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Erie County for the Year

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

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SUBJECT MATTER INDEX

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ANNA MARIE AICHER and DONALD L. AICHER, her husband, Plaintiffs

v.

ERIE INDEMNITY COMPANY, Attorney-in-fact for Subscribers at Erie Insurance Exchange, Defendant

PLEADING/PRELIMINARY OBJECTIONS

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 and must overrule the demurrer unless it is certain that there is no set of facts under which the plaintiff could recover; any doubt must be resolved in favor of overruling the demurrer.

CIVIL PROCEDURES/STANDING

As a general rule a party to an insurance contract has standing to enforce the terms of the insurance contract even though he was not injured in the accident at issue and has not been required to pay the medical bills of the injured person.

INSURANCE/AUTO INSURANCE

Section 1797 of the Motor Vehicle Financial Responsibility Law, 75 Pa.C.S.A. §1797, which provides for insurance companies to contract with Peer Review Organizations to determine whether medical expenses are "medically necessary" or conforms to medially accepted practice, does not apply to the issue of causation, i.e., whether the injury and subsequent treatment was a result of the accident.

DAMAGES/PUNITIVE DAMAGES

Since an insurance company need not refer questions of causation to a Peer Review Organization under 75 Pa.C.S.A. §1797, failure to make such referral to determine causation could not be the basis for a recovery of treble damages under Section 75 Pa.C.S.A. §1797(b)(4).

DAMAGES/PUNITIVE DAMAGES

Section 8371 of the Judicial Code, 42 Pa.C.S.A. §8371, which allows a recovery for bad faith damages, applies to the bad faith refusal to pay medical benefits under the Motor Vehicle Financial Responsibility Law, 75 Pa.C.S.A. §§ 1701 et seq.

DAMAGES/PUNITIVE DAMAGES

While a recovery for bad faith damages under 42 Pa.C.S.A. §8371 is available for the bad faith refusal to pay medical benefits under the Motor Vehicle Financial Responsibility Law, 75 Pa.C.S.A. §§ 1701 et seq., a complaint which alleges only that the insurer denied plaintiffs' claim after a "paper review" is not sufficient to allege bad faith to satisfy 42 Pa.C.S.A. §8371.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW NO. 11359-1998

Appearances: S. E. Riley, Esquire for the Plaintiff
Craig R.F. Murphey, Esquire for the Defendant

OPINION

Anthony, J., June 1, 1999.

This matter is before the Court on Defendant's Amended Preliminary Objections to Plaintiff's Complaint. After reviewing the complaint, the parties' briefs and the arguments of counsel, the Court will grant the Motion in part and deny the Motion in part. The factual and procedural history is as follows.

Anna Maria Aicher (hereinafter "Mrs. Aicher") was in a motor vehicle accident on October 5, 1995. Mrs. Aicher and her husband, Donald L. Aicher (hereinafter "Mr. Aicher") were the named insureds on a motor vehicle insurance policy issued by the Defendant, Erie Indemnity Company (hereinafter "Erie") during that time. Mrs. Aicher filed a claim for first party benefits under the policy for her injuries. Erie paid for the medical expenses involved in treating Mrs. Aicher's neck and back injuries. However, Erie refused to pay the expenses for any treatment involved with Mrs. Aicher's injury to her left chest area because Erie did not believe that the injury was causally related to the accident.

The Plaintiffs filed this action on March 24, 1998, alleging a breach of contract and violations of the Motor Vehicle Financial Responsibility Law (hereinafter "MVFRL"), 75 PA.C.S.A. §1701, et.seq. Erie filed Preliminary Objections on May 11, 1998. The parties requested leave to reach an amicable settlement of the Objections which the Court granted. The parties could not reach a settlement and Erie filed Amended Preliminary Objections on March 29, 1999. Plaintiffs' responded and oral arguments were held in which both sides were represented.

Erie has made several objections to the Complaint, all in the form of demurrers. 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 Co., 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).

The first issue argued by Erie is that Mr. Aicher should be dismissed from the case for lack of standing. Erie argues that Mr. Aicher has not stated a claim since he was not injured in the accident nor has he been required to pay Mrs. Aicher's medical bills. Therefore, Erie claims that Mr. Aicher has not suffered any injury and therefore has only a general interest in the suit. Thus, he can not and should not be a party to the present action.

However, a recent Supreme Court case has determined that "as a general rule, a party to an insurance contract has standing to enforce the terms of the insurance contract." *Kuropatwa v. State Farm Ins. Co.*, 721 A.2d 1067, 1070. (Pa. 1998). Mr. Aicher is undisputedly a party to the insurance contract and thus has standing to sue in the present case.

The second issue argued by Erie is that it can not be subject to treble damages under 75 Pa.C.S.A. §1797 because it does not apply to questions of causation.[1] Section 1797 provides for insurance companies to contract with Peer Review Organizations (hereinafter "PRO") to determine whether the medical expenses are "medically necessary" or that the medical treatment conforms to the medically accepted practice. 75 Pa.C.S.A. §1797(b)(1). Insurance companies that deny benefits without referral are subject to treble damages if the conduct is considered wanton. 75 PA.C.S.A. §1797(b)(4).

However, §1797 makes no mention of whether an insurance company may refer a case to a PRO to determine causation. Nor is there any appellate case on this issue. The only time an appellate court has addressed the issue was in *Bodtke v. State Farm Mutual Automobile Insurance Company*, 637 A.2d 648 (Pa.Super. 1994). In dicta in that case, the Superior Court stated that PRO denials on the basis of causation are the same as stating that the treatment was not medically necessary. *Id.* At 649. However, *Bodtke* was overruled by the Supreme Court and therefore has no precedential value.

This leaves the court with a multitude of Common Pleas decisions and U.S. District Court cases that have addressed the issue. Only two of these decisions, both of them from Mercer County[2], have held that causation is a proper subject for peer review under §1797. Those decisions, *DeSantis v. Erie Insurance Exchange*, 28 Mercer C.L.J. 97 (1997) and *Murphy v. Progressive Insurance Co*., 27 Mercer C.L.J. 373 (1996), rely primarily on the Superior Court's decision in *Bodtke*. Judge Dobson determined that the reasoning of *Bodtke* was persuasive and that the Superior Court would likely rule the same way should it be put before them a second time.

The Court, however, is not as persuaded as Judge Dobson by the *Bodtke* decision. First, the Court will note that it was only a panel decision and not an opinion by the Superior Court *en banc*. Therefore, *Bodtke*, while possible a predictor of a decision by the Superior Court judges who

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[1] Erie actually spent more of its time, in the brief and in argument, arguing that §1797 should apply to causation while the Plaintff argued that it did not. While contrary to the position taken by Erie in its motion, Plaintiffs did not complain at arguments.

[2] Both decisions were authored by the Honorable Judge Thomas R. Dobson

were on that panel, is not a predictor of the opinion of the Superior Court as a whole.[3] Secondly, the language in *Bodtke* was dicta and limited to a paragraph of the opinion. It simply states that the panel agrees with the decision of the lower court. It does not, however, give the rationale for that agreement, just that causation is simply another way of stating that the treatment was not medically necessary.

This Court is not convinced that, given the opportunity to squarely consider the issue, that the Superior Court will rule the same way. Causation is a determination that the injury and subsequent treatment was a result of the accident. That treatment is medically necessary is a determination that the injury can not be cured without the treatment in question. While a determination on either ground will result in a denial of medical benefits, they are two different inquiries. If a PRO were to determine that Mrs. Aicher's injuries were not caused by the accident, this in no way impacts upon the inquiry into whether the treatment recommended by her doctor is necessary for her to get better. Nor would a determination that the treatment is not medically necessary impact whether or not that injury was caused by the accident like the insured contends.

This is not to say that causation would not be proper for a PRO to determine if the legislature had chosen to make it such. Clearly, a determination by a PRO would help eliminate lawsuits and bring down the costs of litigation.

However, it has not been provided for in §1797. The Pennsylvania Legislature could have added causation to the subjects covered by §1797 but, for whatever reason, it has not chosen to do so in the plain language of the statute. Nor can this Court, after careful review, find any support in the legislative history to support reading causation as a covered subject under peer review. Regardless of whether causation should be covered by §1797, this Court does not have the authority to legislate such a result when it is not called for in the plain language of the statute.

A majority of decisions have determined that causation is not a proper subject for peer review. *See e.g., Knox v. Worldwide Insurance Group,* 140 P.L.J., 185 (1992); *Pierce v. State Farm Ins. Co.,* 27 D.&C. 4th 464 (1994); *Grove v. Aetna Cas. & Ins. Co.,* 855 F.Supp. 113 (W.D.PA. 1993) and *Hice v. Prudential Insurance Company*, 80 West.L.J. 27(1997). This Court concludes that peer review does not cover questions of causation as §1797 is now written.

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[3] Futhermore, *Bodtke* does not and could not be used to predict the opinion of the Pennsylvania Supreme Court, which has disagreed on occasion with the Superior Court as to how the MVFRL is to be interpreted.

The third issue before the Court is whether the Plaintiffs can proceed on a claim under 42 Pa.C.S.A. §8371[4] for bad faith damages. Erie contends that the MVFRL[5] contains the only remedy available to the Plaintiffs. Since the MVFRL is the exclusive remedy available to the Plaintiffs for bad faith damages, §8371 would be inapplicable to the present situation and a demurrer would be appropriate.

As support, the Defendant relies on *Barnum v. State Farm*, 635 A.2d 155 (PA.Super. 1993), rev'd on other grounds 652 A.2d 1319 (Pa. 1994). *Barnum* states that §1797 is an exception to the general remedy allowed in §8371. However, like *Bodtke*, *Barnum* was overrule and the issue is once again in doubt.

This again leaves the Court with other Common Pleas Court decisions. The majority of Common Pleas decisions have decided that §8371 damages are available in a case such as this. *See e.g., Knox v. Worldwide Insurance Group, supra; Pierce v. State Farm Ins. Co., supra; Grove v. Aetna Cas. & Ins. Co., supra* and *Hice v. Prudential Insurance Company, supra.* As Judge Wettick aptly stated "there is nothing in either the Financial Responsibility Law or the Judicial Code indicating the legislature sought to limit the damages for a bad faith refusal to pay medical benefits to the payments set forth in §1716 where the provisions of §1797(b) are inapplicable. Since the goals of the Financial Responsibility Law will not be achieved without insurance companies processing claims in good faith, its goals are furthered by allowing the insured to obtain the benefits of §8371 upon a showing of bad faith." *Knox, supra* at 188.

This Court agrees with the opinion of Judge Wettick. Once again, although it would certainly be possible and perhaps reasonable for the Pennsylvania Legislature to limit damages available to the Plaintiff to those found in the MVFRL, it has not done so. Therefore, the Plaintiffs are entitled to damages under §8371 if they can prove bad faith.

Erie's final objection to the Complaint is that, even assuming the applicability of §8371, the Plaintiffs have not set forth a cause of action for

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[4] Section 8371 provides that
"In an action arising under an insurance policy, if the court finds that the insurer acted in bad faith toward the insured, the court may take all of the following actions:

(1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate plus 3%
(2) Award punitive damages against the insurer.
(3) Assess court costs and attorney fees against the insurer."

[5] More specifically §§1716, 1797 and 1798

bad faith damages under that section. After a careful review of the Complaint, the Court would agree. Plaintiffs' Complaint alleges that Erie denied the Plaintiffs' claim after a "proper review." Complaint at ¶14. While a "paper review" may encompass a determination of a PRO, it does not necessarily entail a PRO determination. Therefore, the simple submission of a claim to a "paper review" is not sufficient to allege bad faith to satisfy §8371. Thus, the demurrer must be granted.[6]

In conclusion, Mr. Aicher does have standing to be a party to the action. Also, Erie's second demurrer will be granted as causation is not a proper subject for peer review under 75 Pa.C.S.A. §1797. Furthermore, although Plaintiffs are able to pursue a bad faith claim under 42 Pa.C.S.A. §8371, they have not alleged facts to substantiate a cause of action in their Complaint.

ORDER

AND NOW, to-wit, this 1st day of June, 1999, it is hereby ORDERED and DECREED that Defendant's second and fourth Preliminary Objections to Plaintiffs' Complaint are SUSTAINED and those causes of action relating to 75 Pa.C.S.A. 1797 and 42 Pa.C.S.A. 8371 are DISMISSED. The Court further ORDERS that Defendant's first and third Preliminary Objections are OVERRULED.

BY THE COURT:
Fred P. Anthony, Judge

[6] The Court will note that it recently granted a Motion by the Plaintiff to Amend the Complaint to allege a violation of §8371 that specifically states that the claim was submitted to peer review. This would effectively make moot the Erie's fourth demurrer. However, until the amended Complaint has been filed, the Court must rule on the issue. The Court's ruling only affects the Complaint as it now exists and does not apply to the Amended Complaint.

DIANE M. KABASINSKI a/k/a DIANE SANTOMENNA

v.

JOHN J. KABASINSKI, JR., ITT HARTFORD LIFE INSURANCE CO., HARTFORD EQUITY SALES CO., INC., HARTE, HAWKE & ZUPSIC INSURANCE AGENCY, INC., MATTHEW M. ZUPSIC, ROBERT C. LEASURE, PNC BANK, N.A., AMERICAN SKANDIA LIFE ASSURANCE CORPORATION, CAPITAL ANALYST, INC., ANDREA M. LECLERC, THREE RIVERS FINANCIAL SERVICES, INC., FIRST NATIONAL BANK OF PENNSYLVANIA, WILLIAM S. EBER, JOHN A FOLINO, ASSOCIATES OF RISK TRANSFER, INC., d/b/a RTI INSURANCE SERVICES and RTI INSURANCE SERVICES OF FLORIDA, INC.

UNIFORM COMMERCIAL CODE/13 Pa.C.S.A. § 3420

In action for conversion of instrument, delivery of instrument to payee's home address constitutes sufficient evidence of delivery to allow payee to maintain action

UNIFORM COMMERCIAL CODE/13 Pa.C.S.A § 3404(a)

Imposter rule protects bank where check with forged endorsement is accepted for deposit, subject to exception at §3404(d)

UNIFORM COMMERCIAL CODE/13 Pa.C.S.A.§3404(d)

Imposter rule effective only where person paying the instrument exercises ordinary care, defined for this purpose as observance of reasonable commercial standards

IN THE ERIE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 10592 -1999

Appearances:

Ronald L. Slater, Esq. for Ms. Kabasinski a/k/a Santomenna

John Quinn, Jr., Esq. and Joel M. Snavely, Esq. for Mr. Kabasinski, ITT Hartford Life Insurance Co. and Hartford Equity Sales Co., Inc.

Brian T. Must, Esq. for Harte Hawke & Zupsic and Matthew M. Zupsic

Richard A. Lanzillo, Esq. for PNC Bank, N.A.

S. E. Riley, Esq. and Richard J. Cairns, Esq. for American Skandia Life Assurance Corporation

Daniel M. Taylor, Jr., Esq. and Jeffery B. Hymnson, Esq. for Capital Analyst, Inc. and Three Rivers Financial Services, Inc.

Susan F. Reiter, Esq. for First National Bank of PA,

Michael M. Burns, Esq. for William S. Eber, John A. Folino, Associates of Risk Transfer and RTI Insurance Services of Florida, Inc.

OPINION

Bozza, John A., J.

Diane Kabasinski, hereinafter Diane M. Santomenna, has filed an action

against several parties asserting that they are responsible for losses she incurred as a result of the actions of her husband, John J. Kabasinski, Jr. In a complaint filed in February of 1999, she has set forth numerous factual allegations in support of a number of causes of action, only two of which concern the defendant, PNC Bank, N.A. In Count V, Ms. Santomenna puts forth a claim against PNC Bank, N.A. for conversion pursuant to 13 Pa.C.S.A. §3420. In Count VI, she asserts against PNC Bank, N.A. a claim for negligence. Both of these claims pertain to two checks made payable to Diane M. Santomenna, which John J. Kabasinski deposited in his PNC business account. Pending before the Court is PNC's Motion for Judgment on the Pleadings. Accepting as true all well-pled facts set forth in the plaintiff's complaint, the following facts support Ms. Santomenna's claim:

In 1994, Ms. Santomenna transferred various assets to ITT Hartford Life Insurance Company, opening an account and purchasing an annuity for the sum of $717,382.44. The account was in the name of Diane M. Santomenna, and her address was listed as 1222 St. Ann Drive, Erie, PA 16509. Other funds in the amount of $1,180.00 were transferred to another ITT Hartford account in April of 1994. On or about March 7, 1996, John J. Kabasinski, Jr., the husband of Diane M. Santomenna, forged her signature to an ITT Hartford withdrawal request form seeking to withdraw ten (10%) per cent from Account No. 161190. A few days later, ITT Hartford in response to the request for withdrawal, issued a check in the amount of $71,738.24, made payable to Diane M. Santomenna, and mailed the check to Ms. Santomenna's home address of 1222 St. Ann Drive, Erie, PA 16509. Mr. Kabasinski obtained the check and endorsed the back of the check with Diane M. Santomenna's name and deposited the proceeds in his account with PNC Bank. The account at PNC was only in Kabasinski's name and he did not endorse the back of the check.

In September of 1996, Kabasinski provided ITT Hartford with a request for a change of address on one of his wife's accounts. Then in February, 1997, Kabasinski once again forged his wife's signature to an ITT Hartford withdrawal request form requesting a withdrawal from Account No. 161190 of the "maximum amount available without a deferred sales charge." In response, on or about March 5, 1997, ITT Hartford issued Check No. 110913885 in the amount of $71,738.24, made payable to "Diane M. Santomenna" and mailed it to her home address. Mr. Kabasinski took the check, forged his wife's endorsement, "Diane M. Santomenna" on the back of the check, and deposited the proceeds into his business account at PNC Bank.

Ms. Santomenna knew nothing of Mr. Kabasinski's action in arranging for the withdrawal of the sums from her ITT Hartford account. He was not authorized to withdraw those sums nor deposit the proceeds in his PNC Bank account, and all his actions were without her consent or knowledge. Mr. Kabasinski appropriated the money for his own use.

It is now PNC's position that Ms. Santomenna has failed to set forth a cause of action against PNC for conversion because of the application of the "imposter rule," and furthermore, asserts she cannot maintain an action in negligence against a depository bank under Pennsylvania law. In the alternative, PNC argues that she has not set forth sufficient facts to maintain a cause of action in negligence.

With regard to Ms. Santomenna's claim for conversion pursuant to 13 Pa.C.S.A. § 3420, a payee may maintain an action for conversion only if she had received a delivery of the instrument. Although PNC argues that Ms. Santomenna did not actually receive delivery of the checks, the fact that ITT Hartford sent the checks by mail to her home address is sufficient evidence of delivery to allow her to maintain an action for conversion against PNC.

The application of the "imposter rule," as set forth in 13 Pa.C.S.A. §3404(a) provides protection to banks who accept checks with forged endorsements for deposit in certain circumstances. The relevant section provides as follows:

> **(a) Imposter.** — If an imposter, by use of the mails or otherwise, induces the issuer of an instrument to issue the instrument to the imposter, or to a person acting in concert with the imposter, by impersonating the payee of the instrument or a person authorized to act for the payee, an indorsement of the instrument by any person in the name of the payee is effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

The facts as set forth in the complaint would indicate that Mr. Kabasinski acted as an imposter when he requested the withdrawal of funds from his wife's accounts at ITT Hartford. Obviously believing that Ms. Santomenna authorized the withdrawal of funds, ITT Hartford delivered checks to her home address and Mr. Kabasinski, as the imposter, retrieved them. In those circumstances, Mr. Kabasinski's forged endorsement be effective [sic] pursuant to the "imposter rule" so long as PNC exercised "ordinary care in paying or taking the instrument." Indeed, Section 3404 provides for an exception to the protection provided by the "imposter rule." Subsection (d) provides as follows:

> **(d) Failure to exercise ordinary care.** — With respect to an instrument to which subsection (a) or (b) applies, if a person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from payment of the instrument, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.

Therefore, while it is apparent from the allegations in the complaint that Mr. Kabasinski's actions fell within the requirements of Section 3404(a), it is equally clear that an issue remains as to whether or not PNC Bank acted consistent with its obligation to observe "ordinary care" which is defined to mean "reasonable commercial standards." 13 Pa.C.S.A. §3103. It is evident under the current codification of the Uniform Commercial Code in Pennsylvania that the protection intended by the "imposter rule" is contingent upon a depositary bank's utilization of reasonable commercial standards in paying or taking an endorsed check. The comments to the 1990 Code make this clear:

> "But in some cases the person taking the check might have detected the fraud and thus have prevented the loss by the exercise of ordinary care. In those cases, if that person failed to exercise ordinary case, it is reasonable that that person bear loss to the extent the failure contributed to the loss. Subsection (d) is intended to reach that result. It allows the person who suffers loss as a result of payment of the check to recover from the person who failed to exercise ordinary care."

13 Pa.C.S.A §3404, comment 3.

This principle is further reinforced by the provisions of Section 3406, which limits a person's ability to assert forgery where the person's negligence substantially contributed to the forgery. It is obvious that the intention of the Uniform Commercial Code as adopted by Pennsylvania is to apportion liability in circumstances such as these where a drawer and depositary bank and perhaps others may have failed to exercise ordinary care. *2 James J. White & Robert S. Summers, Uniform Commercial Code* §19-4 (4th Ed. 1995).

PNC Bank's reliance on the reasoning found in *Land Title and Trust Company v. Northwestern National Bank*, 196 Pa. 230, 46 A. 420 (1900) is accurate to the extent that the court set forth the accepted rationale for shielding a bank in the position of PNC from liability for conversion. However, the court also noted that negligence on the part of the bank accepting for collection the forged check was not properly raised or proven.

Similarly, the Supreme Court decision in *Philadelphia Title Ins. Co. v. Fidelity-Philadelphia Trust Co.*, 419 Pa. 78, 212 A.2d 222 (1965), is not dispositive as there was no issue as to negligence or the failure to follow reasonable commercial practice on the part of the defendant banks. Moreover, there can be no real dispute as to whether Mr. Kabasinski was an "imposter."

Finally, it is noteworthy that in *Bolich v. Continental Assur. Co.*, 70 D&C 2d 617 (Montgomery County 1974), that the court explicitly considered whether a depository, (non-drawee) bank was negligent when it concluded that:

> "The company is precluded from asserting the forged signature against the bank who paid the check **in good faith and in accordance with reasonable commercial standards of the banking business."** (Emphasis added).

Bolich, 70 D&C 2d at 621.

The court's conclusion followed a trial and its finding that "there was no evidence that the bank failed to follow reasonable commercial practice."

The law in Pennsylvania dictates that non-drawee banks in the position of PNC are protected from liability where they pay a check over a forged endorsement, so long as they follow reasonable commercial practice. On the pleading before the Court, this question is yet to be resolved and plaintiff's case must be allowed to proceed accordingly. An appropriate Order shall follow.

ORDER

AND NOW, to-wit, this 3 day of December, 1999, upon consideration of defendant PNC Bank, N.A.'s Motion for Judgment on the Pleadings and for the reasons set forth in preceding Opinion, the Court is of the opinion that said Motion should be denied. It is therefore **ORDERED, ADJUDGED AND DECREED** that PNC Bank, N.A.'s Motion for Judgment on the Pleadings is hereby **DENIED**.

By the Court
/s/ **John A. Bozza, Judge**

COMMONWEALTH OF PENNSYLVANIA

v.

JAMES E. McKENRICK

CRIMINAL LAW/DRIVING UNDER THE INFLUENCE

Driving Under the Influence includes persons who operate or are in actual physical control of the movement of a vehicle.

CRIMINAL LAW/DRIVING UNDER THE INFLUENCE

A person can be in physical control of the movement of a parked vehicle.

CRIMINAL LAW/DRIVING UNDER THE INFLUENCE

A parked car should be started and running before a finding of physical control can be made.

CRIMINAL LAW/DRIVING UNDER THE INFLUENCE

Pursuant to 75 Pa.C.S. §3731(a) regarding driving under the influence, Commonwealth established, under a totality of the circumstances standard, Defendant was in "actual physical control" of his vehicle when Defendant had started the vehicle's engine and placed the vehicle in gear with his foot on the brake.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 2111 OF 1999

Appearances: Vincent P. Nudi, Esq., for the Commonwealth
Mark W. Richmond, Esq., for Defendant

OPINION

Domitrovich, J., November 29, 1999

This matter arises from Defendant's Omnibus Pre-trial Motion for Relief in the nature of an Application for Issuance of Writ of Habeas Corpus and Dismissal. Defendant, who is charged with Driving under the Influence (DUI) incapable of safe driving, raises the following issues: (1) whether the Commonwealth presented prima facie evidence that Defendant was in "actual physical control" of his vehicle while under the influence of alcohol; (2) whether the Defendant actually caused or threatened to cause the harm or evil sought to be prevented by 75 Pa.C.S. § 3731.

The following is a brief review of the relevant facts from the Preliminary Hearing transcripts. On July 9, 1999, Millcreek Mall security guard, Scott Kline, discovers Defendant laying across the front seat of his pickup truck. Mr. Kline's attention was alerted to Defendant since the truck's passenger door was open. Defendant's keys were not in the ignition upon Mr. Kline's arrival at the vehicle. Mr. Kline asked Defendant if he needed help. Defendant responds by sitting up and placing his key in the ignition of the truck. However, Defendant only turned the key far enough for the battery to activate the radio only; Defendant did not actually engage the

starter. Mr. Kline decided to call Millcreek Police and Defendant "slumped right back over the seat" (N.T. at 5, 12). Mr. Kline informed Defendant a few minutes later that the Millcreek Police were on their way. Once again, Defendant sat up and proceeded to turn the key in the ignition over again; however, this time, the engine actually had started and Defendant put the gearshift in drive, but kept his foot on the brake. The vehicle did not move in any direction at that time, but a security guard did jump out of the way in fear for his own safety. Upon arrival of the Millcreek Police officers, Defendant returned the gearshift to park and slumped over the steering wheel and eventually over the seat. Defendant's vehicle was located where two restaurant establishments are licensed to sell alcoholic beverages at the Millcreek Mall: Ruby Tuesdays and Roadhouse. Also, Defendant's vehicle was parked on the same side of the Mall where Ruby Tuesdays is located.

The first issue before this Court is whether the Commonwealth established Defendant was in actual physical control of his vehicle while under the influence of alcohol. The relevant statute, 75 Pa.C.S. § 3731(a)(1) reads in part, as follows:

> § 3731. Driving under influence of alcohol or controlled substance
> (a) Offense defined.--A person shall not drive, operate or be in actual physical control of the movement of a vehicle in any of the following circumstances:
> (1) while under the influence of alcohol to a degree which renders the person incapable to safe driving.
> . . . .
> (4) While the amount of alcohol by weight in the blood of:
> (I) an adult is 0.10% or greater.

The Commonwealth may exclusively use circumstantial evidence in proving each element of a DUI charge. *Commonwealth v. Byers,* 437 PaSuper 502, 650 A.2d 468, 469 (1994), citing *Commonwealth v. Price,* 416 PaSuper 23, 26, 610 A.2d 488, 489 (1992). Courts have interpreted the phrase "actual physical control" and have made it clear that "actual movement of the vehicle is not required." *Commonwealth v. Bobotas,* 403 PaSuper 136, 141-142, 588 A.2d 518, 521 (1991). Merely sitting in a car while intoxicated is not enough. "At a very minimum, a parked car should be started and running before a finding of actual physical control can be made." *Price,* at 490.

Rather than focusing on whether the vehicle's motor is running or not running, the appellate courts have developed case law taking a common-sense approach to achieving the Legislature's goal: public safety. *Byers,* at 470. This point is further illustrated in the Pennsylvania Suggested Standard Jury Instructions, which has been quoted in several cases. *Byers,* at 470, citing *Commonwealth v. Crum,* 362 PaSuper 110, 115-117, 523 A.2d 799, 802 (1987). This instruction reads:

> The crime of driving under the influence can be committed not only by a person who drives, but also by one who "operates" or is "in actual physical control of the movement" of a vehicle. A person does not drive unless he actually has the vehicle in motion, however, a person may operate or be in actual physical control of the movement of a standing vehicle. These terms are more comprehensive than the term drive. (They cover certain situations where a person under the influence is a *threat to public safety even though he is not driving at the time.)* Thus a person operated a vehicle is he is in actual physical control of either the machinery of the motor vehicle or the movement of the vehicle itself. [sic]

Byers, at 470, citing Pa.SSJI(Crim.) 173731 (emphasis added). In determining "actual physical control", Pennsylvania courts have properly focused on the danger that defendant poses to society. *Id.* This danger or threat is shown through a combination of the factors. *Id.* The Commonwealth must show more than just the fact that the Defendant started the engine of the car. *Id.*

Furthermore, in *Wolen,* the lower court instructed the jury regarding control of the vehicle, in part, that:

> An individual may be in actual physical control of this vehicle, and, therefore, operating it while it is parked or merely standing still so long as that individual is keeping that car in restraint or is in a position to regulate its movement .... If the defendant had the ability to exercise any control over the movement of that vehicle, even though that exercise resulted in the vehicle not moving, then he may be found guilty of the offense of operating a motor vehicle while under the influence of alcohol.

Commonwealth v. Wolen, 546 Pa 448, 685 A.2d 1384, 1387 (1996).

In the instant case, this Court must and will look at the totality of the circumstances in order to determine if Defendant had "actual physical control" of his vehicle. First, Defendant was in his vehicle while under the influence. Although Defendant did not have the keys in the ignition at the time he was first discovered, Defendant later placed the keys in the ignition and turned the ignition over twice. The starter was not engaged; only the radio was activated. However, the second time, Defendant not only started the vehicle's engine, he also moved the vehicle's gears to place the vehicle in drive with his foot on the brake. At that time, a security guard jumped out of Defendant's way in fear for his safety. Obviously, Defendant was in actual control of the vehicle to cause any bystander to be concerned about her or his safety. Defendant's first issue is without merit. As to Defendant's second issue regarding whether his actions were the harm or evil sought to be prevented by the Legislature, Defendant's actions created

a threat to public safety and placed everyone at risk of being in danger or in harm's way. This is true even if the vehicle actually moved or not. Defendant's fatal mistake was starting the engine and putting the vehicle in drive, thereby endangering society and violating the Legislature's goal in enacting a statute for public safety. Wherefore, Defendant's issue is without merit since the Commonwealth did establish by prima facie evidence that Defendant was in actual physical control of his vehicle while under the influence of alcohol.

Finally, in view this Court's finding sufficient facts that Defendant posed a potential threat to public safety, the harm sought to be prevented by statute, Defendant's De Minimis Infraction issue is also without merit.

For all the foregoing reasons, Defendant's Omnibus Pre-trial Motion for Relief in the nature of a Writ of Habeas Corpus and Motion to Dismiss is denied.

ORDER OF COURT

AND NOW, to-wit, this Twenty-ninth day of November, 1999, after review of the preliminary hearing transcript and the parties' Memoranda of Law, it is hereby **ORDERED, ADJUDGED AND DECREED** that Defendant's Omnibus Pretrial Motion for Relief in the nature of a Writ of Habeas Corpus and Motion to Dismiss is DENIED as more fully set forth in this Court's Opinion attached.

BY THE COURT:
/s/ **Stephanie Domitrovich, Judge**

JERRY J. SPEAR, Plaintiff

v.

EDWARD J. BAJOREK, M.D., Defendant

CIVIL PROCEDURE/MOTION TO STRIKE DISCONTINUANCE

The court acts within its discretion to deny the Plaintiff's motion to strike off a discontinuance voluntarily entered by the Plaintiff where the case is almost 5-1/2 years old and is premised on alleged acts occurring 11 years ago, current counsel has been involved in the case for over two years, and trial dates have been repeatedly postponed at the Plaintiff's request. The Plaintiff may not voluntarily discontinue and then file a motion to strike the discontinuance as a sham to circumvent the denial of a request for continuance of the trial. The Defendant is prejudiced because of the additional costs and personal aggravation of continuing to defend this action under these circumstances.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 10911-1994

Appearances: William S. Schweers, Jr., Esq. for Mr. Spear
Wallace J. Knox, II, Esq. for Dr. Bajorek

OPINION

The present appeal is yet another attempt by Appellant to delay a case in which Appellant has had ample time and opportunity to prepare for trial. On the eve of a jury trial nearly eleven years after the alleged negligence of the Appellee, Appellant filed a voluntary discontinuance rather than proceed to trial. Subsequently, Appellant petitioned for permission to strike off the discontinuance and thereby have another trial. Appellant's request was rightfully rejected. Appellant is now appealing from the Order denying his Motion to Strike off Discontinuance.

At the outset, it is important to distinguish what is at issue in this case. Procedurally, the issue is whether there was an abuse of discretion in denying the Motion to Strike off Discontinuance. The issue is not whether there was error in the denial of Appellant's request for yet another continuance of a jury trial.

Appellant contends that his Praecipe to Discontinue was not voluntary. Instead, Appellant's counsel claims he was faced with the Hobson's choice of going to trial without an expert witness to establish liability and facing a nonsuit and potential sanctions from the Court or discontinuing the case prior to trial.

Appellant's counsel, after consultation with Appellant, consciously chose to file a discontinuance rather than proceed to trial without an expert witness. It is worthy of note that Appellant's Praecipe to Discontinue does not contain any averment of duress or coercion;

instead it simply states the case is discontinued.

Appellant's circumstances were of his own making and not the result of any coercion or pressure by the Court. Appellant's purported missing witness, Dr. Hutson, had prepared an expert report which had been filed almost four years prior to trial. To Appellant's knowledge, Dr. Hutson was located in Salt Lake City, Utah and therefore not readily available for trial. Nonetheless, Appellant opted not to take Dr. Hutson's deposition for use at trial.

Appellant's cause of action allegedly accrued in October 1988. On March 7, 1994 Appellant instituted the within lawsuit. The record reveals a continuing series of Case Management Orders in which Appellant was required to file an expert report in 1995 and be prepared for trial as far back as the October, 1997 term of Court. A detailed review of the record leads to the inescapable conclusion that Appellant had little desire for this case to see a courtroom.

The record establishes the following procedural history. On July 25, 1995, the Honorable Judge Levin ordered Appellant to file an expert report within 90 days or suffer a dismissal. Thereafter Appellant filed the expert report of Dr. Hutson on November 1, 1995 and the Appellee's request for a non-pros was denied by Order dated November 7, 1995.

Apparently, the case was then reassigned to the Honorable Judge Joyce[1] who issued an Order requiring all discovery completed by July 15, 1997 and pre-trial narratives and depositions filed by August 1, 1997. Further, the Order of Judge Joyce required the case to be certified for the October, 1997 term of court. All time periods were to be "strictly followed". Hearing Transcript, October 7, 1999 (hereinafter H.T.) Pg. 6. Attorney Schweers entered an appearance as counsel of record on July 16, 1997.

For reasons unclear from the docket, Judge Joyce entered another scheduling Order dated October 31, 1997 requiring all discovery completed by January 31, 1998, all depositions completed by February 28, 1998 and the case certified for the April, 1998 term of court.

The timetable was again moved back in an Order issued by Judge Levin dated January 14, 1998 requiring discovery to be completed by March 31, 1998, all pre-trial narratives and depositions finished by April 30, 1998 and the case certified for the June, 1998 term of court.

On March 25, 1998 Appellee filed a Motion for Summary Judgment, which was denied by the Honorable Judge Michael Palmisano by Order dated July 2, 1998.

The case was then placed back in a trial posture and assigned to

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[1] Now the Honorable Michael T. Joyce of the Superior Court of Pennsylvania.

President Judge John A. Bozza. Upon the recusal of President Judge Bozza, the case was assigned to this Court.

A Status Conference was held before this Count in November, 1998, with Appellant's counsel permitted to appear by telephone. At the Status Conference, all parties requested a date certain to allow the presentation of out-of-town expert witnesses. The parties were not prepared to proceed for the November term of court.

Prior to the February, 1999 term of court, a Settlement Conference was held on January 26, 1999 in which all parties were represented. At that time, Appellant again requested additional time to prepare for trial indicating that three video-taped depositions needed to be taken, including the deposition of Dr. Hutson in Salt Lake City, Utah. The parties agreed to move the case from the February to the April term of court to permit the taking of these depositions.

During the April, 1999 term of court, this case was not reached because of a prior lengthy trial involving this Court as well as Appellee's counsel. Hence this case was listed for the next term of civil court, which was June, 1999.

At a Settlement Conference on June 2, 1999, prior to the June term of court, Appellant was still not ready to proceed to trial. Instead, Appellant requested the case be heard at a date certain for August. Appellant's request was honored and the case was given a date certain for Monday, August 16, 1999. Thus, to Appellant's knowledge as of June 2, 1999, this case was going to be tried beginning Monday August 16, 1999. Accordingly, Appellant's counsel had over two months to prepare on a case which had been filed in March, 1994 for which he had been counsel of record since July 16, 1997.

Another Settlement Conference was held on July 30, 1999 with all parties represented by counsel. At no time did Appellant ever mention any problem(s) with presenting the testimony of any witness for the upcoming trial. There were discussions initiated by Appellant's counsel about scheduling trial depositions. Appellee's counsel made himself available on numerous dates for any needed deposition(s). No deposition(s) ever occurred.

On Monday, August 9, 1999, Appellant faxed to the Court a written request for a continuance claiming his expert witness was unavailable for the trial. This request was denied by order dated August 9, 1999. On Friday, August 13, 1999 Appellant filed a Praecipe for Voluntary Discontinuance and the jury trial scheduled for Monday, August 16, 1999 was called off.

On September 20, 1999, Appellant filed a Motion to Strike Off Discontinuance. A hearing was held thereon on October 7, 1999 and an Order entered October 7, 1999 denying the Motion to Strike.

Appellant's Voluntary Discontinuance and then subsequent Petition

to Strike Off the Discontinuance were nothing more than a sham designed to circumvent the denial of Appellant's continuance request. Any purported duress Appellant's counsel suffered in making the decision whether to proceed with the trial as scheduled or file a discontinuance was the direct result of counsel's failure to have a case when the matter was finally called for trial.

As the record reflects, the trial scheduled for Monday, August 16, 1999 was nearly eleven years after the alleged negligence in October, 1988; almost five and one-half years after the lawsuit was filed; over two years after Appellant's counsel entered an appearance; and over two months after the case was given a date certain status as of June 2, 1999. It is apparent as far back as 1995 Appellant was at risk of losing his case because of his inability to establish liability via expert testimony.

Appellant and his counsel were given complete access to the Court system and a plethora of opportunities to have a trial. Originally, Appellant's case was to be tried in the October, 1997 term of court. Appellant was thereafter listed for trial on at least four other trial terms. Appellant's various requests for a continuance and a date certain for trial had been granted. Appellant's failure to timely prosecute his case cannot be a legal basis to strike off Appellant's own discontinuance.

Also, the prejudice, expense and inconvenience to the Appellee cannot be ignored. The Appellee has been forced to incur the costs, time and expense of defending this case for five and one-half years. The record reflects the Appellee was prepared to proceed to trial on Monday, August 16, 1999.

Counsel for Appellee had secured expert witnesses from out-of-town and had made the necessary arrangements for their testimony at the August, 1999 trial. All trial preparations had been made at a significant cost to the defense. All of this time and expense Appellee would have to suffer again should the Appellant be allowed to reinstate his case. Further, Appellee correctly contends that his experts may not be available at a future trial.

Finally, Appellee has been retired from the medical profession and is now in the middle of his seventh decade of life and suffering from poor health. Appellee has had to live with the costs and aggravation of defending this action since March, 1994. It is inherently prejudicial to allow this matter to linger any longer.

CONCLUSION

Appellant's bluff was eventually called. Appellant folded his hand. Appellant is not entitled to a new deal.

BY THE COURT:
/s/ WILLIAM R. CUNNINGHAM
President Judge

RICHARD J. WRIGHT and STACI L. WRIGHT, his wife, Plaintiffs

v.

GLEN MORGAN, RICHARD FOSTER, and JOHN DOE, Defendants

EQUITY/PRELIMINARY INJUNCTION

A request for temporary restraining order/preliminary injunction will be denied where there is no evidence that an injury is irreparable.

EQUITY/PRELIMINARY INJUNCTION

A request for temporary restraining order/preliminary will be denied where any damages could be compensated by money damages.

EQUITY/PRELIMINARY INJUNCTION

A request for temporary restraining order/preliminary injunction will be denied where any alleged damages were speculative.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION -EQUITY CASE No. 60020 -1999

Appearances: Timothy D. McNair, Esq. for the Plaintiffs
Tammi L. Elkin, Esq. for the Defendants

OPINION

Anthony, J., December 10, 1999.

This matter comes before the Court on Plaintiff's Petition for Temporary Restraining Order/Preliminary Injunction. After hearing evidence and considering the briefs of the parties, this Court will deny the Petition. The factual and procedural history is as follows.

In 1857, Anan Raymond and his wife Celenda Raymond deeded a certain parcel of land to Daniel Lowell, William A. Yost and Charles Morgan and their successors in trust for use as a "free, public burying ground." The deed was recorded on October 4, 1881. The trustees have all apparently died and no successor trustees were appointed. However, the property remained a cemetery as bodies were interred and markers still indicate the grave sites. Plaintiffs state that they have maintained a portion of the cemetery grounds in front of their property for the past 9 1/2 years. Defendants claimed to have maintained basicially all of the cemetery going over there 2 or 3 times per year for the past 10 to 15 years.

The portion of the cemetery in front of Plaintiffs' home did not contain any remains until sometime in 1997 when Defendant Frederick Foster[1] (hereinafter "Foster") interred the cremated remains of his parents on that portion of the cemetery. The remains have been marked. Defendants are part of a group that wishes to operate and control the cemetery but have

[1] The Defendant has been misnamed in the Complaint in Equity and Petition as Richard Foster. His real name is Frederick Foster.

not completed all the necessary requirements to be considered the trustees of the cemetery. As part of this process, however, the group believes it advantageous to enclose the cemetery with a fence. This fence would curtail Plaintiffs use of a portion of a circular driveway that they created and/or maintained crossing over the cemetery, but would not deny them access to their property or the use of the driveway as a straight road.

Plaintiffs filed a Complaint in Equity on July 6, 1999 seeking to enjoin the Defendants from developing or improving the cemetery. Defendants answered on August 30, 1999. Plaintiffs filed the above petition requesting the court enjoin the Defendants from putting up a fence on October 11, 1999. A hearing was held on October 26, 1999.

At the hearing, Plaintiff Richard J. Wright (hereinafter "Wright") was the only witness for the Plaintiffs. He stated that he and his wife had bought the property sometime in 1990. He stated the proposed fence would cause the property not to be maintained by anyone and weeds and underbrush would develop affecting the view of their property and would interfere with their use of the driveway.

Counsel for Plaintiffs contend that they are "defacto trustees" over that portion of the cemetery that is in front of their home and over which the portion of their circular driveway intersects. However no legal authority has been submitted by Plaintiffs to support this so-called "defacto trustee" status. Wright also stated that there would not be any damages that could not be compensated with a monetary judgment.

The only other witness to testify was Foster who testified that he had been involved in cleaning and maintaining the cemetery for the past ten years. He testified that he went to the cemetery two to three times a year for this purpose. He further testified that the Defendants were attempting to establish a fund for the maintenance of the cemetery. Finally, he testified that the fence that the Defendants wished to install was a split rail fence standing about five feet high and the fence would be two and a half to three feet within the cemetary property line.

The issue before this Court is whether the Plaintiffs have succeeded in making a case for a preliminary injunction.[2] For the Court to grant a preliminary injunction, the Plaintiffs must show that (1) the right to relief is clear; (2) the need for relief is immediate; and (3) that the injury which would result would be irreparable. *Fedorko Properties v. Zurn & Associates*, 720 A.2d 147, 149 (Pa. Super. 1998). In order to show irreparable damages a plaintiff must show that the injury cannot be adequately

[2] The Court *sua sponte* raised the issue of Plaintiff's standing to bring the lawsuit. This was in error as the Court cannot raise the issue of standing since it is not a jurisdictional question. It must be raised by the Defendants. *See In re Estate of Schram*, 696 A.2d 1206, 1209 (Pa. Cmwlth. 1997).

compensated by money damages. *Sovereign Bank v. Harper,* 674 A.2d 1085, 1091 (Pa. Super. 1996). An injury is regarded as irreparable if it will cause damage which can be estimated by conjecture alone and not by any accurate pecuniary statement. *Id.* at 1093. Finally, for an injury to be irreparable, it must also be irreversible. *Id.*

Looking at the case *sub judice,* Plaintiffs can not make a claim for a preliminary injunction as there is no evidence that the injury is irreparable. Wright himself testified that he believed that any damages could be compensated by money damages. Even if he had not, the Court's decision would be the same. At most, Plaintiffs have shown that their only damages would be from the failure to maintain the cemetery properly. However, any diminution in property values could be compensated by money damages, as could any work that the Plaintiffs may have to perform in the future.[3]

More importantly, Plaintiffs have not put forth any evidence to show that these damages would accrue in the frrst place. All Plaintiffs have contended is that Defendant's **may** not properly maintain the property. This is pure speculation on the part of the Plaintiffs and is not enough for the Court to grant a preliminary injunction.

In conclusion, since there is no evidence sufficient to show that the Plaintiffs will suffer an irreparable injury, the petition for a preliminary injunction will be denied.

ORDER

AND NOW, to-wit, this 10 day of December, 1999, it is hereby ORDERED and DECREED that Plaintff's Petition for Temporary Restraining Order/ Preliminary Injunction is DENIED

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

[3] Plaintiffs have not put forth any evidence to show that the loss of use of a portion of the driveway would amount to anything more than inconvenience. This also would not be irreparable injury.

CLAIR J. MONSCHEIN and JUDITH A. MONSCHEIN, his wife

v.

EXECUTRIX OF THE ESTATE OF CHARLES PHIFER, deceased

VERDICT

The standard to be applied in determining if a new trail should be granted is found in *Neison v. Himes* 539 Pa. 516, 653 A.2d 634 (1995). In order for a trial court to grant a new trial, the jury's verdict must be so contrary to the evidence that it "shocks one's sense of justice." *Id.* P. 636. More precisely, "...it is not for this Court, absent evidence of unfairness, mistake, partiality, prejudice, corruption, exorbitance, excessiveness, or a result is offensive to the conscience and judgement of the court..." to disturb a jury's verdict. *Catalano v. Bujak*, 537 Pa. 155, 642 A.2d 448 (1994).

VERDICT

In circumstances where a jury accepted to a significant extent plaintiff's position that he incurred a painful injury, the verdict of zero for pain and suffering was "so disportionate to the uncontested evidence as to defy common sense and logic." *Neison*, 653 A.2d 637.

DAMAGES

A jury's award of an amount for lost earnings implicitly acknowledges pain associated with an injury. A plaintiff is entitled to be fairly and adequately compensated for the pain and suffering he incurred as a result of the negligence of the defendant.

DAMAGES

In circumstances where a jury awards an amount for lost earnings but not pain and suffering, a new trail is required on the issue of damages. If a jury's decision to award no amount for general damages is inconsistent with the weight of the evidence, the jury's own conclusions, and the instructions of the court it "is offensive to the conscience and judgement of the court." *Catalano*, 642 A.2d 450.

EVIDENCE

If a plaintiff fails to lay an appropriate foundation for the introduction of evidence. The Court will exclude the evidence. Pa. R.E. 402, states that, "Evidence that is not relevant is not admissible."

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11732 - 1998

Appearances: Michael J. Koehler, Esq., for the Plaintiffs
Edward Klym, Esq., for the Defendants

OPINION

Bozza, John A., J.

This matter is before the Court on plaintiffs' Motion for Post Trial Relief.

A trial was conducted on November 9 and 10, 1999, and the jury rendered a verdict of $30,000.00 for lost earnings to the plaintiff. The jury declined to award any sum for past and future physical pain and suffering, embarrassment and humiliation, and loss of enjoyment of life. The jury also declined to award any sum for the loss of consortium. Now before the Court is the plaintiffs' Motion for Post Trial Relief in which *inter-alia*, the plaintiff seeks a new trial on the issue of damages. The plaintiffs have raised other issues that have to do with limitations in the testimony of plaintiffs' economic expert, and concern about the Court's communication with the jury during deliberations. A review of the record in this case indicates these latter two issues are without merit and will be addressed at the end of this Court's opinion.

The essence of plaintiffs' position is that the verdict of the jury was against the weight of the evidence, both with regard to lost earnings and pain and suffering and other general damages. The standard to be applied in determining this issue has been delineated and applied in a number of cases before the appellate courts. In *Neison v. Hines*, 539 Pa. 516, 653 A.2d 634 (1995), the Pennsylvania Supreme Court noted that in order for a trial court to grant a new trial in circumstances such as these, the jury's verdict must be so contrary to the evidence that it "shocks one's sense of justice." *Id*. P. 636. It is not up to the Court to substitute its own judgment for that of the jury where the Court simply decides that it would have come to a different conclusion. More precisely, the Supreme Court has noted that . . ."it is not for this Court, absent evidence of unfairness, mistake, partiality, prejudice, corruption, exorbitance, excessiveness, or a result is offensive to the conscience and judgment of the court . . ." to disturb a jury's verdict. *Catalano v. Bujak*, 537 Pa. 155, 642 A.2d 448 (1994).

The evidence presented in this case included only testimony from plaintiffs' witnesses. The defendant called no witnesses nor introduced any other evidence, so none of what was presented by the plaintiff during the trial was directly contradicted. While cross-examination of the plaintiffs' witnesses raised issues for the jury's consideration, the overwhelming substance of the testimony was uncontroverted. Indeed, at the close of the evidence, the Court directed a verdict in favor of the plaintiff on the issue of negligence. Therefore, the only two issues for the jury's consideration were whether defendant's negligence caused injury to the plaintiff and, if so, to what extent. The jury concluded that the defendant's negligence did cause injury to Mr. Monschein, and as a result of it, he was injured and entitled to receive $30,000.00 for lost earnings.

At trial it was Mr. Monschein's position that he was struck from behind while properly stopped in traffic. There was no evidence to the contrary. The testimony revealed that within two days of the accident he began to suffer serious pain and went to see his physician, Dr. David M. Kruszewski. Dr. Kruszewski testified that Mr. Monschein reported that the morning

after the accident he began to have a "severe occipital headache and a tingling at the base of his neck." Kruszewski Deposition, p. 15. Following examination, the doctor concluded that he was suffering from muscle spasms and he diagnosed "acute cervical strain and perithoracic myospasms." *Id.*, p. 17. There was no evidence introduced contradicting Dr. Kruszewski's conclusions. Further testimony revealed that over time Mr. Monschein's condition persisted, notwithstanding the use of various medications, physical therapy, and chiropractic care. Ultimately, Dr. Kruszewski concluded that Mr. Monschein had a chronic degenerative condition in his neck which was made worse by the motor vehicle accident. None of this was directly contradicted by other evidence, although the defense essentially contended that the degenerative condition was sufficient by itself to cause Mr. Monschein problems. The defense also pointed out that Mr. Monschein had opted not to undergo a series of spinal injections which could have helped to relieve his pain.

Mr. Monschein and his wife both testified that because of the pain associated with his injury, that he was unable to continue working as he had prior to the accident. Mr. Monschein was a self-employed electrician who, at one time, employed up to seven people. Currently he has no regular employees and only works part-time. Mr. Monschein called an expert economist and job placement specialist to testify that lost earnings as a result of his injury would be in excess of $200,000.00. This witness' position was vigorously challenged by the defense. Testimony was elicited indicating inconsistency in Mr. Monschein's prior earnings and past decreases in annual earnings mused by factors unrelated to the accident. In short, the record before the jury contained evidence which called into dispute the extent and consequence of Mr. Monschein's injury.

It is up to the jury to decide what evidence to believe and it is not for the court to determine otherwise. *Catalano v. Bujak*, 537 Pa. 155, 642 A.2d 448 (1994). In this case it is obvious that the jury accepted the testimony of the plaintiffs to the extent that Mr. Monschein incurred an injury caused by the defendant's negligence. It is also apparent that the jury accepted Mr. Monschein's position that he could not work because of the pain he endured as a result in the accident. What the jury did not accept is the extent of Mr. Monschein's disability as they awarded him only a small portion of his claim for monetary loss. This was the jury's prerogative and the jury's decision concerning lost earnings is not so inconsistent with the weight of the evidence that it shocks the conscience of the court. The issue regarding the failure to award any sum for general damages requires a more involved analysis.

The entire theory of recovery advanced by Mr. Monschein was that as a result of his accident he incurred an injury which caused him great pain and that because of the pain he could not carry out the responsibilities of his job as an electrician and electrical contractor. It was the pain associated

with the injury to his neck and the exacerbation of the underlying condition that restricted his movement. The jury obviously accepted the fact that he incurred a disabling injury as a result of his pain and awarded him an amount for lost earnings. The jury's failure to award any sum for pain and suffering and other general damages is plainly inconsistent with its decision concerning lost earnings. While the jury was entirely free, based on the record before it, to believe that the extent of Mr. Monschein's disability was less than what he advocated, the question remains as to whether having accepted the notion that he incurred a pain-related disability, it was free to deny him damages for his pain and suffering.

In *Neison v. Hines*, 539 Pa. 516, 653 A.2d 634 (1995), the Court was confronted with similar circumstances to the extent that the evidence of the plaintiff was largely uncontroverted and the issue for the jury's determination was whether Neison was entitled to damages for pain and suffering. Ms. Neison had incurred "head trauma," for which she was treated in the emergency room, and "cervical sprain" for which she was prescribed pain medication and a home exercise program. She continued to work at her job as a physical education and health teacher and apparently had no claim for lost earnings. Liability was conceded and the jury returned a verdict awarding no damages to Ms. Neison. The trial court awarded her a new trial as to the issue of damages, and Superior Court reinstated the order of the Court of Common Pleas. In reaching its decision, the Supreme Court noted, "Ms. Neison presented unrebutted evidence that she suffered serious injuries from the automobile accident," further noting that defendant "failed to present any adverse evidence for the jury to accept in place of Ms. Neison's expert testimony. *Id.*, p. 639. Both parties' experts agreed that Ms. Neison suffered from an objective injury."

In the instant case, the defense did not present any expert testimony and, although it did not concede the plaintiff was injured, it presented no independent evidence to indicate otherwise. While the cross-examination of Mr. Monschein and other plaintiffs' witnesses raised an issue as to the extent of his injury and the extent of his disability, the fact that he had a pain-based impairment of some kind was not vigorously challenged. The jury's verdict reflects its conclusion that they accepted the plaintiff's position in that regard. While it is well-established that a jury is free to believe whatever portion of the testimony it chooses, its decision cannot be "a product of passion, prejudice, partiality, or corruption," (and) "must bear some reasonable relation to the loss suffered by the plaintiff as demonstrated by uncontroverted evidence presented at trial." *Id.*, p. 637. In the circumstances presented by this case where the jury accepted to a significant extent plaintiff's position that he incurred a painful injury, the verdict of zero for pain and suffering was "so disportionate to the uncontested evidence as to defy common sense and logic." *Id.*

This case is unlike the facts presented in *Catalano v. Bujak*, 537 Pa. 155,

642 A.2d 448 (1994), where the Supreme Court rejected plaintiff's position that an award of no damages for pain and suffering was inconsistent with the weight of the evidence. In *Catalano* the jury did award a modest amount for medical expenses, but it awarded nothing for lost earnings and pain and suffering. The plaintiff had brought an action against a police officer for the excessive use of force and at trial maintained that he suffered an injury to his wrist as a result of defendant's actions. Unlike the facts in the instant case, the defense apparently presented evidence that the plaintiff could still do his job and that the injury occurred at work. In overturning the Commonwealth Court's conclusion that the verdict was inadequate and inconsistent, the Supreme Court noted that under the circumstances where the case involved issues that were hotly contested and the jury's verdict reflected that they "simply disbelieved evidence of damages in excess of what it awarded," the verdict should remain intact. Here, the Estate did not present any evidence indicating an alternative theory of causation and no serious challenge to liability. It only raised questions as to the extent and lasting effects of Mr. Monschein's injury. Moreover, the jury's award of an amount for lost earnings implicitly acknowledged that Mr. Monschein was not able to work because of the pain associated with his injury. It would appear, therefore, that the jurors either misunderstood or misapplied the court's instruction that the plaintiff was entitled to be fairly and adequately compensated for the pain and suffering he incurred as a result of the negligence of the defendant.

In circumstances such as these, a new trial is required on the issue of damages. *See also*: *Douherty v. McLaughlin*, 432 Pa. Super. 129, 637 A.2d 1017 (1994). The jury's decision to award no amount for general damages was inconsistent with the weight of the evidence, the jury's own conclusions, and the instructions of the Court, and as such, "is offensive to the conscience and judgment of the court," *Catalano*, 642 A.2d 450.

Concerning the question of the Court's comments to the jury, a review of the record indicates that the Court spoke with the jurors on two occasions and both times the jurors were told that their deliberations could not go on indefinitely that evening. They were advised that at some point the Court would have to recess and reconvene the next morning. There is no indication in the record that anything the Court said improperly influenced their deliberations. Plaintiffs' assertion that such communication was improper is without merit.

With regard to the Court's limiting the testimony of plaintiffs' economic expert, the record reveals that the plaintiff failed to lay an appropriate foundation for the introduction of the evidence concerning Mrs. Monschein's lost wages and as such the Court excluded the testimony. Mrs. Monschein did not have a direct claim for lost wages before the jury, only her derivative claim for loss of consortium was pled. Pa.R.E. 402, states that, "Evidence that is not relevant is not admissible." The plaintiff

did not establish through its economic expert or otherwise how Mrs. Monschein's lost wages were relevant to her husband's economic loss and, as such, were not relevant to the issue before the jury and properly excluded. Therefore, the plaintiff's assertion of error in that regard is without merit.

An appropriate Order shall follow.

ORDER

AND NOW, to-wit, this 2 day of February, 2000, upon consideration of plaintiffs' Motion for Post Trial Relief and Motion for Delay Damages filed in the above-captioned matter, and in accordance with the foregoing Opinion, it is hereby **ORDERED**, **ADJUDGED** AND **DECREED** that the Motion for a new trial on the issue of damages is **GRANTED**. In all other respects, the Motion is **DENIED**.

IT IS FURTHER **ORDERED** that the Motion for Delay Damages is **DENIED** (without prejudice) as moot.

By the Court,
/s/ **John A. Bozza, Judge**

PENNSYLVANIA SOCIAL SERVICES UNION LOCAL 668, SERVICE EMPLOYEES INTERNATIONAL UNION, Petitioner

v.

ERIE COUNTY OFFICE OF CHILDREN AND YOUTH SERVICES, Respondent

CIVIL PROCEDURE/DISCOVERY

As a general rule childrens' protective services reports are considered confidential. 23 Pa. Cons.Stat.Ann. § 6339. The Juvenile Act (42 Pa.Cons.Stat.Ann. § 6307 et. seq.) also requires confidentiality; however this confidentiality is not absolute.

CIVIL PROCEDURE/DISCOVERY/REQUESTS FOR PRODUCTION

Section 6340 (a) (12) of Title 23 allows release of childrens' protective services reports to county commissioners when investigating the competence of county children and youth employees.

CIVIL PROCEDURE/DISCOVERY/REQUESTS FOR PRODUCTION

The exceptions to confidentiality do not extend to civil plaintiffs seeking information about proceedings for purposes of prosecuting a personal injury law suit based on a separate incident.

CIVIL PROCEDURE/DISCOVERY/REQUESTS FOR PRODUCTION

When a discharged caseworker seeks access to records in order to pursue an employment grievance, the employee should have access to information utilized by an agency as a predicate for the decision to terminate the employee's services.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA FAMILY DIVISION NO. 12573 OF 1999

Appearances: Erma Rhodes, PSSU Business Agent for the Petitioner
Thomas E. Kuhn, Esquire for the Respondent

OPINION AND ORDER

I. BACKGROUND OF THE CASE

This matter comes before the Court on Petitioner's Pennsylvania Social Services Union (PSSU) Motion For Special Relief For the Production Of Information Within the possession of the Erie County Office of Children and Youth (OCY). This Petition relates to one of OCY's cases and one of its former caseworkers, Ms. Reta Hall. PSSU requests this information in order to represent Ms. Hall who has filed a grievance related to her discharge.[1]

[1] Generally, this matter is governed by 43 Pa.Cons.Stat.Ann. §§1101.101 *et seq.*

The original motion failed to include a list of the requested items. After request by this Court, it was provided. (See Exhibit A). The Court next issued an order (July 26, 1999) to compel the information to be provided to the Court for an *in camera* review. Both parties submitted supplemental information, including case authority which has been reviewed by the Court.

II. DISCUSSION

Generally, Children's Protective Services reports are considered confidential. 23 Pa.Cons.Stat.Ann. §6339. The release of those reports is governed by 23 Pa.Cons.Stat.Ann. §6340. See also, 55 Pa. Code §§3130.45 and 3680.35. In addition, 42 Pa.Cons.Stat.Ann. §6307 (The Juvenile Act) requires confidentiality. The right of confidentiality is not, however, absolute. See, *Commonwealth v. Ritchie,* 472 A.2d 220 (Pa. Super. 1994), remanded 502 A.2d 148, aff'md. in part, rev. in part on other grounds. 480 U.S. 39 (1987). Moreover, Section 6340(a)(12) of Title 23 allows release to County Commissioners when investigating the competence of county children and youth employees.

Although this Court did not find any case law directly on point, our appellate courts have addressed the issue in other factual contexts. In *V.B.T. v. Family Services of Western Pennsylvania,* 705 A.2d 1325 (Pa. Super. 1998), the Superior Court reversed a trial court's orders denying motions for protective orders in a negligence case. Although factually distinguishable, *V.B.T.* is instructive. There the Superior Court stated:

> The Juvenile Act creates a privilege by providing that Court files and records and proceedings under the Act (such as the dependency proceeding leading to M.F.'s placement) are open to inspection only by defined categories of persons and agencies. 42 Pa.C.S,§6307. footnote 9. These categories include individuals and institutions with a direct interest in either the specific proceedings in question or in the operation of the justice system. Plaintiffs argue that in light of the allegations of their complaint, they fall within the express provision of the statute allowing access "any other person...having a legitimate interest in the proceedings." 42 Pa.C.S.§6307(7). We do not agree. Analysis of the cited language in the context of the statutory section as a whole persuades us that the term, "person with a legitimate interest in the proceedings" in the cited subsection refers only to a person who has a direct involvement with a juvenile court proceeding or the events in question, in this case the dependency proceedings. The statutory exception to confidentiality thus does not extend to an unrelated civil plaintiff seeking information about the proceedings for purposes of prosecuting a personal injury law suit based on a separate incident involving the foster child.

> footnote 10. We therefore conclude that the plaintiffs are not entitled to access to information and records of juvenile court proceedings under the express terms of the Juvenile Act.

Id. at 1331.

The Superior Court then conducted the same analysis relative to the Child Protective Services Act. It determined; "[t]hese categories do not include a civil plaintiff seeking discovery in pursuit of a claim for damages based upon alleged conduct of the abused child." *Id.* at 1333.[2]

The case at bar involves a discharged caseworker who seeks access to records in order to pursue her employment grievance. Unlike the plaintiff in *V.B.T.*, the caseworker does have a direct interest because her employment performance is inextricably intertwined with the dependency case. Moreover, 23 Pa.Cons.Stat.Ann. §6340 (a)(12) anticipates release of information to county commissioners who are charged with the responsibility of investigating the competence of county children and youth employees. Therefore, it logically follows that if county officials have access to that information for employment review purposes, then a discharged employee should also have access to that information utilized by the agency officials as a predicate for the decision to terminate the employee's services. Having made this finding, the Court now will analyze those documents which are requested as part of the grievance process in this case.

1. The transcript from the February court disposition review regarding the Moffett children.

The Court has reviewed that transcript and finds it is available for inspection by Ms. Hall.

2. The May 12, 1998 letter to the Court.

After its review, the Court finds the letter may be released because it sets forth the caseworker's request for a redispositional hearing to change OCY's goal in the case.

3. The Respite Policy for both medically dependent and non-medically dependent children.

This has already been provided.

4. The minutes of all Peer Group meetings in which apnea and CPR training were discussed.

The Court has been informed that no minutes exist.

5. The payment history for foster care provided to the Moffett children.

This information is discoverable.

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[2] The Court also reviewed the case of *S.M. v. Children and Youth Services of Delaware County*, 686 A.2d 872 (Pa. Comwlth. 1996), but does not find that it adds anything to the analysis.

6. Respite forms submitted to the Agency for the care of the Moffett children between September 1997 and July 1998.

This information is discoverable.

7. Any and all witness statements or minutes from meetings held with witnesses in this case, including statements by the Youngs, Earls and Runselers.

Any witness statements which may exist shall be made available to the parties' counsel and/or representative forty-eight (48) hours prior to any formal hearing conducted pursuant to the collective bargaining agreement. This requirement is reciprocal.

8. Records of transport of the Moffett children for doctors' visits, etc.

This information is discoverable.

III. CONCLUSION

In light of the above, this Court will issue the following order.

ORDER

AND NOW, this 20th day of August, 1999, after having conducted a review of the Motion For Special Relief For The Production Of Information, the letter of October 9, 1998 and the supplemental submissions of the parties, and for the reasons stated in the accompanying Opinion, it is hereby ORDERED that items 1, 2, 5, 6, and 8 are to be provided to the Petitioner's representative. Petitioner's request relative to item 7 is GRANTED IN PART as reflected on page 5 of this Court's Opinion. It is further ORDERED that neither the Petitioner, her union representative, her counsel or any other person shall disclose the information which she receives as a result of this order to any other person or entity not involved with the grievance proceeding without further order of Court. A violation of this Court's order in that regard by any person or entity shall subject that person or entity to contempt and appropriate sanctions. As previously indicated in its opinion, this Court finds that item 3 has been provided and item 4 does not exist.

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

PHILIP A. CARLSON, Plaintiff,

v.

JOSEPH NOSKO and ANN NOSKO, his wife, Defendants

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW CASE No. 10761-1998

JOSEPH NOSKO and ANN NOSKO, his wife, Plaintiffs,

v.

PHILIP A. CARLSON, Individually and d/b/a Custom Building and Remodeling, Defendant

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW CASE No. 11505-1999

TRADE REGULATION/CONSUMER PROTECTION LAW

Summary Judgment granted in favor of homeowner in cross-actions involving home remodeling contracts, where homeowner informed construction contractor of intent to cancel remodeling agreements after contractor completed work and sued to collect amounts due under the agreements, since contractor failed to notify homeowner of the right to rescind.

TRADE REGULATION/CONSUMER PROTECTION LAW

Seller who contracts to sell any goods or services with a value in excess of $25 as a result of a contact with buyer at buyer's residence must give buyer a "Notice of Cancellation" explaining buyer's right to rescind the agreement within three days of making the contract.

TRADE REGULATION/CONSUMER PROTECTION LAW

Three day cancellation period does not begin to run until the seller has informed the buyer of right to rescind.

TRADE REGULATION/CONSUMER PROTECTION LAW

Within ten days of receipt of notice of cancellation from buyer, seller must notify buyer whether it intends to repossess the goods or abandon them.

EQUITY/QUANTUM MERUIT

Contractor not entitled to recovery based on *quantum meruit* since contractor failed to give notice of intent to repossess goods within ten days of receipt of homeowner's notice of cancellation.

EQUITY/LACHES

Laches requires a lack of due diligence in the pursuit of a cause of action and resulting prejudice to the other party. Homeowner's claim for rescission under Consumer Protection Law is not barred by Doctrine of Laches since contractor failed to notify homeowner of right to cancel and homeowner pursued right to cancel before the statutory three day period had run.

DAMAGES/CONSUMER PROTECTION LAW

Contractor required to return money paid by homeowners under rescinded agreement, but homeowners not entitled to treble damages.

Appearances: Gary H. Nash, Esquire for Joseph & Ann Nosko
Eugene J. Brew, Jr., Esquire for Philip A. Carlson

OPINION

Anthony, J., February 8, 2000.

This matter comes before the Court on Plaintiff's Joseph and Ann Nosko (hereinafter "Noskos") Motion for Summary Judgment and/or Partial Summary Judgment under Count II of their Complaint. After a review of the record and the briefs of the parties and considering the arguments of counsel, the Court will grant the motion. The factual and procedural history is as follows.

On September 29, October 29 and October 30 of 1997, the Noskos and Philip A. Carlson, either by himself or doing business as Custom Building and Remodeling (hereinafter "Carlson"), entered into a series of home improvement construction contracts for work to be performed on the Noskos' residence. Those contracts were signed at the Nosko residence. Carlson did not provide any written notice to the Noskos about their rights to rescission under 73 P.S. § 201-7. Carlson also did not provide the Noskos with a Notice of Cancellation as required by the statute.

Carlson completed the projects but the Noskos were dissatisfied with the results. Consequently, they refused to pay Carlson the fee agreed upon in the contracts. Carlson sued at docket number 10761-1998 for the fee. The parties stipulated to arbitration on that docket number and also stipulated that the decision could exceed the arbitration limits. The parties proceeded to a mediator in 1998, which was unsuccessful. After the mediation, the case was litigated before three arbitrators who awarded $12,680.00 to Carlson.[1] The Noskos appealed that decision to this Court and also filed a separate action at docket number 11505-1999, alleging breach of contract and unfair trade practices. This was the first time that the Noskos indicated a desire to rescind the contracts. These two actions were consolidated by the Court.

The Noskos filed their motion on September 7, 1999 together with a brief in support. Carlson filed a responsive brief on September 22, 1999. Arguments were held in chambers at which both parties were represented.

The only issue before the Court is whether Carlson's failure to inform

[1] The arbitrators awarded $13,180.00 to Carlson, which was the full amount he had requested. They also awarded $500.00 to the Noskos on their counterclaim, resulting in the net figure of $12,680.00.

the Noskos of their rights under 73 P.S. § 201-7 allows the Noskos to rescind the contracts at this stage. The Noskos assert that their rescission is still timely. Carlson asserts that rescission should be denied due to the doctrine of laches. Carlson further argues that allowing the Noskos to rescind the contracts at this stage would be unjust enrichment. Finally, Carlson claims that the Noskos' claim is a breach of contract claim and, thus, outside 73 P.S. § 201-7.

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). In addition, the record must be looked at in the light most favorable to the non-moving party. *Id.* However, the non-moving party may not rest upon the pleadings. Pa.R.C.P. 1035.3. The non-moving party, if it bears the burden of proof at trial, must produce evidence of the facts essential to its cause of action in order to defeat a motion for summary judgment. Pa.R.C.P. 1035.2.

Section 201-7 requires that a seller who has sold or contracted to sell any goods or services over twenty-five dollars ($25) "as a result of or in connection with, a contact or call with a buyer at his residence" must inform the buyer of the right to rescind the contract. 73 P.S. § 201-7(b)(1). The seller must also provide a written "Notice of Cancellation" with the contract. These explain to the buyer that he or she has the right to rescind the contract within three days of the date of the contract and must return, or hold available for return any merchandise received. 73 P.S. § 201-7(a). Section 201-7 also provides that the cancellation period "shall not begin to run until buyer has been informed of his right to cancel and has been provided with copies of the 'Notice of Cancellation'." 73 P.S. § 201-7(e). Finally, 201-7 provides that the seller shall inform the buyer whether the seller intends to repossess or abandon the goods within ten business days of the notice of cancellation. 73 P.S. § 201-7(i).

The statute allows the Noskos to cancel the contract within three days of being informed of their rights. Since Carlson never informed them of such, the Noskos argue any rescission they make at this point is still timely. Furthermore, they contend that Carlson is not entitled to any recovery based on *quantum meruit* because Carlson did not inform them of an intent to repossess goods in connection with the contract after being notified of their cancellation.

Carlson first argues that it would be unfair for the Noskos to rescind the contract as their underlying claim is really a breach of contract claim and not a claim for fraud, unfair or deceptive business practices. Carlson asserts that the Noskos position would result in a punitive result, since the Noskos would receive the benefit of the contract without having to pay any sum for that benefit. Carlson argues that this would run counter to the purpose

of damages in a contract action and thus should be rejected.

Although this argument has some persuasive appeal, this Court is bound by the statute as interpreted by the case law and must find for the Noskos. The statute, while designed to deal specifically with fraud and unfair and deceptive business practices, is very general in nature. By its own language, the statute deals with **any** contract, not only ones which may be based on fraud or deceptive business practices. Furthermore, this exact argument was examined by the Superior Court and rejected. *Burke v. Yingling,* 666 A.2d 288 (Pa. Super. 1995). While the result is severe and not appealing to the Court, it is bound by the statute and the Superior Court's decision in *Burke.*

Carlson also argues that the Noskos claim is barred by laches. Carlson alleges that the claim is stale based on the Noskos waiting until after they had appealed the arbitrator's decision to assert their rights to rescind. As such, there has been money expended by both parties in pursuit of the breach of contract claim. Furthermore, Carlson notes that the rescission did not occur until a year and a half after the contract was signed and a significant time after the contract was completed.

For laches to apply, there must be a lack of due diligence in pursuing the cause of action and resulting prejudice to the other party. *Sedor v. West Mifflin Area School District,* 713 A.2d 1222, 1225 (Pa. Cmwlth. 1998). It is difficult for Carlson to argue a lack of due diligence on the part of the Noskos as he is the one who is required to notify them of their rights. Therefore, any delay in pursuing their rights to rescission is based on Carlson's failure to inform the Noskos of those rights. Furthermore, the statute states that the applicable three-day period does not begin to run until the buyer is informed. The Noskos exercised their rescission within that three-day window. To pursue your rights within a statutory period cannot be considered a lack of due diligence.

Furthermore, even if the Court were to find that the rights were not pursued with due diligence, Carlson has not set forth any claim of prejudice other than the effort, time and money he put forth to perform the contract. This is not the type of prejudice required to prove laches. "Prejudice may be found where there is some change in the condition or relations of the parties which occurs during the time the complainant has failed to act." *Stilp v. Hafer.* 718 A.2d 290 (Pa. 1998). There has simply been no change in the condition of the parties that is not attributable to Carlson's failure to notify the Noskos of their rights under 73 P.S. § 201-7. Therefore, Carlson's defense of laches fails.

Carlson's final argument is that he should be entitled to compensation on *quantum meruit.* Carlson argues that if the Noskos are allowed to receive the benefit of the contract without paying the contract price then the Noskos would be unjustly enriched. However, once again, this result is the fault of Carlson himself. Section 201-7(i) requires the seller to inform

the buyer whether he intends to repossess the goods or not. Carlson made no such attempt in this case. Carlson argues that since this was a construction contract, there would have been little usable material to return. Assuming this to be true, that would be an even more compelling reason for Carlson to exercise his right to repossess. Had he done so, the Noskos may not have been able to return the goods in compliance with 73 P.S. § 201-7. This might have caused the Court to reach a different result as to the applicability of 73 P.S. § 201-7. However, since Carlson made no attempt, the Court cannot use the lack of return of the building materials to find 73 P.S. § 201-7 inapplicable to the present case.

In conclusion, since Carlson neither informed the Noskos of their rights to rescind the contracts and made no attempt to repossess the property under 73 P.S. § 201-7(i), the Noskos have a right to rescind the contracts. Therefore, the motion for summary judgment will be granted.

ORDER

AND NOW, to-wit, this 9 day of February 2000, it is hereby ORDERED and DECREED that Plaintiffs Joseph and Ann Noskos' Motion for Summary Judgment under Count II of Their Complaint is GRANTED. Plaintiffs are allowed to rescind the three construction contracts made with the Defendant Philip A. Carlson. Furthermore, Plaintiffs are entitled to a refund of any payments made to the Defendant, which both parties agree totals $13,000.00. However, the Court determines that Plaintiffs are not entitled to treble damages or the minimum statutory damage of $100 per violation. Plaintiffs' entitlement to attorney's fees will not be determined at this time but Plaintiffs may petition the Court for a hearing on the subject of attorney's fees. Finally, Defendant's mechanic's lien claim is still viable as the parties neither briefed nor argued the issue and such was not included in the Plaintiffs' motion. Therefore, the issue is not properly before the Court at this time.

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

RONALD E. JONES and MARLENE L. JONES, Petitioners

v.

THE CITY OF CORRY, Respondent

CIVIL PROCEDURE/MOTION FOR JUDGMENT ON PLEADINGS

Judgment on the pleadings granted only where pleadings demonstrate no genuine issue of material fact and moving party entitled to judgment as a matter of law.

CIVIL PROCEDURE/MOTION FOR JUDGMENT ON PLEADINGS

Court accepts all well-pleaded facts of non-moving party and only accepts facts he/she specifically admits against him/her

CIVIL PROCEDURE/MOTION FOR JUDGMENT ON PLEADINGS

Moving party's right to relief must be clear and free from doubt

REAL ESTATE/LIENS AND ENCUMBRANCES

Municipal liens for sanitary sewer, curbing & paving are not claims within the meaning of the Real Estate Tax Sale Law of 1947, 72 P.S. 5860.101.

REAL ESTATE/LIENS AND ENCUMBRANCES

Municipal liens for sanitary sewer, curbing & paving need not be certified to Tax Claim Bureau to avoid discharge of the liens at upset sale

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 11958-1997

Appearances: Richard E. Blakely, Esq., for Petitioners
Paul J. Carney, Esq., for Respondent

OPINION

Anthony, J., February 4, 2000.

This matter comes before the Court on Petitioner's Motion for Judgment on the Pleadings. After a review of the pleadings and the briefs of the parties and considering the arguments of counsel, this Court will deny the Motion. The factual and procedural, history is as follows.

On March 27, 1980, the City of Corry filed a Sanitary Sewer Lien against real property located at 704 Grand Street, Corry, Pennsylvania (hereinafter "the property"). The City of Corry also filed a Paving and Curbing Lien against the property on August 5, 1986. Together the two liens amounted to $8,430.00. Neither lien was ever paid. The Petitioners received title to the property pursuant to a tax sale conducted by the Erie County Tax Claim Bureau on September 28, 1992. This sale was conducted pursuant to the Real Estate Tax Sale Law of 1947 (hereinafter "RETSL"), 72 P.S. §5860.101, et seq. The price paid for the property was $359.96, which was the upset sale price for the property. That sum included the amount of the delinquent taxes for 1990 and 1991, the current taxes for the property for 1992, and the costs of recording. The two Liens recorded by the City of Corry were not certified and thus were not included in the upset sale price.

The City of Corry refused to discharge the two liens and asserts that the liens continue to be in full force. Petitioners filed a Petition for Declaratory Judgment on June 11, 1997, requesting the Court to order that the liens were discharged in the tax sale. The City of Corry answered the Petition on July 14, 1997. Petitioners filed this Motion for Judgment on the Pleadings and a brief in support on November 5, 1999. Respondent filed an Answer to the Motion on November 23, 1999, and its brief in response on December 14, 1999. Arguments were held in Chambers in which all parties were represented.

The only issue before the Court is whether the City of Corry was required to certify the Sanitary Sewer Lien and the Paving and Curbing Lien to the Erie County Tax Claim Bureau. If the City of Corry was required to certify the liens, then those liens would be discharged in the tax sale. However, if the City did not have to certify the liens, then those liens would not be discharged in the tax sale and the Petitioners would still be required to pay those liens.

A motion for judgment on the pleadings should only be granted where the pleadings demonstrate that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Swartz v. Swartz,* 689 A.2d 302 (Pa. Super. 1997). In addition, the Court must accept all well-pled facts of the non-moving party and only accept facts against him which he has specifically admitted. *Id.* Finally, the moving party's right to relief must be clear and free from doubt before a court should grant judgment on the pleadings. *Id*

Both sides agree on the facts and their only dispute is whether the RETSL applies to the liens at issue. If the RETSL does apply, then the parties agree that the liens would be divested by the sale pursuant to 72 P.S. §5860.304. Section 5860.304 states in pertinent part:

> The lien of all taxes and municipal claims now or hereafter imposed, levied or assessed against any property and included in the upset price shall be divested by any upset sale of such property under the provisions of this act, if the amount of the purchase money shall be at least equal to the amount of tax liens of the Commonwealth having priority under section 205, the amount of all taxes due on such property, **the amount of all municipal claims certified to the bureau under section 605** and costs of sale. 72 P.S. §5860.304 (emphasis added).

The issue before the Court is definitional and requires the Court to determine if a municipal claim as embodied in the RETSL includes the liens in question.

The Court determines that it does not. There is no definition of a "municipal claim" in the statute. However, there is a definition of "claim". Claim is defined as: "a claim entered in a claim docket by the bureau to

recover the **taxes** returned by the various taxing districts against a certain property." 72 P.S. §5860.102 (emphasis added). Taxes is defined as: "all taxes, with added interest and penalties, levied by a taxing district upon real property, including improvements." *Id.*

Petitioners argue that the definition of "taxes" includes fees for improvements on the land. This Court does not agree. The definition would include a **tax** for improvement on the land but nothing in the definition of "taxes" specifically includes fees. Moreover, the definition is limited solely to taxes. If the legislature wanted to include fees, it certainly could have included such language in the statute. It did not. The statute only mentions taxes and claims and makes no reference to any other form of payment that may be owed to a municipality.

Petitioners assert that the general municipal law has a definition of municipal claim that would include the liens. 53 P.S. §7101. While this may be true, there is no need for the Court to consider any definitions outside of the RETSL. Both "taxes" and "claim" are sufficiently defined in the RETSL to allow the Court to determine the issue. While the specific term "municipal claim" is not defined, it is simply a claim, as defined in the RETSL, made by a municipal organization. There is nothing that suggests to the Court that it need look elsewhere to determine the meaning of the terms used in the RETSL.

Furthermore, Petitioners cite no case law that requires a municipality to certify liens like the ones in question and the Court has not found any in its own research. Without either appellate case law or the statute requiring the certification of such liens, the Court can find no compelling reason to so hold on its own.

In conclusion, there is no support in either the case law or the RETSL itself that would require that a municipality or municipal organization certify liens that are not taxes in order to avoid those liens being divested in a tax sale. Thus, the Court holds that a municipality need not certify such liens to the Tax Claim Bureau in order to avoid divesting the liens. The Petitioners' motion for judgment on the pleadings will be denied.

ORDER

AND NOW, to-wit, this 4 day of February, 2000, it is hereby ORDERED and DECREED that Petitioners' Motion for Judgment on the Pleadings is DENIED

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

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION

v.

DOUGLAS SCHIRRA

CRIMINAL LAW/DRIVER'S LICENSE SUSPENSION

State Trooper had probable cause, and therefore reasonable grounds, to believe the defendant was operating his motor vehicle while under the influence of alcohol where the defendant was driving erratically, was involved in a minor accident and appeared with a strong odor of alcohol, glassy eyes and an uncooperative attitude within 13 minutes of the accident. The Court denied defendant's appeal from his license suspension.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 12462 -1999

Appearances: Chester J. Karas, Esquire for the Department of State
Paul J. Susko, Esquire for Douglas Schirra

OPINION

Bozza, John A., J.

Before this Court is Douglas Schirra's appeal from a license suspension arising out of his refusal to comply with the requirements of 75 Pa.C.S.A. § 1547(a)(1). On May 23, 1999, Pennsylvania State Police Trooper Matthew Bond was dispatched to the scene of an accident at Township Road 598 in Harborcreek Township. The accident was reported as occurring at approximately 6:42 p.m., and the trooper arrived on the scene at approximately 6:50 p.m. When he arrived he observed a vehicle parked north of the defendant's driveway and the defendant's van parked in the driveway of his residence at 2018 Saltsman Road. Upon arrival, he spoke with a Mr. Walter Griesbach who told him that he had been following the defendant's Chevrolet Lumina van for some distance and had observed it brake and slow down several times. Mr. Griesbach told the trooper that the van stopped before it reached the driveway at 2018 Saltsman Road and, at that point, Mr. Griesbach ran into the rear of Mr. Schirra's van. He further stated that Mr. Schirra parked the van in his driveway and went into his residence.

Trooper Bond proceeded to the defendant's residence and, upon entering, noted Mr. Schirra was seated on the living room couch. He could detect the odor of an alcoholic beverage, and Mr. Schirra's eyes appeared to be glassy. His conversation with Mr. Schirra was initiated no more than five minutes following his arrival on the scene, or approximately thirteen minutes after the accident had occurred. When questioned about the accident, Mr. Schirra denied that there was an accident, and then

subsequently changed his mind and admitted that there had been an accident.

The trooper asked him repeatedly to assist him in determining the circumstances of the accident, but Mr. Schirra refused to cooperate. He refused to obtain documents from his vehicle, and referred the trooper to his wife. During their conversation, the trooper noted a strong odor of alcohol about the defendant's mouth and person. He also observed that there was a can of natural ice beer on the table in front of him which, after picking it up, concluded that it was about three-quarters of the way full. Trooper Bond had extensive experience investigating alcohol-related accidents and was well-familiar with the signs and mannerisms indicative of alcohol intoxication. He then concluded that he had probable cause to believe that Mr. Schirra was operating his motor vehicle while under the influence of alcohol.

The trooper formally arrested Mr. Schirra and transported him to Millcreek Community Hospital for a chemical test of his blood. He properly advised Mr. Schirra concerning the "implied consent warning," indicating that if he refused the chemical test of his blood or breath or urine, that his operator's license would be suspended for a period of one year. After having the warnings read to him, Mr. Schirra refused to submit to a chemical test of his blood.

The issue before the Court is whether the trooper had reasonable grounds to believe Mr. Schirra had been driving while under the influence of alcohol or a controlled substance. The "reasonable grounds" provision of Section 1547(a)(1) has been interpreted by the Courts of this Commonwealth as requiring a showing of "probable cause." *Commonwealth v. Kohl*, 532 Pa. 152, 615 A.2d 308 (1992); *Commonwealth v. Urbanski*, 426 Pa. Super. 505, 627 A.2d 789 (1993). Therefore, the question before the Court is whether Trooper Bond had probable cause to believe Mr. Schirra was driving, operating or in actual physical control of the movement of a motor vehicle while under the influence of alcohol.

This issue has been addressed a number of times by the appellate courts of Pennsylvania and its resolution depends entirely on an assessment of the facts known to a law enforcement officer at the time he requests that a defendant comply with chemical testing. For example, in *Menosky v. Commonwealth*, 121 Pa. Commw. Ct. 464, 550 A.2d 1372 (1988), the officer ascertained that an accident had occurred whereby a car had hit a pole. A witness told the officer that the driver appeared intoxicated. Within fifteen minutes, the officer confronted the defendant who denied the accident, was belligerent, had bloodshot eyes and was swaying. The Commonwealth Court concluded such facts gave rise to a finding of probable cause that the defendant had been operating a motor vehicle while under the influence of alcohol. Similarly in *McCallum v. Commonwealth*, 140 Pa. Commw. Ct. 317, 592 A.2d 820 (1991), the Court concluded that a police officer had

probable cause where a defendant had admitted to others involved in an accident that he had been drinking before the accident. When the police officer found the defendant approximately seventeen minutes after the accident occurred, he smelled of alcohol and had slurred speech.

In *Commonwealth v. Aiello*, 450 Pa. Super. 302, 675 A.2d 1278 (1996), the police responded to an accident where a car hit a parked car. Upon arrival, they found the defendant in her car bleeding and she refused medical treatment. When she got out of the car she appeared to stagger and said that she had had one or two drinks. In these circumstances, the Superior Court concluded the police had probable cause to believe that the driver had been under the influence of alcohol. A different result was dictated by the facts in *Fierst v. Commonwealth*, 115 Pa. Commw. Ct. 266, 539 A.2d 1389 (1988), where the police went to the defendant's house one hour after the accident and saw him with a bottle of beer in his hand. The police observed that he staggered and had an odor of alcohol. There was no information concerning the character of the defendant's driving or his behavior at the time of the accident. The Court concluded there were not reasonable grounds for believing that the defendant had been driving under the influence of alcohol at the time of the accident.

A similar conclusion was reached in *Commonwealth v. Mulholland*, 107 Pa. Commw. Ct. 213,527 A.2d 1123 (1987), where the defendant was found in a bar twenty-five minutes after an accident with a strong order of alcohol, confused, and with an exaggerated gait. Police had no information concerning the character of his driving, and the Court concluded that there were no reasonable grounds to believe that he had been operating his vehicle under the influence of alcohol. [1]

In the present case, Trooper Bond had a report that the defendant had been driving erratically, hitting his brakes and slowing down several times, and ultimately stopping before he got to the driveway where he was turning. In addition, within approximately thirteen minutes of the time of the accident, the trooper observed the defendant with a strong odor of alcohol and glassy eyes, manifesting an uncooperative attitude, either lying to him or being very confused about whether an accident had just occurred. Although he was drinking beer following the accident, the can that he had in front of him was three-quarters full and it is extraordinarily unlikely that these manifestations of intoxication would have developed so quickly. As a result, the Court concludes that the trooper had probable cause, and

[1] In *Commonwealth v. Mulholland*, the Commonwealth Court concluded that "reasonable grounds is a less burdensome standard than that of probable cause needed for arrest." *Mulholland*, 107 Pa. Commw. Ct. at 215, 527 A.2d at 1124.

therefore reasonable grounds to believe that the defendant was operating his motor vehicle while under the influence of alcohol. An Order denying the appeal from his license suspension shall follow.

ORDER

AND NOW, to-wit, this 30 day of December, 1999, upon consideration of the Petition for Appeal From the Order of the Director of the Bureau of Traffic Safety Suspending Operating Privileges, and for the reasons set forth in the foregoing Opinion, it is hereby **ORDERED, ADJUDGED AND DECREED** that the Petition is **DENIED**.

By the Court,
/s/ **John A. Bozza, Judge**

JEFFREY WILL and CONNECTO ELECTRIC, INC.

v.

THE CITY OF ERIE and THE ELECTRIC CONTRACTORS' EXAMINING BOARD OF THE CITY OF ERIE

LOCAL AGENCY LAW/APPEAL

Presence or absence of written findings go to the reviewability of an adjudication and not its validity. Where it is obvious from the record that the basis of a local agency's decision, a remand is not necessary for specific findings.

LOCAL AGENCY/APPEAL

The Court should affirm the local agency's action unless it finds findings of fact made by the agency and necessary to support the adjudication is not supported by substantial evidence, which is such evidence as a reasonable mind would find adequate to support a conclusion.

POLITICAL SUBDIVISIONS/OPTIONAL THIRD CLASS CITY CHARTER LAW

The City of Erie has full power to organize and regulate its own internal affairs, provided it does not adopt ordinances which contravene the enabling act. So long as the City acts within the scope of its authority, its actions will not be distributed by the Court and any ambiguities are resolved in favor of the municipality.

POLITICAL SUBDIVISIONS/OPTIONAL THIRD CLASS CITY CHARTER LAW

The City Council has the ability to create boards to carry out its obligations under the Third Class City Charter Law, and the creation of the Electric Contractor's Examining Board is not prohibited by law.

POLITICAL SUBDIVISIONS/OPTIONAL THIRD CLASS CITY CHARTER LAW

Revocation license for violating a rule intended to serve the public interest is a means of restricting licenses to persons adhering to standards of conduct and is a civil disability and not a penalty and thus is not an improper enlargement of the quasi-criminal provisions of the Third Class City Charter Law.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11881 - 1998

Appearances: Peter J. Belott, Esquire for Jeffrey Will & Connecto Electric, Inc.
Gerald Villella, Esquire for The City of Erie

OPINION

Bozza, John A., J.

This is an appeal of the Electrical Contractors' Examining Board's Decision

to impose a thirty (30) day suspension of the plaintiff's license as a result of a 1990 Board action, and a revocation of the plaintiff's electrical contractor's license in the City of Erie for a recent violation of a city ordinance. The procedural history of this case is as follows:

Jeffrey Will was charged with performing electrical work without first obtaining the proper electrical permits. Hearings were held before the Board on March 4, 1998 and April 9, 1998. In its decision dated April 22, 1998, the Board revoked the plaintiff's license due to a violation of City of Erie Ordinance Article 1711, Section 1711.03. As further support for the revocation, the Board also relied upon other alleged violations of the City of Erie Ordinance, namely four previous entries into the record for failure to obtain required permits to perform electrical work within the City of Erie, and one previous suspension of license. The plaintiff requested the Court to reverse the license revocation penalty imposed by the Board. Following argument held before the Court on such appeal on December 1, 1998, the Court affirmed in part and reversed in part the Electrical Contractors' Examining Board decision, and remanded for further development of the record.

The Court remanded the matter to the Board for determination of the appropriate penalty to be imposed upon the plaintiff. This Court's Memorandum and Order dated January 29, 1999, which is incorporated by reference herein for all purposes, more fully sets forth this Court's decision to remand the matter back to the Board for further factual development of the record.

On June 2, 1999, pursuant to this Court's remand, the Board held a second hearing. At this hearing, the Board introduced into the record allegations of three prior notices of violations to the plaintiff on the dates of June 10, 1985, October 1, 1985, and November 1, 1985. The Board also introduced into the record a 1994 Opinion and Order of the Commonwealth Court, affirming a thirty (30) day suspension of the plaintiff's license, which occurred in 1990.[1] A second hearing was also held by the Board on August 4, 1999. By notice dated August 10, 1999, the Board imposed a thirty (30) day suspension of the plaintiff's license related to the 1990 agency action, and revoked the plaintiff's license to engage in the business of electrical contracting in the City of Erie effective August 17, 1999. It is from this current decision of the Board that the plaintiff appeals. This matter is now before the Court on the plaintiff's Statement of Matters Complained of on Appeal.

Initially Mr. Will complains that the August 10, 1999 decision of the Board does not contain findings of fact and reasons for the adjudication.

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[1] See, *Will v. The Electrical Contractors' Examining Board of the City of Erie*, 168 Pa. Commw. Ct. 535, 650 A.2d 1226 (1994).

The Administrative Agency Law, 2 Pa.C.S.A. § 555 provides the following:

> "All adjudications of a local agency shall be in writing, shall contain findings and the reasons for the adjudication, and shall be served upon all parties or their counsel, personally or by mail."

It is the plaintiff's contention that the adjudication by the Board lacks any findings or reasons for the adjudication and is therefore invalid. Initially it is noted that the presence or absence of written findings goes to the reviewability of an adjudication and not its validity. *Madeja v. Whitehall Township*, 73 Pa. Commw. Ct. 34, 457 A.2d 603 (1983). While it would have been prudent for the Board to have more fully complied with the requirements of 2 Pa.C.S. § 555, it is obvious from the record that the Board based its decision to revoke the plaintiff's license on the existence of prior violations as well as the nature of the current violation. A remand was not necessary for the Board to make specific findings in a more comprehensive manner, since this Court was thoroughly familiar with the underlying issues and facts of the case. *See e.g. Siegel v. City of Philadelphia*, 115 Pa. Commw. Ct. 23, 539 A.2d 503 (1988). In addition, the only issue before the Court was the appropriateness of the Board's response to the violation of City of Erie Ordinance § 1711.03, which had previously been established by substantial evidence.

The next issue raised by the plaintiff is that the record does not contain substantial evidence to support the revocation of the plaintiff's license. The record reflects that the Board introduced into the record allegations of three prior notices of violations to the plaintiff dated June 10, 1985, October 1, 1985, and November 1, 1985. The Board also introduced the Commonwealth Court opinion affirming the thirty (30) day suspension of the plaintiff's license in 1990.

The Court shall affirm the Board's action unless it finds that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. 2 Pa.C.S.A. § 754(b). "Substantial evidence" is such evidence as a reasonable mind would find adequate to support a conclusion. *Crown Communications v. Zoning Hearing Board of Borough of Glenfield*, __ Pa. __, 705 A.2d 427 (1997); *Pittsburgh Cellular Telephone Co. v. Board of Supervisors of Marshall Township*, 704 A.2d 192 (Pa. Commw. Ct. 1997). While this Court does not consider the correspondence dated June 10, 1985, October 1, 1985, and November l, 1985 to be sufficient evidence that Mr. Will previously violated the Ordinance on the dates in question, it was not necessary for the Board to come to that conclusion in order to revoke Mr. Will's license. The Ordinance does not require proof of prior violations of any kind in order to justify revocation.

The Ordinance simply provides that:

> (1) The Board may suspend, revoke or refuse any license if the holder has:
>
> (4) violated a provision of this article or other applicable codes or ordinances with specific reference to Article 1711.

Ordinance Article 1713, § 1713.02(1).

Notwithstanding that fact, the record does reveal that Mr. Will had previously been adjudicated as an electrical ordinance violator in 1990, a decision which was affirmed by the Commonwealth Court. Additionally, this Court previously found in its Memorandum and Order of January 29, 1999, that there was substantial evidence present to support the violation of the Ordinance Article 1711, Section 1711.03, and affirmed the Board's adjudication. Since Mr. Will had a previous suspension of his license and admitted the current violation at the hearing on March 4, 1998, the Court is of the opinion that the Board's decision to revoke the plaintiff's license was, to the extent the law may require it, supported by substantial evidence.

The plaintiff also complains that the City of Erie has violated the Optional Third Class City Charter Law by creating the Electrical Contractors' Licensing Board and vesting the Board with the power to revoke electrical licenses. In a related argument, the plaintiff also complains that the enforcement of City Ordinances is vested with the mayor and, as such, the enforcement of the ordinance may not be delegated to the Board.

The City of Erie is organized pursuant to the Optional Third Class City Charter Law, 53 P.S. § 41101 et. seq. Pursuant to the Optional Charter Law, the City has the full power to organize and regulate its own internal affairs, and may exercise all the powers of local government in such manner as the governing body may determine. 53 P.S. § 41303. In interpreting the City's powers, the general grant of power contained in the Third Class City Charter Law is intended to confer the greatest power of local self government consistent with our Constitution. 53 P.S. § 41304. Additionally, all powers are to be liberally construed in favor of the City. 53 P.S. § 41304. While a local government has substantial authority to regulate its own affairs, it cannot, however, adopt ordinances which contravene the enabling act itself. *Malloy v. Pfuhl*, 116 Pa. Commw. Ct. 461, 542 A.2d 202 (1988). So long as a city acts within the scope of its authority and does not violate any of the laws of the Commonwealth, its actions will not be disturbed by the court. *Id.* Any ambiguities are resolved in favor of the municipality. *Accord. In re: Petition to Recall Reese*, 542 Pa. 114, 665 A.2d 1162 (1995). There are no constitutional or statutory provisions which regulate electricians throughout the Commonwealth. Additionally, there is no constitutional or statutory provision which prohibits the municipality from regulating electricians.

Pursuant to the Third Class City Charter Law, the legislative power of

the city is exercised by City Council. 53 P.S. § 41407. Council also has the authority to create commissions and other bodies with advisory powers. 53 P.S. § 41410. These provisions authorize council to create certain boards in order to carry out its obligations pursuant to the Third Class City Charter Law. The city is required to carry out its obligations to enforce ordinances, and in furtherance thereof, created the Board to effectuate this. Therefore, the Court is of the opinion that the creation of the Board is not prohibited by law.

The plaintiff's argument that the mayor may not delegate such enforcement to the Board is also without merit. Pursuant to the Third Class City Optional Charter Law, the mayor is charged with enforcing the ordinances of the city and all general laws applicable thereto. 53 P.S. § 41412. Pursuant to such provision, the codified ordinances of the City of Erie, Pennsylvania, sets forth in its Administrative Code, Article 113, the exact nature and extent of the mayor's powers and responsibilities. Article 113.01 provides that the mayor shall be the chief executive officer of the city and is responsible for the enforcement provision of all statutes, ordinances; and regulations issued by the authority in the city. The mayor also has direction and control of the administrative branch of the city government, which consists of departments, bureaus, divisions, and other personnel. The City of Erie Ordinance Article 1713.03 provides that the Board of Electrical Examiners is assigned to the mayor's Office of Community Affairs. This Board has been subsumed under the Department of Economic and Community Development, pursuant to Article 117.06. Pursuant to Article 117.06, the mayor appoints the director of the Department of Economic and Community Development. Under Article 113.01, the mayor has direction and control of all the departments set forth in the Administrative Code. Therefore, since the mayor has direction and control of the director of the Department of Economic and Community Development, she also has control of the Board. If it is the plaintiff's argument that the mayor should be directly enforcing the ordinance at issue, such a position would ignore the practical requirements of managing a local government and lead to an absurd result. If that were the case, then the mayor would be required to specifically enforce the provisions of all city ordinances and all general laws of the Commonwealth that are applicable to the City of Erie. This obviously is not the intent of 53 P.S. § 41412.

Finally, the plaintiff argues that the City is precluded from assessing penalties for a violation of an electrical ordinance that is an enlargement of penalties provided by the legislature. The Optional Third Class City Charter Law, 53 P.S. § 41303(2.1) provides that the city may impose penalties and fines not exceeding $1,000.00 or a term of imprisonment not exceeding ninety (90) days, or both, for violations of any section of any other ordinance. These are fines applicable for violations of the electrical code

and are punitive in nature. The revocation of a license is a consequence of violating a rule intended to serve the public interest and is not intended as a "penalty," but rather a means of restricting licenses to persons who adhere to standards of conduct. Revocation or suspension of licensure is not an enlargement of the quasi-criminal provisions of § 41302(2.1) but rather a civil disability associated with the failure to comply with the requirements of engaging in the business of electrical contracting.

By the Court,
/s/ **John A. Bozza, Judge**

COMMONWEALTH OF PENNSYLVANIA

v.

MICHAEL MINICH

CRIMINAL PROCEDURE/GUILTY PLEAS/WITHDRAWAL

Generally, where a motion to withdraw a guilty plea is filed prior to sentencing, withdrawal should be permitted under current appellate case law upon the mere assertion of innocence by the defendant, unless the prosecution has been substantially prejudiced. The appellate courts are asked to reconsider case law granting a vertiable automatic right to withdraw a guilty plea upon a mere assertion of innocence or to revise the requirements of plea colloquy. Absent a requirement that the defendant establish some reasons or facts beyond a mere assertion of innocence to justify the withdawal of the plea, the plea colloquy becomes a mockery and the defendant is given the ability to manipulate cases on and off of the trial list.

The defendant's motion to withdraw will be denied where, following a full and complete colloquy, the defendant freely, knowlingly, and voluntarily admitted his guilt of the crimes to which he pleaded guilty and where the defendant has not articulated any changed circumstances or new facts which form the basis for the assertion of innocence.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 1717 OF 1998

Appearances: District Attorney's Office for the Commonwealth
Christine Fuhrman Konzel, Esq. for Mr. Minich

OPINION

The sole issue on appeal is whether it was error to deny Appellant's Motion to Withdraw Guilty Plea. Because this case involves an extensive plea colloquy establishing a knowing and voluntary plea as well as a blatant attempt by Appellant to manipulate his case off the trial list, Appellant's request to withdraw his plea was properly denied.

The facts are simple and basically uncontroverted. On May 6, 1998, a criminal complaint was filed against Appellant alleging one count of Aggravated Assault and one count of Stalking. Following a contested preliminary hearing on June 26, 1998, the charges of Aggravated Assault (as a felony, first degree) and Stalking (as a Misdemeanor, first degree) were bound over to Court.

On November 5, 1998 Appellant's Motion for Nominal Bond was granted because of the Commonwealth's failure to bring his case to trial within 180 days. However, four days later, on November 9, 1998 a bench warrant was issued for Appellant's failure to appear for trial during the November, 1998 term of criminal court. Over ten months later Appellant was arrested in the

state of Maryland and extradited back to Pennsylvania on September 28, 1999.

Because of the time constraints as set forth in Pennsylvania Rule of Criminal Procedure 1100, Appellant's case was one of the first cases listed for the November 1999 term of criminal court. Prior to the term of court, a pre-trial conference was held for Appellant's case on October 28, 1999. During the pre-trial conference, Appellant had a full opportunity to review the facts of the case as well as his legal status. Of particular concern to Appellant was the effect of his plea upon a revocation of a prior sentence before the Pennsylvania Board of Probation and Parole. Specifically, Appellant was concerned that if he pled guilty to a felony offense, he would get a bigger "hit" from the Board than if he pled guilty to a misdemeanor assault charge.

Appellant was well aware of the amount of time he had served and would be credited at the present docket number. At the pretrial conference, the Commonwealth offered a plea bargain to Appellant of a plea on count 2 to Simple Assault as a misdemeanor of the second degree from Aggravated Assault as a felony of the first degree. Appellant would also be required to plead guilty as charged to Count 1, Stalking as a misdemeanor of the first degree. After consulting with his attorney, Appellant agreed to the plea bargain.

On October 29, 1999, Appellant appeared in open court with his counsel and entered a plea of guilty pursuant to the plea bargain. The record reflects an extensive colloquy in which under oath Appellant admitted, *inter alia*, his guilt of the misdemeanor offenses. A deferred sentence was scheduled for December 9, 1999.

On November 5, 1999, Appellant filed a written Motion to Withdraw Guilty Plea. By Order dated November 8, 1999, a hearing was set on Appellant's Motion for December 6, 1999.

Said hearing was held following which an Order was entered denying Appellant's Motion to Withdraw Plea. Appellant was subsequently sentenced on December 15, 1999 and filed a timely Notice of Appeal on January 12, 2000. On January 26, 2000, Appellant filed a Statement of Matters Complained of on Appeal in which the only issue raised is the propriety of the denial of Appellant's Motion to Withdraw Plea.

DISCUSSION

This case presents a classic opportunity for the Appellate Courts to reconsider the consequences of the progeny of *Commonwealth vs. Forbes*, 450 Pa. 185, 299 A.2d. 268 (1973). Alternatively, the Appellate Courts should consider altering the requirements of a plea colloquy because given the present ability of a defendant to whimsically withdraw a plea prior to sentencing, the current plea colloquy is meaningless.

The test to be utilized by a trial court in determining whether to grant a pre-sentence motion to withdraw a plea is "fairness and justice". "If the

trial court finds any fair and just reason, withdrawal of the plea before sentence should be freely permitted, unless the prosecution has been substantially prejudiced." *Commonwealth v. Randolph*, 718 A.2d 1242, 1244 (Pa. 1998). As a general rule, the mere assertion of innocence is a sufficient "fair and just" reason to grant a request to withdraw a guilty plea prior to sentencing. *Commonwealth v. Randolph, supra*, at 1244.

As a result, there exists a veritable automatic right to withdraw a plea prior to sentencing by simply asserting one's innocence. Unfortunately, the Appellate Courts have not required a defendant to articulate any basis other than a mere assertion of innocence. There is no requirement for a defendant to set forth reasons or facts not known to the person at the time of the plea but which subsequently establish a defense or claim of innocence. By permitting relief based on a bald assertion of innocence without more makes a mockery of a plea colloquy and certainly enables a defendant to manipulate a case on and off a trial list.

In the case *sub judice*, there is absolutely no question Appellant's plea as tendered on October 29, 1999 was a knowing and voluntary plea. A review of the record establishes that the plea occurred nearly eighteen months after the alleged crimes. Hence Appellant had nearly eighteen months (and nearly ten months while on the lam) to consider whether to enter a plea or go to trial on these charges.

Further, Appellant was given considerable time to consult with his attorney at a pre-trial conference in which all of his legal concerns were addressed. Obviously Appellant was well-versed in all of the ramifications of his plea, including the possible maximum sentences, the amount of time he would be credited at this docket number as well as his possible exposure on a revocation for a prior state sentence. After consultation with his attorney, Appellant agreed to enter into a negotiated plea in which he received a significant benefit by the reduction of the assault charge from a felony of the first degree (with a twenty year maximum) to a misdemeanor of the second degree (with a two year maximum).

Thereafter Appellant had additional time to consider the advisability of his plea and elected to go forward on October 29, 1999. At the beginning of the plea colloquy, Appellant was provided with a document entitled "Defendant's Statement of Understanding of Rights" in which all of his constitutional rights that are waived when a plea is entered were stated. These rights were then explained orally on the record to Appellant by a representative of the District Attorney's Office. These rights included Appellant's right to a jury trial, right to counsel and right to a speedy trial.

A colloquy was then conducted with Appellant in which, while he was under oath, Appellant was asked a number of questions to ensure his plea was knowing and voluntary. Initially, Appellant indicated he had an opportunity to review the Statement of Understanding of Rights document, that he had no questions about any matters contained thereon and he

executed it indicating he understood these rights. See Plea Transcript Friday, October 29, 1999, p. 6 (hereinafter P.T.).

Appellant was also asked if he understood the maximum sentences for each of the misdemeanors and he acknowledged that he faced up to seven years incarceration and fifteen thousand dollars in fines. P.T. pg. 6. Appellant was then asked if he was prepared to enter a plea of guilty to Count 1, Stalking as a misdemeanor of the first degree and Count 2, amended from an Aggravated Assault as a felony of the first degree to Simple Assault as a misdemeanor of the second degree and Appellant indicated he was prepared to do so. P.T. pg. 6.

The facts of the case were then reviewed in detail with Appellant. In fact, Appellant objected to the language in the information alleging he struck the victim eight to ten times with his fists. As a result, the factual predicate for the plea was amended to state Appellant was accused of striking the victim multiple times instead of eight to ten times. P.T. pg. 8. This change was acceptable to Appellant. P.T. pg. 8.

Further, the Commonwealth removed any allegation that Appellant's assault caused the victim to lose consciousness, which again satisfied a concern of the Appellant. P.T. pg. 8. After Appellant's active participation in the discussion of the factual allegations, Appellant openly admitted his guilt to striking the victim multiple times with his fists. P.T. pg. 8.

The following colloquy was then conducted by the Court with the Appellant:

THE COURT: We had a pre-trial conference and you've had an ample opportunity to meet with Attorney Konzel; is that correct?

MR. MINICH: Yes, sir.

THE COURT: There were discussions about the resolution of your case, and you had an ample opportunity to participate in that, correct?

MR. MINICH: Yes.

THE COURT: Now, it's your decision here today to enter a plea of guilty to these two offenses; is that correct?

MR.MINCH: Yes.

THE COURT: You understand these two offenses?

MR.MINICH: Yes sir.

THE COURT: You understand the legal definition of them?

MR.MINICH: Yes, sir.

THE COURT: You understand factually what it's alleged that you did that amounts to these crimes?

MR. MINICH: Yes, sir.

THE COURT: Especially now that it's been amended by the Commonwealth?

MR. MINICH: Yes, sir.

THE COURT: DID YOU DO THOSE THINGS?

MR. MINICH: YES, SIR.

THE COURT: SO YOU'RE GUILTY OF THESE TWO OFFENSES?

MR MINICH: YES, SIR.

THE COURT: THAT'S WHY YOU'RE ENTERING YOUR PLEA HERE TODAY?

MR. MINICH: YES.

THE COURT: Anyone pressure you or force you or coerce you in any way to enter a plea today?

MR. MINICH: No, sir.

THE COURT: Anyone promise you anything to get you to plead here today

MR. MINICH: No, sir.

THE COURT: Are you under the influence of any medication or alcohol or any other substance that would affect your ability to know what you're doing here today?

MR. MINICH: No, sir.

THE COURT: Have you had enough time to consult with Attorney Konzel?

MR. MINICH: Yes, sir.

THE COURT: Is your plea of your own free will?

MR. MINICH: Yes, sir.

THE COURT: Is it knowing and voluntary?

MR MINICH: Yes, sir.

THE COURT: All right. I'll accept the plea. We'll set sentencing for December 9, at 8:45.

Plea Transcript, October 29, 1999, pp. 9-11(emphasis added).

As the above record reflects, Appellant stated under oath that he understood the legal and factual basis for his charges; that he was guilty of these charges; that no one had pressured or forced him into entering a plea; that no one promised him anything to induce him to plead; that he was not under the influence of any medication or alcohol or other substances that would affect his ability to know what he was doing; that he had enough time to consult with his attorney; that his plea was of his own free will and knowing and voluntary. In addition, Appellant acknowledged that he had ample opportunity to meet with his attorney and discuss a resolution of his case at a pre-trial conference. P.T. pg. 9. Under these circumstances Appellant's plea was knowing, calculated and voluntary.

To now allow Appellant to withdraw his plea based on a bald assertion of innocence without more is simply wrong. It renders a nullity any plea colloquy. It also places the Appellate Court in a position of assessing the credibility of testimony adduced at the trial Court level. There is absolutely no question Appellant appeared on the record on October 29, 1999 and under oath openly admitted his guilt to these offenses. Hence there has to be some determination of the credibility of innocence. Given all of the circumstances leading up to Appellant's plea, his sworn admission of guilt on October 29, 1999, is credible.

innocence. Given all of the circumstances leading up to Appellant's plea, his sworn admission of guilt on October 29, 1999, is credible.

In making this finding, of particular importance is the fact Appellant had eighteen months (which is much longer than most cases) to decide whether to plead; unlimited time to consult with his attorney; and freely engaged the prosecutor at the time of the plea in an open discussion of the facts to which Appellant was willing to admit. Any facts Appellant contested were withdrawn by the Commonwealth. Hence, at the end of Appellant's plea on October 29, 1999, there was nothing in factual dispute. Importantly, Appellant has since raised no new factual issue nor basis not known to him at the time of his plea.

Instead, Appellant has successfully manipulated his case off the trial list for scheduling at another time when the victim may not appear. As the record reflects, Appellant's case was one of the first scheduled for the November 1999 term of court. By entering his plea prior to the term, Appellant's case was taken off the November list and other cases with more pressing time limits under Pennsylvania Rule of Criminal Procedure 1100 were moved forward on the trial list. As such, Appellant was able to navigate off the list and appear on a subsequent list in which Appellant can hope the victim would not appear. Such abuse of the criminal system should not be tolerated by the Appellate Courts. It is fundamentally unfair to a victim and/or witness. It certainly makes the efficient disposition of a trial list more difficult and uncertain.

This case also presents an opportunity for the Appellate Courts to put teeth into Pennsylvania Rules of Criminal Procedure 319 and 320. These Rules establish the role of the trial court to determine "after inquiry of the defendant that the plea is voluntarily and understandingly tendered". See Pa.R.C.P. 319(a) (3). The same provision of Rule 319 provides discretion of the trial court to refuse to accept a plea of guilty or nolo contendere. In addition, the comments to the Rule set forth a host of questions the trial Court should ask in determining whether the plea is knowing and voluntary. In the instant case, all of these questions and more were inquired of Appellant prior to accepting Appellant's plea.

Pa.R.C.P. 320 likewise imbues a trial court with discretion in determining whether to permit the withdrawal of a guilty plea ("at any time before the imposition of sentence, the Court may, in its discretion, permit, upon motion of the defendant, or direct, sua sponte, the withdrawal of a plea of guilty or nolo contendere and the substitution of a plea of not guilty". Rule 320(a)). In actuality, the progeny of *Commonwealth v. Forbes*, *supra.* have eliminated any discretion a trial Court was granted under Rule 320 because the mere assertion of innocence is a "fair and just reason".

A common sense approach which fairly balances the rights of a criminal defendant with the interests of justice would require a defendant to articulate some change in circumstance(s) or fact(s) not known to the

person at the time of the plea but which have subsequently formed a basis for an assertion of innocence. To hold otherwise means that plea colloquies are hollow and of little affect prior to sentencing.

Given the havoc and uncertainty the present law plays in the lives of victims as well as the efficient administration of a trial list, justice requires that a knowing and voluntary plea remain knowing and voluntary unless shown otherwise by the moving party.

In this case, there is nothing of record to establish Appellant's plea was anything other than knowing and voluntary on October 29, 1999. It did not become unknowing and involuntary by a subsequent bald assertion of innocence. "Fairness and justice" dictates that the plea should stand and this appeal dismissed.

BY THE COURT:
/s/ **WILLIAM R. CUNNINGHAM**
President Judge

COMMONWEALTH OF PENNSYLVANIA
v.
NIAGARA FIREWORKS

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA TRIAL COURT DIVISION NO. 2475 OF 1999

COMMONWEALTH OF PENNSYLVANIA
v.
9-90 VARIETY, INC.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA TRIAL COURT DIVISION NO. 2476 OF 1999

CRIMINAL LAW/FINES AND SEIZURES

The touchstone of whether a fine is excessive under the Excessive Fines Clause of the federal constitution is the principle of proportionality, and a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of the offense. U.S. Const. amend. VIII.

CRIMINAL LAW/FINES AND FORFEITURES

In reviewing a forfeiture for excessiveness, judgments about the appropriate punishment belong in the first instance to the legislature; and any judicial determination regarding the gravity of a particular offense will be inheritantly imprecise.

CRIMINAL LAW/FINES AND FORFEITURES

If property was significantly used in the commission of the offense, the item may be forfeited regardless of its value; but where the criminal incident on which a forfeiture is based is not part of a pattern of similar incidents, there is no "significant" relationship between the property and the offense.

CRIMINAL LAW/FINES AND FORFEITURES

Where fireworks were sold to an undercover officer for $89.01 in one case and $77.91 in another case in violation of 35 Pa. C.S. § 1272, which prohibits sale of Class C fireworks to residents of Pennsylvania, and where the maximum penalty for each offense was a fine of $100.00 and/or 90 days' imprisonment, the forfeiture of $14,000.00 worth of fireworks in the first case and $23,000.00 worth of fireworks in the second would be excessive in violation of the federal and state consitutuional provisions prohibiting excessive fines. U.S. Const. amend. VIII, Pa. Const. Art. I, §13.

CRIMINAL LAW/FINES AND FORFEITURES

A one-time sale of Class C fireworks to a resident of Pennsylvania in violation of 35 Pa. C.S. § 1272 does not constitute a pattern of incidents to allow all other fireworks owned by the defendant to be seized and forfeited, nor, when such fireworks are legally owned, does continued possession render the remainder of the fireworks "derivative contraband" because

this would require that the property, though innocent in itself, be used in the perpetration of an unlawful act.

CRIMINAL LAW/FINES AND FORFEITURES

Property is not derivative contraband unless there is a specific nexus between the property and the alleged criminal activity.

Appearances: James K. Vogel, Esq., for the Commonwealth
David G. Ridge, Esq., for Defendant

OPINION AND ORDER

January 4, 2000, Domitrovich, J.

This matter arises from Defendants' Motions for Return of Property wherein each Defendant requests the return of seized Class C fireworks, which were seized by search warrants, by the Pennsylvania State Police. The issue, identical in both cases, is whether said seizure is an excessive fine resulting from a punitive forfeiture disproportional to the gravity of harm for the offense, if violated, which has only a maximum fine of $100.00 and/or 90 days imprisonment statutorily.

The relevant facts are as follows: each Defendant is a Pennsylvania corporation conducting both retail sale of legal Pennsylvania fireworks and wholesale sale of Class C fireworks to out-of-state residents only. On August 23, 1999, an undercover New York State officer, in conjunction with the Pennsylvania State Police, made a one-time purchase of $89.01 worth of Class C fireworks from Niagara; and a one-time purchase of $77.91 worth of Class C fireworks from 9-90. A search warrant was filed on August 24, 1999 in each case, alleging a violation of 35 Pa.C.S. §1272, occurring on August 23, 1999, during each purchase made by the undercover New York State officer at Niagara and 9-90. Pennsylvania State Police seized $14,194.69 (Exhibit B) worth of Class C fireworks from Niagara Fireworks; and seized $23,842.88 (Exhibit C) from 9-90 Variety, Inc.

Niagara Fireworks and 9-90 Variety Inc.'s procedures regarding the sale of Class C fireworks are basically the same, and any differences are not relevant to this proceeding.[1] Briefly the procedure for each is as follows: each Defendant obtains a picture identification of any potential customer to verify out-of-state residency, and a bill of lading is completed.[2]

To resolve Defendants' issues regarding excessive fines, the United

[1] Although Niagara has not produced its current permits, Trooper McGuire stated there was no allegation made regarding whether a permit was necessary to sell consumer fireworks.

[2] On August 23, 1999, the day of the undercover purchase, Niagara Fireworks completed no bill of lading; however, the employee involved was later fired for failure to complete a bill of lading.

States Supreme Court has provided guidance in the *Bajakajian* case:

> The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish...Until today, however, we have not articulated a standard for determining whether a punitive forfeiture is constitutionally excessive. We now hold that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of the offense.

U.S. v. Bajakajian, 524 U.S. ___ slip op., 118 S.Ct. 2028(1998). In the *Bajakajian* case, the defendant attempted to leave the United States with $357,144.00 without reporting said amount under 18 U.S.C. §982(a)(1). By statute, Defendant was obligated to report he was transporting more than $10,000.00 in currency out of the United States. *Id.* District Court found the entire amount, $357,144.00, was subject to forfeiture. *Id.* However, on appeal, the U. S. Supreme Court determined said forfeiture of the entire $357,144.00 violated the Excessive Fines Clause of the Eighth Amendment. The Court determined that the forfeiture should be only to the extent of $15,000.00, three years' probation, and the maximum fine of $5,000.00 under the Sentencing Guidelines. *Id.*

In *Bajakajian,* the U. S. Supreme Court developed a two-part standard for determining whether a forfeiture was disproportional and, therefore, "excessive." The Court found two considerations "particularly relevant" in deriving this standard:

> The first, previously emphasized in cases interpreting the Cruel and Unusual Punishments Clause, is that judgments about the appropriate punishment belong in the first instance to the legislature. The second is that any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise. Because both considerations counsel against requiring strict proportionality, the Court adopts the gross disproportional standard.

See Bajakajian at 2030-31.

Pennsylvania case law has also recognized that the "excessive fines" provisions of the Pennsylvania Constitution and the United States Constitution are "virtually identical;" therefore, the analysis of "excessiveness" under the United States Constitution is also applicable under the Pennsylvania Constitution. *In Re King Properties,* 535 Pa. 321, 635 A.2d 128,131 (1993). The PennsylvaniaSupreme Court has set forth this standard:

> [I]n determining whether a forfeiture is an excessive fine, and therefore disproportionate, the inquiry does not concern the value

> of the thing forfeited, but the relationship of the offense to the property which is forfeited. If the forfeited property was significantly used in the commission of the offense, the item may be forfeited regardless of its value.
>
> Where the evidence is that the criminal incident on which the forfeiture is based is not part of a pattern of similar incidents, there is no "significant" relationship between the property sought to be forfeited and the offense. Otherwise, significant property interests might become forfeit based on an unusual and unaccustomed incident.

Id., at 133.

In the instant cases, each Defendant sold Class C fireworks to an out-of-state resident. The method used by each Defendant to ship the fireworks out of Pennsylvania once they are sold to an out-of-state resident is not before this Court at this time. If a violation is later determined, the statutory punishment is a maximum fine of $100.00 and/or up to 90 days imprisonment. It is undisputed that Pennsylvania State Police seized over $14,000.00 worth of fireworks from Niagara Fireworks, and over $23,000.00 worth of fireworks from 9-90 Variety, Inc at the time the search warrants were served. This Court finds mathematically said seizure is over 140 times the possible maximum fine in the Niagara case and over 230 times the possible maximum fine in the 9-90 case. Commonwealth requests forfeiture of all fireworks seized by Pennsylvania State Police, including those fireworks not directly related to the one-time undercover purchase of $89.01 from Niagara and the one-time undercover purchase of $77.91 from 9-90 Variety, Inc. However, in light of the *Bajakajian* and *In Re King Properties* cases, this Court finds it is evident that to permit the Commonwealth to withhold over $14,000.00 worth of fireworks from Niagara and over $23,000.00 from 9-90 is excessive in light of the possible statutory maximum limits established by the Pennsylvania Legislature whose legislative judgment to fashion the appropriate punishment is given great deference. The Legislature determines the law regarding the gravity of a particular offense. To hold otherwise is to permit the judiciary to sanction forfeitures so punitive in nature and grossly disproportional to the gravity of the offense established by the Pennsylvania Legislature.

Also, in reference to the standard set forth in the case of *In Re King Properties*, the Commonwealth relies upon a one-time purchase made at Niagara Fireworks of $89.01 and a one-time purchase made at 9-90 Variety, Inc. of $77.91. Obviously, a one-time purchase does not constitute a pattern of similar incidents. The Commonwealth has failed to establish a "significant" relationship between the seized fireworks and the one-time purchase.

Additionally, the Pennsylvania Commonwealth Court determined where a residence is used on more than one occasion to facilitate drug transactions, a "significant" relationship exists between the property seized and the illegal activity to justify the forfeiture. *Commonwealth v. 5043 Anderson Road,* __Pa.Cmwlth. __, 699 A.2d 1337 (1997); allocatur granted on another issue and affirmed at __ Pa. __, 728 A.2d 907 (1999). In the instant case, the Commonwealth has failed to establish that the seized fireworks were used in the commission of the alleged offense, which is a one-time purchase regarding each Defendant. Therefore, the seizure constitutes an excessive forfeiture under the Pennsylvania excessive fines provision.

Commonwealth further argues that all of the fireworks seized from both Niagara and 9-90 are contraband. Commonwealth views all of the seized fireworks from each Defendant as evidencing a course of conduct of potential unlawful acts; therefore, Commonwealth concludes said fireworks should be forfeited, regardless of the Commonwealth's awareness that these seizures would be severe, as indicated in the Commonwealth's Memorandum at p. 3.

This Court finds each Defendant has shown lawful ownership and possession of said fireworks, which was not contested by Commonwealth at the hearing on these Motions of Monday, November 22, 1999. This Court finds Commonwealth has failed to prove said fireworks, in both cases, are contraband per se since contraband "per se" is property that the mere possession of which is unlawful. *Commonwealth v. Howard,* 552 Pa. 27,713 A.2d 89, 92 (1998). Under Pennsylvania Statute, it is not a crime to merely possess Class C fireworks without a permit. 35 Pa.C.S. § 1272. In the instant cases, a Defendant's possession of Class C fireworks is not unlawful.

Furthermore, Commonwealth has failed to show how the fireworks, in each case, in question are derivative contraband, which must be proven by a preponderance of the evidence. Derivative contraband is "property innocent by itself, but used in the perpetration of an unlawful act." *Id.* This Court concludes that Commonwealth has also failed to prove that the fireworks seized from Niagara and 9-90 were used in the perpetration of an unlawful act. The sale of the fireworks is not illegal in either case of Niagara or 9-90. However, Commonwealth disputes whether Defendants' manner of "shipment" is consistent with the law; as stated earlier, said procedure is not an issue before this Court at this time. The Commonwealth has the burden of establishing a sufficient nexus between the seized fireworks of $14,194.69 in the case of Niagara, and $23,842.88 in the case of 9-90, and the one-time purchase by the undercover New York State officer of only $89.01 from Niagara and $77.91 from 9-90. In *Petition of Koenig,* the Pennsylvania Superior Court stated:

> Property is not derivative contraband...merely because it is owned or used by someone who has been engaged in criminal conduct... Rather, the Commonwealth must establish a specific nexus between the property and the alleged criminal activity...

Petition of Koenig, 444 Pa. Super. 163, 663 A.2d 725 (1995). In the instant cases, the Commonwealth has failed to meet this burden of proof. As stated in *Howard, supra*,

> "[a]ll this establishes is that the guns which were illegally sold are derivative contraband and the remaining guns, not having been sold, are not. The remaining guns do not become contraband merely because their owner engaged in criminal conduct with respect to other guns."

Howard, at 93. In the instant cases, Commonwealth is merely speculating when it states that seized Class C fireworks "would have been sold in the same illegal manner the purchased fireworks were sold" and "could have been purchased by the undercover officer." There was only one undercover purchase for $89.01 from Niagara and one undercover purchase for $77.91 from 9-90. Commonwealth has, therefore, not proven there is a course of conduct and a pattern of sales, which are illegal in either case, because one purchase does not establish a course of conduct or a pattern of sales. In the absence of any evidence that the seized property is the fruit of, or was used to further, criminal activity, the Commonwealth cannot prevail in a petition to forfeit the seized property as derivative contraband. *See Commonwealth v. Younge*, 446 Pa. Super. 541, 667 A.2d 739 (1995). In the instant cases, the Commonwealth, therefore, has not proven that the seized fireworks were either items (1) used in the commission of a crime, (2) used in furtherance or in aid of committing a crime and/or (3) the proceeds or items derived from criminal activity. The Commonwealth has not shown the seized fireworks, in either case, were the fruit of, or were used to further criminal activity; therefore, the Commonwealth cannot prevail in the forfeitures of said seized fireworks. The fireworks seized were sitting in the warehouse and had nothing to do with the onetime purchase of $89.01 from Niagara or the one-time purchase of $77.91 from 9-90. Therefore, Commonwealth has failed to meet its burden of proof by a preponderance of the evidence in each of these cases.

For the foregoing reasons, this Court grants Defendants' Motions for Return of Property; and, wherefore, said property shall be returned to Defendants pursuant to the following Order:

ORDER OF COURT

AND NOW, to-wit, this Fourth day of January, 2000, after hearing regarding Defendants' Motions for Return of Property and review of each

counsel's memorandum of law, it is hereby **ORDERED, ADJUDGED AND DECREED** that said Motions for Return of Property are GRANTED to the extent all items seized by the Pennsylvania State Police on August 24, 1999, and inventoried at Receipt No. E1-866647, are hereby returned respectively to Niagara Fireworks and 9-90 Variety, Inc.

Commonwealth can continue to maintain the $89.01 worth of Class C fireworks from Niagara and $77.91 worth of Class C fireworks from 9-90 Variety, Inc., which were the subjects of the sales to the undercover officer, until further Order of Court.

BY THE COURT:
/s/ **Stephanie Domitrovich, Judge**

DEBBIE COUGHLIN and JOHN COUGHLIN, her husband
v.
MILJACK, INC., d/b/a OVERHEAD DOOR COMPANY OF FRANKLIN and DAVID G. ARMANT

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 14402 - 1998

AARON WHITE
v.
JASON T. HAIN

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 13485 - 1997

DONNA M. SCHACK and JOHN C. SCHACK
v.
RUBY VIRGES

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 15431 - 1995

MOTOR VEHICLE(S)/JUDGMENT/INSURANCE/ LIMITED TORT/SERIOUS INJURY

Plaintiff's have the burden to prove occurrence of "serious injury" in order to recover non-economic damages pursuant to plaintiff's limited tort status under Motor Vehicle Financial Responsibility Law, Pa. C.S.A. § 1701 et seq.

MOTOR VEHICLE(S)/SUMMARY JUDGMENT/INSURANCE/ LIMITED TORT/SERIOUS INJURY

Question of whether "serious injury" has been sustained is not a predicate responsibility of the trial court, rather it is an issue to be decided with the context of traditional standards applicable to summary judgment.

SUMMARY JUDGMENT

Summary judgment requires that the court first determine if there are any material issues of fact in dispute and then view the uncontested facts in the light most favorable to the non-moving party. Upon the court's determination that reasonable minds could not differ as to the meaning of those facts in light of the applicable law, summary judgment should be granted.

JUDGMENT/MOTOR VEHICLE(S)/INSURANCE/ LIMITED TORT/SERIOUS INJURY

The ultimate determination of whether a "serious injury" has occurred should be made by the jury in all but the clearest of cases.

JUDGMENT/MOTOR VEHICLE(S)/INSURANCE/
LIMITED TORT/SERIOUS INJURY

In *Washington v. Baxter,* 553 Pa. 434, 719 A.2d 733 (1998), the Pennsylvania Supreme Court adopted the *DiFranco* standard regarding "serious impairment of bodily function". *DiFranco v. Pickard,* 427 Michigan 32, 398 N.W. 2d 896 (1986). Which requires that the trier of fact decide if the plaintiff suffered an injury that impaired a body function and if so, was the impairment serious.

JUDGMENT/MOTOR VEHICLE(S)/INSURANCE/
LIMITED TORT/SERIOUS INJURY

Serious impairment of a bodily function is for the trier of fact to decide and such determination requires the examination of all relevant considerations including but not limited to the extent of the impairment, the length of time the impairment lasted and the kind and extent of treatment required to correct the impairment.

MOTOR VEHICLE(S)/INSURANCE/LIMITED TORT/SERIOUS INJURY

In Pennsylvania there is no legal requirement that a plaintiff's injury be permanent in order to be a "serious impairment of a bodily function".

MOTOR VEHICLE(S)/INSURANCE/
LIMITED TORT/SERIOUS INJURY

In Pennsylvania there is no legal requirement that a plaintiff's injury be an injury to an important bodily function in order to be a "serious injury of a bodily function".

MOTOR VEHICLE(S)/INSURANCE/LIMITED TORT/SERIOUS INJURY

In Pennsylvania there is no "general ability to live a normal life" test in the determination of whether plaintiff has suffered a "serious impairment of a bodily function".

MOTOR VEHICLE(S)/INSURANCE/LIMITED TORT/SERIOUS INJURY

In Pennsylvania there is no legal requirement that plaintiff's injury be objectively manifested in order to be a "serious impairment of a bodily function".

MOTOR VEHICLE(S)/JUDGMENT/INSURANCE/
LIMITED TORT/SERIOUS INJURY

Ascertaining seriousness of plaintiff's injury requires a relative inquiry, which must take into consideration a myriad of individual circumstances and personal characteristics, tending to reject a singular conceptual analysis or standard in addressing the issue.

MOTOR VEHICLE(S)/JUDGMENT/INSURANCE/
LIMITED TORT/SERIOUS INJURY

Whether or not one who selects the limited tort option should recover for non-economic damages is a matter that should routinely be left to the jury.

MOTOR VEHICLE(S)/JUDGMENT/INSURANCE/
LIMITED TORT/SERIOUS INJURY

Coughlin v. Miljack, Erie County CCP No. 14402-1998

Trial court, on deciding Motion for Summary Judgment, utilizing *DiFranco* analysis adopted in *Washington*, concluded jury could reasonably find plaintiff suffered a serious injury where: (a) The functioning of Ms. Coughlin's back was impaired; (b) The extent of impairment included the inability to utilize her back to carry out a number of day-to-day activities for an extended period of time; (c) The length of time associated with the primary period of impairment was eighteen months; (d) Her treatment included a variety of modalities, including spinal surgery and an accompanying six-month period of rehabilitation; (e) The nature and extent of her injuries are well documented by medical records.

MOTOR VEHICLE/JUDGMENT/INSURANCE/
LIMITED TORT/SERIOUS INJURY

White v. Hain, Erie County CCP No. 13485-1997,

Trial court, on deciding Motion for Summary Judgment utilizing *DiFranco* analysis adopted in *Washington,* concluded when all evidence viewed in light most favorable to plaintiff, reasonable minds could differ as to whether impairment of knee was serious where: (a) The functioning of Mr. White's knee was impaired; (b) The extent of impairment included limitations in the general use of his leg for normal activities because of associated pain and weakness. This resulted in the loss of work, the missing of school, the inability to participate in athletic activities, and varying periods or limited mobility; (c) The primary period of impairment encompassed the period within which two surgeries were performed, and lasted about two and one-half years; (d) The treatment included arthroscopic surgery, ACL reconstruction surgery, physical therapy and pain medication: (e) The existence and extent of his injuries are well documented by medical evidence.

MOTOR VEHICLE/JUDGMENT/INSURANCE/
LIMITED TORT/SERIOUS INJURY

Schack v. Virges, Erie County CCP No. 15431-1995,

Trial court, in deciding Motion for Summary Judgment utilizing *DiFranco* analysis adopted in *Washington,* determined that considering the nature, extent and permanency of plaintiff's injury concluded that reasonable minds could not differ that plaintiff did not suffer serious impairment of the use of her neck where: (a) The ability of Ms. Schack to move her neck was impaired; (b) The extent of impairment included limitations on using her neck for work purposes, bike riding and bowling; (c) The primary period of impairment coincided with her work loss and lasted three months; (d) Treatment included physical therapy and injections, chiropractic and osteopathic manipulation and pain medication, but not surgery or prolonged immobilization; (e) The extent of treatment is documented by medical records, but the extent of impairment of the use of her neck or its permanency are not supported by medical testimony.

Appearances: Mark O. Prenatt, Esquire for Debbie Coughlin
Gregory P. Zimmerman, Esquire for Miljack, Inc.
Tibor R. Solymosi, Esquire for Aaron White
Lisa Lynn Smith, Esquire for Jason T. Hain
James R. Bruno, Esquire for Donna M. Schack
Lisa Lynn Smith, Esquire for Ruby Virges

OPINION

Bozza, John A., J.

Once again, the Court is being asked to determine as a matter of law whether a plaintiff has failed to prove the occurrence of a serious injury and is therefore precluded from recovering damages for non-economic loss pursuant to the Motor Vehicle Financial Responsibility Law (MVFRL). 75 Pa.C.S.A. § 1701 et seq. In each of the three cases before the Court, the plaintiffs were injured in motor vehicle accidents and subject to "limited tort" insurance policies. Each filed an action against a driver claiming "a serious impairment of body function." 75 Pa.C.S.A. § 1702.

The Supreme Court has very explicitly determined that the question of whether a serious injury has been sustained is not a predicate responsibility of the trial court, but an issue to be decided within the context of traditional standards applicable to summary judgment. *Washington v. Baxter,* 553 Pa. 434, 719 A.2d 733 (1998). A summary judgment analysis requires that the court first determine if there are any material issues of fact in dispute, and then view the uncontested facts in a light most favorable to the non-moving party. If reasonable minds could not differ as to the meaning of those facts in light of the applicable law, summary judgment should be granted. *Id.* In *Washington,* the court also noted that with regard to the issue of serious injury "the ultimate determination should be made by the jury in all but the clearest of cases." *Id.* , p. 441.

In *Washington,* the court adopted the view of the Supreme Court of Michigan in *DiFranco v. Pickard,* 427 Mich. 32, 398 N.W.2d 896 (1986), and stated that in order to determine whether a serious injury[1] has occurred, the trier of fact must decide the following:

1. Did the plaintiff suffer an injury that impaired a body function?
2. If a function of the body had been impaired, was that impairment serious? *Id.*

In order to determine whether an impairment is serious, the following criteria, as well as other relevant considerations, should be considered:

1. The extent of the impairment;
2. The length of time the impairment lasted; and
3. The kind and extent of treatment required to correct the impairment.

There is no requirement that the injury be permanent. *Id.* The MVFRL

[1] The plaintiffs do not claim that they have suffered "permanent serious disfigurement" or death.

does not provide a definition of "serious" nor indicate any criteria to be used to determine the existence of a serious impairment of body function.

Notwithstanding the now more precisely delineated legal framework for analyzing the existence of a serious injury, the subjective nature of the term "serious" continues to make the resolution of the issue in a summary judgment or any other context very difficult. Indeed, ascertaining seriousness requires at least to some degree a relative inquiry which must take into consideration a myriad of individual circumstances and personal characteristics. Accordingly, it is not surprising that the Supreme Court of Michigan rejected the utilization of a singular conceptual analysis or standard in addressing the issue. *DiFranco v. Pickard*, 427 Michigan 32, 398 NW2d 896 (1986). In *DiFranco*, which the Pennsylvania Supreme Court looked to for guidance in defining "serious impairment of body function," the Court even rejected the notion that in order for there to be a serious bodily injury, an important body function must be impaired. *Id.*, p. 61. The Court also declined to rely on the "general ability to live a normal life" test, and refused to adopt the idea that serious injury had to be one that was "objectively manifested." *Id.* p. 66, 75.

In *Washington*, the plaintiff suffered a cervical sprain, foot sprain, and cuts and contusions. As a result he was treated in the ER and received a cortisone injection in his foot. The injury had no affect on his ability to work, although he could no longer push a lawnmower. He continued to have on-going pain once per week, and periodically he reported that his ankle would swell. The Supreme Court applied a *DiFranco* analysis and concluded that the impairment of body function was not serious.

Recently, the Superior Court has provided some additional guidance in the analysis of factual settings suggestive of serious injury. In *Hellings v. Bowman*, 1999 Pa. Super. 335 (1999), the Superior Court decided that reasonable minds could differ as to whether the plaintiff sustained a serious impairment of body function when he incurred a herniated disc with lumbar ridiculopathy. The injury resulted in numbness in the right knee, hip pain, muscle spasms in the back, hand cramping and frequent headaches. The plaintiff underwent physical therapy, chiropractic care, and took muscle relaxers and other medications. The functional consequences of the injury included his inability to ride in his wife's car and drive his snowmobile, no work for six weeks, no skiing, limitations on his ability to hunt and horseback ride and to physically interact with his children. The duration of his impairment was not clear. His medical condition was diagnosed by a neurosurgeon.

The plaintiff in *Kelly v. Ziolko*, 734 A.2d 893 (Pa. Super. 1999) also suffered a herniated disc with involvement of nerves affecting his face and toes. Treatment included physical therapy and exercise, chiropractic care and pain medications, but no surgery. As a result of his injury, *Kelly* could no longer run or ride his bike, could do limited walking, and couldn't play with his child. However, he had no work limitations. While the duration

of the impairment is not explicitly set forth, it appears that part of the functional consequences will be permanent. He endured pain for a period of at least two years following the accident. There was medical confirmation of his limitations, and an indication that his condition may worsen. In these circumstances, the Court concluded that reasonable minds could differ as to whether Mr. Kelly had sustained a serious impairment of his back.

In *Furhman v. Shapiro,* 721 A.2d 1125 (Pa. Super. 1998), Fuhrman had a back/neck injury described as a "bulging disc." He underwent physical therapy and did home exercises and apparently was prescribed medication. He was required to reduce work to part time, could walk no more than one block, and could do no heavy lifting. His impairment continued to exist as of three years following the date of the accident. The doctor described the condition as permanent. The Superior Court, finding that reasonable minds could differ as to the existence of serious injury, reversed the trial court's grant of summary judgment.

Additional examples of instances where plaintiffs alleged serious injury are found in *DiFranco.* In each of the following cases, the court found that reasonable minds could differ as to the existence of a serious injury:

1. The plaintiff sustained a soft tissue injury to his back, limiting his ability to move his lower back by forty to fifty per cent and his neck by thirty to forty per cent. As of the time of trial, the limitation had been reduced to five to fifteen per cent. He returned to work with no limitations after two months. His treatment included traction and physical therapy. There was some permanent impairment and his ability to move his lower back will be increasingly limited as his arthritis progresses. On these facts, the Supreme Court decided that the trial court was correct in denying defendant's motion for a directed verdict and stated, "We cannot say that all persons would conclude that plaintiff's impairment was not serious." *Id.* p. 78.

2. A person injured while riding his motorcycle suffered a fracture to his right clavicle. He wore a brace-type cast for four to six weeks and the fracture healed without any problem. During a period of four to six weeks, the movement of his arm and shoulder were totally impaired. The plaintiff continued to experience some pain in his shoulder following the removal of the cast and it is likely to continue for several months.

3. Plaintiff sustained a severe fracture of his jaw and was required to have his mouth wired as a result of surgery to correct the fracture. He was restricted to a liquid diet for a period of time and could not chew. The wires in his jaw remained for a period of approximately two months. There were some complications including the temporary

loss of thirty per cent of his hearing, a loss of weight, and pain in his mouth, ears and back. The fracture healed satisfactorily within three to four months and there was no on-going impairment to the functioning of his mouth. In this case, the jury found that the plaintiff did not suffer a serious impairment of body function and the Court decided that the verdict was not against the weight of the evidence. [In an interesting caveat, the Court commented that " . . . the focus of the threshold inquiry must be on the extent the particular body function was impaired, not on how the impairment affected plaintiff's daily life." *Id.* p. 85]

4. As a result of being rear-ended, the plaintiff suffered a dislocation of a thoracic vertebrae and scoliosis. This diagnosis was supported by the opinion of a chiropractor. He underwent chiropractic care for six to eight weeks, and was advised not to stand on his feet for more than four hours per day, nor lift more than twenty-five pounds. He continued to receive treatment thereafter from the chiropractor once every two weeks. The chiropractor believed that the lifting restrictions were permanent and that he would need chiropractic care for the rest of his life and that ultimately the condition would degenerate because of arthritis. Following a trial, the jury found that the plaintiff had sustained a serious impairment of body function. The Court agreed that the record supported the jury's conclusion, reversed the Court of Appeals, and noted that it was incorrect to focus on the plaintiff's lack of absenteeism and wage loss, stating, "The Court of Appeals' reasoning would penalize persons who return to favored work. The Court should have focused instead on the extent and permanency of the plaintiff's impairment." *Id.* p. 88.

5. As the result of an accident, a tractor trailer driver suffered a hernia and underwent two operations with hospitalizations for two weeks. The plaintiff cannot lift more than thirty to forty pounds and experiences severe pain climbing stairs, standing for long periods, and when lifting a gallon of milk. There was no indication as to whether plaintiff's condition would improve in the future. The Court noted the fact that the plaintiff underwent two surgeries performed under general anesthesia and said that "weighs in favor of finding a serious impairment." *Id.* p. 91.

It is apparent that there are a myriad of circumstances which will beg the question of serious injury. The traditional summary judgment analysis required by *Washington* limits the granting of summary judgment to the "clearest of cases." 719 A.2d 737. As is evidenced by the examples described above, each case presents a unique interplay of factual circumstances. It is also apparent that the focus must remain on the nature of the impairment of the body function, its extent and permanency, and the treatment required in an attempt to remedy it. As this Court noted in *Johnson v. Gutfreund*,

Erie County No. 11289 - 1997 (1999), the assessment of seriousness requires an inherently subjective analysis and while the legislature intended that one who selects the limited tort option should recover for non-economic damages in only narrow circumstances, it is a matter that should routinely be left to the jury. In the *Johnson* case, the plaintiff had broken her ankle and the extent of her treatment included wearing a cast for six weeks and using a cane for a couple of additional weeks. She had no medically documented limitations on the use of her ankle and maintained that her only difficulty was in climbing stairs, picking up her daughter, doing heavy cleaning, and roller skating. Three years after the accident she had only intermittent pain and some walking limitations, no other impairment on the use of her ankle, and she described her current state of health as "aches and pains." As the plaintiff in *Washington,* Ms. Johnson missed only limited work, her treatment was not extensive, and the injury had no impact on her ability to perform her job, and only minor impact on her ability to carry out personal activities. This is not to say that a fracture to an ankle may not result in serious impairment of a body function. It is to say that in Ms. Johnson's case, it did not. The Court must now address the diverse and distinct circumstances presented by the three cases before it:

A. *Coughlin v. Miljack* - No. 14402 - 1998

As a result of an automobile accident in December of 1996, Debbie Coughlin suffered a herniated disc and a bulging disc in her spine. In addition to the pain associated with those obvious injuries, she suffered from migraine headaches. For a period of approximately one year following the accident she underwent chiropractic care, physical therapy, utilized various pain medications, and was significantly limited in her ability to carry out her daily activities because of serious pain.

In January, 1998, she underwent spinal surgery to fuse vertebrae in her spine, and for six months following the surgery, she was largely incapacitated from carrying on her ordinary activities. As of June, 1999, the date of her deposition, she was considerably improved, but continued to have problems with arm discomfort and she required some assistance with getting dressed. She couldn't lift heavy objects or stand for long periods of time. The existence and extent of her injury are well-documented by medical records.

Utilizing the *DiFranco* analysis adopted in *Washington* yields the following results:

a. The functioning of Ms. Couglin's back was impaired.
b. The extent of impairment included the inability to utilize her back to carry out a number of day-to-day activities for an extended period of time.
c. The length of time associated with the primary period of impairment was eighteen months.
d. Her treatment included a variety of modalities, including spinal surgery and an accompanying six month period of rehabilitation.

e. The nature and extent of her injuries are well-documented by medical records.

It is obvious based on the summary judgment record that a jury could reasonably find that Ms. Coughlin suffered a serious injury.

B. White v. Hain - No. 13485 - 1997

As a result of being struck by a car as he was crossing the street in October of 1995, Aaron White sustained an injury to his anterior cruciate ligament (ACL) in the area of his knee. He also suffered a fracture of the pubic bone, and various contusions and abrasions. At the time of the accident he was a high school student and employed part time as a busboy and dishwasher. While the pubic bone injury caused him virtually no difficulty, the knee injury required two surgical procedures: an arthroscopic surgery in January, 1996, and a more conventional invasive procedure in September of 1997, which resulted in the reconstruction of his ACL. He underwent two different courses of physical therapy, took pain medication, wore a brace and used crutches. He was unable to work at various part time jobs for a total period of approximately six months, missed school for a number of weeks, and during the intervening year-long period between surgeries, utilizing his knee in a normal fashion was restricted. The knee felt like "straw" when he would bend it and, on occasion, he would collapse to the ground in pain. In general, he suffered continuous discomfort for a period of at least a year.

Following surgery, in addition to going to physical therapy three times per week, he was required to keep his leg totally straight in a brace for two and one-half months, used crutches for one month, and overall, used some form of brace for three to four months. As of the time of his deposition in February of 1999, which was approximately three years post-accident, the knee had improved but he continued to have occasional pain, and he could no longer run or play basketball.

Utilizing the *DiFranco* criteria yields the following result:

a. The functioning of Mr. White's knee was impaired·
b. The extent of impairment included limitations in the general use of his leg for normal activities because of associated pain and weakness. This resulted in the loss of work, the missing of school, the inability to participate in athletic activities, and varying periods of limited mobility.
c. The primary period of impairment encompassed the period within which two surgeries were performed, and lasted about two and one-half years.
d. The treatment included arthroscopic surgery, ACL reconstruction surgery, physical therapy and pain medication.
e. The existence and extent of his injuries are well-documented by medical evidence.

When all the evidence is viewed in a light most favorable to Mr. White, reasonable minds could differ as to whether the impairment of his knee

was serious.

C. Schack v. Virges, 15431- 1995:

As the result of an automobile accident in December, 1993, Donna Schack was seen briefly in the hospital emergency room and released to the care of her private physicians. She suffered a concussion, cervical strain and lacerations. Over a period of four years, she was treated with chiropractic care, osteopathic manipulation, physical therapy, and trigger point injections, as well as pain medication. Her continuing problems included daily neck pain and headaches, and periodic migraine headaches. Following the accident, she was off work for a little bit less than a month before going back to work as an accounting assistant part time. She regained full employment after about three months. Her injuries did not interfere with her ability to carry out any portion of her job. As of the time of the deposition, she was unable to ride her bike, and her injuries had limited her ability to bowl. She has no other functional limitations. She was involved in a second car accident in March of 1995, and as a result of that accident, her neck injury was further aggravated for a period of time. There is no loss of range of motion in her neck, and the diagnostic studies failed to definitively disclose the physiological nature of her neck injury.

The first question is whether Ms. Schack suffered an impairment of a function of her body? In that regard, it would appear that she has had some difficulty moving her neck. Although the record does not explicitly address this matter, the treatment that she received was considerable and it appears to have been directed to improve her ability to use her neck in a less painful manner. From a functional point of view, her injury has had very limited impact. The only activity that she reports completely curtailing is bike riding. Her participation in bowling continued until the second accident, and thereafter, she indicated she was forced to quit. A close review of her medical records does not yield any medical opinion concerning continuing physical limitations as of the date of her deposition in 1997. Although her treatment continues, she cannot distinguish which portion of the treatment is necessary because of her original injury, and which portion is needed because of injuries suffered in the March, 1995, accident.

Applying a *DiFranco* analysis yields the following results:

a. The ability of Ms. Schack to move her neck was impaired.
b. The extent of impairment included limitations on using her neck for work purposes, bike riding and bowling.
c. The primary period of impairment coincided with her work loss and lasted three months.
d. Treatment included physical therapy and injections, chiropractic and osteopathic manipulation and pain medication, but not surgery or prolonged immobilization.
e. The extent of treatment is documented by medical records, but the extent of impairment of the use of her neck or its permanency are not supported by medical testimony.

Considering the nature, extent and permanency of her injury, the Court concludes that reasonable minds could not differ that Ms. Schack did not suffer a serious impairment of the use of her neck.

Based on the conclusions set forth above, appropriate Orders shall follow.

DEBBIE COUGHLIN and JOHN COUGHLIN, her husband
v.
MILJACK, INC., d/b/a OVERHEAD DOOR COMPANY OF FRANKLIN and DAVID G. ARMANT

ORDER

AND NOW, to-wit, this 3 day of March, 2000, upon consideration of defendant's Motion for Summary Judgment and argument thereon, and for the reasons set forth in the attached Opinion, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that the Motion for Summary Judgment is **DENIED**.

By the Court,
/s/ **John A. Bozza, Judge**

AARON WHITE
v.
JASON T. HAIN

ORDER

AND NOW, to-wit, this 3 day of March, 2000, upon consideration of defendant's Motion for Summary Judgment and argument thereon, and for the reasons set forth in the attached Opinion, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that the Motion for Summary Judgment is **DENIED**.

By the Court,
/s/ **John A. Bozza, Judge**

DONNA M. SCHACK and JOHN C. SCHACK
v.
RUBY VIRGES

ORDER

AND NOW, to-wit, this 3 day of March, 2000, upon consideration of defendant's Motion for Summary Judgment and argument thereon, and for the reasons set forth in the attached Opinion, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that the Motion for Summary Judgment is **GRANTED**.

By the Court,
/s/ **John A. Bozza, Judge**

HELEN A. CARTER, Plaintiff

v.

JAMES F. CARTER, Defendant

FAMILY LAW/PRE-NUPTIAL AGREEMENTS

Prenuptial agreements are contracts and, as such, the parties thereto are normally bound by their agreements, without regard to whether the terms were read and fully understood, and irrespective of whether the agreements embodied reasonable or good bargains.

FAMILY LAW/PRE-NUPTIAL AGREEMENTS

A prenuptial agreement will not be declared void on the ground that a party did not consult with independent legal counsel.

FAMILY LAW/PRE-NUPTIAL AGREEMENTS

If an agreement provides that full disclosure has been made, a presumption of full disclosure arises and the party seeking to set aside the agreement must rebut the presumption by clear and convincing evidence.

FAMILY LAW/PRE-NUPTIAL AGREEMENTS

Although it is better to set forth the values of the assets, or a range of values, in the agreement, the absence of stated valuations in the list of assets does not render the agreement unenforceable, if discussions concerning the valuation of the assets occurred between the parties prior to the execution of the agreement.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - DIVORCE No. 12145-1997

Appearances: Rebecca DeSimone, Esquire for the Plaintiff
James H. Richardson, Jr., Esquire for the Defendant

OPINION AND ORDER

This case comes before the Court upon presentation of three motions filed by the plaintiff, Helen A. Carter against defendant, James F. Carter. These relate to the divorce action filed June 26, 1997. As the record indicates, two of the motions were resolved and this Court took testimony spanning two (2) days on the plaintiff's Petition To Set Aside Antenuptial Agreement. The only witnesses to testify were the plaintiff and the defendant.

I. FACTUAL FINDINGS

The parties were married on October 29, 1977. During the preceding summer, the plaintiff and her children relocated to Erie, Pennsylvania from Butler, Pennsylvania and resided with the defendant. They separated on or about January 21, 1998. The antenuptial agreement, which is the subject of this dispute, was executed on October 28, 1977.

Plaintiff alleges that the agreement should be set aside on a number of

bases. Prior to taking testimony, and after review of the pleadings, this Court found that the only two issues which required evidentiary development were: (1) whether there was full and fair disclosure and, (2) whether there was consideration.

The defendant prior to and at the time of the marriage owned real estate and business interests, notably an insurance agency and a related company. He desired an antenuptial agreement in the event of a divorce and the plaintiff was willing to execute one as part of the marital process. Defendant retained Attorney, James Toohey, Esquire who practices in Erie, Pennsylvania to draft the agreement. There were two meetings with Attorney Toohey in preparation for the execution of the agreement. As part of that process, Attorney Toohey with the assistance of the parties, prepared the instant agreement and listed the parties' assets on Schedules A and B. The assets are described in some detail. Both parties understood that Attorney Toohey represented only the defendant and the plaintiff did not retain her own counsel.[1] Both parties had an opportunity to review the agreement, ask questions of Attorney Toohey, and signed the agreement. The facts further establish that prior to executing the agreement, the parties had a number of conversations concerning the defendant's assets (Schedule B) including - in many instances - discussion of values. The defendant shared, in general terms, the value of his insurance agency and the related company.

The evidence disclosed that the plaintiff visited some of the properties and made a few cosmetic recommendations. There is no evidence that any assets were hidden from either party by the other.

In this case, credibility of the witnesses is a critical issue. In that regard, the Court finds the testimony of the defendant more credible than that of the plaintiff.[2] Moreover, the Court finds plaintiff's motive and credibility highly suspect as reflected in her testimony on cross-examination (paraphrased here) that her action to set aside the antenuptial agreement would never have occurred had the defendant complied with some verbal agreement. In brief summary, the evidence clearly established that (1) the parties voluntarily, knowingly, and intelligently entered into this agreement,

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[1] From the plaintiff's testimony, it is clear that at the time of the execution of the agreement her major concern was the forthcoming wedding which occurred the day following the execution of the agreement.

[2] The Court finds especially persuasive the testimony of the defendant concerning his disclosure of item 7 of Schedule B which was property he did not own at the time of the marriage, but was in the process of acquiring.

(2) there was no duress[3], (3) the plaintiff had adequate opportunity to secure her own counsel and question defendant's counsel and defendant concerning the agreement, (4) the agreement specifically lists the assets, and (5) values were discussed by the parties.

II. LEGAL DISCUSSION

A. **The Issue of Consideration**

The Court incorporates by reference those portions of the record which reflect the Court's legal rulings.

Furthermore, after a review of the agreement and the evidence, the Court finds that the agreement does not fail for lack of consideration due to the mutuality of the promises set forth in the agreement and the language set forth in the last paragraph of the agreement which conforms to the requirements of 33 Pa.Cons.Stat.Ann.§6.

B. **The Issue of Full and Fair Disclosure**

Prenuptial agreements are contracts. As the Pennsylvania Supreme Court stated in *Simeone v. Simeone,* 581 A.2d 162 (Pa. 1990):

> Contracting parties are normally bound by their agreements, without regard to whether the terms thereof were read and fully understood and irrespective of whether the agreements embodied reasonable or good bargains. (citations omitted).

Id. at 165.

As in *Simeone,* there is no merit to plaintiff's contention that the agreement should be declared void on the ground that she did not consult with independent legal counsel. *Id.* at 166. Furthermore, the reasonableness of a prenuptial bargain is not a proper subject for judicial review. *Id.*

Continuing, the *Simeone* court did note that:

> [W]e do not depart from the long standing principle that a full and fair disclosure of the financial positions of the parties is required. Absent this disclosure, a material misrepresentation in the inducement for entering a prenuptial agreement may be asserted. (citation omitted). Parties to these agreements do not quite deal at arm's length but rather at the time the contract is entered into stand in a relation of mutual confidence and trust that calls for disclosure of their financial resources. (citation omitted). It is well-settled that this disclosure need not be exact, so long as it is "full and fair". (citation omitted). In essence therefore, the duty of disclosure under these circumstances is consistent with traditional principles of contract law.

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[3] This Court noted on the record at the time of the hearing that the allegations set forth in the petition did not adequately set forth facts which, if proved, would establish duress. For a discussion of what constitutes a duress in the context of these cases, the parties are referred to *Hamilton v. Hamilton.* 591 A.2d 720, 721-722 (Pa. Super. 1991).

ld. at 167.

Most importantly, if an agreement provides that full disclosure has been made, a presumption of full disclosure arises and the party seeking to set aside the agreement must rebut the presumption by clear and convincing evidence. *Id.*[4] Also, it is well-settled that whether there has been adequate disclosure depends on the circumstances of each case. See *Mormallo v. Mormallo*, 682 A.2d 824, 828 (Pa.Super. 1996)(citing *Nigro v. Nigro*, 538 A.2d 910, 914 (Pa. Super. 1988)), etc.

Plaintiff argues that the absence of stated valuations renders the agreement unenforceable. However, in the case of *In re: Estate of Hartman*, 582 A.2d 648 (Pa.Super. 1990), the Pennsylvania Superior Court rejected the proposition that the parties must reduce to writing their respective financial disclosures. *Id.* at 651. In that case, the scrivener testified that prior to the execution of the antenuptial agreement, the parties disclosed their assets to one another. *ld.* In the case at bar, this Court found credible the testimony of the defendant that discussions concerning the valuation of most of the assets occurred prior to the execution of the agreement. Although this Court acknowledges that it is the better practice to set forth the values of the assets or a range of values - that does not appear to be a requirement of Pennsylvania Law. Furthermore, the instant agreement listed in detail all the assets of both parties. Finally, the plaintiff's testimony fails to persuade this Court that her position has merit. Therefore, the Court finds that there was full and fair disclosure and that the plaintiff has failed to meet her burden of proof by clear and convincing evidence that the agreement should be set aside.

III. CONCLUSION

For the reasons set forth above, and on the record, this Court will issue an accompanying order denying plaintiff's petition.

ORDER

AND NOW, this 8th day of February, 2000, after having considered the parties' pleadings, evidence of record, and case authority submitted by counsel, it is hereby **ORDERED** that the plaintiff's Petition To Set Aside Antenuptial Agreement is **DENIED**.

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

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[4] The second "whereas" clause of the agreement provides: "Whereas, both parties hereto are seized in fee of certain real estate and own other personal property, the value of which realty and personalty has been fully desclosed (sec) between the parties."

WILLIAM ZIMMERMAN

v.

COLLEEN C. McCARTHY

NEGLIGENCE/DUTY OF CARE/TRESPASS

A trespasser is a person who enters or remains on land in possession of another without the privilege to do so created by the possessor's consent or otherwise. Restatement of Torts (Second), § 329 (1965)

NEGLIGENCE/DUTY OF CARE/TRESPASS

A trespasser may recover for injuries sustained on land only if the possessor of the land is guilty of wanton or willful negligence or misconduct. Restatement of Torts (Second), §329 (1965).

NEGLIGENCE/DUTY OF CARE/LICENSEE

A licensee is a person who is privileged to enter or remain on land by virtue of the possessor's consent. Restatement of Torts (Second), §330 (1965).

NEGLIGENCE/DUTY OF CARE/LICENSEE

A landowner is subject to liability to a licensee if:

1. A possessor knows or has reason to know of the condition upon the land and to realize that it involves an unreasonable risk of harm, and should expect that the licensee will not realize or discover the danger;
2. The landowner fails to exercise reasonable care to make the condition safe, or to warn the licensee of the risk involved; and
3. The licensee does not know or have reason to know of the condition and risk involved.

Restatement of Torts (Second), Section 342

NEGLIGENCE/DUTY OF CARE/TRESPASSER

An officer serving a warrant is a trespasser for purposes of determining the tort liability of the property owner. Since the plaintiff's complaint does not allege that the defendant was guilty of wanton or willful negligence or misconduct, summary judgment in favor of defendant is granted.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11283 - 1998

Appearances: William T. Jordan, Esquire for the Plaintiff
Thomas M. Lent, Esquire for the Defendant

MEMORANDUM

Bozza, John A., J.

This matter is before the Court on defendant's Motion for Summary Judgment. This case arises out of injuries allegedly sustained by the plaintiff when he fell on property owned by the defendant. On March 18, 1996, the plaintiff, a police officer for the City of Erie, parked by a building

owned by the defendant with the intention of entering the Erie County Courthouse to serve a warrant. As the plaintiff stepped out of his patrol car, he stepped into an area where the soil had been loosened and covered or mixed with mulch. According to the plaintiff, the area was "sloping with a very loose mixture of soil and wood chips." As the plaintiff tried to walk in this area, his left leg slipped, causing his left knee to lock and he subsequently fell. He was taken by ambulance to a local emergency room for treatment. He alleges he has sustained severe and permanent injuries. Plaintiff filed suit against the defendant asserting a negligence cause of action based on his status as a licensee. The defendant contends that the plaintiff was not a licensee of the defendant, but, in fact, was a trespasser on defendant's property.

In a case factually similar to the instant case, the Pennsylvania Supreme Court in *Rossino v. Kovacs*, 553 Pa. 168, 718 A.2d 755 (1998), considered the issue of whether a police officer executing a warrant should be considered a licensee or a trespasser. Officer Rossino was part of a team engaged in serving a warrant on a suspected drug house. In the execution of his duties, Officer Rossino and other officers crossed a vacant lot owned by the Kovacs. While crossing this lot, the officer alleged that he tripped on old chicken wire fencing that was obscured by weeds, and struck his knees on concrete blocks, thus seriously injuring himself. The Kovacs had previously demolished the building in order to construct a parking lot. Therefore, the vacant lot was an unsecured and unmarked construction site. It is undisputed that no one contacted the Kovacs prior to the raid to request permission to enter the subject property.

The defendants moved for summary judgment on the grounds that Officer Rossino was a trespasser and that no duty was breached which was owed to a trespasser, to-wit, to refrain from wanton and willful conduct. Officer Rossino argued that he was a licensee, and therefore the defendants had a higher duty of care than that applicable to a trespasser. The trial court granted defendant's motion for summary judgment on the grounds that Officer Rossino was, in fact, a trespasser and that the defendants had not breached any duty toward him. The Superior Court subsequently affirmed the trial court's granting of the motion.

A trespasser, the court pointed out, is "a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." *Rossino*, 553 Pa. at 172, 718 A.2d at 756-757. (citing Restatement of Torts (Second) § 329 (1965)). A trespasser may recover for injuries sustained on land only if the possessor of land was guilty of wanton or willful negligence or misconduct. *Rossino*, 553 Pa. at 172, 718 A.2d at 756. A licensee, however, is "a person who is privileged to enter or remain on land by virtue of the possessor's consent." *Rossino*, 553 Pa. at 172, 718 A.2d at 757. (citing Restatement of Torts (Second) § 330 (1965)). A landowner is subject to liability to a licensee for

injuries sustained on the land if: (1) the possessor knows or has reason to know of the condition upon the land and should realize that it involves an unreasonable risk of harm to such licensee, and should expect that they will not discover or realize the danger; (2) he fails to exercise reasonable care to make the conditions safe, or to warn the licensees of the condition and the risk involved; and (3) the licensees do not know or have reason to know of the condition and the risk involved. Restatement of Torts (Second) § 342. In reviewing these principles, the Supreme Court concluded that Officer Rossino was for purposes of tort liability, a trespasser.

Officer Rossino also argued that he should be granted licensee status since he entered the Kovacs property in the exercise of a privilege. The Supreme Court declined to adopt Section 345 of the Restatement, which would afford him such status. *Rossino*, 553 Pa. at 174, 718 A.2d at 757. The Court did agree, however, with the principle contained in comment (d) to § 345 of the Restatement of Torts (Second), which provides that in order for a possessor of land to be liable to a trespasser upon the property pursuant to a privilege, the possessor must know or have reason to anticipate that the trespasser is or may be on the land in the exercise of his privilege and that he will be endangered by the state of the land. The Court determined that Officer Rossino did not qualify as a licensee under any rationale, since the Kovacs had no knowledge or reason to know that the police were on their land. *Rossino*, 553 Pa. at 174, 718 A.2d at 757.

In declining to adopt the Restatement position, the Court further stated:

> "If the appellees in this case were liable, every possessor of land in the Commonwealth, no matter how remote the location, would face civil liability every time police or firemen entered his land if he knew or had reason to know of a dangerous condition on his land, expected that a police officer would not discover or realize the danger, and he did not take steps to make the condition safe or warn of the condition. To guard against this liability, the landowner would have to scour his property, however large or wild, for conditions of any sort which might go undetected by a person unfamiliar with the land and either correct these conditions or warn against them. We regard such a result as absurd and the implications for landowners unacceptable."

Rossino, 553 Pa. at 174, 718 A.2d at 758. (Footnote omitted).

Applying the principles enunciated in *Rossino* to the facts of the instant case dictate a similar conclusion. Officers Zimmerman and Karle were dispatched to the Erie County Courthouse to assist in the serving of a warrant. After noting the lack of parking spaces available on West Sixth Street, Officer Karle parked his police car on Fifth Street in a clearly marked "no parking" zone. Defendant McCarthy was never contacted by the

police department to request permission to use her property. Additionally, if the "no parking" sign were obeyed, defendant McCarthy would not have any reason to anticipate that anyone would traverse upon the area of land in question. Based upon the facts of this case and the principles set forth in *Rossino*, Officer Zimmerman must be classified as a trespasser for purposes of determining the tort liability of the property owner. Therefore, Officer Zimmerman can only recover from defendant McCarthy if she was guilty of wanton or willful negligence or misconduct.[1] Plaintiff's complaint in the instant case simply alleges that the defendant was negligent. There are no factual allegations indicating that she acted willfully or wantonly, or was guilty of any misconduct. Furthermore, there is no evidence in the record from which to conclude that Ms. McCarthy had any reason to believe that the police would be on this portion of her property nor that Officer Zimmerman would be endangered by its condition.

The plaintiff also seeks licensee status by requesting application of the "permissive crossing" doctrine, as set forth in *The Estate of Zimmerman*, 168 F.3d, 680 (1999). This doctrine was not raised by the plaintiff in his amended complaint, but was raised by plaintiff in response to defendant's Motion for Summary Judgment. In reviewing the Zimmerman case and the cases cited therein, the Court is of the opinion that the permissive crossing doctrine is inapplicable to the facts of this case. The permissive crossing doctrine has been applied to determine a railroad's duty to pedestrians when pedestrians cross over railroad tracks. This Court declines to extend such doctrine to the facts of this case where the property involved is not akin to railroad tracks.

Finally, the plaintiff argues that he should be granted licensee status based on whether the defendant knew or had reason to know that the police would be on her land at the location where the plaintiff fell. In support of this argument, plaintiff relies upon *Rossino* and the Court's comments relating to comment (d) of § 345 of the Restatement of Torts (Second). However, as stated in *Rossino*, the Court specifically declined to adopt § 345. Moreover, the facts as set forth by the plaintiff do not provide any indication that Ms. McCarthy knew that the police would use

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[1] There is nothing in the record before the Court to indicate that this is anything other than a trespasser situation or anything that would change defendant McCarthy's duty. Plaintiff, in response to the defendant's Motion for Summary Judgment, raises the issue of a "right of way," however, this issue has not been pled by the plaintiff nor is there properly before the Court any evidence on this issue. There was a document attached to the response to the Motion for Summary Judgment which was presented in open court, however, such document was not in appropriate summary judgment evidence form, i.e., in the form of an affidavit.

this property nor any indication that she should have known about it. Therefore, the Court finds this argument to be without merit.

Therefore, based upon all of the preceding reasons, this Court is of the opinion that defendant's Motion for Summary Judgment should be granted. An appropriate Order shall follow.

ORDER

AND NOW, to-wit, this 28 day of January, 2000, upon consideration of defendant's Motion for Summary Judgment and argument thereon, and for the reasons set forth in the preceding Memorandum, it is hereby **ORDERED**, **ADJUDGED AND DECREED** that the Motion for Summary Judgment is **GRANTED**.

By the Court,
/s/ **John A. Bozza, Judge**

JOSEPH MAZZA

v.

TERRA ERIE ASSOCIATES and VICTOR LIBERATORE, SR.

CIVIL PROCEDURE/DISCOVERY/SANCTIONS

Defendant's protracted failure to comply with trial court's order compelling defendant to respond to plaintiff's request for production of documents warranted imposition of civil contempt sanctions under Pa.R.C.P. 4019 (c)(4).

CIVIL PROCEDURE/DISCOVERY/SANCTIONS

Because the purpose of civil contempt is to coerce compliance with the court's lawful process, the contemnor must be given the opportunity to purge himself of the contemptuous conduct.

CIVIL PROCEDURE/DISCOVERY/SANCTIONS

Civil contempt sanction directing defendant to pay $500 for each day he failed to comply with court's discovery order constituted an appropriate and reasonable penalty where defendant was given the opportunity to purge himself of his contemptuous conduct and defendant offered no evidence to show that he was unable to comply with the court's discovery order.

CIVIL PROCEDURE/DISCOVERY/SANCTIONS

Civil contempt sanction totaling $36,000 was not excessive where sanction did not include penalty for period of time that defendant partially complied with the trial court's discovery order.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 10353-1998

Appearances: T. Warren Jones, Esquire for Joseph Mazza
D. Christopher Ohly, Esquire for Joseph Mazza
George M. Schroeck, Esquire for Terra Erie Assoc. & Liberatore

MEMORANDUM

Bozza, John A., J.

This matter is now before the Court on defendant Victor Liberatore, Sr.'s Statement of Matters Complained of on Appeal. Mr. Liberatore is appealing from this Court's Order of September 7, 1999, assessing $36,000.00 against Terra Erie Associates and Mr. Liberatore for failure to comply with this Court's Order concerning discovery.

The factual history of this case is set forth as follows:

A complaint in civil action was filed on January 30, 1998 in which Joseph Mazza sought relief with regard to the operation of a partnership known as Terra Erie Associates. An answer, new matter and counterclaim were filed and preliminary objections were addressed, and ultimately the case proceeded to discovery. On February 19, 1999, a motion to compel responses to plaintiff's first set of "Requests for Production of Documents and Things" was filed and the matter was heard before the Court on

March 3, 1999. At that time Terra Erie's and Mr. Liberatore's responses to the requests were overdue by almost two months. As a result, the Court entered an Order which, among other things, required that Terra Erie Associates provide the requested documents within twenty (20) days of the date of the Order.

On April 7, 1999, the plaintiffs presented the Court with a motion for default judgment and sanctions and the matter was heard at that time. Both parties were represented by counsel and it was apparent that Mr. Liberatore had not complied with the Order in any respect. As a result, and pursuant to Pa.R.C.P. No. 4019(c)(4), the Court entered an Order finding the defendants in civil contempt and imposing a penalty in the amount of $500.00 a day for each day defendants continued to fail to be in full compliance with the Court's Order of March 3, 1999. It was the sole intent of the Order to obtain compliance with the lawful process of the Court.[1]

Thereafter, on May 24, 1999, the plaintiff filed a renewed Motion for Sanctions and the matter was heard before the Court on June 1, 1999. In addition, it appears that a Motion for Reconsideration of the Court's Contempt Order was presented as well.[2] Following argument on the plaintiff's renewed Motion for Sanctions, the Court found that the defendants had only provided limited information in response to the request for production and entered an Order stating, "that at all future times during the course of this litigation, the defendant shall be precluded from introducing into evidence or utilizing in any fashion any documents which were the subject of plaintiff's request for production, beyond those produced . . . ." On July 15, 1999, the Court entered an Order denying the Motion for Reconsideration of the Court's Contempt Order and directing that the daily sanction imposed be paid in full to the Prothonotary of Erie County before July 31, 1999. No sum was paid until August 30, 1999.

Following the entry of a Case Management Order which attempted to expedite the resolution of this case, a non-jury trial was commenced in the early part of September, 1999. During the course of the trial the Court made further findings concerning the defendants' continuing failure to comply with discovery, including the failure to produce various leases, business transactions and photographs. Thereafter, upon consideration of a Motion to Enforce the Court's prior Contempt Orders, the Court conducted a further proceeding and as a result entered an Order assessing the defendants the sum of $36,000.00, representing the amount of $500.00 a day for a period of seventy-two (72) days. It is from this Order that the defendants now appeal.

On appeal Mr. Liberatore asserts that because he "substantially

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[1] While the Pa.R.C.P. No. 4019(c)(4) is captioned "Sanctions," it was not the intent of the Court's Order to punish the defendants but rather to encourage the defendants to provide the Court-ordered documents.

[2] The docket does not reflect that this Motion was filed.

complied," the amount of the sanction was too high. The record reflects that Mr. Liberatore did not comply with the requirements of the March 3, 1999 Court Order for a period in excess of six (6) months. From April 9th, the date the Court imposed the daily sanction, until June 1, 1999, a period of approximately 53 days, important documents including leases and documents related to the Taco Bell transaction were not produced. As of the time of trial in September, Mr. Liberatore still had not produced, among other things, the leases for the Eastway Plaza. The leases were important documents to the plaintiff and had been the subject of significant controversy. The defendant had specifically complained about the failure to produce the documents in June. Their absence caused difficulty for the plaintiff in preparing their case and in trying to determine whether the terms and conditions of the leases were appropriate for the Eastway Plaza and the circumstances of the market. The lack of accurate lease information caused difficulty for plaintiff's expert witness at the time of trial, and exacerbated the parties' dispute.

The entire period of time during which Mr. Liberatore failed to comply with the Court's Discovery Order had been approximately 172 days (3/3/99 to 9/1/99). Including only the period following the Court's Sanction Order of April 9th, the number of days would be 144. Recognizing that the defendant did comply in part with the Discovery Order, this Court accepted the partial compliance as a partial purge of his contemptuous conduct and accordingly entered an Order assessing a penalty for a total of only 72 days, or approximately half the period for which sanctions applied.

The purpose of civil contempt is to coerce compliance with its lawful process. There must be the ability for the contemnor to purge himself of the contemptuous conduct. *In Re: Martorano*, 464 Pa. 66, 346 A.2d 22 (1975). Mr. Liberatore was given the opportunity to purge himself of his failure to comply with the Discovery Order at any time. All he had to do was produce the documents. There is nothing in the record to indicate that this was not possible. Although Mr. Liberatore blames his attorney for not telling him of the $500.00 per day penalty, at no time did he indicate his non-compliance was the result of an inability to produce the requested documents.[3] Indeed, the record reflects that the leases were always available, and that Mr. Liberatore was apparently willing to provide them. Transcript, Contempt Hearing, October 29, 1999.

For the reasons set forth above, this Court affirms its Order of December 7, 1999.

Signed this 14th day of March, 2000.

By the Court,
/s/ **John A. Bozza, Judge**

[3] It is noteworthy that at the hearing Mr. Liberatore was not sure whether he was still represented by Mr. Jeffrey Robinson, who was representing him during the discovery period. Mr. Robinson testified incredulously that he didn't tell his client of the sanction because he didn't want to get yelled at. Transcript, Contempt Hearing, pp. 28, 57.

REBECCA A. FERDINANDSEN

v.

UNITED PARCEL SERVICE, INC. and STEPHON FITZPATRICK

PLEADINGS/PRELIMINARY OBJECTIONS

Defendant's demurrer will be sustained only when it appears with certainty that the law permits no recovery under the facts plead, with all doubts being resolved in favor of the non-moving party.

AGENCY/VICARIOUS LIABILITY

An employer may be held vicariously liable for the negligent acts of his employees, which cause injuries to a third party, provided that such acts were committed during the course of and within the scope of the employment. *Fitzgerald v. McCutcheon,* 270 Pa. Super. 102, 410 A.2d 1270,1271 (Pa. Super. 1979). Liability may also be imposed on an employer for intentional or criminal acts committed by an employee. *ld.* The actions in question must benefit the employer in some way. The plaintiff bears the burden of proof in this regard. *Id.; Shuman Estate v. Weber,* 419 A.2d 169 (Pa. Super. 1980). An employer can not be held vicariously liable for its employees conduct when the conduct is entirely for the employees own personal gratification and the nature of is such that the employer could not have anticipated it.

AGENCY

The Restatement (Second) of Torts Section 317 (dealing with negligent retention and supervision) allows an employer to be held negligent if he knew or should have known that his employee had a propensity for this kind of activity and that the employment might create a situation where the employee would harm a third person. *Coath v. Jones,* 277 Pa. Super. 479, 419 A.2d 1249 (1980). There is no definitive rule that knowledge of one prior incident is sufficient to put an employer on notice with regard to an employee's propensities, at a minimum the nature and essential characteristics of the incident would have had to be known to the employer.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 13210 - 1999

Appearances: Jeffrey A. Connelly, Esquire for Ms. Ferdinandsen
Kenneth G. Vasil, Esquire for United Parcel Service
David Ridge, Esquire for Mr. Fitzpatrick

OPINION

Bozza, John A., J.

This matter is before the Court on Preliminary Objections. The defendant, United Parcel Services (UPS) objects to Count III of the Complaint (Respondeat Superior), to Count IV of the Complaint (Negligence), and to

Count V of the Complaint (Punitive Damages). For the reasons set forth below, the Preliminary Objections as to Count III and Count IV of the Complaint shall be sustained.

The facts as set forth in the Complaint are as follows: In the course of her employment as a receptionist with Lakeshore Customizing, Rebecca Ferdinandsen became acquainted with Stephon Fitzpatrick, who was employed by UPS as a delivery driver. In that capacity, Fitzpatrick routinely made deliveries to Lakeshore Customizing and Ms. Ferdinandsen often accepted these deliveries on behalf of her employer as a part of her duties as a receptionist. During these deliveries, Fitzpatrick would often make unwanted sexually suggestive and sexually explicit comments. He also touched her in sexually and inappropriate ways on several occasions.

Fitzpatrick's inappropriate behavior culminated in an incident on March 1, 1999, during which he exposed his genitals directly in front of Ms. Ferdinandsen's face, while continuing to make strong sexual comments. She reported this incident to her employer, fellow employees, and to the police. As a result of this incident, Ms. Ferdinandsen suffered psychological and emotional trauma for which she required psychological treatment. Fitzpatrick was subsequently arrested and charged with, among other things, indecent assault and indecent exposure. Following his arrest, UPS fired him. Ms. Ferdinandsen then commenced this action against UPS seeking to recover damages.

This case involves two main issues: first, whether the conduct of defendant's employee was within the scope of his employment, thereby subjecting the defendant to vicarious liability, and second, whether defendant's employer knew or had reason to know that the employee had a propensity to commit sexual assault against women, thereby making the employer liable on the theory of negligent retention or supervision. Preliminary objections concerning Counts III and IV are in the nature of a demurrer and the Court has accepted all well-pleaded facts in the complaint and all inferences arising therefrom. *Creeger Brick and Bldg. Supply v. Mid-State Bank and Trust Co.*, 560 A.2d 151 (Pa. Super. 1989). Defendant's demurrer will be sustained only when it appears with certainty that the law permits no recovery under the facts pled with all doubts being resolved in favor of the non-moving party.

I. Vicarious Liability/Respondeat Superior

It is well-settled that an employer may be held vicariously liable for the negligent acts of his employees which cause injuries to a third party, provided that such acts were committed during the course of and within the scope of the employment. *Fitzgerald v. McCutcheon.* 270 Pa. Super. 102, 410 A.2d 1270, 1271 (Pa. Super. 1979). Liability may also be imposed on an employer for intentional or criminal acts committed by an employee. *Id.* The scope of employment encompasses not only the subject matter of

the employment, but also the time and location of the employment activities. The actions in question must be performed in order to benefit the employer in some way. The plaintiff bears the burden of proof in that regard. *Id.; Shuman Estate v. Weber,* 419 A.2d 169 (Pa. Super. 1980). The parties in this case are in agreement that an employee's conduct falls within the scope of employment if:

> "(1) It is of a kind and nature that the employee is employed to perform;
> (2) It occurs substantially within the authorized time and space limits;
> (3) It is actuated, at least in part, by a purpose to serve the employer; and
> (4) If force is intentionally used by the employee against another, the use of force is not unexpected by the employer."

Costa v. Rocksboro Memorial Hospital, 708 A.2d 490, 493 (Pa. Super. 1998).

The facts as set forth in Ms. Ferdinandsen's complaint are only sufficient to meet one of the requirements for finding vicarious liability. While there is no doubt that Mr. Fitzpatrick carried on his offensive activities during his working hours while he was making deliveries to a place where he was supposed to be, it was not the kind of activity that he was supposed to be performing, nor did it serve the employer's interest or benefit the employer in any way. To the extent the activity in question involved the use of force, there is nothing in the complaint to suggest that such activity would have been expected by United Parcel Service. In these circumstances, UPS cannot be held vicariously liable for its employee's conduct. This conclusion is in accord both with the case law of Pennsylvania and other jurisdictions. In *Fitzgerald v. McCutcheon, Id.,* the Superior Court held that a municipality could not be held liable for the conduct of an off-duty policeman who shot his neighbor who had apparently witnessed a domestic dispute the officer had with his wife. The Court concluded that his actions did not further the purpose of his employment as a police officer and were so outrageous that the employer could not have anticipated their occurrence. Here, Fitzpatrick engaged in conduct which was entirely for his own personal gratification and the nature of it was such that UPS could not have anticipated it. Indeed, the complaint does not allege that Fitzpatrick's activities were intended to further his employer's business nor had such activities benefited UPS' business in any way.

Cases from other jurisdictions which are consistent with Pennsylvania decisional law and the conclusion of this court include: *Rabon v. Guardsmark, Inc.,* 571 F.2d 1277 (4th Cir. 1978), cert. den. 439 U.S. 866 (1978); *Stephens v. A-Able Rents Co.,* 654 NE2d 1315 (Ohio, Cuyahoga Cnty. 1996); *Hoppe v. Deese,* 61 SE2d 903 (NC 1950); and *Fleming v. Bronfin.,*

80 A.2d 915 (Mun. Ct. App. Dist. Col. 1951).

For the reasons set forth above, the defendant's Preliminary Objection to Count III in the nature of a demurrer must be sustained.

II. Negligent Supervision/Retention

In *Dempsey v. Walso Bur., Inc.* 143 Pa. 562; 246 A.2d 418 (1968), the Pennsylvania Supreme Court recognized that liability may be imposed on an employer on the theory of negligent retention or supervision for intentional acts of an employee. The Court stated, "To fasten liability upon an employer under Section 317 [dealing with negligent retention and supervision], it must be shown that the employer knew or, in the exercise of ordinary care, should have known of the necessity for exercising control of his employee." *Id.* at 570. In *Coath v. Jones*, 277 Pa. Super. 479, 419 A.2d 1249 (1980), a former employee raped the plaintiff after having gained access to her home by representing that he was there on the defendant/employer's business. In her complaint, the plaintiff had alleged that the perpetrator's propensity for violence against women was known to the defendant and that he was negligent in hiring and retaining the individual and in failing to warn his customers. The Superior Court, reversing the trial court's order sustaining preliminary objections, held that the employer may be negligent if he knew or should have known that his employee had a propensity for this kind of activity and that the employment might create a situation where the employee would harm a third person. And so, the defendant in *Coath* should be found negligent if it knew or should have known that the employee had an inclination to assault women.

In a recent decision of the Pennsylvania Supreme Court, the court revisited the application of Restatement (Second) of Torts § 317 and reaffirmed the principle that an employer may be negligent if he knew or should have known that his employee had a propensity for violence and that such employment might create a situation where the violence would harm a third person. *Hutchison v. Luddy*, 742 A.2d 1052 (Pa. 1999).

In the case before the Court, Ms. Ferdinandsen has alleged that UPS had a knowledge of Fitzpatrick's propensity to commit sexual misconduct towards women. However, the only fact that is alleged in support of this conclusion is the assertion that Fitzpatrick was involved in a prior incident of which UPS was aware. No details concerning the incident were provided and there is no description of the perpetrator's past conduct. Although there is no definitive rule that knowledge of one prior incident is insufficient to put an employer on notice with regard to an employee's propensities, at a minimum the nature and essential characteristics of the incident would have been known to the employer. From the information provided in the complaint, there is no way to know what it is that UPS knew about Mr. Fitzpatrick's alleged prior involvement with sexual misconduct. Therefore, insufficient facts are pled to support the plaintiff's claim and the preliminary

objection to Count IV of the complaint must be sustained. However, plaintiff will be permitted to amend the complaint in order to provide additional facts concerning the nature and characteristics of the alleged incident of sexual misconduct as well as any other acts concerning Fitzpatrick's propensity in that regard. An appropriate Order will follow.

ORDER

AND NOW, to-wit, this 10 day of April, 2000, upon consideration of the preliminary objections filed on behalf of the defendant, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that the preliminary objections to Counts III, IV and V are **SUSTAINED**. The plaintiff shall have twenty (20) days within which to file an amended pleading.

By the Court,
/s/ **John A. Bozza, Judge**

VALERIE HAMM, Plaintiff

v.

MICHAEL D. DUNLAVEY and CAREER UNIFORMS, INC., d/b/a CAREER UNIFORMS and DUNLAVEY ENTERPRISES d/b/a CAREER UNIFORMS, Defendants

CIVIL PROCEDURE/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).

CIVIL PROCEDURE/MOTION FOR SUMMARY JUDGMENT

A non moving party may not rest upon its pleadings; it must produce evidence of the facts essential to its cause of action in order to defeat a Motion for Summary Judgment. Pa. R.C.P. 1035.2-3.

NEGLIGENCE/CONDITION OF PROPERTY

A danger is obvious if both the condition and risk are apparent to and would be recognizable by a reasonable person, in the position of the visitor exercising normal perception, intelligence and judgment. *Carrender v. Fitterer*, 469 A.2d 120, 123 (Pa. 1983)

NEGLIGENCE/CONDITION OF PROPERTY

Where the Plaintiff testifies that she knew from prior visits that the property in question contained potholes, the potholes in question will be considered an open and obvious condition. The Defendants therefore, do not owe the Plaintiff a duty of care and Summary Judgment will be granted.

NEGLIGENCE/CONDITION OF PROPERTY

Where the Plaintiff testifies that she was aware of the existence of potholes prior to the accident, the defect on the property is not a latent defect.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 14525-1998

Appearances: John B. Carlson, Esquire for the Plaintiff
Craig R.F. Murphey, Esquire for the Defendant

OPINION

Anthony, J., March 22, 2000.

This matter comes before the Court on Defendants' Michael D. Dunlavey and Career Uniforms, Inc. d/b/a Career Uniforms and Dunlavey Enterprises, Inc. d/b/a Career Uniforms, (hereinafter collectively "Career Uniforms") Motion for Summary Judgment. After a review of the record and the briefs of the parties and considering the arguments of counsel, the Court will grant the motion. The factual and procedural history is as follows.

Plaintiff works at a local hospital. She went to Career Uniforms at least two or three times a year for at least the last four and a half years prior to the accident. When visiting Career Uniforms, the Plaintiff would park in the parking lot next to Career Uniforms and she would then step over a railing that was about two feet high separating the parking lot from an area described as an alley. Plaintiff would then proceed down the alley to the store to conduct her business. Afterwards, she would return to her vehicle in the same manner. This was the Plaintiff's customary practice because she considered it to be a shortcut. The alley is described as being in poor condition with numerous potholes and depressions.

On May 16, 1997, Plaintiff was a business invitee of Career Uniforms. It had rained previously and there were many puddles throughout the parking lot and the alley. Plaintiff proceeded to enter the store by way of the alley. She stated in her deposition that she stayed in the middle of the alley as it was higher than the sides and consequently did not have puddles. Plaintiff had no trouble on her way into the store. On her way out back to her car, Plaintiff attempted to walk around a puddle. Plaintiff said that it looked like merely a puddle and she did not realize that the puddle was a pothole in the alley that had filled with water. As she attempted to walk beside the puddle, the Plaintiff felt something give way and took a step down. The Plaintiff then lost her balance and fell over the railing, sustaining injuries to her right elbow.

Plaintiff initiated this suit by filing a Complaint on December 10, 1998, and then followed by an Amended Complaint on January 12, 1999. Career Uniforms answered on February 1, 1999. Plaintiff then filed a second Amended Complaint on February 8, 1999 and Career Uniforms filed an Answer on February 24, 1999.

Career Uniforms filed its Motion for Summary Judgment on December 23, 1999. Plaintiff filed her Response to the motion on January 20, 2000. On February 11, 2000, Career Uniforms filed a Motion to Strike Plaintiff's Affidavit attached as Exhibit 2 to Plaintiff's Response to Motion for Summary Judgment and a reply brief to plaintiff's response. The Court held oral arguments in which all parties were represented and the Court addressed both outstanding motions. After oral argument, Plaintiff submitted a Supplemental Appendix of Evidentiary Material and Supporting Memorandum of Law on March 1, 2000. On or about March 6, 2000, Career Uniforms filed a Motion to Strike Plaintiff's most recent affidavit which had been attached to Plaintiff's Supplemental Appendix, and a reply brief to Plaintiff's Supporting Memorandum of Law.

The Court will first address Career Uniforms' two Motions to Strike Plaintiff's affidavit. Both Motions request that Plaintiff's affidavits be stricken because they are not consistent with the Plaintiff's prior testimony in her deposition. After a thorough review both the deposition of the Plaintiff and the two affidavits, the Court will deny the first motion to strike

as the affidavit supplements the Plaintiff's deposition but is not inconsistent with the Plaintiff's prior testimony. However, the Court will grant the Motion to Strike the affidavit attached to Plaintiff's Supplemental Appendix of Evidentiary Material. Plaintiff testified in her deposition that sometimes the potholes in the alley and parking lot had water and sometimes they did not. (Hamm Deposition, pg. 43-44). This is inconsistent with the statement in her affidavit that "I have never been to Career Uniforms while it was raining or when the driveway and parking lot were full of water. In the past, the driveway and ground was [sic] dry when I went to Career Uniforms." Since this statement is inconsistent with prior testimony that sometimes the potholes had water, this affidavit will be stricken.

Taking into consideration those two rulings, the Court will now address Career Uniforms Motion for Summary Judgment. Career Uniforms raises three issues in its motion. The first issue is that it did not owe any duty to the plaintiff as the potholes were an "open and obvious" condition. Secondly, Career Uniforms argues that there is no evidence to support a causal connection between the Plaintiff's injury and Career Uniforms conduct. Finally, Defendants argue that partial summary judgment should be granted as there is no evidence to support a claim for punitive damages. Since the Court finds the first issue dispositive of the case, it will address only that issue in this opinion.

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). In addition, the record must be looked at in the light most favorable to the non-moving party. *Id.* However, the non-moving party may not rest upon the pleadings. Pa.R.C.P. 1035.3. The non-moving party, if it bears the burden of proof at trial, must produce evidence of the facts essential to its cause of action in order to defeat a motion for summary judgment. Pa.R.C.P. 1035.2.

Career Uniforms argues that it did not owe a duty of care to the Plaintiff as her injuries resulted from an "open and obvious" condition on the premises. Plaintiff disagrees and asserts that summary judgment cannot be granted as there is no evidence that the Plaintiff was not subjectively aware of the risk. Plaintiff also argues that Career Uniforms owed the Plaintiff a duty if the danger was latent. Finally, Plaintiff argues that Career Uniforms still owed her a duty of care because it should have known that she would fail to protect herself against such danger despite the "open and obvious" condition.

To set forth a case of negligence, the plaintiff must show: that she was owed a duty of care; that the duty of care has been breached by the defendant, an injury to the plaintiff; and proximate cause between the injury and the breach of the duty. *Waddell v. Bowers*, 609 A.2d 847 (Pa.

Super. 1992). The issue before the Court concerns the first prong of the negligence test - whether the Plaintiff was owed a duty of care. To hold a defendant liable, the plaintiff must show that the defendant breached a duty of care recognized by law which required him to conform to a certain standard of conduct for protection of persons such as the plaintiff. *Brandjord v. Hopper,* 688 A.2d 721, 723 (Pa. Super. 1997). Furthermore, whether a duty exists is a question of fairness which involves weighing the relationship of the parties, the nature of the risk and the public interest involved. *Id.*

The Plaintiff was a business invitee of Career Uniforms which means that she was owed a duty of protection from foreseeable harm. *Carrender v. Fitterer,* 469 A.2d 120, 123 (Pa. 1983). With respect to conditions on the land which are known to or discoverable by the possessor, the possessor is subject to liability only if he,

> "(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitee, and
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> (c) fails to exercise reasonable care to protect them against the danger." *Id.*

The issue presented to the Court is whether Career Uniforms owed a duty to the Plaintiff because the condition was a known or obvious danger. A danger is obvious if "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising normal perception, intelligence and judgment." *Id.*

Despite Plaintiff's contentions to the contrary, whether a condition is "open and obvious" is not the same as the affirmative defense of assumption of the risk. Assumption of the risk is an affirmative defense that is a complete bar to recovery. It requires that there be conclusive evidence that the plaintiff be subjectively aware of the risk of the danger. An "open and obvious" condition, on the other hand, is an objective test to determine whether a reasonable person would have recognized the danger involved. In addition an "open and obvious" condition is not an affirmative defense. Instead, the test is used to determine if the landowner owes a duty to the plaintiff in the first instance. If a condition is "open and obvious" whether the plaintiff has assumed the risk involved in the particular danger is irrelevant.[1] The landowner did not owe the plaintiff a

[1] The Court notes that the opinions cited by the Plaintiff are assumption of the risk cases. While they cite to *Carrender v. Fitterer, supra,* and it may be unclear as to the interplay between the two rules, *Carrender* specifically points out that it relies only on the duty analysis and not on any argument involving assumption of the risk.

duty to begin with, so there can be no recovery under a theory of negligence. Career Uniforms argues that the pothole that the Plaintiff fell into was an "open and obvious" condition not that the Plaintiff assumed the risk involved in using the alley.

In the case *sub judice*, the Court holds that the pothole in question was an open and obvious condition. The Plaintiff had traveled the alley in her previous trips to the store. Both she and other witnesses testified that the alley was in poor condition with numerous potholes and depressions. Furthermore, any reasonable person understands that depressions and potholes will fill with water after it rains. While Plaintiff may not have remembered exactly where the potholes were while going to and from Career Uniforms, she certainly should have assumed that the puddles were either a depression or a pothole in the alley. In addition, despite the arguments of Plaintiff's counsel, she did not testify she used the alley because she had determined that it was safer. Instead, on numerous occasions in her deposition, Plaintiff stated that she used the alley because it was her habit and she "automatically just went that way." (Hamm Deposition, pp. 38, 58, 69-70). The testimony of the Plaintiff herself shows that she knew the alley had potholes that she could not see due to their filling with water and yet she still walked through the alley to get to the store, despite several alternatives.

Plaintiff argues that Career Uniforms would still owe her a duty of care for latent defects. While the Court agrees with Plaintiff's statement of the law, there is no evidence of a latent defect on the property. Plaintiff herself knew about the potholes in the alley. She should have known that water would collect in those potholes and she certainly had to know that she could step into a pothole, lose her balance and sustain injuries. There is no evidence presented that there was any latent defect on the property, that was, in any way, involved in Plaintiff's accident.

Plaintiff's last argument is that Career Uniforms could still be held liable if it should have expected that she would fail to protect herself against the harm despite the knowledge and obviousness of the condition. Once again, this is a valid statement of the law but there is no evidence before the Court that Career Uniforms should have had such an expectation. In fact, all of the evidence shows that Career Uniforms was unaware that the alleyway was being used by customers at all, let alone in such a fashion that they would fail to protect themselves from obvious dangers. Plaintiff argues that Career Uniforms had reason to expect that she would forget what she had discovered about the condition of the alleyway. As such, she contends, they can still be held liable. Once again, there is no evidence to support the proposition that Career Uniforms knew the alleyway was being used at all. More importantly, Plaintiff never testified in her deposition that she ever forgot that there were potholes in the alleyway. She does testify that she does not remember the precise location of the potholes in

the alleyway. That fact, though, is irrelevant. She still knew that there were potholes in the alleyway and should have known that they would fill with water after a rainstorm. Whether she can remember the precise location of the potholes she had previously seen does not change that the condition was open and obvious.

In conclusion, the potholes filled with water in the alleyway between the parking lot and Career Uniforms were an open and obvious condition. Therefore, Career Uniforms did not owe Plaintiff a duty of care to protect from the danger inherent in that condition and summary judgment will be granted.

ORDER

AND NOW, to-wit, this 22 day of March 2000, it is hereby ORDERED and DECREED that Defendants Michael D. Dunlavey and Career Uniforms, Inc. d/b/a Career Uniforms and Dunlavey Enterprises, Inc. d/b/a Career Uniforms' Motion for Summary Judgment is GRANTED.

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

JAMES E. KEPPEL and DOLORES C. KEPPEL, Plaintiffs

v.

KRISTINE K. RICE, now PHELPS, and ROBERT H. RICE, Defendants

FAMILY LAW/CHILD CUSTODY/PETITION FOR JURISDICTION CHANGE

Relocation to Alabama was not undertaken in order to create jurisdiction competition or to evade Pennsylvania custody proceedings where relocation was motivated by new employment obtained prior to initiation of proceedings.

FAMILY LAW/JURISDICTION/FORUM NON CONVENIENS

Under the Pennsylvania Uniform Child Custody Jurisdiction Act (UCCJA), Alabama was a more convenient and appropriate forum than Pennsylvania because the child currently resides, attends school and undergoes medical treatment in Alabama.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA DOCKET NO: 12593-1999

Appearances: Stephen H. Hutzelman, Attorney for Plaintiffs
Elizabeth A. Malc, Attorney for Defendant, Kristine K. Rice
Robert H. Rice, Pro Se

MEMORANDUM OPINION AND ORDER

March 1, 2000: This child custody matter is before the Court on a Petition for Jurisdiction Change. Although this Court has subject matter jurisdiction, for reasons that follow, the Court finds that Alabama is the more convenient forum and will, therefore, decline jurisdiction on the basis of inconvenient forum. The Petition for Jurisdiction Change is granted.

FACTS

Plaintiffs, James E. Keppel and Dolores C. Keppel (Grandparents) are the adoptive parents of the Defendant Kristine Rice (Mother), also known as Kristine Phelps, and the maternal grandparents of Zachery Jeffery James Rice (Child), the child whose custody is at issue in this case. Kristine Rice, the mother of Zachery has always had legal custody of Child since his birth. The Grandparents have never had legal custody of the Child. Child has resided in Pennsylvania from birth until April 1, 1999 when Mother took Child to Alabama. During the 1997/1998 school year, Child stayed with Grandparents four days per week in order to attend school. The Child would spend the rest of the week with either Mother or her relatives. Mother finally took the Child away from Grandparents on December 27, 1998 and resided in Williamsport, Pennsylvania with Child until April 1, 1999, when she took Child to Alabama. For most of his life in Pennsylvania,

Child and Grandparents developed strong bonds and a close relationship. Mother and Child also have a close relationship and strong bonds of attachment. Child's father, Robert Rice, on the other hand, played virtually no role in the Child's care and upbringing. In 1998, for instance, the father saw Child only once. Father even signed a document, which although was not confirmed by a court order, purported to relinquish his parental rights with regard to the Child. Of particular importance is the fact that the father did not file any complaint or petition challenging Mother's custody of the Child or her relocation to Alabama.

The events that precipitated Mother's relocation to Alabama were that Mother's husband secured an out of state employment in Alabama. Mother then relocated to Alabama with Child, and Child's half-brother in April 1999 in order to reside with her husband. Child has been residing in Alabama since then. Child has been enrolled in school, and has been receiving medical attention (when needed) in Alabama since then.

PROCEDURAL HISTORY

Grandparents initiated this action by filing a Complaint for Custody in the Court of Common Pleas of Erie County on March 15, 1999, seeking custody of Child. Believing that Mother was properly served with process, the court ordered Mother to appear for a Custody Conciliation Conference on June 30, 1999. The conference was later rescheduled for November 29, 1999. Upon Mother's failure to appear for this conference, again believing that Mother was properly served, the court entered an order sanctioning Mother by awarding legal custody of the Child to Grandparents. Upon learning of this custody order, Mother, who had previously relocated to Alabama without knowledge of the Pennsylvania custody proceeding, later filed a custody action in Alabama on January 24, 2000. This Alabama action is now pending. A trial date was scheduled for the Pennsylvania custody matter. Mother then filed a petition in Pennsylvania seeking a postponement of the trial as well as a change of jurisdiction from Pennsylvania to Alabama. An evidentiary hearing was subsequently held on the jurisdictional issue on February 17, 2000. Mother's testimony at this evidentiary hearing established that she was not properly served with process in Pennsylvania, that she was unaware of the custody action before relocating with Child to Alabama, and that her relocation was undertaken in good faith in order to reside with her husband. Mother's testimony also established that even when she was served with process in Alabama on May 12, 1999, the documents did not indicate that she was required to appear to vindicate her rights. Neither did the document indicate when and where she could vindicate her rights. On the basis of the entire record, especially, the evidence presented at the February 17, 2000 evidentiary hearing, the Court will grant Mother's Petition for Jurisdiction Change.

DISCUSSION

The Uniform Child Custody Jurisdiction Act (UCCJA), 23 Pa.C.S.A. §5344 provides as follows in pertinent part:

> (a) General rule. --A court of this Commonwealth which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> 1. this Commonwealth:
>
> (i) is the home state of the child at the time of commencement of the proceeding; or (ii) had been the home state of the child within six months before commencement of the proceeding and the child is absent from this Commonwealth because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this Commonwealth;
>
> 2. it is in the best interest of the child that a court of this Commonwealth assume jurisdiction because:
>
> (i) the child and his parents, or the child and at least one contestant, have a significant connection with this Commonwealth; and (ii) there is available in this Commonwealth substantial evidence concerning the present or future care, protection, training and personal relationships of the child...

Pursuant to the above statute, in order to resolve the jurisdictional issue in case, this Court must determine the following: the Child's home state; whether the Child presently resides in the home state; if the Child does not reside in the home state, whether the child was removed from the home state in order to create jurisdictional competition; if not, whether the Child has established significant connections in the new residence; if so, the new location also has jurisdiction based on these significant contacts. Pursuant to Section 5348, considering the best interests of the Child, the Court must determine whether Pennsylvania is a convenient forum and whether another state is a more convenient forum. The Court must also determine whether its decision to exercise or decline jurisdiction would further or contravene the purposes of the UCCJA.

It is undisputed that both the Child and the Mother were residing in Pennsylvania when Grandparents' custody petition was filed. It is also undisputed that both the Child and the Mother resided in Pennsylvania six months prior to the filing of Grandparents' petition. Therefore, Pennsylvania is undeniably the home state of the child for purposes of this custody proceeding. Being the home state of the child, Pennsylvania has jurisdiction in this matter. However, a determination of the home state does not end the inquiry. See *Hattoum v. Hattoum*, 441 A.2d 403 (Pa. Super. 1982). The Court must determine whether another state would be a more convenient forum. See *Merman v. Merman* 603 A.2d 201 (Pa. Super. 1992); *Dincer v. Dincer,* 666 A.2d. 281 (Pa. Super. 1995).

Since the Child and the Mother presently reside in Alabama, the Court must determine whether this move to Alabama was undertaken in order to create a jurisdictional competition between Pennsylvania and Alabama in this custody matter. The Court finds that Mother and Child's relocation to Alabama was not undertaken to create jurisdictional competition. The evidence established that Mother's husband secured gainful employment in Alabama before the filing of Grandparents' custody petition. As a result of this new employment, and before the filing of Grandparents' petition, Mother and husband planned to relocate to Alabama. Mother initially went to Alabama for a week in order to find a residence. At the end of this one week period, having found a place to live, Mother returned to Pennsylvania and took the Child with her to Alabama were she intended to reside with her husband. Mother was not properly served with Grandparents' custody petition and was not aware of the petition when she relocated to Alabama with her husband and the Child. Mother was subsequently served with the petition at a much later date in Alabama. Based on the evidence, the Court concludes that Mother and Child's relocation to Alabama was undertaken in good faith and for legitimate reasons. The relocation was not motivated by a desire to create jurisdictional competition between Pennsylvania and Alabama. The significance of this finding is underscored by the Superior Court decision in *Hamm v. Hamm*, 636 A.2d 652, 655 (Pa. Super. 1994), where the court noted that "the court's of this Commonwealth cannot allow parents to seek to evade the jurisdiction of our courts by unilaterally moving with their children while custody proceedings are pending. In such instances a parent could, as a result of that move, claim that the new location is a more appropriate forum because of the new ties now created." *Id*. at 655 In *Hamm*, mother filed a petition to transfer child custody case to Nebraska on the basis of inconvenient forum. The trial court granted the petition but the Superior Court remanded the case to the trial court for a determination of the factual circumstances surrounding mother's relocation to Nebraska, and particularly, whether the relocation was made so as to create jurisdictional competition. According to the Superior Court, "if the [trial] court [on remand] should determine that the move in this instance was made so as to create jurisdictional competition between states, contrary to the purposes of 23 Pa.C.S.A. §5342(a), such a finding should strongly impact on the decision to transfer." *Id.* at 656

In the instant case, since this Court specifically finds that Mother and Child's relocation to Alabama was made in good faith and not to create jurisdictional competition or to evade or subvert the Pennsylvania custody proceedings, the concerns and issues raised in *Hamm* have been properly addressed.

Having determined that Pennsylvania has home state jurisdiction and that the Mother's relocation to Alabama was not undertaken to create

jurisdictional competition, the Court will address the issue of whether Pennsylvania is an appropriate and convenient forum. The Court finds that Pennsylvania is not a convenient forum and that Alabama is the more appropriate and convenient forum for this custody action. The UCCJA, 23 Pa. C.S.A. § 5348 provides as follows:

> Inconvenient forum.
> (a) General rule. --A court which has jurisdiction under this subchapter to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.
> (b) Moving party. --A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.
> (c) Factors to be considered. --In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose, it may take into account the following factors, among others:
> If another state is or recently was the home state of the child.
> If another state has a closer connection with the child and his family or with the child and one or more of the contestants.
> If substantial evidence concerning the present or future care, protection, training and personal relationships of the child is more readily available in another state.
> If the parties have agreed on another forum which is no less appropriate.
> If the exercise of jurisdiction by a court of this Commonwealth would contravene any of the purposes stated in section 5342 (relating to purposes and construction of subchapter).

The Court finds that it would be in the best interests of the Child for Alabama to assume jurisdiction in this matter. In concluding that Alabama is a more convenient forum, the Court notes that although Alabama was not the home state of the child at the commencement of the proceeding, the Child now has significant contacts in Alabama. It must be noted that Pennsylvania courts have recognized that a state which is not a child's home state may, nevertheless, have jurisdiction on the basis of the child's significant contacts with the state. See *Merman v. Merman,* 603 A.2d. 201, 204 Footnote 5 (Pa. Super. 1992); *Black v. Black*, 657 A.2d 964 (Pa. Super. 1995). In the case at bar, at present, the Child clearly has significant contacts with Alabama - more so than Pennsylvania. The Child has been residing in Alabama since April 1999. The Mother, her husband and the Child relocated to Alabama, intending to permanently reside there. There is no evidence

on the record that they intend to return to Pennsylvania. Furthermore, this relocation was undertaken in good faith without knowledge of Grandparents' custody petition. It was not intended to create jurisdictional competition or to subvert the custody petition in Pennsylvania.

Although the Child was born in Pennsylvania, and has spent the majority of his life in Pennsylvania, at present, Alabama has a closer connection with the Child, with his Mother and stepfather. The Child now resides in Alabama, is enrolled in school in Alabama, and receives medical attention in Alabama. Both the Child's Mother and stepfather live and work in Alabama. Also residing with the Child in Alabama, is the Child's half-brother with whom he has established strong filial bonds. On the other hand the Child *had* connections in Pennsylvania: he stayed with his Grandparents about four days per week while attending school during the 1997/1998 school year; the Child and the Grandparents established strong emotional bonds; the Child's *past* medical and school records are in Pennsylvania; the Child's father resides in Pennsylvania. On balance, however, the Court finds that at present, the Child and his Mother have a closer connection to Alabama than Pennsylvania. This is because, although the Child's father resides in Pennsylvania, he did not file, nor did he join in the petition challenging Mother's custody of the child. In fact, since the birth of the Child, the father has played virtually no part in the child's care, education and upbringing. In 1998, for instance, the father saw his Child only once. The father even signed a document purporting to relinquish his parental rights to the Child. As such, the Court attaches little weight to the fact that the Child's father resides in Pennsylvania. The Court also notes that this is not a custody dispute between a parent who resides in Pennsylvania and a parent who resides in Alabama. It is rather a custody dispute between an Alabama resident, the Child's Mother who has always had legal custody of the Child from birth, and the Child's adoptive Grandparents who have never had legal custody of the Child. A comparison of Mother and Child's present connection with Alabama and the Child and Grandparent's connection with Pennsylvania leads to the conclusion that both the Child and the Mother now have a closer connection with Alabama than with Pennsylvania.

Another reason for the Court to decline jurisdiction is the fact that substantial evidence concerning the present or future care, protection, training and personal relationships of the Child is more readily available in Alabama than in Pennsylvania. In fact, there is virtually no evidence concerning the child's present or future care, protection, training and personal relationships in Pennsylvania. While evidence of the child's *past* care, protection, and personal relationships may have existed or still exist in Pennsylvania, such evidence of the child's past is not determinative under Section 5348(c) of the UCCJA. The Child now resides in Alabama, attends school in Alabama, receives medical attention in Alabama,

maintains a strong relationship with his Mother, stepfather and his half-brother, all of who reside with the Child in the same household in Alabama. The Mother, her husband, and the Child's half-brother all intend to reside permanently in Alabama. As such, virtually all evidence concerning the Child's present or future care, protection, training and personal relationships are available in Alabama alone.

The Court's decision to relinquish jurisdiction in favor of Alabama furthers the purposes of the UCCJA, 23 Pa.C.S.A. § 5342. By relinquishing jurisdiction, this Court avoids a jurisdictional conflict and competition with Alabama, which could have resulted in the shifting of the Child from Alabama to Pennsylvania and vice versa, and which would have had a harmful and detrimental effect to the Child's well-being. This Court's decision will promote cooperation with Alabama courts. This decision also ensures that a custody decree is rendered in the state, which can best decide the case in the best interests of the Child, namely, Alabama. Declining jurisdiction in this matter also paves the way for this custody litigation to continue in Alabama, the state where the Child, his Mother, his half-brother, and stepfather reside; the state in which the Child and his family now have the closest connection and where virtually all evidence concerning his present and future care, protection, training and personal relationships is most readily available.

One of the purposes of the UCCJA is promotion of stability in the child's home environment and family relationships. The Court's relinquishment of jurisdiction furthers this purpose because until an Alabama court decides otherwise, the Child would remain in Alabama with his Mother who has always had legal custody of the Child, the Child would continue to maintain his relationship with his half-brother, and would continue to live and attend school in Alabama where he has been since April, 1999. Because this Court, pursuant to 23 Pa.C.S.A. §5348(d), communicated with the Alabama court which expressed a willingness to assume jurisdiction, this Court's decision to decline jurisdiction also furthers the goals of the UCCJA by promoting and expanding the exchange of information and other forms of mutual assistance between the courts of this Commonwealth and that of another state concerned with the same child.

On the other hand, a decision by this Court to exercise jurisdiction in this matter would contravene the purposes stated in the UCCJA, 23 Pa.C.S.A. §5342. Such a decision would promote jurisdictional competition and would result in shifting the Child from Alabama to Pennsylvania and vice versa. It would also create instability in the Child's home environment and family relationships. Such a decision would also contravene the purposes of the UCCJA because at present the Child has a closer connection with Alabama than Pennsylvania and there is virtually no evidence in Pennsylvania concerning the child's present and future care,

protection, training and personal relationships.

In declining jurisdiction, the Court recognizes that the Grandparents may face some hardships in traveling to Alabama to maintain their custody action. However, the convenience of the parties is not the determinative factor in custody matters. Rather, the best interest of the Child is the controlling factor. See *Aldridge v. Aldridge*, 473 A.2d 602 (1984); *Baines v. Williams*, 635 A.2d 1077, 1081 (Pa. Super. 1993). In declining jurisdiction, the Court attaches great importance to the fact that Mother's relocation to Alabama was made in good faith. Had the Court found that the relocation was undertaken to create jurisdictional competition or to subvert the Pennsylvania custody proceedings, the Court might have arrived at a different result. As such, this decision would not encourage a custodial parent to relocate with a child to another state during the pendency of a Pennsylvania custody proceeding in order to create jurisdictional competition and subvert the pending custody proceeding. See *Hamm v. Hamm*, 636 A.2d 652, 655 (Pa. Super. 1994).

ORDER

AND NOW, to-wit, this 1st day of March 2000, based upon the foregoing Memorandum Opinion, Defendant's Petition for Jurisdiction Change is **GRANTED**. Jurisdiction in this matter is relinquished to the Circuit Court of Escambia County, Alabama.

BY THE COURT:
/s/ ELIZABETH K. KELLY, JUDGE

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION

v.

MATTHEW WROBLEWSKI

CRIMINAL PROCEDURE/DRIVING UNDER THE INFLUENCE/ INTERSTATE COMPACT

Since impairment required by Article IV(a)(2) of the Driver's License Compact is greater than the impairment required for a NY conviction, PA can not suspend the license of a PA citizen on the basis of a NY DWAI conviction.

CRIMINAL PROCEDURE/DRIVING UNDER THE INFLUENCE/ INTERSTATE COMPACT

In cases involving "driving a motor vehicle while under the influence of intoxicating liquor...to a degree which renders the person incapable of safely driving a motor vehicle." The interstate Driver's License Compact requires Pennsylvania to give the same effect to conduct reported from another party state as it would if such conduct occurred in Pennsylvania.

CRIMINAL PROCEDURE/DRIVING UNDER THE INFLUENCE/ INTERSTATE COMPACT

NY failed to provide sufficient information for PA to determine whether the driver's conduct would have been subject to sanctions if it occurred in PA.

CRIMINAL PROCEDURE/DRIVING UNDER THE INFLUENCE/ INTERSTATE COMPACT

To determine the nature of the driver's conduct the PA courts compare the law of the state of the conviction with the standard set forth in Article IV (a)(2) of the Driver's License Compact. The Courts apply a two prong test: (1) is there a Pennsylvania offense of a substantially similar nature to the provisions of Article IV(a)(2); and (2) is there an offense in the other state which is substantially similar in nature to Article IV(a)(2).

CRIMINAL PROCEDURE/DRIVING UNDER THE INFLUENCE/ INTERSTATE COMPACT

1998 Amendment to the Motor Vehicle Code does not change the PA Supreme Courts Article IV(a)(2) Comparison Standard which addresses direct comparisons between state statutes.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 13854 1999

Appearances: Chester J. Karas, Esquire for the PA Dept. of Transportation
Philip Friedman, Esquire for the Defendant

OPINION

Bozza, John A., J.

The Pennsylvania Department of Transportation (Department) notified Matthew Wroblewski that his driver's license would be suspended effective November 12, 1999. Mr. Wroblewski filed a timely appeal, and the matter was heard before this Court on January 25, 2000. The factual basis of the dispute is not contested and the only issue before the Court is whether the Department improperly suspended the petitioner's license following receipt of a report from New York State indicating that Mr. Wroblewski had been convicted of Driving While Ability Impaired (DWAI).[1]

Mr. Wroblewski was convicted of a violation of a New York State statute which prohibited "driving while ability impaired (DWAI)." That statute provides as follows:

> "No person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the consumption of alcohol."

N.Y. Veh. Traf. Law § 1192(1).

Both Pennsylvania and New York are parties to the Drivers' License Compact (Compact), and have promised to carry out certain responsibilities pursuant to the agreement. 75 Pa.C.S.A. § 1581 et seq. It is the nature of the Department's compliance with one of the provisions of the Compact that is at issue. Specifically, it is the petitioner's position that the Department has improperly applied the provisions of Article IV of the Compact, which is entitled "Effect of Conviction" and which, in pertinent part, reads as follows:

> (a) The licensing authority in the home state, for the purposes of suspension, revocation or limitation of the license to operate a motor vehicle, shall give the same effect to the conduct reported, pursuant to Article III of this Compact, as it would if such conduct had occurred in the home state in the case of convictions for:
>
> (2) driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug or under the influence of any other drug to a degree which renders the driver incapable of safely driving a motor vehicle;
>
> (c) If the laws of a party state do not provide for offenses or violations denominated or described in precisely the words employed in subdivision (a) of this article, such party state shall

[1] The notice provided by the Department stated that "as a result of the Department receiving notification from New York of your conviction on 08/12/99 of an offense which occurred on 01/23/99 **which is equivalent to a violation of Section 3731 of the Pa. Vehicle Code, DRIVING UNDER THE INFLUENCE, YOUR DRIVING PRIVILEGE IS BEING SUSPENDED FOR A PERIOD OF ONE YEAR(S), as mandated by Section 1532B of the Vehicle Code.**

> construe the denominations and descriptions appearing in subdivision (a) of this article as being applicable to and identifying those offenses or violations of a substantially similar nature and the laws of such party state shall contain such provisions as may be necessary to ensure that full force and effect is given to this article.

75 Pa. C.S.A. § 1581

This statutory enactment requires that under certain circumstances Pennsylvania must suspend or revoke the operating privileges of its licensed drivers who are convicted of offenses in New York. The question is whether Mr. Wroblewski was one of those drivers.

The language of Article IV directs that Pennsylvania . . .

> **"give the same effect to the conduct reported "from a party state" as it would if such conduct had occurred in the home state in the case of convictions for . . .: (2) driving a motor vehicle while under the influence of intoxicating liquor . . . to a degree which renders the person incapable of safely driving a motor vehicle."** ***Id.***

Although Pennsylvania does not have a DUI statute that contains the exact wording of the Compact, it does have a statute that is "substantially similar." That, according to Article IV(c) of the Compact, is sufficient. *Petrovich v. Commonwealth*, 741 A.2d 1264 (Pa. 1999). Therefore, if Mr. Wroblewski's New York conduct in the nature of driving while his ability was impaired would have led to the suspension or revocation of his license had that conduct occurred in Pennsylvania, then the Department was obligated to act accordingly.

Typically, in order to determine the nature of a driver's conduct leading to a conviction in a Compact state for a driving under the influence offense, Pennsylvania would look to the elements of the offense that was violated and compare it to Pennsylvania's DUI statute. *Hook v. Commonwealth*, 734 A.2d 458 (Pa. Commw. 1999) (West Virginia's DUI statute, substantially similar to Pennsylvania's); *Collins v. Commonwealth*, 735 A.2d 735 (Pa. Commw. 1999) (Arizona's driving under the influence of alcohol statute, not substantially similar to Pennsylvania's statute); *Lafferty v. Commonwealth*, 735 A.2d 1289 (Pa. Commw. 1999) (Florida's DUI statute, substantially similar to Pennsylvania's statute). Most recently, however, the Pennsylvania Supreme Court in *Petrovich v. Commonwealth*, decided that the proper approach was not to compare Pennsylvania's statute with that of another state, but to compare the law of the state where the conviction occurred with the standard set forth in Article IV(a)(2) of the Compact. The Court went on to state that in order to determine whether the provisions of the Compact apply, a two-prong test must be applied:

> "First, we must evaluate whether there is a Pennsylvania offense which is 'of a substantially similar nature' to the provisions of Article IV(a)(2). Second, we must evaluate whether there is a Maryland or New York offense which is of a 'substantially similar nature' to Article IV(a)(2). Both prongs must be satisfied before PennDOT can sanction a Pennsylvania citizen for an out-of-state conviction."

Id., p 1267.

The court in *Petrovich* then proceeded to compare New York's DWAI statute with the provisions of Article IV(a)(2) and determined the two were not substantially similar because the degree of impairment required by Article IV(a)(2) was considerably greater. Therefore, Pennsylvania cannot suspend or revoke the license of a Pennsylvania citizen on the basis of a New York DWAI conviction. Unfortunately, the matter does not end there.

In 1998, while the *Petrovich* case was winding its way through the courts, the legislature adopted a provision of the Motor Vehicle Code ostensibly amending the Compact. The new provision reads in pertinent part, as follows:

> . . . The fact that the offense reported to the department by a party state may require a different degree of impairment of a person's ability to operate, drive or control a vehicle than that required to support a conviction for a violation of Section 3731 shall not be a basis for determining that the party's state's offense is not substantially similar to Section 3731 for purposes of Article IV of the Compact.

75 Pa.C.S.A. § 1586.

It is the department's position that the addition of this provision means that it doesn't matter that New York State's DWAI law requires a lesser degree of impairment than that of the Pennsylvania DUI statute. In essence, it is the Department's position that the degree of impairment is not a relevant consideration. At best, this statute is inconsistent with the Compact which sets forth an impairment standard to be followed. *Id.*, §1581; Article IV(a)(2). It would be impossible to make this determination without considering the level of impairment.

In order for one to be convicted in New York of DWAI, the state only has to prove that the driver's ability to operate a motor vehicle "is impaired by the consumption of alcohol." N.Y.Veh.&Traf. L. § 1192(1). Indeed, the New York Court of Appeals interpreted Section 1192(1) as only requiring a showing of impairment "to any extent." Moreover, in *Petrovich*, the court concluded that this would encompass conduct not punishable pursuant to Pennsylvania's drunk driving law.

It would appear that the amendment to Section 1586 was directed to

Pennsylvania appellate decisions which compared Pennsylvania's DUI statutes to those of other states. The appellate courts concluded that the statutes were not substantially similar, primarily because of differences with regard to the degree of impairment required for conviction. *Olmstead v. Commonwealth,* 677 A.2d 1285 (Pa. Commw. 1996); *See:* Respondent's Brief, p. 6. Since the Pennsylvania Supreme Court has now definitively determined that the application of the Compact does not call for a comparison of statutes, but rather a comparison with the provisions of Article IV(a)(2), the amendment, which requires a comparison between the Pennsylvania DUI statute and that of another state, is of no consequence. The relevant language of Section 1586 does not alter the language of Article IV(a) and (a)(2).[2]

Adoption of the amendment to Section 1586 is also problematic for another reason. Article IV(a) provides that a state treat its licensees convicted in another state the same way it would treat them if they had engaged in that conduct in the home state, i.e., Pennsylvania. The focus is on the conduct rather than on the name or elements of the particular offense. To conclude otherwise would lead to a situation where a Pennsylvania licensee convicted of a DUI-type offense in another state would lose his or her license, even though a Pennsylvania licensee who engaged in the same conduct in Pennsylvania would not. Such a result would be contrary to the obvious goal of the Compact to encourage uniformity in response to drunk driving behavior by directing that participating states "shall give the **same effect** to the **conduct** reported . . . as it would have if such **conduct** had occurred in the home state . . ." (Emphasis added). This central provision of Article IV has not been modified in any way by the adoption of the Section 1586 amendment.

Assuming, *arguendo* that following *Petrovich,* a comparison of Pennsylvania's DUI statute and New York's DWAI statute is somehow a relevant consideration, the mere reporting of Mr. Wroblewski's conviction would not indicate anything about whether he would be subject to Pennsylvania sanctions. To determine the nature of the conduct which led to Mr. Wroblewski's conviction in New York State, it is necessary to rely on the information provided to Pennsylvania. In that regard the Compact requires a party state to report to the home state the following information:

1. The identify [sic] of the person convicted;
2. a description of the violation, specifying the section of the statute, code or ordinance violated;

[2] It would appear that the three recent decisions of the Court of Common Pleas of Erie County finding that the application of Section 1586 leads to the conclusion that New York's DWAI statute and Pennsylvania's DUI statute are substantially similar were decided without the benefit of the Supreme Court's analysis in *Petrovich,* and therefore are not instructive.

3. the identity of the court in which the action was taken; and
4. an indication whether a plea of guilty or not guilty was entered, or the conviction was the result of the forfeiture of bail, bond or other security.

75 Pa.C.S.A. § 1581, Article III.

In Mr. Wroblewski's case, Pennsylvania received a report from New York as follows:

****

WROBLEWSKI, MATTHEW, J DOB: 02/13/61 GENDER: M MI:
RD2 WEEKS VALLEY
WATTSBURG PA ZIP: 16442
VIOL DATE: 01/23/99 CONV DATE: 08/12/99 ACD CODE: A25 ANSI CODE: D16
VIOLATION: DRVG WHILE IMPAIRED
COURT: CHAUTAUQUA COUNTY, TOWN OF SHERIDAN BATCH: 9083000140
COMMERCIAL VEH: UNKNOWN HAZ. MATERIALS: UNKNOWN
TICKET NUMBER: LC4457865

****

Even a cursory review of the information provided indicates that New York did not comply with its obligation pursuant to the Compact. It has not included any reference to the statute, code or ordinance which was violated, nor does it include the manner in which the conviction was accomplished. Concerning the description of the violation, the only thing noted in the form is "VIOLATION: DRVG WHILE IMPAIRED". Based on the information provided in the report, it is impossible to conclude that Mr. Wroblewski would be subject to conviction for violating Pennsylvania's DUI statute for his behavior in New York State. Pennsylvania's statute prohibits driving or operating a motor vehicle **"while under the influence of alcohol to a degree which renders the person incapable of safe driving."** This is almost the identical language as set forth in Article IV(a)(2) of the Compact. There is absolutely no indication in the report from New York that Mr. Wroblewski was driving under the influence of alcohol to a degree that rendered him incapable of safe driving. So not only did the report fail to comply with the technical requirements of the Compact, it did not provide sufficient information to allow Pennsylvania authorities to determine if Mr. Wroblewski would be subject to having his license suspended in Pennsylvania.

It appears that historically, the Pennsylvania Department of Transportation has made its judgment about the imposition of sanctions by accepting the name of the violation, i.e., "Drvg While Impaired," as sufficient to indicate the nature of the driver's conduct. While there are circumstances under which it is possible to glean the nature of the conduct by reference to the name of the offense, or in the alternative, an analysis of the elements of the offense, it is not possible to do so in this case. As the Supreme Court noted in *Petrovich,* a conviction for DWAI in New York State encompasses behavior which would not subject a driver to sanctions

in Pennsylvania. Therefore, a reference to the name of the offense in question does not allow Pennsylvania to determine Mr. Wroblewski's driving under the influence behavior in New York should lead to the suspension of his license in Pennsylvania.

It is Mr. Wroblewski's position that the reporting requirements of the Compact are mandatory and that the failure to comply prevents Pennsylvania from responding to a New York State conviction with the imposition of sanctions. This is an issue which was recently addressed by the Honorable Francis J. Fornelli, President Judge of Mercer County, and the Court adopts Judge Fornelli's thorough analysis and well-reasoned conclusion in finding that the appellant should prevail on that issue as well. Specifically, this Court notes that Judge Fornelli considered the impact of the 1998 amendment to Section 1584 of the Vehicle Code in reaching his decision and it explicitly agrees with his conclusion in that regard.[3] *Commonwealth of Pennsylvania v. Longstreth,* No. 1999-821, (C.P., Mercer County, 1999).

Certainly in Mr. Wroblewski's case, the amendment to Section 1584 is of no consequence. The amendment provides as follows:

> . . . the omission from any report received by the Department from a party state of any information required of Article III of the Compact shall not excuse or prevent the Department from complying with its duties under Articles IV and V of the Compact.

The duties of the Commonwealth upon receiving the report were to make a judgment as to whether Mr. Wroblewski's New York State conduct would have been subject to sanctions had it occurred in Pennsylvania. Such a determination is not possible based on the information provided. Therefore, at best, Section 1584 is inconsistent with what the Compact otherwise requires and cannot be given effect. At worst, its literal interpretation would mean that Pennsylvania could suspend a driver's license without knowing anything about the conduct or conviction of the driver. No matter what the legislature does to direct the way the Department views compliance with the Compact's reporting requirements, Pennsylvania must still have an adequate basis for determining whether the conduct in question is subject to sanctions in the Commonwealth. If it cannot make that determination as a result of the information reported, then it cannot sanction its licensed drivers for conduct they engaged in in another state. To hold otherwise would be to ignore the clear mandate of the Compact.

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[3] As with Section 1586, it appears that the legislature's attempt to amend Section 1584 was also in response to decisional law holding that the reporting requirements are mandatory. *See: Maszurek v. Commonwealth*, 717 A.2d 23 (Pa. Commw. 1998).

As a result of the analysis set forth above, this Court must conclude that the Department could not determine on the basis of the New York report whether Mr. Wroblewski's conduct which led to his conviction for Driving While Ability Impaired in New York State would have led to a suspension of his driving privileges had it occurred in Pennsylvania. Simply knowing that he was convicted of DWAI is not sufficient. Having reached this conclusion, it is not necessary to address the issue as to whether the amendments to Section 1584 and 1586 are unconstitutional.

An appropriate Order will follow.

ORDER

AND NOW, to-wit, this 16 day of March, 2000, in accordance with the attached Opinion, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that the appeal of the defendant Matthew Wroblewski is **GRANTED**, and the decision of the Department of Transportation to suspend his license for a period of one year is **OVERRULED**.

By the Court,
/s/ **John A. Bozza, Judge**

TONY E. GRAHAM

v.

CHRYSLER FINANCIAL CORPORATION, f/k/a CHRYSLER CREDIT CORPORATION

and

MARY CIOBANU and STEPHEN M. KRYSIAK

v.

CHRYSLER FINANCIAL CORPORATION, f/k/a CHRYSLER CREDIT CORPORATION

STATUTES/CONSTRUCTION

The violation of the Motor Vehicle Sales Finance Act does not automatically bar a creditor from collecting its deficiency balances. Rather, the Court found remedies available for such violations must bear some reasonable relationship to the harm suffered, and the Plaintiffs would be permitted to establish the actual harm or damage suffered as a result of the creditor's statutory violations. The Plaintiffs would then be entitled to a setoff against any deficiencies recoverable by the creditor. Thus, preliminary objections of the creditor were overruled.

STATUTES/CONSTRUCTION

Where a debtor voluntarily returned the vehicle peaceably to the creditor, intending to pursue a legal action under the Lemon Law, this method of repossession does not constitute a breach of the peace in violation of 13 Pa.C.S.A. §9503(a) or §9504(c). Preliminary objections to a complaint alleging such a violation are granted.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 10437- 2000 and NO. 10251 - 2000

Appearances: Stephen Hutzelman, Esq.
Gary Nash, Esq.
Stephen G. Harvey, Esq.
Linda Thomasson, Esq. and John Hansberry, Esq.

OPINION

Bozza, John A, J.

This matter is before the Court on Preliminary Objections. The defendant, Chrysler Financial Company (hereinafter, Chrysler or the defendant) objects to all counts of the complaints filed by three different plaintiffs, Tony E. Graham (Docket No. 10437 - 2000), Mary Ciobanu, and Stephen M. Krysiak (Docket No. 10251 - 2000). For reasons set forth below, the defendant's

Preliminary Objections in the nature of a demurrer will be sustained in part and overruled in part. The objections with regard to Counts I and II are overruled while the objections with regard to Count III of Tony E. Graham's complaint are sustained. Plaintiff, Tony E. Graham (hereinafter, Graham) would be permitted to recover his actual loss as a result of the alleged statutory violations and would be entitled to a setoff of his actual loss against the deficiency. Further, in consideration of the above ruling by the Court, Plaintiff Graham would be permitted to plead more specifically the monetary or other losses he suffered as a result of Chrysler's alleged statutory violations. Graham would be permitted to recover his actual loss as a result of the alleged statutory violations and would be entitled to a setoff of his actual loss against the deficiency.

With regard to Chrysler's objections to the complaints filed by Mary Ciobanu (hereinafter, Ciobanu) and Stephen M. Krysiak (hereinafter, Krysiak), these objections will be overruled. However, because this Court believes that under Pennsylvania law, Chrysler did not automatically forfeit its right to collect the deficiency balances because of an alleged violation of the Motor Vehicle Sales Finance Act (MVSFA), Plaintiffs' remedies will be restricted to the actual damages (ascertainable monetary losses) suffered as a result of Chrysler's conduct.

Ciobanu and Krysiak will be permitted to plead more specifically and establish the harm and the ascertainable monetary losses they suffered as a result of Chrysler's alleged violations of the MVSFA. Plaintiffs Ciobanu and Krysiak would be permitted to recover the actual losses suffered as a result of the alleged statutory violations and would be entitled to a setoff of the actual losses against the deficiency balances.

The facts as set forth in Graham's Complaint are as follows: Plaintiff Graham entered into a loan agreement with Chrysler for the purpose of purchasing a 1998 Dodge truck. Being dissatisfied with the truck, Graham later returned the vehicle to the Jim Lockwood Dodge dealership in Girard, Erie County, Pennsylvania, and explained to the personnel at the dealership that he was returning the vehicle in order to pursue a claim under the Lemon Law. Chrysler then treated Graham's return of the vehicle as a voluntary repossession, accelerated the balance, and engaged in efforts to collect the outstanding balance. Chrysler gave Graham a notice of repossession, listing the place of storage of the vehicle as P.O. Box 168, Girard, Pennsylvania, 16417. In an attempt to collect this debt, Chrysler also made repeated abusive and harassing phone calls to Graham. Plaintiff Graham alleges that Chrysler's conduct violated the Pennsylvania Debt Collections Trade Practice Regulations, 37 Pa. Code §§ 303.1 to 303.9, and that these violations are actionable under the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 P.S. §§ 201-1 to 201-9.

Chrysler's alleged conduct in its attempt to collect the debt, if proven, may be actionable under the UTPCPL. Also, by supplying the post office box number rather the street address of where the repossessed vehicle

was located, Chrysler failed to comply completely with the requirements of section 623(D) of the MVSFA, 69 P.S. § 623. It is Graham's position that these violations are actionable under the UTPCPL.

With regard to the Complaint filed by Ciobanu and Krysiak, the facts as set forth therein are as follows: Ciobanu and Krysiak separately purchased automobiles and arranged the financing of those automobile purchases with Chrysler. Upon their failure to make timely periodic payments for the purchase of these automobiles, Chrysler repossessed or directed the repossession of the vehicles. Shortly after the repossession of the automobiles, Chrysler furnished Ciobanu and Krysiak with notices of repossession which stated that Chrysler had removed the vehicles from the counties in which they had been prior to fifteen days after the mailing date of the notices.

Ciobanu and Krysiak now contend that Chrysler's conduct violated section 625(A) of the Motor Vehicle Sales Finance Act (MVSFA), 60 P.S. §§ 601 et. seq., which prohibits the removal of a repossessed automobile from the county in which the vehicle was repossessed prior to fifteen days after the date of mailing a notice of repossession. Ciobanu and Krysiak further contend that as a result of these alleged statutory violations, Chrysler forfeited its right to collect deficiency balances from them.

Because Chrysler, according to Ciobanu and Krysiak, had no right to collect the deficiency balances, its attempts to collect such deficiency balances from Ciobanu and Krysiak constituted violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 P.S. §§ 201-1 et. seq. Ciobanu and Krysiak allege that they were harmed as a result of Chrysler's conduct and that pursuant to the UTPCPL, they are entitled to recover damages against Chrysler.

Plaintiffs Ciobanu and Krysiak argue that because of the alleged statutory violations, Chrysler forfeited its right to recover the deficiency balances. Similarly, Plaintiff Graham argues that as a remedy for the alleged statutory violations by Chrysler, it should lose its right to collect the deficiency balances. Relying primarily on *Savoy v. Beneficial Consumer Discount Co.*, 468 A.2d 465 (Pa. 1983), Chrysler argues that it is only when a product is sold at a commercially unreasonable price that a creditor can forfeit the right to recover the deficiency after repossession.

The issue before the Court in these separate cases is whether under Pennsylvania law, a violation of the MVSFA by a creditor results in a forfeiture of the right to collect the deficiency balances. The Court holds that Pennsylvania law does not automatically bar a creditor from collecting its deficiency balances because the creditor violated provisions of the MVSFA. Even in cases where the forfeiture of the right to collect deficiency balances were upheld, the Courts have declined to adopt a rule mandating it. In *Savoy v. Beneficial Consumer Discount Co.*, 468 A.2d 465 (Pa. 1983), while the Supreme Court noted the practice in some jurisdictions of entirely barring the creditor from obtaining a deficiency judgment against a debtor when the collateral was sold for a commercially unreasonable price, it

refused to adopt it. *See Id.* at 467. Rather, the Supreme Court held that failure by a creditor to establish commercial reasonableness of the resale of the collateral creates a rebuttable presumption that the value of the collateral equaled the amount of the debt secured, thereby extinguishing the debt unless the secured creditor rebuts the presumption. *See, Id.* at 467-468.

On the other hand, *Savoy* did not establish a rule that it is only when a collateral is sold at a commercially unreasonable price that the creditor may lose its right to obtain deficiency judgment. A careful reading of *Savoy* indicates that while the Pennsylvania Supreme Court upheld a creditor's forfeiture of the right to recover the deficiency after a commercially unreasonable sale of repossessed goods, the Court did not hold that it is only in such instances that a creditor may lose the right to collect the deficiency following the resale of a repossessed collateral.

This Court is of the opinion that it is unnecessary to establish a *per se* rule that a violation of the notice requirement under 69 P.S. § 623(D), or a violation of section 625(A) of the MVSFA and/or the violation of the UTPCPL, should automatically result in the forfeiture of the creditor's right to collect on the deficiency. The remedies available for such violations must bear some reasonable relationship to the harm suffered. As such, a plaintiff would be permitted to establish the actual harm or damages suffered as a result of a creditor's statutory violations. Therefore, plaintiffs in this action are permitted to recover any actual damages suffered because of Chrysler's alleged violations of the MVSFA. Upon proof of actual damages suffered, the plaintiffs would then be entitled to a setoff against any deficiencies recoverable by Chrysler. The rationale behind this conclusion ensures that in the event that the amount of actual damages suffered by the plaintiffs exceeds their respective deficiency balances, the plaintiffs' remedies would not be restricted to the deficiency recoverable by Chrysler. Likewise, if the amount of the plaintiffs' damages is less than the amount of the deficiency balances, a windfall for the plaintiffs would be avoided because plaintiffs would only be permitted to recover the actual damages suffered.

In its preliminary objections, Chrysler also argues that the plaintiffs failed to allege that they suffered ascertainable monetary losses as required for the maintenance of a private action under 73 P.S. § 201-9.2. While plaintiffs did not use the term "ascertainable monetary losses" in describing the harm suffered, the plaintiffs in their respective complaints indicated that they suffered some harm as a result of Chrysler's alleged statutory violations. As such, Chrysler's preliminary objections in this regard will be overruled. To this end, the plaintiffs would be permitted to plead with more specificity the ascertainable monetary losses suffered as a result of the alleged statutory violations by Chrysler.

With regard to Plaintiff Graham, Chrysler also objects to Count III of the complaint, arguing that Graham failed to allege facts that would constitute a violation of 13 Pa. C.S.A. § 9503(a) or § 9504(c) (dealing with taking

possession of a collateral without judicial process without breach of the peace). The Court will sustain this objection because Graham's complaint states that he voluntarily returned the vehicle peaceably to Chrysler, intending to pursue legal action under the Lemon Law. This method of repossession does not constitute a breach of the peace within the meaning of the above-referenced statutory sections.

For the foregoing reasons, Chrysler's preliminary objections are granted in part and overruled in part.

An appropriate Order will follow.

ORDER

AND NOW, to-wit, this 20th day of June, 2000, upon consideration of the Preliminary Objections filed on behalf of the defendant in the above-captioned matters and argument thereon, and in accordance with the preceding Opinion, with respect to the action at Docket No. 10437 - 2000 (Graham v. Chrysler, et al), it is hereby **ORDERED**, **ADJUDGED** and **DECREED** as follows:

1. the defendant's preliminary objections to Counts I and II of the plaintiff's Complaint are **OVERRULED**; and
2. the objections to Count III of the Complaint are **SUSTAINED**.
3. Plaintiff Graham's remedies will be restricted to the actual damages (ascertainable monetary losses) suffered and he will be permitted to amend his Complaint within twenty (20) days of the date of this Order to plead more specifically and to establish any ascertainable monetary losses suffered as a result of the defendant's alleged conduct. Upon proof that such losses were attributable to defendant's conduct, plaintiff Graham will be entitled to a setoff against the deficiency balance.

With respect to the action at Docket No. 10251 - 2000 (Ciobanu and Krysiak, et al v. Chrysler, et al), it is hereby **ORDERED**, **ADJUDGED** and **DECREED** as follows:

4. The preliminary objections of defendant Chrysler are **OVERRULED**.
5. The remedies available to the plaintiffs will be restricted to the actual damages (ascertainable monetary losses) suffered. Plaintiffs will be permitted to amend their Complaints within twenty (20) days of the date of this Order to plead more specifically any ascertainable monetary losses suffered as a result of defendant's alleged violations of the MVSFA. Upon proof of any ascertainable monetary losses attributable to defendant's conduct, plaintiffs will be entitled to a setoff against the deficiency balances.

By the Court:
/s/ **John A. Bozza, 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

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION

Susan Hirt Hagen
v.
Erie Indemnity Company

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 10902 OF 2000

CORPORATIONS/VOTING RIGHTS

It is an inherent right of the owner of voting shares to nominate a candidate for director of the corporation. The right of the owner of voting shares to nominate a candidate for director of a corporation is not limited or prohibited by §1405(c)(4) of the Pennsylvania Holding Company Act, 40 P.S. §991.1405(c)(4). Any other interpretation of §1405(c)(4) would divest shareholders of control over the board of directors, creating absurd results not intended by the legislature.

An insurance holding company cannot adopt bylaws which deprive a voting shareholder of the substantive property right to nominate a candidate or candidates to the board of directors.

The trustees do not commit a breach of fiduciary obligation by intervening in litigation to assert the right to nominate a director. To the contrary, by asserting the right to nominate candidates to the board of directors, the trustees are protecting a substantive right of shareholders and preserving the assets of the trust.

An injunction will issue to permit the nomination of a candidate or candidates by a voting shareholder at the annual meeting of the shareholders.

OPINION

In the interest of judicial economy, consolidated herein are several

matters filed under each of the above docket numbers. Specifically, addressed within is Susan Hirt Hagen's Motion for Preliminary Injunction (and the accompanying Petitions to Intervene); two separate Petitions for a Preliminary Injunction filed by F. W. Hirt as well as the Petition of F. W. Hirt to Enjoin Susan Hirt Hagen and Bankers Trust Company from breaching a fiduciary duty and wasting trust assets.

Upon consideration of the pleadings and briefs, evidence adduced at hearings held April 3, 2000 and April 20, 2000, oral argument and applicable law (including legislative history or the lack thereof), the following Findings of Fact and Conclusions of Law are hereby entered.

FINDINGS OF FACT

1. Erie Indemnity Company (hereinafter the "Company") is a Pennsylvania corporation serving as the attorney-in-fact for the Erie Insurance Exchange (the "Exchange"). The principal business activity of the Company is the management of the Exchange.

2. The Company was founded by H. O. Hirt in 1925. The Company has two classes of common stock registered under the Securities Exchange Act of 1934. The Company's Class A common stock is publicly traded on NASDAQ; this stock does not have voting rights. Instead, voting rights are vested in the Company's Class B common stock, which stock is not traded publicly.

3. Over the course of his lifetime, H. O. Hirt acquired 76.22 percent of the Company's Class B voting common stock. H. O. Hirt placed the Class B stock in a trust which became irrevocable upon his death on June 19, 1982.

4. The H. O. Hirt Trusts (hereinafter the "Trusts") are actually two separate but equal Trusts, each for the benefit of his two children. Specifically, 38.11 percent of the Class B stock was placed in a trust for the benefit of H. O. Hirt's son, F. W. Hirt and a like amount placed in a trust for H. O. Hirt's daughter, Susan Hirt Hagen. Each of these trusts operate under the same terms, including management by three co-trustees. The co-trustees consist of F. W. Hirt and Susan Hirt Hagen as individual trustees and Bankers Trust as corporate trustee. It takes a majority vote of the three co-trustees for action to be taken on behalf of either Trust.

5. Susan Hirt Hagen, in addition to being the beneficial owner of Class B stock through her father's Trust, separately owns twelve shares of voting Class B common stock of the Company.

6. Laurel A. Hirt is the daughter of F. W. Hirt, granddaughter of H. O. Hirt and a beneficiary under the H. O. Hirt trust created for her father.

7. F. W. Hirt has been a member of the Board of Directors of the Company since 1965 and continues to have a distinguished career as Chairman of the Board of the Company. Susan Hirt Hagen likewise has a lengthy history of service to the Company, having been a member of the Board of Directors since 1980.

8. On August 16, 1999, the Board of Directors of the Company amended

the by-laws to provide, inter alia, certain time frames for a shareholder to submit to the Nominating Committee any nomination(s) for director(s) to the Board.

9. The annual meeting of the Board of Directors of the Company is scheduled for April 25, 2000. In compliance with the Company's by-laws as amended August 16, 1999, Susan Hirt Hagen, by a letter dated December 29, 1999 to Jan Van Gorder, Executive Vice President, Secretary and General Counsel of the Company, tendered the nomination of eleven individuals for positions as directors to the Board.

Additionally, Susan Hirt Hagen timely filed a Schedule 13(d) with the Securities and Exchange Commission stating her intention to nominate an alternative slate of directors for election at the annual meeting on April 25, 2000. An amended Schedule 13(d) was subsequently filed identifying the eleven candidates tendered by Susan Hirt Hagen.

10. Susan Hirt Hagen stated her intention in the above documents to personally appear at the annual meeting and nominate her candidates for election to the Board if the Nominating Committee did not do so.

11. Consistent with this statement, Susan Hirt Hagen, in her capacity as a Director, appeared at a duly-constituted meeting of the Board of Directors on March 7, 2000 and presented a resolution asking the Board to recognize her ability as an owner of Class B stock to nominate a Board candidate at the annual meeting. The Board voted to table the Hagen resolution. A poll was then taken, with ten Board members taking the position that all nominations must come through the Nominating Committee; one Board member made no comment and one Board member stated his opinion the poll was a waste of time.

12. A special Board meeting of the Company's Directors was held on March 14, 2000, to hear the report of the Nominating Committee. During the meeting, the Board voted twelve to one, with Susan Hirt Hagen the lone dissenting vote, to defeat the Hagen resolution to allow her as an owner of voting shares of Class B stock to nominate a director to the Board of Directors.

The Board also voted (12-1 with Hagen dissenting) to accept the recommendation of the Nominating Committee to reduce the Board from thirteen to twelve directors and to propose for election all incumbent Board members, except Susan Hirt Hagen.

13. Subsequently, Susan Hirt Hagen filed a complaint seeking injunctive and declaratory relief to allow her as an owner of Class B stock to nominate a candidate for director of the Company.

14. Petitions to Intervene have been filed on behalf of the H. O. Hirt Trusts, F. W. Hirt (limited to opposing the intervention of the H. O. Hirt Trusts) and Laurel A. Hirt.

15. On April 3, 2000, a hearing was held on the Motion for Preliminary Injunction as filed by Susan Hirt Hagen. Prior to the hearing, F. W. Hirt

filed a Petition for Preliminary Injunction seeking to enjoin the H. O. Hirt Trustees from participating in this action. While it is almost unprecedented for a party to file a complaint in the morning and have a hearing that same day, the hearing held April 3, 2000 included a record developed for F. W. Hirt's Petition for an injunction since it involved the same set of operative facts.

16. On April 17, 2000, F. W. Hirt launched a two-prong attack by seeking to enjoin the H. O. Hirt Trustees from "breaching fiduciary duties" and asking for an injunction to preclude the Trustees from nominating a candidate for director at the April 25, 2000 meeting or voting for any candidate nominated by any entity other than the Nominating Committee. An evidentiary hearing was held on these Petitions on April 20, 2000.

CONCLUSIONS OF LAW

1. The rights of an owner of voting share(s) of stock in a corporation inherently include the right to nominate a candidate for director of the corporation. There is no law in Pennsylvania divesting the owner of voting shares of the substantive right to nominate a candidate for a board directorship.

2. Section 1405(c) (4) of the Pennsylvania Insurance Holding Company Act does not limit nor prohibit an owner of voting shares of stock in an insurance holding company from nominating a candidate to the board of directors. See 40 P.S. §991.1405(c) (4). Nor does §1405(c) (4) create an exclusive mechanism via the Nominating Committee for the nomination of director candidates.

Instead, §1405(c) (4) simply provides a method of independently assessing appropriate candidates for directorships and communicating to the voting shareholders the views of the Board and/or management. The recommendation of the Nominating Committee is not binding on voting shareholders, who remain free to nominate other candidates. Ultimately it is up to the shareholders, as owners of the company, to determine who should be on the board of directors.

To accept the argument of Erie Indemnity Company means the real or actual Board election occurs in the Nominating Committee because the Committee would control the names submitted for election. Hence, the Board could be self-perpetuating as the Nominating Committee is not obligated to accept any nomination(s) from any voting shareholder. In this scenario, not only is there no accountability of the Nominating Committee to the voting shareholders, but the result is tantamount to a Communist election in which there is only one slate of candidates available to voters.

Further, if the Trustees of the H. O. Hirt Trusts, as owners of over 76 percent of the voting stock, do not agree with the nominations from the Nominating Committee, the Trustees have no other choice(s). If the Trustees choose to abstain from voting, then a small minority of

shareholders determine the entire control of the Company. If all voting shareholders rejected the slate tendered by the Nominating Committee, then the Company is in a state of anarchy. Each of these scenarios is an absurd result not intended by the legislature in enacting §1405(c) (4).

Setting aside the personal agendas of every party in this litigation, if there existed a substantive policy disagreement between the voting shareholders and the board of directors, under the Company's interpretation of §1405(c) (4), the owners of the Company would have little or no ability to change the directors of the Company. While the Company and F. W. Hirt have gone to great lengths to disparage Susan Hirt Hagen as an unworthy controlling stockholder, the same analysis applies equally to a board of directors who pose a threat to the health of the Company.[1] Historically, there has always been a remedy for an owner of a company to remove detrimental director(s). Section 1405(c) (4) does not usurp the fundamental and traditional power of an owner to remove a director by nominating a director whose interests align with that of the owner. Otherwise there would be little meaning or value to the ownership of voting shares of stock because such shareholders are mere rubber stamps for the Nominating Committee.

The language of §1405(c) (4) and its legislative history is important for what it does not say. If the legislature intended to provide the Nominating Committee with the exclusive power to nominate a director, the legislature would have stated so in the statute. The absence of the use of the word exclusive is glaring and consistent with the legislative history. If in fact the Insurance Holding Company Act created a special breed of corporate entity as the Company argues, and in so doing took the unusual and perhaps unconstitutional step of abrogating a voting shareholders substantive property right to nominate a director, the legislative history should have reflected such an intent.

Section 1405(c) (3) of the Insurance Holding Act provides that not less than one-third of the directors of an insurance holding company and members of each committee be comprised of an independent person (meaning the person cannot be an officer, employee or a controlling shareholder). See 40 P.S. §991.1405(c) (3). Logically then, the statute allows the remaining two-thirds of the Board or a committee to consist of officers, employees and/or controlling shareholders. As such, the law clearly envisions a controlling shareholder having an opportunity to serve as a director of an insurance holding company. However, under the Company's interpretation, the controlling shareholder could never become a director if the Nominating Committee opposed it.

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[1] Under no circumstances is the Court expressing an opinion about the performance of the current Board of Directors of the Company.

In conclusion, this Court finds that any owner of Class B common stock of Erie Indemnity Company is entitled to nominate a candidate for director to the Board of Directors at any annual meeting of the Company (assuming compliance with valid by-laws).

3. The Court was not asked, nor is any opinion rendered, on the validity of the by-laws of the Company as enacted August 16, 1999. However, to the extent the Company argues its by-laws preclude an owner of voting shares from nominating a director candidate at the annual meeting, the argument is without legal merit. An insurance holding company cannot through its by-laws appropriate or eliminate a substantive property right of a voting shareholder to nominate a director candidate.

4. Susan Hirt Hagen, because of her timely filing of Schedule 13(d) submissions with the Security Exchange Commission and her letter of December 29, 1999 to the Company, has complied with the by-laws of the Company as enacted August 16, 1999. Accordingly, Susan Hirt Hagen is entitled to tender the nomination of a candidate or candidates for directorship(s) at the annual meeting of the Company on April 25, 2000 or any adjournment thereof.

5. Susan Hirt Hagen has met all of the requirements for a preliminary injunction to issue. She has made a strong showing on the merits in light of this Court's interpretation of §1405(c) (4). She will also suffer irreparable harm since the Company intends to deny her sole opportunity to nominate a director to the Board. As a matter of law, the Company cannot deny Hagen her substantive right to nominate a director.

The issuance of an injunction does not substantially harm any other party, including the Company. As a publicly-traded company, there is an annual risk the voting shareholders will replace or remove directors with whom the shareholders are dissatisfied. Accordingly, the only available remedy is to let the injunction issue.

6. As owners of 76.22 shares of the voting Class B common stock of Erie Indemnity Company, the Trusts have a vital interest in the outcome of this litigation and are therefore entitled to intervene. As a direct beneficiary of her father's Trust, Laurel A. Hirt has a vital interest in the outcome of this litigation and is therefore entitled to intervene. Likewise, F. W. Hirt has a basis to intervene.

7. It is black-letter law that a trustee has a fiduciary obligation to act in the best interest of the trust. In the case sub judice, the sole asset of the H. O. Hirt Trusts is 76.22 percent of the Class B common voting stock of the Company. Unquestionably, the Trustees have a duty to protect and preserve this Trust corpus.

The position of F. W. Hirt that Bankers Trust and Susan Hirt Hagen have breached a fiduciary obligation by voting to intervene in this litigation and assert the right of the Trusts to nominate a director is untenable. The argument of F. W. Hirt is perhaps understandable if he is wearing his hat as

Chairman of the Board of the Company; it is however, unacceptable when he is wearing his hat as a Trustee of the H. O. Hirt Trusts.

Unfortunately, F. W. Hirt, who by reputation is a kind, humble and generous man, is seemingly blinded by his animosity towards his sister or his loyalty to present management and/or the Board. There is no plausible reason, other than possibly to save the Trusts the cost of litigation, for a Trustee not to take the action as asserted by Bankers Trust and Susan Hirt Hagen. For a Trustee to sit idly by and allow the loss of a substantive right to nominate a director to the sole asset of the Trusts, with the inevitable diminution in value of the Trust corpus, is incomprehensible. The position of F. W. Hirt certainly places at risk not only his future ability to change directors of the Company, but it also handcuffs the ability of future beneficiaries under the Trusts to do so.

Accordingly, Bankers Trust and Susan Hirt Hagen have not breached a fiduciary duty nor wasted the assets of the Trusts in seeking to participate in the declaration of the right of the Trusts to nominate a director for the Company.

ORDER

AND NOW to-wit this 24th day of April 2000, based on the foregoing Findings of Fact and Conclusions of Law, the following Order is hereby entered:

1. The Petition of the Trustees of H. O. Hirt Trust to intervene is **GRANTED**. The Petition of F. W. Hirt to intervene is hereby **GRANTED** as is the Petition of Laurel A. Hirt.

2. The request for a Preliminary Injunction filed by Susan Hirt Hagen at Docket Number 10902-2000 is hereby **GRANTED** such that Erie Indemnity Company, through its Directors and Officers, is enjoined from prohibiting Susan Hirt Hagen from nominating a candidate or candidates for director to the Board of Directors of Erie Indemnity Company at the annual meeting on April 25, 2000 or any adjournment thereof. Susan Hirt Hagen shall post bond in the amount of $5,000.00.

3. The Petitions for Preliminary Injunctions filed by F. W. Hirt are hereby **DENIED** as without a basis in fact or law.

4. The Petition of F. W. Hirt to Enjoin Susan Hirt Hagen and Bankers Trust from breaching a fiduciary duty is hereby **DENIED** as without a basis in law or fact.

BY THE COURT:
/s/ **William R. Cunningham, President Judge**

COMMONWEALTH OF PENNSYLVANIA

v.

ENOS C. CLINTON, Defendant

CRIMINAL PROCEDURE/PROBABLE CAUSE

Probable cause to support a warrantless arrest exists only where the facts and circumstances within the knowledge of the officer or officers are sufficient for a reasonable person to believe that a crime has been or is being committed.

CRIMINAL PROCEDURE/PROBABLE CAUSE

Police detective did not have probable cause to stop and arrest defendant where detective only observed defendant and another individual leave a bar in a "high crime" neighborhood, walk through a dimly lit area, look around "suspiciously," and appear to exchange something, which the detective could not identify.

CRIMINAL PROCEDURE/PROBABLE CAUSE

Evidence will be suppressed where it resulted from an illegal arrest.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION Case No. 3297 of 1999

Appearances: Christine F. Konzel, Esquire for the Defendant

OPINION

Anthony, J., June 21, 2000

This matter comes before the Court on Defendant's Omnibus Pre-Trial Motion. After a hearing on the matter and considering the arguments of counsel, this Court will grant the motion and suppress the evidence in the case. The factual and procedural history is as follows.

On November 4, 1999, Detective Michael Nolan (hereinafter "Detective Nolan") of the Erie Police Department was conducting surveillance from his vehicle, which was parked across from the 901 Café, located at 9th and Parade Streets in Erie, Pennsylvania. Sometime around 9:00 PM, two African-American males left the Café, looked around "suspiciously" and walked around to a dimly lit area heading away from Detective Nolan. At this time, the two individuals were walking close together and had their hands at their waists. Detective Nolan testified that the individuals appeared to be exchanging something although he could not see what the individuals were exchanging. Detective Nolan testified that the area was a "high-crime" area and that he, himself, had made approximately twelve arrests in the vicinity in the last three and a half years.

Believing the exchange to be a drug transaction, Detective Nolan called for backup. Several cruisers arrived and one of the individuals, the Defendant, attempted to flee. The Defendant then dropped a candy

container that contained crack cocaine. The Defendant was also found to be in possession of a crack pipe after his arrest.

Defendant filed his Omnibus Pre-Trial Motion on March 1, 2000. A hearing was held on March 27, 2000. The Commonwealth filed a brief on April 5, 2000 and the Defendant filed a responsive brief on April 14, 2000.

The only issue before the Court is whether Detective Nolan had probable cause to stop and arrest the Defendant. Generally, a warrantless arrest must be supported by probable cause. *Commonwealth v. Evans,* 661 A.2d 881, 884 (Pa. Super. 1995). *(citations omitted).* Probable cause exists only where the facts and circumstances within the knowledge of the officer or officers is sufficient for a reasonable person to believe that a crime has been or is being committed. *Commonwealth v. Gibson,* 638 A.2d 203, 206 (Pa. 1994) *(citations omitted).* Suspicion is not a substitute for probable cause. *Id.*

Looking at the case *sub judice,* the Court finds that Detective Nolan did not have probable cause to arrest the Defendant. All he observed were two individuals leave a bar, walk around the corner and "appear" to exchange something. He did not see what was exchanged or even if something was exchanged at all. While Detective Nolan testified that the Defendant and the individual he was with looked around "suspiciously" first, they made no other furtive movements or other signs that they were avoiding detection. There is no indication from Detective Nolan that the Defendant and his companion stopped in the alley, merely that they turned the corner and began to walk down the alley. Nor is there any other indication of criminal activity. Detective Nolan simply watched two individuals possibly exchange something, which could have been drugs, money to satisfy a bar debt, or a stick of gum. Detective Nolan did not have any specific or articulable facts that anything illegal was going on. He obviously had a suspicion, but a suspicion by a police officer is not enough for probable cause. Therefore, the motion to suppress will be granted.

ORDER

AND NOW, to-wit, this 21 day of June, 2000, it is hereby ORDERED and DECREED that Defendant's Omnibus Pre-Trial Motion is GRANTED and the evidence that resulted from the illegal arrest will be SUPPRESSED.

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

THOMAS G. FEIDLER

v.

MORRIS COUPLING CO.

MOTION FOR SUMMARY JUDGMENT

A Motion for Summary Judgment may only be granted if there are no material facts in dispute, and the moving party is entitled to judgment as a matter of law. *Snyder v. Specialty Glass Products*, 441 Pa. Super. 613, 658 A.2d 366 (Pa.Super. 1995)

WORKMAN'S COMPENSATION

The Pennsylvania Worker's Compensation Act provides the exclusive remedy for employees who seek recovery for injuries sustained in the course of their employment. An exception is made in cases where the injuries were caused intentionally by third parties 77 P.S. § 411(1). This "*personal animus*" exception to the act enables employees to pursue common law actions against employers, in an attempt to prove that the employer was negligent in failing to take steps necessary to prevent a foreseeable attack by a third party. This exception to the act does not apply "if the third-party would have attacked a different person in the same position as the injured employee." *Hershey v. Ninety-Five Associates*, 413 Pa. Super. 158, 161 604 A.2d 1068, 1069 (Pa. Super. 1992)

WORKMAN'S COMPENSATION

When an employee is attacked and injured by a fellow employee, a rebutable presumption exists that the injured employee is covered by the act. Anyone "claiming otherwise bears the burden of showing an intention to injure owing to reasons personal to the assailant." *Mike v. Borough of Aliquippa*, 279 Pa. Super. 382, 388, 421 A.2d 251, 254 (Pa. Super. 1980).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11447-1998

Appearances: Jeffrey A. Connelly, Esquire for Thomas Feidler
Arthur D. Martinucci, Esquire for Morris Coupling Co.

MEMORANDUM

Bozza, John A., J.

On May 4, 1998, Thomas G. Feidler filed an Amended Complaint which included a single count alleging that Morris Coupling Company (hereinafter the Company) was negligent in failing to provide a safe workplace. The Company filed an Answer and New Matter on September 3, 1998. A Petition to Intervene was filed on behalf of Mr. Feidler's wife, Michele L. Feidler, in July, 1999, and in August she filed her Complaint. Mrs. Feidler filed her Complaint against the Company. In its responsive pleadings, the Company asserted that Mr. Feidler's exclusive remedy lies with the Pennsylvania Workers' Compensation Act.

The Company filed its Motion for Summary Judgment on January 27, 2000, and on February 25, 2000, Mr. Feidler filed his Brief in Opposition. On April 6, 2000, the Court entered an Order vacating the Intervening Plaintiff's, Mrs. Feidler's, civil action in the case upon stipulation of the parties.

On April 28, 2000, the Court entered an Order granting Morris Coupling Company's Motion for Summary Judgment on the basis that Mr. Feidler's claims did not fall within the *"personal animus"* exception to the Pennsylvania Workers' Compensation Act. On May 25, 2000, Mr. Feidler filed a timely Notice of Appeal and his Concise Statement of the Matters Complained of on Appeal followed.

A Motion for Summary Judgment may only be granted if there are no material facts in dispute, and the moving party is entitled to judgment as a matter of law. *Snyder v. Specialty Glass Products,* 441 Pa. Super. 613, 658 A.2d 366 (Pa. Super. 1995). "In determining whether to grant summary judgment, a trial court must resolve all doubts against the moving party and examine the record in the light most favorable to the non-moving party." *Jones v. Snyder,* 714 A.2d 453, 455, 1998 Pa. Super. LEXIS 1094 (Pa. Super. 1998). A review of the record yields the following factual conclusions.

In August, 1997, Mr. Feidler was requested to fill in at an area of the plant different from his ordinary assignment. He was positioned in the roll shells area of Morris Coupling Company. Here, he was rolling sleeves as part of the assembly process, as well as placing wire hangers on the rack to permit other workers to have access to said hangers. While Mr. Feidler was performing this process, Mr. Joseph Cunningham, a fellow employee, yelled at him to place the hangers in a specific way. Mr. Feidler thought that Mr. Cunningham was joking and told him to "shut up bitch". Several minutes later, Mr. Cunningham left his work area and approached Mr. Feidler stating, "the next time that you call someone a bitch, you better have something to back it up with". Mr. Feidler, still thinking that Mr. Cunningham was joking around, responded in a laughing manner "fuck you, Joe".

Immediately, and without warning, Mr. Cunningham attacked Mr. Feidler by choking him and punching him in the head. Mr. Feidler tried unsuccessfully to escape from Mr. Cunningham, who continued choking him around the neck and punching him about the head. At this point, Mr. Feidler decided to defend himself, and as he backed away from Mr. Cunningham he fell backwards over a skid. As he attempted to regain his footing, Mr. Cunningham grabbed him by his left arm and attempted to bang his head on a roller machine. Morris Coupling Company's foreman, John Wood, then intervened and took Mr. Feidler to his office whereupon it was noted that he had dislocated his shoulder and required medical attention. As a result of the altercation with Mr. Cunningham, Mr. Feidler was suspended for five (5) days without pay and was subsequently

terminated from employment with the Company.

As a general rule, the Pennsylvania Workers' Compensation Act provides the exclusive remedy for employees who seek recovery for injuries sustained in the course of their employment. However, the Act provides a specific exception in cases where the injuries were caused intentionally by third parties. The Act states that:

> The term "injury arising in the course of his employment," as used in this article shall not include an injury caused by an act of a third person intended to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment . . . 77 P.S. § 411(1).

This *"personal animus"* exception to the Act enables employees to pursue common law actions against employers, in an attempt to prove that the employer was negligent in failing to take the steps necessary to prevent a foreseeable attack by a third party.

The *"personal animus"* exception to the Act allows recovery only where the third party's actions were motivated by personal animosity toward that particular employee. "If the third-party would have attacked a different person in the same position as the injured employee, that attack falls outside the exception and is covered exclusively by the Act." *Hershey v. Ninety-Five Associates*, 413 Pa. Super. 158, 161, 604 A.2d 1068, 1069 (Pa. Super. 1992); *Holland v. Commonwealth of Pennsylvania, Norristown State Hospital*, 136 Pa. Comm. 655, 584 A.2d 1056 (Pa. Comm. 1990). Generally, when an employee is attacked and injured by a fellow employee, a rebutable presumption exists that the injured employee is covered by the Act. Any one "claiming otherwise bears the burden of showing an intention to injure owing to reasons personal to the assailant." *Mike v. Borough of Aliquippa*, 279 Pa. Super. 382, 388, 421 A.2d 251, 254 (Pa. Super. 1980). Therefore, Mr. Feidler had the burden of showing that Mr. Cunningham intended to injure him for personal reasons.

Mr. Feidler failed to provide any evidence of either a history of animosity between himself and Mr. Cunningham, or that Mr. Cunningham intended to injure him for personal reasons. Indeed, the record confirms that Mr. Cunningham's conduct was random and directed to Mr. Feidler only by circumstance. His attorney essentially acknowledged this at the time of oral argument:

> THE COURT: What is it that he had in for your client that's reflected in the record to show the personal animus?
>
> MR. CONNELLY: The personal animus only has to be with Mr. Cunningham. And the problem we have is that it is something that would have to come out in trial. **But given his history, there is a record of this personal animus toward any individual that**

> **seems to be in his - wherever his area is or surrounding him. I think that's enough to show that this is a personal act; it wasn't dependent upon anything other than the fact he picked somebody out that day.** I think it's something that needs to be established in front of a jury, was there that personal animus for my client on that day. I'm not saying he had some history of-

See, Transcript of Motion for Summary Judgment on April 25, 2000, pp. 13-14.

Similarly, Mr. Feidler's Deposition taken on November 12, 1999, includes a recorded statement between Mr. Feidler and a representative of Zurich Insurance Company. In this statement, Mr. Feidler indicates there was no history of animosity between himself and his assailant, Mr. Cunningham.

> QUESTION: "This gentleman you were involved with in the fight, Mr. Cunningham. Would you say you are like work friends or have you had problems in the past, any fights in the past at work or outside of work? Does he have it out for you, any personal animosities against each other or?"
>
> ANSWER: "No, he, more or less, he has animosity against the company which I really didn't know about until you hear the stuff from people at work."
>
> QUESTION: "Has he ever, you know, have you ever had words with him before at all? Has he ever?"
>
> ANSWER: "No, not really."
>
> QUESTION: "No, nothing."
>
> ANSWER: "No. That is why I couldn't believe what was happening at that time, you know, he grabbed me and he just punched me. I couldn't believe it."
>
> QUESTION: "And no one ever said to you you know this person doesn't like you or this person has it out for you, it just came as a total surprise."
>
> ANSWER: "No, I would think that he was just a disgruntled worker, time bomb ready to go off."
>
> See, Exhibit C to Deposition of Thomas G. Feidler taken on November 12, 1999, pp. 10-11. (This is also Exhibit 1 to Defendant's Motion for Summary Judgment filed on January 27, 2000).

According to Mr. Feidler's own testimony, Mr. Cunningham's conduct was motivated entirely by his dissatisfaction with the company and had nothing to do with his relationship with him. The other evidence in the record entirely supports this conclusion. For example, in response to Mr. Feidler's Request for Production of Documents, he received six (6) documents detailing Joseph Cunningham's history of verbal abuse and threatening actions towards various other employees of Morris Coupling Company. However, none of these documents show a history of animosity between Mr. Feidler and Mr. Cunningham or any other indication that he was attacked "because of reasons personal to him." 77 P.S. § 411(1). See, Exhibit 1, Plaintiff's Brief in Opposition of Motion for Summary Judgment filed on February 25, 2000. "The Courts have found that the lack of pre-existing animosity between the combatants strongly suggest that the motive for the attack was work related and not because of reasons personal to the assailant." *Mike, supra. at* 391, 421 A.2d at 255.

Mr. Feidler also argues that the fact Mr. Cunningham was convicted of a summary offense of harassment is evidence of personal animosity towards him. A review of the Harassment Statute 18 Pa.C.S.A. § 2704(a)(1), and the District Justice record does not provide any information that indicates the nature of the relationship between Messrs. Feidler and Cunningham.

After reviewing the record in the light most favorable to Mr. Fiedler, the Court found no material fact in dispute and that Morris Coupling Company was entitled to summary judgment as a matter of law.

Signed this 10th day of July, 2000.

By the Court,
John A. Bozza, Judge

IN THE MATTER OF:
THE DOCTOR LORRAINE K. MONROE ACADEMY CHARTER SCHOOL

SCHOOL LAW/CHARTER SCHOOLS

In order to appeal the decision of a local school board of directors not to grant a charter to a charter school, the applicant for such charter must obtain the signatures of at least 2% of the residents of the school district or of 1,000 residents, whichever is less, who are over 18 years of age; and the signatures shall be obtained within 60 days of the denial of the application by the local board of directors. 24 P.S. § 17-1717-A.

SCHOOL LAW/CHARTER SCHOOLS

To any petition appealing the denial of a charter for a charter school there shall be appended a statement that the local board of directors rejected the petition for a charter school, the names of all applicants for the charter, the date of denial by the board, and the proposed location of the charter school. 24 P.S. § 17-1717-A.

SCHOOL LAW/CHARTER SCHOOLS

The failure of the appendage to the petition to appeal the denial of the charter of a charter school must state the location of the proposed charter school; but a statement that the proposed charter school would be located within a township is sufficiently precise to allow the petition to be deemed to be sufficient. 24 P. S. § 17-1717-A.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 12029 - 2000

Appearances: John F. Mizner, Esquire for the Dr. Lorraine K. Monroe Academy Charter School
Timothy M. Sennett, Esquire for Millcreek Township School District

MEMORANDUM

Bozza, John A., J.

The Dr. Lorraine K. Monroe Academy Charter School has filed with the Court a Petition asking for a determination of the sufficiency of the signatures of Millcreek residents seeking to appeal the rejection of the Charter School's application by the Millcreek School Board. The Millcreek School Board has filed an answer in which it claims that the request for the Court's determination was not made in a timely fashion and, further, asserting that the Petition to Appeal did not have appended to it a statement which adequately set forth the proposed location of the Charter School. For the reasons set forth below, the Court concludes that the Petition is sufficient and a Decree shall be entered accordingly.

The "Charter School Law" sets forth a procedure by which a charter school applicant can appeal the denial of its application to the Charter School Appeal Board. 24 P.S|. § 17-1717-A. It includes a requirement for obtaining a designated number of signatures in support of an appeal and specifies that the signatures must be obtained within sixty (60) days of the denial of the application by the school board. The Millcreek School Board agrees that this requirement has been met. The Charter School Law goes on to state as follows:

> There shall be appended to the petition a statement that the local board of directors rejected the petition for a charter school, the names of all applicants for the charter, the date of denial by the board, and the proposed location of the charter school.

24 P.S. § 17-1717-A.

Accordingly, the Petition to Appeal had appended to it the following statement:

> "On March 13, 2000, the Millcreek Township School District's Board of School Directors rejected the application for Lorraine K. Monroe Academy Charter School to be located in Millcreek Township which application was submitted by David Kirkpatrick."

The Millcreek School Board objects that the statement of proposed location is inadequate because it does not specify an exact location within the Township of Millcreek. There is no guidance on this issue to be found within the Charter School Law.

It is apparent to the Court that the foundation of the petition is the inclusion of the proper number of signatures, which in this case is at least one thousand (1,000). The requirement of appending the statement, while certainly significant for practical reasons, is not the essence of the petition. In particular, it is noted that the requirements for the statement set forth in Section 17-1717-A(3) are stated in rather broad terms. For example, an appellant must only state "that the local board of directors rejected the petition for a charter name." Apparently, it is not necessary to provide the name of the local school board. Similarly, with regard to the requirement that an appellant state the "proposed location of the charter school," there is no indication of the necessary specificity. Therefore, it must be concluded that the legislature intended that a general indication of the location would suffice for purposes of this initial step in the appeal process. There is nothing in the law to suggest that anything other than a statement that the proposed school is within a particular political subdivision or region is necessary. It is noteworthy that in the original application for the charter school; a more precise statement of location is required. 24 P.S. 17-

1717-A(11). The application will be a part of the record transmitted and available to the Charter School Appeal Board.[1]

An additional indication of the focus of the Court's review in this regard is found in Section 17-1717-A(5), where it is stated that "the court shall hold a hearing only on the sufficiency of the petition." This provision would seem to contemplate primarily a review of the signature requirement as no mention is made of a review of the appended statement.

While the information included in the "statement" has practical value as a part of the submission of a petition for appeal, it is not a component so critical for the perfecting of an appeal that it requires a standard of strict compliance. As a result of this Court's analysis, it must be concluded that the Petition, including the statement appended thereto, is sufficient to meet the statutory requirements.[2]

Well-settled principles of statutory construction require that the court accepts that the legislature "does not intend a result that is absurd, impossible of execution or unreasonable." 1 Pa.C.S. § 1922(1). To reject the charter school applicant's appeal because of lack of specificity in its statement of location would most certainly lead to an unreasonable result. The merits of the petition of more than one thousand (1,000) citizens would go unheard because of a deficiency in an aspect of the statutory appeals process of virtually no substantive consequence. Such an outcome could not have been intended by the General Assembly.

Turning to the question of the timeliness of the submission of the Petition to Determine Sufficiency, it is noted that there is no indication within the Charter School Law of any time limitation for submitting a petition to the court. The Millcreek School Board agrees that the signatures were obtained within the required sixty (60) day period or by May 13, 2000. The Lorraine K. Monroe Academy Charter School filed its Petition for Determination of Sufficiency within thirty (30) days, which certainly is within a reasonable period of time. Moreover, the charter school applicant has indicated that it will not pursue the opening of its school until the school year 2001-2002, and therefore any adverse affect of a delay on the Millcreek School District's current budgetary planning for the 2000-2001 school year is no longer an issue.

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[1] The Millcreek School Board has also advised the Court that one of the reasons for rejecting the application originally was the lack of certainty concerning the school's location and obviously this would be a matter to be addressed by the Charter School Appeal Board.

[2] Assuming there was a deficiency in the specificity of the statement of location requirement, since there is no express time limitation in the filing of a petition, an amended filing would seem to be the proper remedy.

For the reasons set forth above, the Court finds that the Petition for Determination of Sufficiency should be granted and an appropriate Decree shall be entered.

DECREE

AND NOW, this 11 day of July, 2000, upon consideration of Petition for Determination of Sufficiency of Signatures to Appeal the Millcreek Township School Director's Board of School Director's Rejection of the Lorraine K. Monroe Academy Charter School's Application and pursuant to 24 P.S. § 17-1717-A(5), it is hereby **ORDERED, ADJUDGED and DECREED** that the Petition is **SUFFICIENT** pursuant to 24 P.S. § 17-1717-A(2), (3), (4).

By the Court,
/s/ **John A. Bozza, Judge**

NATIONWIDE MUTUAL INSURANCE COMPANY, Plaintiff

v.

DEBBIE JO CATALFU, Defendant

INSURANCE/HOUSEHOLD EXCLUSION/STACKING

Enforceability of a household exclusion clause depends upon the factual circumstances in each case.

INSURANCE/HOUSEHOLD EXCLUSION/STACKING

Household exclusion unenforceable as against public policy where household members purchased two separate policies, both of which included underinsured motorist benefits, and the additional household policy included stacking coverage.

INSURANCE/HOUSEHOLD EXCLUSION/STACKING

The household exclusion is enforceable in cases where persons attempt to use insurance policies of other household members to create coverage that the injured person chose not to purchase.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 14121 - 1998

Appearances: John B. Cromer, Esq. for Nationwide Insurance
Craig A. Markham, Esq. for Ms. Catalfu

OPINION

The issue before the Court is whether Debbie Jo Catalfu can collect underinsured benefits from an automobile policy issued by the Plaintiff, Nationwide, to Ms. Catalfu's father, Richard Catalfu. Nationwide seeks enforcement of a "household" or "family car" exclusion barring recovery. In response, Ms. Catalfu contends the household exclusion cannot be enforced because it is void for public policy reasons.

The facts are not in dispute. On February 9, 1995, Ms. Catalfu was injured when the 1991 Hyundai Excel which she owned and was operating was struck from behind by an automobile driven by Terry A. Fitch. Fortunately Mr. Fitch was insured and Ms. Catalfu settled her claim against Mr. Fitch for the full limits of his automobile liability policy.

Ms. Catalfu then turned to her own insurance policy for additional benefits. Ms. Catalfu had purchased a contract of insurance with the Plaintiff which provided underinsurance coverage in the amount of $25,000.00 per person/$50,000 per accident. Nationwide paid Ms. Catalfu the full amount ($25,000.00) of underinsured benefits under this policy.

It is undisputed that at the time of the accident, Ms. Catalfu was living with her parents. Further, her father Richard Catalfu, had purchased an insurance policy with Nationwide covering two family vehicles with underinsured benefits in the amount of $15,000 per person/$30,000 per

accident. Mr. Catalfu also paid an extra premium for the "stacking" option. Accordingly, the maximum underinsured benefits available are $30,000 per person/$60,000 per accident.

Nationwide concedes Ms. Catalfu is a relative who is insured under Richard Catalfu's policy. However, Nationwide contends that the following contractual language excludes coverage for any underinsured claim by Ms. Catalfu:

> COVERAGE EXCLUSIONS
> This coverage does not apply to:
> * * *
> 6. Bodily injury suffered while occupying a motor vehicle owned by you or a relative but not insured for underinsured motorist coverage under this policy; nor to bodily injury from being hit by any such motor vehicle.

See Nationwide Endorsement 2358.

Nationwide has filed this declaratory judgment action asserting the household exclusion denies coverage for Ms. Catalfu under her father's policy.[1] Before the Court are cross Motions for Summary Judgment on this issue. Since the facts are not in dispute, the matter is ripe for summary judgment. See Pennsylvania Rule of Civil Procedure 1035.2.

In the case *sub judice*, the interpretation of the insurance contract between Nationwide and Richard Catalfu is not at issue. It is uncontroverted the household exclusion, if enforced, would bar any recovery by Ms. Catalfu. The issue is whether this exclusion violates public policy and therefore should not be enforced.

Pennsylvania courts have been rightfully reluctant to rewrite unambiguous contractual language between parties. *Antanovich v. Allstate Insurance Company*, 488 A.2d 571, 575 (Pa. 1985). In essence, a court should only interfere in the contractual relations among parties to prevent action which is clearly against public policy. See *Hall v. Amica Mutual Insurance Company*, 648 A.2d 755, 760 (Pa. 1994).

Whether the household exclusion should be rendered unenforceable as against public policy has been the subject of much appellate litigation. According to the Pennsylvania Supreme Court:

> "The enforcement of the exclusion is dependent upon the factual circumstances presented in each case."

See *Paylor v. Hartford Insurance Company*, 640 A.2d 1234, 1240 (Pa. 1994)

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[1] Nationwide initially filed this declaratory judgment action alleging Ms. Catalfu waived any right to stack underinsured benefits because the policy she purchased for the Hyundai Excel waived any stacking. The waiver issue was resolved in favor of Ms. Catalfu by Order dated October 11, 1999.

In *Paylor*, a husband and wife were killed in a one-car collision involving their motor home. The motor home was insured by Foremost Insurance Company. After recovering benefits from Foremost Insurance Company, the decedents' estate asserted a claim under a policy with Hartford Insurance Company covering three other vehicles owned by the decedents. Relying on the household exclusion, Hartford denied coverage. Ultimately the Pennsylvania Supreme Court upheld the enforcement of the household exclusion on the rationale the decedents had intentionally chosen to underinsure their motor home and were attempting to convert the underinsured provisions of the Hartford policy into additional liability coverage for the motor home.

Shortly thereafter, the Pennsylvania Supreme Court likewise allowed the enforcement of the household exclusion in *Windrim v. Nationwide Insurance Company*, 641 A.2d 1154 (Pa. 1994). In *Windrim*, the claimant was driving an uninsured automobile when allegedly struck by an unknown hit-n-run driver. At the time, the claimant lived with his mother and sought uninsured coverage under a Nationwide policy owned by his mother. Nationwide denied the claim applying the household exclusion. This denial was affirmed by the Pennsylvania Supreme Court on the theory that a party cannot intentionally decide not to purchase insurance for a vehicle and then attempt to rely on a family member's uninsured motorist coverage in the event of a claim.

Next, the Pennsylvania Supreme Court decided *Hart v. Nationwide Insurance Company*, 663 A.2d 682 (Pa. 1995) again enforcing the household exclusion to deny insurance coverage. In Hart, the claimant recovered the policy limits from an intoxicated individual who struck Hart's vehicle. At the time of the accident, Hart was insured but had opted not to purchase uninsured or underinsured motorist coverage. Instead, UIM benefits were sought under a separate policy of insurance issued for a family member. While the trial court and Superior Court held the household exclusion was void as against public policy, the Pennsylvania Supreme Court reversed in a per curiam Order, citing *Windrim v. Nationwide Insurance Company, supra.*

More recently, in *Eichelman v. Nationwide Insurance Company*, 711 A.2d 1006, (Pa. 1998), the Pennsylvania Supreme Court allowed enforcement of the household exclusion of underinsured coverage for a claimant who had voluntarily chosen not to purchase underinsured coverage on his own vehicle. Specifically, Eichelman received injuries when his motorcycle collided with a pick-up truck. After receiving the policy limits from the truck driver's insurance carrier, Eichelman sought coverage under two insurance policies maintained by his mother and her husband with Nationwide Insurance Company. At the time, Eichelman had opted not to insure his motorcycle for underinsured motorist coverage. The Pennsylvania Supreme Court concluded:

> "...a person who has voluntarily elected not to carry underinsured motorist coverage on his own vehicle is not entitled to recover underinsured motorist benefits from separate insurance policies issued to family members with whom he resides where clear and unambiguous "household" exclusion language explicitly precludes underinsured motorist coverage for bodily injury suffered while occupying a motor vehicle not insured for underinsured motorist coverage."

711 A.2d at 1010.

A different result was reached by the Superior Court in *Burstein v. Prudential Property and Casualty*, 742 A.2d 684 (Pa. Super. 1999). The Bursteins were husband and wife returning from a night out when they were involved in a two-car collision. The Bursteins were in a car provided by Mrs. Burstein's employer but for which the Bursteins paid $25.00 per week for personal use. After settling for the liability limits from the tortfeasor's insurance carrier, the Bursteins sought underinsured coverage under Mrs. Burstein's employers insurance policy. However, the employer's policy did not have underinsured motorist coverage. Thereafter, the Bursteins filed a claim for underinsured benefits under their personal policies which had underinsured motorist coverage. Prudential denied the claim based on the household exclusion. The Superior Court, sitting en banc, weighed the competing public policies and determined the household exclusion was unenforceable under these facts.

Against this appellate background, the question of whether the household exclusion is enforceable is still dependent upon the facts of each case. *Paylor, supra.* In the case *sub judice*, the facts dictate the household exclusion should not be enforced as it would violate the weight of public policy.

The persuasive facts are that Ms. Catalfu has paid for an insurance policy on her Hyundai Excel, including payment for UIM coverage. She collected the full amount of liability coverage from the tortfeasors. Ms. Catalfu had no control over the amount of coverage secured by the tortfeasor. It is not Ms. Catalfu's fault that her damages exceed the tortfeasor's coverage. It is likewise not her fault that her damages may exceed the maximum amount of underinsured benefits under her policy with Nationwide. In addition, Ms. Catalfu is clearly insured as a member of the household under her father's policy with Nationwide, for which a premium was paid for UIM coverage.

Importantly, Ms. Catalfu is not attempting to receive benefits for free. Unlike the claimant in *Windrim*, *Hart* and *Eichelman*, Ms. Catalfu in fact had purchased insurance for the vehicle she was operating and had paid for UIM coverage. Therefore Ms. Catalfu has contributed to the insurance pool from which she now seeks relief consistent with the intent of the Motor Vehicle Financial Responsibility Law that all owners of registered

vehicles share in the burden of insurance before obtaining benefits. *Windrim, supra*., 641 A.2d at 1157, quoting *Allen v. Erie Insurance Company*, 534 A.2d 839, 840-41 (Pa. Super. 1987).

It is likewise undisputed that Richard Catalfu paid an additional premium for UIM coverage under his policy. Hence this is not a situation where a household purchased one insurance policy with UIM benefits and other policies, at a reduced premium, without UIM benefits. Thus, the concern expressed by the Pennsylvania Supreme Court in *Windrim* does not exist in this case since this is not a situation where the Catalfus are attempting to rely on one policy to provide UIM coverage for the entire household.

Further, this is not a case where Ms. Catalfu is attempting to convert UIM coverage to liability coverage. Ms. Catalfu has followed the hierarchy of coverage as set forth in the Motor Vehicle Financial Responsibility Law by first seeking recovery from the tortfeasor, then recovery under her policy and next recovery under her father's policy. It is only when these underinsured limits have been exhausted, which they have, and her injuries remain, that she sought coverage under the policy of her father. In so doing, Ms. Catalfu has not attempted to convert UIM benefits into liability coverage. In fact, as Ms. Catalfu correctly points out, there is no additional insurance coverage she could have purchased.

This is also not a case where the containment of the "spiraling" costs of insurance is a policy issue. Ms. Catalfu and her father have purchased separate policies. The Catalfus are not uninsured claimants seeking to pass along the costs of an uninsured claim to those who pay for insurance. Instead, the Catalfus are simply asking for benefits for which they have each paid a premium.

As the Pennsylvania Superior Court recognized:

> "...the Motor Vehicle Financial Responsibility Law was enacted in order to establish a liberal compensatory scheme of underinsured motorist protection."

See *Burstein*, *supra*, 742 A.2d at 687.

> Further,
> "It is in the public's best interest for insurance companies to provide underinsurance motorist coverage."

Burstein, 742 A.2d at 688.

By its holding in *Paylor, supra.*, obviously the Pennsylvania Supreme Court recognized the existence of a factual scenario in which the household exclusion was void and unenforceable. The facts of the instant case present just such a scenario; indeed this case is a classic example of the need to provide UIM coverage under the Motor Vehicle Financial Responsibility Law.

CONCLUSION

For the foregoing reasons, the household exclusion is void against public policy and unenforceable. Therefore the Motion for Summary Judgment filed by Nationwide Insurance Company is hereby **DENIED**. The Motion for Partial Summary Judgment filed by the Defendant is hereby **GRANTED**.

ORDER

AND NOW to-wit this 14th day of July 2000, for the reasons set forth in the accompanying Opinion, the Motion for Partial Summary Judgment filed by the Defendant is hereby **GRANTED**; the Cross-Motion for Summary Judgment filed by the Plaintiff is hereby **DENIED**.

BY THE COURT:
/s/ **William R. Cunningham, President Judge**

LINDA L. SEELEY, Plaintiff

v.

AMERICAN DENTAL CENTER,
DRS. GUREN, JAFFE & ASSOC., INC., Defendants

v.

MARK T. CIRBUS, D.D.S., Additional Defendant

CIVIL PROCEDURE/POST TRIAL MOTIONS

When a doctor's testimony is presented to a jury and the testimony relates only to the factual basis for a referral to an oral surgeon, the doctor was not presented as an expert witness. No expert report is therefore required. The testimony was relevant and appellant's motion for a new trial is denied.

CIVIL PROCEDURE/POINTS FOR CHARGE

A trial court is bound to charge only on the law for which there is some factual support in the record. *Lockhart v. List*, 665 A.2d 1176, 1179 (Pa. 1995). Where the record is devoid of any factual predicate for a charge, it is not error to deny the appellant's requested jury instruction.

CIVIL PROCEDURE/POINTS FOR CHARGE

An instruction of informed consent which tells the jury, inter alia, that the jury was to determine whether a dentist had a duty to disclose the percentage of risk to the patient and whether non disclosure violated the patient's right to informed consent was proper. The jury was accurately and adequately informed of the applicable law; therefore, appellant's motion for a new trial is denied.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 10649 - 1995

Appearances: Deborah Olszewski, Esq. for Dr. Cirbus
Andrew J. Conner, Esq. for Linda L. Seeley
Francis Klemensic, Esq. for American Dental Centers

OPINION

The facts of this case only lend fuel to the perpetuation of human fear of a dental office. What began as a somewhat routine tooth-pulling culminated in a jury verdict and damages in the amount of $285,000.00 plus delay damages of $79,164.90 for a total of $364,164.90.

In 1994, the Plaintiff was referred by her dentist, Dr. Oliver, to an oral surgeon for the extraction of a tooth. While Dr. Oliver was comfortable in attempting a one-piece extraction of the tooth, he concluded the procedure needed a two-piece extraction which he could not perform. The Plaintiff then went to American Dental Centers, Inc., the original Defendant herein, located in the Millcreek Mall.

On August 5, 1994, in the Defendant's offices, oral surgery was performed

upon Plaintiff by the additional Defendant, Dr. Mark T. Cirbus. In attempting a one-piece extraction of Plaintiff's tooth, Dr. Cirbus broke her jaw. Plaintiff left the American Dental Center in pain but unaware her jaw was broken.

On August 12, 1994, the Plaintiff was seen by Dr. King, an oral surgeon whose x-rays revealed the existence of Plaintiff's fractured jaw. On August 15, 1994, Dr. King surgically repaired and wired Plaintiff's displaced jaw fracture.

On February 14, 1995, Plaintiff filed this action against American Dental Centers seeking to recover for her injuries. Subsequently, American Dental Centers joined Dr. Cirbus as an Additional Defendant pursuant to an employment contract with American Dental Centers (hereinafter ADC).

A jury trial was held resulting in a verdict on February 19, 1999 in favor of the Plaintiff against ADC and Dr. Cirbus.

Dr. Cirbus (hereinafter Appellant) filed a Motion for New Trial on March 2, 1999 which was denied by Order of March 11, 1999. Appellant filed a Notice of Appeal on June 9, 1999 and a Statement of Matters Complained of on Appeal on June 23, 1999. This Opinion will address the issues raised in said Statement seriatim.

WHETHER THE ADMISSION OF THE DEPOSITION TESTIMONY OF DR. OLIVER WAS ERROR

Appellant claims it was error to allow the jury to hear any of the videotaped deposition of Dr. Oliver. According to Appellant, Plaintiff willfully and/or in bad-faith deceived Appellant about the purpose of Dr. Oliver's deposition.

Appellant's counsel maintains she was informed by Plaintiff's counsel that the deposition of Dr. Oliver was simply to set forth the reasons for the referral to an oral surgeon. Because of trial commitments, Appellant's counsel was unable to attend the deposition of Dr. Oliver, instead her law partner appeared on behalf of the Appellant. Appellant's counsel alleges the deposition went beyond the original proffer to include the expert testimony of Dr. Oliver regarding two-piece extractions. Appellant avers Plaintiff's conduct was so outrageous that none of Dr. Oliver's testimony should have been admitted. Appellant's argument is unnecessarily hysterical.

In response to Appellant's Motion in Limine objecting to Dr. Oliver's testimony, the Court excised the deposition testimony of Dr. Oliver beginning on page 15 line 22 through page 19 line 10 and also page 20 lines 18 through 20. These excerpts were redacted because they could have been considered as rendering an expert opinion when in fact no expert report was filed for Dr. Oliver. Importantly, the remaining portions of Dr. Oliver's testimony related to factual testimony regarding his treatment and referral of the Plaintiff. Hence Dr. Oliver's testimony was not submitted to the jury in the form of an expert witness. Instead, in its redacted form, it

was limited to the factual basis for the referral to an oral surgeon and was therefore consistent with the notice and purpose of the deposition.

As submitted to the jury, Dr. Oliver's testimony was relevant. Appellant suffered absolutely no prejudice. Appellant cannot point to any change of trial strategy or any adverse affect on Appellant's ability to cross-examine Dr. Oliver or any other witness. Dr. Oliver's testimony did not affect Appellant's ability to call any witnesses or present a defense. There has been no bad faith on the part of Plaintiff's counsel nor willful violation of any discovery rule. Appellant's arguments to the contrary are specious and without merit.

WHETHER A NEW TRIAL WAS WARRANTED FOR THE FAILURE TO INSTRUCT THE JURY THAT AN ERROR OF JUDGMENT IS NOT MEDICAL NEGLIGENCE

Appellant cries foul by the denial of Appellant's point for charge asserting an error of judgment is not negligence. Appellant overlooks one crucial factor: Appellant failed to adduce any evidence in support of this instruction.

Appellant did not present any evidence, expert or otherwise, for a jury to consider that Appellant simply made an error of judgment. Appellant's expert testimony was focused on a criticism of Dr. King's surgical repairs made on August 15, 1994 and not on whether Appellant made an error of judgment. It has long been the law that "(a) Trial Court is bound to charge only on that law for which there is some factual support in the record" *Lockhart v. List*, 665 A.2d 1176, 1179 (Pa. 1995). As the record is devoid of any factual predicate for the charge, it was not error to deny Appellant's requested jury instruction.

Further, whether there was an error of judgment by Appellant was not at issue in this case. While a two-piece extraction, in hindsight, would have been the preferable method of extraction, the issue was the manner in which Plaintiff's tooth was extracted causing her jaw to break. Had the one-piece extraction attempted by Dr. Cirbus successfully removed Plaintiff's tooth without breaking her jaw, Plaintiff would not have a cause of action. Hence, whether it was a one or two-piece extraction is of little moment since the result was Plaintiff's injuries. Accordingly, the error of judgment instruction was inapplicable.

WHETHER THE JURY WAS PROPERLY INSTRUCTED ON THE LAW OF INFORMED CONSENT

Appellant presents a very narrow objection to the informed consent jury instruction. Appellant contends a dentist is under no obligation to disclose any percentage(s) of risk for oral surgery and it was therefore error to instruct the jury to determine whether Appellant should have disclosed any percentage(s) of risk. Appellant fails to provide any authority

for this position, nor does any exist.

Initially it must be noted Appellant misstates the Court's instruction on informed consent. In fact, Appellant wants blinders used in viewing the instruction to allow focus only on the percentage(s) of risk statement to the jury. However, when the informed consent instruction is viewed in its entirety, it was an accurate and appropriate statement of the law for the jury to consider. Specifically, the instruction was as follows:

> "You've heard the attorneys also talk about the concept of informed consent. When a patient is in possession of her faculties and is physically able to consult about her condition, when no medical emergency exists, the patient's consent is legally required for the dentist to be able to proceed with an invasive procedure. The dentist who performs an invasive procedure without the patient's informed consent has committed a battery on the patient and is liable for any injuries caused by that battery even though the procedure is performed with the proper skill and care.
>
> Consent refers to the agreement of minds. Consent means voluntary submission or agreement by a patient in possession of her faculties to make an intelligent choice to do something that is proposed by the dentist. A patient's consent to the dentist's proposed course of treatment must be an informed or knowledgeable consent. Consent is informed if the patient has been given a description of the procedure and the risks and alternatives that a reasonably prudent patient would need to make an informed decision as to that procedure. The dentist shall be entitled to present evidence of the description of that procedure and those risks and alternatives that the dentist acting in accordance with accepted medical standards would provide.
>
> It's up to you, ladies and gentlemen, as the finders of fact in this case to determine factually what should have been disclosed to the patient and whether it was disclosed in this case. It's up to you to determine whether -- you've heard attorneys talk about percentages of this risk, percentages of that risk. It is entirely up to you to determine whether those percentages should have been disclosed and whether they were or were not and how that would relate to the informed consent of the patient in this case.
>
> A patient's consent to a procedure is valid only if the patient has been informed of all those risks that a reasonable person in that situation would consider important in his or her decision of whether to undergo a procedure. The dentist is also required to inform the patient of alternatives to the proposed treatment and the risks and chances of success of those alternatives. If the patient consents to the procedure proposed by the dentist without this information, the consent is not informed and not valid
>
> The law guarantees the patient be supplied all the material facts

needed to allow the patient to make an intelligent choice as to medical attention. If a dentist performs an invasive procedure on a patient without having supplied that patient with these material facts, the dentist has committed a battery on the patient and is liable for any injuries caused by that procedure regardless of whether the procedure was properly and carefully performed and regardless of whether the patient would have consented to the procedure had she known of all the risks and alternatives. However, the dentist is liable for failure to obtain informed consent only if the patient proves that receiving such information would have been a substantial factor to the patient's decision whether to undergo the procedure."

Day 3, Trial transcript, pp. 24-26

From the above charge, Appellant contends the jury was erroneously instructed that a dentist had to disclose the percentages of risk associated with the tooth extraction. The record does not support Appellant's contention. Instead, the jury was informed, inter alia, "...it is entirely up to you to determine whether those percentages should have been disclosed and whether they were or were not and how that would relate to the informed consent of the patient in this case." This instruction is an accurate statement of the law as it left the issue of what factors need to be disclosed entirely to the discretion of the jurors.

Appellant's reliance on *Festa v. Greenberg*, 354 Pa. Super. 346, 511 A.2d 1371 (1986) does Appellant more harm than good. In *Festa*, *supra*., the Superior Court held it was not error for the trial court to instruct the jury to consider the testimony of a surgical nurse about percentages of risk disclosed prior to surgery. Inherent in the Court's ruling is the requirement that medical personnel can and should discuss percentages of risk in obtaining an informed consent to a medical procedure.

In the case sub judice, the jury was simply informed that it was the jury's discretion to determine whether the percentages of risk should have been disclosed and if not, whether there was a basis for informed consent. When the jury instruction is read as a whole on the issue of informed consent, the jury was accurately and adequately informed of the applicable law. Appellant's arguments to the contrary are without merit.

CONCLUSION

This appeal is frivolous and should be dismissed with prejudice.

ORDER

AND NOW to-wit this 10th day of May, 1999, the Motion for New Trial filed by Additional Defendant Mark T. Cirbus is hereby **DENIED**.

BY THE COURT
/s/ WILLIAM R. CUNNINGHAM, PRESIDENT JUDGE

Judge Cunningham's opinion was affirmed by a Memorandum Opinion of the Superior Court of Pennsylvania at No. 938 WDA 1999.

SUSAN JULIUS

v.

LAURA ANTALEK and GERALD ANTALEK, her husband

MOTION FOR SUMMARY JUDGMENT/"LIMITED TORT" MOTOR VEHICLE INSURANCE/QUESTION OF "SERIOUS INJURY"

Citing *Washington v. Baxter*, the Court granted parties summary judgment where the Plaintiff presented no medical testimony establishing the existence, extent or permanency of plaintiff's impairment.

MOTION FOR SUMMARY JUDGMENT/"LIMITED TORT" MOTOR VEHICLE INSURANCE/QUESTION OF "SERIOUS INJURY"

Where the Plaintiff has not established that her injuries resulted in a substantial interference with a bodily function so as to conclude that they had a serious impact on her life for an extended period of time, the Court will not find the Plaintiff to have suffered a "serious injury".

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 10202 -1999

Appearances: Robert J. Jeffrey, Esquire for the Plaintiff
Marcia H. Haller, Esquire for the Defendant

OPINION

Bozza, John A., J.

Laura and Gerald Antalek filed a Motion for Partial Summary Judgment, seeking the Court's determination of whether Susan Julius suffered a "serious injury" as a result of a car accident. At the time of the accident, Ms. Julius was covered by a "limited tort" motor vehicle insurance policy. Briefly, the relevant facts in this case as gleaned from the summary judgment record indicate that Ms. Julius was involved in an automobile accident on February 3, 1997 in Harborcreek Township, Pennsylvania. The Antalek's vehicle had pulled out in front of Ms. Julius' vehicle and the collision occurred. At the time of the accident, Ms. Julius declined treatment, but the following day she felt sore and saw her family physician. Thereafter she contacted a chiropractor and she was seen by him on a number of occasions through May, 1997. Beginning in March of 1997, she saw Dr. John Euliano, an orthopedic surgeon, who ultimately performed arthroscopic surgery on her knee on May 21, 1997. She continued with a rehabilitation program which included physical therapy until August 12, 1997. She has not seen a physician regarding her injuries for the last three years.

Ms. Julius reports that currently she has a reduced range of motion, pain associated with walking or standing for more than a short period, and difficulty walking upstairs or uphill for more than short distances. She

reports that on occasion her knee gives out. She maintains that she has a limited ability to participate in play with her daughter. Specifically, she is not able to play kick ball with her unless she is the "official pitcher." She also cannot go for bike rides with her. She cannot identify any other activities that she was involved with at the time of the accident that she can no longer perform. There is no medical testimony concerning the extent of her current impairment and no medical documentation concerning its permanency.

As is now well-established, the determination of the existence of a serious injury is ordinarily a question for the jury. *Washington v. Baxter,* 553 Pa. 434, 719 A.2d 733 (1998). In resolving the question prior to trial, the court is to determine the issue applying traditional summary judgment standards. *Id.* Moreover, summary judgment is not appropriate in all but the clearest of cases. *Id.* This Court believes that this is one of those cases. Under the facts of this case, medical testimony of some nature is essential because the actual impact of the plaintiff's injuries on her day-to-day life is most uncertain. For example, although she has stated, and the Court accepts, that she has pain after walking or standing for a short time, there is no indication in the record as to either its character or consequence. Since it is the impact of her injury on her ability to carry on a body function that is the focus of our inquiry, it is critical to know how the pain has affected the use of her knee. Is the injury so painful that walking must be curtailed or carried out only with assistance? Or is it more in the nature of "soreness" and a mild nuisance? Similarly, Ms. Julius has maintained that she has a limited range of motion but there is no evidence in the record to determine the degree or its effect on the utilization of her knee. These matters are not self-evident and the admonition of the Supreme Court in *Washington v. Baxter,* 553 Pa. 434, 719 A.2d 733 (1998), that "Generally, medical testimony will be needed to establish the existence, extent and permanency of the impairment . . ." is directly applicable. *Id.,* (quoting *DiFranco v. Picard,* 398 N.W.2d 896 (Mich. 1986)).

The Superior Court recently noted in a case similar to the one at bar that the absence of objective medical evidence in a case involving "subjective allegations" precluded the finding of a "serious injury." While Ms. Julius' injury to her knee was certainly objectively manifested, medical documentation of any kind concerning her condition for the last three years is absent. In August of 1997 Dr. Euliano, the orthopedic surgeon who performed arthroscopic surgery, noted that he would see Ms. Julius "as needed." *McGee v. Muldowney,* 2000 Pa. Super. 116, 750 A.2d 912 (2000). He has not seen her since.

The record also indicates that at the time of the accident, Ms. Julius was a student and that her studies were not impeded by her injuries. There is no indication that she is unable to work or carry on the overwhelming majority of her day-to-day activities in normal fashion. *Johnson v.*

Gutfruend, No. 11289-1997 (C.P. Erie September 28, 1999). Ms. Julius has not established that her injuries resulted in such a substantial interference with a bodily function so as to conclude that they have had a serious impact on her life for an extended period of time. *McGee v. Muldowney,* 2000 Pa. Super. 116, 750 A.2d 912 (2000). See also, *Coughlin v. Villagac. Inc. et. al.*, 14402 Erie County 1998.

For all of the foregoing reasons, the Court will grant the Motion for Partial Summary Judgment filed by the defendants. An appropriate Order will follow.

ORDER

AND NOW, to-wit, this 23 day of August, 2000, upon consideration of the Motion for Partial Summary Judgment filed on behalf of the defendants in the above-captioned matter and argument thereon, and for the reasons set forth in the foregoing Opinion, it is hereby **ORDERED, ADJUDGED** and **DECREED** that the Motion is **GRANTED** to the extent that the plaintiff shall not be entitled to recover for non-economic losses.

By the Court
/s/ **John A. Bozza, Judge**

RICHARD BAXTER and JANA BAXTER, husband and wife, Appellants

v.

GIRARD TOWNSHIP and THE GIRARD TOWNSHIP ZONING HEARING BOARD, Appellees

VARIANCE/APPEAL FROM DENIAL
REAL ESTATE/DEDICATION OF STREETS

Where no additional evidence is taken, the standard of review on appeal from a decision of the Zoning Hearing Board is whether a manifest abuse of discretion or an error of law has been committed.

The decision of the Zoning Hearing Board will be affirmed with respect to the proposed construction of a deck where the evidence of record is sufficient to support the findings of the Zoning Hearing Board that the appellants failed to carry their burden to prove hardship, unique physical characteristics, that the hardship not be self-induced, and that the variance represents the minimum variance necessary.

With respect to the construction of a pole building, the court finds that the failure to grant a variance constitutes an error of law where the variance was not necessary. Where a municipality does not open a street dedicated by a subdivision plot within 21 years, the abutting lot owners acquire fee to the center line of the street. Measuring from the center line of the street, the pole building complies with all setback requirements, a variance is therefore unnecessary, and the Board committed an error of law by failing to grant the variance.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 13771 OF 1998

Appearances: Richard E. Filippi, Esquire for Appellants
David Keck, Esquire for the Appellees

OPINION

Early in 1997 Appellants were faced with an urgent dilemma. The lakefront property on which their house was located suffered severe erosion. As a result Appellants had to move their house or watch it soon fall into the lake. Moving the house was not the problem. The problem was Appellants had to comply with a coastal bluff setback requirement of 200 feet; however, this would then place the house in violation of the setback requirements of the Girard Township Zoning Ordinance.

Appellants requested a variance for relief of the setback requirements in July of 1997. Realizing Appellants lack of options, the Girard Township Zoning Hearing Board (Board) granted the request and Appellants successfully moved the house.

Early in 1998 Appellants began to construct a deck and pole building on

the same property without obtaining any of the required building permits. The deck was within three feet of the west property line, which by Township Ordinance had a sideyard setback requirement of fifteen feet. The pole building was within nine feet of the right-of-way of Edgewood Drive, which would require a setback of thirty-five feet if it was determined Edgewood Drive was a public street. A concerned neighbor notified the Township and the construction was halted.

Subsequently, Appellants sought variances for the deck and pole building. A hearing was held before the Girard Zoning Hearing Board on August 4, 1998. Appellants testified as to the necessity for the location of the structures. The Zoning Board refused to grant the variances.

This appeal followed.

STANDARD OF REVIEW

When there is no additional evidence taken, such as in the instant case, the standard of review is whether the zoning hearing board committed a manifest abuse of discretion or an error of law. *Board of Supervisors v. Zoning Hearing Board*, 124 Pa. Commonwealth 103 (1989). An abuse of discretion occurs when the board's findings are not supported by substantial evidence in the record. *Pittsburgh v. Zoning Board of Adjustment*, 522 Pa. 44 (1989).

In order for the Board to grant Appellants' variance requests, the five requirements of the Municipal Planning Code Section 10910.2(a)(1-5) had to be met. If Appellants failed to meet any one of these five requirements, the variance must be denied. Those requirements are as follows:

1. That there are unique physical circumstances or conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topography or other physical conditions peculiar to the particular property and that unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.

2. That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of a zoning ordinance and that the authorization of the variance is therefore necessary to enable the reasonable use of the property.

3. That such unnecessary hardship has not been created by the Appellant.

4. That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use

or development of adjacent property, nor be detrimental to the public welfare.

5. That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

THE DECK

The Board found Appellants failed to meet at least three of the five requirements needed for the variance with regard to the deck. For the first requirement, the Board determined that any hardship due to the unique physical characteristics was no longer present because the variance granted in 1997 allowed ample use of the property. The Board found the Appellants currently have their house, attached garage and a remote storage building on the property all within compliance of the 1997 variance.

The Board also found the second requirement was not met in that the unique physical characteristics of the property did not prevent Appellants from using the property in compliance with the ordinance. The Board reasoned because there is currently on the property a house, attached garage and storage building, the property is adequately developed.

The third requirement, that the hardship not be self-imposed by Appellant, was not met simply by the uncontested facts. The only evidence Appellants introduced was that their contractor misled them into thinking a building permit was not required. Appellants failed to adduce evidence this hardship was not self-imposed. See *Boyd v. Wilkins Township Board of Adjustment*, 279 A.2d 363 (Pa. Com. 1971).

The Board found the fourth requirement was met and therefore Appellants have no dispute with this finding.

The fifth requirement, that the variance will represent the minimum variance and still afford relief, was not met according to the Board. Appellants testified there were sliding glass doors facing the west that were useless because they were several feet above the ground and the deck was needed to make use of them. However, no evidence was presented to demonstrate the deck was built to provide a minimal encroachment on the sideyard setback requirement. No evidence was offered to show the deck was as small as it could be and still offer access to the sliding doors. In the Board's view, Appellants could have simply installed steps to give them access to those doors. Instead, Appellants built the deck to the size they wanted. Whether this Court agrees with the Board on this issue is immaterial since there is substantial evidence supporting the Board's finding.

On each of these requirements, the gravamen of Appellant's argument is that the 1997 variance approval recognized the unique characteristics of the property precluding adequate development of it. The sophistry of Appellant's argument is that Appellants' property is in fact developed

differently now than in 1997. Unlike 1997, the unique characteristics are not a factor since Appellants have been able to build a home, attached garage and detached storage building within compliance of the 1997 variance. Presently, there are no hardships to compel the relief Appellants are seeking. Further, it has long been the law that approval of a prior variance is not a basis for approval of a subsequent variance request.

Based on this record, the Board did not commit a manifest abuse of discretion or an error of law regarding the deck.

THE POLE BUILDING

The variance request for the pole building presents a separate set of issues. Initially it must be determined which setback requirement is applicable. Then it must be determined where Appellants' property line begins.

The parties stipulated that Edgewood Drive has never been a public street. While the subdivision plot dedicated Edgewood Drive to Girard Township, it is uncontroverted that Edgewood Drive was never accepted by the Township nor opened as a road. In fact, according to Appellants, Edgewood Drive is overgrown and indistinguishable from the wooded area to the west. The president of the Lakeland Association, Allen James, testified that no plans had been made to utilize this street and he could not foresee any in the future because the land which the street runs through is reserved as a wooded park and cannot be developed.

Given the fact that more than twenty-one years have lapsed since Edgewood Drive was created by subdivision plot, Girard Township cannot now open Edgewood Drive as a public thoroughfare without the consent of Appellants and the adjoining landowners. See 36 P.S. §1961 (which acts as a statute of limitations requiring a municipality to accept a dedicated road within twenty-one years or the public's right to use it is extinguished. See *Ferko v. Spisak*, 541 A.2d 327 (Pa. Sup. 1988), affirmed, 564 A.2d 157 (1989)).

Since Edgewood Drive is not and likely never will be a public street, the applicable setback requirement is fifteen feet (as if for a rear yard setback).

Inquiry next turns to where the fifteen feet setback begins. If Appellants own to the edge of Edgewood Drive, then the pole building is within the fifteen feet setback requirement and in need of a variance. However, if Appellants own to the center of Edgewood Drive then the pole building is twenty-four feet from the property line and no variance request was necessary.

According to Appellants' deed, Appellants acquired title to Lots 152, 153, 156, 157, 158, 159, 160, 161, 162 and 163 of the plot plan of the Erie Lakeland Subdivision. See Deed Book 362 Page 3 at the Erie County Recorder of Deeds Office. Appellants' deed does not contain a separate metes and bounds description. By deed, then, Appellants only acquired

title to the edge of Edgewood Drive. However, by operation of law, Appellants can claim to the centerline of Edgewood Drive.

It has long been the law:

> "Where a municipality does not open the street within the twenty-one year period set forth in §1961, the abutting lot owners acquire the fee in the street to the centerline."

Leininger v. Trapizona, 645 A.2d 437, 440 (Pa. Cmwlth. 1994)

It has likewise been held by the Pennsylvania Supreme Court:

> "It is settled law in Pennsylvania that where the side of the street is called for as a boundary in a deed, the Grantee takes title and fee to the center of it. . . ."

Rahn v. Hess, 106 A.2d 461, 464 (Pa. 1954); citing *Paul v. Carver*, 26 Pa. 233 (1856)

For purposes of reviewing the legality of the Board's action, measurement must begin at the centerline of Edgewood Drive.[1] As such, the pole building is not situated within the fifteen feet setback requirement and there is no need for a variance. Therefore, the Board committed an error of law in denying Appellants' request for a variance since no such variance was needed.

ORDER

AND NOW to-wit this 7th day of July 2000, upon an independent review of the record and applicable law, the decision of the Girard Zoning Hearing Board is **AFFIRMED** as it relates to the denial of the variance for Appellants' deck. For the reasons stated in the accompanying Opinion, the decision denying Appellants' variance request as to the pole building is **OVERRULED** as the Board committed an error of law.

BY THE COURT:
/s/ **WILLIAM R. CUNNINGHAM**
President Judge

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[1] This determination is made solely for the purpose of establishing a starting point to measure from and not for purposes of determining actual ownership of Edgewood Drive. The present case is not an action to quiet title. To the extent there may be adjoining landowners who are not parties to this action but whose property rights may be affected, this Opinion/Order does not convey legal title of any portion of Edgewood Drive to Appellants.

SANDRA L. RICHTER and ROBERT L. RICHTER

v.

DUNLOP TIRE CORPORATION and GTE NORTH, INC.

CIVIL PROCEDURE/MOTION FOR SUMMARY JUDGMENT

A grant of summary judgment is allowable only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The court must view the record in the light most favorable to the non-moving party and entitlement is clear and free from doubt. *Welsh v. Bulger*, 548 Pa. 504, 698 A.2d 581 (1997); *Beck v. Zabrowski*, 168 Pa. Commw. 385, 650 A.2d 1152 (1994).

NEGLIGENCE

The placement of a utility pole, under certain circumstances may constitute negligence. In such cases the conditions of the highway are critical in determining whether the location of a utility pole constitutes an unreasonable risk of harm. *Scheel v. Tremblay*, 226 Pa. Super. 45, 312 A.2d 45 (1973).

NEGLIGENCE

The distance of the pole from the curb does not per se constitute an unreasonably dangerous condition. "The question is whether the place chosen is so dangerous and the danger so needless that the choice becomes unreasonable" *Nelson v. Duquesne Light Co.*, 38 Pa. 37, 45; 12 A.2d 299 (1940).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 10285 - 1997

Appearances: William T. Jorden, Esquire for the Richters
Natalie Dwyer Haller, Esquire for GTE North, Inc.
Gary D. Bax, Esquire for Dunlop Tire Corp.

OPINION

Bozza, John A., J.

On April 5, 1993, Sandra Richter was operating her car along Water Street in Wesleyville Borough. Water Street is a one-way street and Ms. Richter was proceeding at a reasonable speed when she heard a "loud boom" noise and the vehicle was thrown into the utility pole owned by GTE North. The accident happened within seconds and her car traveled a distance of three to five feet into the pole. Ms. Richter has alleged that the accident was caused by a defective tire manufactured by the Dunlop Tire Corporation (Dunlop), and in turn, Dunlop has asserted that GTE North, Inc. (GTE), is responsible because of the improper placement of the utility pole. This matter is now before the Court on GTE's Motion for Summary Judgment. Both parties agree that there are circumstances under which a

utility company may be liable for the placement of a utility pole either on or adjacent to a highway. *Nelson v. Duquesne Light Co.*, 338 Pa. 37, 12 A.2d 299 (1940). However, since they have quite divergent views as to whether the facts of this case present such a circumstance, it is necessary to review the line of cases which have addressed this issue in Pennsylvania.

In 1973, the Superior Court in the case of *Scheel v. Tremblay,* 226 Pa. Super. 45, 312 A.2d 45 (1973), decided that placement of a utility pole ten (10") inches from the curb may, under certain conditions, constitute negligence. The Court stated, "In such cases, the conditions of the highway are critical in determining whether the location of a utility pole adjacent thereto constitutes an unreasonable risk of harm." *Id.* p. 48. In deciding that the trial court erred in granting summary judgment in favor of the defendant, the Court noted the following as evidence of the unreasonableness of the placement of the pole:

1. The narrowness and general contours of the road;
2. the lack of illumination of the pole;
3. the presence or absence of reflective markers;
4. the proximity of the pole to the highway;
5. the availability of less dangerous locations;
6. the natural tendency of westbound traffic to veer toward the middle of the road near the pole.

Id. p. 49.

In *Talarico v. Barnum*, 168 Pa. Commw. 467, 650 A.2d 1192 (1994), the court found that it was error to grant a compulsory non-suit concerning the placement of an electric pole which was struck by a driver who lost control of her vehicle. The pole had been placed eight (8') feet from the road in a location where the Pennsylvania Power and Light Company knew many cars had gone off the road. There was also expert testimony indicating that the terrain of the particular area did not justify placement of the pole at that location. The evidence also revealed that less dangerous alternative locations were available, and that placement of the pole was in violation of Pennsylvania Department of Transportation regulations and guidelines. *Id*, p. 1195.

In *Novak v. Kilby*, 167 Pa. Commw. 217, 647 A.2d 687 (1994), the Commonwealth Court upheld the trial judge's granting of summary judgment in favor of the telephone company in a case involving the placement of a utility pole five and one-half (5 1/2') feet from the edge of the pavement of the roadway. In *Novak*, a minor driver had lost control of his vehicle and crossed a two lane road, crashing into a wooden post, a cable guardrail and the telephone pole behind it. The court noted that there was no evidence that the driver was required to swerve to avoid the pole nor that there was anything about the way the road was laid out to indicate that cars were "funneled" towards the pole. *Id.*, p. 691. Notably, the evidence also indicated that the pole had "existed without incident for

nearly fifty years . . . ."

A grant of summary judgment is allowable only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Moreover, the court must view the record in the light most favorable to the non-moving party and the entitlement is clear and free from doubt. *Welsh v. Bulger,* 548 Pa. 504, 698 A.2d 581 (1997); *Beck v. Zabrowski,* 168 Pa. Commw. 385, 650 A.2d 1152 (1994).

Turning then to the facts of this case when viewed in a light most favorable to Dunlop, we learn that Mrs. Richter lost control of her car after hearing a loud noise and struck a pole owned by GTE which was placed nine (9") inches from the roadway. The road upon which she was traveling was a straight one-way street and there was no evidence of any past accidents or incidents involving that pole or any other pole along the roadway. The accident occurred at 2:30 p.m. and the visibility of the pole was not an issue. The vehicle suffered considerable damage along the right front portion of the passenger side of the vehicle. At the time of the accident, the American Association of State Highway and Transportation Officials (AASHTO) recommended that utility poles and other obstructions should be at least 1.5 feet from the curb. In addition, the Pennsylvania Department of Transportation has taken the position that it would be "desirable" for there to be four (4') feet between the curb and the utility poles. The utility right-of-way encompasses an area six (6') feet wide adjacent to the street. There is no evidence to indicate the reason for the pole's placement nor whether it was practically or financially feasible to have moved it or to have used some other modality to carry the cable. On this record, Dunlop's engineering expert concluded placement of the pole "created an unreasonable and foreseeable risk of collision to northbound motorists and was a substantial causative factor in the subject collision."

In *Nelson v. Duquesne Light Co.*, 38 Pa. 37, 45; 12 A.2d 299 (1940), the court quoted Judge Cardozo of the then New York Court of Appeals, who stated that in cases of this kind "the question is whether the place chosen is so dangerous and the danger so needless that the choice becomes unreasonable." Other than the fact that the pole was located approximately nine or ten inches from the curb, there is no evidence to suggest that the place chosen was dangerous, or if there was danger that it was "needless." There is nothing peculiar about the design or characteristics of Water Street that would lead to that conclusion. There was no history of accidents involving the pole, and no reason to believe that cars tended to go off the road in the direction of, or to be propelled near, the pole's location. In effect, it is Dunlop's position that the distance of the pole from the curb per se constitutes an unreasonably dangerous condition. There does not appear to be any support for this position in the case law of the Commonwealth.

While Dunlop argues that the AASHTO guideline suggesting the

minimum distance of 1.5 feet between the curb and the pole and PennDOT's statement of the desirability of a four foot distance between curb and pole are indications of a standard of care applicable to pole placement, such a conclusion is misplaced. Neither of those opinions are in the nature of regulations with which a utility is required to comply. More importantly, and particularly with regard to the PennDOT guideline, the statements speak only in the most general terms, not in terms of what should have been done in the particular circumstances of this case.[1] Therefore, there was no statutory or comparable duty which was violated. *See, Novak v. Kilby, Id.*, 167 Pa. Commw. at 690.

In each of the decisions discussed above where the court concluded that a jury could have properly found liability on the basis of the negligent placement of a pole by a roadway, there were conditions of the road or circumstances of the decision to place the pole, in addition to the pole's distance from the roadway, which could lead to the conclusion that the placement was unreasonably dangerous. In this case, there are no circumstances beyond the distance of the pole from the road which would allow a jury to find that GTE was negligent. To allow liability on the record before the Court would in effect establish a strict liability standard which would potentially apply to the placement of any pole, tree, fire hydrant, mailbox or other object located within a specified distance of a roadway. This the Court is not prepared to do and the Motion for Summary Judgment of GTE North will be granted and an appropriate Order shall follow.

ORDER

AND NOW, to-wit, this 5th day of September, 2000, upon consideration of the Motion for Summary Judgment filed on behalf of defendant GTE North, and argument thereon, and for the reasons set forth in the foregoing Opinion, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that the Motion for Summary Judgment is **GRANTED**.

By the Court,
/s/ **John A. Bozza, Judge**

[1] Assuming that the AASHTO standard is applicable, the difference between the 1.5 foot guideline and the 9 or l0 inch distance in this case is negligible in light of the obvious fact that the car driven by Mrs. Richter was thrown into the pole, and there is no reason to believe that the result would have been any different had the pole been 9 or 10 inches removed. This is apparent from the photos of the damage submitted as a part of the record.

MARY E. TAYLOR
v.
SANDRA J. SKIFF

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 12574 1997

MARY E. TAYLOR
v.
SCOTT BOJARSKI

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11657 - 1998

CIVIL PROCEDURE/POST TRIAL MOTIONS

Motion for a new trial is directed to the sound discretion of the trial court. Pa. R.Civ. P. 227.1. The court may only grant a new trial when the jury's verdict is so contrary to the evidence that it "shocks one's sense of justice" *Neison v. Hines,* 539 Pa. 516, 520, 653 A.2d 634, 636 (1995).

CIVIL PROCEDURE/POST TRIAL MOTIONS

A new trial will not be granted simply because of a conflict in testimony or because the court would have arrived at a different conclusion. *Nundleman v. Gilbridge,* 436 Pa. Super. 44, 647 A.2d 233 (1994).

CIVIL PROCEDURE/JURY VERDICT

It is entirely up to the jury to determine the credibility of witnesses. *Holland v. Zelnick* 329 Pa. Super. 469, 478 A. 2d 885 (1984). The jury is free to believe all, some, or none of the testimony presented by a witness. *Id*. At 521. It is the province of the jury to assess the worth of the testimony and to accept or reject the estimates given by witnesses *Elza v. Chouon,* 396 Pa. 112, 152 A.2d 238 (1959).

CIVIL PROCEDURE/POST TRIAL MOTIONS

The trial court, after viewing the record with all factual inferences decided in favor of the non-moving party, must determine whether the plaintiff is entitled to judgement as a matter of law or conclude that reasonable minds could not have differed that the outcome should have been in her favor. *Phillips v. A-Best Products Co.*, 542 Pa. 124, 665 A.2d 1167 (1995).

CIVIL PROCEDURE/POST TRIAL MOTIONS

When evidence is presented that calls the credibility of the plaintiff and her witnesses into question, the fact that an independent examining doctor stated injury occurred did not necessitate a new trial when no damages were awarded. The jury's duty is to determine the issue of credibility. With numerous challenges to the plaintiff's credibility, it was reasonable for the jury to conclude that the plaintiff failed to meet her burden of proving by a preponderance of the evidence that her injuries were caused by the

motor vehicle accidents in question.

CIVIL PROCEDURE/EVIDENCE

A review of the independent examining doctor's testimony demonstrated that his conclusions and observations were based on what he was told about the accident in question and the plaintiff's physical condition, along with what he learned from medical records. The doctor repeatedly indicated that he was relying in part on what the plaintiff had told him. Finally, it was revealed at trial that the plaintiff had denied significant prior accidents and prior medical problems, which contradicted plaintiff's prior representations. Therefore, the jury had reasonable evidence to conclude that the plaintiff was not injured as a result of either accident. Plaintiff's post trial motions requesting a new trial were denied.

Appearances: Kevin Colosimo, Esquire for Mary E. Taylor
Christopher J. Sinnott, Esquire for Sandra J. Skiff
Laura Stefanovski, Esquire for Scott Bojarski

OPINION

Bozza, John A., J.

The Plaintiff, Mary E. Taylor, was involved in two separate automobile accidents. The first accident occurred on September 12, 1995, involving defendant Sandra J. Skiff, and a subsequent accident occurred on May 6, 1996, with defendant Scott Bojarski. As a result of the first accident, Ms. Taylor claims to have injured her neck and back and to have suffered a head trauma resulting in a brain injury. Ms. Taylor further claims she experienced symptoms up to the time of the second accident with Mr. Bojarski and that the second accident aggravated each of her alleged injuries.

Both causes of action were consolidated and tried before a jury on June 20, 2000. Prior to trial, both Ms. Skiff and Mr. Bojarski admitted negligence. Therefore, the only issues addressed by the jury were causation and damages. The jury found that the defendants' negligence was not a substantial factor in contributing to the plaintiff's injuries and, consequently, did not reach the question of damages.

On July 3, 2000, Ms. Taylor filed a Motion for Judgment Non-Obstante Verdicto and Motion for New Trial.[1] She seeks a judgment against the defendants with regard to the issues of negligence and causation and she seeks a new trial for the limited purpose of determining the amount of her damages. In support of her position, Ms. Taylor asserts that the evidence

[1] Pursuant to Pa.R.Civ. P. 227.1, a Motion for Post-Trial Relief replaces a Motion for Judgment Notwithstanding the Verdict and a Motion for New Trial.

of causation was uncontroverted and therefore the verdict of the jury was against the weight of the evidence. It is the defendants' position that Ms. Taylor was not injured as the result of either accident, and that the record supports the finding of the jury.

A Motion for New Trial is directed to the sound discretion of the trial court. *Id.* The court may only grant a new trial when the jury's verdict is so contrary to the evidence that it "shocks one's sense of justice." *Neison v. Hines*, 539 Pa. 516, 520, 653 A.2d 634, 636 (1995). Moreover, a new trial will not be granted simply because of a conflict in testimony or because the court would have arrived at a different conclusion. *Nundleman v. Gilbridge*, 436 Pa. Super. 44, 647 A.2d 233 (1994). It is entirely up to the jury to determine the credibility of witnesses. *Holland v. Zelnick*, 329 Pa. Super. 469, 478 A.2d 885 (1984). " . . . [T]he jury is free to believe all, some, or none of the testimony presented by a witness." *Id.* at 521. *See also: Elza v. Chouon*, 396 Pa. 112, 152 A.2d 238 (1959). (It is the province of the jury to assess the worth of the testimony and to accept or reject the estimates given by witnesses." at 115). Specifically, concerning the "Motion for Judgment Non-Obstante Verdicto," the trial court, after viewing the record with all factual inferences decided in favor of the non-moving party, must determine if Ms. Taylor is entitled to judgment as a matter of law or conclude that reasonable minds could not have differed that the outcome should have been in her favor. *Phillips v. A-Best Products Co.*, 542 Pa. 124, 665 A.2d 1167 (1995).

In order to determine whether Ms. Taylor is entitled to the relief requested, it is necessary to closely review the evidence that bears on the issues presented to the court. Since the defendants stipulated to the issue of negligence, most of the testimony that was presented focused squarely on the nature and extent of Ms. Taylor's injuries. From the onset, her credibility was a central issue in the case. Indeed, the defendants vigorously challenged Ms. Taylor's position that she was unable to work or carry out various personal and household activities. Inconsistencies in her conduct were elicited, and defendant Sandra Skiff's expert, Dr. John P. Conomy, a neurologist, testified that she did not suffer any head injury as she had claimed, and that although she presented with exaggerated signs of pain and impairment, all objective indications of injury were negative. He described her as "a healthy woman." In light of her testimony in Court as well as her physical demeanor during the trial, Dr. Conomy's opinion of her state of health could not have been any more different from that which she portrayed to the jury. *See*, Deposition of Dr. John P. Conomy, pp. 54-56.

Ms. Taylor contends that because Dr. Conomy testified that she suffered some injury, (even though it was quite different from the injury that she claimed) that the jury erred by not finding that her injury was the result of the defendants' negligence. Because of Dr. Conomy's testimony, she argues that the fact that she was injured was "uncontroverted" by the

defendants. In support of her position, she points to the following testimony from Dr. Conomy's videotaped deposition:

Question: How about to the muscles of the neck or back?
Answer: Well, again, I don't mean to make a complex answer. She was involved in some accidents. There was a collision and a couple of them that I know about. She was jarred about - that seems perfectly reasonable - and had some symptoms thereafter. I think that she had some physical injury. . . .

See, Deposition of Dr. John P. Conomy, pp. 67-68, on May 30, 2000.

Question: Doctor, based upon your examination and your review of Ms. Taylor's medical records and the various diagnostic tests that you were presented, do you have an opinion as to whether Ms. Taylor suffered any injuries in the September, 1995, automobile accident?
Answer: Yes, I do.

Question: And what is your opinion?
Answer: Well, based on what I know of her, she was knocked about inside a vehicle and experienced physical symptoms as a result of it, you know, stress and strain on her bones and muscles and joints and ligaments. So was she injured to that extent, I believe she was.

Question: Is that based upon the history and your review of the records?
Answer: Yes, it is.

See, Deposition of Dr. John P. Conomy, pp. 70-71, on May 30, 2000.

Question: Now, Doctor, based upon your evaluation, -- well let's - back up for a minute. Let's talk about the May of 1996 accident for a moment. Doctor, do you have an opinion as to whether Ms. Taylor would have sustained any injuries in the accident of May of 1996?
Answer: The accident of May of 1996, as far as I can determine, was something like the one of 1995 in terms of her being a passenger, of being thrown about and having pain along her spine here and there. So my comments about it would be quite similar, were you to ask me as to the answers I've already given you as to what happened in 1995. It was not a serious set of injuries to her as far as I can determine.

Question: So let's talk about that a little bit, May of 1996. Do you have an opinion as to whether she would have sustained any injuries in that accident of May of 1996?
Answer: Of the same type she obtained in 1995. She was thrown about and jostled.

Question: Those of the soft tissue genre?
Answer: Yes. This is not to negate the fact that soft tissue injuries can hurt. They darn well may.

See, Deposition of Dr. John P. Conomy, pp. 74-76, on May 30, 2000.

Question: So in terms of the injury to the cervical region, you agree then that she did sustain an injury?
Answer: Yes, I do.

Question: And you simply disagree in terms of extent of that injury and duration of that injury, is that a fair statement?
Answer: I disagree in the terms of its effects. It's my opinion that that injury was not of a type that is going to produce lasting impairment or lasting disability. Now, having said that, I'm also of the opinion that she was hurt and that she had significant discomfort and temporary disability because of the accidents in which she was involved.

Question: But, it's your opinion that the duration of the injuries shouldn't be as described by her in her history; is that correct?
Answer: The duration of the disabilities shouldn't be as great as it is, yes.

See, Deposition of Dr. John P. Conomy, pp. 79-80, on May 30, 2000.

It is apparent on review of all of Dr. Conomy's testimony that in formulating his opinion concerning soft tissue injuries she may have suffered as a result of both accidents, he relied on what he had learned from others, including Ms. Taylor. He had not been her treating physician, and it was as a neurologist that he had conducted an independent medical examination. The medical records that he reviewed concerning the onset of her injuries were from the plaintiff's treating chiropractor, Dr. Young, and neurologist, Dr. Welles, both of whom testified at trial, and were subjected to extensive cross-examination by the defendants. Indeed, the opinions of both witnesses were strongly challenged. The opinion of an expert must be evaluated in light of the veracity and reliability of the information upon which it is based. e.g. Pa. Standard Jury Instructions (Civil) 5.31.

There were a number of areas where plaintiff's testimony was called into serious question. These included the following:

1. The nature and extent of her injuries.
2. The necessity of treatment.
3. Her ability to work.
4. The severity of the accidents.
5. The amount of her lost wages.
6. Limitations on her ability to carry out daily activity.

More specifically, the defendants introduced evidence directly and on cross-examination in which the jury could have concluded the following:

1. That the accidents in question were not as severe as suggested by the plaintiff.
2. That the records in support of her wage loss claim were not accurate.

3. That the records, including tax returns, did not support her position concerning how much she had been earning while employed as a masseuse.
4. That based on the testimony of her boyfriend and her daughter, she exaggerated the limitations on her activities.
5. That by failing to report pre-existing medical conditions to her physicians, they did not have an accurate picture of her health history and therefore the validity of their opinions was called into question.
6. The injury she complained of may have been the result of a previous car accident which had occurred within two years of the 1995 accident involving Sandra Skiff.

In *Neisen*, the Supreme Court stated:

> "We agree that the jury is free to believe all, some, or none of the testimony presented by a witness. However, this rule is tempered by the requirement that the verdict must not be a product of passion, prejudice, partiality or corruption, or must bear some reasonable relation to the loss suffered by the plaintiff as demonstrated by uncontroverted evidence presented at trial. The synthesis of these conflicting rules is that a jury is entitled to reject any and all evidence up until the point at which the verdict is so disproportionate to the uncontested evidence as to defy common sense and logic."

Id. at 520-521.

The essence of the jury's mission in this case was to determine issues of credibility. The record is replete with instances where the credibility of Ms. Taylor and her witnesses was challenged. The only evidence suggesting that the defendants agreed that she had suffered some injury comes from the testimony of Dr. Conomy. Given the foundation for his opinion, which was rooted in the conclusions and observations of others, it was entirely reasonable for the jury to conclude that the plaintiff failed to meet her burden of proving by a preponderance of the evidence that her injuries were caused by the motor vehicle accidents in question. Certainly, the evidence was not "so disproportionate to the uncontested evidence as to defy common sense and logic." *Id* at 521. Indeed, Dr. Conomy also provided testimony which would have allowed the jury to conclude that she was not being at all truthful about the state of her physical condition. In response to a question concerning his conclusions about Ms. Taylor, he stated:

> A. Yes. "Ms. Taylor's examination of January, 2000, by me is redolent with findings one expects to see in persons suffering hysteria, or who are malingering, that is, making a conscious effort to mislead.

> She has evidence of record to suggest that in the examination setting she is vague, that her responses in the context of examination are inappropriate."

See, Deposition of Dr. John P. Conomy, pp. 77-78.

In support of their request for a new trial on the issue of damages, the plaintiff substantially relies on the decision in *Mano v. Madden*, 1999 Pa. Super. 234, 738 A.2d 493 (1999). In *Mano*, a jury had found that an automobile accident was not a substantial factor in causing the plaintiff's injuries. The trial court awarded a new trial on the basis that the medical experts for both parties agreed that Mano had suffered some injury to his neck and back. Although the issue as to the accuracy of the plaintiff's medical history was in dispute, the trial court concluded that the evidence that he had suffered some injury was uncontradicted. However, the Superior Court noted that the defendant's expert medical witness did not base his opinion on the medical history related by the plaintiff. *Mano*, 738 A.2d at 497, fn. 2. It also appears that there was substantial objective indications of the plaintiff's injuries.

A review of Dr. Conomy's testimony demonstrates that his conclusions and observations were based on what he was told about the accident and Ms. Taylor's physical condition and from what he learned from her medical records. During his testimony, he stated as follows:

> Q: And what is your opinion?
>
> A: Well, based upon what I know of her, she was knocked about inside a vehicle and experienced physical symptoms as a result of it, you know, stress and strain on her bones and muscles and joints and ligaments. So was she injured to that extent? I believe she was.
>
> Q: Is that based upon the history and your review of the records?
>
> A: Yes, it is.

See, Deposition of Dr. John P. Conomy, pp. 70-71.

At other times, Dr. Conomy qualified his opinions by stating that his conclusion was "based on what I know of her," and "given the parameters of her injuries as I understood them from her and from her records." *See*, Deposition of Dr. John P. Conomy, pp. 70-71. Later on in his testimony he further noted, "Now, again, I don't have precise knowledge of the accidents. I am depending on what Ms. Taylor told me, that she was a passenger, she was jostled about, she hurt her back and her spine in each of these things. . . " *See*, Deposition of Dr. John P. Conomy, p. 84.

It is particularly significant to note that at the time she was examined by Dr. Conomy, she maintained that she was currently suffering from substantial pain to her back and neck and that she had suffered a brain injury, and that these conditions had been long-standing, from the time of the original accident and had been exacerbated as a result of the second accident. Following his examination of her, Dr. Conomy concluded that

she had no objective signs of any of the injuries of which she complained, including the head injury. Moreover, Dr. Conomy testified that Ms. Taylor had denied prior accidents and serious injuries, when in fact she had been injured as a result of at least three prior incidents, including a fall down thirteen stairs in May of 1986, an incident in 1992, and a motor vehicle accident in 1993. *See,* Deposition of Dr. John P. Conomy, p. 50. In that regard, Dr. Conomy testified as follows:

> Q: Did she tell you of any traumas or accidents or injuries that she had sustained to her head or her neck?
>
> A: She did not tell me, and I did ask if she had any prior injuries, any serious injuries. And, in fact, that is a point that is characteristically belabored in such examinations. She told me she did not have any serious prior injuries or accidents or illnesses.

See, Deposition of Dr. John P. Conomy, p. 50.

As noted above, evidence was introduced showing that as late as January, 1994, she was complaining of substantial problems with her neck and back as a result of the 1993 automobile accident.

It is also apparent that this case is readily distinguishable from the facts in *Neison v. Hines.* Here, the medical testimony in evidence was strongly contested and there was substantial evidence from which the jury could have concluded that Ms. Taylor was not being at all truthful. The jury could well have concluded, after considering the nature of the accidents, the manner in which she sought medical treatment, the nature of her complaints, and the course of her subsequent treatment, as well as the prior history of being injured in other incidents including an automobile accident in 1993, and after assessing her credibility, that she was not injured as a result of either the accident involving Sandra Skiff or Scott Bojarski.

With regard to Mr. Bojarski the Court would note that there was no medical testimony actually presented on his behalf. Dr. Conomy was a witness who was called to testify by Ms. Skiff. Mr. Bojarski did not present any medical testimony. There is no indication in the record that Mr. Bojarski agreed that Ms. Taylor suffered some injury as a result of the 1996 accident.

For all the reasons noted above, the Post Trial Motions of the plaintiff must be denied.[2] An appropriate Order shall follow.

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[2] This Court is also of the view that the plaintiffs took sufficient steps to raise and preserve for post-trial relief the issues presented, and that the holding in *Picca v. Kriner,* 435 Pa. Super. 297, 645 A.2d 868 (1994) is not applicable to the facts of this case.

ORDER

AND NOW, to-wit, this 3rd day of October, 2000, upon consideration of plaintiff Mary E. Taylor's Motion for Judgment Non-Obstante Verdicto and Motion for New Trial, and for the reasons set forth in the foregoing Memorandum, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that the Motions are **DENIED**.

By the Court,
/s/ **John A. Bozza, Judge**

JOSEPH J. MARSHALL, individually and as the Administrator of the ESTATE OF STEPHEN MARSHALL, and DORIS MARSHALL, individually

v.

ALLEGHENY RAILROAD and HAMMERMILL PAPER COMPANY

Federal Preemption/Federal Railroad Safety Act of 1970

Alleged failure to provide proper warning devices at railroad crossing; state action not preempted by federal law where no evidence offered to establish that warning devices installed with use of federal funds.

Post-Trial Motions/Causation

Sufficient evidence existed to establish causation where testimony regarding vegetation and limited visibility was offered.

Evidence/Pa.R.E. 407/Subsequent Remedial Measures

Evidence of subsequent improvements to grade crossing admissible to show control and feasibility.

Expert Testimony/Damages

Expert economist may not testify regarding the "total offset approach" for the determination of future lost earnings.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 14093 - 1999

Appearances: Steven E. Riley, Jr., Esquire
Gary J. Shapira, Esquire
Paul F. Burroughs, Esquire
Christopher J. Hoare, Esquire
James M. Girman, Esquire
William A. Dopierala, Esquire

OPINION

Bozza, John A., J.

This case is before the Court on defendants' Allegheny Railroad Company and Hammermill Paper Company's 1925(b) Statement of Matters Complained of on Appeal. Although this case has a long procedural history, the present issues arise as the result of a trial in which a jury awarded the estate of the minor plaintiff approximately $1,407,663.00 and the deceased child's mother and plaintiff, Doris Marshall, approximately $182,000.00. The jury also apportioned liability between the defendants and Doris Marshal.[1]

In summary the facts of this case indicated that Stephen Marshall was a passenger in a car operated by his mother, Doris Marshall, proceeding

[1] The jury's verdict was subsequently molded to reflect the apportionment of liability and the request for delay damages.

west on East 38th Street, when it struck a train operated by Allegheny Railroad and Hammermill Paper Company. Both Mrs. Marshall and her son were deaf. At the time of the accident there were no active warning devices alerting motorists to an on-coming train. There was a "crossbuck" in place, indicating the presence of railroad tracks and there were comparable markings on the highway. Stephen Marshall died upon impact, and his mother incurred a variety of injuries.

On appeal, the defendants raise numerous issues and the Court will address them in the following order:

I. Federal Preemption

The defendants argue that the Court erred by not granting its motions for judgment n.o.v., in limine and summary judgment on the basis that the Marshall's tort claims were barred by federal principles of preemption. Prior to trial, the Court had denied two motions for summary judgment on this issue, one explicitly on the basis that there were material issues of fact in dispute.[2] The trial record now provides a factual basis for determining whether the Marshalls' claims were preempted by federal law. There is no question that under certain circumstances, the application of the Federal Railroad Safety Act of 1970 (FRSA), precludes a state tort action for damages arising out of the failure to provide proper warning devices at railroad crossings. *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 113 S.Ct. 1732; 123 L.Ed.2d 387 (1993). In *Easterwood*, the plaintiff filed a wrongful death action for the death of her husband who was killed by a train when it collided with his truck in Georgia. She alleged that the railroad had failed to maintain adequate warning devices at a railroad crossing and that the train had been operating at excessive speed. The Supreme Court decided there are certain circumstances in which a state tort claim is barred by principles of preemption because of the application of FRSA and accompanying federal regulations. Specifically, the court concluded that the federal Secretary of Transportation had adopted a series of regulations pertaining to grade crossings and that federal funding had been made available for highway safety improvements, including improvements to railroad grade crossings. *Id*, p. 662, 666. The Supreme Court noted that states are obligated to comply with federal grade crossing standards in circumstances where federal funds participate in the installation of warning devices, or where regulations explicitly require it. *Id*, p. 666.

In determining whether Mrs. Easterwood's claim for her husband's death was preempted by federal law, the court closely considered the particular factual circumstances underlying the installation of the warning devices at the Cook Street crossing in Cartersville, Georgia. The court went on to

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[2] *See*, Orders of the Honorable Michael T. Joyce of August 1, 1997 and July 14, 1997.

conclude that the facts did not establish that federal funds "participated in the installation of the [warning] devices." *Id.* p. 672. This was so even though federal money was at one time earmarked for improvements to the crossing, but because of other funding issues, the money had been diverted to other projects. The Supreme Court decided that in those circumstances, Mrs. Easterwood's wrongful death claim was not preempted by federal law.[3]

More recently, the Supreme Court had occasion once again to address the issue of federal preemption in circumstances applicable to this case. In *Norfolk Southern Ry. Co. v. Shanklin*, 120 S.Ct. 1467, 146 L.Ed.2d. 374 (2000), the court revisited the issue of preemption in state tort claim cases involving allegations of inadequate warning devices at railroad crossings. *Shanklin* also involved a spouse's action for wrongful death resulting from a car train collision where it was alleged that there were inadequate warning devices. A critical distinction, however, was the fact that the warning devices that were in place at the time of the accident were installed with the use of federal funds intended for that purpose. The court concluded that the rules set forth in 23 C.F.R. § 646.214(b)(3) and (4) require that states meet federal standards for railroad crossing improvement, thereby establishing the standard for determining safety sufficiency. *Id.*, p. 1474.

Specifically, the court held as follows:

> "When the FHWA approves a crossing improvement project and the state installs the warning devices using federal funds, §§ 646.214(b)(3) and (4) establish a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject. At that point, the regulation dictates 'the devices to be installed and the means by which railroads are to participate in their selection.'"

Id. p. 1476.

The court went on to state:

> "It should be noted that nothing prevents a State from revisiting the adequacy of devices installed using federal funds. States are free to install more protective devices at such crossings with their own funds or with additional funding from the FHWA. What States cannot do - - once they have installed federally funded devices at a particular crossing - - is hold the railroad responsible for the adequacy of those devices."

Id.

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[3] With regard to Mrs. Easterwood's claim against the railroad for excessive speed, the Supreme Court did find that preemption barred her claim because of the applicability, of federal regulations concerning train speeds. The Marshalls have not made a claim against the defendants for excessive speed.

Turning then to the facts of this case, the record at trial yielded absolutely no indication of the participation of federal funds of any kind in the installation of the crossbucks at the crossing on East 38th Street. More specifically, there was no evidence to indicate that the Federal Highway Administration (FHWA) approved of the installation of the East 38th Street crossbucks and provided federal funds pursuant to § 646.214(b)(3). Contrary, to the assertion of defendants' trial counsel in its Memorandum of Law in Support of Consolidated Post Trial Motions, there was no testimony by anyone, including David C. Hart, an employee of the Pennsylvania Public Utility Commission, indicating that the crossbucks were installed as a result of a federally-funded "Statewide Crossbuck Reflecterization Program."[4]

There is a very well-established presumption against preemption that was recognized by the Supreme Court in *Easterwood. Id.*, p. 664. A federal statutory or regulatory scheme must more than "touch upon" or "relate to" the subject matter. *Id.* Both *Easterwood* and *Shanklin* established the relational standard for determining federal preemption pursuant to § 646.214(b)(3) and (4) in railroad crossing cases involving allegations of inadequate warning devices. There must be a showing that the warning devices adopted by the state were installed either as a direct result of the existence of a condition enumerated in (b)(3) or because of FHWA approval of the use of federal funds pursuant to (b)(4). *Id.* 1774. Neither of these circumstances were proven to have existed with regard to the East 38th Street crossing.

II. State Law Preemption

With regard to its claim of state law preemption, it would appear that it is the defendant's position that a tort action cannot be maintained against a railroad for the installation of inadequate warning devices because of the Public Utility Commission regulatory authority pursuant to 66 Pa.C.S.A. § 2702. While § 2707 provides that the PUC has the responsibility to:

> . . . "determine and prescribe, by regulation or order, the points at which, and the manner in which, such crossing may be constructed, altered, relocated, suspended, or abolished, and the manner or conditions in or under which such crossing shall be maintained, operated and protected, to effectuate the prevention of accidents and the promotion of the safety of the public."

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[4] While defendants allude to the existence of an affidavit provided as a part of their motion for summary judgment, that matter was resolved by the Honorable Michael T. Joyce, who found that there were material issues of fact in dispute and, at trial, that information was not introduced for the Court's consideration.

There was no evidence introduced at trial to indicate that the PUC had ordered or approved of the use of crossbucks as an appropriate warning device for the East 38th Street crossing. There is nothing contained in the statute which addresses any limitation on the right to pursue a tort claim against a railroad because of the PUC's regulatory authority. One of the assertions of the Marshalls at the time of trial was that the railroad failed to take sufficient steps to bring the dangerous nature of the crossing to the PUC's attention. Contrary, to the defendants' assertion in their post trial memorandum, there was no testimony at trial to indicate that the PUC approved of or participated in the adoption of a statewide crossbuck reflecterization program that resulted in the placement of the crossbuck at East 38th Street. On the other hand, there was testimony from a representative of the PUC which indicated that there was no PUC regulation which precluded Allegheny Railroad from installing warning lights at the crossing. Transcript, Day 3, page 20.

In a similar vein, the plaintiffs' claim concerning the failure of the railroad to properly clear the crossing of vegetation to provide an adequate sight distance was not addressed at trial by the defendants as a matter of PUC's regulatory authority. While Section 2702 directs the PUC to require every railroad to cut or otherwise control vegetation at railroad crossings to a certain standard, there was no evidence that the PUC has actually carried out its mandate, nor did the evidence indicate that the railroad controlled its vegetation to meet a PUC standard.

Consequently, the plaintiffs' tort claims were not preempted by state law.

III. Evidence of Causation

It is the defendants' position that the evidence established that defendant Doris Marshall was entirely responsible for the accident because she did not stop in time to avoid the collision. The jury found otherwise, concluding that the railroad was sixty (60) per cent negligent and that its negligence was a substantial factor in bringing about the death of Stephen Marshall and the injuries to his mother. The jury's verdict was supported by more than sufficient evidence, including the testimony of the general manager of the railroad, Gary Landrio, who acknowledged writing a letter to the Department of Transportation advising that the railroad was "extremely concerned about grade crossing safety" at the 38th Street crossing, *See*, Plaintiffs Exhibit 4. Mr. Landrio further testified the railroad had taken very little action to arrange for the installation of warning lights. Transcript, Day 2, pp. 144-150, et al.

In addition, other testimony was presented by a number of witnesses, including the brakeman for the train, who indicated that he had lost sight of the car approximately thirty-five (35) yards before he got to the road, and that he was only ten (10) to fifteen (15) yards away when he saw the car. On the issue of causation, testimony was also presented by Alice

Hodus and Mark Miller, who witnessed the accident and described the circumstances and the difficulties associated with seeing the train. Transcript, Day 3, pp. 29-35; 96-142. Their testimony was supported further by Richard Korzeniewski, who also testified concerning the limitations of the view of a driver approaching the tracks, and Mrs. Marshall. Transcript, Day 3, pp. 142-212. On the basis of that testimony alone, the jury could have found that the plaintiffs had met their burden on the issue of causation by the preponderance of the evidence. However, plaintiffs also introduced the testimony of Robert B. Mitchell, an expert in the field of railroad crossing safety, and accident investigation, who testified that the nature of the crossing in question was such that it provided limited visibility because of vegetation and the "upgrade" nature of the crossing. Transcript, Day 3, p. 241. He further testified that the presence of crossbucks is not intended by the railroad industry to warn drivers of on-coming trains, but to bring to their attention the fact that a crossing exists. *Id*. He went on to state following extensive cross-examination that the train would have not been plainly visible to Mrs. Marshall in a timely fashion. *Id*., p. 261.

In sum, there was abundant circumstantial evidence for the jury to conclude that Mrs. Marshall did not have sufficient time to see the train approaching and that, had there been an active warning system in the nature of flashing lights, that she would have been alerted in a timely fashion to the on-coming train. In reaching this conclusion, the Court must accept and view the evidence in the light most favorable to the verdict winner. *Murray v. Philadelphia Asbestos Corp.,* 433 Pa. Super. 206, 640 A.2d 446 (1994). Giving the Marshalls the benefit of all reasonable inferences of fact, it must be concluded reasonable minds could differ as to the outcome. *See, Moure v. Raeuchle,* 529 Pa. 394, 604 A.2d 1003 (1992). The jury chose to accept the plaintiff's position.

IV. Testimony of Plaintiff's Expert, Robert Mitchell

The plaintiffs called Robert E. Mitchell as an expert in the field of railroad crossing safety. Mr. Mitchell testified as to his credentials which included experience as a traffic engineer in New Jersey and his service as the chief of a regional traffic department for fourteen (14) years, in which he was responsible for safety at more than 2,200 railroad crossings. Defense counsel objected only to Mr. Mitchell's ability to provide testimony about the "expectations of what normal drivers do under any circumstances involving a crossing with crossbucks of the type involved in this case." Transcript, Day 3, p. 237. In effect, the Court sustained the objection by indicating that it would require an appropriate foundation before the witness was able to testify along the lines outlined by defense counsel. Thereafter, defense counsel objected on a number of occasions to the testimony of Mr. Mitchell, but at no time did he raise an issue concerning his failure to render an opinion to the requisite degree of certainty as the defendants

now assert on appeal. In order to raise an evidentiary issue, a party must timely object. The failure to do so waives the right to subsequently complain. *See*, Pa.R.E. 103(a)(1); *Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 322 A.2d 114 (1974). In any case, it was apparent from Mr. Mitchell's testimony that he was rendering an opinion based on his long involvement with railroad crossing safety and his familiarization with the standards of safety in the profession, and the facts introduced at trial or otherwise properly made known to him. See, Pa. R. E. 702, 703. Consequently, the defendant's position is without merit.

V. Evidence of Subsequent Remedial Measures Defendant's Financial Position and Evidence of Changes to a Different Railroad Crossing

The defendants objected to the introduction of evidence concerning improvements to the grade crossing that were made shortly following the accident resulting in Stephen Marshall's death. They argued that evidence of subsequent remedial measures is not admissible. The plaintiffs' position, which was accepted by the Court, was that such evidence was admissible to indicate the financial and practical "feasibility" of adding flashing lights to the crossing, as well as the "control" the railroad had over the decision to do it. This issue is controlled by the application of Pennsylvania Rule of Evidence 407, which states as follows:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove that the party who took the measures was negligent or engaged in culpable conduct in connection with the event. **This rule does not require the exclusion of evidence of subsequent measures when offered for impeachment or to prove other controverted matters, such as ownership, control, or feasibility of precautionary matters.**

Pa.R.E. 407. (Emphasis added).

The provision of rule 407 allowing the introduction of subsequent remedial measures evidence where it is introduced to show the feasibility of precautionary measures or control is directly applicable to this case.

Beside their claim that the accident was entirely the result of Mrs. Marshall's negligence, the defendants asserted that they acted diligently in trying to improve the safety of the crossing but couldn't do so because they were at the mercy of the Public Utility Commission's inaction. Alternately, they implicitly took the position that they couldn't add flashing lights because there was no federal money available for them to do it. In response, the plaintiffs offered to introduce evidence to show that within six (6) weeks of the accident, flashing lights had been installed and within six (6) days of the accident the PUC responded, and that somehow the railroad was able to prod the PUC to approve the change and find the

money to accomplish it. This development was against the background of the defendants' failure to ever make formal application with the PUC or take any other actions to encourage the PUC to approve of changes to the crossing. In addition, it was plaintiffs' contested position that the railroad could have taken the steps on its own, without PUC permission, to address and change what it had determined to be a dangerous condition. *See*, generally, Notes of Testimony, Gary Landrio, Day 1, pp. 156-180, Day 2, pp. 2-196.

The testimony of Gary Landrio, general manager of the Allegheny Railroad, revealed that sometime following the accident between October and January, formal application was made to the PUC to install flashing lights at the crossing. The application received prompt approval and funds were made available to pay for it, and the work was completed in short order. All of these occurrences were in direct contradiction of the defendants' position. As a result, the circumstances of the installation of flashing lights was admissible to show that it was entirely feasible for the defendants to have taken the steps necessary to move the project forward much more quickly than they did and to have had the lights installed prior to the fatal accident.

Similarly, evidence was admitted concerning the amount of revenue available to the railroad to make the proposed changes. It was the railroad's position that they had declined to make the changes because there was no federal funds available. However, plaintiffs' position was that the railroad could have expended their own money to do so but they chose not to. In that regard, plaintiffs introduced evidence by testimony and through the introduction of the company's annual report to demonstrate the availability of funds to install the lights.

Testimony was also introduced through Mr. Landrio to demonstrate the company did take steps to push the PUC and PennDOT to approve of the changes to the Shannon Road crossing, which had been listed along with 38th Street, as a location about which the railroad had safety concerns. The plaintiffs introduced that evidence to show that the defendants were in a position to expedite the process for improvements to the crossing at East 38th Street, but chose not to do so. Both with regard to the introduction of evidence of financial feasibility and the defendants' ability to expedite the installment of warning lights, the proffered testimony was relevant as it had a direct bearing on the plaintiffs' position that the defendants failed to take the necessary steps to effectuate the addition of warning lights at the East 38th Street crossing. *See*, Pa.R.E. 401.

VI. Cross-Examination of Gary Landrio

The defendants object that plaintiffs' counsel should not have been allowed to ask Mr. Landrio leading questions. Since Mr. Landrio was the general manager of the Allegheny Railroad at the time of the accident and responsible for overseeing the railroad's operations, including the safety of its grade crossings, it is obvious that he was an adverse witness and subject to the provisions of Pa. R.E. 61l(c), which states in pertinent part:

> When a party calls a hostile witness, an adverse party or a witness identified with an adverse party, interrogation may be by leading questions;

There is simply no doubt that, at a minimum, Mr. Landrio would be considered a witness identified with an adverse party and was subject to cross-examination.

VII. Remarks of the Court and Counsel "Within Earshot of the Jury"

Although not raised in post-verdict motions, it appears that the defendants are now expressing a concern that sidebar remarks were heard by the jury. The only reference to this in the record appears to be a statement by the defendants' attorney, who said that someone other than a juror had told him that they could hear sidebar conversations. There was nothing about the character of these discussions which led the Court to believe that they could be overheard in any meaningful way by the jurors. No further information or complaint about the matter was brought to the attention of the Court. Consequently, no error resulted.

VIII. Introduction of the Grade Crossing Handbook

Defense counsel objected to the presentation to witness Gary Landrio of a booklet entitled, "*Railroad Highway Grade Crossing Handbook, Second Edition,*" an edition published by the Department of Transportation, Federal Highway Edition. Mr. Landrio indicated that he relied on it as a standard reference for the Allegheny Railroad. He stated that the book was accepted in the industry noting that "it's a manual that the Federal Railroad Administration requires all railroads to use in issues dealing with highway railroad grade crossings." Transcript, Day 1, p. 165. After some time the defendants' attorney objected that the use of the book had not been disclosed in plaintiffs' "pre-trial memorandum." He stated that he was unfairly surprised. Transcript, Day 1, p. 166. After an attenuated discussion of the issue, the Court indicated that, "we'll talk about it before we get to it." Transcript, Day 1, p. 167. Although counsel indicated that he was prejudiced by its utilization, the discussion at sidebar served to indicate that he was familiar with it. Nonetheless, it does not appear that any meaningful reference was made to the book by the witness, nor was the book submitted to the jury, or further testimony relating to it developed. Consequently, there was no error in the reference to the book.

IX. Expert Economic Testimony

Both plaintiffs and defendants introduced expert economic testimony. The plaintiffs presented the testimony of Dr. Harvey Rosen, who testified concerning the economic loss associated with Stephen Marshall's death. As part of his testimony, he referred to plaintiffs' Exhibits 46, 47, and 48. The defendants have now raised for the first time an issue related to the admission of a "summary of figures" regarding the future lost earnings of Stephen Marshall, prepared by plaintiffs' economic expert, Dr. Rosen. They argue that the "summary" had not been disclosed to defendants

prior to trial. No where in the record of Dr. Rosen's testimony is there an objection to the introduction of any document prepared by him. Rather, the record reveals that defense counsel indicated that he had no objection to the introduction of Exhibits 46, 47 and 48. Transcript, Day 4, p. 103. Moreover, the economic report of Dr. Rosen was provided to the defendants as part of plaintiffs' pre-trial statement and that report contained a fair summary of his testimony at the time of trial. For these reasons, the allegations of error in this regard are without merit.

The defendants called Gary Barrach to testify concerning Stephen Marshall's economic loss. Mr. Barrach had attempted to explain to the jurors the "total offset approach" for the determination of future lost earnings. This is an approach that was adopted by the Pennsylvania Supreme in *Kaczkowski v. Bolubasz,* 491 Pa. 561,421 A.2d 1027 (1980). In that decision, the court rejected various approaches to the calculation of future lost earnings in favor of what it described as a "total offset method." The underlying theoretical assumption of this approach is that inflation is presumed to equal future interest rates, and thus offset each other in trying to calculate the present value of a future earnings damage award. *Id.,* p. 583. From the judicial point of view, this means that it is not necessary to provide jurors with an instruction that they need to discount lost future earnings by estimating future interest rates. As the court stated, "By this method, we are able to reflect the impact of inflation in these cases without specifically submitting the question to the jury."

In his testimony, Mr. Barrach made a number of references to his application of the law in determining the decedent's future lost earnings. He was admonished to avoid doing that, but he persisted and, in response to a question from plaintiffs' attorney, he described that he explicitly referred to as the "total offset method." Transcript, Day 5, p. 246. Whereupon the Court at sidebar reminded defense counsel that he had advised him previously to caution his client about such testimony. The Court then proceeded to provide the jury with a cautionary instruction. It had been the second reference in Mr. Barrach's testimony to the total offset method and it was clear to the Court at that time that the jury could very well be confused. The cautionary instruction was intended to direct their attention to the fact that they would ultimately have to follow the Court's instruction with regard to the manner in which economic damages would be determined. There was no objection to this instruction, nor was there an objection to the Court's direction to the defendants to have their witness avoid making statements concerning the law of economic damages in Pennsylvania. Based on the foregoing, the defendants' position is without merit.

Similarly, the argument that the Court should have provided an instruction to the jury concerning the "total offset method" is completely inconsistent with Pennsylvania law. *See, Kaczkowski v. Bolubasz*. 491 Pa. 561,421 A.2d 1027 (1980).

With regard to the suggestion that Dr. Rosen testified about Stephen Marshall's future wage loss without an adequate foundation, the Court notes that there was no objection on that basis ever brought to the Court's attention. Moreover, his opinions as provided were consistent with Pa.R.E. 703.

X. Plaintiffs' Attorney's Remarks To the Jury in Closing Arguments

It is the defendant's position that counsel's remarks to the jury concerning "federal taxpayers" and "free money" were inflammatory. However, the defendants have not indicated what the appropriate response of the Court should have been. The remarks referred to were not objected to by defense counsel. Transcript, Day 6, pp. 38-41. There was an objection raised to other comments made later in plaintiffs' counsel's closing argument, but they have not been raised on appeal. In addition, no request for a cautionary or limiting instruction was made at the close of the closing argument.

The nature of the comments of plaintiffs' counsel were directed to the central issue in the case which was the failure of the defendants to spend the money necessary to remedy the unsafe condition of the crossing of which they were aware. It was the plaintiffs' position that they had chosen not to install flashing lights at the crossing without first obtaining federal financial assistance. Moreover, plaintiffs introduced evidence that the railroad could have easily afforded the cost of the improvements and in effect, argued that a reasonable person in the position of the defendants would not have waited to secure government funding. While plaintiffs remarks were acerbic, they were directly related to an issue in the case and not so inflammatory as to have incited the passions of the jury to the degree that the jurors would have been unable to render a fair and impartial verdict.

XI. Photographic Exhibits

At the time of trial the defendants sought to offer into evidence defendants' Exhibits 10, 11 and 12, which were computer-enhanced photographs. The testimony of the defendants' expert witness, Mr. Ellsworth, was to the effect that he had constructed these photographs using a computer program and that they represented a composite of other photographs provided to him that were taken following the accident. The photographs depicted the grade crossing with the locomotive present on the track. The plaintiffs had objected on the basis that the photograph was misleading because it gave a false impression as to the view that Mrs. Marshall would have had of the approaching train. The photographs were admitted following an appropriate foundation and, subsequently, the Court provided an instruction advising the jury concerning the limitations of all the photographs and their ability to accurately depict the actual view of Mrs. Marshall at the time of the accident. The concern expressed by the plaintiffs was that the witness would utilize the photographs to express an

opinion as to what could be seen by the human eye in the circumstances of the accident. In response, the Court required that the defendants lay an appropriate foundation with Mr. Ellsworth before he could testify along those lines. With regard to the photographs themselves, they were admitted into evidence, therefore the nature of defendants' allegation of error is not clear. Transcript, Day 5, p. 302.

Concerning the photograph depicting the position of the speedometer needle in Mrs. Marshall's car following the accident, the Court required the defendants to lay a foundation indicating that the position of the speedometer needle following the crash would be a reasonably reliable indication of the speed of her vehicle at the time of the clash. This was not done. At the close of the defendants' case, the defendants' attorney asked to have the photograph moved into admission. No other mention of the photograph was made within the context of a witness' testimony. Therefore, the defendants' allegation of error in this regard is without merit.

XII. Commonwealth's Motion for Non-Suit

At the close of evidence, the Commonwealth made a motion for non-suit with regard to the Pennsylvania Department of Transportation and the Pennsylvania Public Utilities Commission. After discussion, the Court granted the motions and set forth its reasons on the record. In summary, the Court found that there was essentially no evidence to support a finding of liability of either agency. Transcript, Day 5, pp. 275-276.

XIII. Balance of Allegations of Error

Upon complete review of the record, the Court finds that the defendants' additional allegations of error, including allegations concerning "remittitur," molding of the verdict and delay damages, are all without merit.

As set forth above, the Court concludes that the allegations of error contained in defendants' Rule 1925(b) Statement are without merit and were properly rejected by the Court in response to the defendants' Post Trial Motion.

Signed this 17 day of July, 2000.

By the Court,
/s/ **John A. Bozza, Judge**

IN THE MATTER OF THE ESTATE OF DELORES H. SCYPINSKI, DECEASED

ESTATES/ABANDONMENT

A fiduciary acting with reasonable prudence and exercising honest judgment may abandon assets when the disadvantages of retaining the assets outweigh their benefit to the estate.

ESTATES/SUCCESSION

An heir who disclaims property eliminates himself and any of his heirs from participating in the estate.

ESTATES/ABANDONMENT

The effect of all heirs disclaiming their interest in the estate is equivalent to all the heirs having died before the decedents

ESTATES/INTESTACY

Where the residual clause fails to dispose of property an intestacy results and the Commonwealth becomes the statutory heir in default of the designated next of kin.

ESTATES/INTESTACY

The courts will not award a fund to the state as statutory heir unless it is fully satisfied that there are, in fact, no surviving next of kin.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION No. 105-2000

Appearances: Daniel J. Brabender, Jr., Esq. for the Estate of Delores H. Scypinski
Michael A. Fetzner, Esq. for Treasure Lake Property Owners Association, Inc.

OPINION

Connelly, J., September 19, 2000

FACTS

This matter is before the court pursuant to a Petition under Section 3312 of Probate, Estates and Fiduciaries [PEF] Code for Permission for Renunciation of Right to Administer Property filed by Janice M. Boksham, Executrix of the Estate of Delores H. Scypinski on March 9, 2000. Pursuant to the petition, the subject property consists of two parcels of real estate identified as Lot No. 62, Section 14, Treasure Lake, Sandy Township, PA (Clearfield County Deed Book 554, Page 675), and Lot No. 63, Section 9, Treasure Lake, Sandy Township, PA (Clearfield County Deed Book 554, Page 687), purchased by the Decedents, Raymond S. Scypinski and his wife, Delores H. Scypinski for $3,995.00 each in October of 1969. The Petitioner avers that in her reasonable judgment, the two lots are of no value to the Estate, and it would be in the best interests of the Estate to abandon such property. Further, Petitioner attached to the petition

Disclaimer and Renunciation Affidavits executed by all four (4) heirs to the Estate renouncing their right to accept the properties.

On April 27, 2000, Michael A. Fetzner, Esq. filed an Appearance and Answer to Petition for Permission for Renunciation of Right to Administer Property on behalf of Treasure Lake Property Owners Association, Inc. [hereinafter Treasure Lake].[1] This court granted Treasure Lake an opportunity to submit its position by brief to the court, which it subsequently filed on May 15, 2000. In its brief, Treasure Lake argues Section 3312 of the PEF Code is not applicable at bar in the absence of any evidence that the properties are of no value to the estate, and further contends Petitioner is not entitled to disclaim her responsibility to administer the properties in light of the fact the properties carry with them the obligation to pay annual assessments to Treasure Lake.

Treasure Lake also raises the issue regarding the disposition of the properties should this court allow the Executrix to renounce her right to administer the property, as well as the disclaimer of the four residuary beneficiaries, alleging that title to the properties, along with the responsibility to pay the annual assessments on the properties would then fall to the living children of the four residuary heirs.

LAW

The general rule is that a fiduciary must exercise common prudence, common skill and common caution in the performance of his duties. *In re Pearlman's Estate*, 348 Pa. 488, 35 A.2d 418, 419 (1944). "Accordingly, it is held that a fiduciary, acting with such reasonable prudence, may abandon assts." [sic] *Id. citing Provident L.& T. Co. v. Fidelity, etc., Co.*, 203 Pa. 82, 88 *et seq.*, 52 A. 34, 35 (an assignee for creditors abandoned an insurance policy); *Reynolds v. Cridge*, 131 Pa. 189, 18 A. 1010 (an executor abandoned an interest in a bond).

Presently Petitioner seeks to renounce her right to administer the two properties in question pursuant to Section 3312 of the PEF Code which reads:

> When any property is of no value to the estate, the court may authorize the personal representative to renounce his right to administer it.

20 Pa.C.S.§3312. The comments of the Joint State Government Commission to the prior law, Section 502 of the Fiduciaries Act of 1949, P.L. 512, 20 P.S. §320.103, containing the exact language as §3312, reveal that "[t]his section is *consistent with existing law* under which a fiduciary is not required to exercise his right to administer estate property when *in his reasonable*

[1] Attorney Fetzner initially filed his appearance for Treasure Lake, Inc. and subsequently filed a Corrected Appearance and Amended Answer on May 15, 2000 to reflect the proper title.

judgment it is inadvisable to do so." *Ulbricht Estate,* 50 D. & C. 2d 489, 492 (1970) (emphasis in original).

As noted above, the record at bar reveals the subject real estate is comprised of two undeveloped lots, purchased in 1969 by the Decedents, and located at Treasure Lake in Clearfield County, Pennsylvania. At the hearing held on this matter on April 20, 2000, the Executrix offered testimony as to the unsuccessful attempts at giving the lots away, and further noted that she was aware of several other individuals also trying to dispose of their lots at Treasure Lake for free. *N.T., Petition for Renunciation of Right to Administer Property, 04/20/00, pp. 8-9.*

In *Pearlman's Estate, supra,* the Pennsylvania Supreme Court reasoned that "an abandonment by a fiduciary is permitted when, and only when, there are relative advantages and disadvantages which present themselves to him, and call for judgment on his part as to whether the trust will be better off if he retains the property or surrenders it." *Pearlman's Estate,* 35 A.2d at 422. The Court commented that in all of the cases they reviewed, "the fiduciary was confronted with the alternative either of expending trust funds that in the end might prove to have been more than the asset which they were intended to preserve was worth, or of abandoning the trust asset altogether as the lesser of two evils." *Id.*

Treasure Lake contends Section 3312 has no applicability in the present case because, "there has been no proof whatsoever that the property which the Petitioner seeks to disclaim and renounce 'is of no value to the estate.'" *Respondent's Brief of Treasure Lake, Inc., p. 5.* Treasure Lake points to the fact that the Decedents paid approximately $4,000.00 for each lot over thirty years ago, and requests this court to take judicial notice that the land would have appreciated in value absent any environmental concerns. In essence, Treasure Lake's argument rests on Petitioner's failure to demonstrate the property is of no value.

However the language of the statute reads: "When any property is of no value *to the estate,....*" 20 Pa.C.S. §3312 (emphasis added). It has been held that Section 3312 "should prove helpful to personal representatives and to the estate when the personal representative hesitates about assuming the risk that his judgment to abandon property *for estate purposes* may prove to have been in error." *Ulbricht,* 50 D. & C.2d at 492 (emphasis added). Instantly the record reveals that in addition to the real estate taxes, an association fee is due to the Treasure Lake Property Owner's Association in the amount of $974.76, and a utility bill due in the amount of $67.18. Additionally, the record reflects the Decedents maintained the property "only to the extent that they paid the taxes, paid this annual assessment every year to the Treasure Lake Association." *N. T., Petition for Renunciation of Right to Administer Property, 04/20/00, p. 3.* Therefore, in accordance with Petitioner's right and responsibility to execute her administrative duties with the best interests of the Estate in mind, the

Executrix's concerns that these financial obligations attached to these undeveloped properties will perpetually burden and drain the Estate's assets are sufficient to employ the provisions of Section 3312.

Respondent Treasure Lake cites the case *Ulbricht Estate*, 50 D. & C.2d 489 (1970), wherein the court granted a petition by the administrator of an insolvent decedent's estate for leave to abandon certain real estate, which a local realtor, who refused to accept the land as a gift, testified it would cost more than the property is worth to make it livable. *Id.* at 491. Respondent also cites to *Roop v. Greenfield,* 352 Pa. 232, 42 A.2d 614 (1945) which involved an action against a mortgagor's widow as residuary devisee of mortgaged realty to recover taxes paid on the realty by mortgagee. The widow asserted that notwithstanding her husband's estate being insolvent, she had no knowledge that her husband was the owner of the property, and that upon ascertaining his ownership, she immediately disclaimed any interest in said property. *Id*. The court found these assertions to present a valid legal defense to the mortgagor's claim.

In both cases, the Respondent finds significant the fact that the estates were insolvent, thus supporting its argument that in order for the personal representative to renounce her right to administer the property, there cannot be any value attached to such property. However the language in both cases reveal that the focus of the court was more on the acceptance of the property by the devisee. In *Roop,* the Pennsylvania Supreme Court opined:

> There is no basis in human experience for inferring, from the mere act of giving or devising, that a designated recipient has accepted a gift or devise which is not only without any pecuniary value but which would be a financial millstone around his neck....With reference to the disclaimer, the question of importance is how promptly did the defendant act after she first ascertained that the property was a part of her deceased husband's insolvent estate.

Roop, 42 A.2d at 616. Moreover in *Ulbricht,* the court stated that "[n]o one has to accept an inheritance and no law prohibits an heir from abandoning an unwelcome fee after he has determined that to hold on to it would incur a never ending expense." *Ulbricht Estate,* 50 D. & C.2d at 495.

Instantly the record demonstrates the Executrix and other heirs to the property commenced attempts to disclaim and relinquish this property just after Delores Scypinski died on December 2, 1999. The Executrix testified that her brother visited the property shortly after their mother had passed away, and started to inquire as to the neighbors interest in the two lots. The petition for renunciation at bar was filed by the Executrix on March 9, 2000. Consequently, this court concludes the present disclaimer to the two lots located at Treasure Lake has been made within a reasonable time. *See Brinton Estate*, 36 D. & C.2d 679 (1965) (disclaimer held to have been made within a reasonable time where the decedent died December 11,

1962, and the life tenant disclaimed all right to invade principal on March 29, 1963). Therefore, by this renunciation, the Executrix and heirs are released from all obligations which an acceptance would have imposed on them. *Ulbricht Estate*, 50 D. & C.2d at 494.

As noted above, the Executrix in the instant case must *administer* the estate property with the best interests of the estate in mind. Relative to this principle, the Pennsylvania Supreme Court opined:

> That a fiduciary may abandon trust property is, of course, beyond question, the only requirement being that in so doing he exercise "reasonable prudence". . . Only in such cases, if the trustee, in the exercise of his honest judgment as to which is the better course to pursue, decides to abandon the trust asset, is he acting within his legitimate powers as a fiduciary.

Pearlman's Estate, 35 A.2d at 422. Accordingly, leave to abandon Lot No. 62, Section 14, and Lot No. 63, Section 9, located at Treasure Lake, Sandy Township, PA is granted.

In granting the Executrix and heirs permission to renounce and disclaim the property in question, this court must address the second issue raised by Respondent Treasure Lake, which concerns the disposition of the property. Respondent alleges the following portion of Section 6205(b) of the PEF Code controls this question:

> **(b) Rights of other parties.**-Unless a testator or donor has provided for another disposition, the disclaimer shall, for purposes of determining the rights of other parties, be equivalent to the disclaimant's having died before the decedent in the case of a devolution by a will ....

20 Pa.C.S. §6205(b). Pursuant to this language Treasure Lake maintains the "rules of succession would indicate that ownership of the lots would pass equally to the child or children of each of the four (4) residuary legatees...the effect of the disclaimers is to make the children of the Petitioners (grandchildren of decedent) responsible for paying the annual assessment to Treasure Lake, Inc." *Brief of Treasure Lake, Inc., p. 6.* Treasure Lake thus concludes that "should this Court grant the Petition herein, the two (2) lots in question must still be owned by someone. To hold otherwise would deny the Respondent, Treasure Lake, Inc. the right to collect the annual assessments." *Id.* at 8.

This court finds Respondent's argument to be in error in failing to include the language of Section 6205(a) which reads:

> **(a) In general.**-A disclaimer relates back for all purposes to the date of the death of the decedent or the effective date of the inter vivos transfer or third-party beneficiary contract as the case may be. *The disclaimer shall be binding upon the disclaimant and all persons claiming through or under him.*

20 Pa.C.S. §6205(a) (emphasis added). In *Matter of Estate of McCutcheon,* __ PaSuper. __, 699 A.2d 746 (1997), one of three children validly disclaimed her interest in the estate of her father. Since the accountant was unable to state whether the disclaimant had any issue, he awarded her one-third share to the Commonwealth of Pennsylvania, "which share was to be paid into the State Treasury and held in custodial capacity subject to refund." *McCutcheon,* 699 A.2d at 747.

The Appellant, as Administratrix, appealed this order arguing the trial court incorrectly applied Section 6205(a), "which explicitly states that a disclaimer is binding upon the disclaimant and the persons through and under the disclaimant whether known or unknown." *Id.* at 748. Therefore, the Appellant concluded that pursuant to Section 6205(b), there were only two interested parties eligible to participate in the distribution, the Administratrix, and her brother.

The Pennsylvania Superior Court, noting they need not go beyond Section 6205 for the proper resolution of the case, held that paragraph (a) had "the effect of eliminating the disclaimant and any of her heirs from participating in the estate in any fashion, unless it has passed to a trust or other fund at the direction of the decedent before his death and the effective date of disclaimer, as provided in Section 6205(b), which is consistent with the first sentence of Section 6205(a)." *Id.* at 750. Therefore the court concluded the disclaimant and her heirs were not to be included in the chain of succession or distribution and distribution under Section 2104, Rules of descent, pursuant to the disclaimer under Section 6205, was properly awarded to the remaining two siblings. *Id.*

Section 6205(b) extends the meaning of paragraph (a) to establish that in addition to fixing the presumed time of death of the decedent for purposes of the disclaimer and inheritance, it also establishes for that purpose the time of death of the disclaimant as predeceasing the decedent. *Id.* Thus, in the instant case, the effect of all of the heirs disclaiming their interest in the Estate, is equivalent to all of the heirs having died before the Decedents. Clearly the interest in the subject real estate could not accrue to individuals regarded by the law as already deceased.

Concerning the question of what disposition is to be made of the property in light of the disclaimers, this issue is controlled by Section 2514 of the PEF Code, "Rules of Interpretation," which the Pennsylvania legislature enacted in order to clarify the interpretation of testamentary documents. The statute provides that wills shall be construed in accordance with these rules "[i]n the absence of a contrary intent appearing therein." 20 Pa.C.S. §2514.

At bar, subparagraph (10) of Section 2514 is applicable and provides:

> A devise or bequest not being part of the residuary estate which shall fail or be void because the beneficiary fails to survive the

> testator or because it is contrary to law or otherwise incapable of taking effect or which has been revoked by the testator or is undisposed of or is released or *disclaimed by the beneficiary,* if it shall not pass to the issue of the beneficiary under the provisions of clause (9)[2] hereof, and if the disposition thereof shall not be otherwise expressly provided for by law, shall be included in the residuary devise or bequest, if any contained in the will.

20 Pa.C.S. §2541(10) (emphasis added). "Subparagraph (10) of Section 2514 applies when the testator has not demonstrated a contrary intent and when a different disposition is not expressly provided for by law." *Clifford Estate,* 72 D. & C.2d 401 (1975). Accordingly, the disclaimed property is to lapse into the residuary devise contained in the will.

However the only provision of the will, which contains language relative to the issue of disposition of the property reads:

> All of the rest, residue, and remainder of my estate, real, personal or mixed, of whatsoever kind and nature and wheresoever situate at the time of my decease, I give, devise, and bequeath, in equal shares to my children, JANICE MARIE BOKSHAN, JOHN A. SCYPINSKI, DENNIS J. SCYPINSKI, and DANIEL SCYPINSKI or to the survivor of them.

Last Will and Testament of Delores H. Scypinski, Item II. It is well-established that "where a testator has failed to make provision for a contingency which actually comes about, or to cover circumstances which did subsequently result, he must be regarded as having died intestate with respect thereto." *DeLong Estate,* 71 D. & C.2d 148, 150 (1975). Presently, as there is no other disposition of the residue, an intestacy results by implication. "The omission may not be regarded as accidental. It may have been the deliberate act of the testator." *In re Sando's Estate,* 362 Pa. 1, 66 A.2d 312, 314 (1949). Therefore, this court concludes that the failure of the residuary clause in this case to effectively dispose of the residue resulted in a partial intestacy, and the disposition of the subject property is to be governed by the provisions of 20 Pa.C.S. §2103 **Shares of others than surviving spouse**, which sets forth the law of intestate succession. The effect of this provision is to make the Commonwealth the

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[2] Subparagraph (9) of Section 2514 is inapplicable because subsection (9) is confined to a situation where a pre-residuary legatee has failed to survive the testator, an event which did not occur in this estate. Moreover, the Official Comment following Section 2514 reveals that the words "or is released or disclaimed by the beneficiary" have been added "through an abundance of caution to make it clear that such shares are included."

statutory heir in default of the designated next of kin. However "[t]he courts are extremely zealous in their efforts to protect the rights of a decedent's blood relatives and will not award a fund to the State as statutory heir unless it is fully satisfied that there are, in fact, no surviving next of kin." *Onyshochenko Estate*, 64 D. & C.2d 87, 89 (1973). Therefore, the Executrix is directed to file a report pursuant to Section 6.9.3. of the Erie County Local Orphans' Court Rules, which reads, in pertinent part, as follows:

> **6.9.3. Contents of Report.**
> The report shall be submitted at the audit and shall include substantially the following:
>
> (a) Unknown Distributee. If it appears that the identity or whereabouts of a distributee is unknown, or there are no known heirs, the fiduciary shall submit a written report at the audit, verified by the fiduciary or the fiduciary's counsel, in which shall be set forth:
>
> (2) In cases of intestacy, or where there are no known heirs, a family tree, as complete as possible under the circumstances, supported by such documentary evidence as the fiduciary has been able to obtain. The term "investigation", as used in this Rule, shall include inquiry of or to as many of the following as may be pertinent and feasible: residents of the household in which the decedent resided; friends and neighbors; beneficial organizations; insurance records; church membership, school records; social security, Veterans' Administration or military service records; naturalization records, if not native born; and such other sources of information as the circumstances may suggest.

Erie County Local Orphans' Court Rule, 6.9.3(a)(2).

ORDER

AND NOW, TO-WIT, this 19th day of September, 2000, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that the Petition Under Section 3312 of Probate, Estates and Fiduciaries Code for Permission for Renunciation of Right to Administer Property is **GRANTED** pursuant to the foregoing Opinion, and the Executrix of the Estate of Delores H. Scypinski is directed to dispose of the subject property in accordance with the applicable provisions of 20 Pa.C.S. § 2103 and Erie County Local Orphans' Court Rule 6.9.3(a)(2).

BY THE COURT:
/s/ Shad Connelly, Judge