrevocable trust agreement

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA FAMILY COURT DIVISION NO. 8132-1992

Paige E. Peasley, Esq. for the Respondent
James L. Moran, Esq. for the Petitioner

OPINION

This matter is before the Court on a Petition For Enforcement of Property Settlement Agreement brought by Robert A. Ferguson, hereinafter referred to as Petitioner. Janet Ferguson, Plaintiff in the captioned case, will hereinafter be referred to as Respondent. The Court makes the following findings of fact:

Petitioner and Respondent were married on December 31, 1977. On July 15, 1985, Petitioner established the Robert A. Ferguson Irrevocable Life Insurance Charitable Trust. Pursuant to the trust agreement, Respondent was named the trustee of the trust. The above-mentioned trust was funded by a $1,000,000.00 life insurance policy based on Petitioner's life. On November 21, 1994, the parties entered into a marital property settlement agreement which provided in paragraph 20(f) that at Respondent's election the trust would be continued with the Respondent remaining as trustee. It further provides that Respondent shall solely be responsible for payment of any premiums necessary to maintain the trust. On or about January 10, 1995, Respondent forwarded a request for change of beneficiary and transfer of ownership, thereby changing the beneficiary and owner from Janet Ferguson in her capacity as trustee to Janet Ferguson in an individual capacity. On November 20, 1997, this Court issued an Order mandating that Janet Ferguson transfer beneficiary designation and ownership to Janet Ferguson as Trustee as originally set forth under the Agreement of Trust dated July 15, 1985.

The arguments raised by both parties in this case have centered on the interpretation of paragraph 20(f) of the marital property settlement which concerns the charitable trust at issue. Specifically, the parties have raised the issue as to whether the marital property settlement authorized Respondent to change the beneficiary of the life insurance policy funding the charitable trust to herself as an individual. As a preliminary matter, however, this Court must determine whether a marital property settlement can validly alter the terms of a pre-existing irrevocable charitable trust agreement.

Respondent's authority as trustee is limited to the powers bestowed

through the trust agreement. *Delaware Valley Factors, Inc. v. Ronca*, 660 A.2d 623 (Pa.Super. 1995). Once created, a charitable trust may only be revoked or modified by the settlor if he has reserved the power to do so in the trust agreement. RESTATEMENT (SECOND) OF TRUSTS §367. In the instant case, the settlor, the Petitioner herein, expressly relinquished any right to change or modify the trust in Section VIII of the trust agreement. The marital property settlement, therefore, could not alter the pre-existing trust agreement which contains all powers and obligations regarding the charitable trust. The marital property settlement could not provide the Plaintiff any authority to change the beneficiary designation or ownership of the underlying irrevocable trust founded only for charitable means.

The Respondent raises an issue as to an alleged encumbrance of the life insurance policy. Respondent alleges that Petitioner failed to pay past premiums on the life insurance policy, thereby encumbering said policy. According to the marital settlement agreement, the parties agreed that Respondent is responsible solely to maintain payments of any premiums necessary to maintain the trust if she so elects. Respondent as trustee to the irrevocable charitable trust, before and after the marital property settlement agreement, was and is in a position to know of any premium delinquency based on a duty owed to the beneficiaries to take and keep control of the property. RESTATEMENT (SECOND) OF TRUSTS §175. Respondent, however, still assumed the obligation to pay any premium owed on the life insurance policy, and is solely responsible for any premiums.

The Petitioner has further petitioned this court to remove Respondent as trustee under this trust. Pursuant to 20 Pa.C.S. §711, the Orphan's Court, in Erie County the Family Orphans' Court Division has jurisdiction over inter vivos trusts. Pursuant to 20 Pa.C.S. §722, venue shall be at the situs of the trust. This trust agreement selects New Jersey as the situs of the trust. This Court, therefore, dismisses Petitioner's claim on the ground of improper venue.

ORDER OF COURT

AND NOW, to-wit this Second day of January, 1998, it is hereby **ORDERED, ADJUDGED AND DECREED** as follows:

1. Petitioner's Petition to Enforce Marital Settlement Agreement is GRANTED to the extent that the Respondent is prohibited from changing the ownership and beneficiary of the life insurance policy for all the reasons set forth in the above Opinion.
2. Both parties' requests for attorney fees are DENIED.
3. Respondent's counterclaim is DENIED.
4. Petitioner's request for removal of Trustee is DISMISSED.

BY THE COURT:
/s/ Stephanie Domitrovich, Judge

RICHARD A. COLE, M.D., Plaintiff,

v.

LOIS M. CARLSON, Defendant.

CIVIL PROCEDURE/REAL PARTY IN INTEREST

Plaintiff who, during pendency of action, assigned underlying claim upon which action is based to a third party, is no longer real party in interest and can no longer prosecute the action

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA No. 14990 - 1995

MEMORANDUM OPINION

This matter is before the Court on Defendant's Motion to Dismiss. The original action was commenced by Writ on or about November 15, 1995 in a civil action filed on behalf of Richard A. Cole, M.D., Inc., seeking the collection of fees allegedly owed to Plaintiffs for medical services allegedly rendered. On January 1, 1996, Richard A. Cole, M.D., Inc. assigned the instant claim to Richard A. Cole, the individual. On June 6, 1996, Richard A. Cole, M.D., individually, and as President and CEO of Richard A. Cole, M.D., Inc., executed a document entitled "Assignment of Claims" before a Notary public. In that document, he assigned this claim, as well as others, to Steven P. Cole. The assignment of claims reads as follows:

I, Richard A. Cole, M.D., individually and as President and chief executive officer of Richard A. Cole, M.D., Inc., hereby assign to Steven P. Cole, any claims, judgments, settlements, or any other gains, but no liabilities, stemming from the matters now being litigated or litigated in the period 1996 through 1999 in the Court of Common Pleas of Erie County, Pennsylvania or in the United States District Court for the Western District of Pennsylvania wherein Richard A. Cole, M.D. or Richard A. Cole, M.D., Inc. is a party.

Executed on June 6, 1996. Richard A.Cole, M.D.

Richard A. Cole, M.D.
President and CEO
Richard A. Cole, M.D., Inc.

Commonwealth of Massachusetts June 6, 1996
County of Essex SS.

Then personally appeared Richard A. Cole, M.D., the above named assignor, who known to me, signed or acknowledged the foregoing assignment of claims as his free act and deed, before me.

Brenda L. Roy
Notary Public

Over six months after this assignment, on December 20, 1996, a Petition was filed by Richard A. Cole, M.D., to change the name of the Plaintiff in this case from Richard A. Cole, M.D., Inc. to Richard A. Cole, M.D. On June 24, 1997, the Court, without knowledge of the latter assignment, granted Plaintiff's "Petition to Change Plaintiff". Richard A. Cole, M.D. then filed a Complaint on July 16, 1997 in which he was the sole plaintiff.

At no time during the entire twenty-five months that this claim has been litigated has Steven P. Cole appeared before this Court. In fact, Cole never disclosed to the Court that he had ever assigned the assets of the Corporation to Steven P. Cole. The Court only discovered this latter assignment through one of the many concurrent cases Cole is attempting to prosecute in this jurisdiction.

Discussion

When Richard A. Cole, M.D. (hereinafter "Cole"), assigned any "claims, judgments, settlements or any other gains, but not liabilities stemming from the matters now being litigated . . . wherein [Cole, individually], or [Corporation] is a party" to Steven P. Cole, he gave up any right he had to collect on this account receivable or this chose in action. Admittedly, he did agree to be responsible for any liability, but that doesn't make him a party to a collection of an account receivable. It should be noted that one of the reasons for this rule is that the Court must have all parties before it who have a vital interest in collection of the account. Otherwise, any settlement, release, or Order of Court not directed to the Real Parties in Interest would have no validity.

The dictionary defines an assignment as "[t]he act of transferring to another all or part of one's property, interest, or rights. . ." BLACK'S LAW DICTIONARY 79-80 (abr. 6th. ed. 1991). The Pennsylvania Rules of Civil Procedure provide that "[e]xcept as otherwise provided . . . all actions shall be prosecuted by and in the name of the real party in interest . . ." Pa.R.C.P. 2002(a). Black's defines the real party in interest to be the "[p]erson who will be entitled to benefits of action if successful . . . [A] party is a real party in interest if it has the legal right under the applicable substantive law to enforce the claim in question". BLACK'S LAW DICTIONARY 874 (abr. 6th ed. 1991).

Instantly, since Cole assigned his individual rights, as well as the Corporation's rights regarding this claim to Stephen P. Cole, neither Cole nor the Corporation are entitled to the benefits of this action and are barred from prosecuting it by the Pennsylvania Rules of Civil Procedure.

Cole argues that he comes within one of the exceptions to the general rule listed in Pennsylvania Rule of Civil Procedure 2002. The first exception states:

> (b) A plaintiff may sue in his own name without joining . . . any person beneficially interested when such plaintiff
> (1) is acting in a fiduciary or representative capacity,

> which capacity is disclosed in the caption and in the plaintiff's initial pleading . . .

Pa.R.C.P. 2002(b)(1). Here, Cole fails to come within this exception because he is neither a fiduciary nor a representative of Steven P. Cole. Further, he has never disclosed any such purported relationship in any of the pleadings or captions filed in this Court.

The next exception reads:

> (b) A plaintiff may sue in his own name without joining . . . any person beneficially interested when such plaintiff . . .
> (2) is a person with whom or in whose name a contract has been made for the benefit of another."

Pa.R.C.P. 2002 (b)(2). Cole, being the plaintiff in this action, cannot be a "person with whom or in whose name" a contract was made. The only contracts alleged in this case are the contract whereby the Corporation agreed to provide services to the patient in return for payment, which provides the basis of this suit, and that contract whereby Cole and the Corporation assigned all of their assets or gains to Steven P. Cole. Cole does not come within this section. Further, he has never alleged that there is any contract in his name which was executed for the benefit of another.

Exception "c" also fails to apply. Pa.R.C.P. 2002 (c). Cole has not alleged, nor is the Court aware of, any statute or ordinance which allows him to bring this suit when he is not the real party in interest.

The last exception in Rule 2002 declares that the general rule that all actions shall be prosecuted by and in the name of the real party in interest "shall not be mandatory where a subrogee is a real party in interest." Pa.R.C.P. 2002(d). Where, as here, there is no evidence of a subrogation agreement between Cole and Steven P. Cole, none will be presumed. This exception does not apply.

In conclusion, Dr. Richard A. Cole is not the real party in interest in the suit to collect accounts receivable, nor does he come within any of the exceptions to the rule. As such, he has no right to bring this suit in his individual capacity.

ORDER

AND NOW, to wit, this 9th day of February, 1998, it is ORDERED, ADJUDGED and DECREED that Defendant's Motion to Dismiss is GRANTED, with prejudice, for the reasons expressed in the foregoing Opinion.

By the Court:
/s/ Levin, J.

COMMONWEALTH OF PENNSYLVANIA

v.

TIMOTHY TOMKO

CRIMINAL LAW/PROSTITUTION

Defendant not guilty of promoting prostitution where he did not receive any financial benefit from sexual activity conducted between employees and patrons

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION No. 2653 OF 1997

Damon C. Hopkins, Esquire — Assistant District Attorney
James K. Vogel, Esquire — First Assistant District Attorney
John Paul Garhart, Esquire — Attorney for Defendant

OPINION

FACTS

This case is before the court pursuant to the defendant's Petition for Writ of Habeas Corpus which alleges that insufficient evidence was presented at the preliminary hearing to make out a *prima facie* case against him.

At the preliminary hearing the following operative facts were developed: On May 21, 1997, Officer Jeff Dahlstrand and Lieutenant Charles Bowers of the Erie Police Department entered Jiggles night club to initiate an investigation into illegal activities allegedly occurring therein. Upon entering, the officers paid a cover charge of $8.00 per person to the doorman, Michael Warner. After observing the activities in the club, the officers decided to return to conduct videotaped surveillance. On May 30, 1997, the officers returned with surveillance equipment, paid the cover charge and entered. Their attempt to videotape the activities occurring in the club was unsuccessful at that time due to malfunctioning equipment.

Officer Dahlstrand and Lieutenant Bowers returned to Jiggles on June 4, 12, 19, and July 7, 1997, and successfully videotaped the activities in the club. No audiotape was made during any of the visits.

On July 19, 1997, the defendant and several other employees of Jiggles were arrested by members of the Erie Police Department. The defendant was subsequently charged with two counts of promoting prostitution, 18 Pa.C.S.A. § 5902(b)(1), two counts of obscene performances, 18 Pa.C.S.A. § 5903(a)(5), and one count of employing a minor child in connection with obscene performances, 18 Pa.C.S.A. § 5903(a)(6). The charge of employing a minor child was withdrawn by the Commonwealth at the preliminary hearing on October 10, 1997.

At the preliminary hearing, Officer Dahlstrand testified that on each occasion that he visited the club, he observed nude female dancers

performing lap dances on patrons seated on or near the stage. These lap dances were characterized by Officer Dahlstrand as simulated sexual intercourse and consisted of a nude dancer gyrating on the lap of a fully clothed customer for ten to fifteen seconds.

In addition, Officer Dahlstrand testified that he witnessed and videotaped patrons of the club performing oral sex on the nude dancers. He testified that a dancer would crawl up on top of a patron or straddle his face and place her genitals in contact with the patron's face. Officer Dahlstrand could not, however, discern whether any penetration occurred in any of the encounters.

Officer Dahlstrand further testified that during these alleged oral sex encounters, the disc jockey, John Catalino, would make encouraging remarks to the patrons including: "Go ahead and eat it, it's only a buck a plate. City Council says we don't eat in here. It's only a buck a plate. Go ahead, do whatever you want we don't care." (N.T., Preliminary Hearing, 10/10/97, p. 26). Officer Dahlstrand stated that Catalino's remarks were constant and always connected to the oral sexual encounters occurring around and on the stage. Moreover, Catalino admitted to Officer Dahlstrand in an interview that he encouraged the patrons in order to get them to give money to the dancers. Catalino also stated that he was attempting to be funny when making these remarks. Finally, Officer Dahlstrand testified that although his investigation revealed that the defendant received money from the patrons for the cover charge, the sale of drinks, and the private room dances, he had no information that any of the money received by the dancers for their performances on stage was given to the defendant.

LAW

The focus of a pre-trial petition for writ of habeas corpus is whether the Commonwealth possesses sufficient evidence to establish a *prima facie* case. *Commonwealth v. Lutz*, 443 Pa.Super. 262, 661 A.2d 405 (1995). Proof of a *prima facie* case requires the Commonwealth to present evidence with regard to each of the material elements of the charge and to establish sufficient probable cause to warrant the belief that the accused committed the offense. *Commonwealth v. McBride*, 528 Pa. 153, 595 A.2d 589 (1991); *Lutz, supra.*

The defendant in this case was charged with promoting prostitution, the elements of which are as follows:

> [O]wning, controlling, managing, supervising or otherwise keeping, alone or in association with others, a house of prostitution or a prostitution business.

18 P.S. § 5902(b)(1). Under this section, the Commonwealth is required to prove (1) that there was a prostitution business and (2) that the defendant had a connection with the running, control, supervision or

keeping of the prostitution business. *Commonwealth v. DeStefanis*, 442 Pa.Super. 54, 658 A.2d 416 (1995), a*lloc. denied* 542 Pa. 641, 666 A.2d 1051 (1995) *Commonwealth v. Blankenbiller*, 362 Pa.Super. 477, 524 A.2d 976 (1987), *alloc. denied* 517 Pa. 591, 535 A.2d 81 (1987).

In averring that the Commonwealth has failed to make out a *prima facie* case against him, the defendant puts forth three arguments: (1) that the facts adduced at the preliminary hearing do not establish that the activity which took place in Jiggles qualifies as "sexual activity" under the statute; (2) that the Commonwealth failed to establish that the alleged activity was conducted "as a business"; and (3) that the rule of lenity compels this court to resolve this dispute in favor of the defendant. The court will address each of these contentions *seriatim*.

The defendant argues that the preliminary hearing testimony provided by Officer Dahlstrand merely established that a dancer would position her genitalia in front of a patron. He avers that any determination that contact occurred between a patron and a dancer's genitals is mere speculation. On the contrary, however, the surveillance videotapes provided by the Commonwealth clearly show that contact occurred between the dancers and the patrons both when the dancers crawled on top of the patrons and when they straddled the patrons faces. Although it is unclear whether or not penetration occurred, mere oral contact with the vaginal area of a female is all that is required for deviate sexual intercourse. *In the Interest of J.R.*, 436 Pa.Super. 416, 648 A.2d 28 (1994), *alloc. denied* 540 Pa. 584, 655 A.2d 515 (1995). Moreover, deviate sexual relations are encompassed in the statutory definition of "sexual activity". 18 Pa.C.S.A. § 5902. Indeed, it strains the very limits of credulity to suggest that a naked dancer pressing her genitalia against the mouth of a patron does not constitute sexual activity.[1] In this regard, the Commonwealth has sufficiently met its burden of establishing a *prima facie* case that sexual activity occurred in Jiggles on the nights in question.

The defendant next argues that the Commonwealth did not establish that the sexual activity that occurred in Jiggles was conducted as a business insofar as the defendant is concerned. The defendant relies on *DeStefanis, supra*, wherein the appellant appealed a conviction for promoting prostitution. In *DeStefanis*, the appellant, was the owner of a fitness center which charged between sixty ($60.00) and sixty-five ($65.00) dollars for a legitimate massage. After receiving such a massage, an undercover police officer was advised by the masseuse that a hand release was

[1] Although the defendant argues that it is doubtful that any sexual "gratification" occurred on the part of the patrons involved, such is not required under the statute.

available but that oral sex and intercourse were not permitted. When the officer inquired about a price, the masseuse stated that a tip would be appreciated. A female undercover officer who interviewed for a masseuse position was told by the appellant she could perform hand releases if she chose but that engaging in sexual intercourse was prohibited. The masseuses earned twenty ($20.00) dollars per hour in addition to tips.

The Superior Court ruled that the evidence was insufficient to show the existence of a prostitution business:

> When [the officer] inquired about the price of a hand release, the vague response was, "a tip would be appreciated." Arguably, when a client does not agree to pay for a sexual service up front, the ensuing act constitutes sexual activity between two consenting adults ... The fact that [the appellant] indicated ... that providing hand releases was an acceptable way to make "tips" is not probative of a prostitution "business," nor are the admissions of [fitness center employees] that they gave hand releases to some of their customers.

Id. at 63, 658 A.2d at 420.

Further, in *Commonwealth v. Blankenbiller*, *supra*, the Superior Court held that absent any evidence that a defendant received any income from a prostitution business, insufficient evidence exists to sustain a conviction for promoting prostitution. *See also, DeStefanis, supra*. In *Blankenbiller*, the appellant was the president/director of the company that owned the property where prostitution took place. In determining that the appellant did not promote prostitution, the Court considered the appellant's lack of earnings from the business. "Though it is clear that a prostitution business was operating at the date and time in question, the Commonwealth did not prove that the appellant received any income from the business." *Blankenbiller*, 362 Pa.Super. at 481, 524 A.2d at 978.

The instant case is analogous. Here, as in *DeStefanis* and *Blankenbiller*, the defendant provided the venue wherein the allegedly illegal activities took place and charged his patrons a fee to engage in legal activity. In *DeStefanis* the patrons paid $60.00-$65.00 to receive a massage on the premises. Herein, an $8.00 cover charge was paid in order to enter and view the nude dancers on stage. In both cases, additional sexual activities sometimes occurred after which a patron would tip the employee. However, neither in *DeStefanis* nor in the case *sub judice* was there any up front agreement on the part of the patrons to pay for a sexual activity. In fact, the surveillance videotapes reveal that the dancers were not always tipped either after dancing in front of a patron, performing a lap dance, or engaging in what is alleged to be oral sex. The Commonwealth contends that the remarks of Catalino, the disc jockey, which included statements such as "Go ahead and eat it, it's only a buck a plate," show that he was

advertising to the patrons that they could have oral sex with the dancers in exchange for one dollar. However, there is no evidence that the remarks of the disc jockey constituted an offer made on behalf of the dancers to which the patrons agreed prior to engaging in the sexual activities.

Further, no evidence whatsoever was presented to demonstrate that the defendant received any benefit from the tips the dancers received while on stage. The testimony did establish that the defendant received income from the $8.00 cover charge collected at the door as well as a portion of the $10.00 charge for private room dances, in addition to income derived from beverage sales. (N.T., Preliminary Hearing, 10/10/97, pp. 84-85). However, no evidence was presented which could be construed as demonstrating that the defendant received any income from the voluntary tips given to the dancers while they were on stage. *Id.* Absent a showing that the defendant received a portion of those earnings, the Commonwealth cannot make out a *prima facie* case against the defendant. *DeStefanis, supra; Blankenbiller, supra.*

The court also notes that *Commonwealth v. Johnson*, 448 Pa.Super. 42, 670 A.2d 666 (1996) is distinguishable. In *Johnson* the price of a massage at a fitness center escalated with the increasing nudity of the masseuse. Moreover, by paying a greater fee, a nude patron could massage a nude masseuse. As a result, the Court determined that the "sexual activity" performed was included in the initial price and evidence of a "prostitution business" was established beyond a reasonable doubt. Again, in the instant case the only up front cost incurred by the patrons was the eight dollar ($8.00) cover charge required for entry. This cost remained constant regardless of the actions of the patron. The "tips" offered later by the patrons were entirely voluntary both with respect to whether they were offered and how much was offered.

The defendant finally argues that the rule of lenity[2] compels the court to resolve this dispute in his favor. Although this court determined that the Commonwealth failed to make out a *prima facie* case, it notes that the rule of lenity is inapplicable in the case at bar. Although penal statutes must be strictly construed in favor of the accused, if a statute is clear and unambiguous, its provisions must be read in accordance with their plain meaning. *Commonwealth v. Wood*, 432 Pa.Super. 183, 637 A.2d 1335 (1994). Moreover, the words of the statute need not be relegated to their narrowest possible meaning. *Commonwealth v. Gerulis*, 420 Pa.Super.

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[2] The judicial doctrine by which courts decline to interpret criminal statutes so as to increase the penalty imposed, absent clear evidence of legislative intent to do otherwise; in other words, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant. *Black's Law Dictionary*, 6th ed. (1991).

266, 616 A.2d 686 (1992), *alloc. denied* 535 Pa. 645, 633 A.2d 150 (1993). Both the applicable statutory definitions as well as the case law previously set forth sufficiently resolve any ambiguities as to the acts proscribed by 18 Pa.C.S.A. § 5902.[3] Consequently, there is only one reasonable interpretation of the statute at issue and the rule of lenity would not afford the defendant a basis for relief.

ORDER

AND NOW, TO-WIT, this 16th day of December, 1997, after Consideration of the preliminary hearing transcript, briefs of counsel, and the surveillance tapes provided by the Commonwealth, the court hereby determines that the evidence presented at the preliminary hearing is, as a matter of law, insufficient to support the charges of promoting prostitution[4] against the defendant and the return of the District Justice with respect to these charges is **QUASHED** for the reasons set forth in the foregoing OPINION.

BY THE COURT
/s/ Shad Connelly, Judge

[3] Furthermore, 18 Pa.C.S.A. § 5902 has withstood constitutional due process challenges for vagueness. *Commonwealth v. Robbins*, 358 Pa.Super. 225, 516 A.2d 1266 (1986), *alloc. denied*, 515 Pa. 577, 527 A.2d 538 (1987).

[4] The defendant is also charged with two (2) counts of obscene performances. Those charges have not been challenged by the defendant in his petition and therefore were not specifically addressed by the court and remain to be tried per the criminal information at the above said docket number that was filed against the defendant.

COMMONWEALTH OF PENNSYLVANIA

v.

BRIAN S. HIMES

CRIMINAL LAW/ARREST/SEARCH AND SEIZURE

Law Enforcement Personnel must have both legal authority and training in vehicle code enforcement in order to lawfully stop and arrest suspect for Motor Vehicle Code violations

Water Conservation Officer who had not received training in vehicle code enforcement could not lawfully stop and arrest suspect for Motor Vehicle Code violations

Where Water Conservation Officer unlawfully stopped defendant and then summoned police, who arrested defendant, evidence obtained as a result of unlawful stop and subsequent arrest must be suppressed

IN THE COURT COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION. No. 1937 of 1997

Vincent P. Nudi, Esquire — Assistant District Attorney
Peter J. Sala, Esquire — Attorney for Defendant

OPINION

I. FACTS

In the early morning hours of June 21, 1997, Waterways Conservation Officer (WCO) John W. Bowser was assisting the United States Coast Guard with a suspected boating under the influence incident at Presque Isle State Park. At approximately 3:05 A.M. Officer Bowser was exiting the Park near the main entrance when he noticed a vehicle parked alongside the road. The Park is closed to visitors at that time of night and Officer Bowser pulled up next to the vehicle to determine if the occupant needed any assistance. The defendant, Brian S. Himes, replied that he was thinking about going for a swim. Bowser told the defendant that the Park was closed and that he had to leave or the Park Rangers would cite him for remaining on the Park after hours.

The defendant cooperated and pulled away. As Officer Bowser followed, he noticed the defendant's vehicle swerve outside of his lane several times. Also, the defendant would make a lane change, and then activate his turning signal after he had executed the lane change. As the defendant approached the Sixth Street intersection, he bounced his car off a cement curb stone when attempting to make a left hand turn.

At this point Bowser radioed fellow WCO Robert Nestor who was also exiting the Park that he believed the defendant was driving under the influence. Bowser then activated a red signal light and pulled the defendant over after he turned onto Sixth Street. Bowser directed Officer Nestor to

approach the defendant since he was in uniform and Bowser was not. Nestor ordered the defendant to pull his vehicle into a nearby parking lot. The defendant was wearing a softball uniform, his eyes were glassy, bloodshot and he smelled of alcohol. The Officers also noticed what appeared to be a bag containing beer on the passenger side floor.

Officer Nestor proceeded to call the Millcreek Township Police Department for assistance. Millcreek Township Patrolman Rick Emerick was dispatched to the scene. Patrolman Emerick noted that the defendant could only stand up while leaning on his car and the defendant's eyes were glassy and he smelled of an odor of alcohol. Patrolman Emerick also had the defendant perform three separate field sobriety tests. The defendant failed all three and was arrested for DUI. Subsequent chemical testing revealed that the defendant had a BAC of .259%.

Presently before the court is the defendant's Omnibus Pretrial Motion to Suppress all evidence obtained from the stop. A hearing regarding this matter was conducted before this court on November 24, 1997. At the hearing the parties stipulated to the transcript of testimony elicited at the preliminary hearing before District Justice Paul Manzi on July 29, 1997. The defendant, however, called Officer Bowser to the stand for the limited purpose of determining the extent of Bowser's training regarding enforcement of the Motor Vehicle Code.

II. DISCUSSION

A. This matter requires the court to answer two questions. First, did WCO Bowser have the authority to stop the defendant for driving under the influence based upon his observation of the defendant's driving? Second, assuming WCO Bowser did possess such authority, did he have the requisite training to enforce the Motor Vehicle Code?

30 Pa.C.S.A. § 901 lists the authority granted to waterways conservation officers. Section 901 (a)(12) states in pertinent part:

> (a) Waterways patrolmen -- every waterways patrolman shall have the power and duty to:
>
> . . . .
>
> (12) When acting within the scope of their employment, to pursue, apprehend or arrest any individual suspected of violating any provisions of Title 18 (relating to crimes and offenses) or any other offense classified as a misdemeanor or felony.

The defendant argues that this section does not confer upon WCOs the authority to stop vehicles for summary traffic violations. Further, the defense argues that even if this court were to determine that WCOs have the authority to make traffic stops, WCO Bowser did not have the required training to enforce violations of the Motor Vehicle Code.

The Commonwealth counters that the court may take judicial notice of

the fact that driving under the influence of alcohol is a misdemeanor offense. Since Section 901 (a)(12) grants WCOs the power to pursue, apprehend or arrest anyone for misdemeanor offenses, WCO Bowser had the authority to stop the defendant. The Commonwealth also notes that defendant was not in fact arrested until Patrolman Emerick placed him under arrest after defendant failed field sobriety tests.

The determination of whether or not WCO Bowser had the statutory authority to stop the defendant in this case appears to be a question this court does not have to answer at this time. The facts of this case allow the court to dispose of this matter on the second question regarding Bowser's training. The case law reviewed by the court demonstrates that a law enforcement officer in Bowser's position must possess both the authority to make the stop and the requisite municipal police training to enforce the Motor Vehicle Code. Therefore, even assuming that the court were to conclude Bowser had the authority to stop the defendant, the court must rule that the stop and subsequent arrest was unlawful if WCO Bowser had not completed the required training.

B. In *Commonwealth v. Leet*, 537 Pa. 89, 641 A.2d 299 (1994), the Pennsylvania Supreme Court ruled that sheriffs and their deputies had common law authority to make arrests for motor vehicle violations which amount to breaches of the peace committed in their presence. The Court, however, also held that in order for sheriffs and their deputies to lawfully enforce the motor vehicle laws, they must also complete the same type of training that is required of police officers. The Court remanded the case for further proceedings to determine if the deputy sheriff in question possessed the requisite police training.

A similar conclusion was reached by the Superior Court in *Commonwealth v. Mundorf*, 699 A.2d 1299 (Pa.Super. 1997). In *Mundorf*, a Port Authority Transit (PAT) Officer arrested a motorist for DUI following a routine traffic stop while the PAT officer was patrolling a bus lane in the normal course of his duty. The court ruled that the stop and arrest were legal because the evidence demonstrated that the officer was on routine patrol on port authority property and it was routine for the officer to stop and issue citations to vehicles that were traveling in bus lanes. The case was remanded in order for a determination that the PAT officer in question had received the training as required by the Railroad and Street Railway Police Act, 22 P.S. § 3301 *et seq.*[1] The *Mundorf* Court noted that if the PAT

[1] Section 3303(d) specifically states:

(d) Course of Instruction. - Every railroad and street railway police officer shall successfully complete the same course of instruction required for municipal police officers by the Act of June 18, 1974 (P.L. 359, No. 120), referred to as the Municipal Police Education and Training Law.

officer had not received the required training, the arrest of the defendant must be deemed illegal.

Both *Leet* and *Mundorf* mandate that law enforcement personnel must have both the authority **and** the training to stop and arrest a suspect for motor vehicle violations.

C. With these standards in mind, the court will next examine whether WCO Bowser had completed the required police training. If the evidence demonstrates that Bowser did not complete the required training then the law requires the court to conclude that the stop was invalid whether or not Bowser had authority under § 901(a)(12) to stop the defendant's vehicle. *Commonwealth v. Leet, supra*; *Commonwealth v. Mundorf, supra.*

The testimony elicited at the preliminary hearing on July 29, 1997, and from the suppression hearing conducted on November 24, 1997, indicates that WCO Bowser has had some police training. However, when asked directly at the suppression hearing if he had completed the 520 hour basic law enforcement course, Officer Bowser replied that he had not. Bowser also stated that he did not complete any course which required 40 hours of study regarding enforcement of the Motor Vehicle Code. The court therefore concludes that WCO Bowser did not complete the required municipal police training in order for him to lawfully enforce the Motor Vehicle Code.[2] An individual becomes a certified police officer upon successful completion of a mandatory basic training course (Act 120). A certified police officer is authorized to enforce Title 18 (Crimes Code), moving violations under Title 75 (Vehicle Code), and carry a firearm. 37 Pa.Code § 203.1. The evidence presented to this court indicates that WCO Bowser has not completed this type of training.

Since WCO Bowser has not completed the required training, *Leet* and *Mundorf* mandate that this court must conclude that the stop of the defendant's vehicle was unlawful. Even if this court were to determine that § 901 (a)(1 2) authorized Bowser to stop the defendant's vehicle, the result would not change. Driving under the influence, a misdemeanor, is an offense which is listed under the Motor Vehicle Code. 75 Pa.C.S.A. § 3731. Therefore, any officer who endeavors to enforce the Motor Vehicle Code must have completed the required training. WCO Bowser simply has not.

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[2] The evidence demonstrates that WCO Robert Nestor, who assisted in the stop of the defendant, did complete the basic law enforcement course (Act 120). However, it was WCO Bowser who followed the defendant's vehicle and made the determination to stop and pull the defendant over. The testimony unequivocally shows that Bowser was the senior officer and it was his decision to stop the defendant based upon his observation of the defendant's driving,

D. Since the court has determined that the stop of the defendant was unlawful, the next matter to be decided is if this court must suppress the evidence obtained after the defendant was stopped. Two recent decisions of the Appellate Courts of this Commonwealth are instructive on this issue. Both decisions have similar factual backgrounds in that law enforcement personnel who were not police officers effectuated traffic stops which resulted in DUI arrests.

In *Commonwealth v. Price*, 543 Pa. 403, 672 A.2d 280 (Pa. 1996), an agent of the Federal Bureau of Investigation stopped a motorist he had observed driving erratically. The FBI agent smelled an odor of alcohol emanating from the driver and requested a nearby resident to contact the local police. As was done in the case at bar, the Agent never formally placed the driver under arrest. The Agent, however, detained the driver until the local police arrived. The police charged the driver with DUI and he was eventually convicted. On appeal the Superior Court held that the arrest by the FBI agent was illegal and that the subsequent arrest by the local police was tainted by the first illegal arrest. Further, the exclusionary rule required that all the evidence obtained as a result of the illegal arrest must be suppressed. The Supreme Court affirmed and ruled that where the unlawful actions of an individual are deemed to be state action, the exclusionary rule applies and any evidence obtained as a result of those actions must be suppressed. The Supreme Court further noted that "the good or bad faith of the individual acting under color of state authority is simply irrelevant." 543 Pa. at __, 672 A.2d at 284.

Similarly in *Commonwealth v. Bienstock*, 449 Pa.Super. 299, 673 A.2d 952 (1996), an agent of the Pennsylvania Bureau of Liquor Enforcement stopped a motorist after observing his driving. After questioning the driver, the Liquor Enforcement Agent radioed a Pennsylvania State Trooper for assistance. The Trooper administered field sobriety tests and the driver was arrested for DUI. The trial court, however, ruled that the arrest was unlawful and suppressed the evidence acquired after the stop. On appeal, the Superior Court affirmed because the Liquor Bureau Agent did not possess the statutory authority to effectuate the traffic stop. Since the initial seizure was unlawful, the subsequent arrest by the State Trooper impermissibly violated the motorist's constitutional right to be free from unreasonable searches and seizures. The *Bienstock* Court therefore concluded that the trial court's suppression of the evidence was the proper remedy.

In the case *sub judice*, WCO Bowser's well-intended, but nevertheless unlawful, stop of the defendant's vehicle violated the defendant's constitutional right to be free from unreasonable searches and seizures. Had WCO Bowser not stopped the vehicle, the defendant would not have been placed under arrest for DUI by Patrolman Emerick of the Millcreek Police Department. The decisions rendered in *Price* and *Bienstock*

mandate that this court order that the evidence obtained as a result of the defendant's unlawful stop and subsequent arrest be suppressed. In reaching this decision, the court in no way questions the good faith intent of WCO Bowser in stopping the defendant's vehicle for suspicion of DUI. However, under the law, the good faith intentions of WCO Bowser are simply irrelevant. *Commonwealth v. Price, supra*.

For these reasons, the defendant's Motion to Suppress is hereby granted.

ORDER

AND NOW, TO-WIT, this 11th day of December, 1997, for the reasons set forth in the foregoing OPINION, it is hereby **ORDERED** that the defendant's Motion to Suppress is **GRANTED**.

BY THE COURT
/s/ SHAD CONNELLY, JUDGE

JOHN P. ABBATE and IRENE B. ABBATE, his wife, Appellants

v.

ZONING HEARING BOARD OF MILLCREEK TOWNSHIP, Appellee

ZONING/VARIANCE/PROCEDURE

Party seeking variance must prove: (1) unnecessary hardship will result from denial of variance; (2) hardship is unique to the property; (3) proposed use is not contrary to the public interest

Even when the usual three part test for granting a variance is not satisfied, board may grant *de minimis* variance where only a minor deviation from the zoning ordinance is sought and rigid compliance is not necessary to protect the public policy concerns behind the ordinance

Specific findings of fact are not necessary if the zoning hearing board's opinion provides adequate explanation of its resolution of fact questions and sets forth the board's reasoning

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 13181-1996

Eugene J. Brew, Jr., Esq and Jeffrey J. Cole, Esq., on behalf of Plaintiffs
Richard W. Perhacs, Esq., on behalf of Defendant

OPINION

Joyce, J., September 24th, 1997

This matter is before the Court pursuant to the Appellants' appeal of the Millcreek Township Zoning Hearing Board's granting of a variance. For the following reasons, the Appellants' appeal is without merit and the decision of the Zoning Hearing Board is affirmed.

The relevant facts and procedural history of this case are as follows. The property in dispute, 724 Powell Avenue, sits on the southwest corner of the intersection of Powell Avenue and West Lake Road. The Appellants own the residential property directly west of 724 Powell Avenue on West Lake Road. The owner of 724 Powell Avenue applied for a variance to build an addition to the current building which would accommodate a large cooler for Valerio's Restaurant, the business operated on the premises. The addition would violate the set back requirements of 50 feet by 10 feet. The Appellant, John Abbate opposed the granting of this variance, claiming that the large cooler would impair his view and the compressors would be noisy. During the zoning board hearing, Mr. Valerio, the owner of the restaurant, testified that he had purchased the compressors from the business which formally operated at 724 Powell Avenue, and that the noise from the air compressors would not be any increase from prior use. (ZBH T. p. 7). The Zoning Board found that the variance requested was minimal, and granted the variance.

The standard of review for an appeal arising from the decision of a zoning board where the Court of Common Pleas took no additional evidence is limited to a determination of whether the Board abused its discretion, committed an error of law or made findings of fact which are not supported by substantial evidence of record. *Vanguard v. Cellular System v. Zoning Hearing Board of Smithfield Township*, 130 Pa. Cmwlth. 371, 568 A.2d 703 (1989). See also *Human Services Consultants Inc. v. Zoning Hearing Bd. of Butler Township*, 137 Pa. Cmwlth. 594, 587 A.2d. 40 (1989). Since no additional information was received by this Court, this standard shall be applied. "If the board's decision is legally sound and supported by substantial evidence - such relevant evidence as a reasonable mind might accept as adequate support for the conclusion drawn - it must be upheld." *D'Amato v. Zoning Bd. of Adjustment*, 137 Pa. Cmwlth 157, 585 A.2d 580 (1991).

A party seeking a variance generally must show that "(1) unnecessary hardship will result if the variance is denied, (2) the hardship is shown to be unique or particular to the property as distinguished from a hardship arising from the impact of zoning regulations on the entire district, and (3) the proposed use will not be contrary to the public interest." *Tp. of Middletown v. Zoning Hearing Board*, 682 A.2d 900, 901 (Pa. Cmwlth. 1996). However, when these requirements for a variance have not been met, the board may grant a *de minimis* variance "where only a minor deviation from the zoning ordinance is sought and rigid compliance is not absolutely necessary to protect the public policy concerns inherent in the ordinance." *Id.* See also *Constantino v. Zoning Hearing Board of Forest Hills*, 152 Pa. Cmwlth. 258, 618 A.2d 1193 (1992).

The issue before the Court is whether the Zoning Board abused its discretion by granting a variance claiming the proposed use would constitute a "*de minimis*" deviation. In *Tp. Of Middletown, supra*, the court affirmed the granting of a "de minimis" variance when applicants requested a variance to build a garage which would be a 6.76% increase of the ordinance's building coverage requirements. The court held that although the size of the deviation is one consideration, the court also considered how the neighboring property owners had developed their property and whether the denial of the variance would preserve the public interest sought to be protected by the ordinance. *Id.* If the deviations from the requirements are minimal, and there is still sufficient open space between the structure concerned and the neighboring land to satisfy the appropriate policy considerations of the ordinance, a zoning board may grant a *de minimis* variance. *Gottllieb v. ZHB of Lower Moreland Tp.*, 22 Pa. Cmwlth 365, 349 A.2d 61 (Pa. Cmwlth 1975).

This Court concludes that substantial evidence exists to support the decision of the Zoning Hearing Board. "Specific findings of fact are not required if a zoning hearing board's opinion provides an adequate

explanation of it resolution of the fact questions and if it sets forth the board's reasoning in such a way as to demonstrate that its decision was reasoned and not arbitrary." *Borough of Youngsville v. Zoning Hearing Board*, 69 Pa. Cmwlth. 282, 450 A.2d 1086, 1087 (1982). The evidence presented supports the finding that there would be no additional noise from the compressors and that the set back violation of ten feet would not alter the essential character of the neighborhood. The Board also found that the addition would not encroach upon Mr. Abbate's adjacent property. The Zoning Board in its conclusion found that rigid compliance with the set back requirements was not necessary to preserve the interest sought to be protected by the 50 foot set back. In reviewing the record, this Court finds that the decision of the Zoning Board was not arbitrary.

In conclusion, after a review of the pleadings, transcript of the hearing, and all other evidence submitted in this case, this Court finds that there is substantial evidence to support the decision of the Millcreek Township Zoning Board. The decision of the Zoning Hearing Board granting the variance for 724 Powell Avenue is affirmed.

BY THE COURT:
/s/ MICHAEL T. JOYCE, JUDGE

HOUSEHOLD REALTY CORP., Plaintiff

v.

DANNY R. KING and CAROL A. KING, Defendants

CONSUMER LAW/STATUTORY NOTICE OF DEFAULT

Mortgagee must provide second set of Act 6 and Act 91 Notices prior to filing second foreclosure action against same debtors even though notices were originally sent out prior to filing first foreclosure action

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW NO. 11212-1997

Terrence J. McCabe on behalf of Plaintiff
Monica Miller-DiNicola on behalf of Defendants

MEMORANDUM OPINION

Levin, J.

The first link in the chain of events giving rise to this litigation was created when the defendants (hereafter "Kings") encumbered their property with a mortgage loan that they obtained through the plaintiff (hereinafter "Household"). When they subsequently defaulted on that loan, Household sent them statutorily mandated "Act 6" and "Act 91" notices on March 18, 1996. These notices are designed to notify the property-owner of the foreclosure proceedings, give them an opportunity to cure, and to inform them of possible emergency assistance through a state loan program. On April 9, 1996, unable to meet their obligations, the Kings filed for bankruptcy. An April 26, 1996, during the pendency of the Kings' bankruptcy proceeding, Household commenced a foreclosure action. Then, when the Kings emerged from bankruptcy on July 24, 1996, they reassumed their debt to Household. A full nine months later, on April 7, 1997, Household filed an "Order To Discontinue and End" the foreclosure action. On April 8, 1997, the very next day, Household filed the second foreclosure action at issue. "Act 6" and "Act 91" notices were not provided to the Kings prior to the filing of the new action.

Put simply, the issue before the Court is whether a mortgagee must provide "Act 6" and "Act 91" notification to a defaulting mortgagor when they already provided notice to the mortgagor in a prior suit which they voluntarily dismissed.

When asked to grant summary judgment, Pennsylvania Rules of Civil Procedure provide that where there is no material issue of fact, the case is ripe for a determination of whether or not Summary Judgment should be granted. Pa.R.Civ.P. 1035 (b). In the instant case, there is no material factual dispute. Household sent notice prior to the first foreclosure action, that action was voluntarily dismissed by Household, and no notice given to the second action.

The relevant notification language of Act 6 dictates:

> (a) Before any residential mortgage lender may...commence any legal action including mortgage foreclosure...[the lender] shall give the residential mortgage debtor notice of such intention at least thirty days in advance...

41 P.S. §401 (emphasis added). The Emergency Mortgage Assistance Act of 1983 contains similar notice provisions in that the mortgagor must be given thirty days to meet with the mortgagee or a consumer credit counseling agency in an attempt to resolve the delinquency. See 35 P.S. §1680.403c (b).

When Household initially notified the Kings in 1996, prior to the first foreclosure action, they were in full compliance with the applicable notice statutes. On April 7, 1997, however, they terminated that foreclosure action by filing an "Order to Discontinue and End" (emphasis added). The word "end" in the title of the order is instructive and important. Voluntarily and purposefully, Household ended its suit against the Kings. Adding another nail to the first lawsuit's coffin, "discontinuance" is defined in the following way: "Ending, causing to cease...giving up...." BLACK'S LAW DICTIONARY 320 (6th ed. 1991). Therefore, it is clear that Household "gave up" their compliance with the notice statutes when they "gave up" their original suit. Thus, when Household filed a new action in foreclosure on April 8, 1997, they were not in compliance with the notification statutes.

Household claims that no notification was necessary because they had already done so prior to the first action. Since they voluntarily terminated the previous action, however, they brought themselves within the statutory language when they sought to "commence" an entirely different and new lawsuit.

Alternatively, even if Household had not dismissed their original lawsuit, they would still have problems showing a temporal relationship between the notice they provided to the Kings and the commencement of the foreclosure. While the case *sub judice* seems to be of singular impression in Pennsylvania state courts, a similar situation arose in Bankruptcy Court when a debtor was served with an "Act 91" notice over three years prior to the lender's initiation of foreclosure. *In re Miller*, 90 B.R. 762 (Bkrtcy E.D.Pa. 1988). As to the large time lapse, Judge Scholl declared:

> We believe that a rule of reason must control the issue of when a mortgagee is obliged to resend a notice to a mortgagor of the right to apply for benefits under Act 91 and that such a rule should be liberally construed to require a new notice whenever it appears practical to do so.

Id. at 769. In the instant situation, the "Act 91" and "Act 6" notices had been mailed over a year prior to the institution of the second foreclosure action. Even if Household had not discontinued the first suit, it is doubtful that they would have met Judge Scholl's temporal "rule of reason" test.

In sum, it is apparent that once Household voluntarily dismissed the first foreclosure action, there was no suit pending. They were statutorily required, once again, to forward the proper notices to the Kings prior to filing suit. Even if this Court were prepared to overlook the fact that Household terminated the first action and filed a new one, the notification prior to the first suit is too remote in time to accomplish the objectives of the statute.

For the foregoing reasons, Plaintiff's motion for Summary Judgment is DENIED.

ORDER

AND NOW, to wit, this 22nd day of January, 1998, it is hereby ORDERED, ADJUDGED, and DECREED that Plaintiff's motion for Summary Judgment is DENIED. Judgment is hereby entered against the Plaintiff and in favor of the Defendant for the reasons set forth in the foregoing OPINION.

BY THE COURT
/s/ Levin, J.

FEDORKO PROPERTIES, INC., Plaintiff,

v.

C.F. ZURN & ASSOCIATES, Defendant

PRELIMINARY INJUNCTION/ELEMENTS FOR RELIEF
PROPERTY RIGHTS/PROOF OF DAMAGE
EXCLUSIVE EASEMENT/USE BY OWNER

Where an invasion of the property rights of an easement holder has been established, a preliminary injunction will issue without the need for the plaintiff to establish actual damages. The burden on a plaintiff seeking a prohibitive preliminary injunction is not as great as where the plaintiff is seeking affirmative injunctive relief.

Where the easement granted is "exclusive", a court will enjoin the owner of the servient tenement from use of the easement.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - EQUITY No. 60000-1998

Craig A. Zonna, Esquire on behalf of Plaintiff
Darrel J. Vandeveld, Esquire on behalf of Defendant

MEMORANDUM OPINION

Levin, J.

This matter comes before the Court on the Plaintiff's Motion for a Preliminary Injunction. The parties entered into an easement agreement, which is attached hereto and incorporated by reference herein, whereby the Plaintiff (hereinafter "Fedorko") would have "a perpetual, exclusive easement over and across Parcel A for the purpose if ingress and egress to and from Parcel B or any land of Grantee that adjoins Parcel A or Parcel B . . ." [emphasis added]. The Grantor of this easement is the defendant, C.F. Zurn & Associates (hereinafter "Zurn").

The underlying facts were set out in detailed stipulations entered into by the parties on Friday, January 30, 1998. Those stipulations are hereby adopted by this Court as findings of Fact.

Thus, the sole issues before the Court at this stage are twofold: Whether or not Fedorko is entitled to a Preliminary Injunction, and if such an injunction is granted, whether the easement should be exclusive to Fedorko or shared with Zurn.

Generally, a preliminary injunction will only be granted when the following elements are met:

1) the rights of the plaintiff are clear;
2) the need for relief is immediate; and
3) injunctive relief is necessary to avoid injury which is irreparable and cannot be compensated for by damages.

Township of South Fayette v. Commonwealth, 477 Pa. 574, 385 A.2d 344

(1978).

Fedorko has established an invasion of their property rights in the strip of land that is the subject of this suit. As such, equity will act to enjoin further harm without proof of actual damages. *Schmoele v. Betz*, 212 Pa. 32, 39 (1905). It should also be noted that since Fedorko is requesting prohibitive, rather than affirmative relief, the burden on Fedorko is reduced. *City of Philadelphia v. District Council 33*, 112 Pa.Cmwlth. 90, 535 A.2d 231 (1987).

As to whether "exclusive" means that Fedorko can exclude Zurn from its easement, this Court is convinced from its reading of the case law that Pennsylvania allows such a property right when the agreement clearly and unambiguously declares the intention of the parties to do so. *See Ulrich v. William S. Grimes and Alice Grimes*, 94 Pa. Super. 313 (1928); *Caramanico v. Ciccantelli et al.*, 74 Pa. D. & C. 504 (Phila. 1950). Black's Dictionary defines "exclusive" to mean: ". . . Sole. Shutting out; debarring from interference or participation; vested in one person alone. Apart from all others, without the admission of others to participation." BLACK'S LAW DICTIONARY 391 (Abr. 6th ed. 1991). The easement entered into amongst the parties was an exclusive one. It was meant to exclude the servient tenement, Zurn, from use, as evidenced by its language.

Having determined that a preliminary injunction is appropriate at this juncture, and that the easement is exclusive to Fedorko, the final issue before the Court is the value of the bond that should be posted by Fedorko. Obviating a lengthy valuation assessment, the parties have agreed that a $1,000 bond is sufficient provided Zurn has the opportunity to alter the amount upon a showing of need at a later date.

ORDER

AND NOW, to wit, this 3rd day of February, 1998, it is ORDERED, ADJUDGED and DECREED that Plaintiff is granted exclusive use of the right of way easement as set forth in Erie County Contract Book 0494, pages 1494-1500. This easement can only be used by the Plaintiff and its successors or assigns.

AND FURTHER, that this Order is conditioned upon the filing of $1,000 bond by the Plaintiff. The Court, at any time, will take testimony on whether or not the bond should be increased.

BY THE COURT:
/S/ LEVIN, J.

LINDA K. PODLUZNE, Plaintiff

v.

CHARLES CARTER and ROBERTA CARTER, Defendants

PRELIMINARY OBJECTIONS/STATUTE OF LIMITATIONS/ COMMENCEMENT OF ACTION/SERVICE/GOOD FAITH EFFORT/ ACTUAL NOTICE

Plaintiff's action not barred by statute of limitations for failure to serve where failure is due to causes beyond plaintiff's control.

Plaintiff's action not barred by statute of limitations for failure to serve where defendant has actual notice of cause of action.

Where plaintiff makes good faith effort to serve writ pursuant to civil rules, and failure to serve is attributable to sheriff's inaction, action is not time-barred.

Even if service is defective, actual notice shows "good faith" on the part of plaintiff.

Plaintiff is not required to continue to attempt service once proper effort is made, if defendant has actual notice and failure to serve is not attributable to plaintiff's actions or inaction.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION No. 14226 - 1995

Matthew McLaughlin, Esquire
Stephen Magley, Esquire

OPINION

Anthony, J., February 23, 1998.

This matter comes before the Court on the Defendants' Preliminary Objections to the Plaintiff' s Complaint. After considering the arguments of counsel and reviewing the record, the Court will sustain the demurrer as to Charles Carter but overrule the objection as to Roberta Carter.[1] The relevant facts and procedural history are as follows.[2]

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[1] The Plaintiff agrees that there is no cause of action against Charles Carter.

[2] The Plaintiff did not file an evidentiary "Response" to the Preliminary Objections. However, the Plaintiff does assert facts and provides evidentiary support for her position in her brief. While a brief is not usually considered evidence, the Court will consider the facts in the Plaintiff's brief because this is the type of Preliminary Objection which allows for an evidentiary response and the Defendants did not put a Notice to Plead on their Preliminary Objections. Therefore, in the interests of judicial economy the Court will rule on the facts presented which are for the most part undisputed by the parties.

This is a car accident case. The preliminary objections are based on an alleged failure to properly commence the action within the statute of limitations.[3] On September 27, 1993, the car driven by Roberta Carter collided from behind with a van which was transporting the Plaintiff. The car Roberta Carter was driving was owned and insured by Charles Carter who was her estranged husband.

The Plaintiff filed a writ of summons naming both Roberta and Charles Carter on September 27, 1995. The Defendant concedes that the writ was filed within the statute of limitations. The Sheriff then made only one unsuccessful effort within the first eight days to serve the writ on Roberta Carter. For some unknown reason, the Sheriff believed the writ "went dead" after eight days. The Sheriff returned the writ unserved as to Roberta Carter but it was served on Charles Carter within the allotted 30 days. It was not returned to the Plaintiff until over thirty days after its filing. It is undisputed that the Plaintiff followed all applicable state and local rules in issuing the writ and attempting to have it served. Plaintiff's counsel also gave the correct Erie County address for Roberta Carter in his instructions for service.

Before the writ was filed, Plaintiff's counsel was in contact with Ms. Carter by letter advising her of the impending law suit. Roberta Carter responded by letter advising Plaintiff's counsel to contact Charles Carter's insurance carrier, CNA, about the accident because Mr. Carter owned and insured the car involved in the accident. CNA then contacted Plaintiff's counsel and stated that they would be investigating the claim.

After the writ was filed, in April of 1997, Plaintiff's counsel prepared a settlement brochure which was sent to CNA. On September 13, 1997, within two years of the filing of the writ, the Plaintiff filed a Complaint. The Complaint was properly served by the Plaintiff within thirty days.

The starting point of the Court's analysis is that the Plaintiff properly commenced this suit by filing a writ within two years of the accident unless subsequent actions by the Plaintiff nullified her filing of the writ. The filing of a writ extends the statute of limitations for two more years in a trespass action unless the plaintiff "stalls the machinery of justice in its tracks" by failing to make a "good faith" effort to serve the writ. *Lamp v. Hyman*, 366 A. 2d 882 (Pa. 1976). When service is not made, it is the plaintiff's burden to show that he made a "good faith" effort to effectuate service. *Young v. Pennsylvania Department of Transportation*, 690 A.2d 1300 (Pa.Cmwlth. 1997). Further, the Plaintiff filed the Complaint within the next two years which kept the suit alive.[4] However, Ms. Carter is asking

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[3] The Preliminary Objections of Roberta Carter only relate to the procedural facts of the case, therefore the underlying facts need not be recited.

[4] The Complaint was served within thirty days of when it was filed although more than two years after the filing of the original writ.

the Court to rule that the Plaintiff's conduct in not serving the original writ should preclude her from enjoying the protections of the Pennsylvania Rules of Civil Procedure and case law which govern the commencement of actions. Pa.R.C.P. 1007(1); *Zarlinski v. Laudenslager,* 167 A. 2d 317 (Pa. 1961)(stating that filing a writ only tolls the statute of limitations for a time equivalent to the statute of limitations applicable to the action).

The Court will not foreclose the Plaintiff' s action. The situation in the present case is not what the *Lamp v. Hyman* decision was intended to remedy. *Supra. Lamp* was intended to prevent a plaintiff from filing an action against a defendant and then intentionally not giving him actual notice. In *Lamp,* the plaintiff filed a writ but gave instructions for the Sheriff not to deliver the writ. This type of behavior, which occurred often prior to *Lamp,* in a practical sense allowed plaintiffs to extend the statutes of limitations beyond the legislature's intent.[5]

Lamp was then extended to cases where plaintiffs through negligence rather than purposeful behavior did not give defendants notice of actions against them. *Farinacci v. Beaver County Industrial Development Authority,* 511 A.2d 757 (Pa. 1986). To extend *Lamp* to a case such as the present case where the named defendant, Roberta Carter and the true party in interest, the insurance company, have had actual notice of the case from before the time the statute of limitations expired and where the defendants only failed to be served because of the Sheriff's inaction rather than the Plaintiff's negligence, would create a grave injustice. *Young, supra* (reversing trial court's grant of summary judgment for defendant and ruling that actual notice, even if through defective service, shows "good faith" effort of plaintiff)(citing cases); *see Otterson v. Jones,* 690 A.2d 1166 (Pa.Super. *1997)(alloc. granted)(*reversing lower court's granting of judgment on the pleadings based on *Lamp); Shackleford v. Chester County Hospital,* 690 A. 2d 732 (Pa. Super. 1997); *Silver v. Khan,* 689 A.2d 972 (Pa.Super. 1997); *Fulco v. Shaffer,* 686 A.2d 1330 (Pa.Super. 1996)*(alloc. denied); see also, Sanders v. State Farm Mutual Auto Insurance Company,* 622 A.2d 966 (Pa.Super. 1993).

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[5] If a writ is served, this allows the defendant to rule the plaintiff to file a complaint. Therefore, if the plaintiff does not have information to make a case the defendant could have the case dismissed. The same is true even if the plaintiff files a complaint and serves it. However, if the writ is not served, the plaintiff can continue to investigate the case without the risk that the defendant will rule them to file a complaint. Then, if years after the statute of limitations would have run he finds new information he can then serve the writ. This scenario of events would thwart the purpose of the statute of limitations which is meant to limit the time a plaintiff has to gather sufficient facts to file a complaint.

The Defendant seeks to create a duty upon a plaintiff to continue to attempt service even when the opposing party has received actual notice, does not object to the lack of service and when the plaintiff has done everything necessary to effectuate service but is thwarted by inaction in the Sheriff's office or by some other event beyond their control. *See Sanders; Gould v. Nazareth Hospital*, 511 A.2d 855 (Pa.Super. 1986); *Beck v. Minestrella*, 401 A.2d 762 (Pa.Super. 1979); *Patterson v. American Bosch Corp.*, 914 F.2d 384 (3rd. Cir. 1990)(stating that under *Lamp* there is no continuing obligation to attempt service after one correct effort at service has been made). The Court will not create this duty.

The Court does not find any negligence by the Plaintiff in this case in serving the writ and finds that the Plaintiff has met her burden of proving that she made a good faith effort to serve such. Therefore, the action was properly commenced within the statute of limitations. The case factually closest to the present case where a court found that the statute of limitations had run against the plaintiff is *Ferrara v. Hoover*, 636 A.2d 1151 (Pa.Super. 1994). In *Ferrara*, the plaintiff filed a writ with the prothonotary before the statute of limitations had expired. However, the writ was never served. The statute of limitations then expired. Thereafter, the writ was reissued. During the thirty day after the reissuance the plaintiff filed a complaint. Within thirty days of filing the complaint it was served upon the defendant.

However, when first issuing the writ the plaintiff left it up to the prothonotary to forward the writ to the Sheriff. According to the plaintiff this was local custom. A period of six months went by after the filing of the writ when the writ was never served before the plaintiff discovered the writ was not served and took action to correct the problem. The plaintiff in *Ferrara* could have done more during the first thirty days to have the writ served by bringing it to the Sheriff's office himself. It is important to note that the plaintiff in *Ferrara* relied on custom and not the actual rules as the Plaintiff in the present case did. In the present case, there was nothing further the plaintiff could have done to have the writ served, therefore it can not be said that the Plaintiff did not make a good faith effort to have the writ served. In addition, the Court notes that there is a recent line of cases where appellate courts have overturned trial courts rulings which granted judgments for defendants based on *Lamp. Young, supra; Otterson, supra; Shackleford, supra; Silver, supra; Fulco, supra.* This could be the signal that the extension of *Lamp* from intentional conduct to lesser and lesser degrees of negligence has stopped and may even be reexamined. *See Otterson, supra* (Pennsylvania Supreme Court has granted allocator).

In conclusion, the Plaintiff complied with all applicable local and state rules to have the writ served and was not negligent in attempting to have it served within thirty days of its issuance. In addition, where there is actual notice to the opposing party there is not an ongoing duty to make continuous efforts at service when one proper attempt has been made.

Therefore, the filing of the writ commenced this suit within the statute of limitations.

ORDER

AND NOW, to-wit, this 23rd day of February, 1998, it is hereby ORDERED and DECREED that the Preliminary Objections in the nature of a demurrer of the Defendant Charles Carter are SUSTAINED. The Preliminary Objections of Defendant Roberta Carter are OVERRULED.

BY THE COURT:
/s/ Fred P. Anthony, J.

ROBERT TALKISH, BARBARA TALKISH, WILLIAM MILTON and MILDRED MILTON, Appellants

v.

ZONING HEARING BOARD OF HARBORCREEK TOWNSHIP and BROOKSIDE FIRE COMPANY, Appellees

ZONING/PROCEDURE

Denial of right to cross examine witnesses at Zoning Hearing required remand to Zoning Hearing Board for taking of additional evidence

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION- LAW NO. 11683 - 1996

Ritchie T. Marsh, Esq., on behalf of Plaintiffs
Robert C. Ward, Esq., on behalf of Defendant Harborcreek Township
Evan E. Adair, Esq., on behalf of Defendant Harborcreek Twp. Zoning Hearing Board

OPINION AND ORDER

Joyce, J., October 23, 1997

This matter is before the Court pursuant to the Appellants' Motion to Present Additional Evidence. For the following reasons, Appellants' Motion is granted.

This is an appeal of the Harborcreek's Zoning Board's approval of a variance requested by Brookside Fire Company. Appellants, Robert and Barbara Talkish, own 3330 Linoff Lane, Erie, Pennsylvania. Appellants, William and Mildred Milton, own 3320 Linoff Lane, Erie, Pennsylvania. Appellees are the Zoning Hearing Board of Harborcreek Township and the Brookside Fire Company, a volunteer fire company. Brookside Fire Company owns the property identified as 3502 Athens Road, the location of a community center which borders the appellants' properties. The Fire Company applied for an application for a building permit to construct a new community center building on said property and the application was denied because the proposed building would violate rear and side yard setbacks under the Harborcreek Township Zoning Ordinance. The Fire Company then requested a variance from the Harborcreek Zoning Board.

A hearing was held on April 16, 1996, at which Attorney Sundberg represented appellants.

In a decision dated April 30, 1996, the Zoning Board approved the variance requested by the Brookside Fire Company. Appellants have taken this appeal.

In Appellants' Motion to Present Additional Evidence, Appellants assert that they were deprived of their opportunity to be heard. Attorney Sundberg requested permission to cross examine the fire chief of the Brookside Fire

Company, but the Board denied him this opportunity. Attorney Sundberg then presented the Appellants' position in opposing the variance. Appellants Mr. & Mrs. Talkish spoke and Appellants Miltons were not present at the hearing. The fire chief spoke at the end of the hearing, and Attorney Sundberg requested permission to ask the fire chief some questions. Attorney Sundberg was advised to summarize his position and present any additional evidence, but was not permitted to ask the fire chief or anyone else who testified questions. Attorney Adair commented to Attorney Sundberg, "let's not play lawyer games. You and I, when we're visiting other forums, don't decide for them how they conduct business." (ZBH T. 67). The Zoning Board granted the variance, and appellants took this appeal.

A court of common pleas in reviewing a zoning board decision may either review the zoning board's findings of fact, or may consider additional testimony and determine its own findings of fact based upon the record and the supplemental evidence. 53 P.S. § 11005-A. The trial court may either hold a hearing, remand the case to the zoning board, or refer the case to a referee to receive additional evidence. *Id.*

A reviewing court is only obligated to receive additional evidence in certain circumstances. "A court of common pleas faces compulsion to hear additional evidence in a zoning case *only* where the party seeking the hearing demonstrates that the record is incomplete because that party was denied the opportunity to be heard fully, or because relevant testimony was offered and excluded." *In Re Appeal of Little Britain,* 651 A. 2d 606, 613 (Pa. Cmwlth. 1994). (Citations omitted). In *Britain, supra,* the trial court abused its discretion when the court permitted the admission of additional evidence when that additional evidence was deemed to be hearsay. *Id.* Although the court *must* consider additional evidence when the record is incomplete as enunciated in *Britain, supra,* the decision whether to permit additional evidence is otherwise discretionary. *Koutrakos v. Zoning Hearing Board,* 685 A.2d 639, (Pa. Cmwlth 1996); *Kossman v. Green Tree Zoning Hearing Board,* 143 Pa. Cmwlth 107, 597 A.2d 1274 (1991).

Both the procedural requirements of Section 908 and the substantive requirements of Section 910.2 must be satisfied before a variance may be granted. *Kernick v. Zoning Hearing Board of Penn Hills,* 56 Pa. Cmwlth 512, 425 A.2d 1176 (1980). "It is the applicant's burden to prove that the elements of Section 910.2 are met to justify a grant of a variance." *Gateside-Queensgate v. Delaware Petro.,* 580 A.2d 443, 447 (Pa. Cmwlth 1990). This burden is a heavy one, and variances, as a role should be granted sparingly and only under exceptional circumstances. *Id.; Teazers v. Zoning Bd. Of Adjustment,* 682 A. 2d 856 (Pa. Cmwlth. 1996).

A review of the record suggests that the appellants were denied the opportunity to cross examine adverse witnesses. The Municipal and Quasi-

Municipal Corporations Code dictates the procedure of zoning board hearings:

> (5) The parties shall have the right to be represented by counsel and shall be afforded the opportunity to respond and present evidence and argument and cross-examine adverse witnesses on all relevant issues.
>
> (6) Formal rules shall not apply, but irrelevant, immaterial, or unduly repetitious evidence may be excluded. 53 P.S. § 10908.

Although the Board need not conduct its hearing conforming to strict rules of evidence, and other court procedures, it is imperative that it afford each party an opportunity to be heard.

"Significantly, the legislature in the use of the word 'shall' in both the introductory paragraph and subparagraph (5) of Section 908 of the MPC made it mandatory that in all hearings before a zoning hearing board the parties are entitled as a matter of due process to, inter alia, 'cross- examine adverse witnesses'." *Britain*, *supra.* In the hearing before the zoning board in the instant matter, Appellants' attorney specifically requested to cross-examine Mr. Dahlkemper and his request was denied. Appellees submit that Appellants' attorney was given the opportunity to fully argue the appellants' position.

An attorney's sworn statement has been held to satisfy the procedural requirement of the MPC as stated in Section 908. *Kernick*, 425 A.2d 1176. However, when the attorney has requested to cross-examine adverse witnesses and has been denied this procedural right as enunciated in the MPC, this Court must allow the appellant to submit additional evidence. Appellants have the right to be represented by counsel, and if they so choose to have representation, the counselor must be permitted to cross-examine and present relevant evidence accordingly.

For the reasons stated above, this Court grants the Appellants' Motion to present Additional Evidence, and remands the case to the Zoning Board of Harborcreek Township.

ORDER

AND NOW, to-wit, this 23rd day of October, it is hereby **ORDERED ADJUDGED** and **DECREED** that the appellants' motion to present additional evidence is granted. It is further ORDERED that the case be remanded to the Harborcreek Zoning Board for a hearing which complies with 53 P.S.§ 10908 and 53 P.S.§ 10910.2 and this Opinion.

BY THE COURT:
/s/ MICHAEL T. JOYCE, JUDGE

MARJORIE ARMSTRONG, AS ADMINISTRATRIX OF THE ESTATE OF RICHARD ARMSTRONG, MARJORIE ARMSTRONG, INDIVIDUALLY, AND MARJORIE ARMSTRONG AS TRUSTEE AD LITEM, Plaintiff

v.

SAINT VINCENT HEALTH CENTER, MICHAEL ADELMAN, M.D., DAVID M. McGEE, M.D., JEFFERY HEIN, M.D., SEAN MALONEY, M.D. AND A. K. MITRA, M.D., Defendants

EVIDENCE/PRIVILEGES/PEER REVIEW PROTECTION ACT

Courts in cases of first impression have the ability to shape and interpret a statutory privilege to give form to the legislative intent.

Identity of members of peer review committee is privileged

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 14316-1994

Rolf Louis Patberg, Esquire
Marcia H. Haller, Esquire
John M. Quinn, Jr., Esquire

OPINION

Anthony, J., November 20, 1997.

This matter comes before the Court on Defendant Saint Vincent Health Center's (hereinafter, "Saint Vincent") Motion to Reconsider. The motion asks the Court to reconsider the part of its July 28, 1997 Order, which ruled that the identities of the members of Saint Vincent's peer review committee were not privileged. After considering the arguments of counsel as well as the evidence presented on this issue in the form of an affidavit and the stipulated facts; the Court will grant the motion and rule that the identities of the members of the peer review committee are privileged. The relevant facts and procedural history are as follows.

This is a medical malpractice case based on the death of Richard Armstrong.[1] Both parties have been conducting discovery. In July of 1995 and October of 1996, the Plaintiff propounded various discovery requests asking for quality assurance studies and other documents. In addition to providing some of the requested discovery, Saint Vincent objected to some of these requests based on the Peer Review Protection

[1] The particular allegations of malpractice are not relevant to this motion and need not be recited as the current motion involves a legal issue unrelated to the particular facts of this case.

Act (hereinafter the "Act"). 63 P.S. §425 *et seq.* In response to a second motion involving these discovery requests, the Court addressed the remaining unresolved discovery issues in its July 28, 1997 Order. One of the rulings made in this Order was that the identities of the members of the peer review committee were not privileged under the Act. On August 29, 1997, Saint Vincent filed a motion to reconsider which addressed only that part of the Order which held that the names of the committee members were not privileged. The Court held argument on the motion to reconsider.[2,3]

Both parties agree that the Peer Review Protection Act does not explicitly state that the identities of the members of a peer review committee are privileged although the deliberations of such a committee are privileged. Both parties also agree that the purpose of the Act is to improve the quality of health care by encouraging doctors to police themselves and give feedback to each other and hospitals about the quality of service provided by doctors. The Act attempts to accomplish this goal by encouraging frank discussion in the peer review committees by making the committees' deliberations privileged.

The Plaintiff argues that the Act does not specifically state that the names of the members of the committee are privileged and therefore the Court should narrowly construe the privilege and rule that the names are not privileged. In addition, the Plaintiff attempts to analogize the peer review privilege to the attorney-client privilege where an opposing party knows the identity of another party's attorney but the content of any communications between the party and his attorney are privileged. Lastly, the Plaintiff states that she should be given the identities of the committee members in order to test the validity of the privilege being asserted.

In contrast, Saint Vincent argues that the spirit and intent of the Act can only be fulfilled if the identities of the committee members are privileged and confidential. Saint Vincent also argues that the public

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[2] Saint Vincent was prepared to put forth evidence on the discovery issue and did present an affidavit with its brief in support. The Plaintiff's counsel accepted Saint Vincent's representation that Dr. Cogley would have testified as stated in his affidavit and counsel therefore waived cross-examination. In addition, Saint Vincent's counsel represented that the identities of the committee members are kept confidential at the hospital and Plaintiff's counsel accepted this representation, thus the Court will accept it as fact without requiring the presentation of testimony.

[3] The Plaintiff has represented that she would depose members of the committee if given the opportunity. Plaintiff's April 2, 1997 "Motion for Leave to Take Depositions and Motion to Compel and For Sanctions" specifically asks to depose Maureen Sable and Susan Thomas. Ms. Sable's job is to monitor quality control.

interest in protecting the identities of the committee members outweighs the public interest in having this information disclosed.

Saint Vincent's argument has more merit. A review of the legislative history of the Act shows that the fact that the Act did not specifically make the names of the committee members privileged was not the result of an active legislative decision but was probably the result of the sometimes random factors that affect the particular wording of a statute. Further, while Courts should construe privileges narrowly, courts in cases of first impression such as the present case have the ability to shape and interpret a privilege to give form to the legislative intent. *See Bredice v. Doctors Hospital Inc.*, 50 F.R.D. 249 (D.C. for Dist. of Col., 1970), *affirmed without opinion* 479 F.2d 920 (U.S. App. D.C., 1973)(creating federal common law privilege with respect to peer review deliberations). In addition, as noted in *O'Neil v. McKeesport Hospital*, the courts of other states have created a common law privilege in this area. 48 D. & C. 3rd 115 at 123, 24 (Allegheny County, 1987)(citing appellate courts from around the country). Thus, it is certainly this Court's duty to shape the boundaries of this privilege while respecting the legislature's enactment. In addition, as noted by the *O'Neil* court the privilege has been "broadly construed because of the policy considerations for protecting peer review." *Id.* at 123 (citing cases from appellate courts around the country).

The attempted analogy to the attorney-client privilege fails for two reasons. First, in any litigation that has reached the stage of having documents filed with a court the identity of the attorney is a matter of public record. In addition, it can not be said that the goal of having attorneys available to represent clients will be undermined as a result of public disclosure of the attorneys' identities.

Whether to allow discovery of certain information is decided by weighing the interests at stake. In the present case, the interest on the side of ruling that the identities of the committee members are privileged is in having more doctors willing to be part of the peer review process and the possible improvement of health care through that participation.[4] The interest on the side of disclosure of the identities is only plaintiffs' interests

[4] The Court accepts Saint Vincent's claim that less doctors would participate in peer review if their identities were disclosed for two reasons. Saint Vincent keeps the committee members names confidential within the hospital itself showing that it genuinely believes there is some benefit to this confidentiality. In addition, the Court notes that while each individual plaintiff only has one case defendant hospitals, without regard to the quality of their care, are often involved in many cases which would result in the members of the peer review committee potentially being deposed in each of several law suits pending at any given time. It is reasonable to believe that doctors will be less likely to take a volunteer position if that position requires being deposed.

in testing the privilege. The Court defines the interest on this side in this narrow fashion because any documents originating from sources other than the peer review committee itself would be discoverable and any information forwarded outside the peer review process would be discoverable under the Court's previous Order in the present case and under case law in other cases. Thus, unless Saint Vincent is not in compliance with this Order or other defendants would not follow applicable law there is nothing to gain by deposing the members of the committee except the testing of the privilege. Even at oral argument, the Plaintiff was unable to articulate any specific information that she is looking for through these depositions or discovery except to say that committee members may have original first person infomation that would be useful. For these reasons, the Court finds the interest in support of disclosure is small as the Plaintiff should still have enough other information and evidence to present her case.[5]

The legislature and the courts have already decided that the benefit of protecting the deliberations of peer review committees outweighs the benefits of the disclosure of such. *See Cooper v. Delaware Valley Medical Center,* 630 A. 2d 1 (Pa. 1994); *O'Neill v. McKeesport Hospital, supra; Bredice, supra.* The same outcome is mandated with respect to the disclosure of the identities of the committee members. The Court finds that the interest in protecting the identities of the committee members outweighs the interests of the disclosure of such. Thus, the Court will grant Saint Vincent' s motion and hold that the identities of members of peer review committees as defined in the Peer Review Protection Act are privileged in cases where the suit does not involve the peer review process itself. 63 P.S. § 425.2.

ORDER

AND NOW, to-wit, this 20 day of November, 1997, it is hereby ORDERED and DECREED that Saint Vincent Health Center's Motion To Reconsider is GRANTED and Saint Vincent is not required to disclose the identifies of the members of its peer review committee.

BY THE COURT
/s/ Fred P. Anthony, Judge

[5] The Court notes that the Plaintiff has conducted extensive discovery including depositions of all of the treating personnel involved in Mr. Armstrong's care. In addition, the parties have managed to conduct discovery with little Court involvement except for issues involving the Peer Review Protection Act which are legitimate good faith disputes about the state of the law. Thus, the Court finds that St. Vincent is not attempting to use the Peer Review Protection Act in an inappropriate effort to prevent the Plaintiff from gathering information.

PETITIONERS FOR AUDIT, ALAN F. WOOLSLARE, et al, Petitioners

v.

JONES, MARSH, MASTERSON, LYONS & SMITH COMMITTEE, Respondents

STATUTES/ELECTION CODE

Audit procedure is sole procedure to allege Election Code violation.

The Court's only duty in audit procedure is to decide whether Election Code has been violated, rather than to determine issues of willfulness or *de minimis* nature of violations alleged. Discretion is vested in the Prosecuting Authority regarding whether to proceed with criminal prosecution upon certification by Court that the Election Code was violated.

Late filing of committee registration statement does not support a violation of Election Code § 3242 which prohibits collection or disbursing of funds by committee without a treasurer or chairperson.

Election Code § 3243 violated by collection of money on behalf of candidate before committee registration.

Election Code § 3244 violated by failure to register committee within 20 days after receiving aggregate contributions of $250.00.

Election Code § 3246 requires either 1) that committee treasurer and each candidate file a Report of Receipts and Expenditures exceeding $250.00 or 2) a sworn affidavit by the candidate that he will not raise or expend more than $250.00 and is not forming a committee. Among the goals of the Election Code is allowing voters access to documentation of campaign finances. Each candidate is required to file a statement even when he spends or collects less than $250.00.

Committee's failure to invoice and include in expense report services rendered by law firm on behalf of candidate/committee member rather than on committee's behalf in related litigation did not violate Election Code § 3246 as services rendered did not constitute a contribution to the committee. When one party assists another in related litigation which is in a similar position, the providing of the service does not necessarily constitute a contribution from one party to another.

Election Code § 3248 violated by committee's failure to report until after election an in-kind contribution of $1,400.00 received after filing of last pre-election report, as contributions of more than $500.00 received after last pre-election report is deemed completed must be reported to the Board of Elections within 24 hours of committee's receipt. Disclosure of late campaign contributions is required in order to provide public access to such information before election and voting.

Election Code § 3249 violated by candidates' sworn affidavits that their committee had not violated any provisions of the Election Code where such affidavits were executed after candidates' learned of Committee actions constituting violations of the Election Code.

Election Code § 3253 violated by committee's receipt of in-kind corporate contributions. Acceptance of illegal contributions cannot be rectified by amendment or return of funds after knowledge of impropriety. Corporations, National Banks and Unincorporated Associations are prohibited from contributing to campaigns by the Election Code.

Section 3254 of the Election Code, which prohibits accepting contributions on behalf of a person other than the person making the contribution is not violated by receiving a contribution from one person on behalf of that person and other people where such other people are all identified and disclosed in required campaign reports.

Services contributed to committee by law firm, which is a limited liability partnership, are not prohibited by the Election Code.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION No. 12602-1997

OPINION

Anthony, J., March 18, 1998

This matter comes before the Court on the Petitioners' Petition for Audit of Expense Accounts. After considering the arguments of counsel as well as reviewing the pleadings and the evidence presented at the hearing, the Court will certify some violations of the Election Code to the Erie County District Attorney. The relevant facts and procedural history are as follows.

This case involves allegations by the Petitioners that the Jones, Marsh, Masterson, Lyons & Smith Committee (hereinafter "Committee") violated

certain Sections of the Election Code during the campaign for the election of Fairview School Directors. The general election was held in November of 1997, while the primary election was held on May 20, 1997. The Committee consisted of Judith Jones, James Marsh, John Masterson, Jeffrey Lyons and Vicki Smith. The Chairperson of the Committee was Barrie Nolan. The Treasurer of the Committee was Thomas Nolan. Beginning on March 14, 1997, the Committee and the Treasurer began to accept contributions. In addition, beginning on March 19, 1997, the Committee began expending money. Further, the Committee and Treasurer were actively soliciting contributions as of April of 1997. However, the Committee did not file the required Committee Registration Statement until May 9, 1997. On May 9, 1997, one of the Petitioners made an inquiry of the Board of Elections regarding the Committee's Registration Statement. The Committee was not registered as of that time but then did register after being advised by a representative of the Board of Elections that it needed to do so.

At least one member of the Committee, Judith Jones, had been a candidate in an earlier election and had authorized and registered a committee in the proper manner. In addition, the Treasurer for the Committee had acted as a Treasurer for an earlier committee which had filed its registration form in a timely manner. Further, an employee of the Board of Elections testified that it was her custom to provide each candidate with a packet of rules and regulations for campaigns although she could not specifically recall providing a packet to any of these particular candidates. In addition, the registration form which authorized the formation of the Committee and which had been filled out by Judith Jones in the earlier election specifically states that no money may be accepted or expended by the committee until the appropriate registration form is filed with the proper authorities.

One of the contributions that was listed on the Committee's May 9, 1997, campaign expense report was an in-kind contribution of Two Thousand Dollars ($2,000.00) from Gohrs Printing. The Committee's June 8, 1997, report shows a Fourteen Hundred Dollar ($1400.00) in-kind contribution from Gohrs Printing. The propriety of these contributions was questioned by Mr. Woolslare at proceedings before the Board of Elections on June 24, 1997. On June 26, 1997, the Committee wrote a letter to Gohrs Printing stating that its contribution may have been improper and that Gohrs should invoice the Committee for its services. On August 6, 1997, the Committee filed an expense statement showing that the Vice-President of Gohrs Printing had contributed the aggregate amount of Gohrs Printing's previous in-kind contributions to the Committee and that the Committee then paid Gohrs Printing for its services so as to eliminate the improper corporate contribution.

During the time before the November election and after the November election, MacDonald Illig Jones & Britton LLP (hereinafter MacDonald-Illig), a law firm, provided legal services to Judith Jones. Mr. Woolslare

asked that these services be recorded either on her individual expense report or the Committee's expense report. In a related case, the Court directed that MacDonald-Illig invoice Mrs. Jones and through reporting the transaction show whether it would be an expense paid by Mrs. Jones or the Committee or whether it would be an in-kind contribution from MacDonald-Illig. This information was reported to the Court and filed with the appropriate officials.

During the Audit of the Committee, it came to light that both the MacDonald-Illig law firm and the Marsh law firm filed a joint brief on the Committee's behalf in this case. This work has not been paid for and has not been reported as a contribution. However, Mr. Marsh himself is one of the Respondents and is representing himself and the other Respondents. In addition, MacDonald-Illig's work in this case was a duplication of work done on a companion case involving Mrs. Jones which was reported pursuant to this Court's direction. The Court finds that there has been no material new services provided for this case.

Lastly, it has been the Committee who has filed all of the filings since May 9, 1997, rather than the individual candidates with the exception of the 30 day post-election expense report [30 days after the May 20, 1997 election]. The individual candidates instead filed affidavits stating that they did not have contributions or expenses of over Two Hundred Fifty Dollars ($250.00).

The Petitioners filed the present Petition for Audit on August 4, 1997. The Respondents filed preliminary objections. The Court ruled that service by the Petitioners upon the Committee was sufficient but that only the reports of the Committee would be audited and not the reports of the individual candidates because they were not named in this action. The Court further ruled that any audit would only relate to documents filed within ninety days of the Petition. However, the ninety days would be counted from the actual filing of the document not the due date of the filing.

On October 8, 1997, the Court made a finding that there was "good cause" to audit the Committee on two specific issues, as well as any other possible violations of the Election Code, and directed that the Petitioners post a bond of Two Thousand Dollars ($2,000.00) which they did. The bond was later released. The Court then appointed William J. Kelly Sr. Esquire as Auditor. Later, it was learned that Attorney Kelly had a conflict of interest and could not serve as Auditor. Subsequently, the Court removed Attorney Kelly as Auditor and conducted the Audit hearing itself on November 4, 1997. Thereafter, both parties filed briefs.

The Court will initially address a general legal argument before dealing with the alleged violations individually. The Respondents make a general

argument stating that although they technically violated the Election Code the Court should not certify the violations either because the violations are *de minimis*, the violations were not willful and/or the violations were corrected. The Respondents cite *Appeal of Angle* and *Brunwasser v. Fields* to support these arguments. *Appeal of Angle*, 639 A. 2d 875 (Pa. Cmwlth. 1994); *Brztnwasser*, 409 A.2d 352 (Pa. 1979). However, these cases simply state that the audit procedure is the only procedure to allege Election Code violations and that it is the prosecuting authority who shall have the discretion of whether to proceed with a criminal prosecution if the court certifies that violations have been committed. The cases do not vest the auditing court with the discretion that the Respondents are requesting this Court exercise. *Brunwasser, supra.*

The relevant section of the Election Code states:

> (b) If the court shall decide upon the audit that any person, whether a candidate or not, has accepted contributions or incurred expense or has expended or disbursed money in contravention of this act, or has otherwise violated any provision of this act, it shall certify its decision to the appropriate prosecutorial officer and it shall thereupon be the duty of such officer to institute criminal proceedings as he or she shall deem necessary.
> Election Code, 25 P.S. §3256.

Thus, it is not this Court' s duty to decide the willfulness of any violations of the Election Code but it is only this Court's duty to decide whether any person accepted or expended money in contravention of the Election Code or in any other way violated any provision of the Election Code.

The Court shall now examine the alleged violations in the order they are presented by the Petitioners. First, did the Committee violate Section 3242 of the Election Code which prohibits a committee from collecting or disbursing funds if the committee does not have a treasurer or chairperson. The fact that the Committee did not register does not mean that it did not exist or did not have a treasurer or chairperson. In fact, the evidence showed that the Committee existed with a Treasurer. Therefore, the lack of timely registration does not support a violation of this Section of the Election Code. Further, there were allegations that even after the Committee was formed that persons other than the Treasurer disbursed funds on behalf of the Committee. The evidence presented at the hearing showed that all Committee checks were signed with the name of the Treasurer. There also was testimony that the Treasurer's wife was authorized to sign his name through a power of attorney. Considering the lack of definitive evidence of a violation of this Section of the Code, the Court finds that there was not a violation.

The next issue is whether the Committee violated Section 3243 of the

Election Code which mandates that any committee must register before the treasurer or Committee collects money on behalf of a candidate. The Committee and Treasurer acknowledged that the Treasurer collected and solicited money before the Committee was registered. Further, the Committee Treasurer had acted in the same capacity on an earlier campaign which filed its registration in a timely manner. In addition, one of the candidates, Judith Jones, was a candidate in an earlier election and was a member of a committee that filed its reports in a timely manner and another member of the Committee was an attorney. Moreover, the registration was only filed after one of the Petitioners inquired of the Board of Elections about the Committee's registration, such inquiry causing a representative of the Board of Elections to inquire of the Committee about the registration. Thus, there has been a violation of this Section of the Election Code.

Section 3244 of the Election Code states that all committees must register within twenty days of receiving an aggregate amount of Two Hundred Fifty Dollars ($250.00) in contributions. The Committee reached this level of contributions before May 9, 1997, when it registered. Therefore, there was a violation of this Section of the Code.

The next alleged violation centers around an interpretation of Section 3246 of the Election Code. While the Court recognizes that the individuals are not before the Court, the Court will address this issue because it involves an unclear area of law and confusion over its application will likely reoccur in upcoming elections. The Respondents argue that they were excused from filing either the pre-election report or sworn statement which are required by Section 3246(a) because they did not expend or receive any money in their individual capacities. While it is substantially true that the individuals did not receive or expend money in their individual capacities, their argument is incorrect. The Election Code states:

> (a) Each treasurer of a political committee and each candidate for election to public office shall file with the appropriate supervisor reports of receipts and expenditures on forms, designed by the Secretary of the Commonwealth, if the amount received or expended or liabilities incurred shall exceed the sum of two hundred fifty dollars ($250). Should such an amount not exceed two hundred fifty dollars ($250), then the candidate or the treasurer of the committee shall file a sworn statement to that effect with the appropriate supervisor rather than the report required by this section.
>
> 25 P.S. § 3246 (underlining added).

The statute requires each candidate to file some type of documentation and then it continues on to specifically identify what type of documentation is required depending upon the amount of money involved. Alternatively, if a candidate is not going to raise or expend more than two hundred fifty dollars ($250) in any reporting period and is not going to form a committee,

he can so state by signing an affidavit when presenting his petitions and he will then be excused from all further reporting requirements. 25 P.S. § 3246.1.

The Respondents rely on 25 P.S. § 3246(d) and (e) to support their interpretation of the statute. However, these subsections address the timing of the required filings as to state-wide candidates and local candidates. Since subsection (a) deals directly with the issue in question it controls rather than the other subsections. 1 Pa.C.S.A. §1933 (statutory rule of construction stating that a more specific section of a statute is controlling over a more general section).

In addition, the Respondents' interpretation would leave a gap of information for the public which would thwart the intention of the Election Code. One of the goals of the Election Code is to allow any voter to be able to access documentation on the campaign finances of each candidate. Under the Respondents' interpretation, there would be no pre-election documentation on candidates who form committees and spend and raise less than two hundred fifty dollars ($250) in their individual capacities. This would leave the public unsure of whether these candidates did not spend or receive more than two hundred fifty dollars ($250) or whether the candidates simply did not file reports but did spend or receive more than two hundred fifty dollars. It is certainly possible that candidates could form committees but still raise or expend money individually.

The interpretation now adopted by the Court will assure that every candidate is on record in writing as to their campaign finances for each reporting period. If a candidate signs an affidavit under Section 3246.1 and files no other documentation he is on record as saying that he has not formed a committee and has not raised or expended over two hundred fifty dollars for that reporting period.[1] If a candidate has not signed a Section 3246.1 affidavit and he files a statement saying he has raised or expended less than two hundred fifty dollars for the reporting period, the record is also clear. In the alternative, if a candidate has collected or spent over two hundred fifty dollars then a report would be filed. However, this system makes it clear that if there is no documentation for a candidate then a mistake has been made, therefore a voter could bring the mistake to the attention of the Board of Elections or the Court which could address the issue.

Another problem with the Respondents' interpretation is that it would allow a candidate to intentionally not report expenditures that he is required

[1] Section 3246.l(b) does create an obligation on any candidate to file a report if he does expend or receive over two hundred fifty dollars. Therefore, by not filing a report for a reporting period the candidate is affirmatively stating that he has not received or expended over two hundred fifty dollars. If this is not true, the candidate can be held accountable on the basis of his original affidavit and later failure to file a report.

to report and later claim it was an oversigaht that no report was filed. It would be very difficult for a court or district attorney to differentiate between an honest mistake and an intentional violation. By requiring each candidate to file a statement even when he spends or collects less than two hundred fifty dollars, each candidate can be held accountable if he does not report accurate information. It must be remembered that the reporting laws are meant to protect the public from the dishonest candidate and any interpretation of the Election Code must serve that purpose. The Court emphasizes that it is not saying that the individuals' failure to file the required forms in this case were intentional. Because the individuals did not expend or collect any money in their individual capacities with the exception of the in-kind contribution from MacDonald-Illig to Judith Jones which has now been reported, there would appear to have been no reason for them to have not wanted to file the required statements.

The Court finds that the individuals did not file the pre-election sworn statements or reports as required by the Election Code. However, because the individuals are not before the Court, the Court does not have jurisdiction to certify a violation of the Election Code to the District Attorney even if the Court found one.[2] In addition, the Court has no jurisdiction to levy any fines, therefore it is up to the Election Board to take any appropriate actions with regard to the Respondents' bond.

The Petitioners also allege that the Committee received services from MacDonald-Illig that were not invoiced and not included in any expense report, therefore constituting a violation of Section 3246 of the Code. Initially, the Court notes that the services were rendered on behalf of Mrs. Jones and not the Committee. When one party assists another party in related litigation which is in a similar position, the providing of the service does not necessarily constitute a contribution from one party to another. The Court has addressed the issue of these services in relation to Mrs. Jones and does not see the services as constituting a contribution to the Committee. For all of the above reasons, the Court finds no violation of this Section of the Election Code.

Section 3248 of the Election Code requires that any committee that receives a contribution of more than five hundred dollars ($500.00) after the last pre-election report is deemed completed must report the contribution to the Board of Elections within 24 hours. The purpose of this Section of the Code is clear. The goal of the required disclosure of late campaign contributions is to allow the public to have access to such information before the election and before voting. If large contributions could be made after the last pre-election report is deemed completed and

[2] Because the individuals are not before the Court, the Court need not decide whether their failure to file the required statements would constitute a violation of the Code that should be certified to the District Attorney.

therefore be shielded from public view until after the election, the purpose of the disclosure laws would be thwarted. In this situation, a Fourteen Hundred Dollar ($1,400.00) in-kind contribution was made two days after the last pre-election report was filed but twelve days before the election and it was not reported until after the election.[3] This is a clear violation of this Section of the Election Code.

Section 3249 of the Election Code requires candidates to swear under oath that their committees have not violated any provisions of the Election Code. These affidavits were signed by the candidates on June 18, 1997 and August 8, 1997. This is after it came to the candidates' attention that the Committee and the Treasurer had collected money before the Committee was registered which constituted a violation of the Election Code. In addition, this was after the Committee and a member of the Committee, Mr. Marsh, were alerted to the fact that accepting a contribution from a corporation was in violation of the Election Code. Therefore, there was a violation of this Section of the Code.

The next issue is whether the Committee received improper contributions from a corporation which are forbidden by Section 3253 of the Election Code. The first alleged violation is the two in-kind contributions by Gohrs Printing. While these transactions were later re-characterized, at the time they both initially occurred they were in violation of the Election Code. Accepting an illegal contribution is not the type of violation that can be rectified by amendment or by returning the money after other people alert you to the fact that accepting the contribution was improper. Thus, these transactions violated this Section of the Election Code.

The next allegation of an improper contribution raises an issue of law. While the Court has previously stated that it finds that the MacDonald-Illig law firm only contributed to Mrs. Jones individually, the Court will address the issue of whether such a contribution, if made, would violate the Election Code because this issue has been raised in several different cases in this Court involving the 1997 municipal elections. The MacDonald-Illig law firm is a limited liability partnership. It has attributes of a partnership

[3] The Respondents argue that the Petitioners did not put forth sufficient evidence to show that the Respondents failed to report the contribution in a timely manner. The Court rejects this arguinent. The Petitioners showed that there was a contribution of over five hundred dollars ($500.00) made after the last pre-election report was filed. The Petitioners also presented the testimony of Sharon Bailey a representative of the Board of Elections who stated that she was unaware of any notification of this contribution. In addition, the Treasurer of the Committee testified that he did not recall whether he notified the Board of Elections of this contribution before the election. Lastly, the Respondents did not present any evidence to show that the required notification was made. Considering this evidence, the Court must conclude that the required notification was not made.

but also the limited liability of a corporation. The Election Code clearly states that corporations, National Banks and unincorporated associations may not contribute to campaigns. There is no case law applying this prohibition to partnerships despite the practice of partnerships contributing to candidates in elections at all levels of government. Furthermore, the nature of a partnership allows all members of the partnership to have a voice in making contributions and to be identified as making the contributions. Therefore, the Court finds that any contribution by the MacDonald-Illig law firm or any other parrnership or limited liability partnership is not a violation of Section 3253 of the Election Code.

Section 3254 of the Election Code prohibits any committee or candidate from accepting anonymous contributions or contributions on behalf of a person other than the person making the contribution. Here again the purpose of the Code is to allow the public to know who is contributing to the candidates. In the present case, there were two instances where one person wrote a check on behalf of himself and other people. However, the other people were identified to the Committee Treasurer and then identified on the expense reports. Considering the language and purpose of this Section of the Election Code, the Court does not find that it was violated because disclosure of all of the donors was made to the Committee and the public.[4]

In conclusion, the Court finds that the Committee did accept contributions and disburse money in contravention of, or otherwise violate Sections 3243, 3244, 3248, 3249, and 3253 of the Election Code. However, the Court notes that it is in the discretion of the prosecutorial authority, in this case the Erie County District Attorney, to decide whether these violations warrant criminal prosecution and the sanctions that come with such prosecution.

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[4] The Petitioners raise the issue of a campaign letter sent out without the Committee's authorization which allegedly is in violation of the Election Code. However, there was no evidence of this presented in the pleadings or at the Audit hearing. This issue is raised for the first time in the Petitioners' brief through the attachment of a copy of the letter. Attachments or other items in briefs are not evidence. Thus, the Court has no evidence before it of a violation in this instance. Lastly, the Petitioners ask the Court to give the Board of Elections guidance on the certification of the candidates involved in this case. The Board has already addressed this issue and the required reports have been filed, therefore there is no need for the Court to address this issue.

ORDER

AND NOW, to-wit, this 18 day of March, 1998, upon consideration of the Petitioners' Petition for Audit; it is hereby ORDERED and DECREED that it be CERTIFIED to the District Attorney of Erie County that the Jones, Marsh, Masterson, Lyons & Smith Committee accepted contributions, disbursed money and otherwise acted in contravention of the following Sections of the Election Code: 25 P.S. §3243, 25 P.S. §3244, 25 P.S. §3248, 25 P.S. §3249 and 25 P.S. §3253. It shall now be up to the District Attorney of Erie County in his prosecutorial discretion to decide whether these violations warrant criminal prosecution.

It is further ORDERED that there shall be no fine levied on the individual candidates for their failure to file individual pre-election expense reports because the individuals were not properly before the Court.

BY THE COURT:
/s/ Fred P. Anthony, J.

RICHARD A. COLE, M.D., Plaintiff,

v.

CAROL LUNDMARK, Defendant.

CIVIL PROCEDURE/REAL PARTY IN INTEREST

Non-Attorney, who assigned a number of pending claims to his brother, may not now represent his brother in pursuing the claims because he is neither the real party in interest nor a licensed attorney at law

Non-Attorney who assigned pending claims to his brother, does not fall within the exception to the real party in interest rule applicable to "contracts for the benefit of another" where the contracts were not entered into for the benefit of the assignee

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA No. 14265 - 1996

Richard A. Cole, MD, appearing pro se
Jennifer L. Johnston, Esquire on behalf of the Defendant

OPINION

Levin, J.

Dr. Richard A. Cole ("Cole") was formerly a physician who practiced in the Erie area. On December 23, 1996, Cole filed a Complaint against Defendant ("Lundmark"), based upon allegations of unpaid medical bills. The case now comes before this Court on Lundmark's Motion to Dismiss, filed December 22, 1997.

Background

This is but one of many lawsuits that Dr. Richard A. Cole ("Cole") has filed in this jurisdiction to recoup medical fees from former patients. Originally, the suits had been filed in the name of Dr. Richard A. Cole, M.D., Inc. ("corporation"), as well as by Cole himself; however, due to the fact that he was not an attorney, he was not permitted to represent the interests of the corporation.

On January 1, 1996, the corporation assigned all of the relevant claims to Cole. Cole then petitioned this Court to change the name of the Plaintiff in each caption to appropriately reflect his new interest in each suit. In reliance upon his representations that he was now the true owner of these claims, the "real party in interest" the Court granted Cole's request and the captions were altered accordingly.

Subsequently, through the filings in one of Cole's many cases, the Court became cognizant of a document entitled "Assignment of Claims". This agreement between Cole and his brother purported to assign all "claims, judgments, settlements, or any other gains litigated in the period between 1996 and 1999" to Steven P. Cole. Dated June 6, 1996, six months prior to the aforementioned change in caption hearing, the newly discovered assignment contradicted Cole's previous representations to the Court.

The news of this assignment prompted many defendants, as partially

shown by the list set forth at Exhibit "A", to immediately file motions requesting the dismissal of their suits based on the assertion that Cole was not the "real party in interest". Citing a basic rule of civil procedure[1], the defendants contended that, since he had assigned the claims to his brother in June of 1996, he was not the proper party to prosecute them.

To rebut the defendants' contentions, Cole has submitted a copy of a "subrogation" agreement that was allegedly executed simultaneously with the previously mentioned "assignment of claims". The agreement states, in pertinent part:

> I, [Cole], hereby subrogate to Steven P. Cole, any gains stemming from the matters now being litigated or litigated in the period 1996 through 1999 in [Erie County] . . . wherein [Cole] is a party until he has been repaid the sum of $30,000.00 plus interest at 6% per annum beginning on November 1, 1995. These gains would include settlements, judgments, or any other resolution favorable to Richard A. Cole, M.D. Steven P. Cole will assume no liability from any of these cases, and his rights as subrogee will cease in all of these matters when he has been repaid $30,000 plus accrued interest. [Cole] will bear the full responsibility for prosecuting all of the aforementioned claims. This subrogation agreement amplifies the assignment of claims signed simultaneously.

Discussion

Cole claims that this "subrogation agreement", in conjunction with the "assignment of claims" proves that he comes within one of the exceptions to the "Real Party in Interest" rule. Prior to discussing the merits of Cole's arguments, the cumulative effect of the two documents must be examined. Are they synergistic or mutually exclusive?

Timing

Logically, there are two possibilities regarding the timing of the execution of the "subrogation agreement". It was either executed prior to, or subsequent to, the "assignment of claims". Inasmuch as the two agreements are patently inconsistent with one another -- one purports to transfer the claims to a third party, and the other merely subrogates the gains from the claims to the third party -- a closer analysis of the two agreements is warranted.

Assuming that the "subrogation agreement" was executed first, it would have been supplanted by the "assignment of claims". The "subrogation agreement" seeks to assign only the "gains" from the ongoing litigation up to and until the threshold of $30,000 has been reached. Under this scenario, the subsequently executed "Assignment of Claims" would have transferred what remained of Richard A. Cole's rights with respect to these claims. Thus, the "assignment" would have abrogated any effect the "subrogation agreement" may have had.

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[1] Pa.R.C.P. 2002.

On the other hand, it is also possible that the "assignment" was executed prior to the "subrogation". In fact, the language of the two agreements seems to indicate that this latter sequence of events is probably more accurate. The "assignment of claims" does not mention any other agreement that was to be executed simultaneously. The "subrogation agreement" however states that it was executed to "amplify" the "assignment of claims". When Cole assigned the claims to his brother, however, he transferred the totality of his interest.

It is apparent that either path leads to a single destination. Cole no longer retains any rights with respect to the claims at issue herein because he transferred them to his brother.[2]

"Real Party" Exceptions

Having determined that the assignment transferred all of Cole's rights in the instant lawsuits, the next issue is whether he can continue to prosecute them. Seeming to concede that he is not a "real party in interest" Cole next argues that he comes within one of the several exceptions to the "real party in interest" rule. This general rule, similar to the federal notion of "standing", requires that a party to a lawsuit have some measurable interest in the result.

Cole's first argument is that this general rule does not apply to his case because there is an exception which provides for promisees of third-party beneficiary contracts to sue in their own names to enforce the rights of the third party.

> (b) A plaintiff may sue in his own name without joining as plaintiff . . . any person beneficially interested when such plaintiff
> . . .
> (2) is a person with whom or in whose name a contract has been made for the benefit of another.

Pa.R.C.P. 2002.

Cole's entire argument hinges upon the validity of the "subrogation agreement". As discussed previously, however, that document is of no effect. Cole is neither a promisee nor a real party in interest.

Even if the subrogation agreement was deemed to be valid, however, Cole fails to come within this exception. His claim is that there was a contract that was made for the benefit of his brother, and that he, as promisee, has the right to bring suit to enforce it. Cole, however, is not a promisee to an agreement for the benefit of his brother; rather, he is a party to a contract and the recipient of $30,000 in consideration.

To further illustrate the situation envisioned by this exception to the rule, commentators provide the following example:

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[2] It is interesting to note that this "subrogation agreement" actually falls within the definition of an assignment as defined in Black's Dictionary.

> . . . where a mother enters into a separation agreement which provides for the payment of a child's college education, the mother may bring an action in her own name for the benefit of the child . . . without joining the child.

GOODRICH-AMRAM 2d § 2002 (b) :4 Instantly, the doctor-patient services contract entered into by Cole and each defendant was never intended to benefit Cole's brother, so Cole, not being a promisee, has no right to bring suit. The only person who has the capacity to attempt to enforce these contracts is Steven Cole, the assignee and the rightful owner of the claims.

Cole next argues that he may continue to prosecute the action because his brother is a subrogee and the "real party in interest".

> (d) Clause (a) [requiring that all actions be prosecuted by the real party in interest] shall not be mandatory where a subrogee is a real party in interest.

Pa.R.C.P. 2002. Assuming, again, that the "subrogation agreement" is valid, this exception can be deemed inapplicable on the basis of its non-mandatory language alone.

Moreover, an examination of the reasons this exception was originally promulgated demonstrates that it should not apply to the instant case. The rationale behind this exception was the alleviation of the highly prejudicial effect of disclosing an insurer's interest in a claim to the jury. GOODRICH-AMRAM 2d § 2002 (d) :1. The concern of the drafters was, and continues to be, that the jury will balk at awarding damages against a tortfeasor when they know that a insurance company stands to receive the proceeds. The case at bar, however, is not an insurance case, and this exception, drafted for that specific purpose, does not apply, even if the "subrogation agreement" was held to be valid.

Yet, even assuming the plaintiff's contention would be upheld if this were a subrogation agreement, the document relied upon by Plaintiff is not such an agreement. Calling a horse a duck does not make it so. In the final analysis, the "subrogation agreement" is merely an assignment of claims.

Unauthorized Practice of Law

As discussed, the "subrogation agreement" is invalid for many reasons. Setting all of these reasons aside for a moment, and assuming, *arguendo*, that the agreement is valid and accomplishes its goal, Cole attempts to persuade this Court that despite the fact that he is not an attorney, he has the right to represent his brother's interests before the Courts of Pennsylvania.

This representation borders on the unauthorized practice of law. Cole is not an attorney, yet he purports to represent the interests of another in a court of law. The law is very clear: He can represent himself, but in this respect, he cannot be his brother's keeper.

On the record at the argument in several of Cole's cases, Cole has

assured this Court that his brother has not received any monies from any of the suits Cole has brought. Selected portions of the transcripts of two hearings at which he made this assertion are attached as Appendices "B" and "C". Since, as Cole avers, his brother has not yet received payment, this Court is assured that, even if the "subrogation agreement" were deemed to be valid, Cole's brother still has a monetary interest in the outcome of these claims. Not being licensed to practice before the Supreme Court of Pennsylvania, Cole is not authorized to represent him, regardless of any agreement they may have had. *See Kohlman v. Western Pennsylvania Hospital, et. al.*, 652 A.2d 849 (Pa. Super. 1994).

An obvious reason why the Courts and the law look with disfavor on the type of agreement alleged by Plaintiff is the discharge of the debt or the execution of the release of the obligation. If the Plaintiff's brother is going to collect money or sign a settlement agreement, it should be he and he alone to execute the release. To do otherwise would be the practice of law. *See Lore v. Sobolevitch*, 675 A.2d 805, 808 (Pa. Cmwlth. 1996).

Conclusion

For the aforementioned reasons, it is determined that Cole assigned all relevant claims to his brother. This makes him a stranger to each lawsuit. Moreover, Cole has not demonstrated to this Court's satisfaction that he comes within any of the exceptions to the "real party in interest" rule such that he could maintain this suit on his brother's behalf.

Even if there was a subrogation agreement between Cole and his brother, Cole would not be able to represent his brother before the Courts of Pennsylvania because he is not licensed to practice in this jurisdiction. Should he persevere, it is conceivable that he would be engaging in the unauthorized practice of law.

Defendant's Motion is GRANTED and this suit is DISMISSED.

ORDER

AND NOW, to wit, this 2nd day of April, 1998, it is hereby ORDERED, ADJUDGED and DECREED that Defendant's Motion to Dismiss is GRANTED and this suit is therefore DISMISSED WITH PREJUDICE for the reasons set forth in the foregoing Opinion. To eliminate any question, the Court hereby makes this a Final Order.

AND FURTHER, in view of this Opinion, all requests for fees on the part of the Plaintiff are hereby DENIED with prejudice.

By the Court:
/s/ Levin, J.

COMMONWEALTH OF PENNSYLVANIA

v.

RICHARD COSNEK

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION No. 2529 of 1997

OPINION

The defendant proposes and the Commonwealth opposes the admission of expert testimony via Dr. Michael J. Tronetti as to the Fight or Flight Syndrome. As defense counsel concedes he has been able to find no court, either state or federal, which has allowed such testimony. Further, Pennsylvania law has been rather consistent recently in refusing to permit expert witnesses to testify that a party's conduct was consistent with a certain "syndrome," on the basis that such testimony comprises an impermissible attempt to bolster the witnesses credibility.[1] *Commonwealth v. McCleery*, 439 Pa. Super. 378, 654 A.2d 566 (1995) (expert testimony as to rape trauma syndrome inadmissible); *Commonwealth v. Dunkle*, 529 Pa. 168, 602 A. 2d 830 (1992) (testimony about child sexual abuse syndrome inadmissible). *See also Commonwealth v. Gallagher*, 519 Pa. 291, 547 A.2d 355 (1988); *Commonwealth v. Davis*, 518 Pa. 77, 541 A.2d 315 (1988); *Commonwealth v. Seese*, 512 Pa. 439, 517 A.2d 920 (1986); *Commonwealth v. Emge*, 381 Pa. Super. 139, 553 A.2d 74 (1988).

Ordinarily psychiatric testimony in this Commonwealth has been restricted to evidence of insanity, diminished capacity[2], and self defense. In self defense cases the psychiatric testimony is admitted to show the defendant's state of mind at the time of the incident (the subjective element). It is not relevant as to whether the belief was reasonable (the

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[1] *But see, Commonwealth v. Stonehouse*, 521 Pa. 41, 555 A.2d 772 (1989) finding expert testimony as to Battered Woman Syndrome is admissible. (It appears this syndrome is much more recognized and consistently documented in the scientific community than the "syndrome" mentioned above. In addition such goes to justification as to self defense in murder cases and psychiatric testimony has long been recognized as admissible to show defendant was acting under a bona fide "belief". *Commonwealth v. Light*, 458 Pa. Super. 328, 402 A.2d 1371 (1979). *But see also Commonwealth v. Hill*, 427 Pa. Super. 440, 629 A.2d 949 (1993) (self defense issue of whether defendant acted out of honest, bona fide belief that he was in imminent danger and whether such belief was reasonable are questions of fact for jury).

[2] This has been strictly limited to first degree murder cases only.

objective element). *Commonwealth v. Light*, 458 Pa. Super. 328, 402 A. 2d 1371 (1979); *Commonwealth v. Sheppard*, 436 Pa. 584, 648 A.2d 563 (1994), *appeal dn.* 539 Pa. 987 (Cercone, concurring & dissenting). But even this standard has not been consistently adhered to. *Commonwealth v. Battle*, 289 Pa. Super. 369, 433 A.2d 496 (1981) (proffered testimony of clinical psychologist inadmissible to show defendant acting out of bona fide belief of imminent danger). *Commonwealth v. O'Searo*, 466 Pa. 224, 352 A.2d 30 (1976) (testimony of psychologist inadmissible as it buttressed credibility of defendant as to his version of critical events). Under Pennsylvania law the defense of duress is based solely on an objective standard (whether a person of reasonable firmness in the defendant's situation would have been able to resist), and as such psychiatric testimony under Pennsylvania law is inadmissible.

Finally, the court has reviewed the Diagnostic and Statistical Manual of Mental Disorders, fourth edition - DSM IV, of the American Psychiatric Association and finds no listing for or recognition of "Fight or Flight Syndrome."[3]

As to the issue of the admissibility of the defendant's blood alcohol test results, the defendant has alleged that the Commonwealth lacked probable cause to obtain said results and that such constitutes an unreasonable search and seizure of his medical records under both the 4th Amendment of the United States Constitution and Article I Section 8 of the Pennsylvania Constitution. Said Motion to Suppress Blood Test Results was filed on December 17, 1997, and on that date the court set a hearing for January 26, 1998, for the Commonwealth to show cause as to why such should not be granted. At said hearing the Assistant District Attorney appeared on behalf of the Commonwealth with Patrolman Karl Kelm of the Erie Police Department who was the arresting officer and the officer who had obtained the defendant's blood alcohol test results via Search Warrant H 21144 on July 17, 1997.

At the suppression hearing the Commonwealth conceded that the search warrant in question lacked the requisite probable cause and therefore was not legally sufficient. The Commonwealth however argued that under the legal principle of inevitable discovery the blood alcohol test results were admissible.[4] The Commonwealth neither offered nor presented any testimony from Officer Kelm or any other source, nor did

[3] Panic Attack (situationally bound) and its criteria are listed and such appears to be diagnostically similar to the symptoms (physical and mental) of the syndrome defendant proffers.

[4] While the Commonwealth argued inevitable discovery, it did not cite the independent source doctrine nor argue such. While some appellate courts have used the terms interchangeably, it appears a legal and factual distinction between the two exists.

it advance any other legal basis for the admissibility of the evidence at the long-scheduled hearing. At the conclusion of the hearing the court allowed the Commonwealth to submit a brief only as to the admissibility of the blood test results under the legal doctrine of inevitable discovery.

The Commonwealth now advances, for the first time, in its brief that a warrant was not necessary to obtain the defendant's blood alcohol test results, but only probable cause to believe the defendant was driving under the influence of alcohol. While such is a correct statement of the law in Pennsylvania, such was not proffered at the suppression hearing and it is clearly beyond the scope of the court's directive to the Commonwealth as to the contents of its brief. More importantly, the Commonwealth presented absolutely no evidence as to the issue of probable cause and therefore the record is completely devoid of such.[5] The Commonwealth therefore has not met its burden of proof as to the issue of probable cause and cannot succeed based on this argument.[6] *Commonwealth v. Franz*, 430 Pa. Super. 394, 634 A. 2d 662 (1993) (release of blood tests results by hospital to police violated defendant's 4th Amendment rights where not based on probable cause). *Commonwealth v. Reidel*, 539 Pa. 172, 651 A.2d 135 (1994) (defendant has a reasonable expectation of privacy in his or her medical records, subject only to reasonable search and seizure based on probable cause); *Commonwealth v. Simon*., 440 Pa. Super. 428, 655 A.2d 1024 (1995), *alloc. denied* in 666 A.2d 1055 (suppression of blood test results not required so long as original request to withdraw blood from defendant had been supported by probable cause).[7]

The Pennsylvania Supreme Court has recognized the inevitable discovery rule, sometimes referred to as the "independent source rule" as an exception to the exclusionary rule whereby evidence illegally seized will not be suppressed if the prosecution can demonstrate that the evidence was or would have been procured from an independent origin. *Commonwealth v. Melendez*, 544 Pa. 323, 676 A.2d 226 (1996). And application of the independent source doctrine in Pennsylvania is proper only in very limited circumstances where the independent source is truly

[5] The Commonwealth attempts to refer to an alleged transcript of the preliminary hearing in this matter and incorporates it into its brief. However the transcript was neither offered nor admitted into evidence at the suppression hearing and is therefore not a part of the record in this matter.

[6] This argument also has been waived by failing to raise it at the suppression hearing.

[7] ln the case at bar the blood was drawn solely for medical purposes by hospital personnel on July 5, 1997. There is no evidence the police requested the defendant's blood be drawn or tested for alcohol.

independent from both the tainted evidence and the police or investigative team that engaged in the misconduct by which the tainted evidence was discovered. *Id.* at 676 A.2d 231; *see also Commonwealth v. Brundidge*, 533 Pa. 167, 620 A.2d 1115 (1993) and *Commonwealth v. Mason*, 533 Pa. 560, 637 A.2d 251 (1993).

In the case herein at bar the Commonwealth was aware of the suppression hearing and its basis some 5 1/2 weeks before the hearing, yet the Commonwealth did not offer any evidence to substantiate that the disputed blood alcohol test results were or would have been independently obtained.[8] And the Commonwealth has not demonstrated nor has it presented any evidence of record that it was otherwise lawfully entitled to the defendant's blood test results, *Commonwealth v. Simon*, 440 Pa. Super. 28, 655 A.2d 1024 (1995), *alloc. denied* in 666 A.2d 1055, or that they would have been (not can be) inevitably and independently lawfully obtained. *Commonwealth v. Jolly*, 337 Pa. Super. 130, 486 A. 2d 55 (1984).

ORDER

AND NOW, TO-WIT, this 11th day of February, 1998, after hearing, testimony and argument and a review of briefs of counsel, it is hereby **ORDERED** that the testimony of Dr. Michael J. Tronetti as to "Flight or Flight Syndrome" is deemed **INADMISSIBLE**.

IT IS FURTHER ORDERED that the defendant's Motion to Suppress Blood Test Results is hereby **GRANTED**.

BY THE COURT:
/s/ Shad Connelly, Judge

[8] And this may be where the Commonwealth's argument is legally woefully short. In all of the Pennsylvania Supreme Court cases, and the plethora of Pennsylvania Superior Court cases cited by the Commonwealth involving inevitable discovery, the contested evidence was (or would have been) legally obtained prior to it being challenged in court proceedings. In no case in this Commonwealth has the police or prosecution been allowed to attempt to "legally obtain" illegal evidence after the defendant has moved for its exclusion. If that were the law, any evidence could subsequently be lawfully sanitized. Inevitable discovery occurs when evidence was or would have been, not can or could be, legally obtained.

CRAIG KLOPFER, Plaintiff

v.

TERRA ERIE ASSOCIATES; PASCAL M. NARDELLI, VICTOR LIBERATORE, and JOSEPH MAZZA, trading as TERRA ERIE ASSOCIATES, a General Partnership; PASCAL M. NARDELLI, trading as TERRA ERIE ASSOCIATES, a Limited Partnership; VICTOR LIBERATORE, trading as TERRA ERIE ASSOCIATES, a Limited Partnership; VICTOR LIBERATORE, trading as LIBERATORE MANAGEMENT; and ERIE COUNTY INDUSTRIAL DEVELOPMENT AUTHORITY, Defendants

JUDGMENTS - DEFAULT JUDGMENTS

Defendant landlord's assertion that it did not file responsive pleading, even after receiving Notice of Intention to Enter Judgment by Default, because of lease provision obligating tenant to defend and indemnify landlord for all liabilities arising from tenant's occupation of premises is not reasonable excuse sufficient to warranty opening of default judgment

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 7105- 1993

Appearances: S. E. Riley, Jr., Esq. for Plaintiffs;
W. Alan Torrance, Jr., Esq. for Defendants other than Erie County Industrial Development Authority;
Paul F. Burroughs, Esq. for Defendant Erie County Industrial Development Authority

OPINION

Connelly, J., May 4, 1998

This matter comes before the court as the result of Petitioner Erie County Industrial Development Authority's (hereinafter ECIDA) Petition to Open Default Judgment filed March 19, 1998, and its Supplement thereto of April 24, 1998.

Briefly stated the controlling facts are these:

This action was initiated by Writ of Summons on December 20, 1993 at docket number 10141-1993 The Writ of Summons was served on ECIDA on January 11, 1994. On December 4, 1995 the court consolidated the claims at 10141-1993 and 7105-1993.

On June 24, 1996 Plaintiff filed a complaint at 7105-1993. The complaint was served on ECIDA at the address where the Writ of Summons was served, as no counsel had appeared in the action on behalf of ECIDA. Between June 24, 1995 and February 13, 1998 numerous pleadings, discovery pleadings and orders were served on ECIDA, including the New Matter bearing a notice to plead against ECIDA by its co-defendants

on September 9, 1996 to which ECIDA never responded.

On February 13, 1998 Plaintiff served a 10-day Notice of Intention to Enter Judgment by Default upon Petitioner ECIDA.

On February 25, 1998 the Prothonotary entered a Default Judgment in favor of Plaintiff and against Petitioner. Between March 2 and March 18, 1998 a series of discussions took place between the parties and finally concluded when Plaintiff's counsel indicated the default judgment would not be withdrawn.[1]

Petitioner now alleges he did not file a response to the complaint of Plaintiff because of the provisions of Article IX of the Lease Agreement,[2] since he assumed the tenant had undertaken the defense due to said lease provisions, and therefore his delay in responding to the complaint was reasonable.

The Plaintiff counters that the above said excuse falls woefully short of providing a reasonable basis recognized by law for its failure to respond such that the default judgment should now be opened. Plaintiff asserts that Pennsylvania courts have refused to acknowledge that a defendant can rely on another to protect its interests, especially if he should have been aware of possible problems under the circumstances. Citing *Fox v. Volkswagen of America, Inc.*, 328 Pa. Super. 338, 476 A.2d 1360 (1984), Plaintiff argues that the Superior Court made it clear that the failure of a party (Bank here) to inquire or take any other action in response to a 10-day notice of default was not grounds for a party to justify a belief its insurer was protecting its interest.

Similarly in *Flynn v. Casa de Bertacchi Corp.*, 449 Pa. Super. 606, 674 A.2d 1099 (1996) the Superior court reiterated that the reliance of a defendant upon another (insurer) to protect its interests, is a justifiable belief unless the insured fails to take action after it received notification of the other parties intention to seek a default judgment.

This court is persuaded by the above law and facts that ECIDA has set forth no justifiable belief or reasonable excuse to explain its failure to act over the time period and under the circumstances herein. A sophisticated and large authority with a multitude of holdings, ECIDA's failure to take any action to protect its own interests or at least attempt to ascertain that

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[1] During the pendency of those communications the 10-day period for Relief from Judgment by Default expired on March 9, 1998. See Pa.R.C.P. § 237.3.

[2] Such indicates Defendant Terra Erie Associates would protect, defend, indemnify and save harmless the Petitioner from and against any and all costs and liabilities which may arise out of the Petitioner's interest in the premises.

another party was so acting simply does not entitle them to the relief requested of this court. Especially after the 10-day Notice of Intention to Enter Judgment by Default was served on them by the Plaintiff.

ORDER

AND NOW, TO-WIT, this 4th day of May, 1998, upon consideration of Petitioner Erie County Industrial Development Authority's Petition to Open Default Judgment, the Supplement thereto, Plaintiff's Answer, briefs of counsel and after oral argument, it is hereby **ORDERED, ADJUDGED and DECREED** that Erie County Industrial Development Authority's Petition be and is hereby **DENIED** for the reasons set forth in the foregoing Opinion.

BY THE COURT:

/s/ **Shad Connelly, Judge**

CRAIG KLOPFER, Plaintiff

vs.

TERRA ERIE ASSOCIATES; PASCAL M. NARDELLI, VICTOR LIBERATORE, and JOSEPH MAZZA, trading as TERRA ERIE ASSOCIATES, a General Partnership; PASCAL M. NARDELLI, trading as TERRA ERIE ASSOCIATES, a Limited Partnership; VICTOR LIBERATORE, trading as TERRA ERIE ASSOCIATES, a Limited Partnership; VICTOR LIBERATORE, trading as LIBERATORE MANAGEMENT; and ERIE COUNTY INDUSTRIAL DEVELOPMENT AUTHORITY, Defendants

INSURANCE - MOTOR VEHICLE FINANCIAL RESPONSIBILITY LAW

CIVIL PROCEDURE - COLLATERAL ESTOPPEL

Plaintiff's injuries, which were sustained from trying to move an allegedly negligently erected sign that was blocking the path of his vehicle, did not arise out of the "Maintenance or Use of a Motor Vehicle" because use of plaintiff's vehicle did not proximately cause the injuries and the activity causing the injury was not essential to the use of the vehicle

Plaintiff is collaterally estopped from introducing evidence of medical expenses which were found. In an unappealed order from an associated workers' compensation proceeding, to be unreasonable and unncessary

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 7105 - 1993

Appearances: S. E. Riley, Jr., Esq. for Plaintiffs
W. Alan Torrance, Jr., Esq. for Defendants other than Erie County Industrial Development Authority
Paul F. Burroughs, Esq. for Defendant Erie County Industrial Development Authority

OPINION

Connelly, J., May 4, 1998

FACTS

This matter is before the court pursuant to Defendants' (other than Erie County Industrial Development Authority) Motion in Limine. The facts giving rise to Plaintiff's cause of action, as alleged in his complaint, are as follows. On December 20, 1991, Plaintiff, in the course of his employment as a tractor trailer driver with J & S, Inc., was attempting to make a delivery at the Thrift Drug Store in the Eastway Plaza on U.S. Route 20 near Wesleyville, Pennsylvania. When Plaintiff attempted to turn right into the plaza at the west entrance, he noticed a piece of pipe imbedded in a large block of concrete lying in the entrance lane along the curb. Since the concrete block was in the path of the wheels of his trailer, Plaintiff stopped

his rig, activated his emergency flashers and got out of his truck to survey the situation. Since his rig was blocking a portion of the eastbound lane of Route 20, as well as the entrance to the plaza, and because it was snowing at the time, Plaintiff attempted to slide the pipe and concrete block out of the entrance lane so that he could complete his turn into the plaza and make his delivery. In the process of attempting to move the concrete block, Plaintiff allegedly sustained a severe and permanent injury to his back.

Plaintiff claims medical expenses in excess of $25,000 and wage losses of $44,511.00. Further, an expert in vocational rehabilitation evaluated Plaintiff, who was 29 years of age at the time of his injuries, and concluded that due to his injuries and his subsequent inability to return to work, Plaintiff will sustain a lifetime impairment of his earning capacity of between $103,958 and $403,458. In addition, Plaintiff seeks recovery for pain, suffering, disfigurement and loss of life's pleasures.

Following his injury, Plaintiff sought and received both medical and wage workers' compensation benefits. Thereafter, on December 7, 1993, a workers' compensation judge issued an Order stating that Plaintiff's pain management treatment was not reasonable or necessary as a result of the accident in this case. No appeal was taken and Plaintiff shortly thereafter commuted his indemnity benefits.[1] Plaintiff seeks to introduce into evidence all of the medical bills and wage payments that were paid by workers' compensation benefits as well as evidence of wage loss which would have been paid had he not commuted his indemnity benefits.

Defendants' motion requests this court to preclude the introduction at trial of all medical benefits and wage loss that was paid or payable by workers' compensation.

LAW

Defendants first contend that section 1722 of the Motor Vehicle Financial Responsibility Law, 75 Pa.C.S.A. § 1701 *et seq.*, precludes Plaintiff from introducing evidence of medical benefits and wage loss that was paid or payable by workers' compensation. At the time this incident occurred, the following statutory provisions were in effect.[2]

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[1] "Commutation" of workers' compensation benefits is present payment of future benefits in one lump sum instead of payment in periodic installments. 77 P.S. § 604; *Yeager v. W.C.A.B.*, 657 A.2d 1372 (1995), *alloc. denied*, 542 Pa. 682, 668 A.2d 1142 (1995).

[2] Sections 1720 and 1722 of Title 75 were amended by Section 25(b) of Act 1993, July 2, P.L. 190, No. 44. However, the provisions of Act 44 are not retroactive. *Byard F. Brogan, Inc. v. Workmen's Compensation Appeal Board*, 161 Pa. Cmwlth. 453, 637 A.2d 689 (1994); *U.S. Underwriters Ins. Co. v. Liberty Mut. Ins.*, 80 F.2d 93 (3rd Cir. 1996) (Pennsylvania courts have interpreted Act 44 as prospective only); *Carrick v. Zurich-American Ins. Group*, 14 F.3d 907 (3rd Cir. 1994) (predicting prospective application).

75 Pa.C.S.A. § 1720 then provided:

> In actions arising out of the maintenance or use of a motor vehicle, there shall be no right of subrogation or reimbursement from a claimant's tort recovery with respect to workers' compensation benefits, ...

Further, 75 Pa.C.S.A. § 1722 then provided:

> In any action for damages against a tortfeasor, . . . arising out of the use or maintenance of a motor vehicle, a person who is eligible to receive benefits under. . . workers' compensation, . . . shall be precluded from recovering the amount of benefits paid or payable under. . . workers' compensation.

Defendants contend, and Plaintiff disputes, that Plaintiff's conduct at the time of the accident arose out of the "maintenance or use" of a motor vehicle. In *Utica Mutual Insurance Company v. Contrisciane*, 504 Pa, 328, 473 A.2d 1005 (1984), the Pennsylvania Supreme Court interpreted the definition of "occupying," as applied to a motor vehicle with respect to an insurance policy. The Court adopted a liberal interpretation of the term which focused on whether the individual was performing an act normally associated with the immediate "use" of the automobile. A four part test was established to determine if an individual was occupying a vehicle:

(1) there is a causal relation or connection between the injury and the use of the insured vehicle;

(2) the person asserting coverage must be in a reasonably close geographic proximity to the insured vehicle, although the person need not be actually touching it;

(3) the person must be vehicle oriented rather than highway or sidewalk oriented at the time; and

(4) the person must also be engaged in a transaction essential to the use of the vehicle at the time.

Id. at 336, 473 A.2d at 1009.

In *Utica*, the action was filed by the executrix of Kenneth A. Contrisciane. Contrisciane was operating an automobile when he was involved in a minor automobile accident. A police officer arrived and told Contrisciane to get his driver's license and owner's card from his car. While he was standing beside the police cruiser waiting to get his items back, Contrisciane was struck and killed by an automobile. At the time, Contrisciane was approximately 97 feet from his vehicle. The Supreme Court, applying its test, concluded that Contrisciane was unquestionably "occupying" his vehicle at the time he was struck and killed. He was lawfully in possession of his vehicle at the time of the first accident and once involved in that

accident, Contrisciane was statutorily required to stop his vehicle and exchange information with the driver of the other automobile. Thereafter, he was directed by the officer to bring information to the police car. Consequently, the Court concluded that at all times Contrisciane was engaged in transactions essential to the continued use of his vehicle and it was only because of the mandated requirements of the statute and the police officer that Contrisciane found himself physically out of contact with his vehicle. *Id.*

In *Shultz v. Nationwide Insurance Co.*, 373 Pa. Super. 429, 541 A.2d 391 (1988), the Superior Court applied the *Utica* test in holding that the plaintiff Shultz was an "occupant" of her vehicle while she was engaged in putting gas into the tank. The Court concluded that this activity was essential to the use of her automobile and thus Shultz was vehicle oriented.

Plaintiff directs the court to *Lucas-Raso v. American Manufacturers Ins. Co*., 441 Pa. Super. 161, 657 A.2d 1 (1995), wherein the Superior Court held that a woman who was injured when she fell into a pothole in a parking lot while walking around her car from the passenger to the driver's side was not involved in the maintenance and use of her motor vehicle. The plaintiff in *Lucas-Raso* left her place of employment with a co-worker and walked towards her car, intending to drive to a nearby bank. After the plaintiff unlocked the passenger door and let her co-worker in, she proceeded around the back of her car towards the driver's side. At this time, the plaintiff fell into a pothole and sustained injuries. The Court held that although the plaintiff was vehicle oriented at the time of her fall, she failed to establish the necessary causal nexus between her injury and the use of the vehicle. *Id.* at 170, 657 A.2d at 5.

It is well-settled that "arising out of the maintenance or use of a motor vehicle" means causally connected with, not proximately caused by. "But for" causation, i.e., a cause and result relationship is enough to satisfy the provision. *Manufacturers Casualty Ins. Co. v. Goodville Mutual Casualty Co.*, 403 Pa. 603, 170 A.2d 571 (1961); *Lucas-Raso, supra; Roach v. Port Auth. of Allegheny County*, 380 Pa. Super. 28, 5550 A.2d 1346 (1988); *Alvarino v. Allstate Ins. Co.*, 370 Pa. Super. 563, 537 A. 2d 18 (1988). Further, there must be a link between the injury and the motor vehicle before compensation will be awarded. *Lucas-Raso, supra; Roach, supra.*

Even with this relaxed standard, under the facts of the instant case Plaintiff was not engaged in the maintenance and use of his vehicle when he attempted to move the concrete obstruction. As Plaintiff argues, although the removal of the obstruction would have been beneficial to the continued use of his motor vehicle, it was certainly not essential thereto. *Contrast Utica, supra; Shultz, supra.*

The facts herein are analogous to the situation in *Lucas-Raso*. In *Lucas-Raso* the plaintiff was injured as she walked around her car towards the driver's side. Although the plaintiff's sole purpose was to get into her car and drive off, the Court held that she was not engaged in the maintenance

and use of her motor vehicle. Here, as in *Lucas-Raso*, the action arises not out of the maintenance and use of Plaintiff's tractor trailer, but rather out of Defendants' alleged negligence in erecting a sign in the parking lot entrance. *Lucas-Raso* (concurring opinion).

Numerous other cases demonstrate that when complainants are injured due to actions or forces completely independent from the use of their motor vehicle, said injuries are not found to arise out of the vehicle's maintenance and use. For example, in *Schweitzer v. Aetna Life and Casualty Co.*, 306 Pa. Super. 300, 452 A.2d 735 (1982), the Court held that injuries sustained by the owner of a vehicle who was beaten while in her vehicle did not arise from the use of the vehicle. Similarly, in *Erie Ins. Exchange v. Eisenhuth*, 305 Pa. Super. 571, 451 A.2d 1024 (1982), the injuries sustained by a passenger sitting in a car when shot by the driver did not arise out of the use of the motor vehicle. *See also Comacho v. Nationwide Ins. Co.*, 314 Pa. Super. 21, 460 A.2d 353 (1983), *aff'd*, 504 Pa. 351,473 A.2d 1017 (1984) (injuries sustained by driver sitting in car from exploding bottle thrown in car did not arise out of use of motor vehicle); *Day v. State Farm Mutual Ins. Co.*, 261 Pa. Super. 216, 396 A.2d 3 (1979) (plaintiff not vehicle oriented when injured in fight following motor vehicle accident); *Reymer v. Rendina et al.*, 75 Lanc. L.R. 117 (1996) (fatal injuries sustained by driver when utility pole transformer fell on vehicle did not arise out of maintenance and use of motor vehicle).

Similarly, while the involvement of Plaintiff's tractor trailer in the instant action was more than merely incidental, no direct causal connection exists between the use of his tractor trailer and the injuries sustained. *Huber v. Erie Ins. Exchange*, 402 Pa.Super. 443, 587 A.2d 333 (1991). Further, Plaintiff's activity was not essential to the vehicle's maintenance and use. Accordingly, Defendants' motion is denied.

Defendants also argue that the doctrine of collateral estoppel precludes relitigation of the determination of the workers' compensation judge that the pain management treatment of Plaintiff by Dr. Jorge Martinez was neither reasonable or necessary. No appeal was taken from this Order and it is now final. Consequently, Plaintiff is bound by this Order. *Grant v. GAF Corp.*, 415 Pa. Super. 137, 608 A.2d 1047 (1992), *aff'd* 536 Pa. 429, 639 A.2d 1170 (1994) (the doctrine of collateral estoppel operates to preclude relitigation of an issue that has been the subject of a final determination in a workers' compensation proceeding).

Plaintiff contends that rather than appealing to the Workers' Compensation Board of Appeals, he entered into a commutation agreement which was subsequently approved by the Board. Plaintiff avers that this effectively worked a settlement of the issues which were before the workers' compensation judge, operating to deny any conclusive effect to the judge's findings. The commutation agreement was entered into, however, subsequent to the findings of the workers' compensation judge

and Plaintiff, wisely or unwisely, chose to forego his right to appeal the judge's decision. Plaintiff is therefore bound by the Order. *Id.*

Plaintiff further argues, in the alternative, that if the workers' compensation judge's findings are conclusive as to him, they should be conclusive as to all parties in the action. Collateral estoppel applies if (1) the issue decided in the prior case is identical to one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person in privity to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and (5) the determination in the prior proceeding was essential to the judgment. *Philadelphia Marine Trade Assoc. v. International Longshoreman's Assoc.*, 453 Pa. 43, 308 A.2d 98 (1973); *Matternas v. Stehman*, 434 Pa. Super. 255, 642 A.2d 1120 (1994).

Contrary to Plaintiff, Defendants were not parties in the matter before the workers' compensation judge nor have they had the opportunity to litigate any of the issues dealt with therein. Therefore, the findings of the workers' compensation judge are not binding as to Defendants. As to the Order of the workers' compensation judge, Defendants' motion is granted.

ORDER

AND NOW, TO-WIT, this 4th day of May, 1998, upon consideration of Defendants' (other than Erie County Industrial Development Authority) Motion in Limine, it is hereby **ORDERED, ADJUDGED and DECREED** that:

(1) Defendants' Motion in Limine to preclude the introduction of medical benefits and wage loss that were paid or payable by Workers Compensation pursuant to Section 1722 of the Motor Vehicle Financial Responsibility Law is hereby **DENIED**;

(2) Defendants' Motion in Limine to preclude the medical bills for treatment and prescriptions from Revco that were held not reasonable nor necessary by the Workers Compensation Judge is hereby **GRANTED**.

BY THE COURT:
/s/ Shad Connelly, Judge

CHRISTINE HEBERLE, an Administratrix of the Estate of TRISTAN MICHAEL HEBERLE, CHRISTINE HEBERLE and PAUL HEBERLE, husband and wife, individually, and as guardians of the minor, JASON HEBERLE,
Plaintiffs
v.
YOUNG MEN'S CHRISTIAN ASSOCIATION OF ERIE, Defendant

TORTS/WRONGFUL DEATH-SURVIVAL

Fetus of at least 24 weeks gestation is "viable fetus capable of an independent existence at the time of death" for purposes of wrongful death and survival actions

TORTS/LOSS OF CONSORTIUM

Pennsylvania law does not recognize a cause of action for the loss of filial consortium

TORTS/NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Woman claiming emotional distress as a result of death of her fetus is given opportunity to amend to allege causal nexus between physical injury to herself and alleged emotional distress

TORTS/NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Man's claim of emotional distress as a result of death of his unborn child is dismissed where there was no causal nexus between physical injury to himself, or contemporaneous observation of physical injury to a relative and alleged emotional distress

CIVIL PROCEDURE/PROPER PARTIES

Wrongful death claim filed by parents of deceased fetus in their own right is permitted under Pa. R.C.P. §2202 (b) as parents are entitled by law to recover damages for the alleged wrongful death

CIVIL PROCEDURE/MOTION FOR MORE SPECIFIC COMPLAINT

Motion for more specific complaint is granted as to plaintiff's claim for "past, present and future medical, psychological, psychiatric and special educational expense" where complaint fails to specifically state the basis for such alleged damages

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 10826 - 1998

Appearances: Richard Filippi, Esq. and
Rolf Louis Patberg, Esq. for Plaintiffs;
Mark E. Mioduszewski, Esq. for Defendant

OPINION

Connelly, J., June 29, 1998

This matter comes before the court pursuant to Defendant's preliminary objections, filed October 15, 1996, to Plaintiffs complaint which alleges the following relevant facts. On or about September 25, 1995, Plaintiff Christine Heberle, and her husband, Plaintiff Paul Heberle had sexual relations conceiving a child, and discovered the pregnancy on November 27, 1995. From September 1995 through March 1996 Plaintiffs Christine Heberle, her brother Thomas Ondreako, and her sister, Cynthia Ondreako resided in a cabin located at Camp Sherwin, and owned by Defendant Young Men's Christian Association of Erie [YMCA]. On March 18, 1996, Christine Heberle was admitted to Millcreek Community Hospital's emergency room where a sonogram indicated a potential fetal demise. Pursuant to the Complaint, the fetus, Tristan Michael Heberle, was pronounced dead on March 19, 1996. On March 24, 1996, Christine Heberle was found unconscious in the cabin, and transported to Saint Vincent Health Center where test results revealed a level of carbon monoxide at 39%.

Procedurally Christine Heberle, along with her siblings, Thomas and Cynthia, filed suit against the YMCA on October 15, 1996 to recover damages resulting from personal injuries allegedly sustained as a result of carbon monoxide exposure.[1] The three Plaintiffs sought punitive damages in addition to compensatory damages. Thomas Ondreako, an employee of the YMCA, also brought an action for wrongful termination. This court dismissed the claims for wrongful termination and punitive damages pursuant to an order dated February 24, 1997.

The Complaint contains the following five counts: (1) Wrongful death action filed by Christine Heberle and Paul Heberle; (2) Survival action brought by Christine Heberle as Administratrix of the Estate of Tristan Heberle; (3) Claim for negligent infliction of emotional distress filed by Christine Heberle, individually; (4) Claim for negligent infliction of emotional distress filed by Paul Heberle, individually, and (5) Claim for damages for injuries sustained by Jason Heberle, a minor, through his parents Christine Heberle and Paul Heberle,[2] and (6) Claim for medical, psychological, psychiatric, and special education expenses and loss of society and services filed by Christine and Paul Heberle, individually.

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[1] The claims of Cynthia Ondreako and Thomas Ondreako have been settled in their entirety, with Christine Heberle's action for personal injuries remaining.

[2] All claims of and deriving from Jason Heberle, a minor, have been settled and all applicable preliminary objections to such claim are rendered moot.

On April 27, 1998, Defendant filed preliminary objections in the nature of a demurrer as to Counts I and II: wrongful death and survival actions, Counts III & IV: emotional distress claims of both Christine Heberle and Paul Heberle, and paragraph 33(d) of the Complaint seeking loss of society and services of Tristan Michael Heberle. Additionally, Defendant filed preliminary objections in the nature of a Motion to Strike Count I for failure to comply with the requirements of Pennsylvania Rules of Civil Procedure 2202, and a Motion for More Specific Complaint with respect to the damages outlined in Count VI.

Regarding Defendant's objections in the nature of a demurrer, the applicable standard of review provides:

> A demurrer admits every well-pleaded material fact set forth in the pleadings to which it is addressed as well as all inferences reasonably deducible therefrom, but not conclusions of law. In order to sustain the demurrer, it is essential that the plaintiff's complaint indicate on its face that his claim cannot be sustained, and the law will not permit recovery. If there is any doubt, this should be resolved in favor of overruling the demurrer.

Lobdell v. Leichtenberger, 442 Pa. Super. 21, 24, 658 A.2d 399, 401 (1995) *citing*, *Gekas v. Shopp*, 469 Pa. 1, 6, 364 A.2d 691,693 (1976). "If a demurrer is sustained, the right to amend should not be withheld where there is some reasonable possibility that amendment can be accomplished successfully." *Pennfield v. Meadow Valley Elec*t, 413 Pa. Super. 187, 200, 604 A.2d 1082, 1088 (1991) (quotations and citations omitted).

Defendant's first issue challenges Plaintiffs' wrongful death and survival action alleging the law in Pennsylvania does not recognize a claim for wrongful death or survival in an unborn fetus considered nonviable at the time of death. Accordingly, the Defendants maintain that due to the extent Counts III and IV derive from the death of the unborn fetus, these claims should also be dismissed.

In *Amadio v. Levin*, 509 Pa. 199, 501 A.2d 1085 (1985), the Pennsylvania Supreme Court rejected the requirement of a "live birth" and concluded that "injuries received by a child while en ventre sa mere can form the basis for survival or wrongful death actions as maintained on behalf of a child born alive." *Id*.

The Court clarified this rule in a subsequent decision, *Coveleski v. Bubnis*, 535 Pa. 166, 634 A.2d 608 (1993), wherein the Court opined: "In order to maintain an action for wrongful death or survival there must be either a child born alive, or a viable fetus capable of an independent existence at the time of death." *Coveleski*, 634 A.2d at 610. The Court declined to provide any guidance to determine *when* the fetus becomes a

person for purposes of the wrongful death and survival acts.[3]

In *Hudak v. Georgy*, 535 Pa. 152, 634 A.2d 600 (1993) Justice Cappy utilized language from the United States Supreme Court decision *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L. Ed.2d 147 (1973) to address this question in his dissenting opinion. Justice Cappy wrote: "The United States Supreme Court in *Roe* stated 'the fetus becomes viable, that is potentially able to live outside the mother's womb, albeit with artificial aid...at about seven months (28 weeks) but [viability] may occur earlier, even at 24 weeks.'" *Hudak* 634 A.2d at 607 *quoting Roe v. Wade*, *supra*.[4]

In the case at bar, the Complaint reads: "At the time of the fetal demise of the decedent, Tristan Michael Heberle, *the baby was viable* in that he had a gestation period of at least 26 weeks." (Complaint, ¶ 28) (emphasis added). Defendant disputes this calculation of the decedent's gestational age, and argues the dates provided in the Complaint indicate the fetus would actually have been in the 24th week of gestation as of March 19, 1996. (Brief in Support of Preliminary Objections, p. 8, n.2). Nevertheless, in light of the aforementioned case law, the Complaint does contain the necessary allegations to maintain a wrongful death and survival action on behalf of the unborn fetus. Since it is discernible through the dates contained in the Complaint that the fetus was at least 24 weeks old upon fetal demise, and because the Plaintiffs allege in the Complaint that their son was viable when he died, Defendant's preliminary objection in the nature of a demurrer is denied as to this issue.

The second issue pursuant to Defendant's demurrer alleges the Plaintiffs' claim for loss of consortium of their unborn child is not recognized in Pennsylvania courts. Defendant cites *McCaskill v. Housing Authority*, 419 Pa.Super. 313, 615 A.2d 382 (1992) wherein the Pennsylvania Superior Court dismissed the Appellant's claim for loss of filial consortium based on its previous holding in *Schroeder v. Ear, Nose and Throat Assoc.*, 383 Pa. Super. 440, 557 A.2d 21 (1989) *alloc. dn.* at 523 Pa. 650, 567 A.2d 653 (1989) which stated:

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[3] However the Court did not dispute the lower court's observation that "it has often been noted that a fetus ordinarily becomes viable during the sixth or seventh month of its mother's pregnancy." *Coveleski*, 571 A.2d at 435 *citing Right to Maintain Action or to Recover Damages for Death of Unborn Child*, 84 A.L.R. 3d 411,432 n. 72 (1978).

[4] In *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) the Court revisited its central holding in *Roe* and acknowledged: "The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at *23 to 24 weeks, as it sometimes does today*..." *Planned Parenthood*, 112 S.Ct. at 2811 (emphasis added).

> We conclude that because there is no constitutional mandate compelling us to recognize a cause of action for loss of filial consortium, because there is presently no legal basis for allowing the cause of action, because there is no general or growing consensus that such a cause of action should be established, and because to allow such a cause of action is a policy determination which can most thoroughly and representatively be considered by the legislature, we do not recognize a parent's cause of action for loss of a child's consortium due to tortious interference of a third party.

McCaskill, 615 A.2d at 385 quoting *Schroeder v. Ear, Nose and Throat Assoc., supra.* Accordingly, since prior case law evidences a reluctance on the part of the Pennsylvania courts to break from precedence and recognize a cause of action for the loss of filial consortium, Defendant's preliminary objection is granted and Plaintiffs' claim for loss of society and services of their unborn baby is dismissed.

The final argument raised by the Defendant in the nature of a demurrer avers Christine and Paul Heberle's allegations of "severe emotional distress" fail to state a cause of action for negligent infliction of emotional distress. (Complaint, ¶¶ 39, 42) Specifically, Defendant maintains that since neither Christine Heberle nor Paul Heberle allege their emotional distress caused or was caused or accompanied by any physical illness or injury to themselves, these claims must be dismissed.

It is well established that to "state a claim for either negligent or intentional infliction of emotional distress under Pennsylvania law, a plaintiff must allege some physical injury, harm, or illness caused by defendant's conduct". *Lujan v. Mansmann*, 956 F.Supp. 1218 (E.D.Pa. 1997). Yet the authority cited by Defendant to support this proposition, *Strain v. Ferroni*, 405 Pa.Super. 349, 592 A.2d 698 (1991), is distinguishable in that the Pennsylvania Superior Court, failed to find any causation between the physician's conduct and the termination of the pregnancy. The court concluded: "Here there is no evidence that Ms. Strain experienced physical injury attendant to her distress. . . ." *Strain*, 592 A.2d at 703.

At bar, in addition to the fact that the Plaintiffs should be given an opportunity to prove that Defendant was negligent, and that negligence was a proximate cause of the emotional distress, the lack of an allegation of physical injury is not fatal to Plaintiff Christine Heberle's claim for emotional distress, and may be cured through an amendment. Accordingly, Defendant's demurrer regarding Christine Heberle's claim for emotional distress is denied, yet with respect to Paul Heberle, Defendant's motion is granted due to his failure to contemporaneously observe a traumatic event which immediately impacted Christine Heberle or Tristan Michael Heberle.

The basis of recovery for a claim of negligent infliction of emotional distress is the traumatic impact of viewing the negligent injury of a close relative. A person who does not experience a sensory and contemporaneous observance of the injury does not state a cause of action for negligent infliction of emotional distress. *Bloom v. Dubois Regional Medical Ctr.*, 409 Pa. Super. 83, 597 A.2d 671 (1991).

> The Supreme Court has drawn a line between cases involving observation of a traumatic event which has an immediate impact on the plaintiff and those not involving the observation of a traumatic event and where there is some separateness between the negligence of the defendant and its ultimate impact on the plaintiff...To recover the plaintiff must have observed the defendant traumatically inflicting the harm on the plaintiff's relative, with no buffer of time or space to soften the blow.

Id.

In *Bloom*, the plaintiff husband alleged emotional distress after finding his wife hanging by the neck from shoestrings behind a door in her hospital room in the psychiatric unit of the hospital. The Pennsylvania Superior Court denied recovery based on plaintiff's failure to plead the "element of contemporaneous observance of traumatic infliction of injury by defendants." *Bloom*, 597 A.2d at 683. The court recognized the plaintiff had observed his wife subsequent to her own suicide attempt, yet "he did not observe any traumatic infliction of injury on his wife at the hands of the defendants because none occurred. The alleged negligence of defendants here is an omission and involved no direct and traumatic infliction of injury on Mrs. Bloom by defendants." *Id.* Consequently, as Paul Heberle's claim for emotional distress is based on the death of his unborn son, and not on any observation of a traumatic event at the hand of the Defendant causing immediate harm to his wife, and unborn son, his claim must be dismissed.

Defendant filed preliminary objections in the nature of a Motion to Strike Count I of Plaintiffs' Complaint to the extent it is "filed by any person other than Christine Heberle as Administratix of the Estate of Tristan Michael Heberle." (Preliminary Objections, ¶ 11). Defendant contends that since Christine Heberle and Paul Heberle individually filed the wrongful death action arising out of the death of Tristan Michael Heberle; this portion of the Complaint fails to comply with Pa.R.C.P. § 2202. Rule 2202 instructs which parties are entitled to bring actions for wrongful death actions, and provides in part:

> (a) Except as otherwise provided in clause (b) of this rule, an action for wrongful death shall be brought only by the personal representative of the decedent for the benefit of those persons entitled by law to recover damages for such wrongful death.

(b) If no action for wrongful death has been brought within six months after the death of the decedent, the action may be brought by the personal representative or by any person entitled by law to recover damages in such action as trustee ad litem on behalf of all persons entitled to share in the damages.

Pa.R.C.P. § 2202 (a), (b).

Defendant's argument overlooks the specific language of Rule 2202(b) which authorizes the initiation of a wrongful death action by "the personal representative or by any other person entitled by law to recover damages in such action as trustee ad litem...." Pa.R.C.P. § 2202(b) (emphasis added). Thus, as Christine Heberle and Paul Heberle are entitled to recover damages in their capacity as the decedent Tristan Michael Heberle's parents, they should be allowed to bring this action for wrongful death pursuant to Rule § 2202(b). Defendant's preliminary objection in the nature of a Motion to Strike is denied, and Plaintiffs are granted an opportunity to submit an amended Complaint as to this issue.

Finally, Defendant filed a preliminary objection in the form of a Motion for More Specific Complaint. In particular Defendant contests ¶ 49(a) of Count VI of the Complaint wherein Christine Heberle and Paul Heberle seek damages for "past, present and future medical, psychological, psychiatric and special educational expenses...in the amount of $1,000.00", in addition to ¶ 47(f) at Count V which alleges "past, present and future medical and educational costs...in excess of $1,000.00" pursuant to Jason Heberle's action for personal injuries.

Pennsylvania Rule of Civil Procedure 1019 reads: "[T]he material facts on which a cause of action or defense is based shall be stated in a concise and summary form." Pa.R.C.P. § 1019(a). Further, any averments of time, place and items of special damage must be specifically pleaded. Pa.R.C.P. 1019(f). "The pleadings must adequately explain the nature of the claim to the opposing party so as to permit him to prepare a defense and they must be sufficient to convince the court that the averments are not merely subterfuge." *Sevin v. Kelshaw*, 417 Pa.Super. 1,7, 611 A.2d 1232, 1235 (1992) *quoting Bata v. Central-Penn National Bank of Philadelphia*, 423 Pa. 373, 380, 224 A.2d 174, 179 (1966) *cert. denied*, 386 U.S. 1007 (1967).

Defendant's argument that the allegations of damages fail to sufficiently allege "the source of the foregoing expenses or the person with respect to whom the expenses were incurred," (Preliminary Objections, ¶ 23), has merit in light of the fact that all claims arising out of the action by Jason Heberle have been settled, and Defendant's motion as to Paul Heberle's claim for emotional distress has been granted. Thus Defendant's motion is granted in order to sufficiently apprise Defendant of the basis for the alleged damages, and Plaintiffs are directed to submit more specific pleadings accordingly.

ORDER

AND NOW, TO-WIT, this 29th day of June, 1998, upon reviewing Defendant's Preliminary Objections to Plaintiffs' Complaint, Plaintiffs' Reply to Preliminary Objections, and counsels' briefs it is hereby **ORDERED, ADJUDGED and DECREED** as follows:

(1) Defendant's preliminary objection in the nature of a demurrer is **DENIED** as to the issue of whether the Plaintiffs may maintain a wrongful death and survival action arising out of the death of their unborn child;

(2) Defendant's preliminary objection in the nature of a demurrer is **GRANTED** as to paragraph 33(d) of Count I and paragraph 49(b) of Count VI regarding loss of parent-child consortium;

(3) Defendant's preliminary objection in the nature of a demurrer is **DENIED** with respect to Plaintiff Christine Heberle's action for negligent infliction of emotional distress and Plaintiff is required to amend the Complaint accordingly;

(4) Defendant's preliminary objection in the nature of a demurrer is **GRANTED** as to Plaintiff Paul Heberle's action for negligent infliction of emotional distress;

(5) Defendant's preliminary objection in the nature of a Motion to Strike Count I of Plaintiffs' Complaint is **DENIED** and Plaintiffs are required to amend its Complaint accordingly; and

(6) Defendant's preliminary objection for lack of specificity as to paragraph 49 (a) is **GRANTED** and Plaintiffs are required to amend its Complaint accordingly.

BY THE COURT:
/s/ Shad Connelly, Judge

EDWARD H. TERELLA, Plaintiff

v.

MILLCREEK TOWNSHIP and PASTORE, INC., and PAUL PASTORE,[1] individually, Defendants

ZONING/APPEAL

Plaintiff's due process and equal protection claims regarding enactment of zoning ordinance and approval of subdivision plan will not be entertained because they were filed after the expiration of the 30 day appeal period.

ZONING/APPEAL

Plaintiff's first amended complaint, which for the first time includes counts appealing from approval of subdivision plan, is untimely and cannot relate back to original complaint filed during the appeal period because the original complaint specifically stated that it was "not an appeal."

CIVIL PROCEDURE/MANDAMUS

Claim for mandamus is legally insufficient where it fails to allege any ministerial act that a government body failed to perform.

CIVIL PROCEDURE/DECLARATORY JUDGMENT

Declaratory judgment claim against municipality is legally insufficient where there are no allegations of an actual controversy or that the plaintiff is taking or refraining from taking action as a result of the challenged ordinance.

CONSTITUTIONAL LAW/TAKING WITHOUT COMPENSATION

Complaint alleging unconstitutional taking is legally insufficient where it does not allege that municipality physically invaded plaintiff's property or authorized others to do so.

NEGLIGENCE

Complaint alleging that defendant's construction activity caused damage to shrubbery and vegetation on plaintiff's property as a result of encroachment of excavated material on plaintiff's property adequately pleads negligence claim.

TORTS/NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Claim that defendant's construction activity caused damage to shrubbery and vegetation on plaintiff's property as a result of encroachment of excavated material on plaintiff's property does not state cause of action for negligent infliction of emotional distress because it fails to allege contemporaneous observation of injury to a close relative.

TORTS/INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Claim that defendant's construction activity caused damage to shrubbery and vegetation on plaintiff's property as a result of encroachment of excavated material on plaintiff's property does not state cause of action for intentional infliction of emotional distress because it fails to allege conduct "beyond all possible bounds of decency" and "intolerable in a civilized society."

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[1] The Plaintiff's Original Complaint did not name Paul Pastore in his individual capacity as a Defendant. At oral argument on their preliminary objections, Millcreek and Pastore, Inc. agreed to the filing and consideration of the Plaintiff's First Amended Complaint. However, Paul Pastore was not represented in his individual capacity and has not waived any right to file preliminary objections to the First Amended Complaint.

CONSTITUTIONAL LAW/STATE ACTION

Complaint alleging unconstitutional taking and violation of due process and equal protection rights is legally insufficient where claim is not against a state actor.

TORTS/TRESPASS

Claim that defendant's construction activity caused damage to shrubbery and vegetation on plaintiff's property as a result of encroachment of excavated material on plaintiff's property states valid cause of action for trespass.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION No. 12930-1997

L.C. TeWinkle, Esquire
Evan Adair, Esquire
W. John Knox, Esquire

OPINION

Anthony, J., March 24, 1998.

This matter comes before the Court on Millcreek Township and Pastore, Inc.'s Preliminary Objections to the Plaintiff's Complaint.[2] Each Defendant filed separate sets of objections, both of which will be addressed in this Opinion and Order. After considering the arguments of counsel as well as reviewing the pleadings, the Court will sustain the objections of Millcreek and dismiss Millcreek from the case. The Court will sustain the majority of Pastore, Inc.'s objections but allow two of the Counts against Pastore, Inc. to stand. The relevant facts and procedural history are as follows.

This is an action to recover damages for the Defendants' alleged improper and inappropriate installation of sidewalks adjacent to the Plaintiff's land. Pastore, Inc. is a company which develops property. The Plaintiff owns property located at 4242 Asbury Road, Millcreek Township, Pennsylvania. In July of 1994, Pastore, Inc. began the process of applying to Millcreek Township for the approval of a subdivision plan for the "Asbury Woods Estates, Section 1" which would be adjacent to the side of the Plaintiff's property.

Millcreek Township has enacted its own subdivision ordinance which grants the Millcreek Township Board of Supervisors (hereinafter "the Board") the sole power to approve or disapprove subdivision plans. Ordinance Number 65-1, approved April 5, 1965 (hereinafter "the Ordinance"). On July 12, 1994, the Board granted preliminary approval to Pastore, Inc.'s subdivision plan. Before the July 12, 1994 meeting, Millcreek gave notice to the adjoining landowners including the Plaintiff that this subdivision was going to be considered at the meeting.

Pastore, Inc. requested and was granted final approval of its subdivision

[2] Both Defendants' objections were originally filed in response to the Plaintiff's Original Complaint. However, before oral argument on the objections the Plaintiff filed a First Amended Complaint. Both Defendants consented to the Court considering their objections in relation to the First Amended Complaint, which the Court will do.

plan on July 31, 1997. The sidewalk which was required to be constructed by Pastore, Inc. was to be located adjacent to the front of the Plaintiff's property and outside the subdivision. This location was necessary because the sidewalk was intended to connect the sidewalk in front of the subdivision houses to the sidewalk next to Asbury Road which is located on the opposite side of the Plaintiff's property from where the subdivision is located.

The sidewalk in question is intended to be on Pastore, Inc.'s right of way in front of the Plaintiff's land when it is completed. However, the Plaintiff claims that some fill and other material from the sidewalk construction are encroaching on his property and have damaged shrubs and other vegetation on his property. The Plaintiff also claims the sidewalk has damaged the market value of his property and prevented him from fully enjoying the use of the property.

On August 27, 1997, the Plaintiff commenced this action by Complaint. On September 22, 1997, Pastore, Inc. filed preliminary objections. On November 5, 1997, Millcreek Township filed preliminary objections. On January 8, 1998, Millcreek Township filed its brief in support of its objections. On January 28, 1998, the Plaintiff filed a First Amended Complaint. On January 29, 1998, Pastore, Inc. filed a brief in support of its objections. On March 2, 1998, the Court held argument on Millcreek and Pastore, Inc.'s objections.[3]

The Court will first address Millcreek Township's objections. Millcreek has demurred to the Plaintiffs' Original Complaint in its entirety, with the Court now considering such demurrer as to the First Amended Complaint.[4] The Court will address each count individually as if individual demurrers had been filed against each.[5] When addressing a demurrer,

[3] It would have been helpful to the Court if the Plaintiff would have filed a brief so that the Court could more specifically address the Plaintiff's positions on the issues before it. While Plaintiff's counsel did state at argument that she felt filing the First Amended Complaint made filing a brief unnecessary, counsel for Millereek had previously sent a letter to the Court with a copy to Plaintiff's counsel stating that it was Millcreek's position that its objections were still valid despite the filing of the First Amended Complaint. This should have alerted Plaintiff's counsel to the need to file a brief.

[4] The Plaintiff's Original Complaint did not contain separate counts but simply contained 27 paragraphs followed by a Wherefore clause with subsections (a) through (j) asking for all types of relief against either Pastore, Inc., Millereek Township or both.

[5] The Court notes that legal insufficiency is a nonwaivable defense so there is no prejudice by the Court addressing the issue in this manner. Pa.R.C.P. 1032. In addition, the only reason Millcreek did not object to each count individually was because it allowed the Court to consider the First Amended Complaint which was filed well after the allowable time. The Court wants to encourage actions such as Millcreek's flexibility on this issue.

the Court must accept as true all well pled facts set forth in the complaint and give the plaintiff the benefit of all reasonable inferences from those facts. *Moser v. Heistand*, 681 A.2d 1322 (Pa. 1996). Further, the Court must overrule a demurrer unless it is certain that there is no set of facts under which the plaintiff could recover. *Id.* Any doubt must be resolved in favor of overruling the demurrer. *Id*.

The Plaintiff alleges in Count 9 of the First Amended Complaint that Millcreek violated his right to due process. This claim apparently is based on lack of notice of when the Board would consider final approval of the subdivision plan. There is no basis to this claim on its own separate from an appeal of a Township action. In Count 10, the Plaintiff alleges that Millcreek violated his right to equal protection. This claim is without merit on its own for the same reason. In the context of the present case, these claims would need to be asserted as a part of an appeal of the approval of the subdivision and can not be raised absent a timely appeal. The issue of the timeliness of the attempted appeal will be discussed in more detail below.

In Count 11, the Plaintiff attempts to appeal Millcreek's July 31, 1997 approval of the subdivision plan. If this appeal were filed as part of the Plaintiff's Original Complaint it would have been considered timely, however the appeal has only been raised in the First Amended Complaint. Any challenge to an approval of a subdivision plan must be filed within 30 days of the approval. 53 P.S. §11002-A. The Original Complaint specifically stated that it was not an appeal. However, the First Amended Complaint did attempt to appeal the approval of the subdivision.

This attempt is ineffective because the First Amended Complaint can not relate back to the Original Complaint under the facts of this case. A complaint may not be amended to create a new cause of action after the statute of limitations has expired. *Olson v. Grutza*, 631 A.2d 191 (Pa.Super. 1993). The Original Complaint explicitly states that it is not an appeal. To assert an appeal in the First Amended Complaint considering the language of the Original Complaint is adding a new cause of action which can not have the effect of relating back to when the Original Complaint was filed.

Millcreek approved the subdivision plan on July 31, 1997, according to the Plaintiff. The Plaintiff's first attempt to appeal this approval is in his January 28, 1998 First Amended Complaint which is after the allowable time for filing an appeal. Therefore, the appeal must be dismissed as untimely.

Count 12 of the First Amended Complaint asserts an action in mandamus. However, there are no allegations that a government body has failed to carry out a required ministerial act. Thus, this count is legally insufficient. Pa.R.C.P. 1095 (stating what is necessary to support an action in mandamus).

Next, Count 13 of the First Amended Complaint asks for a declaratory judgment regarding the Ordinance's Constitutionality. There is no actual

controversy between Millcreek and the Plaintiff to justify this Court addressing a declaratory judgment action. There is no current or imminent action pursuant to the Ordinance about which the Plaintiff could file a timely appeal. Further, the Plaintiff has not alleged that it is taking any current actions or refraining from any actions due to the Ordinance. *See* Declaratory Judgments Act, 42 Pa.C.S.A. §7532. For all of these reasons, the Court will use its discretion to decline to hear a declaratory judgment action on this matter. 42 Pa.C.S.A. §7537.

In Count 14, the Plaintiff asserts that he has suffered an unconstitutional taking without compensation. The Plaintiff does not make any allegations that Millcreek physically invaded his property or authorized or permitted anyone else to do so. Therefore, the allegations in this Count are legally insufficient.

In summary, the Plaintiff alleges that Millcreek Township enacted a subdivision Ordinance in 1965 and has amended it at various times thereafter. The Plaintiff alleges the enactment was flawed. The Plaintiff alleges that the Ordinance is unconstitutionally vague. The time to appeal such enactment or application in this case has passed. Lastly, the Plaintiff requests declaratory judgment and mandamus relief which he is not entitled to even assuming his factual allegations are true. As there is no valid cause of action against Millcreek Township anywhere in the First Amended Complaint, the Court will dismiss Millcreek from the case.

The Court will now address Pastore, Inc.'s objections. First, Pastore, Inc. objects on the basis that this Court lacks subject matter jurisdiction over any of the Plaintiff's claims which attempt to appeal the approval of the subdivision. This is true for the reasons stated above regarding the untimeliness of any attempted appeal.

Pastore, Inc. also correctly points out that it is not a state actor, therefore any action by it can not violate a Constitutional right through a "taking without just compensation". For this reason among others, Count 4 will be dismissed. The objections also ask for a more specific pleading.[6] The Court will address this issue later in this Opinion.

In its objections, Pastore, Inc. requested the Court to dismiss the Plaintiff's entire Original Complaint on the grounds of legal insufficiency.[7]

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[6] Pastore, Inc. had also objected to a "catch all" phrase in the Plaintiff's Wherefore clause of the Original Complaint. There is no such clause in the First Amended Complaint, thus this objection has been rendered moot. In addition, Pastore, Inc. objected to the request for equitable relief in the Original Complaint. Again, the First Amended Complaint does not contain this request as to Pastore, Inc., therefore this objection is rendered moot.

[7] The Plaintiff's Original Complaint did not contain separate Counts but simply contained 27 paragraphs followed by a Wherefore clause with subsections (a) through (j) asking for all types of relief against either Pastore, Inc., Millcreek Township or both.

However, because the Plaintiff filed an untimely First Amended Complaint, Pastore, Inc. was not able to object to each count of the First Amended Complaint specifically. In the interests of judicial economy, the Court will examine each count against Pastore, Inc. for legal sufficiency as if each Count had been demurred to.[8]

Count 1 alleges negligence. Giving the Plaintiff the benefit of all doubts, the First Amended Complaint does set out a cause of action in negligence. Count 2 alleges negligent infliction of emotional distress. The Plaintiff does not allege that he contemporaneously observed an injury to a close relative which had a direct emotional impact on him. *Sinn v. Burd*, 404 A.2d 672 (Pa. 1979). Thus, the Plaintiff's claim is legally insufficient. *See Gallagher v. Upper Darby Township*, 539 A.2d 463 (Pa.Super. 1988), *alloc. denied*.

The Plaintiff next alleges intentional infliction of emotional distress in Count 3. To make out a prima facie claim of this cause of action the Plaintiff must allege:

1) conduct by the Defendant that could be considered extreme and outrageous,
2) that the Defendant's conduct was intentional or reckless,
3) that it caused emotional distress and
4) that the distress was extreme.

Hoy v. Angelone, 691 A.2d 476, 482-3 (Pa.Super. 1997). By alleging that Pastore, Inc. constructed sidewalks which encroached on his land, the Plaintiff has not alleged conduct that was "beyond all possible bounds of decency... and was utterly intolerable in a civilized community." *Small v. Juniata College*, 682 A.2d 350, 355 (Pa.Super. 1996), *alloc. denied* Therefore, this Count must be dismissed.

Count 4 alleges an unconstitutional taking without just compensation. This cause of action is only cognizable against a state actor. Pastore, Inc. is not a state actor therefore this claim fails. Count 5 alleges damages for "Intentional, Outrageous, Vexatious Conduct". The nature of this cause of action is uncertain to the Court. However, to the extent it is another attempt at claiming damages for an intentional infliction of emotional distress, it is insufficient and shall be dismissed for the reasons stated above.

Count 6 alleges a trespass. There are sufficient allegations to support this claim. Count 7 alleges violations of the Plaintiff's due process rights. This claim is only cognizable against state actors therefore it must be

[8] The Court notes that legal insufficiency is a non-waivable defense so there is no prejudice by the Court addressing the issue in this manner. Pa.R.C.P. 1032. In addition, the only reason Pastore, Inc. did not object to other Counts individually was because it allowed the Court to consider the First Amended Complaint which was filed well after the allowable time. The Court wants to encourage actions such as Pastore, Inc.'s flexibility on this issue.

dismissed. Count 8 alleges that Pastore, Inc. violated the Plaintiff's right to equal protection. Again, a state actor is needed to make out this claim, therefore it must be dismissed.

Lastly, Pastore, Inc. asks for a more specific pleading. As to the two Counts remaining, 1 and 6; the allegations supporting them are sufficiently specific. Pastore, Inc. in its objections asked the Court to strike certain parts of the Original Complaint as being against the rule of Court. As Pastore, Inc. did not have a chance to specifically object to the Plaintiff's First Amended Complaint because of when it was filed, the Court will address the issue of impertinent and scandalous matter at this time in relation to the First Amended Complaint for the guidance of the parties and for judicial economy. The allegations properly supporting Counts 1 and 6 are paragraphs 1, 3, 11, 19, 20, 24 but only the language after the word "caused", 25, 26, 27, 28 as modified to "Pastore, Inc. knew or should have known that this conduct would result in injury to the Premises", 29 without the words "and mental injury", 30 without the words "intentional, outrageous, vexatious, and or bad faith" and without the words "without just compensation and due process of law," 31, 32 without the words "intentional, vexatious, and bad faith", 50, 52, 53, 63 and 64.

In conclusion, the Plaintiff in the first instance complains about the approval of the subdivision Ordinance and then the approval of this particular subdivision. It is too late for him to complain about either. Next, he objects to the requirement that sidewalks be constructed adjacent to his property, however he has no right to object to this requirement because it is not being imposed upon him. In addition, he objects to the construction of the sidewalks on Pastore, Inc.'s right of way. He has no legal basis to object to this construction on another party's property. Lastly, he asserts that the construction was done negligently causing damage to his property and causing materials to be on his property. These are legally valid claims and will be allowed to remain with the necessary modifications.

ORDER

AND NOW, to-wit, this 24th day of March, 1998, in consideration of the Preliminary Objections of Millcreek Township and Pastore, Inc., it is hereby ORDERED and DECREED that all of the Counts of the Plaintiff's First Amended Complaint with the exception of Counts 1 and 6 are DISMISSED. As there are no Counts remaining against it, Millcreek Township is DISMISSED from the case. The Plaintiff shall file an amended complaint in conformance with the foregoing Opinion within twenty (20) days of this Order.

BY THE COURT:
/s/ Fred P. Anthony, J.

NANCY F. MOIR

v.

ROBERT G. MOIR

DIVORCE/CONDITIONAL GIFT

BURDEN OF PROOF/CLEAR AND CONVINCING EVIDENCE

Money given a child (or a child's spouse) is presumed to be a gift. A party seeking to establish that a gift was conditioned upon continuation of marriage bears the burden of proving the condition by clear and convincing evidence.

Husband failed to meet his burden of persuasion by clear, direct, weighty and convincing testimony that a gift to husband and wife from his father to purchase a home was conditioned upon continuation of the marriage.

The court's reversal of the master's decision with respect to the gift requires revision of the scheme of equitable distribution and a determination by the court as to attorneys' fees.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA FAMILY COURT DIVISION NO. 10172-1997

Appearances: Edward J. Niebauer, Esq., for Plaintiff
John P. Eppinger, Esq., for Defendant

OPINION

Domitrovich, J., April 20, 1998

This matter is before the Court on the Plaintiff's Objections to Master's Report filed in this matter. A hearing in this matter was held in front of Michael P. Gehringer, Esq., Master in Divorce (Master). The Master subsequently filed a timely report from which the Plaintiff filed timely objections, although Plaintiff withdrew two of these objections at the time of argument before this Court.

This Court heard testimony and argument on only one issue: remaining: Whether the Master erred in his recommendation to the Court that the $35,000.00 sum of money used in the purchase of the marital residence was a conditional gift to the parties.

The parties in this matter began looking to purchase a home near the end of 1992 and eventually purchased a home in February of 1993. During the course of the parties' search, Robert Moir, Sr., the Defendant's father, provided the parties with a sum of $35,000.00 toward the purchase of the home. Neither party disputes they received a gift of $35,000.00 that originated with Robert Moir, Sr., the Defendant's father. The Defendant, Robert Moir, Jr., contends that this gift was conditioned on the continuation of the marriage. The Master, in his report, recommended to the court that the money was a conditional gift. After oral argument and live testimony of the parties, this Court opines the following.

The law on gifts in Pennsylvania clearly indicates that money given by a parent to a child to facilitate the purchase of a home is presumed to be

a gift. *Kohr v. Kohr*, 271 Pa.Super. 321, 413 A.2d 687 (1979). This presumption does not apply exclusively to natural children, rather it also applies to persons related by marriage. *Mermon v. Mermon*, 257 Pa. Super. 228, 390 A.2d 796 (1978). In order to overcome this presumption of a gift, Defendant must present clear and convincing evidence of the condition. *Id*. In order to meet this standard,

> [t]he witnesses must be found to be credible, that the facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct, weighty and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.

Lessner v. Rubinson, 527 Pa. 393, 592 A.2d 678 (1991). This standard applies in instances where the fact finder is a judge rather than a jury. *Hornyak v. Sell*, __ Pa. Super. __, 629 A.2d 138 (1993). After reviewing all testimony, this Court finds that Robert Moir, Jr. has not met that burden.

The evidence presented on this issue is in the form of testimony taken during two separate hearings. Much of the testimony on this issue concerns three separate instances in which Nancy Moir verbally acknowledged the conditional nature of the $35,000.00 gift. Both Robert Moir, Sr. and Robert Moir, Jr. testified that during a conversation in October of 1992, Robert Moir, Sr. told the parties that he could give them $35,000.00 toward the purchase of a house which would have to be repaid if they ever sold it or got divorced. Both Robert Moir, Sr. and Robert Moir, Jr. testified that Nancy Moir responded by asking if the condition applied if they wanted to upgrade to a bigger house. Nancy Moir's testimony contradicts this contention.

Robert Moir, Jr. also testified on March 10, 1998 at the hearing on exceptions that during the Christmas holiday of 1992 that he and Nancy had informed Theresa Gould that they had received a $35,000.00 conditional gift. He further testified that this was the first instance that he had ever testified to this conversation. Nancy Moir testified that she did not have any knowledge of Theresa Gould being made aware of the gift during that holiday period.

Robert Moir, Jr., Catherine Hill, and Allen Hill testified that, in May of 1993 Nancy Moir, in the course of discussing the new house with the above mentioned individuals, acknowledged the conditional nature of the gift from Robert Moir, Sr. Nancy Moir testified that she did not recall the subject of the gift coming up in conversation at all.

The Court also notes that there was no other evidence to corroborate the contention that the gift was conditional in this case. No notations were made on the checks and no writing was produced. Although evidence of this type is certainly not required to meet the clear and convincing burden, it would certainly be evidence weighing heavily in favor of rebutting the presumption. Further, the testimony presented indicates that although Robert Moir, Sr. is not a wealthy man, he appears to be a very

generous man willing to do whatever he can to help his children and grandchildren. Robert Moir, Sr. testified that he had given various gifts of money on several occasions to both of his children totalling many thousands of dollars, all of them unconditional.

After hearing testimony on this issue, considering the report of the Master and reviewing the transcripts of the Master's hearing, this Court concludes that Robert Moir, Jr. has not met his burden of providing clear and convincing evidence to rebut the presumption that the $35,000.00 was an outright gift.

Robert Moir, Sr. testified that his alleged motivation for conditioning the gift was his suspicion of marital difficulties. If this were true, some written indicia conditioning this large gift of $35,000.00 would logically follow and could have easily been derived. In fact, the father-in-law stated he had made a legal assumption concerning the gift tax liability leading him to construct an intricate "conduit" mechanism to shield the money from tax liability. Then why would he fail to go to the same lengths to protect the entire $35,000.00 from perceived marital discord? In light of the above, this Court finds that the Defendant's evidence submitted on this issue was not so clear, weighty and convincing as to enable this Court to come to a clear conviction without hesitation.

The Plaintiff also filed an objection concerning the lack of an award for attorney fees. As the equitable distribution scheme will have to be revised in light of the above determination, said matter will be considered by the Court at that time.

ORDER

AND NOW, to wit, this Twentieth day of April, 1998, after hearing testimony and reviewing the evidence on Plaintiff's Exceptions to the Master's Report it is hereby **ORDERED, ADJUDGED, AND DECREED** as follows:

1. The $35,000.00 that Robert G. Moir and Nancy F. Moir received from Robert Moir, Sr. was a gift to both parties, not a conditional gift.

2. A hearing is scheduled for Wednesday, April 29, 1998, at 9:00 a.m., in Courtroom G, Erie County Court House, Erie, Pennsylvania, for the parties to present evidence concerning the valuation of the marital estate for purposes of equitable distribution, specifically:

(a) The amount of any existing credit card debt.
(b) The amount of any existing debt owed to the children of the parties.
(c) The amount of post-separation payment of marital debt by either party.

BY THE COURT:
/s/ Stephanie Domitrovich, Judge

NMC LIMITED PARTNERSHIP I, Plaintiff

v.

SAM CRISTEA,
a/k/a SIMION J. CRISTEA a/k/a SIMION CRISTEA, JR., a/k/a SIMION J. CRISTEA, JR., a/k/a SAM CRISTEA, JR.
and
JOAN M. CRISTEA,
a/k/a JOAN CRISTEA,
a/k/a JOAN MARIE CRISTEA
and
SAM CRISTEA LINCOLN MERCURY, INC., Defendants

PENNSYLVANIA DEFICIENCY JUDGMENT ACT/ FAIR MARKET VALUE

The Pennsylvania Deficiency Judgment Act mandates that the Court set the fair market value in accordance with the Petition where an Answer is filed which does not controvert the allegation of fair market value in the Petition.

RULES OF CIVIL PROCEDURE/RULE 3132

A challenge to a Sheriff's sale to set aside the sale or order a resale must be filed before delivery of the Sheriff's deed to the real property in order to be timely.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 30188 - 1997

Richard J. Parks, Esquire Attorney for Plaintiff
Mark M. Ristau, Esquire Attorney for Defendants

OPINION AND ORDER

I. History of the Case

The plaintiff filed a petition on January 30, 1998 to both determine the fair market value and fix deficiency judgement as it related to the Sheriff's Sale conducted August 15, 1997 in Erie County, Pennsylvania.[1] The parcels relevant are: 1643 Brookside Drive, Millcreek, Pennsylvania ("Parcel 1"), Garfield Avenue, Garfield Terrace Lots 44-47, Harborcreek, Pennsylvania ("Parcel 2") and 1117 East 27th Street, Erie, Pennsylvania ("Parcel 3").

On February 13, 1998 the defendant filed an answer to the petition and "admitted" the assertion of paragraph 11 which alleged a fair market value for the parcels of: Parcel 1 ($37,000), Parcel 2 ($53,000) and Parcel 3

[1] Pursuant to 42 Pa.C.S.A. § 8103 (a)

($15,000). The defendant, in new matter, asserted that parcels designated 4 and 5, also subject to the sheriff's sale, had not been purchased by a bonafide "third party."[2]

On March 4, 1998, plaintiff filed a response to defendant's new matter asserting that the challenge to the sale of parcels 4 and 5 was untimely under Pa. R.C.P. 3132 and therefore waived. Further, the plaintiff alleged that the petition for determination of fair market value conformed with 42 Pa. C.S.A. § 8103, the Pennsylvania Deficiency Judgement Act, and should be granted. Plaintiff filed a brief in support of the petition on March 25, 1998. The defendant did not file a brief.

II. Discussion

The Pennsylvania Deficiency Judgement Act, 42 Pa.C.S.A. § 8103(c) states that:

> If no answer is filed within the time prescribed by general rule, or if an answer is filed which does not controvert the allegation of the fair market value of the petition as averred in the petition, the court shall determine and fix as the fair market value of the property sold the amount thereof alleged in the petition to be the fair market value and thereupon enter a decree directing the judgement creditor to file a release of the debtors, obligors, guarantors, or any other persons directly or indirectly liable for the debts, to the extent of the fair value so fixed, whereupon execution may be issued for the balance of the debt.

The defendant's answer to paragraph 11 of the petition clearly admits the plaintiff's assertion. Furthermore, the statute mandates that the court set the fair market value in accordance with the petition where an answer is filed which does not controvert the allegation of fair market value in the petition. The total credit value averred in the petition is $105,000.

Turning to the defendant's allegations concerning Parcels 4 and 5, the Pa. R.C.P. 3132 states:

> Upon petition of any party in interest before delivery of the personal property or of the sheriff's deed to real property, the court may, upon proper cause shown, set aside the sale and order a resale or enter any other order which may be just and proper under the circumstances.

The Sheriff's Deed for Parcels 4 and 5 were transferred on October 9, 1997 while the defendant's answer and "challenge" was filed on February 13, 1998. This "challenge" was clearly untimely.

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[2] ("Parcel 4") 6.976 acres of land lying and being in Waterford Reserve, Tract #21, Waterford, Pennsylvania. ("Parcel 5") 2.726 acres of land lying and being in Waterford Reserve, Tract #2l, Waterford, Pennsylvania)

III. Conclusion

Based upon the above, the Fair Market Value of the parcels is determined to be: (Parcel 1) $37,000, (Parcel 2) $53,000 and (Parcel 3) $15,000. The defendants are entitled to a total credit against their judgement debt of $105,000 as provided under the Pennsylvania Deficiency Judgement Act. Further, the plaintiff is entitled to a deficiency judgement for the remaining balance of the judgement not satisfied by the $105,000 credit.

ORDER

AND NOW, this 24th day of April, 1998, after consideration of the matter of record and the response set forth above, it is hereby **ORDERED** that plaintiff's Petition to Fix Fair Market Value and for Deficiency Judgment is hereby **GRANTED** as follows:

Parcel 1 ($37,000)

Parcel 2 ($53,000)

Parcel 3 ($15,000)

BY THE COURT:
/s/ Ernest J. DiSantis, Jr., Judge

MICHAEL SZYMANOWSKI AND CHARLENE SZYMANOWSKI, husband and wife; MICHAEL B. MOSKE AND JANET L. MOSKE, husband and wife; KATIE E. HOLLAND; EDWARD SZYMANOWSKI AND GLORIA SZYMANOWSKI, husband and wife; DIANE M. JOHNSON AND SAMUEL E. JOHNSON, husband and wife; DANIEL L. DAVIS AND

SUSAN A. DAVIS, husband and wife; MATTHEW J. KINNEY; NORBERT P. LECHNER AND MARILYN P. LECHNER, husband and wife; STEVE DOVICHOW AND JANICE DOVICHOW, husband and wife; FRED H. SCHADE AND LUCILLE A. SCHADE, husband and wife; FRED M. SCHADE;

BRIAN A. VANDERMARK; MAINLINE MECHANICAL CONTRACTORS, INC., a corporation; MAINLINE MECHANICAL SHEETMETAL MANUFACTURING, INC., a corporation, Plaintiffs

v.

ALUMINUM WASTE TECHNOLOGY, INC., ASA AUSTRIA SEKUNDAR ALUMINUM GESELLSCHAFT m.b.H., GENCHART V.O.F., ERIE SAND & GRAVEL CO., MOUNTFORT TERMINAL, LTD., a wholly owned subsidiary of ERIE SAND & GRAVEL, CO., RICHARD F. GRYGO t/b/d/a RICHARD GRYGO TRUCKING, a/k/a GRYGO TRUCKING, AND LAWRENCE PARK LEASING, INC., Defendants

PERSONAL JURISDICTION

Where an out-of-state party ships materials knowing that they will enter another state, putting them in the "stream of commerce", the party is personally availing himself to that state's benefits and may anticipate being hauled into court in that state if the material causes harm there.

PERSONAL JURISDICTION

Entering into contracts with Pennsylvania entities who contemplated shipping materials into Pennsylvania and storing it in Pennsylvania on an ongoing basis constituted sufficient minimum contacts for Pennsylvania to assert jurisdiction.

STRICT LIABILITY/ABNORMALLY DANGEROUS ACTIVITY

Considering that aluminum waste can be shipped and stored safely if reasonable care is taken, as well as other Restatement (2nd) of Tort, Section 519 factors, none of the activities were found to be abnormally dangerous.

PUNITIVE DAMAGES

Allegations of the Complaint that the Defendants knew there was a danger to others by their actions and conscientiously disregarded the dangers are sufficiently plead to support the imposition of punitive damages so as to overcome a preliminary objection.

CORPORATE PLAINTIFFS/CLAIMS FOR ECONOMIC DAMAGES

Claims for damages for lost profits, expenses for shutdown, relocation and startup, as well as clean-up costs because of a trespass of dust onto the property of the corporate plaintiffs sufficiently pleaded physical damage to their property to sustain an allegation of trespass and make a claim for economic damages.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 13587- 1996

Appearances: John W. McCandless, Esquire
Francis J. Klemensic, Esquire
Timothy J. Downing, Esquire
Matthew W. McCullough, Esquire
William T. Morton, Esquire
Gary Eiben, Esquire

OPINION

Anthony, J., May 22, 1998.

This matter comes before the Court on the Amended Preliminary Objections of several of the Defendants.[1] After considering the arguments of counsel as well as reviewing the pleadings, the Court will sustain some of the objections and overrule others. The relevant facts and procedural history are as follows.

ASA Austria Sekundar Aluminum Gesellschaft m.b.H. (hereinafter "ASA") is an Austrian company. It generates aluminum waste as a result of its industrial operations in Austria. Such aluminum waste is considered a hazardous material in Austria although not so considered in the United States.[2] On March 22, 1993, ASA entered into an agreement with Defendant Aluminum Waste Technology (Hereinafter "Aluminum Waste") whereby Aluminum Waste would take title to the waste and process and dispose of it in the United States. Aluminum Waste is based in Ohio. Pursuant to the agreement, ASA shipped 30,404.89 metric tons of aluminum waste to Aluminum Waste between April 28, 1993 and November 4, 1994. The shipments were made by a ship operated by

[1] Aluminum Waste Technology, Mountfort Terminal and Erie Sand and Gravel, Grygo and Grygo Trucking filed Amended Preliminary Objections which are presently before the Court.

[2] However, the waste is regulated as a "solid waste" in Pennsylvania and the United States. This is a less stringent regulatory scheme than if it were considered a hazardous material. Solid Waste Management Act. 35 P.S. § 6108.101 *et seq.*

Defendant Genchart, a Netherlands company. All of these shipments went through the Port of Erie and were temporarily stored either at Mountfort Terminal or the Old Tanner Manufacturing Plant (Hereinafter "Tanner Plant").

As of November 9, 1994, approximately 14,000 tons of aluminum waste were still being stored at the Mountfort Terminal (Hereinafter "Mountfort"). Mountfort had insufficient indoor storage space for the waste therefore some of it was stored outside. Some of the material inside and outside of the storage building was wet. Aluminum waste such as that in the present case becomes toxic when wet and can also cause health problems when inhaled as a dust material. Defendant Mountfort accepted the shipments for storage and allegedly stored the waste in a way that allowed it to become wet.

Aluminum Waste entered into a contract with Defendant Lawrence Park Leasing to store the aluminum waste at the Tanner Plant in Lawrence Park Township. In November 1994, Defendant Richard Grygo transported the aluminum waste to the Tanner Plant. He was transporting loads of waste for about two weeks before the evacuation of the Tanner Plant was ordered and Aluminum Waste was told that they could not store any aluminum waste there. Some of the waste deposited at the Tanner Plant was wet and some of it was dry. The Plaintiffs allege that Grygo allowed the waste to become wet during transport.

A substantial amount of aluminum waste was stored at the Tanner Plant by November 10, 1994. All of the individual Plaintiffs, except for Norber P. Lechner, are workers for Mainline Mechanical Contractors and Mainline Mechanical Sheetmetal Manufacturing which are located in the Tanner Plant. Lechner was exposed to the aluminum waste at the Mountfort Terminal. Other individual Plaintiffs were not exposed to the materials but are spouses of those who were exposed. The exposed individuals became sick. On November 10, 1994, the Erie County Hazardous Materials Team and Lawrence Park Fire Department ordered all people to evacuate the Tanner Plant until the waste was removed.

This action was commenced by Complaint on November 5, 1996. Thereafter, each of the Defendants except for ASA and Genchart filed Preliminary Objections.[3] These Preliminary Objections were never ruled upon.[4] Judge Joyce then solicited the assistance of Austrian authorities

[3] ASA and Genchart were served with process but have not filed any responsive pleadings and no attorney has entered an appearance on either of their behalf in this case.

[4] The Honorable Michael Joyce of this Court was originally presiding over this case. However, on May 30, 1997, he recused himself from this case. On March 10, 1998, Plaintiffs' counsel wrote this Court asking that it set argument on the unresolved objections and rule on such.

in serving process on ASA, the Austrian Defendant. Subsequently, the Defendants, with the exception of Lawrence Park Leasing which filed an Answer and New Matter and ASA and Genchart which still have not filed any responsive pleading, filed Amended Preliminary Objections. Lawrence Park Leasing also filed cross claims against other Defendants. The Plaintiffs filed an Answer to the Defendants' Preliminary Objections containing affidavits and evidentiary material. Lawrence Park Leasing also filed an Answer to the Amended Preliminary Objections of Aluminum Waste. All of the parties to the Amended Preliminary Objections filed briefs. The Court held argument.

Most of the objections are common to all of the Defendants who filed Amended Preliminary Objections. However, the Court will first address the issue of personal jurisdiction which is only raised by Aluminum Waste.[5] Aluminum Waste claims that because it does not operate a business in Pennsylvania that Pennsylvania can not assert jurisdiction over it under the United States Constitution. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *International Shoe Company v. Washington*, 326 U.S. 310 (1945).

Pennsylvania exerts jurisdictions to the fullest extent allowed by the United States Constitution. 42 Pa.C.S.A. 5322(b). Therefore, if jurisdiction is proper under the United States Constitution it is also proper under Pennsylvania law. In addition, Pennsylvania specifically can exert jurisdiction if a party ships merchandise through Pennsylvania. 42 Pa.C.S.A. § 5322(a)(1)(iii). Aluminum Waste has so acted and thus there is a specific basis for jurisdiction under Pennsylvania law. See 42 Pa.C.S.A. § 5322(a)(2) & (3) & (4).

Courts interpreting jurisdiction under the due process clause of the United States Constitution have consistently held that when a party ships materials knowing that they will enter another state, in other words puts them in the "stream of commerce", the party is "purposefully availing" himself of that state's benefits. The courts further reason that the party must therefore anticipate being haled into court in that state if the material causes harm there. *Burger King*, at 474-76; *North American Phillips Corporation. v. American Vending Sales, Inc*., 35 F.3d 1576 (Fed. Cir. 1994). In addition, negotiating and entering a contract with a resident of the forum state may subject the party to the jurisdiction of the forum state. *Maleski by Taylor v. DP Realty Trust*, 653 A.2d 54 (Pa. Cmwlth. 1994).

In the current case, Aluminum Waste entered into contracts with Pennsylvania entities that contemplated shipping material into Pennsylvania and storing it in Pennsylvania. In addition, this was to occur on an ongoing basis. This conduct constitutes sufficient "minimum

[5] Aluminum Waste also raises the issue of subject matter jurisdiction but provides no support for why it believes that this Court does not have subject matter jurisdiction. In addition, this Court sees no colorable argument that it does not have subject matter jurisdiction. Therefore, the Court finds that it does have subject matter jurisdiction

contacts" for Pennsylvania to exert jurisdiction. In addition, the exercise of such jurisdiction will not offend notions of fair play and substantial justice. *International Shoe, supra.*

Next, each of the objecting Defendants[6] demur to the Counts in the Plaintiffs' Complaint which allege that the Defendants should be held strictly liable because they were performing an "abnormally dangerous activity". When addressing a demurrer, the Court must accept as true all well pled facts set forth in the complaint and give the plaintiff the benefit of all reasonable inferences from those facts. *Aetna Electroplating Comp., Inc. v. Jenkins*, 484 A.2d 134 (Pa. Super. 1984) Further, the Court must overrule a demurrer unless it is certain that there is no set of facts under which the plaintiff could recover. *Bower v. Bower*, 611 A.2d 181 (Pa. 1992) Any doubt must be resolved in favor of overruling the demurrer. *Id. Moser v. Heistand*, 681 A. 2d 1322 (Pa. 1996).

All parties acknowledge that Pennsylvania has adopted the Restatement (Second) of Torts Sections 519 and 520 in relation to this issue. A party will be held strictly liabile for any damage caused by an abnormally dangerous activity. Restatement (Second) of Torts § 519. The Restatement definition of "abnormally dangerous activity" takes into account several different factors, two of the factors being whether the activity can be done safely with the use of reasonable care and whether there is a high degree of risk of some harm to people, land or chattels. Restatement (Second) of Torts § 520.

In *Smith v. Weaver*, the court found that storing gasoline in underground storage tanks was not an abnormally dangerous activity despite the fact that the tanks had been allowed to deteriorate and leak gasoline.[7] *Smith*, 665 A. 2d 1215 (Pa.Super. 1995). The court reasoned that the potential danger of the activity had to be looked at considering the activity as done

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[6] The "objecting Defendants" refers to all of the Defendants except Lawrence Park Leasing, ASA and Genchart V.O.F. which have not filed Amended Preliminary Objections.

[7] The Plaintiffs want the Court to phrase the question as whether the storage of this waste in the Tanner Plant (an unfit place according to the Plaintiffs) was an abnormally dangerous activity. The Court will not phrase the question as such just as the *Smith* court would not phrase the question of whether underground tanks leaking a hazardous substance are abnormally dangerous. *Smith* at 1219. In addition, the Plaintiffs urge that the shipping and storage of this waste is an abnormally dangerous activity because the waste is regulated by the Solid Waste Management Act. 35 P.S. § 6108.101 et seq. However, gasoline is also regulated under the Hazardous Sites Cleanup Act (HSCA) and the storage of gasoline is also regulated under the Pennsylvania Storage Tank and Spill Prevention Act (PSTSPA). HSCA 35 P.S. § 6020.101 *et seq*., PSTSPA, 35 P.S. § 6021.101 *et seq*. Yet, the *Smith* court found that the storage of gasoline in underground tanks was not an abnormally dangerous activity.

properly and not considering the activity as it had been done negligently. *Id*. Considering that aluminum waste can be shipped and stored safely if reasonable care is taken as well as the other Restatement factors, the Court finds that none of the activities of any of the objecting Defendants could be found to be abnormally dangerous. Restatement § 520(c). For example, while there is a risk of harm the harm risked is not great such as death or catastrophic injury. Restatement § 520(b).

Next, the objecting Defendants demur to the Plaintiffs' claims for punitive damages. All parties agree that Pennsylvania follows the Restatement (Second) of Torts Section 908(2). In addition, Pennsylvania follows the Restatement (Second) of Torts Section 500 to define the state of mind necessary to justify the imposition of punitive damages. The Plaintiffs argue that they have alleged that the objecting Defendants had actual knowledge of the danger of their actions, disregarded that danger and knowingly subjected people to physical harm. The Court agrees with the Plaintiffs' characterization of their allegations except as they relate to Mountfort and Erie Sand and Gravel.

In paragraph 88(d) of the Complaint the Plaintiffs allege that:

> . . . the Defendants [AWT and ASA] knew that said aluminum waste was unreasonably dangerous and hazardous and that substantial harm was likely to result to members of the public in general and the Plaintiffs in particular from their activities;

In paragraph 119(e) the Plaintiffs allege that Richard Grygo and Grygo Trucking acted recklessly and willfully:

> in transporting, hauling and delivering aluminum waste to the Old Tanner Manufacturing Plant when the Defendant knew that such activity would expose members of the public and the Plaintiffs in particular to a risk of harm from said activity;

These allegations allege that the Defendants in question knew that there was a danger to others by their actions but consciously disregarded the danger. These allegations are sufficiently pled to support the imposition of punitive damages. *Field v. Philadelphia Electric Company*, 565 A.2d 1170 (Pa.Super. 1989).

As to Mountfort and Erie Sand and Gravel, the Plaintiffs only allege that they accepted the shipment of aluminum waste when they knew they did not have sufficient storage space. However, the Plaintiffs do not allege that these Defendants knew that this waste presented a danger to any person's health or property if stored improperly. Therefore, these allegations are insufficient as presently pled to sustain a claim for punitive damages.

Next, the objecting Defendants demur to the claims for economic

damages by Mainline Mechanical Contractors, Inc. and Mainline Mechanical Sheetmetal Manufacturing, Inc. (hereinafter "Corporate Plaintiffs"). The objecting Defendants phrase the question as whether the Corporate Plaintiffs can recover economic damages if the Defendants' alleged negligence caused only economic damages to the Corporate Plaintiffs. However, the Corporate Plaintiffs are alleging a trespass. While there is not an actionable trespass every time dust comes onto a person's property, there can be times when pollution such as dust will constitute an actionable trespass. *Karpiak v. Russo*, 676 A.2d 270 (Pa. Super. 1996). Courts have anticipated future cases when pollution, even unseen radiation, would contact property and "damage" property so that there could be a cause of action for economic damages. *General Public Utilities v. Glass Kitchens*, 542 A.2d 567 (Pa. Super. 1988); *See Moore v. Pavex, Inc.*, 514 A.2d 137; *Commonwealth v. General Public Utilities Corporation*, 710 F.2d 117 (3rd. Cir. 1983).

In rejecting a demurrer based on the same grounds being asserted in the present case by the objecting Defendants the court in *General Public Utilities* stated:

> The complaints do not contain any claim of damages for direct physical damage to any of the plaintiffs' property, ... The district court concluded therefore that the losses claimed were "all purely economic losses." Both in the briefs and oral arguments, however, there was the contention by plaintiffs that increased radioactivity and radioactive materials emitted during the nuclear incident permeated the entire area, and this rendered the public buildings unsafe for a temporary period of time, and constituted a physical intrusion upon the plaintiffs' properties. This intrusion, plaintiffs argue, is a sufficient showing of physical harm or injury to permit plaintiffs to recover for damages flowing from such harm, including [economic damages] .... Plaintiffs also contend that the intrusion of radioactive materials made their buildings and properties at least temporarily less usable for which they are entitled to recover damages measured by the decreased staff of workers reporting for duty. Although we express no opinion as to whether such a theory of damages may ultimately prevail, plaintiffs should be permitted to develop the facts upon which these contentions may be tested.
>
> *General Public Utilities* at 122, 123.

The Court finds this rationale persuasive. The *General Public Utilities* case was decided simply on the plaintiffs' pleading which is the same procedural state as the present case. The facts of the present case are even more compelling in favor of the Plaintiffs because there was a physical intrusion which required clean-up and which caused injuries to people and resulted in a forced evacuation of the building.

The objecting Defendants make much of the fact that the Corporate Plaintiffs are asking for damages for lost profits, expenses of their shutdown, relocation and start-up. However, the Corporate Plaintiffs also ask for damages for the "clean-up" which was necessary because of the dust. This type of allegation is no different than an allegation that water invaded a property even if the water did not cause permanent damage but simply needed to be cleaned up before the property could be used. *See Moore v. Pavex, Inc., supra; General Public Utilities, supr*a. In addition, the dust caused people to suffer injuries therefore it did constitute a trespass. *See Karpiak, supra* at 275. Finally, it would be unjust to say that if an individual owns property, dust trespasses on the property and the individual suffers a physical injury that the individual can recover economic damages but that a corporation could own a property that was equally trespassed upon, but could not recover economic damages because it as a corporation can not suffer physical harm to itself. For all of these reasons, the Court finds that the Corporate Plaintiffs have alleged sufficient physical damage to their property to sustain an allegation of trespass and make a claim for economic damages.

In conclusion, the Court does have personal and subject matter jurisdiction in this case over AWT. Further, the objecting Defendants were not participating in an abnormally dangerous activity. However, as to AWT and Grygo and Grygo Trucking, the Plaintiffs have sufficiently alleged a state of mind to sustain a claim for punitive damages. The Plaintiffs have not sufficiently alleged a state of mind as to Mountfort and Erie Sand and Gravel to sustain a claim for punitive damages. Finally, there are sufficient allegations of a physical trespass and property "damage" to the Corporate Plaintiffs' property to allow them to make a claim for economic damages.

ORDER

AND NOW, to-wit, this 22 day of May, 1998, in consideration of the Amended Preliminary Objections of Aluminum Waste Technology, Erie Sand and Gravel Company, Mountfort Terminal, Richard Grygo and Grygo Trucking, it is hereby ORDERED and DECREED that by agreement of the parties the words "generally and in the following particulars" shall be STRICKEN from the Complaint wherever they were
objected to.

Aluminum Waste Technology's objection based on this Court's alleged lack of personal and subject matter jurisdiction is OVERRULED.

The demurrers of Aluminum Waste Technology, Erie Sand and Gravel Company, Mountfort Terminal, Richard Grygo and Grygo Trucking to the Counts of the Complaint which allege strict liability based on the Defendants conducting an abnormally dangerous activity are SUSTAINED and such Counts are DISMISSED.

The demurrers of Aluminum Waste Technology, Richard Grygo and Grygo Trucking to the Counts of the Complaint requesting punitive damages are OVERRULED.

The demurrers of Mountfort Terminal and Erie Sand and Gravel to the Counts of the Complaint asking for punitive damages are SUSTAINED. However, the Plaintiffs shall have twenty (20) days to amend this Count.[8]

The demurrers of Aluminum Waste Technology, Erie Sand and Gravel Company, Mountfort Terminal, Richard Grygo and Grygo Trucking to the Counts of the Complaint where Mainline Mechanical Contractors Inc. and Mainline Mechanical Sheetmetal Manufacturers request economic damages are OVERRULED.

BY THE COURT:
/s/ Fred P. Anthony, Judge

[8] At oral argument Plaintiffs' counsel stated that he believed the facts were that these two Defendants had knowledge of the danger of aluminum waste such as was being stored. Therefore, the Court will allow the Plaintiffs to replead in order to more effectively state their case.

GIUSEPPE LOMBARDI and MICHELINA LOMBARDI, his wife, Plaintiffs

v.

BIAGIO COLECCHIA and THE ESTATE OF JOSEPHINE C. COLECCHIA, Defendants

LIMITATION OF ACTIONS

Where a loan became due on April 4, 1990, and civil action was not commenced until March 26, 1996, cause of action was barred by the statutue of limitations, 42 Pa. C.S §5525(8), which requires a cause of action on a contract to accrue within four years.

LIMITATION OF ACTIONS/ACKNOWLEDGMENT

Statute of limitations was not tolled by acknowlegment of the debt where no partial payments were made and defendant's statements indicated at most a desire to pay in the future.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION No: 10879 - 1996

Appearance: Peter Belott, Esquire
Stephen Tetuan, Esquire

OPINION

Anthony, J., March 17, 1998.

This matter comes before the Court on the Defendants' Motion for Summary Judgment. After considering the arguments of counsel as well as reviewing the pleadings, documents and depositions,[1] the Court will grant the Defendants' motion. The facts and procedural history are as follows.

This is an action to collect payment on a loan that was made by the Plaintiffs to the Defendants. The facts are not in dispute. In 1979, Mr. and Mrs. Colecchia owned and operated a restaurant. Mr. Lombardi was employed by the Defendants. The restaurant began having financial difficulties. On April 4, 1980, the Colecchias and the Lombardis executed an agreement whereby the Lombardis would loan the Colecchias Fifty Thousand Dollars ($50,000) to be used in operating the restaurant. Among other items, the contract stated that the loan was to be due either when the business was sold or ten years from the date of the agreement if the

[1] The Defendants did not file depositions before oral argument which would preclude the Court from considering them. However, at argument the Defendants made an oral motion to file the depositions *nunc pro tunc*. The Plaintiffs did not object to the late filing of the depositions and the Court allowed the depositions to be filed and considered on this motion. The Court has reviewed the depositions and will take them into consideration in ruling on this motion.

business was not sold before that time. On October 11, 1981, the bank holding the mortgage foreclosed on the restaurant's real estate. The Defendants' liquor license was no longer renewed and lapsed after July 31, 1987. The ten year anniversary of the agreement occurred on April 4, 1990.

Mr. Lombardi did not begin asking Mr. Colecchia to repay the loan until sometime in 1991. Mr. Colecchia responded by saying that he did not have the money to pay and he asked Mr. Lombardi to allow him more time to pay back the money. Thereafter, Mr. Lombardi continued to ask about once a month for the money to be returned. Mr. Colecchia gave similar responses each time he was asked to pay back the money, except on one occasion Mr. Colecchia jokingly stated that he would play the lottery and if he won the lottery he would pay Mr. Lombardi back with the lottery proceeds. He never paid any amount on the loan.

On March 26, 1996, the Plaintiffs commenced this suit by filing a Complaint. On April 12, 1996, the Defendant filed an Answer and New Matter. The pleadings are now closed. Discovery was completed including the deposition of Mr. Lombardi. On January 16, 1998, the Defendant filed the current motion for summary judgment.

In order for a party to be granted summary judgment it must be shown that there are no disputed issues of material fact and that the moving party is entitled to a judgment as a matter of law. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995); Pa.R.C.P. 1035.2. In addition, the record must be looked at in the light most favorable to the non-moving party. *Ducjai, supra*. The Defendants argue that they are entitled to summary judgment because the Plaintiffs' action is barred by the statute of limitations as a matter of law.

The Plaintiffs' cause of action is based on a written contract. The statute of limitations for actions based on written contracts is four years. 42 Pa.C.S.A. §5525(8). A cause of action on a contract accrues when the contract is first breached, such as by a failure to make a payment when it is due. *Cole v. Lawrence*, 701 A.2d 987 (Pa.Super. 1997). In the present case, the last possible date payment was due would have been April 4, 1990. This suit was commenced in 1996 which is after the four year statute of limitations had expired unless the statute of limitations was tolled.

The only tolling doctrine that possibly applies in the present case is the acknowledgment doctrine. *Id*. Most often an acknowledgment which tolls the statute of limitations occurs when a debtor makes partial payments on a debt. *Id*. The debtor in this case did not make any payments on the debt.

An acknowledgment even absent partial payment can act to toll the statute of limitations but only in limited circumstances. Pennsylvania law states that to toll the statute of limitations a promise to pay a debt must be consistent with a promise to pay on demand and not simply a desire to pay at some indefinite time in the future. *Id*. In the present case, the

statements made by the Defendant do not meet this standard as a matter of law. Mr. Colecchia asked for more time in which to make the required payment.

These statements were at most statements of a desire to pay in the future which do not toll the statute of limitations. *Huntingdon Finance Corporation v. Newton Artesian Water Company*, 659 A.2d 1052 (Pa.Super. 1995).

In conclusion, there are no factual issues in dispute about when the statute of limitations began to run and that the action was filed after the statute of limitations expired on this claim. Therefore, the Court must grant the Defendants' motion.

ORDER

AND NOW, to-wit, this 17 day of March, 1998, it is hereby **ORDERED** and **DECREED** that the Defendants' Motion for Summary Judgment is **GRANTED**.

BY THE COURT:
/s/ Fred P. Anthony, Judge

DESIREE SMITH, a minor, Petitioner,

v.

SCHOOL DISTRICT OF THE CITY OF ERIE, PENNSYLVANIA
Respondent

STATUTES/LOCAL AGENCY LAW/STANDARD OF REVIEW

A decision of the school board is a decision of a local agency, and anyone aggrieved by the decision may appeal it to the Court of Common Pleas. 2 Pa. CSA § 752; 42 Pa. CSA § 933.

STATUTES/LOCAL AGENCY LAW/STANDARD OF REVIEW

Where there is a full and complete record of the proceedings before the school board, on appeal the Court of Common Pleas must limit its review to the record to determine if there was an error of law, a violation of the constitutional rights of the pupil, a due process or procedural infraction, or a determination that a finding of fact necessary to the school board's ruling was not supported by substantial evidence as certified by the agency below. 2 Pa. CSA § 754(v).

STATUTES/LOCAL AGENCY LAW/STANDARD OF REVIEW

If there is not a full and complete hearing before the school board, the Court of Common Pleas can either hear the appeal *de novo* or remand the case to the board for further inquiry. 2 PA. CSA § 754(a).

STATUTES/SCHOOLS/RULES

A school board rule is generally considered reasonable if it uses a rationale means of accomplishing some legitimate school purpose. 22 Pa. Code § 12.3(b).

STATUTES/SCHOOLS/RULES

Statute authorizes school to define "weapon" to include mace, and mace includes pepper spray, and such definition is reasonable.

CONSTITUTIONAL LAW/EQUAL PROTECTION

The possibility of different rules in different school districts does not violate the constitutional guarantee of equal protection. Since the statute requires students to follow the rules of their school the statute treats all students equally.

CONSTITUTIONAL LAW/EQUAL PROTECTION

Only when a state adopts a rule that has a special impact on less than all persons subject to its jurisdiction does a question arise as to whether the equal protection clause is violated.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 10057-1998

Gary J. Shapira, Esquire for the Plaintiff
Timothy M. Sennett, Esquire for the Erie City School District

OPINION

This matter comes before the Court on Petitioner, Desiree Smith's,

Petition for Review of the Erie City School District's decision to expel her for one year.

Facts

On October 28, 1997, Desiree Smith (hereinafter "Desiree") brought a can of pepper spray to school. Her mother had given it to her for her protection when walking the streets to and from school. At some point during that day, another student came into possession of Desiree's pepper spray and sprayed it in the hallway. After the spray had permeated the classroom, many students experienced difficulty breathing and rushed to the windows to get fresh air.

Later that same day, the spray was released again with substantially the same effect on the children in the classroom. This time, however, about three classrooms were evacuated to the gymnasium to ensure that the children had fresh air to breathe. Gerald Misfud, the principal at Central High School, testified that nurses were dispatched to explain the temporary physical effects of pepper spray to the children. He also asserted that the event was a "disruption to the educational process" and that it was "very upsetting, both physically and educationally."

On November 19, 1997, Respondent, The Erie City School District (hereinafter "District"), conducted a hearing to investigate this incident and determine the appropriate punishment for Desiree. At the hearing which was duly recorded and attended by attorneys for both parties, it was determined that Desiree knew that it was against the District's policy to allow such weapons on school property. In fact, Desiree testified that she was aware of and had signed off on the District's weapons policy[1] when school had first started in September. She also stated that she

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[1] The School's Weapons Policy states, *inter alia*,

> **BB. WEAPON** - an object or look-alike object which can be used **for protection** or to harm others. Carrying, using or concealing a weapon look-alike which includes, but is not limited to, gun, knife, razor blade(s), chain(s), **mace**, brass knuckles, metal objects, baseball bat or any other object designed for protection or harm to others. [emphasis added]
>
> 1. Any student found in possession of a gun or other weapon or
>
> found using a gun or other weapon while on school property . . . will be expelled immediately by the School Board of the School District of the City of Erie for a period of not less than one year. **THIS IS ZERO TOLERANCE . . .**
>
> High School Discipline Policy for the School District of the City of Erie, Pennsylvania, 1997-1998, p. 36.

believed that mace and pepper spray were the same.

After the hearing, Desiree was found to have been in possession of a weapon, as defined by the District's weapons policy, on school grounds. For this offense, the District expelled Desiree for one year pursuant to the aforementioned policy. It is this decision to expel Desiree which, in the face of her unblemished past disciplinary record, induced the instant Petition to Review.

Discussion

Before the Court sets forth the applicable law of this case, it is important to first discuss what the case is *not* about. This case is not about the Court's personal opinion as to what should be done with Desiree. If that were the case, the Court's task would be extremely easy, for the Court would simply say that the punishment meted out to Desiree was too strict. With all due respect to the School Board, the Court believes the "crime" did not justify the penalty imposed.

In the Court's personal opinion, justice would have been better served if Desiree had been punished less severely with a limited period of suspension as opposed to expulsion. After that suspension, Desiree should be allowed to return to school. Simply put, it doesn't make sense to expel Desiree for a year inasmuch as she was just following her mother's instructions and did not release the spray herself. If, somehow, this Court could modify and change the law to do this, it would immediately do so and order the District to readmit Desiree. In such an event, the end result would be far more just and equitable than the District's solution. Yet the Court readily admits it does not have such freedom. It has taken an oath to apply the law of this Commonwealth to the facts of this case. If the Court did otherwise, it would be violating its oath and attempting to become a "super" school board, which concept it abhors. *Zebra v. School District of the City of Pittsburgh*, 449 Pa. 432, __, 296 A.2d 748, 750 (1972).

Standard of Review

Since it is undisputed that the Erie City School District is a local agency within the meaning of Pennsylvania's Local Agency Law, anyone aggrieved by a decision of the School Board may appeal the decision to the court vested with jurisdiction of such appeals. 2 Pa.C.S.A. §752. Pennsylvania's Legislature provided that the Court of Common Pleas shall have jurisdiction of appeals from government agencies. 42 Pa.C.S.A. §933. This Court is therefore the appropriate forum for the instant petition.

As to the breadth of this Court's purview in this matter, the parties are in dispute. If, as the District asserts, there is a full and complete record of the proceedings before the School Board, this Court must don judicial blinders and limit its review to the record as certified by the agency below. 2 Pa.C.S.A. §754(b). If, however, as Desiree insists, there was not a full and complete hearing before the School Board, this Court has carte blanche

to either hear the appeal *de novo* or remand the case to the Board for further inquiry. 2 Pa.C.S.A. §754 (a).

Desiree insists that there was not a full and complete hearing below mainly due to the fact that no testimony was elicited as to the particular characteristics of pepper spray; specifically, whether there is a difference between pepper spray and mace. The reason she believes this to be important is that the school weapons policy includes "mace" in its list of prohibited weapons, but not "pepper spray". Despite her contention, however, this issue *was* raised and addressed at the hearing. On direct examination, Desiree was asked whether she knew that mace and pepper spray were the same. She answered in the affirmative. (Transcript p. 38) A witness for the District, Jim Perfetto, the Chief of Security for the Erie School District and a former Police Officer, testified to the effects of mace and pepper spray without differentiating between the two other than to say that they had different ingredients. (Transcript p. 33)

Since the issue of whether there was a difference between pepper spray and mace was, in fact, addressed by both Desiree and the District, Desiree is estopped from arguing that there was not a full and complete hearing on that basis. If Desiree or her attorney had wished to offer more testimony, expert or otherwise, on that issue at the School Board Hearing, they had full opportunity to do so. Thus, she was presented with constitutional procedural safeguards which were hers to employ or forego. Hence, the School Board conducted a full and complete hearing such that this Court is obligated to hear the appeal without a jury, solely on the record of the hearing certified by the School Board. 2 Pa.C.S.A. §754(b).

Having determined that there was a full and complete hearing, this Court is constrained to affirm the School Board's decision absent a finding of an error of law, a violation of the constitutional rights of the pupil, a due process or procedural infraction[2], or a determination that a finding of fact necessary to the School Board's ruling was not supported by substantial evidence. 2 Pa.C.S.A. §754(b); *Monaghan v. Board of School Directors*, 152 Pa. Cmwlth. 348, __, 618 A.2d 1239, 1241 (1992) (citing *Board of Licenses and Inspection Review v. Mirowitz*, 103 Pa.Cmwlth. 415, 520 A.2d 558, *appeal denied*, 516 Pa. 643, 533 A.2d 714 (1987)).

Error of Law

The first error of law alleged by Desiree is that the District exceeded its authority when it promulgated a weapons policy which expanded upon

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[2] 2 Pa.C.S.A. §754(b) provides that the agency's decision shall be upheld unless ". . . the provisions of Subchapter B of Chapter 5 (relating to practice and procedure of local agencies) have been violated in the proceedings before the agency. . .". Subchapter B of Chapter 5 consists of provisions for representation, due process, record-making, evidentiary rules and other procedural safeguards. *See* 2 Pa.C.S.A. §551-555.

the legislative statute's definition of "weapon". The two possible bases for this assertion are that the legislature preempted this statutory arena when it listed a variety of weapons which were prohibited or that the School Board's enactment was unreasonable given the clear and unambiguous language of the statute. This Court finds neither of these arguments to be persuasive.

a. Preemption

An analysis of the portion of the School Code which directs local School Districts to enact their own policies regarding expulsion of pupils for possession of weapons[3] demonstrates that the Pennsylvania legislature did not intend to preempt the regulatory arena with respect to weapons in schools. In the definitional subpart of the statute, the legislature declared:

> [t]he term **"weapon"** shall include, *but not be limited to*, any knife, cutting instrument, cutting tool, nunchaku, firearm, shotgun, rifle *and any other tool, instrument or implement capable of inflicting serious bodily injury*. [italicized emphasis added; bold emphasis in original]

24 P.S. §13-1317.2(g). By its very terms, this statute was meant to be supplemented. The language "but not be limited to" as well as the phrase "any other tool . . . capable of inflicting serious bodily injury" demonstrate, without room for doubt, that this definition is not the final word on the class of items to be included within this statute as a "weapon".

Desiree argues that since the statute doesn't list "mace" or "pepper spray", and these substances allegedly are unable to cause serious bodily injury, the legislature meant to exclude them from the definition. In the Court's humble opinion, this analysis misapprehends the statute, especially in light of the definition of "weapon" in the dictionary. Black's defines "weapon" as "[a]n instrument of offensive *or defensive* combat, or anything used, or designed to be used, in destroying, defeating, threatening, or injuring a person." [emphasis added] BLACK'S LAW DICTIONARY 1100 (abr. 6th. ed. 1991). If the legislature had intended to limit the class of weapons that were to fall within the statutory definition, they would

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[3] §13-1317.2 Possession of weapons prohibited.

(a) Except as otherwise provided in this section, a school district or area vocational-technical school shall expel, for a period of not less that [sic] one year, any student who is determined to have brought a weapon onto any school property . . .

(b) Every school district and area vocational-technical school shall develop a written policy regarding expulsions for possession of a weapon as required under this section. Expulsions shall be conducted pursuant to all applicable regulations.

. . .

not have inserted the "but is not limited to" language. This is language that literally invites expansion and, as the District points out, demonstrates the very opposite of an intent to limit the definition.

Desiree next claims that the School District only has the authority to draft a written policy regarding *expulsion* for possession of a weapon, as opposed to expanding the definition of "weapon". As the basis for this argument, she refers the Court to 24 P.S. §13-1317 (b) which mandates: "[e]very school district . . . shall develop a written policy regarding expulsions for possession of a weapon . . ." for the proposition that the legislature said all there was to say regarding the definition of weapon and the District may only regulate in the matter of punishment for possession of such a weapon.

As discussed *supra*, the term "weapon" was not fully defined by the statute; therefore, it defies logic to assert that the District was required to develop a weapons policy without the ability to further explain the definition of "weapon" for the students. As part of this policy, the District naturally expanded the definition of weapon for clarification purposes. They did so not only because the legislature expected them to, but so that the students would be on notice as to what the District considered a weapon.

b. Reasonableness

When examining rules and regulations promulgated by the schools of this Commonwealth, the School Code dictates that the Court must take pains to ascertain that they are based in reason.

> "The board of school directors in any school district may adopt and enforce such reasonable rules and regulations as it may deem necessary and proper . . . regarding the conduct and deportment of all pupils attending the public schools . . ."

24 P.S. §5-510. The gist of Desiree's argument here seems to be that it was unreasonable for the District to include mace or pepper spray in its list of weapons that would not be tolerated on school grounds. A "defensive weapon", the argument goes, should not be "criminalized" in the same manner as "offensive weapons" like knives and guns.

When the Court examines a validly enacted local agency policy or legislative enactment, it does so with great deference.

> The legislature in determining what shall be done, what it is reasonable to do, does not divide its duty with the judges, nor must it conform to their conception of what is prudent or reasonable legislation. The judicial function is merely that of fixing the outside border of reasonable legislative function.

James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 Harvard Law Review, 129, 148 (1893).

When determining that penumbral "outside border" of reasonableness, the standard the Court is constrained to apply to the District's rule is found in the Pennsylvania Code.

> School boards may not make rules which are arbitrary, capricious or outside their grant of authority from the General Assembly. Their rules must stand the test of fairness and reasonableness. A rule is generally considered reasonable if it uses a rational means of accomplishing some legitimate school purpose.

22 Pa. Code §12.3 (b). Can it be said that there is a rational basis for the rule in this case?

At Desiree's expulsion hearing, Jim Perfetto, the Chief of Security for the Erie School District, testified on direct examination by the District's attorney as follows:

> Q: If a person has an asthma condition, what effect would pepper spray have?
> A: Pepper spray can cause an asthma attack to a person who suffers from asthma, and it could be lethal.
> Q: Have you seen the use of mace or pepper spray on a person with asthma and the triggering of an asthma attack in your years as --
> A: We just had an incident here not too long ago, where a young woman was sprayed, and she suffers from asthma, and ended up being taken to the hospital and treated in the emergency room.

(Transcript p. 33-34). From this testimony, it is apparent that pepper spray could be, in some cases, lethal. The bottom line is that if it interferes with the breathing of students, it interferes with their safety. It cannot be denied that student safety is a legitimate school purpose. Since pepper spray, a "defensive weapon" has the capacity to be just as dangerous as guns and knives, this policy choice by the District is well within the "outside border" of reasonableness.

Even if, however, pepper spray wasn't possibly lethal to students, the Court can scarcely envision the havoc wreaked by a playground or classroom populated by mace-wielding teenagers. It is clear to the Court that this admittedly tumultuous stage of maturation need not be agitated by allowing our schools to become "defensive" battlegrounds.

Desiree also points out that the definition of weapon in the School Code is the same as that in the statute criminalizing possession of a weapon

on school property.[4] This, however, merely underscores the reasonableness and importance of the District's purpose in expanding the "weapon" definition -- to protect the students. The crimes code statute merely demonstrates that the legislature thought this was an important enough goal to criminalize possession of weapons on school grounds for all persons.

Constitutional Rights

Having decided there was no error of law in the School Board's policy nor in its decision, the next question is whether Desiree received equal protection under the law as guaranteed by the Fourteenth Amendment of the United States Constitution. Equal protection analysis requires that the State must govern impartially, treating all similarly circumstanced people alike. *Alexander v. Whitman*, 114 F.3d 1392, 1406-7 (3rd Cir. 1997) (internal quotations omitted). Desiree appears to claim that, since the state legislature has directed each school district to enact policies concerning expulsion of students for violations of their weapons policies, when those schools enact differing policies and weapons definitions, certain students will be denied equal protection because they will be treated differently in different districts. The Court fails to be persuaded by this analysis.

"Only when a state adopts a rule that has a special impact on less than all persons subject to its jurisdiction does a question arise as to whether the equal protection clause is violated." *Alexander*, 114 F.3d 1392, 1406-1407 (3rd Cir. 1997). In the instant case, there is no unequal treatment. The state statute directs that each school district enact rules and policies regarding expulsion of students for weapons possession. Since all students in Pennsylvania are responsible for following the rules and regulations passed by their school districts, the state statute treats every pupil similarly. It merely orders each district to adopt regulations on the weapons issue.

When, as directed by this statute, the Erie School District promulgated a policy which declared that the possession of mace on school property would garner a one year expulsion, everyone *subject to the School District's jurisdiction* was treated equally. Every single student who was found to have mace on school property would be expelled for one year.

Petitioner's argument, taken to its logical conclusion, requires that every state, county and district must have exactly the same laws, policies and regulations as every other state, county and district. If the laws differ, citizens are not treated equally and there is an equal protection violation.

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[4] 18 Pa.C.S.A. §912. Possession of a Weapon on School Property.
(a) . . . "weapon" for purposes of this section shall include but not be limited to any knife, cutting instrument, cutting tool, nun-chuck stick, firearm, shotgun, rifle and any other tool, instrument or implement capable of inflicting serious bodily injury.

This cannot be the law.

Equal protection requires that persons be similarly situated. The students in Petitioner's example go to school in different districts. As to each individual district, which adopts policies regarding students within its jurisdiction, and as to the state, which enacts general statutes applicable to all students, the pupils are all treated equally. Thus, it is this Court's finding that no equal protection violation has occurred.

Due process or procedural infraction

While Desiree does not assert that she was denied any procedural rights, it may be well to note that the due process rights afforded students faced with suspension or expulsion were fully complied with in this case. They are as follows:

1. Written notice to parents and student including a specific statement of the charges which, if proved, would justify the punishment sought.
2. A full hearing after adequate notice.
3. An impartial tribunal with the authority to examine exhibits and other evidence against the student.
4. Representation by legal counsel (though not at public expense)
5. Confrontation and examination of adverse witnesses.
6. Presentation of evidence on behalf of the student.
7. Access by all parties to a record of the proceedings.
8. The requirement that the decision of the authorities be based upon substantial evidence.

Pennsylvania School Law, Francis, Samuel N. and Rutter, Thomas M., Vol. 1, p. 511 (1983) (citing *Givens v. Poe*, W.D. N.Car., No. 2615, June 19, 1972).

Having determined that there was no error of law, no constitutional violation, and no procedural deficiency, the sole remaining issue is whether the Board's decision was based on substantial evidence. Based upon her interpretation of the weapons statute, Desiree claims that no substantial evidence was presented that pepper spray is capable of causing serious bodily harm. However, given this Court's reading of the statute as discussed above, the type of injury that can be inflicted by pepper spray is irrelevant because serious bodily harm is not a requirement for an item to be a weapon under the statute.

Even if it was necessary that the Board find that pepper spray is capable of causing serious bodily injury, testimony at the hearing demonstrated that, given an asthmatic victim, pepper spray can be lethal. Thus, even in that situation, the Board's finding of fact on that issue would have been supported by substantial evidence.

Conclusion

While the Court realizes the School District's need for consistency in

the discipline of its students, it is respectfully suggested that the Board reconsider its decision, especially given the fact that Desiree didn't spray the Pepper spray herself and given the amount of time that has passed. Mindful of the District's concern with being even-handed, the Court respectfully suggests that the Board could logically allow Desiree back in school and still be consistent with earlier expulsion decisions. The distinguishing feature of this case is the fact that she merely possessed the spray, as opposed to actually releasing it.[5]

ORDER

AND NOW, to wit, this 9th day of February, 1998, it is ORDERED, ADJUDGED and DECREED that the Respondent's decision, expelling, Petitioner for one year, is hereby AFFIRMED for the reasons set forth in the foregoing Opinion.

BY THE COURT:
Levin, J.

[5] The Court would be remiss if it did not thank respective counsel for the outstanding briefs they supplied the Court. Certainly their most professional work made the Court's task in ruling on this sad but complex case somewhat easier.

COMMONWEALTH OF PENNSYLVANIA

v.

TERRELL STONEWALL

CRIMINAL LAW/SENTENCING/STANDARD OF REVIEW

A sentencing decision will not be disturbed unless there is a manifest use of discretion by the sentencing judge, the sentence is outside the statutory limits, or it is manifestly excessive.

CRIMINAL LAW/POST-SENTENCE RELIEF

The court will reach the merits of a defendant's contentions only if a substantial question is raised for review by a colorable argument that the trial judge's actions were inconsistent with a specific provision of the sentencing code, or were contrary to the fundamental norms which underlay the sentencing process.

CRIMINAL LAW/POST-SENTENCE RELIEF

A challenge to imposition of consecutive rather than concurrent sentences does not present a substantial question for review.

CRIMINAL LAW/POST-SENTENCE RELIEF

A substantial question regarding the discretionary aspects of sentence is raised by defendant's claim that there were no sufficiently specific reasons for the sentencing choice, and that the sentence was clearly unreasonable.

CRIMINAL LAW/SENTENCING/DISCRETION

As long as the sentence is within the guidelines the court is not required to state its reasons for sentencing within one guideline range over another.

CRIMINAL LAW/POST-SENTENCE RELIEF

The trial court gives an adequate statement of the reasons for the sentence where the sentencing colloqui shows consideration of the defendant's circumstances, prior criminal record, personal characteristics, rehab potential, and that the court had the benefit of a pre-sentence report.

CRIMINAL LAW/POST-SENTENCE RELIEF

Defendant's argument that there were no reasons for the sentencing choice lacked merit where the transcript showed the judge: reviewed the pre-sentence reports; noted the sentences were lenient considering the maximum allowable time; considered the defendant's past criminal history and Prior Record Score; considered the defendant's mother's testimony and the impact of incarceration on his family; noted the defendant's expression of remorse; considered the severity of the crime and its impact on the community; and noted failed prior attempts to correct the defendant's behavior.

CRIMINAL LAW/INEFFECTIVE ASSISTANCE OF COUNSEL

The law presumes counsel is effective. Failure to file non-meritorious claims in a motion for post-trial relief does not overcome the presumption of effectiveness.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 2515 & 2516 of 1996

Damon C. Hopkins, Esquire for the Commonwealth
Joseph P. Burt, Esquire for the Defendant

OPINION

Joyce, J., November 24th 1997.

The Defendant, Terrell Stonewall, was charged with one count of violation of unlawful delivery (35 P.S. 780-113)(a)(30) at Docket No. 2515 of 1996. He was also charged with one count of unlawful delivery (35 P.S. 780-113)(a)(30)and one count of criminal conspiracy (18 P.S. 903) at Docket No. 2516 of 1996. The Defendant proceeded to a jury trial presided over by the Honorable Judge Michael T. Joyce on March 11, 1997, and the jury found him guilty on all counts. On May 9, 1997, the Defendant was sentenced to 18 months to 10 years on Count 1 at Docket No. 2515 of 1996, 18 months to 10 years consecutive on Count 1 at Docket No. 2516 of 1996, and 6 months to 10 years consecutive on Count 2 at Docket No. 2516 of 1996. On May 19, 1997, the Defendant filed a Post-Sentence Motion for Relief. By Order dated May 30, 1997, this Court denied the Motion. On June 18, 1997, the Defendant filed his Notice of Appeal. The issues are now before the Court.

Before the Court can reach the merits of the Defendant's contentions, a determination must first be made as to whether a substantial question has been presented for review. *Commonwealth v. Urrutia*, 439 Pa.Super. 227, 653 A.2d 706 (1995), *appeal denied*, 541 Pa. 625, 661 A.2d 873 (1995). A substantial question is presented if the defendant advances "a colorable argument that the trial judge's actions were: (1) inconsistent with a specific provision of the sentencing code; or (2) contrary to the fundamental norms which underlie the sentencing process." *Commonwealth v. McKiel*, 427 Pa.Super. 561, 564, 629 A.2d 1012, 1013 (1993).

The Defendant's first and third arguments shall be addressed together as they present essentially the same question. In his Statement of Matters Complained of on Appeal, the Defendant argues that there were no sufficiently specific reasons expressed for the sentencing choice and the sentence was clearly unreasonable. The Defendant goes on to argue that there were no true reasons expressed for the sentencing choice, especially in light of the emphasis on offense gravity. These claims do raise a substantial question as to the propriety of sentence. *Commonwealth v. Jones*, 418 Pa.Super. 93, 613 A.2d 587 (1992). The Supreme Court of Pennsylvania has outlined the standard which governs whether a sentencing court has properly stated the reasons for imposition of a sentence. The Court stated:

> Where pre-sentence reports exist, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. A pre-sentence report constitutes the record and speaks for itself.... Having been fully informed by the pre-sentence report, the sentencing court's discretion should not be disturbed.

Commonwealth v. Devers, 519 Pa. 88, 101-102, 546 A. 2d 12, 18 (1988). Therefore, this requirement is met if the court states on the record that it has consulted a pre-sentence report. *Id.*

The Court would note that "sentencing is a matter within the sound discretion of the trial court and will not be disturbed unless it is outside the statutory limits or manifestly excessive so as to inflict too severe a punishment." *Commonwealth v. Phillips*, 411 Pa.Super. 329, 601 A.2d 818 (1992), citing *Commonwealth v. Gee*, 394 Pa.Super. 277, 575 A.2d 628 (1990). Where the court's sentencing colloquy "shows consideration of the defendant's circumstances, prior criminal record, personal characteristics and rehabilitative potential, and the record indicates that the court had the benefit of a presentence report, an adequate statement of the reasons for the sentence imposed has been given." *Phillips, supra*, citing *Commonwealth v. Fenton*, 388 Pa. Super. 538, 566 A. 2d 260 (1989), *allocatur denied*, 525 Pa. 662, 583 A. 2d 792 (1990). A sentencing decision will only be reversed where an appellant can prove a manifest abuse of discretion on the part of the sentencing judge. *Commonwealth v. Koren*, 435 Pa.Super. 499, 504, 646 A.2d 1205, 1208 (1994).

In the present case, this Court has met the requirements as set forth in *Devers*. The Court stated on the record that it reviewed the Pre-Sentence Report prepared on the Defendant's behalf. (N.T., Sentencing, 5/9/97, p. 16). The Court noted that the Defendant's sentences were within the standard range and that the sentences were lenient considering the maximum allowable time. (N.T., Sentencing, 5/9/97, p. 17). The Court went on to acknowledge that it was aware of the Defendant's past criminal history. (N.T., Sentencing, 5/9/97, p. 15-16, 18-19, 21-22, 25). The Court noted that the Defendant had an extensive juvenile criminal history and that he had a Prior Record Score of 4 at twenty-two years of age. (N.T., Sentencing, 5/9/97, p. 15). The Court stated that the highest Prior Record Score obtainable is a 6, and that the Defendant would have a Prior Record Score of 6 after including the current offenses. (N.T., Sentencing, 5/9/97, p. 15). The Court took into consideration the testimony of the Defendant's mother. (N.T., Sentencing, 5/9/97, p. 9-19). The Court considered the fact that the Defendant's incarceration would be difficult for his family and his children. (N.T., Sentencing, 5/9/97, p. 16). Additionally, the Court noted that the Defendant expressed remorse at the time of sentencing and that the Court found this to be meaningful for sentencing purposes.

(N.T., Sentencing, 5/9/97, p. 14). The Court further took into consideration the seriousness of the crime committed and severity of the drug problems in the community. (N.T., Sentencing, 5/9/97, p. 15, 20). The Court noted the danger to not only the community, but especially to the children in the community. Further, the Court noted that there have been attempts in the past to correct the Defendant's behavior which have failed. (N.T., Sentencing, 5/9/97, p. 21-22). Therefore, since this Court stated sufficient reasons for the sentences imposed and the sentences were within the standard range, the Defendant's argument is belied by the record, lacks merit and should be denied.

The Defendant next argues that there was an abuse of discretion to sentence consecutively because no relevant facts were present for consecutiveness and because there was no real reason expressed for consecutive sentencing. "The general rule in Pennsylvania is that in imposing a sentence a court has discretion to determine whether to make it concurrent or consecutive to other sentences then being imposed or other sentences previously imposed." *Commonwealth v. Hoag*, 445 Pa.Super. 455, 459, 665 A.2d 1212, 1214 (1995). "A challenge to the court's imposing consecutive rather than concurrent sentences, however, does not present a substantial question regarding the discretionary aspects of sentence." *Id*. Therefore, this argument does not raise a substantial question and should be dismissed.

The Defendant argues that because the sentence was unexplainable otherwise, it must have been selected as part of a uniform policy. As previously discussed in detail, this Court considered the Pre-Sentence report before sentencing the Defendant. Further, the Court considered the Defendant's past criminal history, rehabilitative potential, personal characteristics, severity of the offenses, and testimony of the Defendant's mother. As long as the sentencing court imposes a sentence within the guidelines, the court is not required to state its reasons for sentencing within one guideline range over another. *Commonwealth v. Hill*, 427 Pa. Super. 440, 629 A. 2d 949 (1993). In this case, the Court clearly stated on the record its numerous reasons for imposing the sentence given. Further, the sentence was within the standard range. Hence, the Defendant's arguments are without merit, the sentence imposed was within the sentencing guidelines, and there was no abuse of discretion in its imposition.

Lastly, the Defendant alleges ineffectiveness of counsel to the extent that counsel failed to include the previously discussed issues in post-trial motions, thereby waving them. At the outset, it must be noted that "because the law presumes that counsel is effective, the burden of establishing effectiveness rests with the appellant." *Commonwealth v. Garnett*, 418 Pa.Super. 58, 62, 613 A.2d 569, 571 (1992). In determining whether trial counsel was effective, first it must be determined whether

the underlying claim has any merit. *Id.* If it is found that there is a meritorious claim, counsel will not be deemed ineffective if the course of action chosen had a reasonable basis designed to effectuate the client's interests and if the Defendant suffered no prejudice. *Id.* As discussed, *supra*, all of the allegations counsel is claimed to be ineffective for are without merit. Therefore, trial counsel's presumption of effectiveness shall stand.

Based on the foregoing reasons, the Defendants' Matters Complained of on Appeal are without merit and the judgment of sentence should be affirmed.

BY THE COURT:
/s/ MICHAEL T. JOYCE, JUDGE

CATHERINE M. SARGENT

v.

STEPHEN MERSKI and
GENERAL McLANE SCHOOL DISTRICT

GOVERNMENTAL IMMUNITY/42 PA.C.S.A. §8541

Summary judgment for school district granted where plaintiff failed to establish common law or statutory cause of action;

CAUSATION

School district's erection of some traffic control signs was not catalyst for potential liability (distinguishing *Kennedy v. City of Philadelphia*)

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW NO. 10927-1996

Elliot J. Segel, Esq., for plaintiff
Thomas P. Birris, Esq., for defendant Merski
David S. Rzepecki, Esq., for defendant School District

OPINION AND ORDER

I. FACTS OF THE CASE

This automobile accident case comes before this Court on the motion for summary judgment filed by General McLane School District. Also before the Court is a motion for continuance per Pa.R.C.P. §1035.3(c) filed by the Plaintiff.

Briefly, this case was initiated by the Plaintiff to recover for alleged injuries she sustained in an automobile accident on March 18, 1994 which occurred while she was driving her automobile along a street located in the General McLane School District complex. Attached to this Opinion and Order are two diagrams of the area submitted during the summary judgment argument. The Plaintiff has sued the driver of the automobile with which she collided on the school district property. She has also sued the School District. As the facts indicate, just prior to the accident, Defendant Merski was stopped facing north at the intersection where the accident occurred. (M.D. 19).[1] He was intending to make a right-hand turn onto the road on which the Plaintiff was traveling in order to get to the rear of the school district complex. *Id.* It appears that a snowpile located to Merski's right obstructed his vision and that as he crept slowly out into the roadway, he was struck by the Plaintiff. M.D. 21-27. Mr. Merski testified that when he first saw the Plaintiff's automobile, her automobile was only one or two car lengths from his. M.D. 27; S.D. 127-28.[2]

[1] M.D. denotes Merski deposition.

[2] S.D. denotes Ms. Sargent's deposition.

The Plaintiff, while conceding that the school district does not generally have an obligation to erect directional signs, argues that it did so in this case.[3]

II. DISCUSSION

Summary judgment is governed by Pa.R.C.P. §1035.2. It is properly granted where the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Ducjai v. Dennis*, 656 A.2d 102, 107 (Pa. 1995). While the moving party has the initial burden of proving that no genuine of material facts exists, the non-moving party may not rest upon the averments and the pleadings but rather must demonstrate that there is a genuine issue for trial. A*ccu-Weather, Inc. v. Prospect Communications, Inc.*, 644 A.2d 1251, 1254 (Pa.Super. 1994). In *Ertel v. Patriot News Co.*, 674 A.2d 1038, 1042 (Pa. 1996), the Supreme Court of Pennsylvania noted:

> A non-moving party must adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor. Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Finally, summary judgment may be granted based on the depositional admissions of the opposing party. *Gray v. Gray*, 671 A.2d 1166, 1172 n.1 (Pa.Super. 1996).

Having set forth that standard, this Court notes that 42 Pa. Cons.Stat.Ann. §8541 establishes the parameters of governmental immunity. The statute provides that except as otherwise provided, "no local agency shall be liable for any damages on account of any injury to a person or property caused by an act of a local agency or an employee thereof or any other person". The exceptions to governmental immunity are set forth in §8542.

Based upon its review of those exceptions, this Court finds that the Plaintiff has failed to establish either a common law or statutory cause of action against a local agency or that the Plaintiff has shown that the action falls within one of the exceptions. Compare *Chacko v. Commonwealth, Dep't. of Transp.*, 611 A.2d 1346, 1348 (Pa. Cmnwith. 1992).

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[3] Plaintiff alleges that the school district was negligent in not erecting a traffic control sign which would have notified Defendant Merski not to turn right (east) onto the roadway upon which the Plaintiff was traveling.

In order to maintain its action, Plaintiff asks this Court to rely upon the case of *Kennedy v. City of Philadelphia*, 635 A.2d 1105, 1108 (Pa. Cmnwlth. 1993). In *Kennedy*, the Commonwealth Court was called upon to decide whether the City of Philadelphia could be held liable for negligence in failing to paint additional traffic control lane markings on a state highway upon which there had been a collision between an automobile and two (2) pedestrians. Citing the applicability of §8542 (b)(4) the Commonwealth Court stated that the City was under no statutory authority to paint lines on a state highway. *Id.*, at 1109. However, it noted that the City exercised discretionary authority by placing some lane markings on the state highway. That, however, was not dispositive. Rather, what it found significant was the fact stated in the following quote: "Accordingly, its actions in choosing to delineate part of the state highway constituted the catalyst for potential liability in this case not its failure to paint any lines." *Id.*

Therefore, based upon the above, this Court finds Kennedy to be both factually and legally distinguishable. As the diagrams show, the school district did erect some directional and stop signs in the area. However, the facts of record fail to demonstrate a prima facie case that the school district's actions constituted the catalyst for potential liability. Therefore, summary judgment relative to the school district is appropriate.

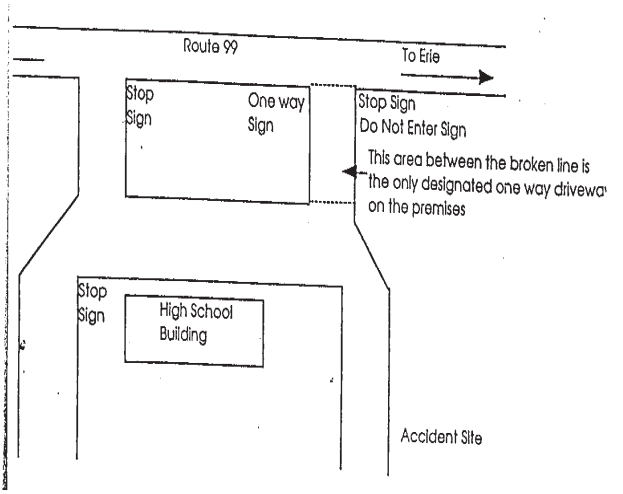
ORDER

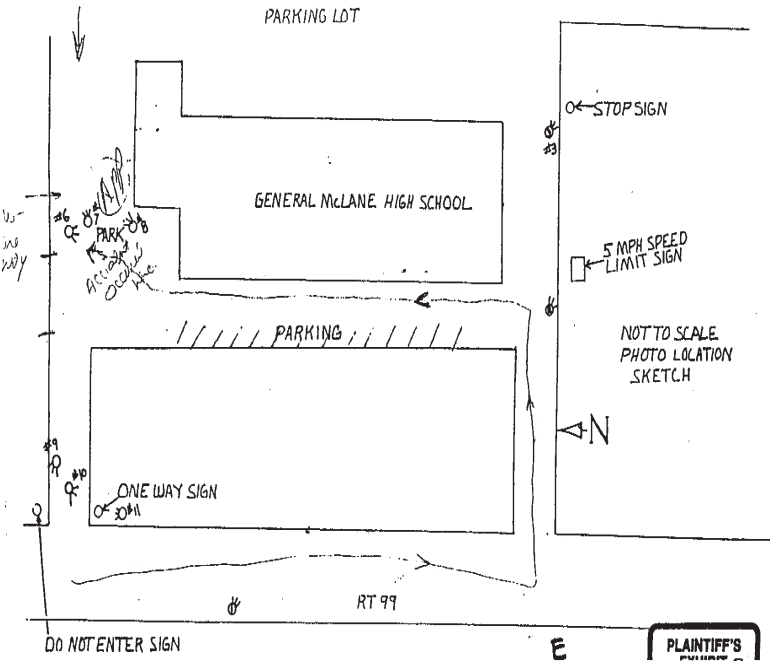
AND NOW, this 14th day of May, 1998, having considered all matters of record relative to Defendant General McLane School District's motion for summary judgment, it is hereby ORDERED that the motion is GRANTED. Plaintiffs motion for continuance is DENIED AS MOOT.

BY THE COURT:
Ernest J. DiSantis, Jr., Judge

Attachments

ATTACHMENT





BARBARA A. FICHTHORN, Plaintiff

v.

MICHAEL A. KARR, JR., Defendant

EVIDENCE/MOTION IN LIMINE

Defendant's motion in limine granted eliminating testimony regarding damages unrelated to claims stated in complaint.

STATUTES/DAMAGES

Statutory damages for wrongful use of civil proceedings can include reasonable attorney's fees, costs and punitive damages.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 14026 - 1995

Appearances: Barbara A. Fichthorn, pro se;
Kevin L. Colosimo, Esq. for Defendant

OPINION

Connelly, J., April 14, 1998

This matter comes before the court pursuant to Defendant's Motion in Limine to limit Plaintiff's damage claims. The instant action arose out of a claim for attorney's fees and punitive damages brought by Plaintiff to recover expenses incurred in an action in ejectment, at docket number 14011 -1994, against Mary M. Karr, Plaintiff's mother, and Plaintiff.

In her First Amended Complaint, Plaintiff claimed damages in the amount of $2,315.30 along with a claim for punitive damages and costs. In her Pre-Trial Narrative, however, Plaintiff set forth a claim for damages in the amount of $12,320.36. Specifically, Plaintiff has requested $3770.16 in attorney's fees and costs, $1,222.20 for repairs allegedly made to the property located at 212 Lighthouse Street, Erie, Pennsylvania, and $7,328.00 for "involuntary general management, maintenance" of said property.

Pursuant to 42 Pa.C.S.A. § 8353, if Plaintiff successfully establishes the essential elements of her claim for wrongful use of civil proceedings, she will be entitled to recover reasonable attorney fees and costs and may be entitled to punitive damages, if appropriate. However, Plaintiff may not recover either the $1,222.20 for repairs or the $7,328.00 for general management and maintenance since said claims are unrelated to Plaintiff's action at this docket number.

Therefore, Defendant's motion is granted as to all testimony and evidence relating to damages claimed for improvements or services rendered at 212 Lighthouse Street, Erie, Pennsylvania, and all such testimony and evidence will be excluded.

ORDER

AND NOW, TO-WIT, this 14th day of April, 1998, for the reasons set forth in the foregoing OPINION it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that Defendant's Motion in Limine is GRANTED as to all testimony and evidence relating to damages claimed for improvements or services rendered at 212 Lighthouse Street, Erie, Pennsylvania, and all such testimony and evidence will be excluded.

BY THE COURT:

/s/ **Shad Connelly, Judge**

TIMOTHY BOETGER and KATHLEEN BOETGER, his wife, Plaintiffs

v.

TINA J. SIPOS-GEISSINGER, Defendant

TIMOTHY BOETGER and KATHLEEN BOETGER, his wife, Plaintiffs

v.

CATHERINE M. SAURO, Defendant

CIVIL PROCEDURE/POST TRIAL RELIEF

Post-trial relief should be awarded when the jury's verdict is so contrary to the evidence as to shock ones sense of justice.

EVIDENCE

Evidence is not proof until it is accepted by a trier of fact.

CIVIL PROCEDURE/POST TRIAL RELIEF

Post-trial relief may not be granted merely because a jury could have drawn different inferences or the court would have reached a different conclusion.

POST-TRIAL RELIEF/NEGLIGENCE/CAUSATION

The jury's specific finding that plaintiffs' motor vehicle accidents with defendants were not the significant cause of plainitffs' injuries will not be disturbed where defendants' experts testified that plaintiffs' surgery was necessitated by degenerative disc changes, and was not caused by the motor vehicle accidents.

CIVIL PROCEDURE/POST-TRIAL RELIEF

Under Pa.R.C.P. 227.1 motions for judgment notwithstanding the verdict and motions for new trial have been replaced by motions for post-trial relief.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW No. 15167 - 1995 & No. 15169-1995

Appearances: William J. Kelly, Jr., Esq. for Plaintiffs;
Joanna K. Budde, Esq. for Defendant Sipos-Geissinger;
W. Patrick Delaney, Esq. for Defendant Sauro.

OPINION

Connelly, J., April 9, 1998

FACTS

This matter comes before the court pursuant to Plaintiffs' Motion for Judgment Non-Obstante Verdicto and Motion for New Trial.[1] The facts

[1] Pursuant to Pa.R.Civ.P. 227.1, a motion for post-trial relief replaces a motion for judgment not withstanding the verdict and a motion for new trial.

of the instant matter are as follows. Plaintiff Kathleen Boetger was involved in a motor vehicle accident on April 12, 1994 with Defendant Sipos-Geissinger. Mrs. Boetger sought medical treatment the following day at the emergency room of Saint Vincent Hospital. She was not admitted to the hospital but was discharged after x-rays were reported as normal. The x-rays did reveal, however, and it is not contested, that Mrs. Boetger was suffering from a degenerative disc disease which predated the accident. Subsequently, on May 27, 1994, Mrs. Boetger was in a second motor vehicle accident involving Defendant Sauro.

Plaintiffs claim that as a result of one or both of these accidents, Mrs. Boetger suffered injuries to her neck, back and right shoulder. In March of 1996, Mrs. Boetger's physician, Dr. William P. Diefenbach, performed a fusion of her vertebrae at the C4-5 and C5-6 level. In October of 1996, Mrs. Boetger also underwent arthroscopic shoulder surgery for a torn rotator cuff.

A jury trial was held on February 10, 1998 through February 12, 1998. At the conclusion of the evidence, the court directed a verdict for the Plaintiffs against both defendants on the issue of negligence.[2] Following trial, the jury returned a finding that neither the April 12, 1994 motor vehicle accident nor the May 27, 1994 motor vehicle accident was a significant factor in bringing about Mrs. Boetger's claimed injuries. Consequently, Plaintiffs have filed a motion for judgment n.o.v. or, in the alternative, a motion for new trial, claiming that the jury's verdict was against the weight of the evidence.

LAW

The sole issue before this court is whether the jury's verdict was against the weight of the evidence such that an entry of judgment n.o.v. is required or a new trial on the issue of damages should be granted. It is well settled that a new trial should be awarded when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. *Randt v. Abex Corp.*, 448 Pa. Super. 224, 671 A.2d 228 (1996). The reviewing court may not reweigh the evidence, and a new trial may not be granted merely because the jury could have drawn different inferences or the court would have reached a different conclusion. *Riccio v. American Republic Ins. Co.*, 683 A.2d 1226 (Pa.Super. 1996); *Sundlun v. Shoemaker*, 421 Pa.Super. 353, 617 A.2d 1330 (1992).

In the instant case, Plaintiffs contend that the jury's verdict is against

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[2] In its instructions to the jury, the court indicated that while the defendants had been found negligent, the question remained for them as to whether the negligence of either or both of the defendants was a substantial contributing factor of Mrs. Boetger's injuries. Such was indicated on the verdict form as well.

the great weight of the evidence since, they aver, both Plaintiffs and Defendants' experts found some degree of causation between the two accidents and Mrs. Boetger's neck and back injuries.[3] In support of their claim, Plaintiffs presented the testimony of Dr. Diefenbach, her treating physician. Dr. Diefenbach testified that as a result of the April 12, 1994 accident, Mrs. Boetger suffered a neck injury which was exacerbated by the May 27, 1994 accident. (N.T., Dr. William P. Diefenbach Deposition, 1/19/98, p. 25). Dr. Diefenbach also testified that the surgery he performed on Mrs. Boetger was necessary as a result of degenerative condition of Mrs. Boetger's neck which preexisted and was unrelated to either of the motor vehicle accidents. (Diefenbach depo., pp. 37-38).

As to the April 12, 1994 accident, Dr. John C. Lyons, Defendant Sipos-Geissinger's expert, acknowledged the possibility that Mrs. Boetger may have suffered a mild cervical strain from the accident. However, it was his opinion that the strain was transient in nature, did not change the natural course of her history and resolved prior to the May 27, 1994 accident. (N.T., Dr. John C. Lyons Deposition, 6/26/97, p. 109). Moreover, Dr. Lyons testified that the May 27, 1994 accident also resulted in no more than a transient strain that resolved itself and was not the reason for Mrs. Boetger's surgery. *Id*.

Dr. Lyons further testified that both accidents were limited in force and that the stresses or G-forces experienced by Mrs. Boetger during each of her two accidents were not disproportionate to the activities of daily life. (Lyons depo., p. 76). He opined that the strain phenomena experienced by Mrs. Boetger was similar to that experienced while raking leaves or perhaps making a bed. (Lyons depo., p. 80).

As to whether Mrs. Boetger's surgery was necessitated by either or both of the accidents, Dr. Lyons stated:

> I don't think those doctors [who examined Mrs. Boetger following her accident] missed a herniated disc. And yet she's operated on for a herniated disc at two levels, months or more than a year later. I don't think that car accident caused that. The X-rays showed that it was a degenerative process. The surgery shows it's a degenerative process. And you don't have correlation between the physical findings after the car accident and the later surgical findings. So it's not the cause. That's in both cases. You can't get those spurs in a day. You can't get them in six weeks.

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[3] At trial, Plaintiffs also averred that Mrs. Boetger sustained a shoulder injury in one or both of the accidents. Plaintiffs are not challenging the jury's finding that neither accident was a substantial contributing factor in that injury.

> So the next question is, okay, if it didn't cause the process, did it perpetuate or propagate the process of degeneration. So you look at the forces on that disc. If they're going to upset the disc, it's a peripheral action on the disc, and the process of this disc problem is internal wear-down and degeneration.
>
> I think the car accident caused some inflammation, a sprain or strain of the disc. I don't think it ruptured it. There is no rupture in the low back, and yet she had some strain symptoms, but that doesn't mean that she's now going to rupture her back because of it. The forces aren't sufficient.
>
> So it's kind of redundant to go through all these things, but the forces aren't sufficient, the clinical features weren't sufficient, the surgical findings were of degenerative change, and I think, at most, the car accident sprained and her neck went back to her baseline.

(Lyons depo., pp. 86-87).

Dr. Daniel A. Funk, Defendant Sauro's expert, based upon his review of the evidence submitted to him, calculated that Mrs. Boetger sustained approximately 2.5 Gs in the May 27, 1994 accident and that this force, approximately equivalent to a sneeze, was insufficient to rupture a disc in her neck. (Dr. Daniel A. Funk Deposition, 1/20/98, pp. 19-20). Dr. Funk therefore opined that no causal relationship existed between the injury to Mrs. Boetger's disc and the May 27, 1994 accident. (Funk depo., p. 58).

In *Henery v. Shadle*, 443 Pa.Super. 331, 661 A.2d 439 (1995), the Court was faced with a scenario virtually identical to that in the instant case. In *Henery*, the appellant testified that he suffered pain in his neck and back as a result of an automobile accident with the appellee. This testimony was supported by the appellant's treating physician. Appellee's medical expert, however, testified that although appellant may have suffered some soft tissue injury in his accident, his pain resulted from a degenerative disc disease which existed prior to the accident and which had not been affected by the accident. As a result, the Court declined to disturb the jury's verdict stating that there was "a sure and certain evidentiary basis for the determination of the jury that the negligence of appellee was not a substantial contributing factor in the injuries suffered by appellant." *Id*. at 337, 661 A.2d 442.

Moreover, the Court stated that:

> The issues as to whether appellant was really suffering any pain and whether any such pain was caused by appellee's conduct were for the jury. The jury was not required to award appellant any amount as it obviously believed that any injury appellant suffered in the accident was insignificant. *Holland v. Zelnick*, 329 Pa.Super. 469, 478 A.2d 885 (1994).

> Evidence is not proof until it is believed and accepted by a trier of fact. Persons may indeed suffer pain that they attribute to a cause, but at law the cause they assert must be accepted as the cause of their pain. Their belief, however well founded in their minds, is not the cause until it finds acceptance in the minds of the fact triers. *Boggavarapu v. Ponist*, 518 Pa. 162, 542 A.2d 516 (1988)

Henery, 443 Pa.Super. at 337, 661 A.2d at 442.

In *Bronchak v. Rebmann*, 263 Pa.Super. 136, 397 A.2d 438 (1979), the appellant sought a new trial based upon the alleged inadequacy of the jury verdict awarding her damages in the amount of $63.30, the amount of the medical bill incurred for hospital services following her accident. It was adduced at trial that the appellant's vehicle was struck in the rear by a vehicle operated by appellee. The appellant declined treatment at the scene but was subsequently treated at a hospital, incurring a bill for $63.30. The appellant's physician diagnosed her with a cervical strain and prescribed muscle relaxants and physiotherapy.

At trial, the appellant's physician opined that she was permanently disabled. The appellee's expert testified that it was his opinion that the appellant had fully recovered from any cervical strain she might have sustained. Moreover, both physicians agreed that the appellant had been suffering from a preexisting, degenerative arthritis of the cervical spine and that her condition was compounded by calcium deposits and curvature of the spine. The experts disagreed, however, as to whether the accident aggravated the preexisting condition.

In only awarding the appellant the amount of her initial hospital bill, the jury found either that the appellant's evidence of neck pain was not credible or that her pain and stiffness had been caused by the preexisting calcium deposits and arthritis of the cervical spine. In upholding the jury's verdict, the Court stated that the evidence suggested that the verdict was within the bounds of logic and was consistent with the law and the evidence.

The cases cited by Plaintiffs in support of their motion are distinguishable from the instant matter. In *Neison v. Hines*, 539 Pa. 516, 653 A.2d 634 (1995), the Pennsylvania Supreme Court determined that the jury's verdict awarding zero damages was against the weight of the evidence. However, the Court's holding was based on uncontroverted evidence that established that Neison was involved in a violent automobile accident that caused her head to shatter the rear window of the car, producing trauma in the form of a large lump on the back of her head. *Id*. at 521, 653 A.2d at 637. As a result of the collision, the rear end of Neison's car had been "wiped out," the car looked like an "accordion" and the glasses that Neison had been wearing were found on the trunk of the vehicle. *Id*. at 521-22, 653 A.2d at 637. The uncontroverted testimony

established that Neison had sustained soft tissue injuries, a cervical sprain and a herniated disc in the accident. The Court then stated that in light of this evidence, the jury's decision to award no damages defied common sense, bore no rational relationship to the evidence produced and shocked the conscience of the Court. *Id*. at 523, 653 A.2d 638.

In the case at bar, however, neither of the accidents were violent or severe. Indeed, both of the accidents occurred at speeds less than 5 miles per hour and neither resulted in any structural damage to the vehicles involved. (Lyons depo., pp. 16-17, 19-20; Funk depo., p. 29). In addition, nothing in the car struck Mrs. Boetger nor was she thrown around to strike herself inside the vehicle. (Lyons depo., p. 16; Funk depo., p. 26). Moreover, both Dr. Lyons and Dr. Funk opined that the forces involved in the accidents were consistent with the forces experienced in the activities of daily living, i.e., making a bed, raking leaves, a sneeze, or a slap on the back. (Lyons depo., p. 80; Funk depo., pp. 19).

The remaining cases[4] cited by Plaintiffs are likewise distinguishable since all involve situations in which causation was either uncontested or obvious but damages were denied nonetheless. In the instant case, however, it is not uncontroverted from the evidence that Mrs. Boetger suffered an obvious injury from either of the accidents. Although she complained of soreness following the accidents, the evidence was such that a jury could reasonably find that any strain Mrs. Boetger might have sustained resolved itself in a short period of time. Further, the type of stiffness that was complained about could have been caused by any one of a number of everyday activities. Most importantly, it was uncontested that Mrs. Boetger suffered from a degenerative disc disease. The disease precipitated the need for the surgery undergone by Mrs. Boetger and indeed could reasonably have been responsible for all of her symptoms.

In finding that neither of the accidents were a substantial contributing factor in Mrs. Boetger's injury, the jury obviously concluded that Mrs. Boetger's preexisting degenerative disc disease was the cause of her injury. This finding was reasonable based upon all of the evidence, did not involve a manifest abuse of discretion and did not shock the conscience of the court. Accordingly, Plaintiffs' Motion for New Trial is denied.

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[4] *Fillmore v. Hill*, 445 Pa.Super 324, 665 A.2d 514 (1995), *alloc. denied*, 544 Pa. 609, 674 A.2d 1073 (1996) (both plaintiff's and defendant's medical experts agreed that plaintiff's lower back injury was reasonably related to the accident), *Rozanc v. Urbany*, 444 Pa.Super. 645, 664 A.2d 619 (1995) (x-rays showed some straightening of the cervical spine due to spasms of the muscle), and *Lupkin v. Sternick*, 431 Pa. Super. 300, 636 A.2d 661, (1994), *aff'd*, 542 Pa. 351, 667 A.2d 13 (1995) (substantial evidence of injury following accident, including the need for eight day hospital stay immediately following accident).

ORDER

AND NOW, TO-WIT, this 9th day of April, 1998, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that the Plaintiff's Motion for Judgment Non-Obstante Verdicto and Motion for New Trial are **DENIED** for the reasons set forth in the foregoing OPINION.

BY THE COURT:
/s/ **Shad Connelly, Judge**

REV. ALBERT J. VAZQUEZ, Plaintiff

v.

REV. JAMES E. COLLINS, BRENDA COLLINS AND FAMILY WORSHIP CENTER OF THE ASSEMBLIES OF GOD, Defendants

MOTION FOR JUDGMENT ON THE PLEADINGS

A motion for judgment on the pleadings may only be granted where there are no material facts in dispute and a trial by jury would be unnecessary

MOTION FOR JUDGMENT ON THE PLEADINGS

In considering a motion for judgment on the pleadings, the Court must accept all of the non-moving party's allegations as true, and only consider facts against the non-moving party which he has specifically admitted.

JUSTICIABLE QUESTIONS

In most cases, a secular court can not adjudicate the propriety of a church's decision to terminate a pastor.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 11280- 1996

Appearances: Paul Susko, Esquire
Kenneth Vasil, Esquire
John Mehler, Esquire

OPINION

Anthony, J. August 20, 1998.

This matter comes before the Court on the Defendants' Motion for Judgment on the Pleadings. After considering the arguments of counsel and reviewing the pleadings, the Court will grant the motion for judgment on the pleadings as to the negligent hiring, retention and supervision count but deny it as to the defamation count. The relevant facts and procedural history are as follows.[1]

On September 30, 1997, the Court dismissed most of the counts of the Plaintiff's Complaint but allowed Count II based on defamation and Count IV based on negligent hiring, retention and supervision to stand. On December 12, 1997, all three Defendants filed a joint Amended Answer and New Matter to Plaintiff's Complaint which raised doctrinal issues in defense of the Plaintiff's Complaint. On January 21, 1998, the Plaintiff filed his Reply to New Matter and the pleadings were completed.

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[1] In its September 30, 1997 Order and Opinion, the Court set out the procedural and factual history of the case up to that time. Thus, the Court will only recite subsequent history.

During the above time frame the Plaintiff propounded discovery as to all three Defendants. On March 3, 1998, the Defendants jointly filed one motion for protective order and Reverend Collins simultaneously filed a separate motion for protective order. The Defendants also filed the current motion for judgment on the pleadings. At an earlier oral argument on the motions for protective order, the Court excused the Defendants' duty to respond to discovery until after the Court had made its ruling on the motion for judgment on the pleadings.[2]

The Court will now address the motion for judgment on the pleadings. A motion for judgment on the pleadings may only be granted where there are no material facts in dispute and a trial by jury would be unnecessary. *Pennsylvania Financial Responsibility Assigned Claims Plan v. English*, 664 A.2d 84 (Pa. 1995). The Court must accept all of the non-moving party's allegations as true and only consider facts against him which he has specifically admitted. *Sejpal v. Corson Mitchell, Tomhave & McKinley, M.D.'S., Inc.*, 665 A.2d 1198 (Pa.Super. 1995).

The Court will first address the defamation count. The Defendants state that any defamatory comments that are alleged were either not made or were privileged. The Defendants do raise doctrinal issues but all of these issues are raised in connection with their assertion that any statements made were either true or priviliged. Therefore, the factual issues in this count do not involve doctrine but only involve whether statements were made, whether such were true or false, whether they were made with malice and whether they were privileged. Privilege is a legal doctrine that can only be decided by using secular legal principles even if the privilege involves religion such as the priest-penitent privilege. Consequently, as stated earlier this Court does have jurisdiction of this claim. *Opinion and Order*, September 30, 1997, p. 7.

In relation to Count IV, the Defendant's argument emphasizes that secular courts can not adjudicate the claims of negligent hiring and retention of a pastor. It is true that in most cases the decision to hire and fire a pastor is a religious decision, per se. *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991).

However, the complaint also alleges negligent supervision. A claim of negligent supervision may be justiciable depending on the underlying claim. *See Podilinski v. Episcopal Diocese of Pittsburgh*, 23 D. & C. 4th 385, 401, 416 (*supplemental memorandum opinion*) (Armstrong County, 1995); *See also*, *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993). If the underlying tort, for example sexual abuse, supporting the allegations of negligent supervision is not one which the defendant justifies on the

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[2] The motions for protective order did not address the substance of the discovery but asked the Court to stay discovery until the Defendants' motion for judgment on the pleadings could be ruled on.

basis of religious doctrine, then the secular court can adjudicate the claim. *Moses v. Diocese of Colorado* at 321.

The Defendants assert that the Plaintiff alleges that the Defendant Center was negligent in allowing Reverend Collins to wrongfully dismiss the Plaintiff. This characterization of the complaint is accurate. The Plaintiff's complaint creates an issue as to whether the Court has jurisdiction to decide whether the dismissal of the Plaintiff was improper.

As the Court stated earlier, the decision of whether or not to retain a pastor is essentially a religious decision, per se. The decision to not retain, in other words to dismiss, a pastor as in the Plaintiff's situation is not a justiciable question. *See Opinion and Order*, September 30, 1997, p. 6-7 (discussing why secular courts can not adjudicate breach of contract actions by pastors against churches); *See also, Opinion and Order*, September 30, 1997, p. 10 (discussing and citing cases which have found that civil rights claims brought by pastors against churches are not justiciable because of the "deference rule"). Thus, the Court can not adjudicate whether it was wrongful for the Center to dismiss the Plaintiff. Therefore, Plaintiff is legally prevented from proving the underlying claim of damages in his negligent hiring, retention and supervision cause of action. Without a provable claim of damages, it is irrelevant whether the Center was negligent in hiring, retaining and supervising Reverend Collins.

In order to make a claim for negligence a party must prove a duty, a breach of the duty, and that the breach was the proximate cause of damages. *Orner v. Mallick*, 527 A.2d 521 (Pa. 1987). In this case, the Center's duty would be to properly hire, supervise and retain its staff. The breach would be the Center negligently retaining and supervising Reverend Collins. The cause element would be that the negligent supervision and retention of Reverend Collins caused the Plaintiff's wrongful termination. The damages would be those arising from the wrongful termination. However, this Court is not permitted to determine whether the Plaintiff's termination was wrongful because the Center has pled that the dismissal was based on religious doctrine. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976); *Moses v. Diocese, supra; Fraser v. The Salvation Army*, Docket # 96-8691 (E.D.Pa. Jan. 14, 1998), 1998 U. S.Dist. LX209.

The Plaintiff may argue that this is only a pretext defense by the Center to avoid his claim. However, at least one other court has ruled that pleading a doctrinal defense is enough to invoke the "deference role" because to even decide whether the defense pled is a pretext would require the court to inquire into the validity of religious doctrine, which it can not due [sic] under the "neutral principles" approach. *Scharon v. St. Luke's Episcopal Presbyterian Hospitals, supra; Contra, DeMarco v. Holy Cross High School*, 4 F.3d 166 (2nd Cir. 1993). This Court agrees with the reasoning in *Scharon* and will follow it in this case. *See Serbian Eastern Orthodox*,

supra; Fraser v. Salvation Army, supra.

More importantly, even if there was an improper motive it would still be a complete defense to the Plaintiff's claim if the Center could prove that the Plaintiff did not fulfill his duties. Such duties included being a "Christ-like example". This defense was not available in the cases involving the Age Discrimination Act which is where the pretext inquiry has been allowed on a limited basis by at least one court. *DeMarco, supra.* The determination of whether the Plaintiff breached the contract would necessarily involve "excessive entanglement" with religion because it would involve "inquiry into ecclesiastic questions". *Serbian Eastern Orthodox, supra; Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971); *Presbytery of Beaver-Butler v. Middlesex*, 489 A.2d 1317 (Pa. 1985) U.S. *cert. denied* 474 U.S. 888; *See Opinion and Order*, September 30, 1997, p. 6-7; *See also, Gaston v. Diocese of Allentown*, Docket # 3457 Phil. 1997, (Pa.Super. April 20, 1998), 1998 Pa.Super. LX 639, *slip. opinion.*

In summary, the Court can not adjudicate the propriety of the Center's decision to terminate the Plaintiff. Therefore, the Plaintiff as a matter of law can not prove that any negligent actions by the Center caused him damages.

In conclusion, the Court will allow the claim for defamation to go forward but dismiss the claim for negligent hiring, supervision and retention as currently pled.

ORDER

AND NOW, to-wit, this 20 day of August, 1998, it is hereby ORDERED and DECREED that the Defendants' Motion for Judgment on the Pleadings is GRANTED as to Count IV, Negligent Hiring, Retention and Supervision, but DENIED as to Count II, Defamation. The Defendants shall have 30 days to file responses or objections to the Plaintiff's discovery requests.

BY THE COURT:
/s/ **Fred P. Anthony, Judge**

COMMONWEALTH OF PENNSYLVANIA

v.

TERRY M. KANTOROWSKI

CRIMINAL LAW/DISCRETIONARY ASPECTS OF SENTENCING

A substantial question that a sentence was inappropriate under the sentencing code which would entitle the defendant to appellate review is not found in the defendant's claim of disparity in sentencing between himself and co-defendants where the Commonwealth did not seek a robbery conviction with a mandatory minimum sentence of five years against the co-defendants, where the co-defendants did not participate as principals in the robbery, and where the co-defendants cooperated with investigating officers while the defendant did everything he could to avoid apprehension.

Assuming the defendant properly preserved a challenge to his sentence, it was not an abuse of discretion to impose a sentence of 1-1/2 to 3 years incarceration on a charge of conspiracy to commit robbery to be served consecutive to the mandatory minimum sentence for robbery and a five-year period of probation to be served consecutive to both sentences of incarceration where the sentences do not exceed the sentencing guidelines, where the crimes were the product of extensive planning based upon inside information, the crime involved the use of a gun to terrorize people (including holding the gun to the manager's head), and where the defendant fled to Florida and enjoyed the proceeds of the crime, evading capture for almost two years. Weighing the defendant's lack of prior record, age and potential against the nature of the crime and its impact upon the community, there was neither an abuse of discretion nor an excessive sentence.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION No. 432-1998

Appearances: Elliot Segel, Esquire for Appellant
Elvage Murphy, Esquire, Assistant District Attorney

OPINION

On May 11, 1998, Appellant pled guilty to Count 1, Robbery; Count 2, Conspiracy to Commit Robbery; Count 3, Theft; Count 4, Receiving Stolen Property; and Count 5, Unlawful Restraint.

On June 18, 1998, Appellant was sentenced to 5 to 10 years incarceration on Count 1; 1 1/2 to 3 years incarceration on Count 2 to be served consecutive to Count 1; and 5 years probation on Count 5, to be served consecutive to Count 2. Counts 3 and 4 were merged with Count 1.

Appellant filed a Motion to Modify Sentence on June 22, 1998, which

was denied by Order of June 23, 1998.

Appellant filed a Notice of Appeal on July 15, 1998, and a Statement of Matters Complained of on Appeal on July 29, 1998. This opinion will address the issues raised in said Statement.

Appellant first argues:

"The court failed to properly consider and balance the rehabilitative needs of the defendant, an individual with no prior juvenile or adult criminal arrests and an exemplary background, as evidenced by the numerous character letters presented to the court at sentencing."

"The court failed to appreciate that an aggregate sentence of 5 to 10 years imprisonment which would have resulted from concurrent rather than consecutively imposed sentences, fully serves the rehabilitative needs of the defendant and the protection and other interests of the community, and that therefore any aggregate sentence in excess of 5 to 10 years is excessive on both of these accounts..."

Appellant's arguments attack the discretionary aspects of his sentencing. To obtain appellate review of the discretionary aspects of a sentence, Appellant must present a "substantial question"[1] that the sentence was inappropriate under the sentencing code, *Com. v. Hlatky,* 626 A.2d 575 (Pa.Super. 1993), appeal denied 644 A.2d 1200, or that the sentence violates fundamental norms underlying the sentencing process. *Com. v. Reading,* 412 Pa.Super. 239, 603 A.2d 197 (1992). An argument that the sentence was unreasonable given the mitigating factors is essentially a claim the sentencing court did not properly consider and/or weigh certain factors. Such a reason does not state a substantial question permitting appellate review of the discretionary aspects of a sentence. *Com. v. Jones,* 418 Pa.Super. 93, 106, 613 A.2d 587, 590, alloc. dn. 629 A.2d 1377 (1993). An argument concerning the weight a sentencing court gives to legitimate sentencing factors, such as Appellant's rehabilitative needs, does not raise a substantial question. *Com. v. Canfield,* 639 A.2d 46, 49 (Pa.Super. 1994). Further, Appellant's challenge to the consecutive sentences imposed does not raise a substantial question reviewable on appeal. *Com. v. Gaddis,* 639 A.2d 469, 470 (Pa.Super 1995). Whether to impose sentences concurrently or consecutively is within the discretion of the sentencing court. *Com. v. Dalberto,* 648 A.2d 16, 22 (Pa.Super. 1994), alloc. dn. 655 A.2d 983.

Appellant further attacks the discretionary aspects of his sentence in arguing:

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[1] "Allowance of appeal may be granted at the discretion of the appellate court where it appears there is a substantial question the sentence imposed is not appropriate under this chapter." 42 Pa.C.S.A. §9781(b).

"The sentence imposed, as compared to the sentences imposed for co-defendants Angela Klinzing and Gregory Lichtarski, is contrary to the stated purposes of the Pennsylvania Sentencing Guidelines which is to make criminal sentences more rational and consistent, to eliminate unwarranted disparity in sentencing, and to restrict unfettered discretion given to sentencing judges...As regards Mr. Lichtarski, the appellant contends that the apparent reason offered by the Court for being more lenient with Mr. Lichtarski finds no justification in the Sentencing Code or Sentencing Guidelines. One of the victims in this case was a sister of Mr. Lichtarski who was an employee at the Burger King where the crimes occurred. Her's was one of the victim impact statements which the sentencing judge specifically cited at the appellant's sentencing as justification for the sentence imposed .... One if not the most important reason cited by the sentencing judge for imposing a much more lenient sentence against Mr. Lichtarski was the fact that his sister, this same victim, had written a letter forgiving her brother, the co-defendant Lichtarski. Thus, the sentencing court came to the unusual result, as indicated by the message sent from these sentences, that a criminal defendant "A" is justified in getting a more lenient sentence than co-defendant "B" so long as that criminal defendant "A" inflicts crimes against immediate family members who later forgive him..."

Appellant's argument is grounded on the false premise of an unwarranted disparity in the sentences imposed on two co-defendants. Appellant deceptively portrays a more lenient sentence was imposed on one co-defendant based primarily on the forgiveness of one of the victims-the co-defendant's sister. Appellant's position is unsupported by the record.

There are at least three significant factors distinguishing Appellant's sentence from the sentences imposed on co-defendants Angela Klinzing and Gregory Lichtarski. First, the Commonwealth, in its unfettered discretion, did not seek a conviction for robbery imposing a mandatory minimum sentence of five years against Klinzing and Lichtarski. Appellant pled guilty to robbery with full knowledge that at a minimum he would go to jail for five years.

Secondly, unlike Appellant, Klinzing and Lichtarski did not don a ski mask, enter the Burger King, and actually terrorize the victims. Appellant actively participated as a principal in committing the robbery and his conduct has inflicted long-term trauma on all of the victims.

Thirdly, Klinzing and Lichtarski cooperated with the investigating officers by giving incriminating statements, identifying the co-defendants, and assisted in locating the others, including Appellant, who were obviously hiding out from the police. Appellant did everything in his power to try and get away with these crimes. Appellant never turned himself in, never had a change of heart, and would still be at large but for the cooperation of Klinzing and Lichtarski. Hence, there are significant

legal and factual reasons accounting for the disparity in sentences imposed in this case. Thus, Appellant has failed to preserve a challenge to the discretionary aspects of his sentence.

Assuming *arguendo* Appellant has properly preserved a challenge to the sentence, such a challenge is nonetheless without merit. "When reviewing a sentence for abuse of discretion, it is only when the sentencing court goes outside the guideline ranges of the sentencing code a reviewing court will presume the sentence imposed is not the minimum sentence recommended by statute; recommended ranges within the sentencing guidelines are minimum sentences consistent with requirements and concerns of the state, victim, and defendant." *Com. v. Hoag*, 445 Pa.Super. 455, 665 A.2d 1212 (1995). In the case sub judice, the sentences did not exceed the sentencing guidelines.

Appellant loses sight of the fact the sentence imposed on Count 1 was the sentence requested by Appellant, i.e. that nothing more than the mandatory minimum be imposed. As Appellant is aware, a sentence twice as long as Appellant's sentence was still within the statutory maximum on Count 1.

Appellant also ignores the guidelines as to the sentence imposed on Count 2. The guidelines in the standard range were from 6 to 18 months, and in the aggravated range up to 24 months. Thus, Appellant's sentence was a standard range sentence. Appellant provides no authority, nor does any exist, for the proposition a standard range sentence is excessive.

The Sentencing Court stated its reasons for Appellant's sentence as follows. The pre-sentence report was reviewed in its entirety. (Sentencing Transcript, 6/18/98, p. 14).[2] The Court presided over the juvenile co-defendant's disposition and heard the victims' input then. S.T., p. 14. The Court also reviewed all of the character letters submitted on Appellant's behalf. S.T., pp. 5, 14.

These crimes were not an impulsive, spontaneous act, but rather the product of extensive planning. S.T., p. 15. Appellant and his co-defendants had inside information regarding when the shift changes occur. S.T., p. 15. They went in the restaurant at a time when there would not be a lot of people but there would be a lot of cash. S.T., p. 15. They secured a gun to carry out their plan. S.T., p. 15. They had ski masks and terrorized people, including holding a gun to the manager's head because it was felt she was not opening the safe fast enough. S.T., p. 15.

Not only did Appellant follow though with this plan, he fled the jurisdiction to Florida and enjoyed the proceeds. S.T., p. 16. Appellant did not come to his senses, realize what he did was wrong, return from Florida and turn himself in but rather did everything in his power to get

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[2] Hereinafter, all references to the Sentencing Transcript shall be S.T.

away with the crime. S.T., p. 16. It is worthy of note that the crimes were committed on January 21, 1996 and the Appellant was not arrested until December 22, 1997, almost two years later.

Appellant's lack of a prior record, age, and his potential as evidenced by the good things he has done in his life were also taken into account. S.T., pp. 16-17. Also considered was the impact this type of crime has on the community and the need to send the message that if you think about getting together with friends and committing a robbery and then actually carrying it out, there will be serious consequences. S.T., p. 17.

"Having been fully informed by the pre-sentence report, the sentencing court's discretion should not be disturbed. This is particularly true where it can be demonstrated that the judge had any awareness of the sentencing considerations, and there we will presume also that the weighing process took place in a meaningful fashion." *Com. v. Devers,* 546 A.2d 18 (Pa. 1988). Thus, Appellant's argument the Court abused its discretion is without merit and should be denied.

For the foregoing reasons, Appellant's grounds for appeal lack merit and should be denied.

BY THE COURT:
/s/ WILLIAM R. CUNNINGHAM, JUDGE

TRUST OF HENRY ORTH HIRT, Settlor
Trust Under Agreement Restated December 22, 1980
With Respect to Susan Hirt Hagen
No. 100-1998

AND

TRUST OF HENRY ORTH HIRT, Settlor
Trust Under Agreement Restated December 22, 1980
With Respect to F. W. Hirt
No. 101-1998

CIVIL PROCEDURE/PRELIMINARY INJUNCTION

Five prerequistites must be established in order for a Preliminary Injunction to be issued:
(1) A strong showing of likelihood of prevailing on the merits in order for a Preliminary Injunction to be issued;
(2) Irreparable Harm;
(3) Stay will not substantially harm other interested parties;
(4) Stay will not adversely effect the public interest;
(5) Activity sought to be restrained is actionable.

CIVIL PROCEDURE - PRELIMINARY INJUNCTION

Allegations of a potential conflict of interest does not sufficiently assert irreparable harm which needs to be abated before a full trial can be held on the merits.

CIVIL PROCEDURE/PRELIMINARY INJUNCTION

The issuance of a stay could cause substantial harm to an interested party if the petitioner knew and agreed upon a date for the annual shareholder's meeting and notices had been sent to all shareholders of record prior to the commencement of petitioner's action and the cancellation of the shareholder's meeting would adversely effect the value of company stock.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHAN' S COURT DIVISION

Appearances:
Lawrence G. McMichael, Esq. &
Roger W. Richards, Esq. for Susan Hirt Hagen
Gregory B. Jordan, Esq. & Richard A. Lanzillo, Esq. for Mellon Bank
Samuel W. Braver, Esq. & S.E. Riley, Esq. for F. W. Hirt
William R. Caroselli, Esquire for Laurel Hirt
John J. Soroko, Esq., Peter Jason, Esq., Roger H. Taft, Esq. & Jan R. Van Gorder, Esq. for Erie Indemnity Co. & Erie Insurance Exchange

OPINION

This case involves a consolidated request by Susan Hirt Hagen, in her capacity as co-trustee of two trusts, to have another co-trustee, Mellon Bank, enjoined from continuing to act as co-trustee until a trial can be held on Mrs. Hagen's request to have Mellon Bank permanently removed

as a co-trustee. After an evidentiary hearing held April 20, 1998, the request for a preliminary injunction is DENIED.

The salient facts begin with the establishment of a trust in 1967 by Henry Orth Hirt, which trust was amended and restated several times, the last time being December 22, 1980. H. O. Hirt died in 1982 whereupon his inter vivos trust begat two separate yet identical testamentary trusts for each of his two children, F. W. Hirt and Susan Hirt Hagen (hereinafter Petitioner).

At the time these two trusts were created, the principal asset was 76.22 percent of Class B stock of Erie Indemnity Company. Class B stock is the voting stock; Class A stock is the non-voting, publicly traded stock of Erie Indemnity Company. Each of the trusts has an equal share of the Class B stock.[1]

The terms of these two trusts are similar and are administered by three co-equal trustees: Petitioner, her brother F. W. Hirt and a corporate trustee, Mellon Bank N.A. The trusts provide that all trustee decisions are made by a majority vote of the trustees. The co-trustees lived relatively harmoniously under this arrangement until several recent developments.

By an amendment to Pennsylvania law effective June 25, 1997, prior restrictions on the banking industry were removed such that banks could fully participate in selling insurance. Since that time, Mellon Bank has actively and aggressively marketed a full line of insurance products, including auto and homeowners insurance. As reflected in the 1997 Annual Statement for the Erie Indemnity Company, approximately seventy-five percent of the revenue generated to the Erie Indemnity Company comes from auto and homeowners insurance. See Petitioner's Exhibit 3. Further, while Erie Indemnity Company does business in ten states, approximately sixty percent of its business is done in Pennsylvania. See Petitioner's Exhibit 3. Likewise, the main concentration of Mellon Bank's banking and insurance business is located in Pennsylvania. See Petitioner's Exhibit 7. Hence Petitioner seeks to have Mellon Bank removed as a co-trustee because Mellon Bank has now become a direct competitor offering the same insurance products as Erie Indemnity Company.

Another recent development was the decision by the nominating committee of the board of directors of the Erie Indemnity Company to not renominate Thomas B. Hagen, husband of Petitioner, to the board of directors of the Erie Indemnity Company. Thomas Hagen is the veritable

[1] The Erie Indemnity Company was formed in 1925 to be the attorney-in-fact for Erie Insurance Exchange, also a Pennsylvania corporation. Erie Insurance Exchange is a reciprocal insurance exchange. The principal business activity of Erie Indemnity Company is the management of the Erie Insurance Exchange. The Erie Indemnity Company is also engaged in the property/casualty insurance business through various subsidiaries in different states.

Horatio Alger of Erie Indemnity Company, having begun his career as a part-time file clerk and eventually serving as the Chief Executive Officer and Chairman of the Erie Insurance Group from 1990 to 1993. He has been a member of the board of directors of the Erie Indemnity Company from 1979 to the present. However, at a meeting of the nominating Committee held March 11, 1998 and as reported to the board of directors of the Erie Indemnity Company on March 19, 1998, the nominating committee stated its unanimous decision that it was not in the best interest of the Company to renominate Mr. Hagen to another term on the board. The final shareholder vote for board directors is set for the annual meeting of the Erie Indemnity Company on April 28, 1998.

The same nominating committee did recommend that Petitioner be re-elected a director of the Company as well as her brother F. W. Hirt. Petitioner has been a member of the board of directors since 1980 and her brother has been a member of the board since 1965. F. W. Hirt concurs in the recommendation of the nominating committee.

Petitioner avers that unless Mellon Bank is enjoined, Mellon will be the tie-breaking vote for the trustees bloc of votes at the shareholders meeting on April 28, 1998. As such, Mellon Bank will be voting with F. W. Hirt to accept the recommendation of the nominating committee thereby removing her husband, Thomas B. Hagen, from the board of directors.

It is further Petitioner's position that she is not in good health for stress-related reasons.[2] Because of her husband's depth and breadth of knowledge of the insurance business and the operation of Erie Indemnity Company, Petitioner relies on his expertise to serve as a Director. She asserts she will be irreparably harmed if Mr. Hagen is unable to serve on the Board. Neither the law nor the record supports Petitioner's position.

A preliminary injunction is "a most extraordinary form of relief which is to be granted only in the most compelling cases". *Goodies Olde Fashion Fudge Company vs. Kuiros*. 408 Pa.Super. 495, 501, 597 A.2d 141, 144 (1991). In at least one instance, a preliminary injunction has been deemed a "judgment and execution before a trial." *Herman v. Dickson*, 393 Pa. 33, 36, 141 A.2d 576, 577 (1958) .

There are five prerequisites which must be established in order for a preliminary injunction to be issued. According to the Pennsylvania Supreme Court, these requirements are:

1. The Petitioner must make a strong showing that she is likely to prevail on the merits.

2. The Petitioner shows that without the requested relief, she will suffer irreparable injury.

[2] Indeed Susan Hirt Hagen was hospitalized and unable to attend the April 20, 1998 hearing.

3. The issuance of a stay will not substantially harm other interested parties in the proceedings.

4. The issuance of a stay will not adversely affect the public interest.

5. The activity sought to be restrained is actionable.

See *Public Utility Commission Process Gas Consumers Group*, 502 Pa. 545, 552, 467 A.d. 805 (1983); *John G. Bryant. Inc. vs. Sling testing and Repair Inc.*, 471 Pa. 1, 6, 369 A.d. 1164, 1166 (1977) .

The Petitioner has failed to satisfy the second and third requirements. There is no irreparable harm in the case sub judice. In fact, there could be greater harm to Erie Indemnity Company if the preliminary injunction were granted.

Petitioner concedes there is no proof that Mellon Bank in its capacity as co-trustee has been privy to any proprietary information or gained any competitive edge to the benefit of the insurance operations of Mellon Bank. Petitioner has not alleged nor proven any impropriety on the part of Mellon other than Mellon's headfirst dive into the insurance industry. While the Court makes no finding herein whether Mellon's status as a business competitor warrants its removal as co-Trustee, given the past conduct of Mellon as a trustee there is little concern that Mellon will cause any harm to the trust between now and the time of a trial on the removal request. Indeed there are sufficient checks and balances within the trust and the operation of the Erie Indemnity Company by a separate board of directors which inhibit the ability of Mellon to adversely affect the trust assets in the short time before the trial.[3]

Petitioner makes a powerful argument that no actual damage to the Trust need be shown, the "potential" conflict of interest ipso facto creates harm which needs to be removed. However, the purpose of a hearing on a preliminary injunction request is to identify what harm needs to be abated until a full trial can be held on the merits. Petitioner cannot identify any such harm between now and the time of the trial other than the market forces at work in the insurance business, which trend(s) will occur regardless of whether Mellon continues as a Trustee until the time of trial. Petitioner's argument is better suited to the ultimate question of whether Mellon should be removed.

The Court is also cognizant that the denial of the preliminary injunction will likely result in a shareholders vote on April 28, 1998 removing Thomas B. Hagen from the board of directors. However, Petitioner does not have an absolute right as a co-trustee or as a beneficiary or as the daughter of H. O. Hirt to be on the board of directors of Erie Indemnity Company. In fact, the trust provides that "at least one of the individual Trustees shall always be a member of the Board of Directors of said Company." See §403 (a) of the First Amendment to the Second Restated

[3] This is not a case where Mellon is the sole Trustee and is the fox guarding the chicken coop.

Agreement, Respondent's Exhibit 11.

Because Petitioner does not have an absolute right to be on the Board, a fortiori her husband does not have a right to be a board member. The Court respects the relationship between the Hagens and Mrs. Hagen's reliance on her husband for his expertise. However, Petitioner cannot lose sight of the fact she remains a member of the board and can continue to provide input into the operations of the company. Also, this damage is not irreparable since the term of office for directors is one year and Mr. Hagen can possibly be reinstated as a Director.

The issuance of a stay in the instant case will or could substantially harm the interest of Erie Indemnity Company. As was known and agreed upon by the Petitioner, the annual meeting for Erie Indemnity Company was set for April 28, 1998. Notices to all shareholders of record went out on April 1, 1998. On April 2, 1998, Petitioner filed the within action. To now cancel the annual meeting after its public announcement can only have one of two effects on the company stock: either investors will be concerned over perceived management problems causing the stock value to go down (which is the most likely scenario) or at best there will be little or no devaluation of the stock. Under no circumstances can it be foreseen that the cancellation of the annual meeting would cause the value of the Company stock to increase. Accordingly, the issuance of a preliminary injunction at this late stage would substantially harm an interested party, that being the Erie Indemnity Company and its shareholders.

Given the above analysis, there is no need to consider the other prerequisites necessary for a preliminary injunction. However, the parties would be wise to consider before the trial of this matter the reaction of H.O. Hirt if he walked into a Mellon Bank lobby as Thomas B. Hagen did recently and saw the prominent display of signs advertising insurance through The Hartford, as depicted in Petitioner's Exhibit #13. Would Mr. Hirt then proceed to the Trust Department in the same building? Obviously the law and the marketplace are different now than when these trusts were formulated. The parties would be well-served to look at the future of the marketplace in determining their respective positions at trial.

ORDER

The Preliminary Objections of Mellon Bank are hereby **DISMISSED**.

Intervenors Exhibits 2 and 3, Respondent's Exhibit 12 and the Affidavit of Frank William Hirt are not admitted into evidence and were not considered by the Court.

For the reasons set forth in the accompanying Opinion, the requests for a preliminary injunction is hereby **DENIED**.

BY THE COURT:
/s/ WILLIAM R. CUNNINGHAM, JUDGE

Dated: April 21, 1998

PRESTA CONTRACTORS SUPPLY, INC., Appellant

v.

SCOTT DIBBLE and B&L WHOLESALE SUPPLY, INC., Respondents

PRELIMINARY INJUNCTION/REQUIREMENTS FOR ISSUANCE

A preliminary injunction is a most extraordinary form of relief which is to be granted in only the most compelling cases.

PRELIMINARY INJUNCTION/REQUIREMENTS FOR ISSUANCE

In order for preliminary injunction to issue: (1) petitioner must make strong showing that he is likely to prevail on the merits; (2) petitioner must show that he will suffer irreparable harm; (3) the issuance of a stay will not harm other interested parties; and (4) the issuance of the injunction will not adversely affect the public interest.

PRELIMINARY INJUNCTION/DAMAGES/PROOF

In order for preliminary injunction to issue, plaintiff must show both actual harm and irreparable harm.

CONTRACTS/RESTRICTIVE COVENANTS

In order for a noncompetition covenant to be enforceable between employee and employer, it must be supported by adequate consideration and must not be overly broad in time, geographic scope, and in the employment it prohibits employee from taking.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION-EQUITY No. 60031-1998

Appearances: Christopher J. Kovski, Esq.
John F. Mizner, Esq.
S.E. Riley, Jr., Esq.

OPINION

On June 10, 1998, Appellant filed a Motion for a Preliminary Injunction to enjoin Scott Dibble (hereinafter "Dibble") from working for B & L Wholesale Supply (hereinafter "B & L"), a competitor in the wholesale building materials business. On June 23, 1998, an evidentiary hearing was held on this Motion. By Order dated June 30, 1998, Appellant's Motion was denied. The Appellant filed an Appeal on July 21, 1998. This Opinion is in response to the Statement of Matters Complained of on Appeal filed by Appellant.

FACTUAL HISTORY

Dibble worked 9 1/2 years for B & L as a driver, dispatcher, inside salesperson, and assistant branch manager before beginning his employment with Appellant. On April 16 and/or 17, 1996, Appellant and Dibble orally discussed the terms of Dibble's employment with Appellant.

On April 22, 1996, Dibble began working for Appellant and signed what purports to be an employment agreement containing a restrictive covenant. The covenant which Appellant seeks to enforce herein would restrict Dibble for a period of three years following the termination of his employment from working in any capacity for Appellant's competitors in the geographic area served by the Appellant.

On June 5, 1998, Dibble informed Appellant he intended to resign his position and return to B & L. On June 9, 1998, Appellant notified Dibble he was suspended from employment. On June 10, 1998, Appellant filed a complaint seeking preliminary and permanent injunctive relief.

DISCUSSION

A preliminary injunction is "a most extraordinary form of relief which is to be granted only in the most compelling cases." *Goodies Olde Fashion Fudge Company v. Kuiros*, 408 Pa. Super. 495, 501, 597 A.2d 141, 144 (1991) . Because a preliminary injunction has been deemed a "judgment and execution before a trial", see *Herman v. Dickson*, 393 Pa. 33, 36, 141 A.2d 576, 577 (1958), an injunction should be issued only in urgent circumstances to prevent an injury which cannot be compensated for by damages. See also *Maritrans v. Pepper Hamilton and Scheetz*, 529 Pa. 241, 602 A.2d 1277 (1992).

The Pennsylvania Supreme Court has established the following criteria for the issuance of a preliminary injunction:

1. The petitioner must make a strong showing that he/she is likely to prevail on the merits;

2. The petitioner must show that without the requested relief, he/she will suffer irreparable harm;

3. The issuance of a stay will not substantially harm other interested parties in the proceeding; and

4. The issuance of an injunction will not adversely affect the public interest.

Public Utility Commission v. Process Gas and Consumers Group, 502 Pa. 545, 552, 467 A.2d 805 (1983).

In the case sub judice, Appellant has not satisfied the first two prongs of the above test. There are legitimate issues of fact and law surrounding the terms of Dibble's employment with Appellant. In addition, Appellant did not establish any actual harm, let alone any irreparable harm requiring an injunction. Any damages suffered by Appellant are recoverable in an action at law.

As to the merits of Appellant's case, it is questionable whether the restrictive covenant not to compete is enforceable. While there is no question Dibble signed a written employment agreement with Appellant, it appears the document used was a document Appellant had previously prepared for employees prior to Dibble's arrival. According to Louis Presta, President of Presta Contractor's Supply Inc., prior to hiring Dibble,

Presta had certain employees sign covenants not to compete for which separate consideration was paid to each employee. It appears the same document was then used with Dibble, although some of its terms were inapplicable.[1] There was no separate consideration paid to Dibble for a covenant not to compete. Unfortunately, the written "employment contract" raises as many questions as it answers.

There are other legitimate issues regarding whether the covenant not to compete was overly broad in time, geographical scope and in the employment it prohibits Dibble from taking. Although the agreement talks about protectable trade secrets, there was no evidence presented Appellant possessed any trade secrets or that Dibble misappropriated any trade secrets. Dibble appears to be using sales techniques common to the field and is likely not using protectable trade secrets of Appellant's, if any exist.

The Court also takes into consideration the equities involved in that Appellant has suspended Dibble's employment with Appellant. The Court further notes Dibble is the primary wage-earner for his wife and four children. Finally, the Court cannot overlook the fact Dibble generated significant revenue for Appellant such that Appellant has greatly profited from Dibble's services.[2]

Given the foregoing concerns, Appellant has not made a strong showing that it will prevail at the time of trial.

Appellant also failed to establish the existence of any irreparable harm suffered in the absence of an injunction. In fact, Appellant's own witnesses cannot show the existence of any actual harm. When asked directly, Louis Presta (President) and Tim Presta (Vice President) could not cite any loss of business attributable to Dibble. While each suspected that over time Appellant would lose business to B & L through Dibble, their suspicions did not form the basis for irreparable harm. Neither witness could identify any current customer of Appellant that Dibble had approached on behalf of B & L, or used trade secrets or other confidential information obtained during his employment to compete with Appellant in violation of any restrictive covenant. Accordingly, Appellant has not suffered any actual harm yet nor can it demonstrate any irreparable harm requiring the issuance

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[1] For example, the written document recognizes the employee had performed services for employer "for a period of time" which clearly Dibble had not done at the time the agreement was executed.

[2] Appellant's witnesses testified Dibble generated approximately 1.4 million dollars in annual sales having on average a profit margin of 25%. Hence, in exchange for a salary of approximately $35,000-40,000 per year, Dibble generated about $300,000 in profit per year for Appellant.

of an injunction. At best, Appellant is left with an action at law to recover any damages caused by Dibble.

Based on this record, a preliminary injunction is surely not warranted.

BY THE COURT:
/s/ WILLIAM R. CUNNINGHAM, JUDGE

Dated: August 18, 1998

NANCY F. MOIR

v.

ROBERT G. MOIR

EQUITABLE DISTRIBUTION

Factors set forth at 23 Pa.C.S. §3502(a); paramour's contribution to plaintiff's living expenses included in her disposable income; no credit to defendant for premarital cash gift to both parties used to purchase marital residence; plaintiff given first opportunity to refinance marital home which is children's principal place of residence

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA FAMILY COURT DIVISION NO. 10172- 1997

Appearances: Edward J. Niebauer, Esq., for Plaintiff
John P. Eppinger, Esq., for Defendant

OPINION AND ORDER

Domitrovich, J., May 11, 1998

In light of the opinion dated April 20, 1998 and upon further hearing, this Court now considers the issue of equitable distribution of the marital estate. Based upon the recommendation of the Master, an examination of the record, and stipulations of the parties, the Court makes the following findings of fact:

1. The attorney of record for the Defendant accepted service of the Complaint in Divorce on January 22, 1997.

2. The parties to this action were married on April 28, 1990 in Pomton Plains, NJ.

3. Neither party to this action was previously married.

4. In February of 1993, the parties purchased a home located at [omitted], Erie, Pennsylvania. The Plaintiff continues to occupy this residence. The parties separated on December 31, 1996, and the Defendant has resided at [omitted], Jamestown, New York, since. The residency requirements of the Divorce Code are satisfied.

5. The Plaintiff's date of birth is April 3, 1968, and she is unemployed. The Defendant's date of birth is September 5, 1962. He is employed as a truck driver by C.A. Curtze Company.

6. There are three children of this marriage: Aaron Robert Moir (dob 2/4/90), John Gould Moir (dob 7/18/91), and Lindsay Alexis Moir (dob 6/17/93).

7. Neither party to this action has any affiliation with the Armed Forces of the United States of America.

8. No previous actions in divorce or annulment have been brought by either party against the other.

9. The parties possessed the following assets at the time of Master's Hearing:

[omitted]

10. The parties owe the following debts:

[omitted]

11. The parties stipulated that a total of One Thousand Six Hundred Twenty and no/100 ($1,620.00) Dollars was paid by Defendant toward the second mortgage on the home. The parties also stipulated that the balance owed on the second mortgage, specifically Two Thousand Nine Hundred Sixty-two and 70/100 ($2,962.70) Dollars, was paid by Plaintiff extinguishing the existing mortgage. At the time of separation, the balance on the second mortgage was Four Thousand Two Hundred Forty-seven and 54/100 ($4,247.54) Dollars.

12. The parties stipulated that Plaintiff has made the payments on the first mortgage on the home amounting to Nine Thousand One Hundred Twenty and no/100 ($9,120.00) Dollars.

Based on the above findings, the marital estate is defined as follows:

[Marital Residence] (9/1/97)	$120,000.00	
First mortgage (4/30/97)	- 52,053.40	
Net Value		$67,946.60
Defendant's IRA account (marital portion)	1,323.21	
Defendant's 401K		8,608.03
Harley Davidson stock (increase)		24.00
Paragon Federal Credit Union		59.49
Personal property in Wife's possession		3,500.00
Enumerated personal property subject to distribution		830.00
1987 Ford Escort		500.00
1984 Plymouth Voyager		+1,000.00
Total marital estate (not including credit card debt and debt owed to children)		$83,791.33

In formulating an equitable distribution scheme, the Court must consider all relevant factors. These factors, outlined in 23 Pa.C.S. 3502(a), include:

(1) The length of the marriage.

(2) Any prior marriage of either party.

(3) The age, health, station, amount and source of income, vocational skills, employability, estate, liabilities and needs of each of the parties.

(4) The contribution by one party to the education, training or increased earning power of the other party.

(5) The opportunity of each party for future acquisitions of capital assets

and income.

(6) The source of income of both parties, including but not limited to, medical, retirement, insurance or other benefits.

(7) The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker.

(8) The value of the property set apart to each party.

(9) The standard of living of the parties established during the marriage.

(10) The economic circumstances of each party, including federal, state and local tax ramifications, at the time the division of property is to become effective.

(11) Whether the party will be serving as the custodian of any dependent minor children.

The parties in this action were married for a period of approximately six (6) years. Neither party had been married previously.

The Plaintiff is thirty (30) years old and was unemployed at the time of the Master's Hearing. She has a G.E.D. and no other advanced or technical education (Master's Tr. 24-26). Plaintiff's work experience is limited, having worked as baby sitter, a deli worker, and an exotic dancer (Master's Tr. 21-24). The Plaintiff's income at the time of the Master's Hearing included the following: Eight Hundred ($800.00) Dollars per month as child support; Three Hundred Fifty ($350.00) Dollars per month alimony pendente lite; One Hundred Seventy-two ($172.00) Dollars per month in food stamps and Two Hundred ($200.00) Dollars per month in support for a child from a previous relationship, and a Two Hundred Fifty ($250.00) Dollar per week contribution by a paramour who resides in the [Marital Residence] property (Master's Tr. at 26, 33).

The Defendant is thirty-five (35) years old and is currently employed by the C.A. Curtze Company as a truck driver. He is a high school graduate with no other advanced or technical education (Master's Tr. 95). Defendant has held numerous positions of employment prior to working his present employer (Master's Tr. 95-96). In the calendar year of 1996, Defendant had gross income of Thirty-nine Thousand Five Hundred Forty-seven ($39,547.00) Dollars with a net monthly income of Two Thousand Five Hundred Sixty-Six ($2,566.00) Dollars (Master's Tr. 109).

There are three children born of this marriage, Aaron, John and Lindsey. All three children have their principal place of residence with the Plaintiff.

Upon the entry of this order, Plaintiff will lose the alimony pendente lite payment that she has been receiving totaling Three Hundred Fifty ($350.00) Dollars per month. Her disposable monthly income will be Two Thousand One Hundred Seventy-Two ($2,172.00) Dollars per month.

Child support	$800.00
Food stamps	172.00
Support for child from prior relationship	200.00
Paramour's contribution	+1,000.00
Total	$ 2,172.00

Upon the entry of this order, Defendant will have disposable monthly income in the amount of One Thousand Seven Hundred Sixty-Six ($1,766.00) Dollars per month.

Monthly wages	$2,566.00
Child support payment	- 800.00
Total	$ 1,766.00

The Defendant will further have access to health insurance and retirement benefits through his employer, while the Plaintiff will be responsible to pay for her own benefits.

During the course of the marriage, Defendant was the main source of income for the parties while the Plaintiff worked as a homemaker and neither party received any education or training resulting in an increase in earning power. Neither party has dissipated any marital assets. The parties together received substantial sums of money as gifts toward the purchase of the marital residence. Because these amounts were gifts to both parties as a unit, the Court finds that both parties made equal contributions to the acquisition, preservation, and appreciation of the marital estate.

Defendant, in his memorandum on equitable distribution, contends that he should be given a credit for a Thirty-five Thousand and no/100 ($35,000.00) Dollar gift from Robert Moir, which was used to purchase the marital residence. In support of this contention, Defendant cites the case of *Winters v. Winters*, 355 Pa. Super. 64, 512 A.2d 1211 (1986). *Winters* held that one party to a divorce may be given credit for premarital contributions to an asset that was subsequently converted into marital property. The case at hand is clearly distinguishable from *Winters*. This Court, in its Opinion and Order of April 20, 1998, found that the gift was given to both parties, not just to the Defendant. As such, no contribution is attributable to the Defendant.

As the Defendant is fully employed, and the Plaintiff is currently unemployed with a limited amount of work experience, the Defendant clearly has a greater capacity for the acquisition of property. Neither party has a substantial amount of property set apart from the marital estate and the tax consequences of the final division of property will be negligible.

Based on all relevant considerations and factors, the Court awards to Plaintiff, wife, Fifty-five (55%) percent of the marital estate while the Defendant, husband, will receive Forty-five (45%) percent of the marital

estate.

Both parties have expressed a desire to retain possession of the marital residence and the evidence suggests that both parties may have the ability to refinance the marital home. Although the parties share custody of the three children of the marriage, the principal place of residence for the children is at the [Marital] residence with the Plaintiff. This being the case, the Plaintiff will be given the first opportunity to purchase the [Marital Residence] property.

Earlier in this opinion, the marital estate was defined as having a total value of Eighty-three Thousand Seven Hundred Ninety-one and 33/100 ($83,791.33) Dollars excluding any credit card debt and a debt owed to the children. Fifty-five (55%) percent of this amount totals Forty-six Thousand Eighty-five and 23/100 ($46,085.23) Dollars. The following items of marital property shall be awarded to the Plaintiff:

[Marital Residence] (net equity)	$67,946.60
Personal property in possession of Plaintiff	3,500.00
1988 Ford Escort [sic]	+ 500.00
Total	$71,946.60

Since separation, a second mortgage on the house has been extinguished. The balance on that mortgage at the time of separation was Four Thousand Two Hundred Forty-seven and 54/100 ($4,247.54) Dollars. This debt would have been divided on the 55/45 percentage ratio with Plaintiff being responsible for forty-five (45%) percent of the debt. The Plaintiff paid Two Thousand Nine Hundred Sixty-two and 70/100 ($2,962.70) Dollars to extinguish that mortgage which was One Thousand Fifty-one and 31/100 ($1,051.31) Dollars more than her share. As Plaintiff has made an overpayment on the second mortgage, she will receive a credit for that amount in the equitable distribution scheme.

This award will require Plaintiff to make a cash payment to Defendant based on the following calculation:

Total Award to Plaintiff		$71,946.60
55% of Marital Estate	$46,085.23	
2nd Mortgage Overpayment	+ 1,051.31	
Total deductions:		-47,136.54
Cash Payment to Defendant		$24,810.06

Plaintiff shall have a period of sixty (60) days in which to secure sufficient financing to pay in full the first mortgage in favor of Marquette Savings Bank and Twenty-four Thousand Eight Hundred Ten and 6/100 ($24,810.06) Dollars to the Defendant.

The following items of marital property shall be awarded to the Defendant:

Marital Portion of I.R.A.	$ 1,323.21	
401 K		8,608.03
1987 Plymouth Voyager [sic]		1,000.00
Harley Davidson stock value increase		24.00
Paragon Federal Credit Union		59.49
Enumerated Personal Property		830.00
Cash Payment from Plaintiff		+24,810.06
Total		$36,654.79

The total of Thirty-six Thousand Six Hundred Fifty-four and 79/100 ($36,654.79) Dollars represents forty-five (45%) percent of the marital estate less the Plaintiff's credit for overpayment on the second mortgage.

In the event that Plaintiff is unable or unwilling to secure the necessary financing to effectuate the above, the Defendant shall be given the opportunity to purchase the home.

In this instance the above property distribution will be altered. The Defendant shall be awarded the [Marital] residence in lieu of receiving a cash payment from the Plaintiff. Defendant will then be required to make a cash payment to Plaintiff in the amount of Forty-three Thousand One Hundred Thirty-six and 55/100 ($43,136.55) Dollars which effectuates the fifty-five (55%) percent distribution and gives Plaintiff credit for the second mortgage overpayment. Should Plaintiff elect not to refinance the home, Defendant shall have a period of sixty (60) days to secure sufficient financing to pay the first mortgage in favor of Marquette Savings Bank in full and make a cash payment. These figures coupled with the other property distributed above will effectuate the 55/45 percentage ratio of equitable distribution.

In the event that neither Plaintiff nor Defendant secure sufficient financing to effectuate the above on the one hundred twenty-first (121st) day of this Court's Order, the [Marital Residence] property shall be listed with a mutually agreeable real estate broker, at a price recommended by said broker. Upon the sale of the subject property, all necessary and reasonable costs of sale shall be paid. The first mortgage obligations in favor of Marquette Savings Bank shall be paid in full. The next Ten Thousand Eight Hundred Seventy-two and 94/100 ($10,872.94) Dollars shall be paid to Plaintiff. Any remaining balance shall be divided so that Plaintiff receives fifty-five (55%) percent of the remainder with Defendant receiving forty-five (45%) percent of the remainder.

Regardless of which of the above schemes for distributing the marital estate is effectuated, the parties will have a period of sixty (60) days to repay the outstanding marital credit card debt. Defendant will pay Two Thousand Ninety-four and 3/100 ($2,094.03) Dollars toward the

outstanding credit card debt representing fifty-five (55%) percent of the April 1997 balance plus the increase in the balance from that date. Plaintiff will pay One Thousand Three Hundred Seventy-one and 74/100 ($1,371.74) Dollars toward the outstanding credit card debt representing forty-five (45%) percent of the April 1997 balance.

The parties shall also have a period of sixty (60) days to repay the One Thousand Eight Hundred Fifty-six and 50/100 ($1,856.50) Dollar obligation owed to the children. Plaintiff shall pay Eight Hundred Thirty-four and 43/100 ($834.43) Dollars representing forty-five (45%) percent of the debt. Defendant shall pay One Thousand Twenty-one and 7/100 ($1,021.07) Dollars representing fifty-five (55%) percent of the debt.

Plaintiff in this matter has incurred legal fees approaching Two Thousand and no/100 ($2,000.00) Dollars and filed an exception to the Master's recommendation that Defendant not be required to contribute further toward these fees. The Master's recommendation indicated that both parties had incurred substantial legal fees from competent representation (Master's Rpt. at 19). Additionally, pursuant to the Court Order of June 12, 1997, the Defendant was ordered to pay One Thousand and no/100 ($1,000.00) Dollars toward Plaintiff's Attorney fees. The law on counsel fees in Pennsylvania provides that "the purpose of an award of counsel fees is to promote fair administration of justice by enabling the dependent spouse to maintain or defend the divorce action without being placed at a financial disadvantage." *Periberger v. Periberger*, 426 Pa.Super. 245, 283, 626 A.2d 1186, 1206 (1993). In making its decision, the Court has considered the facts of the instant case and relevant factors including the ability of pay, financial resources, the value of services rendered, and the property received in equitable distribution. In light of these considerations and the recommendation of the Master, this Court accepts the Master's recommendation that each party shall be responsible for his or her own Attorney's fees.

The Defendant has been solely liable for Master's fees and stenographic costs in this matter. Based on all relevant considerations, these costs will be now shared by the parties, with Plaintiff being responsible for forty-five (45%) percent of these costs and Defendant being responsible for fifty-five (55) percent.

ORDER OF COURT

AND NOW, to-wit, this Eleventh day of May, 1998, it is hereby **ORDERED AND DECREED** as follows:

1. Nancy F. Moir and Robert G. Moir are permitted to praecipe to be divorced from the bonds of matrimony.

2. The following items of personal property are found to be the non-marital property of the Defendant:

Ryobi table saw
Elgin boat motor
Antique dresser
Fishing poles and lures
Two sleds
Unicycle
Camera (35mm), flash and zoom lens
Watches
Pocket tool box
Pinewood derby cars
Sailboat
Television (19" color)
JVC VCR (2-head)
Black & Decker cordless drill
One pair of ice skates
One air conditioner

To the extent that the Plaintiff has physical possession of any fishing poles and/or lures, they are to be returned to the possession of the Defendant within twenty (20) days of the date of this Order.

3. The following items of property are awarded to and shall become the sole property of the Plaintiff:

Personal property located at [Marital Residence]
1988 Ford Escort automobile [sic]

4. The following items of property are awarded and shall become the sole property of the Defendant:

IRA account
401K plan
1987 Plymouth Voyager automobile [sic]
Harley Davidson stock
Paragon Federal Credit Union account
Personal property defined in the attached Opinion

5. The [Marital Residence] shall become the sole property of the Plaintiff, PROVIDED HOWEVER that, within sixty (60) days of the date of this Order, the Plaintiff shall secure sufficient financing to pay in full the first mortgage in favor of Marquette Savings Bank, and to pay the sum of Twenty-four Thousand Eight Hundred Ten and 6/100 ($24,810.06) Dollars to the Defendant.

6. In the event the Plaintiff is unable or unwilling to effectuate the provisions of the foregoing paragraph, the Defendant shall be given a period of sixty (60) days in which to secure sufficient financing to pay in full the first mortgage in favor of Marquette Savings Bank, and to pay the sum of Forty-three Thousand One Hundred Thirty-six and 55/100

($43,136.55) Dollars to the Plaintiff.

7. In the event that neither party is able or willing to secure financing required to effectuate the above-referenced debt payments, the [Marital Residence] property shall be listed for sale on the one hundred twenty-first (121) day with a real estate broker mutually agreed upon, at a price recommended by said real estate broker. Upon sale of the subject property, all necessary and reasonable costs of sale shall be paid. The first mortgage obligation in favor of Marquette Savings Bank shall be paid in full. The next Ten Thousand Eight Hundred Seventy-two and 94/100 ($10,872.94) Dollars shall be paid over to the Plaintiff. Any remaining balance shall be divided in such a fashion that the Plaintiff shall receive fifty-five (55%) percent of said balance, and the Defendant shall receive the remaining forty-five (45%) percent of said balance.

8. Plaintiff shall pay One Thousand Three Hundred Seventy-one and 74/100 ($1,371.74) Dollars toward the outstanding credit card debt, and Defendant shall pay Two Thousand Ninety-four and 03/100 ($2,094.03) Dollars toward the outstanding credit card debt. Said payments shall be made within sixty (60) days of the date of this Order.

9. Plaintiff shall pay Eight Hundred Thirty-four and 43/100 ($834.43) Dollars toward the debt owed to the children as defined in the above Opinion. Defendant shall pay One Thousand Twenty-one and 7/100 ($1,021.07) toward the debts owed to the children as defined in the above Opinion. Said payments shall be made within sixty (60) days from the date of this Order.

10. Plantiff is not entitled to any further Attorney fees.

11. Any outstanding Master fees or costs shall be shared by the parties, with Plaintiff paying forty-five (45%) percent and Defendant paying fifty-five (55%) percent. To the extent that Defendant has already made payments, Plaintiff shall have sixty (60) days in which to reimburse Defendant for forty-five (45%) percent of that amount.

12. Both parties shall sign any and all documents and/or take any actions required to effectuate the terms of the Order.

13. All other claims are dismisssed.

BY THE COURT:
/s/ Stephanie Domitrovich, Judge

COMMONWEALTH OF PENNSYLVANIA

v.

ERIC HURST

CRIMINAL PROCEDURE/PROBABLE CAUSE

Probable cause exists where criminal activity is reasonably inferred from the totality of the circumstances

CRIMINAL PROCEDURE/ARREST WARRANT

Police officer may make warrantless arrest where felony is committed in officer's presence

CRIMINAL PROCEDURE/SEARCH WARRANT

Warrantless search permitted where defendant establishes no reasonable expectation of privacy

CRIMINAL PROCEDURE/CONSTITUTIONAL RIGHTS

No reasonable expectation of privacy in activities knowingly exposed to public; under facts of this case, no reasonable expectation of privacy in mailbox, where defendant established no ownership or possessory interest

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 679 of 1998

Appearances: Julianne Foltz, Esquire
David G. Ridge, Esquire

OPINION

Cunningham, J.

On February 2, 1998, Eric Hurst was arrested by members of the Erie Police Department for possessing crack cocaine with the intent to deliver, possessing drug paraphernalia and violating a City of Erie ordinance known as Loitering in Aid of Drug Offense. Following a preliminary hearing in which all charges were bound over to Court, Mr. Hurst filed an Omnibus Pre-trial Motion seeking, inter alia, suppression of the cocaine found in a mailbox at the time of arrest. Mr. Hurst contests the validity of his arrest and search arguing there was a lack of probable cause for each action. In addition, Mr. Hurst asserts the police erred in not obtaining an arrest warrant and a search warrant. Each of these arguments will be addressed seriatim.

This case begins with the Erie Police Department responding to a call on February 2, 1998 from a neighbor in the area of the 700 block of East 7th Street in the City of Erie. The neighbor identified Eric Hurst as an individual standing on the sidewalk and/or street selling drugs again. Hurst was described as wearing a gray coat and black pants. Lt. Charles Bowers, who received the neighbor's call, immediately assigned Detectives Michael Nolan and Joseph Kress to investigate.

At approximately 4:00 p.m. on February 2, 1998, the officers began a

surveillance of Mr. Hurst from an unmarked parked car approximately 1/2 block to the east. From this vantage point Detective Kress observed the Defendant for approximately the next 40 minutes.

During this time Detective Kress observed Mr. Hurst on the sidewalk in front of 747 East 7th Street hailing passersby, whether traveling on foot or in a vehicle. Hurst was wearing a gray coat and black pants consistent with the information Lt. Bowers received. On at least two occasions, Mr. Hurst was successful in motioning a car to stop in the middle of the street. On each occasion Mr. Hurst walked up to the vehicle, looked around in a suspicious fashion, engaged the driver in a conversation, placed his hands in his pockets, put his hands into the vehicle, removed his hands and again placed them into his pockets. The vehicle left and Mr. Hurst returned to his position on the sidewalk.

On each of these occasions, the exchange process took less than 30 seconds. After each exchange, Mr. Hurst went to the mailbox on the front porch of 747 East 7th Street and placed his hands inside, keeping them inside briefly. The mailbox was located on an open porch in full view from the public street.

On at least one occasion, Mr. Hurst attempted to hail a vehicle, but the driver continued without stopping. He also engaged in conversation with at least one passerby on foot. To the knowledge of Detective Kress, the 700 block of East 7th Street is a residential, not a commercial, area. In fact, there were no businesses operating on that block of East 7th Street. Also to the knowledge of Detective Kress, the 700 block of East 7th Street has been an area known for a high volume of street level drug trafficking. Further, at that time and place, Eric Hurst did not appear to be engaged in any legitimate business operation (yard sale, kool-aid stand, etc.-keep in mind, this was February in Erie, Pennsylvania!) .

Detective Kress also observed Mr. Hurst drinking from a bottle of liquor that he kept on the front porch of 747 East 7th Street.

While Detective Kress did not see an actual exchange of money for drugs, the constellation of circumstances, when coupled with Detective Kress' experience, led him to conclude Eric Hurst was engaged in the street level sales of illegal narcotics. Detective Kress then radioed uniform officers to effectuate an arrest. In the meantime, Detective Kress continued to surveil the Defendant and again observed him go to the mailbox, reach in and within a few seconds return to his post on the front sidewalk. While the responding uniform officers were arresting Mr. Hurst in front of 747 East 7th Street, Detective Kress went to the mailbox which he observed Mr. Hurst utilizing and observed a cellophane wrapper from a cigarette pack containing what appeared to be crack cocaine. Detective Kress also took into custody the bottle of liquor on the front porch which Mr. Hurst had been consuming.

The test for probable cause to arrest is the "totality of the circumstances" as initially set forth in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct., 2317 (1983) and adopted in Pennsylvania in *Commonwealth vs. Gray*, 509 Pa. 476, 503 A.2d 921 (1985). "Probable cause exists where the facts and circumstances within the officers knowledge are sufficient to warrant a person of reasonable caution in the belief that an offense had been or is being committed." *Commonwealth v. Gibson*, 536 Pa. 123, 130, 638 A.2d 203, 206 (1994). In viewing the totality of the circumstances:

> "We consider all the factors and their total effect, and do not concentrate on each individual element...We also focus on the circumstances as seen through the eyes of a trained officer, and do not view the situation as an average citizen might...Finally, we must remember that in dealing with questions of probable cause, we are not dealing with certainties. We are dealing with the factual and practical considerations of everyday life on which reasonable and prudent men act. This is not the same beyond a reasonable doubt standard which we apply in determining guilt or innocence at trial."

Commonwealth v. Simmons, 295, Pa. Super. 72, 83, 440 A.2d 1228, 1234 (1982), quoting, *Commonwealth vs. Kazior*, 269 Pa. Super. 518, 524, 410 A.2d 822, 824-825 (1979).

When the facts of the instant case are seen through the eyes of Detective Kress as a trained narcotics officer, it is certainly reasonable to conclude Eric Hurst was engaged in the street level sale of narcotics. Detective Kress has been recognized on at least 23 occasions by the Court as an expert in drug trafficking and the Court herein accepts his testimony as a credible explanation for Mr. Hurst's conduct. Besides, there is no other plausible explanation for Mr. Hurst to be indiscriminatingly flagging down cars and people passing by in a residential neighborhood. It should also be noted that "probable cause exists when criminality is one reasonable inference; it need not be the only, or even the most likely inference." *Commonwealth vs. Quiles*, 422 Pa. Super. 153, 167, 619 A.2d 291, 298 (1993).

The most reasonable inference from the circumstances as seen through the eyes of a trained and experienced police officer is that Eric Hurst was engaging in a felony offense, namely the delivery of a controlled substance. As such, Detective Kress did not need to secure an arrest warrant. It has long been the law that a police officer can make a warrantless arrest for a felony committed in his presence. See Pa.R.Crim. P. 101. Accordingly, the Erie Police Department properly effectuated a warrantless arrest of Mr. Hurst.[1]

[1] Assuming arguendo the arrest was for the summary offense of loitering in aid of a drug offense, the police can, under certain circumstances, take a person into custody to effectuate a warrantless arrest for a summary offense. See Pa.R.Crim.Proc. 70 et seq.

Next, Mr. Hurst claims the police did not have probable cause to go into the mailbox, or alternatively should have secured a search warrant. The same probable cause which existed for the arrest of Mr. Hurst also exists for a search of the mailbox. As Mr. Hurst was observed on several occasions going from his sidewalk post to the mailbox, placing his hands inside the mailbox and then returning to the sidewalk, it is reasonable to infer he was using the mailbox as a stash location for his cocaine. He obviously was not checking for any delivered mail. It is noteworthy that Mr. Hurst went to the mailbox after each exchange with the people in stopped vehicles. Accordingly, there was probable cause to believe contraband was located within the mailbox.

Importantly, it is the burden of Mr. Hurst to establish he has a privacy interest in the mailbox subject to protection under the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution. To do so, Mr. Hurst must establish he has a subjective expectation of privacy in the mailbox which society is prepared to recognize as reasonable and legitimate under the circumstances. See *Commonwealth vs. Gordon*, 683 A.d. 253, 256 (Pa. 1996).

Mr. Hurst has failed to establish what, if any, possessory interest he had in the mailbox.[2] The Defendant did not establish he lived at 747 East 7th Street. The record further reflects there were two mailboxes on the porch, neither of which had any identification on them.

Under these facts, the record is not clear as to who owns the mailbox in question. The fact Eric Hurst was using the mailbox as part of an illegal enterprise does not mean he owns the mailbox or has any possessory interest therein. After all, the mailbox could belong to any resident of 747 East 7th Street. On the face of this record the claim to privacy by Mr. Hurst is no greater than any other person in the area. In other words, Mr. Hurst has failed to establish a factual basis for any expectation of privacy in this particular mailbox.[3]

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[2] The Court recognizes Mr. Hurst has standing to contest the search of the mailbox since he was charged with a possessory offense. However it is a separate issue as to whether he has a possessory interest or legitimate expectation of privacy in the mailbox cloaking him with constitutional protection.

[3] To blindly accept any assertion of an expectation of privacy absent any evidentiary basis for it would permit a vast array of people to claim constitutional protection in a diverse number of areas. For example, does an overnight guest at 747 East 7th Street have an expectation of privacy in one of the two mailboxes on the premises? Does any person who visits at 747 East 7th Street have an expectation of privacy in such a mailbox? The hypotheticals could continue ad nauseam, the point being there has to be some threshold showing by the Defendant as to what basis he has to assert an expectation of privacy in a particular area. In the case sub judice, the record is devoid of any such evidence.

Assuming arguendo Mr. Hurst has a possessory interest in the mailbox, its location and his use of it does not create a legitimate expectation of privacy. As previously noted, the mailbox was located on the exterior of the home in full view from the public sidewalk and street. Indeed, Detective Kress could observe Mr. Hurst going to this mailbox from his vantage point one/half a block away.

Detective Kress stated the mailbox was not locked in any fashion, hence others were not excluded from access. Unfortunately, Detective Kress does not recall whether the mailbox had a lid and if so, whether the lid was closed. However, it is Mr. Hurst's burden of proving the legitimacy of his privacy interest in the mailbox, not the Commonwealth's.

To the knowledge of Mr. Hurst, at least once a day for six of the seven days per week (except holidays!), someone from the United States postal service has access to the mailbox. Further, any member of the public who walked up onto the porch, from a young girl selling Girl Scout cookies or a Boy Scout selling Boy Scout sausage or even a political candidate canvassing votes, could access the mailbox. As at least one appellate court has noted, "it is well established that a reasonable expectation of privacy generally does not exist in activities that are exposed to or observable from a vantage point accessible to the public." *Commonwealth v. Rood*, 686 A.2d 442, 447 (Pa. 1996).

The Defendant's activities, including his use of the mailbox, were exposed to the public view and could be observed from any vantage point on the public sidewalk or street. As the United States Supreme Court has aptly stated, "... (t)he police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public. Hence, what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection". *Katz v. United States*, 389 U.S. 347, 351, (1967).

The attempt by Mr. Hurst to claim the mailbox is part of the curtilage of the home must also fail. As noted, Mr. Hurst has not established this was his home or his mailbox, therefore he cannot claim it as his curtilage. Further, curtilage is defined as "the land or structures immediately adjacent to a dwelling or within close proximity thereto, an area which is typically enclosed in some manner by a fence, shrubs, or the like." *Commonwealth v. Rood*, *supra.*, 686 A.2d at 447 citing *United States v. Romano*, 388 F. Supp., 101 (E.D.Pa. 1975). Inherent in the concept of curtilage is some action or measure by a homeowner to preclude the public from viewing a private area. To the contrary in the case sub judice, Mr. Hurst conducted his business in full public view, in fact he was soliciting the public on the street and sidewalk within close proximity of the mailbox. Under these unique circumstances, where Mr. Hurst is conducting his business under the bright light of day in full view of the public, his claim to a legitimate expectation of privacy in a mailbox (for which he has not established any

possessory interest) is unreasonable. Accordingly, there is no constitutional cloak of protection under either the Fourth Amendment of the United States Constitution or Article I, Section 8 of the Pennsylvania Constitution behind which Mr. Hurst can hide to carry out his illegal business.

In reaching this conclusion, particular attention has been given to the facts peculiar to this case, including the nature and extent of Mr. Hurst's conduct. Under no circumstances is this Court condoning the general intrusion into mailboxes by the police (nor has such been a past practice of the police). In other words, there are many instances wherein a citizen may have a legitimate expectation of privacy in a mailbox. Under these circumstances, however, when a person such as Mr. Hurst conducts illegal business in such an overtly public manner, including the public use of a mailbox, he has abandoned whatever expectation of privacy he possesses, or at least reduced that expectation below which society is prepared to recognize as reasonable.

Because Mr. Hurst has not established an expectation of privacy in the mailbox, or one that society is prepared to accept as legitimate under the circumstances, the police did not need a search warrant prior to the retrieval of the cocaine.

For the foregoing reasons, the Motion to Suppress is hereby DENIED.

ORDER

For the reasons set forth in the accompanying Opinion, the Defendant's Motion to Suppress is hereby **DENIED**.

BY THE COURT:
WILLIAM R. CUNNINGHAM, JUDGE

DAVID W. BENNETT and NANCY S. BENNETT, Plaintiffs

v.

EUGENE J. BREW, JR., ESQ. and McCLURE & MILLER, ATTORNEYS-AT-LAW, Defendants

MOTION FOR SUMMARY JUDGMENT/COORDINATE JURISDICTION RULE

Prior denial of summary judgment does not preclude another judge of the same court from granting a subsequent motion for summary judgment where second motion raises intervening changes of fact or law, or issues not raised in prior motion

TORTS/SLANDER

Absolute defense of judicial privilege extends to all participants in judicial process

TORTS

Broad scope of judicial privilege extends to communications in both formal and less formal circumstances

TORTS

Judicial privilege extends to all statements made in the course of judicial proceedings, however false or malicious, whether or not relevant or material to any issue before the Court

PROFESSIONAL RESPONSIBILITY

Rules 1.6 and 3.3 permit attorney to disclose information which may prevent death, substantial bodily harm or substantial injury to others

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 2454-1993

OPINION

Cunningham, J.

The Defendants have filed a Motion for Summary Judgment on the remaining cause of action of Plaintiffs' Amended Complaint, Count 5, Slander. For the following reasons, the relief requested is granted.

FACTUAL and PROCEDURAL HISTORY

For a thorough discussion of the background of this case, incorporated herein is the History of the Case found in the March 31, 1998 Opinion & Order of the Honorable Ernest DiSantis, Jr. The learned Judge DiSantis denied Defendants' February 13, 1998 Motion for Summary Judgment as to Plaintiffs' slander claim stating:

> "While this court recognizes the defense of judicial privilege as set forth in *Binder v. Triangle, Inc.,* 4242 Pa. 319, 275 A.2d 53 (1971), there is a genuine issue of material fact concerning the nature and circumstances of the alleged defamatory statements in this case."

Opinion, p. 6.

As the Defendants' Motion for Summary Judgment on all other claims was granted, the only unresolved matter is Plaintiffs' slander action. On August 27, 1998, Defendants again filed a Motion for Summary Judgment on Plaintiff's slander claim, to which the Plaintiffs have responded.

At first blush, it appeared the Defendants were improperly attempting a second bite of the same legal apple. Indeed, Plaintiffs argue this Court "should not overrule an interlocutory order of another judge of the same court in a case involving an issue previously litigated." Plaintiffs' Brief in Opposition to Motion for Summary Judgment, p. 10, 9/30/98, *citing Sanchez by Sanchez v. Phila. Housing Authority*, 611 A.2d 346 at 348 (Pa.Cmwlth. 1992) . However, the "coordinate jurisdiction rule" provides:

> "When motions differ in kind...the judge ruling on the later motion is not precluded from granting relief even though another judge has denied the earlier motion. The later motion should not be...granted when a motion of the same kind has previously been denied, unless intervening changes in the facts or the law clearly warrant a new look at the question."

Goldey v. Trustees of Univ. of PA, 675 A.2d 264 at 267 (Pa. 1996).

Applying the coordinate jurisdiction rule specifically to summary judgment motions, the Superior Court of Pennsylvania concluded:

> "Prior denials of summary judgment by a court of common pleas judge did not preclude another judge in the same court and the same case from granting a motion for summary judgment where previous summary judgment proceedings did not address issues and facts which were raised in a later motion for summary judgment."

Delmont Mechanical Services, Inc. v. Kenver Corp., 677 A.2d 1241 (Pa. Super. 1996).

After consideration of the pleadings and the relevant case law, this Court is satisfied the Defendants' have offered new and persuasive evidence in support of their Motion not heretofore available to Judge DiSantis such that Summary Judgment on the slander claim is now warranted.

DISCUSSION

In support of the Motion for Summary Judgment, Defendants now offer two separate Memorandums, dated April 29, 1992 and July 21, 1992 generated by Attorney William Kelly, Sr. as counsel for the Plaintiff David Bennett. See Defendant's Motion for Summary Judgment, Exhibits "A" and "B", August 27, 1998. These Memorandums were unknown to the Defendants until Plaintiffs listed them as Exhibits on their pre-trial narrative submitted after the Defendants February 13, 1998 Motion for Summary Judgment and after Judge DiSantis' March 31, 1998 Opinion and Order.

In addition, Plaintiffs have filed an Affidavit of David Bennett dated September 30, 1998 and an Affidavit of Attorney William Kelly, Sr., also dated September 30, 1998, neither of which was available to Judge DiSantis. Drawing from all of these documents as well as the affidavits of Attorneys Brew and Lojewski and construing the facts in a light favorable to the Plaintiffs, there are no material facts at issue precluding Summary Judgment.

The salient, undisputed facts begin with the underlying civil action *David W. Bennett v. Erie Bearings Company, et al*, Docket #2273-A-1990 wherein the present Plaintiffs were represented by Attorney William J. Kelly, Sr. Attorney Eugene Brew represented Erie Bearings Company and Attorney Cathy Lojewski represented defendant George Trost. An Argument was scheduled before the Honorable George Levin for April 24, 1992 on the Plaintiff's request to continue a trial scheduled for April 27, 1992. At the time set for argument, Judge Levin did postpone the trial from Monday April 27, 1992 to Tuesday April 28, 1992. Judge Levin further instructed the parties while assembled to discuss the possible settlement of the case.

Pursuant to Judge Levin's directive, Attorneys Brew, Kelly and Lojewski then discussed a settlement. During the course of these discussions, Attorney Brew expressed to Attorneys Kelly and Lojewski his concern about the Plaintiff David W. Bennett. According to the Amended Complaint filed in this case, Attorney Brew stated:

> "You know this guy (Bennett) is mentally unstable."
>
> "You know (Bennett) has spent a lot of time in Vietnam and I think he was discharged from the Army for being mentally unstable."
>
> "Bennett is dangerous. I'm afraid if the case goes to trial, he (Bennett), will bring a gun into the courtroom and shoot someone."

See Amended Complaint Paragraphs 132 to 134.

While in his Answer Attorney Brew specifically denied making these comments, in his Affidavit Attorney Brew admitted to making statements expressing "my genuine concern as to the safety of all participants . . . should the matter not be settled. . ." See Defendant's Exhibit "C". There is no dispute Attorney Lojewski and Attorney Kelly were present for comments made by Attorney Brew. It remains an open question of fact whether Judge Levin was present and whether these discussions occurred in Judge Levin's chambers or in his courtroom. In any event, it is uncontroverted that Attorney Brew's statements were made only to the lawyers and possibly Judge Levin and not to any third party, including

the Plaintiff David Bennett.[1]

There is a factual dispute as to whether Attorney Brew's comments included a request for a sheriff's deputy to be present at the time of trial. Attorney Brew and Attorney Lojewski recall Attorney Brew's comments to that affect; Attorney Kelly does not recall such a comment nor is it reflected in Kelly's Memorandums. See Defendant's Exhibits "A" and "B".

The Plaintiff argues that summary judgment should be denied because there is a material issue of fact as to whether Judge Levin was present during any of the comments made by Attorney Brew and whether Attorney Brew in fact asked for a deputy sheriff's presence during a trial. The Plaintiff further questions whether Attorney Brew's comments impugned his mental stability and military record and also contends there is a dispute as to where the defamatory statements occurred. All of these factual issues can be resolved in a manner favorable to the Plaintiff yet summary judgment is nonetheless warranted because of the immunity provided by the judicial privilege.

Attorney Brew's comments are protected by an absolute immunity from civil liability for statements made as part of a judicial proceeding. It has long been the law that all participants in the judicial process (judges, lawyers, parties, witnesses etc.) enjoy an absolute privilege from civil liability for all communications "pertinent to any stage of a judicial proceeding". *Binder v. Triangle Publications, Inc.* 442 Pa. 319, 323, 275 A.2d 53, 56 (1971). Section 586 of the Restatement (Second) of Torts provides:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relationship to the proceeding.

Comment (a) to the above section further states:

> The publication of defamatory matter by any attorney is protected not only when made in the institution of the proceedings or in the conduct of litigation before a judicial tribunal, but in conferences and other communications preliminary to the proceedings.

Importantly, the broad scope of this privilege in the eyes of the Pennsylvania Superior Court includes:

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[1] In his Affidavit dated September 30, 1998, Plaintiff concedes he "was not present at the pre-trial conference or settlement conference on April 24, 1992"... but spoke with his attorney shortly thereafter and learned of Attorney Brew's comments.

> "The purpose for which the privilege exists cannot fully be achieved by limiting the privilege to structured or formal proceedings. To permit an attorney to best serve a client, the privilege must be broad enough to include occasions when a client's cause is being advocated under less formal circumstances. Thus, the privilege extends to and includes preliminary demands, as well as informal conferences in negotiations conducted after litigation has been commenced or when litigation is seriously contemplated. It is, on the whole, for the public's interest, and best calculated to serve the purposes of justice, to allow counsel full freedom of speech, in conducting the causes and advocating and sustaining the rights of their constituents, in this freedom of discussion not to be impaired by numerous and refined distinctions."

Smith v. Griffith, 327 Pa. Super. 418, 425, 476 A.2d 22, 25 (1984).

In the case at bar, the dispositive facts surrounding the defamation claim are not in dispute. Attorney Brew does not contest expressing his concerns about the danger of harm Plaintiff posed in the event of a trial. Importantly, Attorney Brew's comments were made during the course of a pre-trial hearing on the Plaintiff's request to continue trial. While there may be a factual dispute as to whether Judge Levin was present for the comments, whether the comments were made in chambers or in the courtroom and whether Attorney Brew requested a sheriff's deputy at trial, there is still no civil liability given the judicial setting. Construing the statements of Attorney Brew in the most expansive fashion favorable to the Plaintiffs, and even assuming the defamatory character of same, the judicial privilege provides immunity. In the words of the Superior Court "where statements are made in the course of judicial proceedings, it is clear that such statements are absolutely privileged, and however false and malicious, they are not libelous." See *Milliner v. Enck*, 709 A.2d 417, 421 (1998).

Interestingly, the Superior Court in *Milliner v. Enck, supra*, at 420-421 also quoted comment (c) of Section 587 of the Restatement (Second) of Torts:

> "It is not necessary that the defamatory matter be relevant or material to any issue before the Court. It is enough that it have some reference to the subject of the inquiry. Thus, while the party may not introduce in to his pleadings defamatory matter that is entirely disconnected to the litigation, he is not answerable for defamatory matter volunteered or included by way of surplusage in his pleadings if it has any bearing upon the subject matter of the litigation. The fact that defamatory publication is an unwarranted reference from the alleged or existing facts is not enough to deprive the parties of this privilege, if the inference itself has some bearing on litigation."

In his Memorandum dated July 21, 1992, Attorney William Kelly, Sr. states:

> "Brew also expressed a fear which Kelly felt was genuine that Bennett might bring a gun into the courtroom and do someone harm."

See Defendant's Exhibit "B"

Obviously Attorney Kelly understood Attorney Brew to be expressing his genuine concern about the safety of participants should the case proceed to trial. Clearly such concerns have "bearing upon the subject matter of the litigation." See Section 587(c) of the Restatement (Second) of Torts.

In the context of a judicial proceeding, an attorney for a party to a civil action must be free to express concerns about the safety of participants to any present or future judicial proceeding. To hold otherwise would leave an attorney, such as Attorney Brew herein, with the Hobson's choice of raising security concerns at the risk of a slander claim or doing nothing, thereby possibly placing a host of people at risk in a court setting. The Pennsylvania Rules of Professional Conduct resolve this Hobson's choice for attorneys in favor of disclosing information candidly which may prevent death or substantial bodily harm or substantial injury to others. See Professional Rules of Conduct 1.6 and 3.3. The judicial privilege rightfully protects the attorney for such action.

In this era of open violence in public buildings, all parties to a judicial proceeding must have the ability to raise security concerns. Hence Attorney Brew's comments, even if false, are within the scope of the absolute privilege protecting participants in a judicial proceedings. As such, the slander claim cannot prevail as a matter of law.

CONCLUSION

For the foregoing reasons, Summary Judgment shall be entered on the remaining count of slander.

ORDER

AND NOW to-wit this 6th day of November, 1998 for the reasons set forth in the accompanying Opinion, the Plaintiff's Motion for Summary Judgment on Count 5, Slander is hereby **GRANTED**.

BY THE COURT:
/s/ WILLIAM R. CUNNINGHAM, JUDGE

KIMBERLY A. CHURCH, Plaintiff

v.

DAVID G. WELCH, Defendant

CHILD SUPPORT

Depreciation and depletion expenses allowed by IRS are not automatically deducted from gross income; Court looks to actual available financial resources

CHILD SUPPORT

In calculation of disposable income, only expenditures necessary to preserve and maintain the business will be deducted from business owner's income

CHILD SUPPORT

Pa. R.C.P. 1910-16-4 "exceptional circumstances" do not extend beyond child's financial needs or parents' relative contributions

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA FAMILY DIVISION DOCKET NO. NS951649 ACCOUNT NO. AA23190/01

Appearances: Stanley G. Berlin, Esq.
James H. Richardson, Esq.

DECISION

AND NOW, this 4th day of September, 1998, after this Court's review of the evidence of record including the testimony elicited at the hearing conducted August 20, 1998, and after considering the memoranda submitted by counsel, this Court issues the following decision.

On August 19, 1998, this Court conducted a de novo hearing relative to the Plaintiff's request for increase in child support and the Defendant's correlative petition for a decrease. Although a number of items are not in dispute, one of the bones of contention is the Defendant's claim for depreciation associated with his auto and boat repair business. The Defendant argues that pursuant to *Labar v. Labar*, 644 A.2d 777 (Pa. Super. 1994) *alloc. granted*, 674 A.2d 673 (Pa.Super. 1996), his claim of depreciation should be accepted by the Court. He argues, *inter alia*, that absent evidence that shows that he attempted to take a blatantly unreasonable amount of depreciation expense, he must prevail. In essence, he argues that unless the Court finds evidence that he was sheltering actual personal income that should have been included in calculating child support, the Court should adopt his computation.

Plaintiff on the other hand attempts to distinguish *Labar*. Relying upon the Superior Court's decision in *Holland v. Holland*, 663 A.2d 768 (Pa. Super. 1995), she argues that depreciation may be deducted from income only if it represents actual cash out-lay. *Id.* at 770. She then concludes that

because only $1,895 represents the actual cash out-lay for 1997, that represents the appropriate depreciation figure. The support counselor accepted that analysis.

Also important to the Court's analysis is the issue of the credibility of the witnesses. The assessment of the credibility of witnesses is within the sole province of the trial court. It falls upon the Court as fact-finder to weigh the evidence presented and assess its credibility. See, *Calabrese v. Calabrese*, 682 A.2d 393, 395 (Pa.Super. 1996). As noted in the footnote, this Court found Mr. Welch's testimony somewhat troubling on the issue of depreciation.[1]

In an attempt to reconcile the various decisions addressing the issue of depreciation, this Court notes the following.

Depreciation and depletion expenses permitted under Federal Income Tax Law without proof of actual loss will not automatically be deducted from gross income for purposes of determining worth of alimony and equitable distribution. In determining the financial responsibilities of the parties to a dissolving marriage, the Court looks to the actual disposable income of the parties. That income must reflect actual available financial resources and not the oft-time fictional financial picture which develops as the result of depreciation deductions. See, *Cunningham v. Cunningham*, 548 A.2d 611, 612-13 (Pa.Super. 1988), *appeal denied*, 559 A.2d 37 (1989). Relative to child support, actual available financial resources are the correct basis for calculation of support obligor's income. See, *Heisey v. Heisey*, 633 A.2d 211 (1993). In *McAuliffe v. McAuliffe*, 613 A.2d 20 (I 992), the Superior Court reaffirmed the proposition that expenditures must be necessary to preserve and maintain the business before they may be deducted in calculating the income of the business owner. Judge Beck in *Labar's* dissenting opinion makes the cogent point:

> Clearly it is reasonable, as the majority states, for a business owner to invest money in the expansion of the business and the improvement of its facilities. However, the business owner, who is

[1] On Mr. Welch's 1997 Form 1040, Schedule C, he lists a depreciation deduction of $4,374. According to the depreciation schedule on the tax return, $1,895 is Section 179 expense and the balance ($2,479) represents purchases made in years prior to 1997, but afforded a depreciation tax write-off for the 1997 calendar year. Plaintiff argues that the $2,479 is not a cash or capital out-lay for calendar year 1997 and should not, therefore, be treated as depreciation. As noted above, this Court found a serious credibility issue relative to the 1997 tax form and Mr. Welch's testimony in that regard. He testified that he "blacked-out" a number of figures which he attributed to his wife's income. This raised a serious question of accuracy and reliability relative to his claims. His failure to disclose all the amounts on the tax form severely depreciates the quality of his testimony.

> also a support obligor, may not improve and expand at the expense of those to whom he or she owes a legal duty of support. That duty comes first and is 'well nigh absolute'. In order to expand or improve the business, the owner may be required to seek other sources of funds, such as bank loans or the owner may have to rely on his or her own resources. However, the law is clear that the overriding limitation is that it is impermissible for the owner to expand or improve the business if it means reducing the support obligations to the family. It is also impermissible for the business owner to increase the equity in the business, to his or her sole advantage, to the detriment of the support obligees.

Labar, supra. at 786-787.

Paraphrasing Judge Beck's analysis, this Court agrees that there is inherent wisdom in the principle enunciated in *McAuliffe*. It provides a family with a stable source of support and prevents a business person from using an accounting mechanism in order to unilaterally reduce the support obligations. As Judge Beck correctly points out:

> Under the *McAuliffe* standard, the business person can deduct reasonable sums to maintain and preserve the business. To expand or improve it, the business person/support obligor must rely on funds other than those necessary to support the family. The *McAuliffe* principle recognizes the need of maintaining a business as the source of family support without sacrificing reasonable support to the family.

Id.

After this Court's review, it rejects Mr. Welch's testimony in regard to depreciation, finding that testimony not credible. It follows, then, that the Court is not persuaded by his claim that the depreciation deduction should be $4,374. It does find, however, the evidence of record supports a finding of $1,895.

Turning to an unrelated issue, Plaintiff argues that the 10% upward adjustment is implicitly authorized under the facts of this case under the authority of Pa.R.C.P. 1910.16-4 which permits deviations from the guidelines under exceptional circumstances. Although this Court was initially inclined to grant that request, it has, upon further consideration, declined to do so. First, this Court can find no case law which addresses the issue. Second, under the facts of this case, such an award would be punitive, punishing this Defendant for not being a good parent in respects other than the payment of support. Irrespective of this Court's personal view relative to the Defendant's abject disinterest in the welfare of his child (the Defendant has had virtually no contact nor has he shown any interest in this child during the most recent history of this case), the purpose of Pennsylvania's support law is to ensure that parents financially support

their children. To date, he has done so. To award Plaintiff an additional 10% would not correspond with the statute's purpose and could be construed as an attempt to enforce this Court's personal view of the Defendant's conduct. Therefore, absent express statutory authority justifying the award under circumstances unrelated to the financial needs of the child or relative contributions of the parents, the Court will not grant the Plaintiff's request.

After this Court's review of the facts, it agrees with the Plaintiffs argument and will resolve all disputed issues as follows:

1. Child support - The Court finds that the Plaintiff's net income is $1,208.32 and that the Defendant's net income is $1,433.57. The Court further finds that the base support payment is $243.87 effective March 5, 1998.

2. Tuition/Day Care - The court finds that the appropriate tuition/day care amount to be paid by each party shall be $130 per month (based upon a calculation of one-half (1/2) of $260/month). Each party shall be responsible for one-half of any excess over $260 per month, and their portion shall be reduced proportionately in the event of any decrease. This calculation is effective August 24, 1998.

3. Dental Insurance - The parties shall each pay $6.00 per month, if and only if coverage is not currently provided by the Defendant. Upon appropriate documentation in this regard, this amount may be deleted from the final order as an obligation of the Defendant. This calculation shall be effective August 24, 1998 if applicable.

4. Uninsured Expenses - The Defendant shall be responsible for 54% of any uninsured expenses effective March 5, 1998.

5. Arrearages - Relative to any arrearages, the Defendant shall be responsible for payment at a rate of $100 per month in addition to the support obligations which are reflected in paragraphs 1-4 above.

Finally, this Court directs the Erie County Support Office to prepare a final order in accordance with this Court's decision.

BY THE COURT:
/s/ **Ernest J. DiSantis, Jr., Judge**

IN THE MATTER OF THE ADOPTION
OF
K.U.J.

FAMILY LAW/ADOPTION

A petition to involuntarily terminate the father's parental rights to a child under the age of 18 will be denied where the proposed adoptive parent is not the spouse of the natural mother and does not reside with the natural mother, and the consent of the natural mother does not reveal an intent to unconditionally and permanently relinquish all rights to the child. 23 Pa.C.S.A. §2711(a)(3) and (d)(1).

A natural parent may retain parental rights only if it is his or her spouse who intends to adopt the child. 23 Pa.C.S.A. §2903.

While a party standing *in loco parentis* to a child can seek to adopt, 23 Pa.C.S.A. §2903, such an adoption is permitted only upon termination of both natural parents' rights to the child.

The proposed adoption by a petitioner standing *in loco parentis* to the child but neither married to nor residing with the child's mother conflicts with the legislative intent and public policy of the Adoption Act as it does not create a new family for the child and would create a confusing and disruptive environment in the event either the adoptive parent or the natural parent should marry.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION
No. 109 in Adoption 1998

Appearances: Jeffrey Misko, Attorney for Petitioner

OPINION

Connelly, J., October 1, 1998

This matter comes before the court pursuant to a Petition for Involuntary Termination of Parental Rights to a Child under the Age of 18 Years filed August 31, 1998. Petitioner, W.R.H., is not the natural father of the minor child, yet stands *in loco parentis* to the child, and has partial custody pursuant to a custody consent order dated March 19, 1998. The natural mother, S.S.S., the custodial parent, is also named as a Petitioner in the present case.[1]

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[1] Petitioners standing to file for the termination of the natural father's parental rights is governed by 23 Pa.C.S.A. § 2512 which provides:

§ 2512. Petition for involuntary termination.

(a) Who may file. - A petition to terminate parental rights with respect to a child under the age of 18 years may be filed by any of the following:

Petitioners seek to terminate the parental rights of the natural father in order to allow the petitioner, W.R.H., to adopt the subject child, K.U.J. It also appears the natural mother's consent to the adoption is "qualified", in that she desires to retain her parental rights to the child. The petition further reveals the natural mother and W.R.H. are not married, and do not reside together. Therefore the issue is whether this court may terminate the parental rights of the natural father in order to enable W.R.H., who is not the spouse of the natural mother, to become the adopting parent where the natural mother intends to retain her parental rights.

The determination of this issue is governed by the Adoption Act, 23 Pa.C.S. §§ 2101-2901. It is well established that the guidelines set forth in the act which govern an adoption procedure "must be strictly construed, and exceptions to the Act may not be judicially created." *Gibbs v. Ernst*, 538 Pa 193, 647 A.2d 882 (1994) (citations omitted). Furthermore, courts have no authority to decree an adoption in the absence of the statutorily required consents." *In re Adoption of Stickley*, 432 Pa. Super. 354, 638 A.2d 976 (1994) *alloc. dn.* in 648 A.2d 790 *quoting In re Adoption of E.M.A.*, 487 Pa. 152, 153, 409 A.2d 10, 11 (1979).

Pursuant to section 2701 of the Adoption Act an adoption petition shall include "all consents pursuant to section 2711 (relating to consents necessary to adoption)." 23 Pa.C.S.A. § 2701(7). Section 2711(a)(3) requires the consent of the parents or surviving parent of an adoptee who has not reached the age of 18 years.[2] 23 Pa.C.S.A. § 2711(a)(3). Furthermore this consent of the natural parent must reveal an intent to unconditionally and permanently relinquish all rights to the child. *See* 23 Pa. C.S.A. § 2711 (d)(1).

As stated previously, nothing in the present petition indicates the natural mother's intent to unconditionally relinquish her rights to the child. Therefore the natural mother may retain her parental rights to K.U.J. only

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1 (con't)

> *(1) Either parent when termination is sought with respect to the other parent.*
> (2) An agency.
> *(3) The individual having custody or standing in loco parentis to the child and who has filed a report of intention to adopt required by section 2531 (relating to report of intention to adopt).*

23 Pa.C.S.A. § 2512 (a) (emphasis added).

[2] Consent of a parent shall not be required if the court, after a hearing, finds sufficient grounds for involuntary termination under section 2511. *See* 23 Pa.C.S.A. § 2714.

if her *spouse* intends to adopt the child. *See* 23 Pa.C.S.A. § 2903[3]; *In re Adoption of J.F.*, Pa. Super., 572 A.2d 223 (1990) ("A parent may not petition to terminate the parental rights of the other parent unless it is established that there is an adoption contemplated by the spouse of the petitioner.") (emphasis added). "Only in such intra-family adoptions may a natural parent execute a valid consent retaining parental rights. And only in such a husband-wife relationship is the qualified consent legally sufficient for the spouse seeking to become an adopting parent." *In re E.M.A.*, 487 Pa. 152, 409 A.2d 10 (1979).

Petitioner's standing *in loco parentis* to the child could allow him to seek adoption of the child.[4] *Chester County Children and Youth Services v. Cunningham*, 431 Pa. Super. 421,636 A.2d 1157 (1994) *alloc. gr.* in 645 A.2d 1311, *affirmed* in 656 A.2d 1346. However such third party adoptions are permitted only upon satisfaction of the requirement that both natural parents terminate their rights to the child. *See T.J.B. v. E.C.*, 438 Pa. Super. 529, 652 A.2d 936 (1995) (appellants, standing *in loco parentis*, could not contest the natural father's custody of the child if the natural father and natural mother still possessed parental rights).

Furthermore, the petition in the present case must be denied due to the legislative intent and public policy concerning the Adoption Act. The court would first note that the termination of parental rights and adoption depend upon the court's discretion in assessing the needs and welfare of the child." *In re Involuntary Termination of Parental Rights K.D.M.A.*, 18 D. & C. 4th 297 (1993) *citing Matter of Adoption of David C.*, 479 Pa. 1, 387 A.2d 804 (1978). Secondly, "the purpose of adoption is to establish a new parent-child relationship within a family." *Id.* at 303. The significance of this legislative intent was addressed by the Pennsylvania Supreme Court in *In re E.M.A. supra* wherein the Court considered the issue of the natural father's qualified consent pursuant to 1 P.S. § 503, predecessor to 23 Pa.C.S.A. § 2903, and opined:

> *It is the legislative judgment and mandate that a section 503*

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[3] § 2903. Retention of parental status

Whenever a parent consents to the adoption of his child *by his spouse*, the parent-child relationship between him and his child shall remain whether or not he is one of the petitioners in the adoption proceeding.

23 Pa.C.S.A. § 2903 (emphasis added).

[4] The court would note the only evidence supporting Petitioner's standing *in loco parentis* is the natural mother's consent to share custody with Petitioner, as well as her testimony that Petitioner has raised the child since the child was eight months old. *See* N.T., Motion Court, 3/9/98, p. 2.

> *qualified consent be available only to the spouse of a natural parent.* Given the state's traditional authority and longstanding interest in the family, it must be obvious that section 503 is a proper reflection of the legislative judgment and public policy of the Commonwealth concerning the intra-family aspects of Pennsylvania's comprehensive adoption act.

In re E.M.A., 409 A.2d at 12 (emphasis added).

Applying these principles to the facts of this case, this court concludes the proposed adoption would not create a new family for the child, and thus fails to promote the child's best interests and welfare. The petitioners do not reside together, and do not reveal any intention of doing so in the future. Moreover, there is the possibility that either petitioner will remarry, creating a "confusing and disruptive" environment for the child. *See In re Involuntary Termination of Parental Rights K.D.M.A., supra*, (proposed adoption of minor child by maternal uncle, without the termination of the natural mother's parental rights, would not "enhance stability for the child and would lead to inherent difficulties were the natural mother to marry").

In light of the foregoing discussion, this court concludes the proposed termination of the natural father's parental rights fails to satisfy the statutory requirements of the Adoption Act, as well as the policy considerations surrounding such act, and therefore the Petition for Involuntary Termination of Parental Rights to a Child under the Age of 18 Years is denied.

DECREE NISI

AND NOW, TO-WIT, this 1st day of October, 1998, it is hereby **ORDERED, ADJUDGED and DECREED** that the Petition for Involuntary Termination of Parental Rights to a Child Under the Age of 18 Years (Section 2152 - Adoption Act) is **DENIED** for the reasons set forth in the foregoing OPINION.

This Decree shall become final unless Exceptions are filed within ten (10) days of the filing of said Decree.

BY THE COURT:
/s/ **Shad Connelly, Judge**