ERIE COUNTY LEGAL JOURNAL

(Published by the Committee on Publications of the Erie County Legal Journal and the Erie County Bar Association)

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Reports of Cases Decided in the Several Courts of Erie County for the Year

2004

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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 JESS S. JIULIANTE ---------- Senior Judge
HONORABLE FRED P. ANTHONY ---------- Judge
HONORABLE SHAD CONNELLY ---------- Judge
HONORABLE STEPHANIE DOMITROVICH ---------- Judge
HONORABLE JOHN A. BOZZA ---------- Judge
HONORABLE ERNEST J. DISANTIS, JR. ---------- Judge
HONORABLE MICHAEL E. DUNLAVEY ---------- Judge
HONORABLE ELIZABETH K. KELLY ---------- Judge
HONORABLE JOHN J. TRUCILLA ---------- Judge

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v.

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and

NORTHWEST PENNSYLVANIA COLLEGIATE ACADEMY CHARTER SCHOOL, Appellee/Defendant

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 60046-2003

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and

PENNSYLVANIA GLOBAL ACADEMY CHARTER SCHOOL, Appellee

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 60052 - 2003

SCHOOL LAW / CHARTER SCHOOLS / APPEALS

According to the Pennsylvania Charter School Law, only a charter school applicant may appeal to the Charter School Appeal Board from the denial of a charter by the local school board. 24 P.S. §17-1717-A. There is no provision in the Charter School Law that permits an appeal to be taken from the grant of a charter by any party.

AGENCY LAW / APPEALS

Section 752 of Local Agency Law provides that any person aggrieved by an adjudication of a local agency who has a direct interest in such adjudication shall have the right to appeal to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure). 2 P.S. §752. This section does not apply to an appeal from the grant of a charter school application.

AGENCY LAW / CHARTER SCHOOLS / APPEALS

The CSL specifically provides that jurisdiction for an appeal from the denial of a charter school application by a local board of school directors lies with the Charter School Appeal Board. 24 P.S. §17-1717-A(i)(1). All

decisions of the Charter School Appeal Board may then be appealed to the Commonwealth Court of Pennsylvania. 24 P.S. §171-1717-A(i)(10).

AGENCY LAW / APPEALS

Section 751 of the Local Agency Law provides that this subchapter shall apply to all local agencies regardless of the fact that a statute expressly provides that there shall be no appeal from an adjudication of any agency, or that the adjudication of an agency shall be final or conclusive, or shall not be subject to review. 2 P.S. §751 (a).

AGENCY LAW / CHARTER SCHOOLS / APPEALS

Section 751 does not apply to an appeal from the grant of a charter school application, as the General Assembly chose to disregard this section, limiting the parties and setting specific appellate procedures for charter school applications. The legislature cannot bind future legislatures' authority. *Lobolito, Inc. v. North Pocono Sch. Dist.*, 755 A.2d 1287 (Pa. 2000).

CIVIL PROCEDURE / STANDING

To appeal an agency adjudication, the person must have been a party with the agency who is aggrieved by the action and has a direct interest in the subject matter of the proceeding. A party is aggrieved when adversely, directly, immediately and substantially affected by a judgment, decree or order. *ARIPPA v. PUC*, 792 A.2d 636 (Pa. Cmwlth. 2002).

Appearances:

At docket number 60046-2003:

Thomas P. Agresti, Esq., for Northwest Pennsylvania Collegiate Academy Charter School

Richard A. Lanzillo, Esq., for Board of School Directors of the School District of the City of Erie

Richard S. McEwen, Esq., and William R. Lloyd, Jr., Esq. for appellants/plaintiff

At docket number 60052-2003:

Joseph P. Conti, Esq., for Board of School Directors of Millcreek Township School District

Edwin W. Smith, Esq., for the Pennsylvania Global Academy Charter School

Richard S. McEwen, Esq., and William R. Lloyd, Jr., Esq., for appellants/plaintiffs

OPINION

Bozza, John A., J.

This matter is currently before the Court on Preliminary Objections filed

by Northwest Pennsylvania Collegiate Academy Charter School ("Collegiate Academy") and the Board of School Directors of the School District of the City of Erie ("Erie Board") to the Second Amended Statutory Appeal filed by the appellants/plaintiffs at docket number 60046 - 2003, and Preliminary Objections filed by the Pennsylvania Global Academy Charter School ("Global Board") and the Board of School Directors of Millcreek Township School District ("Millcreek Township Board") to the Amended Statutory Appeal filed by the appellants/plaintiffs at docket number 60052 - 2003. Both of these civil actions surround the creation of charter schools by both the City of Erie and Millcreek Township School Districts.

On May 28, 2003, the Erie Board granted the charter application of the Collegiate Academy, and on June 23, 2003, appellants/plaintiffs filed a complaint at docket number 60046 - 2003. This complaint included a count involving a statutory appeal under Local Agency Law, a count involving an action in mandamus, and an equity claim seeking a permanent injunction. On September 15, 2003, the appellants/plaintiffs filed a Second Amended Complaint, again alleging the same three counts. On June 17, 2003, the Millcreek Township Board granted the charter application of the Global Academy. On July 16, 2003, the appellants/plaintiffs filed a statutory appeal under Local Agency Law at docket number 60052 - 2003, and filed an Amended Statutory Appeal on September 17, 2003. In both cases, the appellants/plaintiffs are community members and taxpayers of the Millcreek Township School District ("MTSD"), teachers employed by the MTSD, parents of minor children currently enrolled in the MTSD, and members and/or officers of the Millcreek Education Association, the bargaining unit for the MTSD professional employees, and members and/or officers of the Erie Education Association, the bargaining unit for the professional employees of the Erie School District.

At issue in each of these statutory appeals filed by the appellants/plaintiffs is the allegation that the creation of these charter schools will cause financial harm to the MTSD, which may result in the raising of taxes, cutting of educational programs, diversion of financial resources, and layoffs of and/or lower compensation of professional staff in the MTSD. The Erie Education Association alleged it may suffer layoffs of and/or lower compensation of professional staff in the City of Erie School District. The preliminary objections filed on behalf of the various defendants in these two cases allege

1. the appellants/plaintiffs lack standing to assert their claims under the Pennsylvania Charter School Law, 24 P.S. §17-1701-A *et seq.*,

and under the Pennsylvania Local Agency Law pursuant to 2 P.S. §751 and §752 and 42 P.S. §933(a)(2);

2. the Court lacks subject matter jurisdiction over the matter;

3. the appellants/plaintiffs have failed to exhaust their administrative remedies under the Pennsylvania Charter School Law;

4. the appellants/plaintiffs failed to state a claim upon which relief can be granted;

5. the pleadings are legally insufficient to constitute a proper appeal; and

6. the pleadings lack specificity.

It is the finding of this Court that the appellants/plaintiffs lack standing to assert their claims, and the civil actions filed at both docket numbers shall be dismissed on that basis. Although the remainder of the defendants' preliminary objections need not be addressed, the standing question and the jurisdictional issue are closely related in the circumstances of this case and therefore a discussion of both is required.

According to the Pennsylvania Charter School Law ("CSL"), only a charter school applicant may appeal to the Charter School Appeal Board ("CAB") from the denial of a charter by the local school board. 24 P.S. §17-1717-A; *West Chester Area Sch. Dist. v. Collegium Charter Sch.*, 571 Pa. 503, 812 A.2d 1172 (2002); *Mosaica Acad. Charter Sch. v. Commonwealth*, 572 Pa. 191, 813 A.2d 813 (2002); *Pennsylvania Sch. Bd. Assoc., Inc. v. Zogby*, 802 A.2d 6 (2002). There is *no* provision in the CSL that permits an appeal to be taken from the *grant* of a charter by *anyone*. *West Chester*, 571 Pa. at 527, 812 A.2d at 1186; *Zogby*, 802 A.2d at 10-11. As the Pennsylvania Supreme Court recently stated

> The CSL is explicit as to the procedure a *charter applicant* must utilize to appeal the local board of directors' decision to *deny* a charter application. Id. at § 17-1717-A(i)(2)- (5). It also delineates the procedure to be utilized by the CAB on appeal from such decisions, id. at §§ 17-1717-A(i)(6)-(8), and directs that all decisions of the CAB be subject to appellate review by the Commonwealth Court. Id. at § 17-1717-A(i)(10). The CSL simply does not provide for an appeal from a local board of directors' decision to *grant* a charter. Upon examination of the CSL in its entirety, we agree with the Commonwealth Court that the Legislature's omission in this regard was deliberate. We decline to recognize an appeal procedure when the Legislature did not see fit to create one.

Mosaica, 572 Pa. at 200, 813 A.2d at 818-819 (emphasis in original).

As the charter applications were granted for both Collegiate Academy and

Global Academy in this case, there is no basis for a statutory appeal by *anyone*, regardless of whether the appeals were filed by the appellants/plaintiffs or the charter school applicants. Moreover, even if there had been a denial of the applications, appellants/plaintiffs are not the charter school applicants, and could not proceed under the CSL. The Pennsylvania Supreme Court in the recent cases of *West Chester, Mosaica*, and *Zogby* has clearly stated that the actions taken by the appellants/plaintiffs are not permitted under Pennsylvania law.

Appellants/plaintiffs also argue that they have standing under the Local Agency Law, 2 P.S. §752, which provides that "[a]ny person aggrieved by an adjudication of a local agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure)." The CSL specifically provides that jurisdiction for an appeal from the denial of a charter school application by a local board of school directors lies with the CAB. 24 P.S. §17-1717-A(i)(1). All decisions of the CAB may then be appealed to the Commonwealth Court of Pennsylvania. 24 P.S. §17-1717-A(i)(10). Appellants/plaintiffs have not offered a convincing rationale why the Court should extend the provisions in Section 752 to their appeal, where the CSL has specified an entirely different procedure. To find that the appellants have standing to file an appeal in the Court of Common Pleas would have the effect of creating a bifurcated system of appellate review, with appeals of denials of charters heard by one process and appeals of the granting of charters resolved through another. Moreover, adopting appellants view would result in establishing a class of litigants entitled to file statutory appeals far broader than that envisioned in the CSL. There is nothing in the CSL that would indicate that the legislature intended such an inconsistent and inefficient approach.[1] *See: Mosaica Acad. Charter Sch. v. Commonwealth*, 572 Pa. 191, 200, 813 A.2d 813, 818-819 (Pa. 2002) (Pennsylvania Supreme Court declines to recognize an appeal procedure for grant of charter when the Legislature did not see fit to create one).

Moreover, Section 751 of the Local Agency Law does not establish standing for the appellants/plaintiffs. Section 751 provides that

> ...this subchapter shall apply to all local agencies regardless of

[1] It should be noted, however, that the issue of whether a party has standing to institute an equity action is not a jurisdictional question. *Housing Auth. v. Pennsylvania State Civ Serv. Comm'n,* 556 Pa. 621, 632, 730 A.2d 935, 941 (1999) *(citing Jones Memorial Baptist Church v. Brackeen,* 416 Pa. 599, 207 A.2d 861 (1965)). This Court is not specifically reaching the question of jurisdiction.

> the fact that a statute expressly provides that there shall be no appeal from an adjudication of an agency, or that the adjudication of an agency shall be final or conclusive, or shall not be subject to review.

2 P.S. §751(a).

As the Erie Board correctly noted in its brief in support of its Preliminary Objections, the Local Agency Law, which was enacted in 1978, cannot limit the CSL, which was enacted in 1997. In choosing to limit the parties and set specific procedures for appeals concerning charter school applications, the General Assembly chose to disregard Section 751 of the Local Agency Law. The General Assembly was free to do so, as the legislature cannot bind future legislatures' authority. *Lobolito, Inc. v. North Pocono Sch. Dist.*, 755 A.2d 1287 (Pa. 2000) (legislature generally cannot enter into contracts and bind future legislatures). The Court will not override the General Assembly's clear legislative intent to create a specific procedure for charter school application appeals.

Finally, appellants/plaintiffs also fail to meet any of the traditional requirements for standing. As the Pennsylvania Supreme Court has explained,

> To have standing, the person must have been aggrieved. 'Standing' requires that the person be adversely affected by the matter challenged in order to assure that the person is the appropriate party to bring the matter to judicial resolution. To appeal an agency adjudication, the person must have been a 'party' with the agency who is 'aggrieved' by the action and has a 'direct interest' in the subject matter of the proceeding. A party is aggrieved when adversely, directly, immediately and substantially affected by a judgement (sic), decree or order. An association may have standing solely as the representative of its members and may initiate a cause of action if its members are suffering immediate or threatened injury as a result of the contested action.

ARIPPA v. PUC, 792 A.2d 636, 654 D. 30 (Pa. Cmwlth. 2002)(citations omitted).

The case of *West Chester* clearly illustrates taxpayers' interests are too far removed from the actions of the respective school boards to claim that they have a direct interest in the subject. In that case, the Commonwealth Court explained (and the Supreme Court affirmed) that "taxpayers' interests, based only on a *possibility* that taxes and services would be adversely affected, are too remote to provide a basis for intervention." *West Chester,* 760 A.2d at 467 (emphasis added). Appellants/plaintiffs similarly have only alleged a possibility that taxes may be raised, educational programs may be cut, and layoffs or reduced compensation of professional employees in both school

districts may result from the creation of the two charter schools. Although appellants/plaintiffs claim that MTSD directors have testified that losses to the MTSD will be in excess of $425,000 each year, this information is based solely on an opinion expressed by one of the MTSD directors at a meeting on the charter school application for Collegiate Academy. There is nothing in the pleadings before the Court to establish any kind of concrete impact that the formation of these charter schools will have on either school district. Without this information, the Court cannot find that appellants/plaintiffs have been aggrieved and therefore have standing.

An appropriate Order shall follow.

ORDER

AND NOW, to-wit, this 5 day of January, 2004, upon consideration of Preliminary Objections filed by the Board of School Directors of the School District of the City of Erie, and the Northwest Pennsylvania Collegiate Academy Charter School at Docket Number 60046- 2003, and Preliminary Objections filed by the Board of School Directors of the Millcreek Township School District, and the Pennsylvania Global Academy Charter School at Docket Number 60052 - 2003, and argument thereon, it is hereby **ORDERED, ADJUDGED and DECREED** that the preliminary objections asserting that the appellants/plaintiffs lack standing to assert their claims under the Pennsylvania Charter School Law, 24 P.S. §17-1701-A et seq., and under the Pennsylvania Local Agency Law pursuant to 2 P.S. §§751, 752 and 42 P.S. §933(a)(2) are **SUSTAINED** and the appellants/plaintiffs' cause of action at both docket numbers are hereby **DISMISSED.**

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

DEBRA COSTELLO SHARP, Plaintiff

v.

JAMES K. SHARP, Defendant

v.

ESTATE OF JAMES K. SHARP, MONIQUEM SHARP and BRYAN SHARP, Additional Defendants

CIVIL PROCEDURE / APPEALS

Issues not properly raised before the trial court are waived on appeal.

Issues raised for first time in a motion for reconsideration have not been properly preserved for appeal purposes.

FAMILY LAW / DIVORCE

Decedent was entitled to change beneficiary of life insurance policy during divorce proceedings and prior to execution of marital settlement agreement.

Petitioner failed to present sufficient evidence of decedent's alleged fraud where she merely thought that she was beneficiary of life insurance policy and where she did not present any evidence of decedent's alleged wrongdoing.

CONTRACTS

The general rules of contract apply to marriage settlement agreements (this could also be under family law/divorce heading).

The parties' intent is found in the express language of a contract, provided that the language is not ambiguous.

Parole evidence may only be used to resolve an ambiguity in the language of a contract.

A contract is not ambiguous merely because the parties have different interpretations of the contract terms.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION - DIVORCE NO. 12201-2001

Appearances: Edward J. Niebauer, Esquire for Plaintiff
William Van Scyoc, Esquire for Defendants

OPINION

December 31, 2003: This divorce matter is before the Court on Debra Costello Sharp's Statement of Matters Complained of on Appeal. Specifically, Ms. Costello Sharp appeals the October 22, 2003 Order of this Court, which denied her Petition to Enforce Marital Settlement Agreement and to Compel Disclosure of Insurance Benefits.

Ms. Costello Sharp and James K. Sharp (hereinafter "decedent") were married on May 27, 1978. They separated in 1980. Two children, Moniquem and Bryan, were born of their marriage. Ms. Costello Sharp filed a Complaint in Divorce on June 29, 2001.

With divorce proceedings pending, decedent, on March 24, 2003,

designated his daughter Moniquem Sharp as fifty percent beneficiary of his GE Security Life Insurance, GE Life & Accident Insurance, GE Accidental Death & Dismemberment Insurance, GE Plus Life Insurance, and GE Personal Accident Insurance (hereinafter collectively referred to as "GE Life Insurance") policies and his son, Bryan Sharp, as the other fifty percent beneficiary.

Thereafter, Ms. Costello Sharp and decedent entered into a Marriage Settlement Agreement (hereinafter "MSA"), dated April 8, 2003. Relevant to these proceedings is the "Life Insurance" provision of the MSA, which, in its entirety, provides:

> **LIFE INSURANCE**
>
> $8,000.00 will be taken off the top of any said payout/ distribution and shall go to Wife. Then out of the remainder Wife shall receive 50% of proceeds and the party's children, Bryan and Monique, shall each receive 25%.
>
> Husband agrees to keep wife as a beneficiary of his life insurance along with the couples' children, Bryan and Monique.
>
> If the life insurance beneficiary has not been changed by the time of Husband's death, Wife agrees to the above described distribution.
>
> Husband also agrees that if at any time should he withdraw any monies from any Life Insurance Policy that Wife shall receive an equal amount at that time.

On April 30, 2003, decedent died. By letter dated May 12, 2003, GE acknowledged Moniquem and Bryan Sharp as equal share beneficiaries of the GE Life Insurance. Thereafter, on June 20, 2003, Ms. Costello Sharp filed a Petition to Enforce Marital Settlement Agreement and to Compel Disclosure of Insurance Benefits alleging that the GE Life Insurance beneficiary designation was amended, excluding her as a beneficiary, in contravention of the MSA. Thereby, mother requested enforcement of the MSA via her redesignation as beneficiary of the GE Life Insurance and distribution of the GE Life Insurance in accordance with the MSA. By Order dated July 1, 2003, this Court ordered mother to join the Estate of James K. Sharp, as well as Moniquem and Bryan Sharp, as parties to the action. Mother joined the Estate, Moniquem and Bryan as additional defendants. On October 16, 2003, this Court heard arguments and testimony in this matter. By Order dated October 22, 2003, this Court denied mother's Petition to Enforce Marital Settlement Agreement and to Compel Disclosure of Insurance Benefits.

Thereafter, mother, on November 6, 2003, filed a Motion for Reconsideration alleging that decedent committed fraud by representing to Ms. Costello Sharp that she was listed as the sole beneficiary of the policy, when in fact she was not. Mother then filed a Supplemental

Motion for Reconsideration alleging that, on October 29, 2003, her counsel received correspondence and the original Election for Beneficiary, as well as the Amended Beneficiary Designation, that the Amended Beneficiary Designation did not have Ms. Costello Sharp's signature consenting to the change and that decedent represented at the time of execution of the MSA that Ms. Costello Sharp was still the beneficiary of the GE Life Insurance. By Order dated November 21, 2003, this Court denied Ms. Costello Sharp's Motion for Reconsideration.

Ms. Costello Sharp now appeals this Court's October 22, 2003 Order. In her Statement of Matters Complained of on Appeal, Ms. Costello Sharp raises the following assignments of error: (1) that the Court erred in failing to enforce the MSA when decedent committed fraud in order to induce Ms. Costello Sharp's execution of the MSA; and (2) that the Court erred by failing to recognize that decedent was contractually bound to keep Ms. Costello Sharp as a beneficiary of the GE Life Insurance.[1]

Although the October 22, 2003 Order was not accompanied by an opinion, it is supported by the evidence of record

DISCUSSION

For the following reasons, the Court will affirm its October 22, 2003 Order.

I. FRAUD

Ms. Costello Sharp alleges that this Court erred in failing to enforce the MSA when decedent committed fraud in order to induce Ms. Costello Sharp's execution of the MSA.

As an initial matter, this Court does not believe that Ms. Costello Sharp's fraud theory was properly raised before this Court and, therefore, it is not properly preserved for purposes of appeal. *In re Estate of Rosser*, 821 A.2d 615, 619-20 (Pa.Super. 2003)(in a case with initial claims that a contract should fail for lack of consideration or as illusory, claims that the contract was unconscionable and the result of undue influence were not preserved for appeal when they were raised for the first time on a motion for reconsideration). Ms. Costello Sharp first raised her theory of fraud in her Motion for Reconsideration and supplement thereto. She neither mentioned this claim at trial nor did she present evidence in support of the claim.

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[1] Although Ms. Costello Sharp's Statement of Matters Complained of on Appeal is numbered one through five, there are only two allegations of error. Statement of Matter numbered 4 is merely an assertion, which this Court is hearing for the first time in Ms. Costello Sharp's Statement of Matters Complained of on Appeal, and does not raise issue with any action of the Court. Statement of Matters numbered 2 and 3 are repetitive in that they raise the same issue as Statement of Matter number 1, namely that mother believes that the Court erred in failing to enforce the MSA, despite her allegation of fraud.

Regardless, there is not sufficient evidence of record to indicate that father's actions were fraudulent. Father changed the beneficiary of the GE Life Insurance policies during the divorce proceedings and prior to entering into the MSA, as he was entitled to do. *Oswald v. Olds,* 493 A.2d 699, 701 (Pa.Super. 1985). Ms Costello Sharp offered no testimony or evidence to indicate that decedent represented to her at the time of settlement that she was a beneficiary on the GE Life Insurance policies, that he intentionally concealed facts relevant to the beneficiary status or that he was even aware that Ms. Costello Sharp thought that she was a beneficiary of the GE Life Insurance policies. Instead, the only record evidence potentially relevant to fraud is Ms. Costello Sharp's testimony, which only indicates what she thought. *See* transcript of Petition to Enforce Marital Settlement Agreement and to Compel Disclosure of Insurance Benefits, October 16, 2003, at 3-6, 8. What Ms. Costello Sharp thought or expected, without any misrepresentation or wrongdoing by decedent, does not constitute fraud.

Therefore, this Court did not err in its decision not to enforce the settlement agreement on the basis of Ms. Costello Sharp's allegation of fraud

II. DECEDENT'S CONTRACTUAL OBLIGATIONS

Ms. Costello Sharp further argues that this Court erred by failing to recognize that decedent was contractually bound to keep Ms. Costello Sharp as a beneficiary of the GE Life Insurance. This argument is without merit because decedent could not be bound to keep Ms. Costello Sharp as a beneficiary of the GE Life Insurance policies when she was not a beneficiary of said policies at the time of the parties' Agreement.

The general rules of contract apply to marriage settlement agreements. *Tuthill v. Tuthill,* 763 A.2d 417, 419 (Pa.Super. 2000); *Reif v. Reif:* 626 A.2d 169, 73 (Pa. Super. 1993). The parties' intent governs the interpretation of the agreement. *Krizovensky v. Krizovensky,* 624 A.2d 638, 642 (Pa. Super. 1993). The intent of parties is found in the express language of the writing itself, provided that it is unambiguous. *Tuthill,* 763 A.2d at 419; *Krizovensky,* 624 A.2d at 642; *McMahon v. McMahon,* 612 A.2d 1360, 1364 (Pa.Super. 1992). The court is only free to receive extrinsic evidence, i.e. parol evidence, to resolve an ambiguity. *Tuthill,* 763 A.2d at 419; *Krizovensky,* 624 A.2d at 642. A contract is not ambiguous merely because the parties have different interpretations of its terms. *Id.*

Looking to the language of the MSA, this Court determined that it was the intent of the parties for Ms. Costello Sharp to receive $8,000.00 off of the top of any life insurance benefit distribution, plus fifty percent of the remainder of the proceeds, from any policy on which she was designated as a beneficiary as of April 8, 2003, the date of the parties' settlement. As the word "keep" in the MSA indicates, the parties only intended for Ms. Costello Sharp to be the beneficiary of any policy on which she was

designated as a beneficiary, as of the signing of the MSA. On any policy on which she was a named beneficiary as of April 8, 2003, her percentage benefits were to be changed to indicate that she was to receive $8,000.00 off of the top of the distribution plus fifty percent of the remainder of the proceeds. As of April 8, 2003, the signing of the MSA, Ms. Costello Sharp was not a designated beneficiary of the GE Life Insurance and, therefore, the MSA did not apply to the GE Life Insurance.

Moreover, the interpretation that Ms. Costello Sharp attempts to advance is not consistent with the spirit of the MSA. Were this Court to accept Ms. Costello Sharp's argument that the "Life Insurance" provision of the MSA applies to the GE Life Insurance policies, policies neither specifically named in the MSA nor upon which Ms. Costello Sharp was a designated beneficiary at the time of settlement, decedent could never have any life insurance for the benefit of anyone other than Ms. Costello Sharp and his children. The parties could not possibly have intended for the MSA to create a beneficiary status in *all* of decedent's life insurance, particularly considering the nature of the MSA. The MSA, in its entirety, preserves decedent's property, as well as Ms. Costello Sharp's. Of the major assets listed in the MSA, Ms. Costello Sharp was to receive only a 50% interest in the parties' marital residence and 50% of decedent's G.E., stock. As a result, the parties could not have intended to force decedent to list Ms. Costello Sharp as beneficiary of *all* of his life insurance. Instead, as the policy indicates, decedent was only obligated to keep Ms. Costello Sharp as a beneficiary of policies upon which she was already named as a beneficiary.

Therefore, this Court did not err in its interpretation of the MSA.

For the foregoing reasons, this Court affirms its October 22, 2003 Order.

BY THE COURT:

/s/ **ELIZABETH K. KELLY, JUDGE**

JOSEPH A. BENACCI and BERIT I. BENACCI, his wife, Plaintiffs

v.

JOHN V. SCHULTZ COMPANY, Defendant

CIVIL PROCEDURE / SUMMARY JUDGMENT

Summary Judgment may be granted only in those cases in which the record clearly shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.

CIVIL PROCEDURE / SUMMARY JUDGMENT

A Summary Judgment motion based on defendant's prior failure to properly verify its answer, new matter and counterclaim is rendered moot by the subsequent filing of the verification. This creates a properly verified, and valid, answer, new matter and counterclaim of record, which creates genuine issues of material fact.

CIVIL PROCEDURE / PREJUDICE

Plaintiffs will not suffer prejudice where the plaintiffs had previously filed a certification indicating that they were prepared to go to trial, and subsequently withdrew said certification; they will now have ample time to review the new verification in preparation for trial.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 13561-2001

Appearances: John Wingerter, Esquire
Roger Taft, Esquire

OPINION

Anthony, J., December 22, 2003

This matter comes before the Court on Plaintiffs' Motion for Summary Judgment and Motion in Limine. After a review of the record and considering the arguments of counsel, the Court will deny the motions. The factual and procedural history is as follows.

Plaintiffs Joseph A. and Berit I. Bennaci filed the instant lawsuit on October 8, 2001 alleging that Defendant had breached a commercial lease agreement. Defendant John V. Schultz Company, by and through former counsel, filed an answer and new matter including a counterclaim. The counterclaim alleged that structural damage at the commercial property caused flooding which damaged the area used for inventory delivery and customer pick-up. The answer and new matter were verified by former counsel, but no authorized representative of Defendant filed a verification. Plaintiffs filed a reply to the new matter on November 15, 2001.

In August of 2002, present counsel entered an appearance on behalf of Defendant. At a deposition in September, it became apparent that Defendant had not verified the answered new matter and counterclaim. Counsel for Defendant offered to file an amended answer which would

be verified by the client. Counsel for Plaintiffs did not object to the filing of an amended answer, but expressed his desire that the amended answer not change any of the allegations that were contained in the original answer. Counsel for Defendant interjected that there were new allegations of damages that had been discovered since the original answer had been filed. Counsel for Defendant then indicated that he would have his client review the answer and new matter to see if it could be verified. Despite several requests, the answer, new matter and counterclaim were never verified.

In spite of the fact that the answer, new matter and counterclaim remained unverified, Plaintiffs filed a Certification II in March of 2003 thereby indicating that the case was ready to go to trial with the exception of the fact that Defendant had failed to file a pre-trial narrative statement. Plaintiffs withdrew their request for certification later that month. In May of 2003, Plaintiffs filed a second Certification II. Plaintiffs then advised the Court that the parties had resolved the issues which had prevented the case from going to trial, and they asked that the case be certified for trial. The Court listed the case for trial during the August 2003 term of court. The Court then withdrew the case from the trial list after Plaintiffs indicated that they would be filing a motion for summary judgment.

On October 3, 2003, Plaintiffs filed the instant motion for summary judgment and motion in limine. Defendant filed responses to both motions. On November 25, 2003, Defendant filed an amended answer, new matter and counterclaim which was verified by the client. Argument on the two motions was held in chambers at which all parties were represented.

The standard for summary judgment is well settled. Summary judgment may be granted only in those cases in which the record clearly shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See Ertel v. Patriot-News*, 544 Pa. 93, 674 A.2d 1038 (1996).

In the case at bar, Plaintiffs contend that because Defendant failed to properly verify its answer, new matter and counterclaim there is no valid answer of record and thus there are no facts in dispute. While Plaintiffs are technically correct that the answer and new matter filed by Defendant violated Pa.R.C.P. 1024 in that it was not properly verified by the party, the Court finds that this defect has been rendered moot by the filing of the verification. Accordingly, there is now a properly verified, and valid, amended answer, new matter and counterclaim of record which creates genuine issues of material fact.

Plaintiffs contend that the verification should not be permitted at this late date because they would be prejudiced by the amendments to the answer, new matter and counterclaim. The Court does not find that Plaintiffs would suffer actual prejudice. As the Court noted above, Plaintiffs indicated that they were prepared to go to trial in August.

Additionally, this case will not now be tried until the February 2004 term, at the earliest. Thus, Plaintiffs will have had ample time to review the verification in preparation for trial. In the event that Plaintiffs discover they need additional information given the statements which have now been verified, Plaintiffs are free to request a continuance. As the Court finds that Plaintiffs will not be prejudiced by the acceptance of the verified amended answer, new matter and counterclaim, the motion for summary judgment is denied.

Plaintiffs' motion in limine is similar to their motion for summary judgment. Plaintiffs seek to preclude Defendant from offering any evidence regarding: (1) the unverified answer, new matter and counterclaim; (2) any matter contradicting unverified Answers to Plaintiffs' First Set of Interrogatories; (3) any matters relating to a report submitted by Schaffner, Knight, Minnaugh Company, P.C., relating to damages allegedly sustained by Defendant converting showrooms to warehouse space; and (4) all correspondence between counsel for the parties. Plaintiffs contend that because the answer, new matter and counterclaim had not been properly verified "allowing Defendant John V. Schultz Company to present any evidence on the aforementioned items would be prejudicial to the Plaintiffs by allowing the presentation of new causes and new damage elements not previously properly in issue before the Court and/or allow the jury to hear or view otherwise inadmissible material." For the reasons stated above, the Court finds that Plaintiffs will not suffer prejudice if Defendant is permitted to present evidence regarding either its original answer, new matter and counterclaim or the amended answer, new matter and counterclaim. Accordingly, the motion in limine is denied.

ORDER

AND NOW, to-wit, this 22 day of December 2003, it is hereby ORDERED and DECREED that Plaintiffs' Motion for Summary Judgment is DENIED. It is further ORDERED and DECREED that Plaintiffs' Motion in Limine is also DENIED

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

MAINLINE MECHANICAL SHEET METAL MANUFACTURING, INC., Plaintiff

v.

IROQUOIS SCHOOL DISTRICT, Defendant

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary judgment should only be granted in the case that is clear and free from doubt.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Where the non-moving party has failed to produce sufficient evidence to establish the existence of an element essential to the case, in which he bears the burden of proof, the moving party is entitled to judgment as a matter of law.

CONTRACTS / INTERPRETATION

Where the contract itself did not explicitly impose a duty upon the defendant to oversee the scheduling and coordination of the project, the court cannot conclude on a motion for summary judgment that an implied duty did not arise.

CONTRACTS / INTERPRETATION

The owner may have an implied duty to coordinate and schedule the work in certain circumstances where, for example, the owner ordered a contractor to proceed with the work.

CONTRACTS / INTERPRETATION

Where a genuine issue of material fact existed as to whether the defendant school district assumed the main contractor's responsibilities to schedule and coordinate work, summary judgment would be denied.

CONTRACTS / INTERPRETATION

The Separation Act, 71 Pa. C.S.A. §1618, was intended to protect materialmen who would become subject to the whim of dishonor or incompetent general contractors, not only in the procedures the general contractor adopted for award of the work, but also for payment of work done.

CONTRACTS / INTERPRETATION

Neither the Separation Act, 71 Pa. C.S.A. §1618, nor 24 Pa. C.S. §7-751 of the Public School Code precluded delegation of scheduling and coordinating activities on the project at issue; and there existed a genuine issue of material fact as to whether or not the defendant school district assumed the responsibilities of coordinating and scheduling work after the main contractor's default.

CONTRACTS / THIRD PARTY BENEFICIARY

Although the contractual language was not clear whether the plaintiff subcontractor was a third-party beneficiary or incidental beneficiary of the main contact between the school district and lead contractor, the plaintiff would not be precluded from pursuing a cause of action against the defendant school district where the facts are not clear whether the

school district undertook the duty and responsibility to schedule and coordinate the work upon the lead contractor's failure.

CONTRACTS / DAMAGES

Where there was a genuine issue of material fact as to the nature and extent of defendant's school district's actions and the plaintiff's ability to complete its assignments in a timely manner, summary judgments were denied despite a contractual provision stating that the delays or hindrances were intended to be remedied by extension of time only, not by monetary damages.

CONTRACTS / DAMAGES

Summary judgment would not be granted as to liquidated damages, where damages, liquidated or otherwise, could not be resolved because there were genuine issues of material fact as to (1) whether the defendant school district undertook the responsibility for coordination and scheduling of the contract after the lead contractor's default on its obligations and (2) whether either party is responsible for any delays.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 13188-2002

Appearances: Brian W. Ashbaugh, Esq. for Plaintiff
Anthony Sciarrino, Esq. for Plaintiff
Michael G. Bock, Esq. for Defendant
Gregory H. Teufel, Esq. for Defendant
Christine H. McClure, Esq., Solicitor for Defendant

OPINION

To some extent, the relevant factual history of this case is set forth in this Court's Opinion and Order of July 31, 2003. Subsequently, the defendant filed a motion for partial summary judgment. The plaintiff filed an answer to defendant's motion for partial summary judgment and a cross-motion for partial summary judgment. Briefs and exhibits were also submitted. Argument was conducted on December 15, 2003. This opinion and order follow.

I. LEGAL STANDARD

Summary judgment is governed by Pa.R.C.P. 1035.2. That Rule states, in relevant part:

> After the relevant pleadings are closed, but within, such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law
>
> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> (2) if, after the completion of discovery relevant to the motion,

> including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Summary judgment should only be granted in a case that is clear and free from doubt. *Ducjai v. Dennis*, 656 A.2d 102, 107 (Pa.1995).

Furthermore, the Pennsylvania Supreme Court has stated that

> Where the non-moving party has failed to produce sufficient evidence to establish the existence of an element essential to the case, in which he bears the burden of proof, the moving party is entitled to judgment as a matter of law.

Durtel v. Patriot-News Company, 674 A.2d 1038, 1042 (Pa.1996),

In that regard, Pa.R.Civ.P. 1035.3 provides, in part:

> (a) the adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty (30) days after service of the motion identifying
>
> (1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or
>
> (2) evidence in the record establishing the facts essential to the cause of action or defense which the motions cite as not having been produced.

II. THE PARTIES' MOTIONS

The Court will now address the parties' motions.[1]

> A. Whether summary judgment should be entered in favor of the defendant because it had no express or implied duty to schedule and coordinate or to force the lead contractor to do so.

In its July 31, 2003 Opinion and Order, this Court concluded that: "The contract does not appear to impose a duty upon the defendant to oversee the scheduling and coordination of the project. On the other hand, it does not prohibit the defendant from assuming those responsibilities." *Id.* at 4.

This Court still concludes that the contract itself does not explicitly impose a duty upon the defendant to oversee the scheduling and coordination of the project. Continuing, at this stage of the case, this

[1] This Court concludes that it is not necessary to address each argument presented. In some instances, this Court has combined the parties' positions into one discussion section.

Court cannot conclude that an implied duty did not arise.[2]

The defendant, citing *Broadway Maintenance Corp. v. Rutgers,* 447 A.2d 906 (N.J. 1982), points out at p. 7-8 of its brief in support of motion for partial summary judgment:

> The court held that the owner did not have the duty to coordinate the work of the prime contractors because the owner had effectively delegated overall responsibility for supervision of the work to the prime contractor identified as the general (prime) contractor and "the contractual scheme contemplated that if a contractor were adversely affected by delays, it could maintain an action for costs and expenses against a fellow contractor who was a wrong-doer." (citation omitted).

The operable portion of that opinion (which is persuasive but non-precedental) deals with the effective delegation of the overall responsibility for supervision of the work by the contractor. To prevail at this stage of the case, the defendant must demonstrate that there is no genuine issue of material fact in that regard. After this Court's review, it concludes that the defendant has not so demonstrated.

More to the point is the case of *Commonwealth of Pennsylvania State Highway Bridge Authority v. General Asphalt Paving Co.*, 405 A.2d 138, 140-41 (Pa.Cmwlth. 1979). There, the Commonwealth Court noted that a duty may arise if the defendant undertook certain steps to assume some of the duties. The defendant acknowledges that legal principal, but argues at page 12 of its brief that, "there is no evidence even approaching the type of assumption of duties that Penn-DOT did in the *Commonwealth of Pennsylvania State Highway Bridge Authority* through Penn-DOT's extensive involvement in the efforts to relocate the water main." The defendant further states, "through its discovery responses and its pretrial statement, Mainline has admitted, time and again, that the School District never assumed any of North Coast's duties and never took any affirmative action that impaired Mainline from performing its work." However, given the state of the record, this Court disagrees that the issue is "clear and free from doubt." Therefore, because a genuine issue of material fact exists

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[2] An implied duty to coordinate and schedule the work may arise in certain circumstances. *See, Gasparini Excavating Co. v. Pennsylvania Turnpike Commission,* 187 A.2d 157 (Pa. 1963) which held that an owner breached an implied obligation when he ordered a contractor to proceed with its work, despite the knowledge that the contractor's work would not begin due to the delay of a separate contractor; *C.H. Klinger, Inc. v. Commonwealth of Pennsylvania, Dept. of General Services,* 1991 WL 639437 (Pa. Bd. Claims) (when an owner enters into a contract and demands that a contractor perform in accordance with an approved progress schedule. . . and a delay is apparent, the owner breaches an implied contractual duty if it does not take those actions that are necessary to enable the contractor to perform in accordance with that schedule).

as to whether the defendant assumed North Coast's responsibilities to schedule and co-ordinate the work after North Coast's default, summary judgment is not appropriate.

> B. Whether summary judgment should be entered in favor of the defendant because it properly, fully and effectively delegated the scheduling and coordination duties to the lead contractor and related duties to the prime contractors.

The Court agrees with the defendant that there is no law precluding the assignment of the duty to schedule and coordinate to a lead contractor and the other prime contractors in contracts for renovations of school buildings. To the extent that the plaintiff relies upon 24 Pa.C.S.A. §7-751 of the Public School Code and 71 Pa.C.S.A. §1618 (Separation Act), to argue the contrary, it is mistaken. Mr. Justice Cappy (while a trial judge) properly described the intention of the Act when he stated:

> Furthermore, the Separation Act was intended to protect the materialmen who. . . would become subject to the whim of a dishonest or incompetent general contractor; not only in the procedures the general contractor adopted for the award of work, but also for payment of work done. Regardless of whatever bond would be supplied by a general contractor under the proposed procedure, materialmen and subcontractors need the protection guaranteed by the involvement of responsible public officials.

Mechanical Contractors Ass'n. of Eastern Pennsylvania, Inc. v. Southeastern Pennsylvania Transp. Authority, 654 A.2d 19, 121 (Pa. Cmwlth. 1995). (original citations omitted) As the Commonwealth Court noted:

> We agree with Justice Cappy and believe that the legislative purpose in enacting 71 Pa.S. §1618 was, *inter alia,* to protect the plumbing, heating, ventilating and electrical contractors from the potential of dealing with unscrupulous general contractors. Thus, we conclude that requiring the public entity to be the direct contracting party with these contractors best accomplishes this intention, and we hold that the trial court erred in denying Mechanical's motion for summary judgment.

Id. at 121-122.

This Court does not conclude that those statutes preclude delegation of scheduling and coordinating activities on a project such as this. However, there exists a genuine issue of material fact as to whether or not the defendant assumed the responsibilities of coordinating and scheduling after North Coast's default. Therefore, summary judgment should not be granted.[3]

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[3] Having made the determination that a genuine issue of material fact exists, the Court finds that it is unnecessary to specifically address the parties' other arguments on this point.

C. Whether the plaintiff was a third party beneficiary under the contract.

Section 00800-3.3.3.1 of the agreement states that, "Contractors whose failure to perform their Work or whose negligence in performing their Work impacts the other Contractors shall be responsible for damages incurred by other contractors that are necessary to maintain the project's schedules." In addition, Section 00800-3.10.1 requires the contractors to coordinate their work requirements with the lead contractor so that the progress of the project is not interrupted.

Based upon the contract language, it is not clear whether the Plaintiff is a third party beneficiary[4] or an incidental beneficiary. However, assuming arguendo that the plaintiff is a third party beneficiary this does preclude it from pursuing a cause of action against the defendant. Once again, because there is a genuine issue of material fact as to whether the school district by its actions undertook the duty and responsibility to schedule and coordinate the work upon North Coast's failure, summary judgment is not appropriate.

D. Whether summary judgment should be entered dismissing the plaintiff's claims for damages for delay and whether summary judgment should be entered in the defendant's favor on count three of the defendant's counterclaims.

The "no damages for delay" clause is found at Section 00800-8.3.4 of the contract. Paraphrasing that provision, delays or hindrances from any cause - avoidable or unavoidable - were intended to be remedied by extension of time only, not by monetary damages. Furthermore, the section provided that if the contractor chose to litigate this clause or issue and lost the litigation, the contractor was required to reimburse the owner and architect reasonable attorney's fees and expert witness fees and all other costs and expenses incurred by them for litigation.

In *Henry Shenk v. Erie County*, 178 A.2d 662 (Pa. 1935), the Pennsylvania Supreme Court, examining similar provisions, stated:

> [S]uch provisions have no reference to an affirmative or positive interference on the part of the owner or his representative apart from the contract, or ordinarily to a failure to act in some essential manner necessary to the prosecution of the work unless delay in performance is contemplated by the contract . . .
>
> It may be stated as a general rule that where an owner by an unwarranted positive act interferes with the execution of a contract, or where the

[4] See, *Scarpitti v. Weborg*, 609 A.2d 147, 149-50 (Pa. 1992), *Mechanical Insul Co., Inc. v. J. Marcellus & Co., Inc.*, 36 Pa. D.&C.2d 163 (Bucks Co. 1964). *Broadway Maintenance Corporation v. Rutgers, supra* at 909.

> owner unreasonably neglects to perform an essential element of the work in furtherance thereof, to the detriment of the contractor, he will be liable for the damages resulting therefrom.

Id. at 664-665.

After its review, the Court is constrained not to grant summary judgment because there is a genuine issue of material fact as to the nature and extent of defendant's actions and whether it interfered with the plaintiff's ability to complete its assignments in a timely manner.[5] See, *Gasparini Excavating Company v. Pennsylvania Turnpike Commission*, supra at 161-162; *Henry Shenk Company v. Erie County,* supra.

E. Whether either party is entitled to summary judgment with respect to liquidated damages.

The agreement and related documents contains two provisions which discuss liquidated damages. Article 3, paragraph 3.2 of the contract with the plaintiff states:

> LIQUIDATED DAMAGES SHALL BE $750 FOR EACH AND EVERY CALENDAR DAY'S DELAY FROM THE FINAL COMPLETION DATE.

In addition, the General Requirements Section found at paragraph 1.02K of section 01100 provides, in part, that liquidated damages are to be assessed "for each phase, as well as the final project completion date." (emphasis added). When these provisions are read in harmony with one another, there is no ambiguity.

Continuing, the issue of entitlement to liquidated damages (and any amount) cannot be resolved at this point because there are genuine issues of material fact as to: (1) whether the defendant undertook the responsibility for coordination and scheduling of the contract after North Coast defaulted on its obligations, and (2) whether either party is responsible for any delays. Therefore, summary judgment is not appropriate.

F. Whether Mainline is entitled to summary judgment and defendant's claim for liquidated damages should be dismissed because defendant failed to satisfy a condition precedent of submission of its claim to the architect.

The operable provisions of the agreement are paragraphs 3.1, 4.3.2 and 4.3.3 of the General Conditions to Mainline's contract with defendant.

Paragraph 4.3.2 states:

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[5] Based upon the agreement, if the defendant would prevail, it would be entitled to reimbursement for attorneys' and expert witnesses' fees as well as costs associated with the litigation of that subsection.

> Decision of Architect. Claims ... shall be referred initially to the Architect for action as provided, in Paragraph 4.4. A decision by the Architect as provided in Subparagraph 4.4.4, shall be required as a condition precedent to arbitration or litigation of a Claim between Contractor and Owner as to all such matters arising prior to the date final payment is due. . .

Continuing, paragraph 4.3.3 provides:

> Time Limits on Claims. Claims by either party must be made within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be made by written notice. . .

Finally, paragraph 4.3.1 defines a "Claim" as follows:

> A claim is a demand or assertion by one of the parties seeking, as a matter or right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be made by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

Here, the plaintiff initiated the lawsuit. The defendant's counterclaims were raised in reaction to the lawsuit. Therefore, the above contractual provisions are not applicable and summary judgment is not appropriate.

III. CONCLUSION

Based upon the above, the Court concludes that it would be inappropriate to grant summary judgment in favor of either party.

ORDER

AND NOW, this 8th day of January 2004, for the reasons set forth in the accompanying Opinion, it is hereby ORDERED that the Defendant's Motion for Partial Summary Judgment and Plaintiff's Motion for Partial Summary Judgment are DENIED.

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

ARNOLD J. PENKSA, EXECUTOR OF THE ESTATE OF ARNOLD PENKSA, deceased

v.

GEORGE A. JENCIK

DECEDENTS, ESTATES AND FIDUCIARIES

REAL ESTATE

TRUSTS/CONSTRUCTIVE TRUSTS

If any person makes a legally binding agreement to purchase or sell real or personal estate and dies before its consummation, his personal representative shall have the power to consummate it, but if he does not do so, the court, on the application of any party in interest and after such notice and with such security, if any, may order specific performance of the agreement if it would have been enforced specifically had the decedent not died. 20 Pa. C.S. § 3390(a).

A constructive trust arises when a person holds title to property subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he was permitted to retain it.

Decedent acquired an equitable interest to subject property by articles of agreement and, upon his death, the equitable interest passed to his estate, which was left in its entirety to decedent's spouse.

Past practice of parties to articles of agreement evidenced parties' intent to purchase property as tenants in common rather than tenants with the right of survivorship.

Court will impose a constructive trust in favor of party where opposing party titled land purchase as "tenants with the right of survivorship" rather than "tenants in common" when past practices' of parties evidenced that the parties equally shared financial obligations arising from ownership of subject property.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 13738-2000

Appearances: David J. Rhodes, Esq. for the Plaintiff
Eugene C. Sundberg, Esq. for the Defendant

OPINION

This matter is a non-jury trial in which the Plaintiff is seeking equitable relief in the form of a constructive trust on title to real property. Based on the record, Plaintiff's relief is GRANTED.

This matter involves the title to a bayfront cottage in which the parties experienced decades of enjoyment. The Defendant, George A. Jencik, along with his brother-in-law, Arnold S. Penksa purchased Cottage #8 on Lot #8 of Ferncliff Beach in Erie, Pennsylvania from Stanley Spara on May 29, 1973. The property on which the cottage sat was leased from the

Erie Western Pennsylvania Port Authority. Arnold S. Penksa and George Jencik were the sole lessees for Lot #8 with the Erie Western Pennsylvania Port Authority.

Arnold S. Penksa was married to George Jencik's sister, Helen. The Penksas lived in Garfield Heights, Ohio and were the parents of two children, Arnold J. Penksa and Donald Penksa. George Jencik has never married nor fathered any children. The parties used Cottage #8 largely as a summer fishing camp. Arnold S. Penksa and his wife Helen M. Penksa, along with their two boys, would spend mainly weekends at the cottage. It appears George Jencik, who had a more flexible schedule, spent longer periods of time at the cottage. Arnold S. Penksa and George Jencik evenly divided all expenses and costs of the ownership of Cottage #8. Helen M. Penksa would pay the bills and then settle up on an annual basis with her brother George Jencik.

It is clear from the time that Arnold S. Penksa and George Jencik purchased Cottage #8 on May 29, 1973 and entered into the lease with the Erie Western Pennsylvania Port Authority that they held the properties as tenants in common. In fact the family history reflects a true partnership, with the parties not only splitting the expenses but dividing the labor associated with the use of Cottage #8. The parties characterized George Jencik's role as doing the physical/manual labor of repairing the cottage while Arnold S. Penksa was described as the chief cook and bottle washer.

On February 5, 1999, Arnold S. Penksa and George Jencik entered into Articles of Agreement with the Port Authority to purchase Lot #8 of Ferncliff Beach. The closing was not consummated prior to Arnold Penksa's death on February 20, 2000. Arnold Penksa's Will left his estate to his surviving spouse, Helen Penksa. His Will did not make any specific mention of an interest in Cottage #8 or Lot #8. On August 1, 2000, Arnold J. Penksa was appointed personal representative of the estate of his father by Letters of Authority from the Probate Court of Cuyahoga County, Ohio.

Shortly after her husband's death, Helen Penksa became ill and in need of medical treatment. George Jencik was aware of his sister's medical condition because he visited her in the hospital.

Meanwhile, George Jencik hired Attorney Joseph Martone to represent him in the purchase of Lot #8 of Ferncliff Beach pursuant to the Articles of Agreement entered into on February 5, 1999. Based on the Articles of Agreement, Attorney Martone explained to George Jencik the various ways title to Lot #8 could be held. Unfortunately, Attorney Martone did not have the same discussion with Helen Penksa or any representative of the estate of Arnold S. Penksa. Instead, acting solely on instructions from George Jencik, Attorney Martone had the deed to Lot #8 titled to George Jencik and Helen Penksa as joint tenants with the right of survivorship. Further, there were no discussions between George Jencik and Helen

Penksa or a representative of the estate of Arnold S. Penksa about how title should be taken to Lot #8

The closing on Lot #8 occurred on May 11, 2000. The deed to Lot #8 was prepared by Attorney Richard Levick, representing the Port Authority. Based on the information from Attorney Martone, Attorney Levick prepared the deed with grantees as George Jencik and Helen Penksa as joint tenants with the right of survivorship. Helen Penksa did not participate in the closing. The settlement statement was executed only by George Jencik. The entire purchase price for Lot #8 was paid by George Jencik.

There is nothing of record to establish that Helen Penksa was ever aware of how Lot #8 was actually titled at the closing on May 11, 2000. Nothing in the record establishes that Attorney Martone or George Jencik provided a copy of the executed deed to Helen Penksa or the representative of the estate of Arnold S. Penksa.

Helen Penksa died testate on June 22, 2000. She left all of her assets equally to her two sons. Her Will did not contain any provision leaving an interest in Cottage #8 or Lot #8 to her brother George Jencik. On August 1, 2000, Helen's son, Arnold J. Penksa was duly appointed personal representative of the estate of Helen Penksa by Letters of Authority from the Probate Court of Cuyahoga County, Ohio.

At some time after his sister Helen's death, George Jencik informed Arnold J. Penksa that he (George) owned the entire property to the exclusion of the Penksa family. Thereafter, Arnold J. Penksa, in his capacity as Executor of the Estate of Arnold S. Penksa, instituted this lawsuit seeking a constructive trust on the title to Lot #8.

The analysis of this case must begin with an examination of the chain of title to Lot #8. By virtue of the Articles of Agreement signed on February 5, 1999, Arnold S. Penksa and George Jencik acquired an equitable interest in Lot #8 of Ferncliff Beach. Helen Penksa acquired no interest since she was not a party to the Articles of Agreement[1]. When Arnold Penksa died on February 20, 2000, his interest in Lot #8 passed to his estate. By his Will, Arnold S. Penksa left all of his estate to his surviving spouse, Helen M. Penksa. Therefore any interest Helen M. Penksa could acquire to Lot #8 had to come through the estate of her husband.

Importantly, under the Probate, Estates and Fiduciary Code, the responsibility for passing title to Lot #8 rested solely with the personal representative of the estate of Arnold S. Penksa. See 20 Pa. C.S.A §3390. There is nothing of record establishing that the interest in Lot #8 had been distributed pursuant to Arnold S. Penksa's Will to Helen Penksa prior to

[1] Nor was Helen Penksa ever a named lessee on the lease with the Port Authority.

the May 11, 2000 closing or prior to Helen's death on June 22, 2000. Accordingly, neither Helen Penksa nor her estate ever acquired title to Lot #8.

Taking title as joint tenants with the right of survivorship was inconsistent with the entire history of the usage of this property by the parties. At all times the parties shared this property as tenants in common. From 1973 through 1999, George Jencik and Arnold S. Penksa were tenants in common on the lease with the Port Authority. They shared equally all expenses associated with Cottage #8 and Lot #8. George Jencik and Arnold S. Penksa signed the Articles of Agreement on a separate but equal basis consistent with their tenant in common history. Notably, there was no mention in the right of survivorship.

Factually, this Court finds that George Jencik was trying to outmaneuver his dying sister and his nephew Arnie Penksa for whom he did not care. While Helen Penksa may have been more intellectually astute then George Jencik, nonetheless, Jencik knew he would very likely outlive his dying sister. Despite having sufficient time and opportunity to do so, Jencik never specifically discussed with Helen Penksa the actual title to the property and never obtained her consent to the right of survivorship.

Jencik knew from his discussions with Attorney Martone that if the property were titled with the right of survivorship and his sister died, he would own the entire property to the exclusion of his despised nephew Arnold J. Penksa. Therefore, George Jencik instructed Attorney Martone to list the Grantee clause as joint tenants with the right of survivorship with the intent of depriving his nephews of the property.

After all, George Jencik had no children and thus the right of survivorship was meaningless to his nonexistent heirs. However, the right of survivorship was not meaningless to Helen Penksa. To the contrary, as evidenced by her Will and the family history of the usage of this cottage, Helen Penksa's intent was that her children would inherit her share of the property, not her brother.

Under these circumstances, a constructive trust is warranted. "A constructive trust arises when a person holds title to property subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he was permitted to retain it." *Koffman v. Smith*, 682 A.2d 1282, 453 Pa. 15 (1996). This Court finds George Jencik is unjustly enriched by receiving a one-half share of Lot #8 to which he is not entitled. Thus the following Order is entered.

VERDICT/ORDER

AND NOW to-wit this 22 day of December 2003, judgment is hereby entered in favor of the Plaintiff Arnold J. Penksa, Executor of the Estate of Arnold S. Penksa, against the Defendant George A. Jencik, and the

following relief is granted:

A constructive trust is hereby imposed upon the real property located at Lot #8 of Ferncliff Beach, Erie, Pennsylvania, as more fully described by deed dated May 9, 2000 and recorded in Erie County Record Book 703 at Page 250.

IT IS FURTHER ORDERED that within thirty days from the date herein, the Defendant George A. Jencik, shall convey title to the above property to himself and the heirs of Arnold S. Penksa, namely Arnold J. Penksa and Donald A. Penksa. This Deed shall reflect that George A. Jencik owns an undivided one-half interest in the property and that Arnold J. Penksa and Donald A. Penksa each own an undivided one-fourth interest in the property. All interests in this property are held as tenants in common.

IT IS FURTHER ORDERED that Arnold J. Penksa and Donald A. Penksa shall within ninety (90) days from the date of this Order pay to George A. Jencik one-half of all of the purchase price and closing costs incurred by the buyer at the closing on May 11, 2000, except the Penksas are not responsible for any attorney fees paid to Attorney Martone.

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

IN THE MATTER OF S.H. and Z.H., Minors
ADJUDICATED DEPENDENT

FAMILY LAW/CHILD CUSTODY

The Court is only required to conduct permanency hearings once a child is adjudicated dependent and removed from his or her parent's physical custody. 42 Pa.C.S.A. §6351.

FAMILY LAW/CHILD CUSTODY

The Appellate Courts have recognized that the Juvenile Court, pursuant to the Juvenile Act, 42 Pa.C.S.A. §6301 *et seq*., has broad and continuing jurisdiction to adjudicate in the best interests of children after an adjudication of dependency.

FAMILY LAW/CHILD CUSTODY

Pa.R.A.P. 1701(a) allows a Permanency Hearing during an appeal from a prior order challenging the adjudication of dependency.

FAMILY LAW/CHILD CUSTODY

A permanency hearing does not review the appropriateness of the initial adjudication and the initial disposition, but only looks at occurrences arising subsequent to the events precipitating appeal and assesses the child's best interest in light of the child's current situation. 42 Pa.C.S.A. §6351.

FAMILY LAW/CHILD CUSTODY

All statutory review hearings should continue at the prescribed intervals; generally a stay should not be ordered and proceedings halted pending the appeal. *In re H.S.W.C.-B. and S.E.C.-B.*, 836 A.2d at 8.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHANS COURT DIVISION
NOS. 150 and 151 of 2003

Appearances: Christine Jewell, Attorney for the children
Gerald J. Villella, Attorney for the parents
Michael R. Cauley, Attorney for the Agency

OPINION

March 8, 2004: Before this Court is J.H. and D.H.'s (hereinafter "Parents") request for a Permanency Hearing. Specifically, the parents request that the Permanency Hearing cancelled in this matter, because of the pendency of an Appeal of Adjudication/Disposition, be rescheduled.

BACKGROUND

S.H. and Z.H. (hereinafter "Children") were detained, by the Office of Children and Youth (hereinafter "Agency"), and adjudicated dependent. Thereafter, the Honorable Stephanie Domitrovich held a timely Dispositional Hearing and placed the children in foster care. On September 11, 2003, the parents filed an Appea l from the Disposition of

both children specifically challenging the Adjudication of Dependency. Said appeals are still pending before the Superior Court at docket numbers 1634 WDA 2003 and 1635 WDA 2003, consolidated *sua sponte*.

A Permanency Hearing in this matter was due to occur on or before February 15, 2004. However, the Agency sent notice to the parties canceling the Permanency Hearing in accordance with its position that, pursuant to the Superior Court decision *In re C.A.*, Consol. Appeal, No.1, No. 446, No. 511, Pittsburgh District (Pa. Super. 12/20/93), this Court lacks jurisdiction to hold such hearings while the Adjudication/ Disposition is on appeal. Thereafter, by correspondence dated January 16, 2004, counsel for the parents filed a request to reschedule the permanency hearing, alleging that this Court had jurisdiction to conduct a permanency hearing, despite the pending appeal, pursuant to the recent Supreme Court decision *In re H.S.W.C.-B and S.E.C.-B, Minors Appeal of: York County Children and Youth Services*, 836 A.2d 908 (Pa. 2003). By correspondence, dated January 26, 2004, the Agency reiterated its position that this Court lacks jurisdiction to modify the Dependency Order. Via correspondence, dated February 2, 2004, counsel for the children joined in the parents' request. By Order, dated February 6, the children cannot be scheduled during the pendency of the Appeal of Adjudication/Disposition. The Rule to Show Cause hearing was held before this Court on February 24, 2004.

DISCUSSION

As a general rule, "after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may no longer proceed further in the matter." Pa.R.A.P. 1701(a). Nevertheless, Pennsylvania Rule of Appellate Procedure 1701 allows lower court proceedings during an appeal in the following relevant circumstances:

> (b) After an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may:
>
> (1) Take such action as may be necessary to preserve the status quo...and take other action permitted or required by these rules or otherwise ancillary to the appeal or petition for review proceeding.
>
> (2) Enforce any order entered in the matter, unless the effect of the order has been superseded as prescribed in this chapter.
>
> (c) Where only a particular item, claim or assessment adjudged in the matter is involved in an appeal, or in a petition for review proceeding relating to a quasijudicial order, the appeal or petition for review proceeding shall operate to prevent the trial court or other government unit from proceeding further with only such item, claim or assessment, unless otherwise ordered by the trial court or other government unit or by the appellate court or a judge thereof as necessary to preserve the rights of the appellant.

Pa.R.A.P. 1701.

It is clear that jurisdiction exists to continue to hold permanency hearings, even though a prior order is on appeal.

A. *In re H.S.W.C-B. and S.E.C.-B., minors Appeal of York County CYS in York Court CYS*

First, in a dependency case, the Pennsylvania Supreme Court recently held that: "all statutory review hearings should continue at the prescribed intervals; generally, a stay should not be ordered and proceedings halted pending the appeal." *In re H.S.W.C.-B. and S.E.C.-B.* 836 A.2d at *8. In *In re H.S.W.C.-B and S.E.C.-B.* the York County Children and Youth Services (CYS) appealed the juvenile court's denial of its petition to change a goal of reunification of a mother and her children to adoption and to involuntarily terminate the mother's parental rights. *Id.* at *2. The trial court cancelled a scheduled review hearing and stayed all action until final disposition of the appeal. *Id.* The Superior Court quashed the appeal, holding that, because the order maintained the status quo, it was not a final appealable order. *Id.* The Pennsylvania Supreme Court reversed the Superior Court and held that orders granting or denying status changes, as well as orders terminating or preserving parental rights, are final when entered. *Id.* at *7. The Supreme Court further held that:

> In order to avoid gamesmanship, and because of the time needed for appellate review, all orders denying goal changes or termination of parental rights will remain in effect until overturned on appeal or rendered moot by a subsequent order. However, all statutory review hearings should continue at the prescribed intervals; generally, a stay should not be ordered and proceedings halted pending the appeal. As the best interest of the children is always paramount, the continued finger of the trial court on the pulse of the case is needed, even while the matter is appealed.

Id. at *7-8.

By referencing the recent Superior Court decision *In re M.D.*, 839 A.2d 1116 (Pa.Super. 2003), the Agency attempts to limit application of *H.S.W.C.-B.* to change of goal and termination of parental rights proceedings. In *In re M.D.*, the Superior Court refused to extend application of *H.S.W.C.-B.* to allow appeals of orders of commitment following an adjudication of delinquency. *In re M.D.*, 839 A.2d at 1122. The *In re M.D.* Court made its distinction on the basis that it is faced with delinquency, rather than dependency proceedings. *Id.* The Superior Court further explained that *H.S.W.C.-B.* requires the continuation of *all periodic review hearings* during an appeal of a dependency matter. *Id.* at 1121-22. Therefore, the Agency's position is without merit.

The direction of this State's Supreme Court in *In re H.S.W.C.-B and S.E.C.-B* is strikingly clear to this Court. Accordingly, permanency hearings shall continue during the pendency of an appeal.

B. Pennsylvania Rule of Appellate Procedure 1701

This Court finds its application of *In re H.S.W.C.-B. and S.E.C.-B* .consistent with Pa.R.A.P. 1701. First, this Court, by proceeding with review hearings as required by 42 Pa.C.S.A. § 6351(e), is acting to enforce the dependency adjudication and to preserve the status quo established by said adjudication. Pa.R.A.P. 1701(b)(l) and (2). A court is only required to conduct permanency hearings once a child is adjudicated dependant and removed from his or her parents' physical custody. 42 Pa.C.S.A. § 6351. Accordingly, by holding a permanency hearing, this Court accepts the dictate of the appealed Order, namely that clear and convincing evidence existed to declare the child dependent and that the evidence demonstrated a clear necessity for removal, and thereby enforces the adjudication and disposition and preserves the status quo of said determination.

Similarly, Pa.R.A.P. 1701, in this case, only precludes further action on the decision to adjudicate the children dependent. As the appellate courts of this State have recognized, the Juvenile Court, pursuant to the Juvenile Act, 42 Pa.C.S.A. § 6301 *et seq.*, has broad and continuing jurisdiction to adjudicate in the best interests of children after an adjudication of dependency. *In re Byrae Lafay Griffin and Byron Todd Griffin*, 690 A.2d 1192,1199-1200 (Pa.Super. 1997) *citing In Re Tameka M.*, 580 A.2d 750, 752 (Pa. 1990). As the Superior Court stated with regard to the application of Pa.R.A.P. 1701 in dependency cases:

> Were we to accept [the][] argument that Juvenile Court is deprived of jurisdiction once an appeal of any aspect of a dependency action is filed, we would render the court powerless to prevent any abuse, no matter how egregious, of a dependent child at the hands of his custodian. Most dependency actions, and especially those as prolonged as the one currently at issue, involve a variety of issues, parties and Orders of court. A holding that deprives the Juvenile Court of jurisdiction merely because a single Order, involving any issue or party, has been appealed would not only defy logic, but it would also frustrate the statutory authority of Juvenile Court to exercise continuing independent and original authority to adjudicate in the best interests of a dependent child.

In re Griffin, 690 A.2d at 1200 (Pa.R.A.P. 1701 did not deprive Juvenile Court of jurisdiction to issue order removing children from pre-adoptive foster family's home, when pending appeals were of order terminating mother's parental rights and of order removing the children from the custody of their maternal grandmother, because each appeal raised a particular item or claim and the Juvenile Court was only precluded from proceeding with such item or claim).

In this case, the particular issue on appeal is the actual adjudication of dependency. Accordingly, pursuant to Pa.R.A.P. 1701(c), this Court

is only precluded from proceeding in a manner contrary to the Court's earlier finding of dependency. The Court, at a permanency hearing, does not review the appropriateness of the initial adjudication and the initial disposition but only looks at occurrences arising subsequent to the events precipitating appeal and assesses the child's best interest in light of the child's current situation. 42 Pa.C.S.A. § 6351

Therefore, Pa.R.A.P. 1701 does not preclude this Court from conducting a permanency hearing in this case.

C. Best Interest of the Children

Finally, the Court acknowledges that continuing jurisdiction is in the best interest of the children and that it is the children's interests which are of paramount concern to this Court. This court is required to conduct permanency hearings, in this case within six months of the date of the child's removal from his parents' care. 42 Pa.C.SA §6351(e). Without permanency hearings, children, as well as their parents, are left without access to the Court, the very entity that determines what is in the children's best interests and thereby governs the course of their lives. The Agency itself recognized that its stance deprives parents and children of access to the Court; it stated during oral argument to this Court that the parties do have an option and that is to withdraw the Appeal." This Court is not persuaded by such a proposition because it clearly demonstrates that, if this Court loses jurisdiction upon a party's filing of an appeal, the children's fate is left to the whim of the Agency, without the supervision of the Court. In essence, the parents and the children are punished for accessing the Courts while the Agency, another party to the action, is rewarded by receipt of unfettered control over the case while it is on appeal. This Court finds such a prejudicial result unacceptable.

D. *In re C.A.*

The Agency uses the Memorandum Opinion of the Honorable Superior Court, *In re C.A.*, Consol. Appeal, No. 1, No. 446, No. 511, Pittsburgh District (Pa. Super. 12/20/93) to support its eleven-year practice of canceling permanency hearings while an appeal from an adjudication of dependency is pending. However, even *In re C.A.*, supports the position that this Court takes today. The *In re C.A.* Court held that, after thirty days from issuance of an order, the trial court does not have jurisdiction to issue an order *rescinding or altering* an order being appealed, however, the lower court is authorized to continue disposition review hearings, despite appeal of such an order. *In re C.A.*, at 8. As discussed above, holding a permanency hearing does not rescind or alter an adjudication of dependency; instead, it enforces it.

The Agency further argues that this Court lacks jurisdiction to hold permanency hearings when the adjudication/disposition is on appeal because, if the Court ultimately elects to change the status of the children's placement it will change the status quo established by the

initial disposition of the children. In that regard, the Agency again relies upon *In re C.A.*, at p. 8, n.6. However, the issue of changing or maintaining the status quo is premature as this Court has not yet held the Permanency Hearing in this case and, therefore, has not even had the opportunity to consider changing the children's placement. Therefore, what constitutes "status quo" is not ripe for adjudication.[1] At this point, the Court merely notes that its actions in conducting permanency hearings is in accordance with Pa.R.A.P. 1701 by preserving the status quo of the initial adjudication and disposition. This Court will not disturb the fact of adjudication or the fact of disposition as those are the particular items on appeal.

Therefore, despite a pending appeal, all statutory review hearings shall continue to occur.

An appropriate Order will follow.

ORDER

AND NOW, to-wit, this 8th day of March 2004, upon consideration of the parents' request to reschedule a Permanency Hearing in this case, it is hereby ORDERED, ADJUDGED and DECREED that said request is GRANTED. The Agency shall immediately schedule this matter for a Permanency Hearing.

BY THE COURT:
/s/ **ELIZABETH J. KELLY, JUDGE**

[1] ln light of *In re H.S.W.C.-B. and S.E.C.-B,* it is now clear that if this Court were to issue an order creating a status change, it is a final and appealable order. Accordingly, the issue of changing the status quo is more appropriately raised once the Court has issued an order.

IN THE MATTER OF O. M., A Minor

APPELLATE PROCEDURE / JUVENILE DEPENDENCY

As a general rule, after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may no longer proceed further in the matter. Pa.R. App. P. 1701(a).

APPELLATE PROCEDURE / JUVENILE DEPENDENCY

In order to avoid gamesmanship and because of the time needed for appellate review, all orders denying goal changes or termination of parental rights will remain in effect until overturned on appeal or rendered moot by a subsequent order. However, all statutory review hearings should continue at the prescribed intervals; generally a stay should not be ordered and proceedings halted pending the appeal. As the best interest of the children is always paramount, the continued finger of the trial court on the pulse of the case is needed even while the matter is appealed.

APPELLATE PROCEDURE / JUVENILE DEPENDENCY

By proceeding with review hearings even after appeal, the court is acting to enforce the dependency adjudication and to preserve the status quo established by said adjudication. Pa.R.App.P. 1701; 42 Pa. C.S.A §6351(e).

APPELLATE PROCEDURE / JUVENILE DEPENDENCY

A court is only required to conduct permanency hearings once a child is an adjudicated dependent and removed from his or her parents' physical custody. Accordingly, by holding a review hearing, the Court of Common Pleas accepts the dictate of the appealed Order, namely, that clear and convincing evidence existed to declare the child dependent and that the evidence demonstrated a clear necessity for removal and thereby enforces the adjudication and disposition and preserves the status quo of said determination on appeal. Pa.R.APP. 1701; 42 Pa. C.S.A §6351.

APPELLATE PROCEDURE / JUVENILE DEPENDENCY

The Court of Common Pleas after appeal to Superior Court is only precluded from proceeding in a manner contrary to the court's earlier findings of dependency, abuse, and the need to remove the child from the parents' home. The Court of Common Pleas, at a review hearing after such appeal, does not review the appropriateness of the initial adjudication and the initial disposition but only looks at occurrences arising subsequent to the events precipitating the appeal and assesses the child's best interest in light of the child's current situation. Pa.R. App. 1701(c); 42 Pa. C.S.A. §6351.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA JUVENILE DIVISION NO. 220 of 2003

Appearances: Public Defenders's Office for the child
Elizabeth Brew Walbridge, Esq. for the mother
Kelly A. Mroz, Esq. for the father
Kenneth A. Zak, Esq. for the Office of Children & Youth

OPINION

March 8, 2004: Before this Court is C.C.'s (hereinafter "Mother") Motion for Custody and/or Redispositional Hearing.

BACKGROUND

O.M. (hereinafter "Child"), born October 2, 2003, was detained by the Office of Children and Youth (hereinafter "Agency") on October 29, 2003. Thereafter, the Master conducted a hearing and concluded that clear and convincing evidence did not exist to adjudicate the child dependent. The Honorable Stephanie Domitrovich did not approve the Master's finding and an Adjudication Denovo Hearing was scheduled.

On December 3, 2003, the Court entered a finding of abuse and adjudicated the child dependent. Thereafter, mother and S.M., the child's father, (hereinafter "Parents") filed a joint Motion for Reconsideration of Finding of Abuse. Following a December 17, 2003 Dispositional Hearing, Judge Domitrovich kept the child in foster care and issued a Rule to Show Cause why the Motion for Reconsideration should not be granted. Judge Domitrovich made said Rule returnable on January 14, 2004 before this Court.

At the January 14, 2004 Hearing, counsel for both parents indicated that they were new to the case and had not yet had an opportunity to speak with Dr. Gunnar Bergqvist, the plastic surgeon whose opinion was the subject of their Motion for Reconsideration. Therefore, both parents requested a continuance to which all parties agreed. On the record at the January 14, 2004 Hearing, this Court ordered that it would not review the determination made by Judge Domitrovich and that said determination would stand. Nevertheless, this Court granted a continuance to allow counsel the opportunity to review *additional* information. The Court then directed counsel of each of the parents to notify counsel of record when it would be appropriate to bring the matter before the court for an expedited hearing.

Thereafter, on January 16, 2004, the child filed an Appeal from the December 17, 2003 Disposition. On January 26, 2004, mother filed an Appeal from said Order. Both appeals are pending before the Superior Court at docket numbers 101 WDA 2004 and 243 WDA 2004, consolidated *sua sponte*.

DISCUSSION

As a general rule, "after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may no longer

proceed further in the matter." Pa.R.A.P. 1701(a). Nevertheless, Pennsylvania Rule of Appellate Procedure 1701 allows lower court proceedings during an appeal in the following relevant circumstances:

> (b) After an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may:
>
> (1) Take such action as may be necessary to preserve the status quo...and take other action permitted or required by these rules or otherwise ancillary to the appeal or petition for review proceeding.
>
> (2) Enforce any order entered in the matter, unless the effect of the order has been superseded as prescribed in this chapter.
>
> ...
>
> (c) Where only a particular item, claim or assessment adjudged in the matter is involved in an appeal, or in a petition for review proceeding relating to a quasijudicial order, the appeal or petition for review proceeding shall operate to prevent the trial court or other government unit from proceeding further with only such item, claim or assessment, unless otherwise ordered by the trial court or other government unit or by the appellate court or a judge thereof as necessary to preserve the rights of the appellant.

Pa.R.A.P. 1701.

In accordance with this Court's direction at the January 14, 2004 Hearing, this matter shall be scheduled for an expedited review hearing. This Court will not review the Adjudication, the Disposition, or the Finding of Abuse in this matter. However, this Court will hear any new information since the time of Disposition.

Based upon recent arguments before this Court regarding review hearings while an Adjudication/Disposition is on Appeal, this Court is familiar with the Agency's position that, pursuant to the Superior Court decision *In re C.A.*, Consol. Appeal, No.1, No. 446, No. 511, Pittsburgh District (Pa. Super. 12/20/93)(Mem. Op.), this Court lacks jurisdiction to hold such hearings while the Adjudication/Disposition is on appeal. However, for the following reasons, it is clear to this Court that jurisdiction exists to hold a review hearing in this matter.

A. *In re H.S.W.C.-B. and S.E.C.-B., Minors Appeal of York County CYS*

First, in a dependency case, the Pennsylvania Supreme Court recently held that: "all statutory review hearings should continue at the prescribed intervals; generally, a stay should not be ordered and proceedings halted pending the appeal." *In re H.S.W.C.-B and S.E.C.-B.* 836 A.2d at *8. In *In re H.S.W.C.-B. and S.E.C.-B.* the York County Children and Youth Services (CYS) appealed the juvenile court's denial of its petition to change a goal of reunification of a mother and her children to adoption and to involuntarily terminate the mother's parental rights. *Id.* at *2. The trial court cancelled a scheduled review hearing and stayed all action until final disposition of the appeal. *Id.* The Superior Court quashed the appeal,

holding that, because the order maintained the status quo, it was not a final appealable order. *Id.* The Pennsylvania Supreme Court reversed the Superior Court and held that orders granting or denying status changes, as well as orders terminating or preserving parental rights, are final when entered. *Id.* at *7. The Supreme Court further held that:

> In order to avoid gamesmanship, and because of the time needed for appellate review, all orders denying goal changes or termination of parental rights will remain in effect until overturned on appeal or rendered moot by a subsequent order. However, all statutory review hearings should continue at the prescribed intervals; generally, a stay should not be ordered and proceedings halted pending the appeal. As the best interest of the children is always paramount, the continued finger of the trial court on the pulse of the case is needed, even while the matter is appealed.

Id. at *7-8,

By referencing the recent Superior Court decision *In re M.D.*, 839 A.2d 1116 (Pa.Super. 2003), the Agency attempts to limit application of *H.S.W.C.-B.* to change of goal and termination of parental rights proceedings. In *In re M.D.*, the Superior Court refused to extend application of *H.S.W.C.-B.* to allow appeals of orders of commitment following an adjudication of delinquency. *In re M.D.*, 839 A.2d at 1122. The *In re M.D.* Court made its distinction on the basis that it is faced with delinquency, rather than dependency proceedings. *Id.* The Superior Court further explained that *H.S.W.C.-B.* requires the continuation of all periodic review hearings during an appeal of a dependency matter. *Id.* at 1121-22. Therefore, the Agency's position is without merit.

The direction of this State's Supreme Court in *In re H.S.W.C.-B. and S.E.C.-B.* is strikingly clear to this Court. Accordingly, review hearings shall continue during the pendency of an appeal.

B. Pennsylvania Rule of Appellate Procedure 1701

This Court finds its application of *In re H.S.W.C.-B. and S.E.C.-B.* consistent with Pa.R.A.P. 1701. First, this Court, by proceeding with review hearings as required by 42 Pa.C.S.A. § 6351(e), is acting to enforce the dependency adjudication and to preserve the status quo established by said adjudication. Pa.R.A.P. 1701(b)(1) and (2). A court is only required to conduct permanency hearings once a child is adjudicated dependant and removed from his or her parents' physical custody. 42 Pa.C.S.A. § 6351. Accordingly, by holding a review hearing, this Court accepts the dictate of the appealed Order, namely that clear and convincing evidence existed to declare the child dependent and that the evidence demonstrated a clear necessity for removal, and thereby enforces the adjudication and disposition and preserves the status quo of said determination.

Similarly, Pa.R.A.P. 1701, in this case, only precludes further action on the decision to adjudicate the child dependent, the finding of abuse and the finding of a clear necessity that the child needed to be removed from the parents' home. As the appellate courts of this State have recognized, the Juvenile Court, pursuant to the Juvenile Act, 42 Pa.C.S.A. § 6301 *et seq.*, has broad and continuing jurisdiction to adjudicate in the best interests of children after an adjudication of dependency. *In re Byrae Lafay Griffin and Byron Todd Griffin*, 690 A.2d 1192, 1199-1200 (Pa. Super. 1997) citing *In Re Tameka M.*, 580 A.2d 750, 752 (Pa. 1990). As the Superior Court stated with regard to the application of Pa.R.A.P. 1701 in dependency cases:

> Were we to accept [the][] argument that Juvenile Court is deprived of jurisdiction once an appeal of any aspect of a dependency action is filed, we would render the court powerless to prevent any abuse, no matter how egregious, of a dependent child at the hands of his custodian. Most dependency actions, and especially those as prolonged as the one currently at issue, involve a variety of issues, parties and Orders of court. A holding that deprives the Juvenile Court of jurisdiction merely because a single Order, involving any issue or party, has been appealed would not only defy logic, but it would also frustrate the statutory authority of Juvenile Court to exercise continuing independent and original authority to adjudicate in the best interests of a dependent child.

In re Griffin, 690 A.2d at 1200 (Pa.R.A.P. 1701 did not deprive Juvenile Court of jurisdiction to issue order removing children from pre-adoptive foster family's home, when pending appeals were of order terminating mother's parental rights and of order removing the children from the custody of their maternal grandmother, because each appeal raised a particular item or claim and the Juvenile Court was only precluded from proceeding with such item or claim).

Accordingly, pursuant to Pa.R.A.P. 1701 (c), this Court is only precluded from proceeding in a manner contrary to the Court's earlier findings of dependency, abuse and the need to remove the child from the parents' home. The Court, at a review hearing, does not review the appropriateness of the initial adjudication and the initial disposition, but only looks at occurrences arising subsequent to the events precipitating appeal and assesses the child's best interest in light of the child's current situation. 42 Pa.C.S.A. § 6351.

Therefore, Pa.R.A.P. 1701 does not preclude this Court from conducting a review hearing in this case.

C. Best Interest of the Child

Finally, the Court acknowledges that continuing jurisdiction is in the best interest of the child and that it is the child's interests which are of paramount concern to this Court. Without review hearings, children, as

well as their parents, are left without access to the Court, the very entity that determines what is in the children's best interests and thereby governs the course of their lives. In essence, the parents and the child are punished for accessing the Courts while the Agency, another party to the action is rewarded by receipt of unfettered control over the case while it is on appeal. This Court finds such a prejudicial result unacceptable.

D. *In re C.A.*

The Agency uses the Memorandum Opinion of the Honorable Superior Court, *In re C.A.*, Consol. Appeal, No. 1, No. 446, No. 511, Pittsburgh District (Pa. Super. 12/20/93) to its eleven-year practice of canceling review hearings while an appeal from an adjudication of dependency is pending. However, even *In re C.A.*, supports the position that this Court takes today. The *In re C.A.* Court held that, after thirty days from issuance of an order the trial court does not have jurisdiction to issue an order rescinding or altering an order being appealed, however, the lower court is authorized to continue disposition review hearings, despite appeal of such an order. *In re C.A.*, at 8. As discussed above, holding a review hearing does not rescind or alter an adjudication of dependency; instead, it enforces it.

The Agency further argues that this Court lacks jurisdiction to hold review hearings when the adjudication/disposition is on appeal because, if the Court ultimately elects to change the status of the child's placement, it will change the status quo established by the initial disposition of the child. In that regard, the Agency again relies upon *In re C.A.*, at p. 8, n.6. However, the issue of changing or maintaining the status quo is premature as this Court has not yet held a review hearing in this case and, therefore, has not even had the opportunity to consider changing the child's placement.

Therefore, what constitutes "status quo" is not ripe for adjudication.[1] At this point, the Court merely notes that its actions in conducting review hearings is in accordance with Pa.R.A.P. 1701 by preserving the status quo of the initial adjudication and disposition. This Court will not disturb the fact of adjudication or the fact of disposition as those are the particular items on appeal.

Therefore, despite a pending appeal, all statutory review hearings shall continue to occur.

An appropriate Order will follow.

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[1] In light of *In re H.S.W.C.-B. and S.E.C.-B.*, it is now clear that if this Court were to issue an order creating a status change, it is a final and appealable order. Accordingly, the issue of changing the status quo is more appropriately raised once the Court has issued an order.

ORDER

AND NOW, to-wit, this 8th day of March, 2004, upon consideration of mother's Motion for Custody and/or Redispositional Hearing, it is hereby **ORDERED**, **ADJUDGED and DECREED** that, to the extent that mother requests a statutory review hearing, said request is **GRANTED**. The Agency shall immediately schedule this matter for a review hearing.

It is further **ORDERED** that, to the extent that mother requests a Redispositional Hearing, said request is **DENIED**. This Court will not review the Disposition, or any other determination made by the Honorable Stephanie Domitrovich in this matter. This Court will only hear new information arising in the case since the time of Disposition.

BY THE COURT:
/s/ **Elizabeth K. Kelly, Judge**

J.F., Plaintiff

v.

D.B., Defendant

CHILD CUSTODY / SURROGACY

Surrogate mother could not challenge paternity where she previously acknowledged in pleadings that sperm donor was father of children.

A gestational surrogate is a woman who carries implanted embryos, created by donor eggs fertilized by the biological father's sperm, in her womb until birth.

Pennsylvania defines the term "parent" as anyone entitled to take under a child's estate: natural parents, adoptive parents, illegitimate parents, or any individual or agency acting as a child's guardian.

Pennsylvania has recognized that a child may have one or two parents, but not three.

Children should be able to identify who their parents are, even if they are not biologically or genetically connected to them.

If the doctrine of paternity by estoppel is based on the public policy that a child should know its father, then a doctrine of maternity by estoppel would be based on the corresponding public policy that a child should know its mother as well.

Contract entered into by parties was void as against public policy where it did not provide for a legal mother of the children and it allowed the parties to bargain away the children's custody and support rights.

Standing is conferred upon surrogate mother who acted *in loco parentis.*

Surrogate mother who has not terminated her parental rights and who cared for children after birth is legal mother of children.

Claims of parenthood and parental disagreement are not enough to defeat standing.

CONTRACTS

A contract is void if it is used to bargain away rights belonging to children.

A contract is unenforceable if its format or performance is criminal, tortious or otherwise opposed to public policy.

Enforcement of a contract will be denied only if it conflicts with the law's traditional interest in protecting the expectations of the parties, its abhorrence of any unjust enrichment, and any public interest in the enforcement of the particular terms.

GENERAL

Court must look to sister states in rendering a decision involving a case of first impression in the Commonwealth.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY. PENNSYLVANIA ORPHANS' COURT DIVISION No. 15061-2003

Appearances: Melissa H. Shirey, Esq., Attorney for Plaintiff
Joseph P. Martone, Esq., Attorney for Defendant

OPINION

Connelly, J., April 2, 2004

This unusual matter comes before the Court primarily on the issue of standing for child custody. At the center of the custodial dispute are male triplets A, B, and C, born to a surrogate mother not genetically related to them and a biological father whose sperm fertilized the three donor eggs that created them.[1]

On December 11, 2003, the Plaintiff and biological father, J.F., filed a Complaint for Sole Custody and Motion for Special Relief. The Honorable John J. Trucilla issued an Order granting temporary custody of the triplets to the Defendant and surrogate mother, D.B. The Order also provided five days a week visitation for the Plaintiff and his companion E.D. The Order specifically did not waive Defendant's standing claims, which were to be heard later before this Court. On December 16, 2003, Defendant filed an Answer with a Counterclaim for Custody. The following day, The Honorable Elizabeth K. Kelly cancelled that parties' scheduled custody conciliation *sua sponte*, awaiting this Court's determination.

Hearings were held before this Court on December 22, 2003 and March 11, 2004, solely on the issue of standing. Briefs and supplemental briefs were submitted to the Court on December 29, 2003 and March 12, 2004, respectively.

Findings of Fact

Given the already complicated history of this case, a timeline of the relevant facts is necessary. At the end of 2001, D.B., interested in the idea of being a surrogate mother, found and applied online to Surrogate Mothers Inc. (SMI), a private surrogacy agency based in Indiana.[2] SMI matched D.B. with J.F. and E.D., his paramour, to be a gestational surrogate. A gestational surrogate is a woman who carries implanted embryos, created by donor eggs fertilized by the biological father's sperm, in her womb until birth.[3]

[1] Despite Defendant's argument demanding proof of Plaintiff's paternity, the Court finds Defendant to be bound by her previous pleadings acknowledging said paternity. See *Tregoning v. Wiltschek*, 2001 Pennsylvania Super 243; 782 A.2d 1001. Wife who sued former husband seeking custody of child was estopped from challenging husband's paternity because she had accepted paternity in past.

[2] *http://www.surrogatemothers.com/expense.html*

[3] "Adventures in Babysitting: Gestational Surrogate Mother Tort Liability," Karen A. Bussel, 41 Duke L.J. 661 (1991)

In April 2002, D.B. and E.D. met for the first time. J.F. was not present for this meeting. During July and August 2002, J.F., D.B. and her husband, and the egg donor, J.R., signed and notarized a surrogacy contract drawn up by SMI director and attorney, Steven Litz.[4] At the end of 2002 and beginning of 2003, the parties underwent extensive medical and psychological testing.

In April 2003, D.B. was implanted with three embryos in Cleveland, Ohio. J.F. and E.D. were present for this procedure. D.B.'s pregnancy was confirmed in May and shortly thereafter it was discovered that she was carrying triplets, with a tentative due date of December 3, 2003. Hearing testimony revealed this to be a very unusual situation because normally only one embryo may take, not all three.

From May to November 2003, D.B. attended doctor's visits every two weeks in Erie, Pennsylvania. J.F. and E.D. attended the first few visits until D.B.'s doctor asked them to stay in Cleveland. Per doctor's orders in June, D.B. quit her job to go on bed rest. From July to November, D.B. remained on bed rest. During this time, she requested that J.F. and E.D. pay her $1000.00 per month to cover her expenses, including housekeeping, a babysitter for her three children, and lost wages from quitting her job. J.F. and E.D. agreed and mailed checks of $500.00 to D.B.'s home address every two weeks. They, in particular E.D., also remained in frequent phone contact with D.B. about her condition.

In September 2003, Hamot Medical Center (hereinafter Hamot) was informed via letter from SMI, that D.B., a surrogate mother, was choosing to give birth to triplets at their hospital and to make arrangements as needed. Hamot was also told to expect a court order accompanying the intended parents, J.F. and E.D. that would give them legal custody of the triplets after their birth. At that time, according to witness Paul Huckno, head of Risk Management at Hamot, the hospital had never dealt with a surrogate pregnancy before and had no specific policy in place governing such.

On Wednesday, November 19, 2003, at approximately 10 a.m., D.B. gave birth to triplets by C-section at Hamot. The babies were slightly premature

[4] The Court does not wish to forcibly include J.R., the egg donor, in this matter, after she has already declined to become involved. As the Court views it, an egg donor should be likened to a sperm donor. Because egg donation is a newer medical process than sperm donation, most states have not passed legislation addressing it. However, both donors contribute genetic material to others in exchange for payment, signing away all biological, parental, and other legal rights to their contribution and any child they may help produce. The majority of egg and sperm donations are anonymous proceedings, with neither the donors nor the recipients knowing the other. The donors, by choice and often by contract, choose to be uninvolved in the lives of any children that may result from their donations. For these reasons, the Court does not consider J.R. to be a party to this matter. See *Ferguson infra*.

at 35 weeks old and had some minor medical problems typical of their age. They were placed in the Neonatal Intensive Care Unit (NICU) under the care of Doctors Jonathan and Michelle Kay Chai.[5]

J.F. and E.D. were called at 8:00 a.m. on November 19th to inform them that D.B. was in labor. They arrived at Hamot that night between 7:00 and 8:00 p.m. from Ohio, with no court order. Hamot staff then employed their normal procedure of allowing the birth mother to consent to any and all visitors. From her hospital bed, D.B. consented to J.F. and E.D. seeing the triplets. At that time, D.B. testified that she fully expected J.F. and E.D. to take care and custody of the triplets and she would return home without them.

The following days, November 20-24th, E.D. maintained phone contact with Hamot NICU staff, checking on the triplets' condition and making appointments to visit them again that weekend. J.F. helped her complete legal and medical insurance paperwork and bought a mini-van with three car seats, as well as clothes, toys, and other things for the triplets.

On Saturday, November 22nd, D.B. was discharged from the hospital. She received a call from E.D. saying they were very "busy". E.D. made an appointment by phone with Dr. Jonathan Chai for November 22nd to undergo sleep apnea monitor training (hereinafter monitor training) for the triplets. The appointment was cancelled the next day because two triplets were put on oxygen by Dr. Michelle Chai. Both Doctors Chai later testified that cancellation of the appointment did not bar J.F. and E.D. from visiting the triplets. Meanwhile, D.B. continued to receive updates on the triplets' progress from her mother, a Hamot employee, who would stop by to check on the them.

On Monday, November 24th, E.D. called Hamot and scheduled monitor training. E.D. also called D.B. and said she and J.F. visited the triplets that weekend. The next day, D.B. called Hamot NICU to check on the triplets and discovered that E.D. and J.F. never visited the triplets that weekend. D.B. then called SMI concerned about this information.

On Tuesday, November 25th, E.D. called Hamot for an update and indicated that she and J.F. would arrive at the hospital that evening. The same day, D.B. returned to Hamot to meet with several staff members, including Dr. Michelle Chai, NICU nurses, and social workers, about the triplets and whether she could take them home herself. She expressed concerns about the lack of visits from the intended parents, the fact that no names had been selected for the triplets, and E.D.'s apparent lie about visiting them. At the conclusion of the meeting, D.B. revoked her consent for J.F. and E.D. to visit the triplets and prepared to take them home with her. According to the testimony at the hearing from various Hamot staff

[5] Doctors Chai are married and both employed in Hamot's NICU as staff neonatalogists. Both gave deposition testimony for this matter on February 2, 2004.

members, no one encouraged or convinced D.B. that she should take the triplets home. Rather, it appears to have been her own idea.

Hamot set up "nesting" with D.B., her husband, and the triplets for that night (November 25th). Nesting allows the parents or caretakers to care for their babies overnight, use the apnea sleep monitors, etc. as they would at home, but with hospital staff nearby to assist them with any problems and emergencies. D.B. and her husband also completed monitor training that day. D.B. did not call J.F. and E.D., testifying she assumed SMI would call them about her decision.

That evening, J.F. and E.D. arrived at Hamot and were met by security. They were informed that the triplets have been discharged to D.B.[6] Upon returning home to Ohio, E.D. called D.B. and left a message, asking, "What's going on?" E.D. and J.F. also received a message from SMI Director, Steven Litz, informing them of D.B.'s decision. On Thursday, November 27, the triplets were officially discharged to D.B.

From November 27 to December 11, 2003, D.B. received two phone calls from J.F. and E.D., which she did not return because she was "upset" and "angry". J.F. and E.D. did not attempt to visit the triplets, claiming they did not know where they were until the December 11 court hearing before Judge Trucilla.

According to D.B.'s testimony at the hearing, J.F. and D.B. have only visited the triplets at D.B.'s residence two or three times a week, often at inconvenient times, instead of the allowed five visits per week. J.F. and E.D. testified that D.B often cuts their visits short. D.B. also testified when J.F. and E.D. take the triplets with them, they often return them in soiled clothing and dirty diapers; E.D. often insists on feeding them, even when they have just been fed; and J.F. often sits silently or watches television, and once even fell asleep. D.B. further testified about increasing tension and conflicts between herself, her husband, and J.F. and E.D. whenever they visit. J.F. and E.D. maintain that they still intend to be parents to the triplets. The matter is now before the Court.

Conclusions of Law

For purposes of better understanding of the terms involved in this case, the Court defines the following[7]:

Gestational Surrogate/Carrier- A woman who carries a fetus not genetically related to her for the purpose of delivering it to the intended parents. The embryo carried is created by either the intended father's sperm or donated sperm fertilizing either the intended mother's harvested egg or a donor egg. The resulting embryo is implanted through in vitro

[6] They weren't discharged with D.B. that day. Paul Huckno testified that this was told to J.F. and E.D. for "safety reasons."

[7] From Black's Law Dictionary, 1990 ed., http://www.surrogacy.com/legals/article/checklist/chklst1.html.

fertilization into the surrogate's womb where it gestates until birth.

Biological/Genetic Parent- A person who shares a genetic connection to a child. They are the contributor of genetic material that creates a child. Some biological/genetic parents do not assume custody and/or parental duties for that child. (i.e. a biological parent who gives up child for adoption at birth)

Intended Parent(s)- A person (or couple) who intends to take custody of and assume all parental rights and responsibilities to a child born via surrogacy, given up for adoption, etc. Some intended parents may be genetically related to the child through sperm or egg donation.

Surrogate Parenting Agreement- A contract between a surrogate mother and intended parent(s) which manages the surrogacy arrangement, including legal, financial, medical, documentary, etc. details. Some surrogate parenting agreements allow fees for the surrogate mother, if not prohibited by state law. Private agencies and attorneys may draw up the agreements while some states require a court to approve them.

Parent- The lawful father or mother of a person. Includes anyone entitled to take under a child's estate, natural parents, adoptive parents, illegitimate parents, or any individual or agency acting as child's guardian.

Mother- A woman who has borne a child, includes maternity during pre-birth period.

Egg Donor or Sperm Donor- A person who donates genetic material (female donates eggs, male donates sperm) usually for a fee to help others have children. Donors are often anonymous and usually give up any parental rights they may have to a child they may help create.

I. Surrogacy Law in Pennsylvania[8]

With these terms in mind, the Court now turns to the issue at bar- whether a gestational surrogate like D.B. has standing to pursue a custody action against a biological parent like J.F. The only case in Pennsylvania to address a surrogate mother's standing is *Huddleston v. Infertility Center of America, Inc.*, 700 A.2d 453 (1997), a negligence and wrongful death case, but it is barely on point.

In *Huddleston*, a surrogate mother entered into a surrogate parenting agreement with a biological father, a single man. A month after birth, the child died as a result of the biological father's abuse. The surrogate mother filed suit against the fertility clinic that had arranged the surrogacy,

[8] "Surrogacy And The Law Of Pennsylvania," by Lawrence A. Kalikow, Esq., April 1999.

alleging that the clinic's negligence in choosing the biological father caused the wrongful death of the child. The trial court found that the surrogate mother had no standing because she was not the child's legal parent. On appeal, the Superior Court found that the surrogate mother had standing, mostly because no one had challenged her standing to seek Letters of Administration for the child's estate. Further, the Court found that the biological father's abusive actions were foreseeable and that the clinic had a duty of care to screen its surrogacy applicants for potential negative characteristics.

Since no Pennsylvania cases relating to surrogacy existed at that time, the *Huddleston* Court relied on a Sixth Circuit case, *Stiver v. Parker,* 975 F.2d 261 (1992) which held a surrogacy agency liable for allowing surrogate mother to be infected by biological father's untested semen. The Court determined that the agency had a "special relationship" with the surrogate mother and a duty of care to reduce harm to her and the child she carried.

However, *Stiver* is no more on point to the case at bar than *Huddleston.* As the trial court in *Huddleston* stated, "...[T]he absence of judicial precedence, and... legislative offerings, point out that there is no articulated fixed policy on many surrogacy issues in Pennsylvania at this time." *Huddleston,* 31 Pa. D. & C. 4th 128 (1996)

This Court is inclined to agree. Its own research has revealed very little stated policy regarding surrogacy in Pennsylvania. The last proposed surrogacy legislation was in 1997, H.B. 527 P.N. 590, a bill introduced in the House.[9] H.B. 527 proposed legalizing surrogate parenting agreements with court review and approval. If the parties did not seek court approval, a fine of up to $20,000.00 could be imposed and any agreement made would be null and void. The bill also required criminal background checks and extensive medical and psychological testing for all parties involved. Upon birth of the child/children, the surrogate mother's parental rights would terminate immediately and the intended parents would take full legal custody. If for any reason prior to the birth the surrogate parenting agreement was terminated, written notice would be given to the Court and the surrogate mother would become the legal mother of the child/children. Unfortunately, H.B 527 succumbed to the fate of several predecessors and died in Judiciary Committee.[10]

While it is premature to say that the Pennsylvania Legislature intended that a surrogate mother have legal custody in situations where there is no

[9] http://www.legis.state.pa.us/search/billsearch.idq

[10] Bills in favor and against surrogacy were also proposed in 1987, 1991, and 1995. None of them survived the Judiciary Committee. No bill relating to surrogacy is currently before the Legislature.

surrogacy contract or where it has been declared void, the possibility has at least been considered by the Legislature and the Court takes that into minor consideration in issuing its decision. Without an actual surrogacy statute in place however, the Court can only strongly urge the legislature to address the issue as soon as possible to prevent more complicated cases such as the one at bar.

II. Surrogacy Laws in Other States[11]

Since this is a case of first impression in Pennsylvania, the Court must look to the decisions rendered in sister states. In general, thirty-one (31) states have either some type of surrogacy statute or case law setting forth the legality or illegality of surrogate parenting arrangements. Nineteen (19) states, including Pennsylvania, are generally silent about surrogacy or do not have surrogacy laws or cases yet.

Sixteen (16) of those 31 states have made surrogacy itself or surrogacy contracts illegal. Those states that make surrogacy (e.g. paid surrogacy or baby selling) expressly illegal are Delaware, Iowa, Michigan, New Mexico, New York, Oregon, Utah, Washington D.C., and Wisconsin. Surrogacy is exempt from criminal baby selling statutes in Iowa, Alabama, and Washington. Those states that ban surrogacy contracts are Arizona, Connecticut, Indiana, Louisiana, New Jersey, North Dakota, and Tennessee. Despite the fact that paid surrogacy contracts are illegal in New Jersey, free surrogacy volunteers (usually family members) are permitted.[12]

Seven states generally allow surrogacy, with or without a contract, fees, etc. They are Arkansas, California, Hawaii, Illinois, Massachusetts, Ohio, and West Virginia. Two of them, Massachusetts and California, require pre-birth orders that terminate the surrogate mother's parental rights and give custody to the intended parents. Illinois allows all "parents" to be listed on birth certificate, including the surrogate mother or gestational surrogate, the intended parents, the biological parents, and/or sperm and egg donors.

Florida, New Hampshire, Virginia, and Arkansas allow surrogacy contracts and mothers, with the first three states requiring that the intended mother be infertile. New Hampshire and Virginia courts review and approve surrogacy contacts while Arkansas statute presumes a child born to a surrogate mother to be the child of the intended parents, not the surrogate mother.[13]

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[11] http://www.surrogacy.com/legals/states.html, http://www.surrogacy.com/legals/map.html

[12] "Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating "Non-Traditional" Gestational Surrogacy Contracts," James J. Dalessio, 31 McGeorge L. Rev. 673, 2000.

[13] *Id.*

California appears to be the state with the most surrogacy procedures, cases, and clinics.[14] It also appears to have some of the most complicated surrogacy case law and statutes. Generally, a surrogacy arrangement requires a contract between the parties prior to any medical procedures being performed. Then the intended parents must obtain a Judgment of Maternity and Paternity prior to the child's birth. This Judgment makes the intended parents the legal custodial parents. The surrogate mother, with or without a contract, is not the legal mother in California.[15]

Such contracts are not barred by public policy as held in *Johnson v. Calvert*, 5 Cal. 4th 84, 851 P.2d 776,19 Cal. Rptr. 2d 494 1993). In that case, the Court ruled that the genetic parents were determined to be the natural, intended parents of the gestated child. The parties' intentions were foremost in determining who would have legal custody of a child conceived by surrogacy. This "intent test" continues to be followed in California and by other states, including Pennsylvania's neighbor, Ohio. See *Belsito v. Clark*, 644 N.E.2d 760 (1994) where a Common Pleas Court determined those with genetic ties to a child conceived by surrogacy were the intended parents.

The Connecticut Supreme Court in *Doe v. Doe*, 244 Conn. 403, 710 A.2d 1297 (1998) granted a custody trial concerning a child conceived by surrogacy and related biologically only to the father/husband. The Court decided to treat the wife as a third party with standing (the surrogate mother and egg donor had terminated their rights). Ultimately, the Court determined that the best interests of the children would control, no matter the legal standing of the parties.

In Massachusetts, the case of *R.R .v. M.H.*, 426 Mass. 501, 689 N.E.2D 790 (1998) set forth a requirement of three or more days for a surrogate mother to decide whether to terminate her parental rights, a time period similar to the state's adoption process. The Massachusetts Supreme Court found the surrogacy contract to be unenforceable because the surrogate mother received a fee for her services, which was against state public policy. The Court expressed a preference for court-approved surrogacy contracts, or at the very least, some type of surrogacy statute passed by the legislature:

> "We recognize that there is nothing inherently unlawful in an arrangement by which an informed woman agrees to attempt to conceive artificially and give birth to a child whose father would be

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[14] http://www.everythingsurrogacy.com/cgi-bin/main.cgi?agencies#CA, a list of California surrogacy clinics and associated law firms.

[15] "Thomas Pinkerton: The San Diego Surrogacy Case" Transcript of chat with CNN.com on August 15, 2001. Pinkerton is a surrogacy attorney who practices in California.

> the husband of an infertile wife. We suspect that many such arrangements are made and carried out without disagreement... The mother and father may not, however, make a binding best-interests-of-the-child determination by private agreement. Any custody agreement is subject to a judicial determination of custody based on the best interests of the child... A surrogacy agreement judicially approved before conception may be a better procedure... *A Massachusetts statute concerning surrogacy agreements, pro or con, would provide guidance to judges, lawyers, infertile couples interested in surrogate parenthood, and prospective surrogate mothers."*

At 512-13, emphasis added.

In a Massachusetts case addressing the custody of frozen embryos, the Court in *A.Z. v. B.Z.*, 431 Mass. 150, 725 N.E.2d 1051 (2000) remarked:

> "We glean from...statutes and judicial decisions that prior agreements to enter into familial relationships (marriage or parenthood) should not be enforced against individuals who subsequently reconsider their decisions. This enhances the "freedom of personal choice in matters of marriage and family life. We derive from existing State laws and judicial precedent a public policy in this Commonwealth that individuals shall not be compelled to enter into intimate family relationships, and that the law shall not be used as a mechanism for forcing such relationships when they are not desired. This policy is grounded in the notion that respect for liberty and privacy requires that individuals be accorded the freedom to decide whether to enter into a family relationship."

At 162, citations omitted.

A New Jersey case, *J.B. v. M.B.*, 751 A.2d 613 (2000), similarly decided that a contract to procreate is against state public policy and agreements entering in or terminating family relations should not be enforced against unwilling parties. New Jersey is also home to the infamous *In re Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988) case, which caused many states to either criminalize or regulate surrogacy. Since the surrogate was genetically related to the child she gave birth to, *Baby M* case is not on point to the case at bar.

Based on the above cases, it appears to this Court that the best way to address this matter is in terms of contract law and public policy.

This opinion will be continued in the April 30, 2004 edition of the Erie County Legal Journal.

J.F., Plaintiff
v.
D.B., Defendant

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY. PENNSYLVANIA ORPHANS' COURT DIVISION No. 15061-2003

This opinion is continued from the April 23, 2004 edition of the Erie County Legal Journal.

III. Legality of the Surrogacy Contract

While the Court is encouraged by several states' approach to surrogacy via contract law regulation, it is keenly aware that there is no Pennsylvania statute in place yet. Still, the Court is inclined to look at the surrogacy contract entered into during July and August 2002 that started this entire sequence of events. (Plaintiff's Exhibit B)

The parties to the contract are the Plaintiffs J.F., and his paramour E.D., the Defendant, D.B., and her husband, J.R., the egg donor, SMI, and its Director/Attorney, Steven Litz. The Court again notes that J.R. is not considered a party to this action, despite the fact that the contract refers to her together with D.B. The Court reviews some of the more interesting sections of the contract as follows:

Section 3 of the contract informs D.B. in capital letters that she is not consenting to termination of her parental rights or adoption at that time, just her intention to do so after the children are born.

Section 9 states biological father's obligations, except those required by law of a biological parent, will cease if the surrogate mother, D.B., refuses to abort or selectively reduce any of the fetuses she carries at J.F.'s request. The section does not state who would then take legal custody of the children once they were born.

Section 15 provides in the event that custody is awarded to surrogate mother, the other parties are indemnified and should be reimbursed any monies paid to the surrogate mother.

Section 20 states that the biological father, J.F., is legally responsible for the children, even if they have abnormalities, unless a paternity test reveals that the children are not the J.F.'s. There is no provision providing for a legally responsible mother or other co-parent, especially if the children are not his.

Section 21 is where J.F. names E.D. to be his successor should something happen to him, but the space for a successor to E.D. is left blank. Again, there is no provision for whom takes custody of the children then.

> **The Release and Hold Harmless Agreement**, the last pages of the contract, appears to bar D.B. and her husband from seeking custody of the children, (Plaintiff's Exhibit 8, p. 9, ¶1) It reads in relevant part: "Upon the birth of the child, ***Surrogate*** and/or E.D. [egg donor] ***will surrender any custody rights to the child to the biological father*** [biological father] whose identity (unless otherwise agreed upon) I/ we may never know," [emphasis added]

These contractual inconsistencies and the failure to name a legal mother for these children greatly trouble the Court. Section 3 and the Release and Hold Harmless Agreement contradict each other when D.B. agrees that she *intends* to terminate her rights and then agrees that she *will* surrender her rights. Sections 9 and 20, 20 and 21, 15 and 20, and 9 and 20 are in conflict with each other in that Section 20 says J.F. will be legally responsible for the children but the other Sections undermine that responsibility by allowing it to "cease" or be "indemnified." At no time does the contract state who the legal mother of the children shall be, particularly if something were to happen to J.F. and E.D., or if they were to decide not to take custody of the children.

Pennsylvania has traditionally recognized that a child has two legal parents, usually a mother and father. According to the aforementioned definition of "parent," it includes anyone entitled to take under a child's estate, natural parents, adoptive parents, illegitimate parents, or any individual or agency acting as child's guardian. In some circumstances, there may only be one legal parent (i.e. death or abandonment). However, there cannot be three legal parents. See *Beltran v. Piersody,* 2000 Pennsylvania Super 66; 748 A.2d 715, Dissenting Opinion by J. Olszewski:

> "I also note that it is impossible for J.P. to have three parents. While a child may have two mothers or two fathers, *see J.A.L. v. E.P.H.,* 453 Pa. Super. 78, 682 A.2d 1314 (Pa.Super. 1996) (parties by their conduct created a parent-like relationship between appellee's homosexual partner and her biological child, thus giving partner standing to seek custody), he cannot have two fathers and one mother. *See Michael H.*, 491 U.S. at 130-31 (stating that "multiple fatherhood has no support in the history or traditions of this country"). Until our legislature recognizes a different structure to the basic family unit, J.P. has two parents - Piersody and Mother."

Beltran at 720, footnote 3. Thus, J.F., E.D., and D.B. cannot all be parents simultaneously. Since E.D. is not actually a plaintiff/party to this action nor is she related to the triplets, the Court excludes her from consideration.

Children should be able to identify who their parents are, even if they are not biologically or genetically connected to them. As the Court in *J.C. v. J.S.,* 2003 Pa. Super 172,826 A.2d 1 recently held:

> "Estoppel in paternity actions is merely the legal determination that because of a person's conduct (e.g., holding out the child as his own, or supporting the child) that person, regardless of his true biological status, will not be permitted to deny parentage... [T]he doctrine of estoppel in paternity actions is aimed at "achieving fairness as between the parents by holding them, both mother and father, to their prior conduct regarding paternity of the child." *Warfield v. Warfield*, 2003 Pennsylvania Super 16, 815 A.2d 1073, P 8 (Pa. Super. 2003) (quoting *Fish v. Behers*, 559 Pa. 523, 741 A.2d 721, 723 (Pa. 1999)). Moreover, "[e]stoppel is based on the public policy that children should be secure in knowing who their parents are. If a certain person has acted as the parent and bonded with the child, the child should not be required to suffer the potentially damaging trauma that may come from being told that the father he has known all his life is not in fact his father. *Hamilton v. Hamilton*, 2002 Pennsylvania Super 72, 795 A.2d 403, 405 (Pa. Super. 2002) (quoting *Fish*, 741 A.2d at 724).

At 6, emphasis added. See also *Di Paolo v. Cugini*, 2002 Pa. Super 364, 811 A.2d 1053 (J. Hudock, dissenting) and *Bahl v. Lambert Farms, Inc.*, 572 Pa. 675; 819 A.2d 534 (2003) "Such estoppel 'is based on the public policy that children should be secure in knowing who their parents are,' *Brinkley v. King*, 549 Pa. 241,701 A.2d 176, 180 (Pa. 1997), and, as such, it is designed to protect the best interests of minor children."

There is no maternity by estoppel doctrine nor is there any legal definition of maternity, both of which might be suitable for this case since no legal mother has been named for the triplets. The Court theorizes that if the doctrine of paternity by estoppel is based on the public policy that a child should know its father, then a doctrine of maternity by estoppel would be based on the corresponding public policy that a child should know its mother as well.

Moving on, a contract is void if it is used to bargain away rights belonging to children. See *Sams v. Sams.* 2002 Pa. Super 300, 808 A.2d 206 (Father/NFL player could not compel his ex-wife/mother to contract away his child support obligation. The Court found the agreement to reduce the child support amount was unconscionable, reducing Father's obligation from $ 3,400.00/month to $ 1,000.00/month.), *Kesler v. Weniger*, 2000 Pennsylvania Super 2,744 A.2d 794 (2000) (Biological father and biological mother had longstanding agreement that if she became pregnant, she would not seek any child support from him was void. "It matters not when an agreement to forego support occurred; the right to support is a right of the child, not the mother or father. It cannot be bargained away before conception any more than it can be bargained away after birth, nor can it be extinguished by principles of estoppel."), and *Ferguson v. McKiernan*, 60 Pa. D. & C. 4th 353 (Dauphin County Court of Common Pleas, 2000)

(Court voided an oral contract between the parties where biological mother would release biological father from his child support obligation if he secretly volunteered to be her sperm donor).

The contract in the case at bar did precisely the same as the parties attempted in *Sams, Kesler* and *Ferguson,* to sign away the rights of the triplets. The Court therefore declares the surrogacy contract entered into by the parties to be void as against public policy because it does not provide for a legal mother for the triplets and it allows the parties to bargain away the children's custody and support rights. A contract is unenforceable if its formation or performance is criminal, tortious, or otherwise opposed to public policy. *Espenshade v. Espenshade.* 1999 PA Super 108. Courts should not override private contracts unless their terms offend public policy. *McIlvaine Trucking v. Workers' Comp. Appeal Bd.,* 570 Pa. 662, (2002).

The contract allowed D.B. to sign away her custodial rights without a time period to consider them or a court hearing to address them. That is against Pennsylvania public policy and the contract should not be enforced against her. The decision in *Prudential Prop.* & *Cas. Ins. Co. v. Colbert,* 572 Pa. 82 (2002) explained the concept of contracts and public policy this way:

> "Generally, courts must give plain meaning to a clear and unambiguous contract provision unless to do so would be contrary to a clearly expressed public policy. Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest. As the term "public policy" is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy. Only dominant public policy would justify such action. In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, a court should not assume to declare contracts contrary to public policy. The courts must be content to await legislative action." At 82-83.

In the present case, the Court cannot wait for legislative action. But, it can look to the state tradition and public policy regarding children having two parents. Enforcement of a contract will be denied only if it conflicts with the law's traditional interest in protecting the expectations of the parties, its abhorrence of any unjust enrichment, and any public interest in the enforcement of the particular term. *City of Wilkes-Barre v. City of Wilkes-Barre Police Benevolent Ass'n,* 814 A.2d 285, (2002)

A, B, and C did not hatch, they were born. They can only identify their father in the contract as J.F., but they cannot identify their mother so easily. It cannot be J.R., the egg donor, because she is not a party to this action.

It cannot be E.D. who is not genetically related to them, nor is she even married to J.F. She has contributed nothing more than her presence and her interest in the triplets. That leaves D.B., who like E.D. is not genetically related to the triplets, but carried them in her womb and then gave birth to them. Her every decision prior to their birth has affected them- health, nutrition, pre-natal care, etc. In addition, she has not terminated any parental rights she may have to the triplets. She has instead taken the triplets into her home and cared for them along with her three other children. She is more a mother and a parent by her actions than by genetics. She has assumed "maternity" if there were such a legal definition as there exists for "paternity." Since the contract is void because it does not provide for a legal mother, the Court finds D.B. to be the legal mother of the triplets since she carried and bore them and has taken care of them as a natural parent would.

IV. Standing *In Loco Parentis*

Even if this Court did not determine that D.B. is the legal mother of the triplets, she would most likely still have third party standing *in loco parentis.* Black's Law Dictionary defines *in loco parentis* to be, literally, "in place of parent."[16] It is also a legal doctrine that allows a person who assumes the duties and rights of a natural parent to have temporary standing in parental matters, such as custody and support, in absence of legal proceedings.[17] Given D.B.'s unusual situation as a gestational surrogate with no genetic tie to A, B, and C, and her previous intentions to give them to J.F. and E.D., she does not neatly fit into any particular category of third party that have tried to claim custodial standing *in loco parentis.*

Foster Parents

D.B. is like foster parents in that she has no genetic tie to the triplets but has volunteered to take care of them. She is not like foster parents because the state or government agency that places foster children stands *in loco parentis,* not the foster parents. In addition, SMI, the agency that arranged the surrogacy, is a private agency, not a governmental one. See *In the Interest of N.S., K.G., and P.A.,* 2004 Pa. Super 65, and *In re G.C.,* 358 Pa. 116 (1999) (Foster parents acting as de facto parents do not have *in loco parentis* standing because the foster care agency has relationship with child, not the foster parents.)

Relatives

D.B. might be considered a non-blood related relative to the triplets, like an aunt or uncle or half sibling. See *D.N. v. V.B.,* 2002 Pa. Super 420, 814 A.2d 750 (half-sibling had no standing to pursue custody of her younger

[16] Black's Law Dictionary, 1990 ed.

[17] *Id.*

siblings), *Larson v. DiVeglia,* 549 Pa. Super 118, 700 A.2d 931 (1997) (uncle who lived with and supported child could not bring child support action against biological father when only his wife, the child's aunt, had legal custody), and *Jackson v. Garland,* 424 Pa. Super 378, 622 A.2d 969 (1993) and *Butler v. Illes,* 2000 Pa. Super 54,747 A.2d 943 (no standing for aunts because no statute provides for it, unlike grandparents).

All these relatives have been held not to stand *in loco parentis* to children in their care mostly due to a "void in the law." *Jackson, supra.* A surrogate mother like D.B. may also fall into that void if she is not declared to be a legal mother. Grandparents and great-grandparents have standing under the Grandparents Visitation Act, 23 Pa. C.S.A. § 5301, *et. seq.*, but that is balanced against the best interests of the children. See *In re Adoption of D.M.H.*, 452 Pa. Super 340, 682 A.2d 315 (1996) where Court awarded custody to adoptive parents who were better for child's welfare than the biological grandmother.

Stepparents and Same Sex Parents

D.B. is much more like a stepparent or a same sex parent, taking into account her lack of genetic tie and her voluntary care of the triplets. In *Parton v. Parton,* 36 Pa. D. & C. 4th 241 (Monroe County Court of Common Pleas, 1996), the Court granted a stepfather partial custody *in loco parentis* based on his good relationship with stepson. He met the preponderance of evidence burden of proof by showing that he was. In *Liebner v. Simcox,* 2003 Pa. Super 377, 834 A.2d 606, another stepfather was granted standing *in loco parentis* because he provided a "family setting [for the child], irrespective of traditional or nontraditional composition." The nature of the relationship between parents has no legal significance for *in loco parentis* standing. *T.B. v. L.R.M.*, 567 Pa. 222 (2001) and children are not to be treated as the offspring of the biological single parent only. *J.A.L. v. E.P.H.*, 453 Pa. Super 78, 682 A.2d 1314 (1996) Thus, despite the unusualness of a surrogacy arrangement, J.F. cannot claim to be the sole parent of the triplets. D.B., through her actions, has clearly shown that she "doing all things a parent would do" and as a surrogate mother has and is creating a nontraditional family setting.

The Court also notes a "void in the law" for surrogate mother standing. As the Court in *L.S.K. v. H.A.N.*, 813 A.2d 872 (2002) said, "We recognize this is a matter which is better addressed by the legislature rather than the courts. However, in the absence of legislative mandates, the courts must construct a fair, workable and responsible basis for the protection of children, aside from whatever rights the adults may have *vis a vis* each other."

D.B. has assumed parental duties when she could have simply taken her surrogacy fee and walked away. She was not legally obligated to provide care or child support, yet she took on those responsibilities willingly and voluntarily. She and her husband went through monitor training and car

seat testing and overnight nesting with the triplets. They continue to care for the triplets plus three other children in their home. It does not appear to the Court that D.B. was pressured or talked into bringing the triplets home with her or that she is unable to handle the responsibility of being a legal mother to A, B, and C.

V. Parental Duties and Wishes

The Court disagrees with Plaintiff's argument that D.B. acted in defiance of J.F.'s wishes by taking the triplets home with her and thus should not be granted standing *in loco parentis* because J.F., as biological father, does not approve. See *B.A. v. E.E.*, 559 Pa. 545,741 A.2d 1227 (1999) The Court would point out the unfortunate reality that many custody decisions are made where one party/parent does not approve of the other's actions and decisions, but must acquiesce because a court has allowed it.

Claims of parenthood and parental disagreement are not enough to defeat standing. As the Court in *Cardamone v. Elshoff*, 442 Pa. Super 263, 659 A.2d 575 (1995) stated:

> "In Pennsylvania, there are three types of custody disputes: parent versus parent; parent(s) versus state; and parent(s) versus third party. Persons other than natural or biological parents are deemed to be "third parties" for purposes of custody disputes... Factors other than parenthood...may have significant impact on the well-being of the child and can justify a finding in favor of the non-parent, even though the parent has not been shown to have been unfit... [P]arenthood alone is insufficient to defeat a custody claim raised by a non-parent. The most important issues in a custody dispute are the child's physical, intellectual, moral, and spiritual well-being."

At 272-273, citations omitted.

In the case at bar and prior to this Court's determination of D.B.'s legal parental status, D.B. is a third party seeking custody against J.F., the biological father of the triplets. As *Cardamone* held, his claim of parenthood alone is not enough to defeat D.B.'s Counterclaim for Custody. The Court may consider the triplets' present well-being as well as their future welfare. See *Com. ex rel. Bloomfield v. Faxstein*, 84 Pa.Super. 243 (1924) where it would be contrary to the permanent well-being of the child to give its parents the custody, the parents' natural right must give way, and *Com. ex rel. Rockey v. Hoffman*, 91 Pa.Super. 213 (1927) where parent's right to custody of infant child must be yielded, if child's welfare will be more secure elsewhere.

The Court heard the testimony of D.B. as to her care of the triplets as well as their condition upon their return from visits with J.F. and E.D., and found her to be credible. Even discounting her testimony, the Court also heard testimony from various Hamot medical staff and read their reports regarding the lack of visits from the intended parents and their behavior

when they did visit (i.e. arriving late or canceling appointments, the delay in monitor training, nursing staff repeatedly telling E.D. to be quiet or calm down in the NICU). This is more than enough to cause the Court some concern regarding J.F. and E.D. and the fulfillment of their parental duties.

As in the case *In re C.M.S.*, 2003 Pa. Super 292, 832 A.2d 457, the biological father argued that since he was not aware of the child's whereabouts, he had no recourse but to wait for the adoption papers. The Court determined that the father failed to take any action to overcome the obstacles to assert his parental rights. *C.M.S.* relied on the Pennsylvania Supreme Court's decision in *In re Burns*, 474 Pa. 615, 379 A.2d 535 (1977) in making its determination. *Burns* set forth what parental duties should include:

> "Parental duty is best understood in relation to the needs of a child... These needs, physical and emotional, cannot be met by a merely passive interest in the development of the child. Thus, this court has held that the parental obligation is a positive duty which requires affirmative performance. This affirmative duty encompasses more than a financial obligation; it requires continuing interest in the child and a genuine effort to maintain communication and association with the child... [A] child needs more than a benefactor... A parent is required to exert a sincere and genuine effort to maintain a parent-child relationship; the parent must use all available resources to preserve the parental relationship and must exercise "reasonable firmness" in resisting obstacles placed in the path of maintaining the parent-child relationship. *In re Shives*, 363 Pa. Super. 225, 525 A.2d 801, 803 (Pa. Super. 1987) This court has repeatedly recognized that "parental rights are not preserved ... by waiting for a more suitable or convenient time to perform one's parental responsibilities while others provide the child with his or her immediate physical and emotional needs." *In re Adoption* of *Godzak*, 719 A.2d 365, 368 (Pa. Super. 1998)"

At 624-625, citations omitted, emphasis added.

It is obvious from J.F. and E.D.'s testimony that they have an interest in the triplets. J.F. vowed at one hearing to fight for custody "all the way to the United States Supreme Court." But, their testimony and actions, or rather inactions, belie their professed intentions for these children. They have provided financial support and insurance and amenities that children need, but they have not named the children, have not visited them with regular frequency, did not buy and prepare things for the triplets *prior* to their birth nor make insurance arrangements, schedule monitor and car seat training, etc. with Hamot in a timely manner. They have not shown this Court that they exerted themselves to maintain a parent-child relationship with the triplets, such as going to court as soon as D.B. took triplets home against their wishes, or exercised reasonable firmness in overcoming

obstacles, like locating D.B.'s home to visit the triplets or speak with her in person. Even after they obtained a court order allowing them visitation five days a week, they have not fully utilized it. See also *C.T.D. v. N.E.E. and M.C.E.*, 439 Pa. Super 58, 653 A.2d 28 (1995) (Delay is arguable abandonment and failure to perform parental duties).

If Plaintiff's counsel is correct that D.B. has custody of the triplets in defiance of J.F.'s wishes, then the Court wonders why J.F. and E.D. have not appealed Judge Trucilla's Order. The Court also notes that Hamot has never received a court order from J.F. and E.D. allowing them legal access and custody of the triplets. All available resources, including all legal procedures, have not been used by J.F. and E.D. to preserve their parental relationship with the triplets.

Further, in light of E.D.'s little white lies to D.B. and Hamot staff as well as the incredible claim that J.F. and E.D. could not locate D.B. despite mailing checks to her home several months beforehand, the Court does not find J.F. and E.D. to be fully believable. Their testimony often appeared to be self-serving and full of excuses, none of which the Court is inclined to believe.

Conclusion

It is the finding of this Court that D.B. is the legal mother of the triplets, A, B, and C, due to the fact that no legal mother was provided for in the surrogacy contract. Because the contract encouraged parties to sign away certain legal rights belonging to the triplets, the Court finds it to be unconscionable. Thus, the contract is void as against Pennsylvania public policy.

Aside from the Court's determination that D.B. is the legal mother of the triplets and therefore has automatic standing, the Court also finds that D.B. has standing *in loco parentis* to pursue both custody and child support for the triplets. As biological father, J.F. has a legal duty to provide child support even if he disagrees with who has custody of the triplets. The Court refers the parties back to custody conciliation with all due haste.

Finally, the Court asks that the Plaintiff and Defendant bear in mind that the best interests of the triplets are most important here. "To say that the child is merely the subject of the proceeding, not a 'party' to it, would be to return to the child-as-chattel mentality." *Stapleton v. Dauphin Court Child Care Service,* 228 Pa.Super. 371, 392; 324 A.2d 562, 573 (1974) (Opinion of J. Spaeth, overruled on other grounds) It is the hope of this Court that a custodial tug-of-war will not begin here. It is additionally the Court's hope that the Legislature will address surrogacy matters in Pennsylvania to prevent cases like this one from appearing before the courts without statutory guidance.

ORDER

AND NOW, to-wit, this 2nd day of April, 2004, after reviewing the testimony and evidence presented, the briefs of counsel, and in consideration of the foregoing Opinion, it is hereby **ORDERED**, **ADJUDGED and DECREED** that D.B. is the legal mother of the triplets, A, B, and C, and therefore has standing to pursue custody. Since no legal mother was provided for in the surrogacy contract and because the contract encouraged parties to sign away legal rights belonging to the triplets, the Court finds the contract to be null and void as against Pennsylvania public policy.

Further, D.B. has standing *in loco parentis* to pursue both custody and child support for A, B, and C. As their biological father, J.F. has a legal duty to provide child support even if he disagrees with who has custody of the triplets.

The Court further **ORDERS** that a custody conciliation conference and support conference for the parties be scheduled immediately with the appropriate court related office. The subsequent hearing dates of April 5, 2004, and April 16, 2004 are hereby cancelled.

ORDER

AND NOW, TO-WIT, this 2nd day of April, 2004, it is hereby **ORDERED** that because of the importance and precedence of this Opinion, it is **NOT** to be sealed with the rest of the record since it may be of import to members of the public, legal profession, the Pennsylvania Legislature, and other Commonwealth Courts.

BY THE COURT:
/s/ **Shad Connelly, Judge**

BRANDON BRECKER, Plaintiff,

v.

WILLIAM MAY, Defendant.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary judgment is properly entered where the materials of records show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The record must be reviewed in the light most favorable to the nonmoving party, with all doubts as to an issue of material fact being resolved against the moving party. A nonmoving party must adduce sufficient evidence to bear the burden of proof and where the nonmoving party fails to adduce this evidence, the moving party is entitled to judgment as a matter of law. Summary judgment may be granted only in a case which is free from doubt.

AUTOMOBILE INSURANCE / TORT OPTION / DEFAULT JUDGMENT

A defendant who has allowed a default judgment to be entered may still raise a defense of failure to state a claim upon which relief can be granted. By raising the limited tort option in a motion for summary judgment, the defendant is, in essence, averring that the plaintiff has failed to state a claim for non-economic damages and therefore this defense is not waived where a default judgment has been entered.

LIMITED TORT / SERIOUS INJURY / MOTION FOR SUMMARY JUDGMENT

A party bound by the limited tort election is precluded from maintaining an action for non-economic loss unless the injury is serious; defined so as to include death, serious impairment of a body function or permanent serious disfigurement. Determination of whether a serious impairment of a body function exists requires inquiry as to what body function was impaired and whether the impairment was serious. Consideration must be given to the extent of the impairment, the length of time of the impairment, the treatment required and any other relevant factors. It is not necessary that an impairment be permanent to be serious.

The plaintiff in this action sustained a chest abrasion requiring that he sleep with his arms folded over his chest for 1-1/2 months and approximately once a month he experiences soreness in his chest. This pain does not impair any body function or require medication or treatment. The plaintiff also has a circular, 1-1/2 inch circumference neck scar and a 1-inch chest scar. The scars are not painful, do not cause discomfort and are barely visible. The court therefore concludes that the injuries sustained by the plaintiff are not serious and summary judgment is properly entered in the plaintiff's favor.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 13336-2002

Appearances: Thomas P. Wall, II, Esq. for the Plaintiff
Andrew M. Schmidt, Esq. for the Defendant

OPINION

Before the Court is the Defendant's Motion for Summary Judgment. The Defendant has not waived the right to contest the Plaintiff's non-economic damages. Because the Plaintiff opted for limited tort coverage and has not suffered a serious injury, the Defendant's Motion is granted.

FACTUAL / PROCEDURAL HISTORY

At approximately 4:45 AM on August 4, 2001, the Plaintiff was a passenger in a motor vehicle being operated by the Defendant, who was traveling north on Mooreheadville Road in North East Township, Pennsylvania. As the Defendant's vehicle approached Sidehill Road, it left the roadway over the western berm and struck a tree.

On September 24, 2002, the Plaintiff filed a civil complaint alleging serious and permanent injuries as a result of the Defendant's negligent operation of a motor vehicle. At the time of the accident, the Plaintiff was covered under a limited tort insurance policy.

The Plaintiff filed a Praecipe to Reinstate Complaint on November 5, 2002 and the Defendant was served on December 3, 2002. On January 15, 2003, the Plaintiff filed a Default Notice to the Defendant pursuant to Pa. R. C. P. 237.1. The Plaintiff filed a Praecipe for Entry of Default Judgment on February 20, 2003. A Default Judgment was entered against the Defendant on that same date

Subsequently, the Defendant filed a Motion for Summary Judgment alleging the Plaintiff is bound by his choice of limited tort coverage and cannot recover non-economic damages because he has not suffered a serious injury. The Plaintiff counters the Defendant failed to raise the limited tort statute as an affirmative defense in New Matter pursuant to Pa. R.C.P. 1030 and therefore this defense is waived. As a result, the Plaintiff contends he is entitled to pursue all damages at trial, including non-economic damages.

The Plaintiff's position is unsupportable. The Defendant's Motion for Summary Judgment is appropriate.

THE LEGAL STANDARD

"Summary judgment is proper where the pleadings, depositions, affidavits and other materials of record show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Frederick v. Action Tire Co.*, 744 A.2d 762, 765 (Pa. Super. 1999). In determining whether to grant summary judgment, the record must be viewed "in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. In order to withstand a motion for summary judgment, a non-moving party 'must adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor. Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.' Finally,

we stress that summary judgment will be granted only in those cases which are free and clear from doubt." *Washington v. Baxter*, 553 Pa. 434, 441, 719 A.2d 733, 737 (1998); *Frederick v. Action Tire Co., supra.*

WHETHER THE DEFENDANT CAN CONTEST PLAINTIFF'S DAMAGES

Since a default judgment has been entered against the Defendant, liability has been established. The remaining question is the extent of Plaintiff's recoverable damages. At issue is whether the Defendant has waived the right to contest the Plaintiff's non-economic damages. Given the procedural posture of this case, and the facts known to the Plaintiff, the Defendant is not precluded from contesting the Plaintiff's non-economic damages.

The Plaintiff is correct that all affirmative defenses as identified in Pa. R.C.P. 1030(a) must be pled as New Matter. It is uncontroverted the Defendant did not file an Answer and/or New Matter raising the limited tort provisions of the Motor Vehicle Financial Responsibility Law, 75 Pa. C.S.A §1701 *et seq.* (hereinafter "MVFRL"). Plaintiff contends the Defendant has waived the limited tort statute by failing to plead it as New Matter. However, the Plaintiff has not provided any legal authority establishing that a failure to raise the limited tort provision of the MVFRL as an affirmative defense in New Matter precludes a defendant from subsequently contesting non-economic damages.

Contrary to Plaintiff's position, Pa. R.C.P. 1032 (a) provides that a party waives all defenses except, *inter alia*, "...the defense of failure to state a claim upon which relief can be granted...". In essence, the Defendant is contending the Plaintiff has failed to state a claim for non-economic damages, which defense is not waived pursuant to Pa.R.C.P. 1032(a).

While it may have been preferable that the Defendant pled the MVFRL as an affirmative defense in New Matter, the issue is not waived if raised in a Motion for Summary Judgment provided the Plaintiff is not prejudiced. *See, Sanderson-Cruz v. U.S.*, 88 F. Supp. 2d 388, 392 (E.D. Pa. 2000) ("A motion for summary judgment, 'while not the most appropriate way to raise a previously unpled defense,' may nonetheless be appropriate if the plaintiff is not prejudiced.").

In the case *sub judice,* the Plaintiff cannot claim prejudice in the form of unfair surprise. After all, the Plaintiff has known from the outset that he opted for limited tort coverage. This is not a situation where the Defendant is attempting at trial to spring upon the Plaintiff a defense that should have been previously pled. Plaintiff has been on notice that he did not have full tort coverage. Therefore Plaintiff cannot claim surprise by the Defendant contesting Plaintiff's non-economic damages.

Herein, the parties have engaged in discovery and the record is sufficient for the Plaintiff to oppose the Defendant's Motion for Summary Judgment. The Plaintiff is not prejudiced in his ability to respond to the Defendant's Motion for Summary Judgment. The legal constraints governing the ability

to claim non-economic damages are of Plaintiff's own choosing. The Defendant is neither gaining any unfair tactical advantage nor perpetrating any ambush upon the Plaintiff by raising the limitation of damages as set forth in MVFRL by way of a Motion for Summary Judgment.

Notably, one purpose of the MVFRL was to provide insurance relief to Pennsylvania citizens by making the required motor vehicle insurance more affordable. This purpose was achieved, in part, by providing an individual with the option of paying a lower premium and in return limiting that persons recovery in the event of an accident. In theory, the lower premiums would support the lower claim amounts allowed. *See, Stelea v. Nationwide Mutual Insurance Co.*, 830 A2d 1028 (Pa. Super. 2003).

In the instant case, this purpose of the MVFRL would be thwarted if the Plaintiff could claim non-economic damages even though he intentionally chose limited tort coverage and paid lower premiums. The default judgment does not convert the Plaintiff's limited tort choice to full tort coverage. A limited tort plaintiff should not receive a windfall benefit of full tort coverage by the fortuitous inaction of the Defendant. Accordingly, the Defendant is not precluded from contesting the Plaintiff's non-economic damages by way of a Motion for Summary Judgment.

WHETHER PLAINTIFF HAS SUFFERED A SERIOUS INJURY

The MVFRL requires that an individual choose either limited tort or full tort coverage. It is uncontested the Plaintiff chose limited tort coverage meaning he "remains eligible to seek compensation for economic loss sustained in a motor vehicle accident as the consequence of the fault of another person pursuant to applicable tort law. Unless the injury is a serious injury, [he] is bound by the limited tort election [and] shall be precluded from maintaining any action for non-economic loss..." 75 Pa. C.S.A. § 1705(d).

Since the Plaintiff opted for limited tort coverage, his recovery is limited to economic damages unless he can demonstrate that he has suffered a "serious injury," The MVFRL defines "serious injury" as "a personal injury resulting in death, serious impairment of a body function or permanent serious disfigurement." In order to determine whether a "serious impairment of body function" exists, two inquiries must be made: "a) What body function, if any, was impaired because of injuries sustained in a motor vehicle accident; [and] b) Was the impairment of the body function serious? The focus of these inquiries is not on the injuries themselves, but on how the injuries affected a particular body function.... In determining whether the impairment was serious, several factors should be considered: the extent of the impairment, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors. An impairment need not be permanent to be serious." *Washington, supra* at 447-448, 719 A.2d at 740.

Applying these criteria, the Plaintiff has not suffered a "serious injury." At his deposition, the Plaintiff testified he received these injuries from the accident: an abrasion from his neck to the center of his chest, pain in the center of his chest, a scar on the left side of his neck, a scar on his left clavicle and a slightly sprained ankle. *See*, Deposition of Brandon Brecker, 10/15/03, pp. 4-5. Regarding the pain in the Plaintiff's chest, he testified that he occasionally experienced soreness where his ribs met his sternum when wrestling, playing basketball or lifting heavy objects. The Plaintiff did not use any medication and did not seek treatment from a doctor for the chest pain.

Immediately following the accident, the Plaintiff was required to sleep with his arms folded over his chest for one and one-half months. The Plaintiff testified that he experienced soreness in his chest once every month. *Id.* at pp. 11-13. The Plaintiff's chest pain is not a "serious injury" because the extent of the pain does not impair any body function and it does not require medication or treatment by a physician. Indeed, the Plaintiff was not limited or restricted in any of life's functions by any of his injuries. As noted, the Plaintiff is able to engage in strenuous exercises such as wrestling, basketball and weightlifting.

Likewise, the Plaintiff has not suffered a "serious injury" in the form of scars to his neck and chest that constitute a "permanent, serious disfigurement." At his deposition, the Plaintiff testified that the neck scar was circular and one and one-half inches in circumference. The neck scar was not painful, did not itch, did not cause discomfort when shaving or wearing collared shirts, did not interfere with his ability to play sports and did not limit the Plaintiff physically in any manner. *See*, Deposition of Brandon Brecker, 10/15/03, pp. 5-7. The Plaintiff also testified that when people noticed the neck scar and inquired as to what happened, it was "kind of embarrassing" to disclose the scar resulted from an automobile accident. *Id.* at pp. 7-9.

The Plaintiff testified that the chest scar is circular and one inch in circumference. The chest scar was not painful, was not irritated by clothing, but was occasionally irritated by sweat. The Plaintiff also testified that other people rarely commented upon his chest scar. The Plaintiff's neck and chest scars were more prominent when he gets a suntan. *Id*. at pp. 9-11.

Upon careful review of the photographs submitted (Complaint-Exhibit "B" & Motion For Summary Judgment-Exhibit "C"), the Plaintiff's scars are barely visible and do not even minimally detract from the Plaintiff's physical appearance. Therefore, the Plaintiff's scars are not permanent, serious disfigurements constituting a serious bodily injury.[1]

[1] Also, based upon the Plaintiff's deposition testimony neither scar is a serious impairment of his body functions and therefore, do not qualify as serious injuries under that standard.

CONCLUSION

The Plaintiff is bound by his limited tort selection. Despite the default judgment, the Defendant has not waived his right to contest the Plaintiff's damages. None of the Plaintiff's injuries constitute a serious injury permitting recovery of non-economic damages. Therefore, the Defendant's Motion for Summary Judgment is granted.

ORDER

AND NOW, to-wit, this 15 day of April, 2004, upon consideration of the pleadings, briefs and oral argument, it is hereby **ORDERED** that the Defendant's Motion for Summary Judgment is **GRANTED**. Since the Plaintiff has not suffered a serious injury, the Plaintiff cannot recover non-economic damages.

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

JEREMY SHAMPOE, Administrator of the Estate of RYAN SHAMPOE, Deceased, Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, OFFICE OF PARKS & FORESTRY, BUREAU OF STATE PARKS, now known as COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CONSERVATION & NATURAL RESOURCES, COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Defendants

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary judgment may be granted only in those cases in which there are no genuine issues of material fact and the moving party is entitled to relief as a matter of law.

Where the non-moving party bears the burden of proof on an issue, that party may not merely rely on its pleadings in order to survive summary judgment.

The Court must view the record in a light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

STATUTES

Courts are required to strictly construe exceptions to sovereign immunity statutes in favor of the Commonwealth.

TORTS / DEFENSES / IMMUNITY

Under Sovereign Immunity Act, Commonwealth is immune from suit and immunity is waived only in certain narrowly-defined circumstances involving suits based on negligence.

Where a dangerous condition derives from, originates or has as its source Commonwealth realty, sovereign immunity is waived.

Negligent lifeguard supervision does not fall within an exception to the Sovereign Immunity Act.

The purpose of the Recreational Use of Land and Water Act is to encourage owners of land to make land and water areas available to the public for recreational uses by limiting their liability toward persons entering thereon for such purposes.

The Recreational Use of Land and Water Act provides immunity only to land owners who open their land free of charge to the public for recreational purposes.

The Recreational Use of Land and Water Act does not protect landowners from willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity of the land.

The protection afforded by the Recreational Use of Land and Water Act extends to the Commonwealth.

In considering whether the Recreational Use of Land and Water Act provides immunity, the courts will consider the (1) use, (2) size, (3) location, (4) openness, and (5) extent of the improvement of the land.

TORTS / NEGLIGENCE / DUTY

The corresponding duty of care a Commonwealth agency owes to those using its real estate is to require that the condition of the property is safe for the activities for which it is regularly used, intended to be used or reasonably foreseen to be used.

Where land subject to the Recreational Use of Land and Water Act is improved, the owner of the land is subject to liability for harm caused by negligent failure to maintain the improvements or to warn of dangers posed by them.

In order to demonstrate a willful failure to warn, a plaintiff must show that the defendant had actual knowledge of a danger that is not obvious to those using the premises for recreational purposes.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY. PENNSYLVANIA NO. 12609 - 2001

Appearances: William A. Dopierala, Esq. for the Defendant
J. Timothy George, Esq. for the Plaintiff
Matthew McLaughlin, Esq. for the Plaintiff

MEMORANDUM

Bozza, John A., J.

This case is currently before the Court on a Motion for Summary Judgment filed by defendant, Commonwealth of Pennsylvania, Department of Conservation and Natural Resources (herein D.C.N.R.). The facts surround the drowning death of Ryan Shampoe, which occurred in the Barracks Beach area of Presque Isle State Park on August 1, 1999. Plaintiff Jeremy Shampoe, as administrator of the estate of Ryan Shampoe, alleges that the drowning resulted from negligent supervision of swimmers and a dangerous condition of Commonwealth-owned real estate, specifically the designated swimming area and breakwalls at Barracks Beach. The D.C.N.R. claims immunity from suit under both the Sovereign Immunity Act, 42 Pa. C.S. §8521 et seq., and the Recreational Use of Land and Water Act (herein RULWA), 68 P.S. §477-1 et seq. After reviewing the pleadings, briefs, and oral argument, the Court finds that D.C.N.R. is entitled to partial summary judgement regarding the allegations of negligent supervision. Additionally, the Court finds that there are issues of material fact regarding the applicability of the real property exception to the Sovereign Immunity Act and the RULWA.

Summary judgment may be granted only in those cases in which there

are no genuine issues of material fact and the moving party is entitled to relief as a matter of law. *Harleysville Insurance Cos. v. Aetna Cas. & Sur. Ins. Co.*, 795 A.2d 383 (Pa. 2002). Where the non-moving party bears the burden of proof on an issue, that party may not merely rely on its pleadings in order to survive summary judgment. *Murphy v. Duquesne Univ. of the Holy Ghost*, 565 Pa. 571, 777 A.2d 418 (2001). "Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case on which it bears the burden of proof...establishes the entitlement of the moving party to judgment as a matter of law." *Young v. Pennsylvania Department of Transportation*, 560 Pa. 373, 744 A.2d 1277 (2000). The Court must view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Pennsylvania State University v. County of Centre*, 532 Pa. 142, 615 A.2d 303 (1992). Upon reviewing all the evidence in the light most favorable to the plaintiff, it is apparent that the D.C.N.R. is entitled to partial summary judgment.

I. Sovereign Immunity

While as a general rule the Sovereign Immunity Act provides that the Commonwealth is immune from suit, immunity is waived in certain narrowly defined circumstances involving suits based on negligence. 42 Pa. C.S § 8521-8522. Courts are required to strictly construe these exceptions to sovereign immunity in favor of the Commonwealth. *Snyder v. Harmon*, 522 Pa. 524, 562 A.2d 307 (1989). The relevant exception in this case is for injury caused by "a dangerous condition of Commonwealth agency real estate...including Commonwealth-owned real property." 42 Pa. C.S. § 8522(b)(4). In interpreting this provision, the Pennsylvania Supreme Court has stated that where a dangerous condition derives from, originates or has as its source Commonwealth realty, sovereign immunity is waived. *Jones v. SEPTA*, 565 Pa. 211, 225, 772 A.2d 435, 443 (2001). A plaintiff must therefore allege that an artificial condition or defect of the land itself caused the injury to occur. *Snyder*, 522 Pa. at 434-435, 562 A.2d at 312. "The corresponding duty of care a Commonwealth agency owes to those using its real estate, is such as to require that the condition of the property is safe for the activities for which it is regularly used, intended to be used or reasonably foreseen to be used." *Id*.

The D.C.N.R. argues that Mr. Shampoe failed to allege a defect of Commonwealth property as required to satisfy the real estate exception to sovereign immunity. The D.C.N.R. also contends that Mr. Shampoe's negligence claims involve allegations of negligent lifeguard supervision at Presque Isle State Park, and do not fall into any exception to the Sovereign Immunity Act. This Court has reviewed the record in its entirety and is in agreement with the D.C.N.R. that negligent lifeguard supervision does not fall within an exception to sovereign immunity. *Wilson v. Norristown Area Sch. Dist.*, 2001 Pa. Commw. LEXIS 651, 783 A.2d 871 (2001); *See*

also: Sims v. Silver Springs-Martin Luther School, 155 Pa. Commw. 619, 625 A.2d 1297 (1993); *Prescott v. Philadelphia Housing Authority*, 124 Pa. Commw. 124, 555 A.2d 305 (1989). However, the Court finds that the record is sufficient to support the assertion that a dangerous condition derived from, originated or had as its source Commonwealth realty. 42 Pa. C.S.A. ¶8522 (b)(4); *Jones v. SEPTA*, 565 Pa. 211, 225, 772 A.2d 435, 443 (2001). Specifically, Mr. Shampoe alleges in paragraphs 7, 8, 9, and 30(e) and (l), and further develops through subsequent pleadings and supporting evidence, that the D.C.N.R. exercises actual control over portions of Lake Erie and particularly the Barracks Beach area, including a swimming area confined by artificial markers, buoys, floats and manmade breakwalls. These improvements are alleged to have contributed to the decedent's drowning. Therefore, with respect to the Sovereign Immunity Act the D.C.N.R. is entitled to partial summary judgment regarding the assertions of negligent lifeguard supervision. However, Mr. Shampoe has alleged sufficient facts to go forward on the issue of whether the waiver of sovereign immunity based on the real estate exception is applicable in this case.

II. Recreational Use of Land and Water Act

The purpose of the RULWA "is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." 68 P.S. §477-1. "The need to limit owner liability derives from the impracticality of keeping large tracts of largely undeveloped land safe for public use." *Riviera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc*., 510 Pa. 1, 15 n. 17, 507 A.2d 1, 8 n. 17 (1986). This immunity extends only to owners of land who open their property to the public for recreational purposes free of charge. 68 P.S. § 477-5. The protection afforded by the RULWA extends to the Commonwealth. *Commonwealth, Dep't of Environmental Resources v. Auresto*, 511 Pa. 73, 511 A.2d 815 (1986).

The Act does not protect owners from liability for the "willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity." 68 P.S. § 477-6. In order to demonstrate a willful failure to warn, a plaintiff must introduce evidence that the defendant had actual knowledge of a danger that is not obvious to those using the premises for recreational purposes. *Livingston v. Pennsylvania Power and Light Company*, 609 F. Supp. 643, 1985 U.S. Dist. LEXIS 20144 (1985).

Mr. Shampoe asserts that the D.C.N.R. was on notice of the dangerous condition based on a past drowning, and report drafted by the U.S. Army Corps of Engineers describing the strong currents created by breakwalls and the danger posed to swimmers. In response, the D.C.N.R. asserts that even if this Court were to find that its actions constituted willful or malicious conduct the Sovereign Immunity Act's real estate exception

waiver only applies in cases involving negligence, and the D.C.N.R. would therefore be immune from liability for such conduct. *See Lory v. City of Philadelphia*, 544 Pa. 38, 674 A.2d 673 (1996); *Wilkinson v. Conoy Township*, 677 A.2d 876, 1996 Pa. Commw. LEXIS 239 (1996). This Court finds that the record is insufficient at this time to conclude whether the D.C.N.R.'s actions constituted willful or malicious conduct. However, to the degree that the plaintiff pursues this claim at trail, this Court would conclude that any intentional conduct is subject to the limitations of the Sovereign Immunity Act.

The RULWA was also "not intended to insulate owners of fully developed recreational facilities from the normal duty of maintaining their property in a manner consistent with the property's designated and intended use by the public." *Stone v. York Haven Power Co.*, 561 Pa. 189, 195, 749 A.2d 452, 456 (2000). Where land subject to RULWA protection contains improvements, the owner of that land is subject to liability for harm caused by a negligent failure to maintain the improvements or to warn of dangers posed by them. *Stone*, 561 Pa. at 196-197, 749 A.2d at 457. While the Act is interpreted to apply mainly to unimproved land, "the plain language of the RULWA does not assign or withhold immunity based on the extent of improvement on the land." *Yanno v. CONRAIL*, 1999 Pa. Super. 338, 744 A.2d 279, 281 (1999). Rather, the courts have taken a case-by-case approach, applying various factors including: (1) use, (2) size, (3) location, (4) openness, and (5) extent of improvement, in determining whether immunity applies. *Yanno*, 744 A.2d at 282. A court can also consider "any unique facts as additional factors where doing so would advance the purpose of the RUA." *Pagnotti v. Lancaster Twp.*, 2000 Pa. Commw. LEXIS 274, 751 A.2d 1226, 1233-1234 (2000). Finally, the
courts must determine on a case-by-case basis whether to apply these factors to the property as a whole, or to that portion of property where the injury occurred. *Yanno*, 744 A.2d at 283. Based on a review of the record, the Court finds that there are issues of material fact regarding whether an action against the D.C.N.R. is barred based on the protection afforded in the RULWA and whether the improvements to the beach, including the designated swimming area and the breakwalls, caused the decedent's drowning.

The D.C.N.R. asserts that the RULWA bars all claims against the Commonwealth as the owner of Presque Isle State Park, as it is largely unimproved land and Mr. Shampoe's death was not caused by any improvements to the land. While only 134.62 of the approximately 3127.11 acres constituting Presque Isle State Park are improved, it is alleged that the incident occurred on improved land. Additionally, the public is encouraged to come to Barracks Beach to swim, as evidenced by the designated swimming area and the provision of lifeguards. Swimming is one of the recreational activities listed in the RULWA. 68 P.S. § 477-2.

Furthermore, the record supports the conclusion that the area has been altered from its natural state in that breakwalls have been installed to prevent erosion of the beach, and various floatation devices are utilized to delineate an approved swimming area. Therefore, when viewing the record in a light most favorable to the plaintiff, the evidence is sufficient to allow the case to proceed to trial on the theory that the D.C.N.R. was negligent for failing to warn of a dangerous condition resulting from improvements to the Barracks Beach area of Presque Isle State Park.

An appropriate order shall follow.

ORDER

AND NOW, to wit, this 29 day of April, 2004, upon consideration of defendant's Motion for Summary Judgment and argument thereon, it is hereby ORDERED, ADJUDGED and DECREED that defendant's Motion for Summary Judgment is GRANTED with respect to the allegation of negligent supervision, and DENIED with respect to all other issues at this time.

By the Court,
John A. Bozza, Judge

GARY A. FLOWERS, and EVELYN F. FLOWERS, his wife, Appellants

v.

THE ZONING HEARING BOARD OF MILLCREEK TOWNSHIP, Appellee

v.

TOWNSHIP OF MILLCREEK, Intervener

ZONING / VARIANCE / NONCONFORMING USES / MOTION TO REMAND

The Municipalities Planning Code authorizes the court to receive additional evidence, to remand or to refer to a referee to receive additional evidence if required for a proper consideration of a land use appeal.

Factors to be considered in determining whether additional evidence should be received by the court or if the case should be remanded are identified in Erie L.R. 311(d), and include whether the movant was represented by counsel, whether there exists previously undisclosed or newly discovered evidence, the overall adequacy of the record, the regularity and fairness of the administrative proceedings as disclosed by the record, and such other factors as may be considered in the interest of justice. Essentially, the court's inquiry is to determine whether the moving party was denied a full and fair opportunity to be heard.

Appellants sought a variance to raise a cottage and construct a new first floor lacking required setbacks from all property lines. Upon a review of the record, the court finds that the appellants are not entitled to submit additional evidence or to a remand. It was appellants' election not to proceed with counsel. Evidence claimed to be unavailable to the Zoning Hearing Board was actually available or could have been obtained had additional research been performed prior to the hearing. Further, the record is adequate for appellate review and does not indicate a lack of regularity or that the proceedings were fundamentally unfair. Finally, the appellants identify no other significant factors which, in the interest of justice, would justify a decision to accept additional evidence or remand this case.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 10941- 2004

Appearances: David J. Rhodes, Esq. for the Appellants
Evan E. Adair, Esq. for the Twp. of Millcreek
Timothy M. Zieziula, Esq. for the Zoning Hearing Bd. of Millcreek Twp.

OPINION

I. FACTUAL BACKGROUND

This case comes before the Court on the Appellant's Motion For Leave

To Submit Additional Evidence/Remand To Zoning Hearing Board.

The Appellants, husband and wife, are the owners of property located at 3148 Lakefront Drive, Erie, Pennsylvania. This parcel is also known as Lot No. 8 of the Kelso Beach Subdivision The Flowers submitted an application seeking a variance permitting them to raise the existing cottage located on the property in order to construct a new first floor which lacked the required setbacks from all property lines. On January 19, 2004, their application for variance was denied. They took an appeal to the Millcreek Township Zoning Hearing Board. (hereinafter "Board"). The Board conducted a hearing on the Appellants' application and denied their appeal on February 25, 2004. On March 17, 2004, the Appellants filed a Land Use Appeal with the Court of Common Pleas at this docket number. On April 20, 2004, the Board filed the record of the underlying proceeding with the Erie County Prothonotary, including its adjudication. Appellants seek a leave to submit additional evidence/remand the case to the Zoning Hearing Board for the following reasons.

1. They assert that the record created at the Zoning Hearing Board hearing is incomplete.

2. They were not represented by counsel before the Board.

3. There are neighboring parcels similarly situated to theirs that have been allowed to contain multi-story dwellings

4. They did not have available to them, nor did they point out to the board that at least ten (10) properties within the subdivision have second floor additions or have been elevated by the placement of raised basements beneath the existing cottages.

5. They did not inform the Board that the Board had determined within the past several years that at least three (3) properties located along the "front row" of Kelso and neighboring Baer Beach met the requirements for granting a variance from the set-back requirements and were thus permitted to add or modify additional stories to the cottages located thereon.

6. The record created before the Board is inadequate in that it fails to explain how numerous properties within the same subdivision met the requirements for a variance or were granted permission to build a second story onto a non-conforming structure while Appellants' property failed to meet the same requirements.

Both the Appellee as well as the intervenor (Millcreek Township) opposed the motion.

II. LEGAL ANALYSIS

53 P .S. § 11005-A states in relevant part:

> If, upon motion, it is shown that proper consideration of the land use appeal requires the presentation of additional evidence, a judge of the court may hold a hearing to receive additional evidence, may remand the case to the body, agency

> or officer whose discretion or order has been brought up for review, or may refer the case to a referee to receive additional evidence... .

Erie L. R. 311(d) sets forth additional factors which may be considered by the Court reviewing such requests. They are:

1. Whether movant was represented by counsel before the administrative tribunal.

2. Whether previously undisclosed or newly discovered evidence exists which was not made available to the administrative tribunal prior to its decision.

3. The overall adequacy for the purpose of appellant review of the record made before the administrative tribunal.

4. The apparent regularity and fundamental fairness of the administrative proceedings, as disclosed by the record.

5. Such other factors as may be considered in the interest of justice.

There are two basic requirements which must be met before the Appellants' relief can be granted

1. the appellant was refused the opportunity to be fully heard before the Zoning Hearing Board; or

2. relevant testimony was excluded by the Zoning Hearing Board. *Lower Allen Citizens Action Group, Inc. v. Lower Allen Township Zoning Hearing Board,* 500 A.2d 1253,1259 (Pa. Cmwlth. 1985).

This Court has reviewed the adjudication and record which was filed by the Board in this case. As the adjudication indicates the Board initially determined that the Appellants' request was inappropriately characterized as a variance request and, instead, treated it as a request for expansion of a non-conforming use. In that regard, the Board noted that: The prerequisites for authorizing an expansion of a non-conforming use exists, have not been established. Adj. 2.[1] What the Board found significant was:

> the structural alteration proposed in this case is virtual doubling of the structure itself, thus doubling the cumulative amount of encroachment into the side, rear, and front yards. We also note the evidence indicating an adverse impact on the use and enjoyment of properties to the south which would be created by the significant increase in the height of the structure.

Id.

The Board heard the Appellants' testimony that a number of other structures are higher than one story. *Id.* at 2. See also, Tr. 7, 36.[2] However, as the Board correctly noted:

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[1] Adj. denotes the Board's adjudication.

[2] Tr. denotes the transcript of the 2/25/04 hearing.

> "The record does not establish how those structures came to be and there is no evidence of record indicating their permanent or prior approval status. They may be perfectly lawful or in conformity with the Ordinance. Even if they are violations or had received approvals to which they may not have been entitled, it is well established that relief granted to one property owner from a zoning restriction, even if improvidently granted, does not provide a basis for the same granted relief to a nearby property owner. Neither does a nearby, tolerated violation.

Id. at 2-3.[3]

Continuing, this Court will analyze the relevant factors found in Erie L.R. 311(d).

First, counsel did not represent the Appellants. Although that might have placed them at a disadvantage, it is a position they chose to assume. Furthermore, that fact alone does not entitle them to relief. Second, the case does not involve previously undisclosed or newly discovered evidence which was not made available to the Board. It is obvious that the Appellants had some of this information and raised it at the hearing. Also, they could have conducted additional research prior to the hearing in order to present the other evidence which they assert was relevant. Third, the record is adequate for appellate review. Fourth, there is no evidence that the proceedings lacked regularity or were fundamentally unfair. Fifth, there are no other significant factors which, in the interest of justice, this Court should consider that would militate in favor of granting the Appellants requests.

III. CONCLUSION

In essence, this Court must determine whether the Appellants were denied a full and fair opportunity to be heard. The evidence is to the contrary. Furthermore, the Board did not exclude relevant testimony. Any lack of evidence presented resulted from the failure of the Appellants to present it.

The Court agrees with the Board and the Intervenor that there is an inherent danger in opening the evidentiary record in situations like this where the most that can be said is that the Appellants were not represented by counsel. To grant the Appellants' request would set a dangerous precedent for future cases, a precedent that would lead to repetitious litigation. The mere fact that a citizen is frustrated with a Zoning Hearing Board's decision, or in hindsight feels that the case could

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[3] *See Vito v. Zoning Hearing Board of the Borough of Whitehall,* 458 A.2d 620 (Pa. Cmwlth. 1983). *See also, Drop v. Board of Adjustment,* 293 A.2d 144, 147 (Pa.Cmwlth. 1972)(citing *Spadaro v. Zoning Board of Adjustment,* 147 A.2d 159 (Pa. 1959)).

have been better presented, does not provide grounds to present additional evidence and/or for remand.

ORDER

AND NOW, this 18th day of May, 2004, for the reasons set forth in the accompanying Opinion, it is hereby ORDERED that the Appellants' Motion For Leave To Submit Additional Evidence/Remand To Zoning Hearing Board is DENIED.

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

COMMONWEALTH OF PENNSYLVANIA

v.

JOANN E. ROESCH

CRIMINAL PROCEDURE / SENTENCING

Ordinarily, a party seeking modification of a sentencing order must file a post-sentencing motion within ten (10) days of the date of the sentencing under Pa. R. Crim. P. 721(b)(1).

JUDGMENT / OPEN, VACATE OR AMEND

A trial court has jurisdiction to modify or rescind its order within thirty (30) days of entry under 42 Pa. C.S.A. §5505.

CRIMINAL PROCEDURE / SENTENCING

Restitution orders are outside of the scope of 42 Pa. C.S.A. §5505, which allows thirty (30) days to modify a court order, because the legislature has 'otherwise provided' for restitution orders under the restitution statute, 18 Pa. C.S.A. §1106.

CRIMINAL PROCEDURE / SENTENCING

Because 18 Pa. C.S.A. §1106 empowers the trial court to modify a restitution order "at any time," trial court maintains power to modify such an order regardless of whether the court's action is the result of a party's motion or otherwise.

CRIMINAL PROCEDURE / SENTENCING

It is well within a trial court's authority to sua sponte amend a sentencing order for restitution.

CRIMINAL PROCEDURE / SENTENCING

Where original sentencing order required payment of a specific amount of restitution, Court was free to amend its order "at any time" under 18 Pa. C.S.A. §1106.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 2663 of 2003

Appearances: Patricia Kennedy, Esq. for the Commonwealth
Stephen Lagner, Esq. for the Defendant

OPINION

Bozza, John A., J.

On March 3, 2004 Joann Roesch pled guilty to one count of simple assault as a misdemeanor in the third degree. Both the Commonwealth and the defendant agreed to proceed immediately to sentencing, and she was sentenced to a period of twelve (12) months probation and ordered to pay restitution in the amount of $300.00. Prior to sentencing there was discussion concerning restitution. The Court, however, was without the benefit of a pre-sentence investigation report or the victim's impact statement. The Commonwealth requested $300.00, noting that the actual

amount would not be known until the victim was contacted. Following sentencing, the probation department received information from the victim specifying the amount of loss as $2,042.70.

On April 5, 2004, the Commonwealth filed a Motion to Modify Sentence requesting that the Court order the defendant to pay the additional amount of restitution specified by the victim. The defendant objected on the basis that the Commonwealth had failed to file a timely motion for modification of sentence pursuant to Pa. R. Crim. P. 721, and that it's request was beyond the 30 days allowed for modification of court orders pursuant to 42 Pa. C.S.A. §5505 (2003). Commonwealth argues that the issue is controlled by the specific provisions of 18 Pa. §1106(a)(3), concerning the amendment of restitution orders, which provides for the modification of restitution orders at any time. It does not appear that the appellate courts have squarely addressed this issue.

There is no question that a party seeking modification of a sentencing order ordinarily must file a post-sentencing motion within ten (10) days of the date of sentence. Pa. R. Crim. P. 721(b)(1). *Commonwealth v. Ledoux*, 768 A.2d 1124 (Pa. Super. 2001); *Commonwealth v. Rohrer*, 719 A.2d 1078 (Pa. Super. 1998). Similarly, it is well established that the trial court may only modify or rescind an order within thirty days of its entry. Thereafter it loses jurisdiction to do so. 42 Pa. C.S.A. §5505; *Rohrer*, 719 A.2d 1078 (Pa. Super. 1998). Here, the Commonwealth filed its motion to change the amount of restitution well beyond the ten (10) days specified in Rule 721. Indeed it was beyond the thirty days required by 42 Pa. C.S.A. § 5505. The Commonwealth's position is that the legislature, by adopting the new provisions of 18 Pa. C.S.A. §1106, has provided for an exception to the ten (10) day limitation, granting the courts authority to change the amount of restitution regardless of when a request to modify has been made. Section 1106 provides "the court may, at any time or upon recommendation of the district attorney...alter or amend any order of restitution ..." 18 Pa. C.S.A. §1106(a)(3) (2003). The defendant has suggested that while this section may allow the court to proceed "at any time" to amend a restitution order, it should be interpreted to require the Commonwealth to adhere to the time limitations of Rule 721 with regard to the filing of a post-sentence motion to modify sentence.

An analysis of this issue must begin with the recognition that the time limitation for modification of court orders within thirty days of their entry is the result of legislative prerogative. The statute specifically states that the 30-day period applies unless "otherwise provided or prescribed by law". 42 Pa. C.S.A. §5505 (2003). With the amendment of the restitution statute in 1998, it is apparent that the legislature "otherwise provided" with regard to restitution orders. The legislature explicitly stated that the court may "at any time" amend or alter an order of restitution. The notion that a modification of restitution order can be made "at any time" explicitly

and plainly denotes that the Court is not bound by the 30-day time limitation set forth in 42 Pa. C.S.A. §5505. Since the Court has been so empowered by the legislature, it makes little difference as to whether its action is the result of a motion by the Commonwealth or the Court having been informed by some other proper source, such as a probation department, that a restitution order should be modified. Through the adoption of the amendment to 18 Pa. C.S.A. §1106 the legislature implicitly recognized the practical difficulty of arriving at the precise amount of restitution at the time of sentencing, and the need for a flexible approach for fixing an amount that is accurate and just. In light of the broad authority granted to the Court pursuant to 18 Pa. C.S.A. §1106, where an initial amount of restitution has been set it is not necessary for the Commonwealth to file the motion for modification of restitution within ten (10) days of sentence. The exact amount of a victim's loss may be impossible to determine within such a short time period, and in any case it is well within the Court's statutory authority to *sua sponte* amend a sentencing order for restitution. In the circumstances of this case the Court was not required to await the Commonwealth's request before modifying its original order to provide that the defendant pay the $2,042.70 requested by the victim.

In support of his position the defendant directs the Court's attention to *Commonwealth v. Dinoia*, 801 A.2d 1254 (Pa. Super. 2002). In *Dinoia* the Superior Court concluded that the amendment to the restitution statute as adopted in 1998 requires the sentencing court to specify the amount of restitution at the time of sentencing, and that the failure to do so precluded the subsequent imposition of restitution at a later time. 801 A.2d at 1257. In that case, although the trial court ordered the defendant to pay restitution, no specific amount was either requested by the Commonwealth or ordered by the court. Eight months after the sentencing, the district attorney filed a petition seeking a determined restitution, and it was not until 18 months after the initial sentencing that the court entered an order of restitution for a specific amount. The Superior Court concluded that since no amount had been initially specified by the trial court as required by statute the amount of restitution could not be determined thereafter. The facts in this case are distinguishable. At the time of sentencing this Court, upon the Commonwealth's recommendation, ordered the defendant to pay a specific amount of restitution - $300.00. The amount of restitution was not left open. Therefore the threshold statutory requirement was met and the Court was free "at any time" to amend its order.

It is the Court's conclusion that based on the foregoing analysis, the Commonwealth's motion to modify sentence should be granted and an appropriate order shall be filed.

ORDER

AND NOW, this 26 day of May, 2004, upon consideration of the Motion to Modify Sentence filed by the Commonwealth, it is hereby ORDERED, ADJUDGED and DECREED that said Motion is GRANTED and the defendant is ORDERED to pay the additional amount of restitution specified for a total amount of $2042.70.

BY THE COURT,
/s/ **John A. Bozza, Judge**

BISHOP OF ERIE CATHOLIC DIOCESE, ST. JUDE THE APOSTLE CHURCH, Appellant

v.

BOARD OF ASSESSMENT APPEALS OF ERIE COUNTY, PENNSYLVANIA, Appellee

v.

THE MILLCREEK TOWNSHIP SCHOOL DISTRICT, Intervenor

REAL ESTATE / RESTRICTIVE COVENANT

__A restrictive covenant is defined as "a private agreement, usu. in a deed or lease, that restricts the use of occupancy of the real property, …" Black's Law Dictionary 371 (7th ed. 1999).

REAL ESTATE / RESTRICTIVE COVENANT

A document unilaterally filed by the Diocese designated as a restrictive covenant that did not actually restrict the ability of the Diocese to sell the property without the covenant or prevent the Diocese from removing the covenant is not actually a restrictive covenant.

The Court therefore accepted the testimony of Millcreek's expert as to the issue of fair market value, when the expert did not factor in the alleged restrictive covenant.

Appearances: David E. Holland, Esq. for Bishop of Erie Catholic Diocese
Michael J. Visnosky, Esq. for Millcreek Twp. School Dist.
Lee S. Acquista, Esq. for Bd. of Assessment Appeals

OPINION

Bozza, John A., J.

In this case, the Erie Catholic Diocese is seeking to determine the tax assessment for property it holds in trust for St. Jude the Apostle Church. At issue is the value of a parcel of real estate comprised of 3.5 acres that lies immediately to the west of the St. Jude church facilities at the intersection of West 6th Street and Peninsula Drive. A 1.25-acre portion of the parcel was previously determined by this Court to be tax exempt.

At the time of trial, each party presented testimony from a certified real estate appraiser. Both appraisers relied on a sales comparison approach to determine the market value of the property. Mr. Robert Glowacki, the appraiser for Millcreek Township School District, also utilized the "income approach" in reaching his conclusion. The essential difference between the final opinions of value from each of the appraisers concerns the effect of a document recorded by the Diocese entitled "RESTRICTIVE COVENANT" and signed by the Bishop of the Erie Catholic Diocese. This document states that the use of the property for business or commercial purposes is prohibited for a period of 15 years. Mr. Glowacki's report did not refer to this document as a factor in his conclusion. The parties seem to

be in agreement that in the absence of any legal restrictions, the highest and best use of the parcel is commercial development.

As noted above, both appraisers utilized the sales comparison approach. In fact, for the most part, they relied on the same comparable properties. Mr. Sammartino concluded that as of November 25, 2003 the property had a market value of $400,000. However, without the adjustment for the effect of the Restrictive Covenant, it was Mr. Sammartino's opinion that the property was worth $1.137 million. Mr. Glowacki's view was that of September 1, 2003, the 3.5-acre parcel was worth $1.4 million. He also concluded that as of September 1, 2001, it was worth $1.27 million and as of September 1, 2002 it was worth $1.325 million. It is apparent that consideration of the terms set forth in the Restrictive Covenant recorded by the Diocese is a critical distinction in the approach to the valuation taken by the appraisers.

This Court's analysis must begin with a determination of the nature of the document that was recorded by the Diocese. Captioned "RESTRICTIVE COVENANT", it states as follows:

> NOW WITNESS, for good and valuable consideration, and intending to be legally bound hereby, the undersigned does hereby covenant and agree as follows:
>
> 1. The real estate which is described in the attached Exhibit A shall not be used for any commercial or business purpose, except for a pre-existing lease for the occasional use of an existing parking lot located in the northeast corner of the property.
>
> 2. This covenant and restriction shall commence on the date set forth above and shall continue for a period of fifteen (15) years.
>
> 3. This covenant and restriction may not be terminated prior to the term hereof set forth in paragraph 2.

The Bishop is the only party to the document. A restrictive covenant is defined as "a private agreement, usu. in a deed or lease, that restricts the use of occupancy of the real property,..." BLACK'S LAW DICTIONARY 371 (7th ed. 1999). Such agreements are usually described as covenants running with the land, and although not favored in the law, when properly incorporated in a deed or other appropriate document they are legally enforceable. *De Sanno v. Earle,* 273 Pa. 265, 117 A. 200 (1922). When a restrictive covenant is determined to run with the land, its effect is in the nature of contract. RESTATEMENT OF PROPERTY: SERVITUDES § 543, Introductory Note (1944). Restrictive covenants are those that bind only the promissor. Real covenants on the other hand are enforceable against subsequent buyers of the property and other successors in interest. *Id., De Sanno,* 273 Pa. 265, 117 A. 200 (1922).

The core issue in this case is what is the practical effect — more precisely, the effect on the property's fair market value — of the document

characterized by the Erie Catholic Diocese as a restrictive covenant. It is obvious that a restrictive covenant enforceable against subsequent purchasers and successors in interest that limits the manner in which property may be used may have a significant effect on its value. Therefore, if the restrictive covenant at issue is a "real covenant" and "runs with the land", it will limit a subsequent purchaser's ability to use the land for business and commercial purposes and it is likely to be, as noted by Mr. Sammartino, less valuable. If it does not "run with the land", it is unlikely that its mere existence as a recorded document will have a predictable impact on the property's fair market value because the Diocese, as promissor, is not obligated by contract or law to pass the restriction on to future buyers. Since the Diocese is free to change its mind without adverse legal consequence, it is not possible to determine what effect the document may have on the market value of the property. Because the covenant would be "personal" to the Diocese, the Bishop may ultimately offer the land for sale or agree to its sale with or without the restriction at issue.

It is unclear from Mr. Sammartino's testimony whether he assumed that the document signed by the Bishop would legally require the Diocese to pass it along to subsequent purchasers. However, it is apparent from his testimony that he did conclude that the diocese would behave as a "prudent seller" and refrain from selling the property unless a buyer promised not to use it for commercial or business purposes. (Transcript, p. 58-59). "Fair market value" has been defined as "the price which a purchaser, willing but not obliged to buy, would pay an owner willing but not obliged to sell, taking into consideration all uses to which the property is adapted and might in reason be applied." *Green v. Schuykill County Board of Assessment Appeals*, 565 Pa. 185, 194, 772 A.2d 419, 425, fn 6 (2001). While Mr. Sammartino's assessment of the Diocese's intentions and future conduct may ultimately be proved accurate, without any legal impediment to selling the property without a restrictive covenant, the Court must conclude that his opinion of the property's fair market value is based on speculation.

The question remains as to whether the property as it presently exists should have its fair market value for tax purposes adjusted in any manner because the Bishop of the Erie Diocese has promised that it will not be used for any commercial or business purpose for a period of 15 years. The essence of a restrictive covenant is the existence of an agreement in the nature of a contract that requires a seller to convey property burdened by a limitation on its use. Here, there is no such agreement. While the Bishop may be influenced by his unilateral promise regarding church policy, the document does not legally bind anyone to a course of action with regard to the sale of the property. While it clearly manifests the Bishop's

intention not to develop the property for business or commercial purposes, it does not restrict the ability of the Diocese to sell the property without the covenant nor does it prevent the Diocese from removing the covenant. The Diocese was under no obligation to record the "Restrictive Covenant" and is under no obligation to pass it along. The deed it received did not have any covenant restricting the business or commercial use of the property. Since the Diocese is without legal obligation to pass along the covenant to subsequent buyers, it is apparent that it does not run with the land.

The Court concludes that the evidence presented by Millcreek Township, largely comprised of the opinion of Robert Glowacki, is more credible as to the issue of fair market value and adopts it accordingly. An appropriate order shall follow.

ORDER

AND NOW, this 17 day of May, 2004, for the reasons set forth in this Court's Opinion, it is hereby **ORDERED, ADJUDGED and DECREED** that the value of the 3.5 acres comprising the entire parcel of Erie County Index No. 33-029-050.0-001.00 is as follows:

1. September 1, 2004 - $1,270,000.00;
2. September 2, 2002 - $1,325,000.00; and
3. September 1, 2003 - $1,400,000.00.

BY THE COURT:
/s/ **John A. Bozza, Judge**

IN THE MATTER OF THE ADOPTION OF I.J.A., M.A., and S.E.A.

FAMILY LAW / ADOPTION

In involuntary termination of parent rights proceedings, the burden of proof is upon the party seeking termination to establish by clear and convincing evidence the existence of grounds for doing so.

FAMILY LAW / ADOPTION

If evidence demonstrates that a parent has failed to perform parental duties or has evidenced a purpose of relinquishing parental claims, the court must then consider (1) the parent's explanation for his or her conduct; (2) the post-abandonment contact between the parent and the child; and (3) the effect of termination of parental rights on the child.

FAMILY LAW / ADOPTION

Mother's actions of moving to Philadelphia, distancing herself from her children, and failing to participate in unification process demonstrated that termination of mother's parental rights were in best interests of children.

FAMILY LAW / ADOPTION

Father's neglect and refusal to participate in children's lives, failure to contact Office of Children and Youth during termination proceedings, and failure to participate or attend termination proceedings evidenced his failure to perform parental duties and supported court determination to terminate parental rights.

FAMILY LAW / ADOPTION

In order to terminate parental rights under 23 Pa. C.S. § 2511 (a)(1), the burdened party must show that

> [t]he parent by conduct continuing for a period of at least six months immediately preceding the filing of the petition either has evidenced a settled purpose of relinquishing parental claim to a child or has refused or failed to perform parental duties.

FAMILY LAW / ADOPTION

The court may terminate parental rights under 23 Pa. C.S. § 2511 (a)(2), where

> [t]he repeated and continued incapacity, abuse, neglect or refusal of the parent has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent.

FAMILY LAW / ADOPTION

The court may terminate parental rights under 23 Pa. C.S. § 2511(a)(5), where

> [t]he child has been removed from the care of the parent by the court or under a voluntary agreement with an agency for a period of at least six months, the conditions which led to the removal or placement

of the child continue to exist, the parent cannot or will not remedy those conditions within a reasonable period of time, the services or assistance reasonably available to the parent are not likely to remedy the conditions which led to the removal or placement of the child within a reasonable period of time and termination of parental rights would best serve the needs and welfare of the child.

FAMILY LAW / ADOPTION

The court may terminate parental rights under 23 Pa. C.S. § 2511(a)(8), where

[t]he child has been removed from the care of the parent by the court or under a voluntary agreement with an agency, 12 months or more have elapsed from the date of removal or placement, the conditions which led to the removal or placement of the child continue to exist and termination of the parental rights would best serve the needs and welfare of the child.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHANS COURT DIVISION
NO. 135 IN ADOPTION 2003

Appearances: Michael J. Nies, Attorney for the Children
Karen L. Klapsinos, Attorney for J.L.
Kenneth A. Zak, Attorney for the Agency

OPINION

June 4, 2004: Before the Court are the following: (1) the Erie County Office of Children and Youth's Petition for the Involuntary Termination of Parental Rights to a Child Under the Age of 18 Years, as amended, seeking termination of natural mother's, J.L., parental rights with regard to three minor children, I.J.A., born September 7, 1998, M.A., born April 22, 2000, and S.E.A., born December 7, 2001; and (2) the Erie County Office of Children and Youth's Petition for the Involuntary Termination of Parental Rights to a Child Under the Age of 18 Years, as amended, seeking termination of natural father's, S.A., parental rights with regard to the aforementioned children.

STATEMENT OF ISSUES

I. Whether the Erie County Office of Children and Youth has demonstrated, by clear and convincing evidence, that the parental rights of J.L., the natural mother of I.J.A., M.A. and S.E.A., should be terminated pursuant to 23 Pa. Cons. Stat. Ann. §§ 2511(a)(1), (2), (5), (8) and (b).

II. Whether the Erie County Office of Children and Youth has demonstrated, by clear and convincing evidence, that the parental rights of S.A., the natural father of I.J.A., M.A. and S.E.A., should be terminated

pursuant to 23 Pa. Cons. Stat. Ann. §§ 2511(a)(1), (2), (5), (8) and (b).

FINDINGS OF FACT

The Office of Children and Youth (hereinafter "OCY") has been involved with J.L. (hereinafter "Mother") and S.A. (hereinafter "father ") since 2002. On November 12, 2002, the Honorable Stephanie Domitrovich adjudicated I.J.A. and M.A. dependent when counsel for mother, counsel for the children, and counsel for OCY agreed to stipulate to a finding of dependency based upon the allegations in the Dependent Child Petition, which included an instance where mother left the children home alone[1]. Father was not at the Adjudication Hearing and his whereabouts were unknown. Following the Adjudication, I.J.A. and M.A. were initially returned to their mother's care, however, a deferred placement was ordered. The deferred placement was contingent upon mother's cooperation with OCY and her ability to provide proper supervision of the children.

In December of 2002, OCY caseworker Patricia Wozniak discovered that mother had a third child, S.E.A., in her care. At the time, Ms. Wozniak observed that the child lacked muscle tone. S.E.A. was detained by OCY on February 4, 2003 after Ms. Wozniak observed that S.E.A. had become very ill and confirmed that mother misrepresented the status of S.E.A.'s medical care.[2] At the same time, I.J.A. and M.A. were detained and their deferred placements were enacted. On February 7, 2003, Judge Domitrovich adjudicated S.E.A. dependent when counsel for the mother, counsel for the children, and counsel for OCY agreed to stipulate to a finding of dependency based upon the allegations in the Dependent Child Petitioner, which included mother's failure to provide OCY with accurate and truthful information and the necessity of S.E.A.'s hospitalization for lack of appropriate medical care. Father was not present at the combined detention and adjudication hearing and his whereabouts remained unknown.

Recommendations set forth by Order Of Court established supervised visitation between mother and the children every other week and set forth a plan for reunification. Mother was encouraged to: (1) undergo a bonding assessment with each of the children; (2) attend a psychological evaluation and follow the recommendations from said evaluation; (3) sign releases for all service providers for past mental health treatments; (4) participate in parenting classes; (5) submit to random urine screenings; (6) attend 12-Step meetings; (7) complete a drug and alcohol assessment;

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[1] Mother has since been charged with two counts of Endangering the Welfare of Children. On May 10, 2004, a bench warrant was issued for mother based upon her failure to appear for trial.

[2] S.E.A. was detained at Hamot Medical Center and thereafter placed in a foster home.

(8) secure and maintain appropriate housing; and (9) provide OCY with any available information regarding father, including his location.

Mother's compliance with the court Order established for her reunification with the children has been minimal. Following disposition of the children, mother moved to Philadelphia. Thereafter, it became a part of the reunification plan for mother to consider relocating to Erie in order to reunify with her children. Upon OCY's last contact with mother, she remained in Philadelphia.

On June 26, 2003, mother participated in the psychological evaluation with clinical neuropsychologist Dr. Donna L. Ziegler. Dr. Ziegler determined that mother had major depressive disorder and generalized anxiety disorder. Her expert testimony to this Court further indicated that mother, who is very vulnerable to stress and overwhelmed, is only marginally capable of caring for her own needs and not able to care for three young children.

Similarly, a bonding assessment commenced on June 27, 2003. Said assessment was never completed, however, as Dr. Ziegler did not receive a second opportunity to observe mother and the children

Mother only attended six visits with the children from the time of their adjudication until August 15, 2003. OCY offered mother transportation, however, mother generally declined. Initially, visits went well and mother showered the children with food and gifts. Nevertheless, by April of 2003, mother's visits with the children began to deteriorate. At visits, the children were more interested in playing with toys than spending time with mother. The last visit that mother had with the children was July 28, 2003. At that visit, mother was distant with the children and yelled at them for referring to their foster parents as "Mom" and "Dad."

Since April of 2003, mother has not sent any cards, gifts or letters to the children. Similarly, mother has not contacted OCY to inquire about the children's welfare.

Regarding father, he has not had any contact with OCY. Father did not attend any hearings with regard to the children. During the time that OCY has been involved with the family, father did not send the children cards, gifts, letters or support.[3]

Alleging that aggravated circumstances existed against father because his whereabouts were unknown and could not be ascertained and father had not claimed the children since their placement, OCY, on September 3, 2003, filed a Petition for Permanency Hearing and Finding of Aggravated

[3] OCY made sufficient efforts to locate father. In addition to following leads provided by mother as to father's whereabouts, OCY sent notice of hearings to father's last known address. With regard to the IVT Right to Amend Hearing and the IVT trial, OCY published notice to father in the newspaper of general circulation for father's last known address in Lakeland, Florida.

Circumstances. On September 16, 2003, the court entered a finding of Aggravated Circumstances against father.

Regarding the children, Permanency Hearings were held on August 15, 2003, November 19, 2003, and February 4, 2004. At the November 19, 2003 hearing, the Court changed the goal for the children to adoption and authorized the filing of IVT Petitions. Visitation was suspended at that time. Neither parent has had any contact with OCY since the November 19, 2003 Hearing.

I.J.A. and M.A. were placed together in a confidential Bridge Home on December 20, 2003. S.E.A. is also in a Bridge Home. An adoptive resource has been identified for each of the children. All of the children are doing well. S.E.A. is no longer delayed and she is doing well developmentally.

On December 18, 2003, OCY filed its IVT Petitions against mother and father with regard to the children. OCY filed Amended Petitions on March 16, 2004. This Court held the IVT trial with regard to both parents on May 27, 2004.

At The IVT trial, OCY introduced into evidence numerous documents, including Court Orders, treatment plans, and Dr. Donna Ziegler's Psychological Consultation report with regard to mother. In addition, OCY presented the testimony of OCY Orphan's Court Supervisor, Becky Dwyer, OCY caseworker, Patricia Wozniak, and the expert testimony of Dr. Donna Ziegler.

Neither mother nor father appeared at trial, although, mother was represented by counsel. The Court has considered all matters of record in reaching its decision.

DISCUSSION

In a proceeding for involuntary termination of parental rights, the burden of proof is upon the party seeking termination to establish by clear and convincing evidence the existence of grounds for so ordering. *Santosky* v. *Kramer,* 455 U.S. 745 (1982); *In Re E.M,* 620 A. 2d 481 (Pa. 1993). The standard of clear and convincing evidence, is legally defined as testimony that is so "clear, direct, weighty and convincing as to enable the trier of fact to come to a clear conviction, without hesitance, of the truth of the precise facts in issue." *Matter of Adoption of Charles E.D.M., II,* 708 A.2d 88, 91 (Pa. 1998).

A. MOTHER

OCY has requested that mother's parental rights be terminated pursuant to 23 Pa. Cons. Stat. Ann. §2511(a), (1), (2), (5), and (8).

1. Termination Pursuant to Section 2511(a)(1)

First the evidence, by a clear and convincing nature, demonstrates that the termination of parental rights is appropriate under 23 Pa. Cons. Stat. Ann. § 2511(a)(1).

Termination based on Section 2511(a)(1) requires that:

> [t]he parent by conduct continuing for a period of at least six

> months immediately preceding the filing of the petition either has evidenced a settled purpose of relinquishing parental claim to a child or has refused or failed to perform parental duties.

23 Pa. Cons. Stat. Ann. § 2511(a)(1). If clear and convincing evidence establishes that a parent either failed to perform parental duties or has evidenced a settled purpose of relinquishing parental claim as set forth in Section 2511(a)(1), the Court must then consider:

> (1) the parent's explanation for his or her conduct; (2) the post-abandonment contact between parent and child; and (3) [] the effect of termination of parental rights on the child pursuant to Section 2511 (b).

Adoption of Charles E.D.M., 708 A.2d at 92.

Mother, for a period of at least six months immediately preceding the filing of the IVT Petition, has failed to perform parental duties and has evidenced a settled purpose of relinquishing her parental rights to her children. Following disposition of the children, mother moved to Philadelphia. Despite the recommendation that mother return to Erie in order to reunify with her children, mother remained in Philadelphia. Of greatest significance to mother's choice, she has completely lost her connection to her children. Since April of 2003, mother has not sent any cards, gifts or letters to the children. Similarly, she has not contacted OCY to inquire about the children's welfare and she did not actively participate in the plan established for her reunification with her children. She did attend one last visit with the children on July 28, 2003, however, she was distant with the children and yelled at them. During visits, the children found greater interest in playing with toys than in spending time with mother.

Furthermore, there is no post-abandonment contact between mother and the children in this case. Mother did not even attend the IVT Trial, nor did she respond to her court-appointed counsel's requests for information. As a result, this Court is unaware of any explanation for her conduct.

Accordingly, mother's inexcusable and continuing abandonment of these children for a period exceeding six months demonstrates her failure to perform parental duties and evidences a settled purpose of relinquishing parental claim to the children.

Moreover, as discussed in Section 4 below, termination of mother's parental rights serves the needs and welfare of these children.

Accordingly OCY has met its burden with regard to 23 Pa.Cons.Stat. 2511(a)(1).

2. Termination Pursuant to Section 2511(a)(2)

The evidence, by a clear and convincing nature, further demonstrates that the termination of mother's parental rights is appropriate under 23 Pa. Cons. Stat. Ann. § 2511(a)(2).

Termination pursuant to Section 2511(a)(2) requires that:

> [t]he repeated and continued incapacity, abuse, neglect or refusal of the parent has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent.

23 Pa. Cons. Stat. Ann. § 2511(a)(2).

The children were detained for reasons related to mother's inability to provide the proper parental care or control necessary for their care. Specifically, I.J.A. and M.A. were left home alone and S.E.A. was without proper medical attention. Thereafter, mother abandoned her children in favor of creating a life in Philadelphia. After conducting a psychological evaluation on mother, Dr. Ziegler concluded, and testified before this Court, that mother is only marginally capable of caring for her own needs and not able to care for three young children. Mother's incapacity continues today as shown by her complete disregard for her children's future by failing to cooperate with her court-appointed counsel and failing to attend the IVT Trial. Moreover, it is clear that mother cannot, or will not, remedy her inability to provide proper care for her children. Specifically, she failed to actively participate in the plan established for her reunification with the children, she completely ended her contact with OCY, and she failed to participate in the IVT proceedings.

Accordingly, mother's repeated and continuing incapacity, abuse, neglect and refusal have caused her children to be without essential parental care, control, and subsistence and the conditions and the causes of the incapacity cannot or will not be remedied by mother.

3. Termination Pursuant to Section 2511(a)(5) and 2511(a)(8)

Furthermore, the evidence, by a clear and convincing nature, demonstrates that the termination of parental rights is appropriate under both 23 Pa. Cons. Stat. Ann. § 2511(a)(5) and 23 Pa. Cons. Stat. Ann. § 2511(a)(8).

Termination pursuant to Section 2511(a)(5) requires that:

> [t]he child has been removed from the care of the parent by the court or under a voluntary agreement with an agency for a period of at least six months, the conditions which led to the removal or placement of the child continue to exist, the parent cannot or will not remedy those conditions within a reasonable period of time, the services or assistance reasonably available to the parent are not likely to remedy the conditions which lead to the removal or placement of the child within a reasonable period of time and termination of the parental rights would best serve the needs and welfare of the child.

23 Pa. Cons. Stat. Ann. § 2511(a)(5). Similarly, termination pursuant to

Section 2511(a)(8) requires that:

> [t]he child has been removed from the care of the parent by the court or under a voluntary agreement with an agency, 12 months or more have elapsed from the date of removal or placement, the conditions which led to the removal or placement of the child continue to exist and termination of parental rights would best serve the needs and welfare of the child.

23 Pa. Cons. Stat. Ann. § 2511(a)(8)

The children were detained on February 4, 2003. More than twelve months have elapsed between the children's removal from their mother's care and this IVT proceeding. The condition, mother's inability to provide proper care for her children, continues to exist as shown by mother's failure to actively participate in the plan established for her reunification with them, the credible testimony of Dr. Ziegler that mother is only marginally capable of caring for her own needs and not able to care for three young children, and mother's failure to contact the children or visit with them since July 28, 2003. Mother has shown that she cannot or will not remedy the condition by choosing to remain in Philadelphia, rather than participate in the plan for her reunification with them. Moreover, it is not likely that services can remedy the condition within a reasonable period of time as it is clear that mother has lost interest in reunification. She has not contacted the children or visited with them since July 28, 2003, nor has she contacted OCY to inquire about their welfare. It is even more telling that she failed to participate in these IVT proceedings. Further, as discussed in Section 4 below, termination of mother's parental rights best serves the needs and welfare of the child.

Accordingly, the requirements of both 23 Pa.C.S.A. § 2511(a)(5) and 23 Pa.C.S.A. § 2511 (a)(8) have been met

4. Effect of Termination on the Needs and Welfare of the Child

Having determined that the statutory grounds for termination have been established by clear and convincing evidence, of paramount concern to this Court are the developmental, physical and emotional needs and welfare of the children. 23 Pa.C.S.A. § 2511(b).

This Court is convinced that, emotionally, developmentally and physically, these children will be in a better position if mother's rights are terminated than if they are not.

First, it is clear that mother cannot provide proper care for these children. Mother stipulated to their adjudication, yet she failed to remedy the conditions that led to their adjudication. Instead, she opted to move to Philadelphia to live with her mother, distancing herself from the children and failing to actively participate in the reunification process. Mother cannot care for these children when she has yet to learn how to take care of herself.

Moreover, visits between mother and the children indicate that the bond

between mother and the children has deteriorated significantly. In fact, during the few final visits between mother and the children, the children were more interested in playing with toys than in spending time with mother. Clearly, mother is not able to provide the type of support that these young children need. In fact, mother continues to display her lack of interest in the children. Specifically, she has not attended a visit with the children since July of 2003, she has not had any contact with OCY regarding the children's well being and she has not provided any correspondence or gifts for the child since April of 2003.

Meanwhile, an adoptive resource has been identified for each of the children. All of the children are currently residing in their pre-adoptive homes and are doing well. S.E.A., who was initially hospitalized due to her lack of medical care, is no longer delayed and she is doing well developmentally

Accordingly, termination of mother's parental rights is in the best interest of each of these children.

B. FATHER

OCY has requested that father's parental rights be terminated pursuant to 23 Pa. Cons. Stat. Ann. §2511(a), (1), (2), (5), and (8).

Regarding subsections (a)(5) and (8), both sections are predicated on the removal of children from the care of the parent, and, therefore, both sections are inapplicable in this case. As in *In Re C.S.*, 161 A.2d 1197, 1200 (Pa. Super. 2000), termination is not appropriate under these sections because there is no record evidence that any of these children were ever in father's care and, therefore, they could not have been removed from his care.

This Court will, however, terminate father's rights pursuant to subsections §2511(a)(1), (2) and (b).

1. Termination Pursuant to Section 2511(a)(1)

First, the evidence, by a clear and convincing nature, demonstrates that the termination of parental rights is appropriate under 23 Pa. Cons. Stat. Ann. § 2511(a)(1).

Father, for a period of at least six months immediately preceding the filing of the IVT Petition, has failed to perform parental duties and has evidenced a settled purpose of relinquishing his parental rights to his children. Despite repeated efforts by OCY to contact father, father has neither contacted OCY nor has he attended any hearings regarding his children. Moreover, he has not sent the children cards, gifts, letters or support during the entire time that OCY has been involved with the children. Furthermore, he did not attend the IVT Trial. There is neither post-abandonment contact nor is there an explanation for father's conduct.

Accordingly, father's inexcusable and continuing abandonment of these children for a period exceeding six months demonstrates his failure to

perform parental duties and evidences a settled purpose of relinquishing parental claim to the children.

Moreover, as discussed in Section 3 below, termination of father's parental rights serves the needs and welfare of these children.

2. Termination Pursuant to Section 2511(a)(2)

The evidence, by a clear and convincing nature, further demonstrates that the termination of father's parental rights is appropriate under 23 Pa. Cons. Stat. Ann. § 2511(a)(2). Father's neglect, or refusal, to be present in the children's lives, has continued throughout OCY's entire involvement with these children. Despite repeated attempts by OCY to contact father, father has remained absent from the children's lives. Father's neglect or refusal continues today as shown by his complete disregard for his children's future by failing to attend the IVT Trial. Moreover, it is clear that father cannot, or will not, remedy the condition as he has failed to make his whereabouts known to OCY.

Accordingly, father's repeated and continuing incapacity, abuse, neglect and refusal have caused her children to be without essential parental care, control, and subsistence and the conditions and the causes of the incapacity cannot or will not be remedied by father.

3. Effect of Termination on the Needs and Welfare of the Child

Having determined that the statutory grounds for termination have been established by clear and convincing evidence, of paramount concern to this Court are the developmental, physical and emotional needs and welfare of the children. 23 Pa.C.S.A. § 2511(b).

This Court is convinced that, emotionally, developmentally and physically, these children will be in a better position if father's rights are terminated than if they are not.

These children have had no contact with their father for at least one and one half years. As a result, they have not developed a bond with him. Father is a stranger to these children.

Meanwhile, an adoptive resource has been identified for each of the children. All of the children are currently residing in their pre-adoptive homes and are doing well. S.E.A., who was initially hospitalized due to her lack of medical care, is no longer delayed and she is doing well developmentally. These children, who have been completely abandoned by their father, should be given the opportunity to accept the individuals who are willing to treat them as their children as their parents.

Accordingly, termination of father's parental rights is in the best interest of each of these children.

CONCLUSIONS OF LAW

I. OCY has met its burden of proof by clear and convincing evidence that mother's parental rights should be terminated pursuant to 23 Pa. Cons. Stat. Ann. § 2511(a)(1). For a period exceeding six months prior to OCY's filing of its IVT Petition, mother abandoned these children,

demonstrating her failure to perform parental duties and evidencing a settled purpose of relinquishing parental claim to the children.

II. OCY has met its burden of proof by clear and convincing evidence that mother's parental rights should be terminated pursuant to 23 Pa. Cons. Stat. Ann. § 2511(a)(2). Mother's repeated and continuing incapacity, neglect and refusal have caused the children to be without essential parental care, control and subsistence necessary for their physical and mental well-being, a condition which cannot, or will not, be remedied by mother.

III. OCY has met its burden of proof by clear and convincing evidence that mother's parental rights should be terminated pursuant to 23 Pa. Cons. Stat. Ann. § 2511(a)(5). The children have been removed from mother's care for a period exceeding six months, the conditions leading to the children's removal continue to exist, mother cannot or will not remedy those conditions, the services available to mother are not likely to remedy the conditions which led to the children's removal and termination of mother's parental rights serves the needs and welfare of the child.

IV. OCY has met its burden of proof by clear and convincing evidence that mother's parental rights should be terminated pursuant to 23 Pa. Cons. Stat. Ann. § 2511(a)(8). The children have been removed from mother's care for at least twelve months, the conditions leading to the children's removal continue to exist, and termination of mother's parental rights serves the needs and welfare of the children.

V. The termination of mother's parental rights is in the best interest of each of the children, serving both the needs and welfare of the children.

VI. OCY has met its burden of proof by clear and convincing evidence that father's parental rights should be terminated pursuant to 23 Pa. Cons. Stat. Ann. § 2511(a)(1). For a period exceeding six months prior to OCY's filing of its IVT Petition, father abandoned these children, demonstrating his failure to perform parental duties and evidencing a settled purpose of relinquishing parental claim to the children.

VII. OCY has met its burden of proof by clear and convincing evidence that father's parental rights should be terminated pursuant to 23 Pa. Cons. Stat. Ann. § 2511(a)(2). Father's repeated and continuing neglect and refusal have caused the children to be without essential parental care, control and subsistence necessary for their physical and mental well-being, a condition which cannot, or will not, be remedied by father.

VIII. OCY has failed to meet its burden of proof by clear and convincing evidence that father's parental rights should be terminated pursuant to 23 Pa. Cons. Stat. Ann. §§ 2511(a)(5).

IX. OCY has failed to meet its burden of proof by clear and convincing evidence that father's parental rights should be terminated pursuant to 23 Pa. Cons. Stat. Ann. §§ 2511(a)(8).

X. The termination of father's parental rights is in the best interest of each of the children, serving both the needs and welfare of the children.

Accordingly, the Court will issue an Order terminating mother's parental rights pursuant to 23 Pa. Cons. Stat. Ann. § 2511(a)(1), (2), (5), (8) and (b) and terminating father's parental rights pursuant to 23 Pa. Cons. Stat. Ann. § 2511(a)(1), (2), and (b).

ORDER

AND NOW, to-wit, this 4th day of June, 2004, it is hereby DECREED as follows:

1. The parental rights of natural mother, J.L., relative to her three minor children, I.J.A., born September 7, 1998, M.A., born April 22, 2000, and S.E.A., born December 7, 2001 shall be TERMINATED.

2. The parental rights of natural father, S.A., relative to his three minor children, I.J.A., born September 7, 1998, M.A., born April 22, 2000, and S.E.A., born December 7, 2001 shall be TERMINATED.

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

COMMONWEALTH OF PENNSYLVANIA

v.

ROBERT WILEY

CRIMINAL PROCEDURE / AUTOMOBILE SEARCHES / WARRANTLESS

There are varying decrees of police interaction with citizens, which require increasing levels of justification. They have been classified to include the "mere encounter," the "investigative detention," and the "custodial detention."

CRIMINAL PROCEDURE / AUTOMOBILE SEARCHES / WARRANTLESS

The "mere encounter" type of police interaction refers to police-citizen contact arising in constitutionally benign circumstances and requires no level of justification. Investigative and custodial detentions, on the other hand, constitute seizures and implicate the protections of the federal and state constitutions.

CRIMINAL PROCEDURE / AUTOMOBILE SEARCHES / WARRANTLESS

An investigative detention must be supported by articulable facts that lead police to a reasonable suspension that crime is afoot. Such detentions must be brief, and any subsequent search must be of a limited nature.

CRIMINAL PROCEDURE / AUTOMOBILE SEARCHES / WARRANTLESS

Custodial detentions are the most intrusive and must be supported by probable cause to believe that a crime has been committed.

CRIMINAL PROCEDURE / AUTOMOBILE SEARCHES/ WARRANTLESS

In determining whether the police have met the applicable standard for investigative or custodial detentions, the court must consider the totality of the circumstances.

CRIMINAL PROCEDURE / AUTOMOBILE SEARCHES / WARRANTLESS

The test for determining whether an individual has been subjected to an investigative detention is whether the police conduct would communicate to a reasonable person that the person was not free to decline the officer's request or otherwise terminate the encounter. It is not necessary for the police to actually stop a vehicle in order to effectuate an investigative detention.

CRIMINAL PROCEDURE / AUTOMOBILE SEARCHES / WARRANTLESS

Where police officers hold their cruiser closely to the defendant's car while the police vehicle stopped in the wrong lane of traffic, asked him questions about what he was doing, asked his name more than once, and remained in place while making inquiry of another person in the neighborhood, the defendant was effectively not free to leave or to fail to respond to police questions. Accordingly this contact subjected the

defendant to an investigative detention.

CRIMINAL PROCEDURE / AUTOMOBILE SEARCHES / WARRANTLESS

When the defendant was subject to an investigative detention and the defendant's vehicle, there were not sufficient facts to meet the requirement of reasonable suspicion of criminal activity where there was no report of criminal activity and no evidence of what the police may have been concerned about and the neighborhood was only known as a high crime area.

CRIMINAL PROCEDURE / AUTOMOBILE SEARCHES / WARRANTLESS

The defendant's looking down and moving his hands in his car while the police vehicle was adjacent was insufficient to constitute reasonable suspicion of criminal activity. The occurrence of a "furtive movement" or other suspicious movement is insufficient to constitute reasonable suspicion.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 3274 of 2003

Appearances: Gene Placidi, Esquire for the Defendant
Erin Connelly, Esquire for the Commonwealth

OPINION

Bozza, John A., J.

On November 7, 2003, Robert Wiley was arrested by the Erie Police and charged with one count of possession of a controlled substance, possession of drug paraphernalia, resisting arrest, disorderly conduct and various summary offenses. The defendant filed an Omnibus Pre-Trial Motion in which he asserts that his arrest was the result of an illegal search and seizure, and accordingly evidence obtained by the police should be suppressed. A hearing was conducted on April 27, 2004, at which time Erie Police Officers Stephen DeLuca and Ryan Victory testified with regard to circumstances leading to Mr. Wiley's arrest. Another individual, Mary McCoy, was also present at the time of the arrest and provided testimony on behalf of the defendant.

Initially, it must be noted that there were significant differences between the testimony of Officers DeLuca and Victory regarding a number of factual issues of significance.[1] Having considered all of the testimony,

[1] The police officer testified differently with regard to the initial position of the police vehicle when it turned the corner onto East 10th Street and pulled parallel to the defendant's vehicle. They also testified differently with regard to the distance between the two vehicles just prior to the time Officer Victory backed up the vehicle and put it in park, and whether the car changed position prior to that point. In addition, and significantly, the officers testified differently with regard to when it was that they believed that Mr. Wiley was looking down and perhaps reaching for something. Officer Victory testified that it occurred as before he exited the vehicle and Officer DeLuca testified that it occurred after the vehicle was backed up and after he had exited the vehicle.

the Court makes the following findings of fact:

1. At approximately 3:00 a.m. in the morning on November 7, 2003. Officers Victory and DeLuca of the Erie Police Department, while on routine patrol, were heading northbound on Ash Street when they stopped for a traffic light at the intersection of 10th and Ash Streets.

2. They observed a maroon car that was legally parked on 10th Street facing east with its headlights on.

3. The area that the police were in, the 500 block of East 10th Street, is part of a high crime area.

4. There was no indication that there were other individuals outside on the street at that time.

5. After waiting a couple of traffic light cycles the police turned left to head west on East 10th Street, but turned into the eastbound lane of traffic, pulling their cruiser alongside the defendant's car close enough so that if the doors opened they would hit each other. The cars were faced in opposite directions with the police car pointed in the wrong direction for the lane.

6. The officers engaged the defendant in conversation, explaining to him that it was a high crime area, and asked him what he was doing. The defendant responded that he was waiting for a woman by the name of Aquanetta. The police asked him his name, and he said his name was Mike. A woman came out from the corner house. The police asked for her name, and she said it was Mary. She indicated that she was getting a cigarette for the defendant but didn't know his name. Once again they asked him for his name, and the defendant said his name was Mike.

7. The officers backed up their cruiser so it was positioned diagonally in front of the defendant's vehicle and prevented any forward movement.

8. After exiting their vehicle, they noticed the defendant reaching for something. They then proceeded to approach the vehicle quickly.

9. Officer Victory indicated that he saw the defendant with a bag of cocaine.

10. Officer DeLuca opened the car door on the driver's side and observed the defendant attempting to put the bag of cocaine in his mouth.

11. Officer DeLuca then pulled the defendant out of the vehicle while he gripped the steering wheel with at least one hand and struggled as the officer tried to remove him.

12. The struggle continued while the defendant was on the ground.

The issue in this case is whether Mr. Wiley was subject to a "seizure" within the meaning of the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution. It has long been recognized that from a constitutional perspective there are varying degrees of police interaction with citizens, which require increasing levels of justification. They have been classified to include the "mere encounter", the "investigative detention" and the "custodial

detention". *Commonwealth v. Stevenson,* 2003 Pa. Super. 347, 354, 832 A.2d 1123, 1127 (2003). The "mere encounter" refers to police-citizen contact arising in constitutionally benign circumstances and requires no level of justification. *Commonwealth v. DeHart,* 2000 Pa. Super. 10, 20, 745 A.2d 633, 636 (2000). Investigative and custodial detentions, on the other hand, constitute seizures and implicate the protections of the Federal and State Constitutions. *Commonwealth v. Jackson,* 548 Pa. 484,488,698 A.2d 571, 573 (1997). An investigative detention must be supported by articulable facts that lead police to a reasonable suspicion that crime is afoot. *Stevenson,* 2003 Pa. Super. at 356, 832 A.2d at 1127. Such detentions must be brief, and any subsequent search must be of a limited nature. *Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *See also Commonwealth v. Morris,* 537 Pa. 417, 644 A.2d 721 (1994). Custodial detentions are the most intrusive, and must be supported by probable cause to believe that a crime has been committed. *Commonwealth v. Smith,* 575 Pa. 203, 836 A.2d 5, 15 (2003) (citations omitted). In making a determination as to whether the police have met the applicable standard, the Court must consider the totality of the circumstances. *In the Interest of D.M.,* 566 Pa. 445, 781 A.2d 1161 (2001).

In this instance, the Commonwealth's position is that the officers' initial interaction with Mr. Wiley was a "mere encounter" and did not require any level of suspicion. Once the defendant was detained, the Commonwealth argues that it was investigative in nature and justified by the police officers' reasonable suspicion of criminal activity. It is the defendant's position that from the onset he was detained, and there were no articulable facts to support a reasonable suspicion that he was engaged in criminal activity. The test for determining whether an individual has been subjected to an investigative detention is whether "the police conduct would communicate to a reasonable person that the person was not free to decline the officer's request or otherwise terminate the encounter ." *DeHart,* 2000 Pa. Super. at 24, 745 A.2d at 637 (citations omitted). It is not necessary for the police to actually stop a vehicle in order to effectuate an investigative detention. *Id.* at 638.

Here the police did not approach the defendant's vehicle in the normal manner to make a casual or routine inquiry. Rather the officers' pulled their cruiser closely adjacent to Mr. Wiley's car while proceeding in the wrong lane of traffic. They asked him questions about what he was doing, and asked his name more than once, and they remained in place while making inquiry of another person in the neighborhood, Mary McCoy, In such circumstances, the average citizen would be hard pressed to conclude that he was free to leave, or not required to respond to police questions. The position of the police cruiser vehicle alone made it clear that they were interested in investigating something about the defendant's behavior, although the record is silent as to what the police may in fact have

suspected. Therefore, it must be concluded that from the very beginning of their contact with Mr. Wiley the police subjected him to an investigative detention. *DeHart,* 2000 Pa. Super. 10, 745 A.2d 633 (2000). Moreover, regardless of the constitutional character of the initial contact with the defendant it is beyond question that once the police moved their vehicle in front of his car Mr. Wiley was not free to leave. It is obvious that at that point the threshold requiring application of the reasonable suspicion standard had been crossed.

The question remains as to whether the police had a reasonable suspicion to justify the seizure of Mr. Wiley. In this regard the record is silent as to why the police had any contact with the defendant at all. The testimony of the officers was to the effect that Mr. Wiley's vehicle was lawfully parked on East 10th Street. While the neighborhood was known to the police as a high crime area there was no indication that the defendant was engaged in any activity other than sitting in his car. Apparently the initial confrontation with Mr. Wiley was based on no more than a generalized suspicion of some sort of criminal activity. The police were not responding to any sort of report of criminal activity, and as noted above there was no evidence presented that gave any indication what the police may have been concerned about. The requirement of reasonable suspicion was not satisfied by the officers' "hunch". *Stevenson,* 2003 Pa. Super. at 357, 832 A.2d at 1128.

With regard to the subsequent actions of the police in directly blocking the defendant's car the conclusion is the same. In response to the police officers' questions concerning his name Mr. Wiley stated that his name was "Mike". There is no indication in the record that the police believed that there was anything improper about that response. He then told them that he was waiting for a woman by the name of Aquanetta. A woman did come out of a house and proceed toward the car. She told the police that her name was Mary McCoy, and that the defendant had asked her for a cigarette, which she went to her house to retrieve. It also seems that Mr. Wiley was annoyed by the police officers' questions and may have asked why they were harassing him. Those are the only facts of any significance that would have preceded the officers' action in reversing the police cruiser in the eastbound lane in front of Mr. Wiley's car with the obvious intention of preventing any further movement. The only potentially suspicious aspect of this exchange was that the woman who was approaching Mr. Wiley's vehicle was not named Aquanetta. This alone does not give rise to a suspicion of criminal activity sufficient to justify an investigative detention.

At some point it would appear that the officers observed Mr. Wiley looking down and perhaps reaching for something. Officers DeLuca and Victory testified very differently in this regard. Officer DeLuca testified that it was not until the officers had actually pulled diagonally in front of

the defendant and exited their vehicle with the intention of approaching Mr. Wiley that they observed him reaching for something. Officer Victory testified that he saw Mr. Wiley looking down and moving his hands while the vehicles were adjacent to each other. According to Officer Victory, he proceeded to block the defendant's vehicle because after seeing this movement he was concerned for his safety. The occurrence of a "furtive movement" or other suspicious movement is insufficient to constitute reasonable suspicion. *Commonwealth v. DeWitt*, 530 Pa. 299, 608 A.2d 1030 (1992).[2] None of the activities on the defendant's part, either independently or in the context of all of the circumstances present, justified an investigative detention. *See Commonwealth v. Sierra*, 555 Pa. 170,723 A.2d 644 (1999). While it is apparent that after the police officers approached Mr. Wiley's vehicle the character of their involvement with Mr. Wiley significantly changed, resulting in the need for the officers to physically restrain him, the actions of the police preceding his arrest were not based on a reasonable suspicion that criminal activity was afoot. This constituted a violation of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution. As such, the defendant's Motion to Suppress must be granted and an appropriate order shall be entered.

ORDER

AND NOW, to-wit, this 25 day of May, 2004, upon consideration of the defendant's Motion to Suppress, and argument thereon, it is hereby **ORDERED, ADJUDGED and DECREED** that the Motion is **GRANTED**.

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

[2] It is not appear [sic] from its brief that the Commonwealth is justifying the police conduct on the basis of concern for police safety during the course of an otherwise lawful investigative detention.

FRANZ JOSEPH HERSICK, Administrator of the Estate of MARTHA SWICK, Deceased, and MELISSA MILESKI, in her own right, Plaintiffs

v.

RONALD J. SAUTER, DEBORAH K. FLEMING, and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, a Commonwealth agency, Defendants

CONNIE BRUCKER and MILTON BRUCKER, as parents and legal guardians of HOLLY BRUCKER, a minor, and CONNIE BRUCKER and MILTON BRUCKER, in their own right, Plaintiffs

v.

RONALD J. SAUTER, DEBORAH K. FLEMING, and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, a Commonwealth agency, Defendants

DIANNE L. SAUTER, as parent and legal guardian of AMY L. SAUTER, a minor, and DIANNE L. SAUTER, in her own right, Plaintiffs

v.

RONALD J. SAUTER, DEBORAH K. FLEMING, and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, a Commonwealth agency, Defendants

CIVIL PROCEDURE / PLEADINGS

An amendment to a pleading will not be allowed when it will surprise or prejudice the opposing party. Pa. R. Civ. P. 1033.

CIVIL PROCEDURE / PLEADINGS

The plaintiffs were not actually prejudiced as a result of the defendants' late filing of a motion to amend their answer to reduce any verdict by the settlements for policy limits with their underinsured motorist carriers.

EVIDENCE / COLLATERAL SOURCE RULE

The "collateral source rule" is a rule of evidence prohibiting the diminution of a tortfeasor's liability on the basis of insurance benefits independently contracted for and received by a plaintiff.

INSURANCE / DAMAGES / COLLATERAL SOURCE RULE

As any judgment against the defendants would be for less than the full value of the harm they may have caused if the verdict in a personal injury action would be reduced by the amounts plaintiffs received from their underinsurance carriers and as, further, the defendants would otherwise enjoy the benefit of the plaintiffs' voluntary decision to purchase UIM benefits, the collateral source rule prohibited the reduction of the verdict by the amount of underinsurance benefits that had been paid to the plaintiffs.

INSURANCE / UNDERINSURED BENEFITS

Although insurers must offer underinsurance coverage to their insureds, its purchase is optional under the law of this state. 75 Pa. C.S. §1731(a).
IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW
Nos. 13210-2002, 11047-2003, 11287-2003 (consolidated at 13210-2002)

Appearances: Mark J. Homyak, Esq.
Sharon Bliss, Esq.
Paul R. Giba, Esq.
Craig L. Fishman, Esq.
William C. Wagner, Esq.

OPINION

Bozza, John A., Judge

This case is before the Court on the defendants' Motion to File an Amended Answer and New Matter to Plaintiff's Complaints and Motion in Limine to Reduce Any Verdict Entered in Favor of Plaintiffs by Any Amounts Paid to the Plaintiffs in Underinsured Motorist Benefits. The Court is asked to determine whether a defendant in a personal injury case arising from a motor vehicle accident is entitled to a credit or set-off for the proceeds of an underinsurance policy settlement received by a plaintiff prior to trial. The facts of the case may be briefly summarized as follows.

The plaintiffs were injured as a result of an accident that occurred at or near the intersection of Routes 98 and 6N in Elk Creek Township, Erie, Pennsylvania on May 27, 2002. On that date, a car driven by Defendant Ronald Sauter collided with a car driven by Defendant Deborah Fleming. Two rear-seat passengers in the Sauter vehicle, Amy L. Sauter and Holly Brucker, were seriously injured as a result of the collision. Additionally, the front-seat passenger, Martha Swick, was killed. Individual lawsuits were initiated against the above-named defendants, as well as the Commonwealth of Pennsylvania, Department of Transportation ("DOT"). These lawsuits were later consolidated. Discovery has been conducted and the cases are ready to proceed to trial.

Each of the plaintiffs made claims with their respective insurance carriers for underinsured motorist coverage benefits.[1] The Brucker Plaintiffs accepted $100,000, the policy limit, from their underinsurance carrier, State Farm Insurance Company ("State Farm"). The Sauter Plaintiffs accepted $25,000, the policy limit, from Mrs. Dianne Sauter's underinsured motorist policy with Nationwide Insurance Company ("Nationwide").[2] Additionally,

[1] In reaching settlements, each of the underinsurance carriers waived subrogation rights.

Melissa Mileski, as administrator of the Estate of Martha Swick, accepted $25,000, the policy limit, based on the deceased's underinsured motorist policy with State Farm. Some time later,
Defendant Fleming filed a Motion to File Amended Answer and New Matter and a Motion in Limine in the Sauter and Brucker cases.[3] Both Defendant Sauter and the DOT filed motions to join in Defendant Fleming's motions.[4] There has been no determination as to either fault or the amount of damages to which the plaintiffs are entitled.

Initially, the Court concludes that the defendants' Motion in Limine is without merit, as it is not an appropriate procedural vehicle for addressing the issue of a defendant's entitlement to a "credit" for underinsured motorist benefits. *See Gallop v. Rose*, 420 Pa. Super. 388, 616 A.2d 1027 (1992). Rather, the purpose of a motion in limine is to determine the admissibility of evidence in a trial. Pa.R.E. 104. At the time of trial, the issue for the jury will be the amount of damages sustained by the plaintiffs as a result of the defendant's negligence. It is only once the issue of damages is resolved that the question of a "credit", if applicable, would be determined by the Court.

With respect to the underlying issue presented in this case, there is only limited appellate guidance. The defendants largely rely on the decision of the Pennsylvania Supreme Court in *Johnson v. Beane*, 541 Pa. 449, 664 A.2d 96 (1995). In that case, the plaintiff was injured in an automobile accident and the defendant admitted liability. While the defendant had $25,000 in liability coverage, the insurance carrier, State Auto, refused to settle for that amount. A jury trial was conducted and a verdict was rendered for $200,000, which later was reduced to $75,000 by the court. Following the jury's verdict, the plaintiff sought benefits pursuant to her underinsured motorist policy issued by Erie Insurance Group ("Erie"). After remittitur by the court, State Auto paid its policy limit of $25,000 and the plaintiff reached an agreement with Erie for the remaining $50,000 of the judgment. In return for receiving underinsured motorists benefits from Erie, Ms. Johnson signed a release in which she agreed:

(1) to subrogate Erie Insurance Exchange/Erie Insurance

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[2] Defendant Fleming asserts in her brief in support of the motions regarding the Sauter Plaintiffs, at footnote 1, that they "are also pursuing additional claims for underinsured motorist benefits against Nationwide, the automobile insurer of Ronald Sauter, and Harleysville Insurance Company, the automobile insurer of Dianne Sauter's parents."

[3] The record reflects that Defendant Fleming had previously reached a settlement agreement with the Estate of Martha Swick.

[4] Defendant Sauter also filed a similar Motion to File Amended Answer and New Matter in the Swick case. No response was filed on behalf of the Estate.

> Company to my right of recovery against any person or party legally liable to me for the amount of and for the purpose of the payment noted above;

Id. at 452, 98. Additionally, and obviously contemplating a bad faith action against State Auto, she further agreed:

> It is my understanding that Erie has agreed to advance any out-of-pocket expenses reasonably necessary to prosecute the bad faith/ excess action against State Auto and if said action is successful Erie has agreed to pay its pro rata share of attorneys fees and expenses as per the contingent fee agreement entered into by Angino & Rovner, P.C. and myself. . .

Id.

Thereafter, Erie declined to pursue the bad faith action. Ms. Johnson, however, proceeded to file a "bad faith garnishment action"[5] against State Auto. Following a somewhat involved procedural history, the trial court entered an order dismissing the "bad faith garnishment action" on the basis that the plaintiff had assigned her right to recover further damages to Erie in exchange for receiving underinsured motorists benefits. The trial court's decision was affirmed by the Superior Court and then by the Supreme Court, which noted, "because appellant has received the full value of the remitted verdict, she has no claim to pursue." *Id*. at 457, 101.

The parties have brought to this Court's attention two Common Pleas Court decisions applying *Johnson*, the respective judges coming to very different results under similar but not identical factual circumstances. In *Shankweiler v. Regan*, 60 Pa. D. & C. 4th 20 (2002), Judge Charles Burr of the Delaware County Court of Common Pleas agreed to allow the defendants to amend their answer and new matter following a jury verdict and ultimately granted their request to mold the verdict, providing them with a credit in the amount of $50,000 representing the proceeds from the plaintiffs' underinsured motorist policy. This resulted in the defendants being required to pay $300. The court rejected plaintiffs' arguments that to do so violated Pennsylvania's "collateral source rule" or the public policy of the Commonwealth. In *Walsh v. DiPietro*, No. 01-02843 (Chester County Ct. C.P. Oct. 31, 2003), a jury returned a verdict in the amount of $225,000. The Honorable Jacqueline C. Cody of the Court of Common Pleas of Chester County refused the defendants' post-trial request to mold the verdict to reflect payment of underinsured motorist benefits by State

[5] This is apparently a procedure whereby a plaintiff attempts to garnish the amount an insurance carrier would theoretically owe it's insured, and therefore indirectly the defendant, for the failure to represent the insured's interests in good faith. In *Johnson* the court commented "There is no basis in law for such a procedure since State Auto does not owe money to Beane, nor does it have in its possession assets belonging to Beane." *Johnson*, 541 Pa. 455, fn2 (1995). Although this has been referred to as a bad faith action it is not at all clear as to its exact legal status.

Farm in the amount of $60,000. The court concluded that the result in *Johnson* was limited to circumstances where a plaintiff, after being made whole by receiving UIM benefits, agreed to subrogate to the UIM carrier any right to further recover from a third party.

Here the plaintiffs first argue that defendant's Motion to Amend Answer and New Matter should be denied because they have been prejudiced as a result of its late filing. Pennsylvania Rule of Civil Procedure 1033 provides "an amendment will not be allowed... when it will surprise or prejudice the opposing party." *Somerset Community Hospital v. Alan B. Mitchell & Associates*, 454 Pa. Super. 188, 685 A.2d 141 (1996). The plaintiffs maintain that defendants waited nearly one year from the time they filed their original Answers to seek leave to amend, and that had they known that the defendants were going to seek a credit for UIM proceeds, they would not have settled with their underinsured motorist carriers. However, the plaintiffs have not demonstrated to this Court's satisfaction that there is actual prejudice as a result of the late filing of this motion. The plaintiffs settled with their UIM carriers for the limits of the respective policies. If they had refused to settle for the policy limits, they would have run the risk of not being entitled to any underinsured motorists benefits if a jury returned a verdict for an amount for which defendant's liability was adequate. They have not pointed to any practical or legal advantage to rejecting settlement for the limits of the underinsured motorist policies before trial in the circumstances of this case. Therefore, this Court respectfully rejects the plaintiffs' contention in that regard.

A more compelling reason to deny the Motion to Amend, asserted by the plaintiffs, is the existence of the "collateral source rule", a long established rule of evidence prohibiting the diminution of a tortfeasor's liability on the basis of insurance benefits independently contracted for and received by a plaintiff. After a thorough analysis of *Johnson v. Beane*, 41 Pa. 449, 664 A.2d 96 (1995), and other applicable case law, this Court is constrained to agree with the plaintiffs' position.

As noted in *Johnson*:

> The collateral source rule provides that payments from a collateral source shall not diminish the damages otherwise recoverable from the wrongdoer. (citations omitted). The principle behind the collateral source rule is that it is better for the wronged plaintiff to receive a potential windfall than for the tortfeasor to be relieved of responsibility for the wrong.

541 Pa. at 456, 664 A.2d at 100. Although the Supreme Court found it inapplicable to the facts of the case being decided, it noted "we reaffirm the collateral source rule in general...". *Id.* There is nothing in the *Johnson* decision to in any way suggest that the applicability of the collateral source rule has been diminished. Although the court rejected

the plaintiff's right to pursue a garnishment action against the defendant's insurance carrier for bad faith, the court emphasized that its decision would not have the effect of reducing or limiting the defendant's liability in any way. *Id.*

The facts in *Johnson* differ materially from the case at bar. In *Johnson,* the plaintiff received $50,000, and executed a written release where she in effect gave up her right to pursue further recovery in favor of her underinsured motorist carrier, Erie.[6] Erie was then free to pursue a bad faith action against State Auto, or for that matter any other action to collect on the judgment against the defendant, in order to recover the $50,000 it paid in underinsured motorist benefits.[7] In addition, *Johnson* did not directly involve the underlying action against the tortfeasor, but rather a third party action against an insurance carrier ostensibly in an attempt to collect a debt the insurance carrier owed to its insured for acting in bad faith. Lastly, in *Johnson,* a jury had determined the extent of the defendant's liability, so the tortfeasor's legal responsibility had been finally established and was not subject to diminution by any future action against the liability carrier for bad faith. What remained was a collection issue and the court, in essence, concluded that once the plaintiff received full compensation from her UIM carrier she passed on to the carrier the right to pursue further collection of the judgment.

Here, defendants seek to be actually relieved of their responsibility for paying the full amount of the plaintiffs' damages. The extent of their liability has yet to be determined. If the defendants were entitled to have the verdict against them reduced by the amount of underinsurance benefits paid to the plaintiffs, the judgment would be for less than the full value of the harm they may have caused. There would be no further recourse against them by either the plaintiffs or the UIM carriers that could lead to their full legal accountability. The defendants would have enjoyed the benefit of the plaintiffs' voluntary decision to purchase UIM benefits.[8] In *Johnson,* the award against the defendant reflected the jury's assessment

[6] In *Johnson v. Beane* 420 Pa. Super. 193, 616 A.2d 648 (1992), the Superior Court observed that the plaintiff had agreed to give up her right to pursue further civil action by signing a subrogation agreement with her UIM carrier. Judge Johnson in his concurring opinion took the position that regardless of the language of any agreement, Ms. Johnson lost her right to pursue any additional action when she received the proceeds of UIM benefits such that the judgment against the defendant was fully satisfied. The Supreme Court later noted its agreement with Judge Johnson's opinion. *Johnson v. Beane*, 541 Pa. 449, 456, 665 A.2d 96, 100 (1995).

[7] For reasons not clear in the opinion, Erie chose not to pursue an action against State Auto.

[8] In Pennsylvania, although insurers must offer UIM coverage its purchase is optional. *See* 75 Pa. C.S. § 1731(a).

of the full amount of the plaintiff's damages for which the defendant was responsible. Moreover, the UIM carrier, Erie, was not only in a position to pursue a claim for bad faith against State Auto, but theoretically as subrogee to Ms. Johnson, could have pursued collection of the balance of the judgment still owed by the defendant in the amount of $50,000. Once a verdict has been rendered and a judgment entered accordingly, plaintiffs and quite possibly their UIM carriers would have no further recourse.[9] In this case, by molding the verdict to allow the defendants the benefit of a credit or set-off, no one will be able to pursue the defendants for any more money, effectively reducing the defendant's legal responsibility.[10]

The court in *Johnson* did not conclude that a defendant was entitled to a credit against a verdict for the UIM benefits received by the plaintiff. It did conclude that the collateral source rule is not necessarily implicated in circumstances where a plaintiff, who received full payment of a verdict from a UIM carrier, is precluded from pursuing collection activity in the nature of a "bad faith garnishment action" against a tortfeasor's liability carrier. These are not the circumstances of this case. For all the reasons stated above the defendants motions must be denied. An appropriate order shall be entered.

Signed this 8 day of June, 2004.

ORDER

AND NOW, to-wit, this 8 day of June, 2004, upon consideration of the Motion to File Amended Answer and New Matter and Motion in Limine filed by defendants. and argument thereon, and in accordance with the foregoing Memorandum, it is hereby **ORDERED, ADJUDGED and DECREED** that the motions are **DENIED.**

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

[9] Without knowing what the actual amount of the verdict will be, it must be assumed that it is possible that a credit against the verdict would result in a judgment that would preclude or diminish the value of a collection action against the defendant by a subrogee.

[10] There is no issue in this case with regard to the plaintiff's ability to pursue the defendant's liability carrier for a bad faith claim.

ERIE INSURANCE EXCHANGE, Plaintiff

v.

DESTINY BELLE, Defendant

INSURANCE / CONTRACTS AND AGREEMENTS

In interpretation of insurance policy, any ambiguity must be construed in favor of the insured and unambiguous terms must be given plain and ordinary meaning.

INSURANCE / AMBIGUITY

An insurance policy is deemed ambiguous when is reasonably and fairly susceptible to more than one construction, is capable of being understood in more than one sense, is obscure in meaning or has double meaning.

INSURANCE / RESIDENT OF THE HOUSEHOLD

Term "resident" in insurance policy, defined as "a person who physically lives with you in your household," is reasonably susceptible to more than one construction and is capable of being understood in more than one sense.

INSURANCE / RESIDENT OF THE HOUSEHOLD

Under terms of policy that included no duration limitation in definition of "resident," plaintiff was eligible for UM/UIM benefits as a relative who was a "resident" of the named insured's household, where the plaintiff was living with her aunt (the named insured) and planned to live there for an indefinite time until she secured employment.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY. PENNSYLVANIA CIVIL ACTION - LAW NO. 14668 - 2002

Appearances: T. Warren Jones, Esquire for the Plaintiff
Barry F. Levine, Esquire for the Defendant

OPINION

Bozza, John A., Judge

This case is before the Court on Cross-Motions for Summary Judgment. The only issue is whether Destiny Belle is entitled to uninsured/underinsured motorist coverage (UM/UIM), pursuant to a policy issued by Erie Insurance Exchange in the name of Tonya D. Belle. The policy in question was issued to Tonya D. Belle for coverage of two vehicles, each of which provided for coverage in the amount of $15,000 per person and $30,000 per accident. Coverage was "stacked" resulting in the availability of total coverage in the amount of $30,000 per person and $60,000 per accident. The policy provided coverage for "a relative" who was a resident of Tonya Belle's household. The policy defined "resident" as a "person who physically lives with **you** in **your** household". Destiny Belle claims that she is a relative of Tonya Belle and was a resident of her

household, and therefore has made a claim of the UM/UIM benefits of the policy. Since there is no dispute that Tonya Belle is Destiny Belle's aunt, the only question that remains is whether she was a resident of her aunt's household at the time she was involved in a motor vehicle accident on June 26, 2000. The relevant facts may be summarized as follows:

1. Destiny Belle moved to Charlotte, North Carolina to live with her mother in 1995.

2. She remained in Charlotte until June 2000 when she decided to relocate to Erie, Pennsylvania.

3. On June 18, 2000, she flew to Erie, Pennsylvania to stay with her aunt, Tonya Belle, at 2126 June Street.

4. It was Destiny Belle's intention to find a job and suitable living arrangements for her and her children.

5. She was welcome to stay with her aunt, Tonya Belle, as long as necessary.

6. Destiny Belle's two daughters joined her at Tonya Belle's house in the early part of July 2000.

7. On June 26, 2000, Destiny Belle was involved in a one-car motor vehicle accident while riding as a passenger in a car owned by Willie Jones and operated by another individual.

8. While staying at Tonya Belle's house, she shared a bedroom with her cousin and was given a set of keys to the house and she received limited mail.

9. While living at Tonya Belle's house, she was hired by Volt Temporary Services where she worked for a short period of time.

10. On July 17, 2000, she signed a lease for an apartment on East 13th Street. She moved into the apartment approximately two weeks later and remained there for approximately one year.

11. She had spent a total of six to seven weeks residing with her aunt, Tonya Belle.

When interpreting language of an insurance policy, any ambiguity must be construed in favor of the insured and unambiguous terms must be given the plain and ordinary meaning. *Madison Construction Co. v. Harleysville Mutual Insurance Co.*, 557 Pa. 595, 735 A.2d 100 (1999). An insurance contract is deemed ambiguous when it is reasonably and fairly susceptible to more than one construction, is capable of being understood in more than one sense, is obscure in meaning or has double meaning. *Erie Insurance Company/Erie Insurance Exchange v. Flood*, 168 Pa. Commwlth. 258, 649 A.2d 736 (1994). Previously, this Court found the language of the insurance policy at issue to have been ambiguous. *Fedorko v. Erie Insurance Exchange*, 14243-2001, Erie County (2003). The term "resident" is defined in the Erie policy as "a person who physically lives with you in your household". This extraordinarily broad and imprecise definition is reasonably susceptible to more than one construction and is

capable of being understood in more than one sense.

This is not a circumstance where there is an issue as to dual residency, as was the case in *Amica Mut. Ins. Co. v. Donegal Mut. Ins. Co.*, 376 Pa. Super. 109, 545 A.2d 343 (1988). (It has not been suggested that Destiny Belle was a resident of two different places.) Rather, plaintiff, Erie Insurance Exchange, argues that Destiny Belle was only a "temporary" resident of her aunt's household and as such, did not qualify for benefits as a resident relative. Erie Insurance relies on the decision of the Third Circuit of the U. S. Court of Appeals in *National Mutual Insurance Co. v. Budd-Baldwin*, 947 F.2d 1098 (3rd Cir. 1991). In that case, a brother of a named insured was seeking insurance benefits that provided coverage for "relatives living in your household". The term "relative" was defined as "one who regularly lives in your household. . ." *National Mutual Insurance Co. v. Budd/Baldwin*, 947 F.2d 1098, 1101-02. The Court concluded that weekend visits to the insured's house to visit his fiancee were insufficient to establish that he was a resident of his brother's household.

The policy language at issue in this case is entirely different. Here the only explicit requirement of residency is that the person "physically" live in the insured's household.[1] As this Court noted in *Fedorko*:

> "Unfortunately" there is no entirely objective means of determining residency as that term is defined in Erie Insurance Exchange's policy. The notion that, in order to be a resident, one has to physically live in a household is limiting but still encompasses a broad range of circumstances. For example, there is no requirement placed on the frequency with which one must physically be present in the household to qualify, nor is there an indication as to how long the living period must have existed. Nor is the character of residency suggested. For example, does residency require overnight stays, meal preparation or consumption, and other activities associated with normal domestic life? There is no distinction between a temporary arrangement and a more permanent one. Also, unlike some insurance companies, the defendant did not choose to limit its definition by using "words of refinement" such as "regularly lives".

There is nothing in the policy at issue that in any way limits the amount of time that one must be living in a particular household to qualify as a "resident". The only requirement is that one is actually physically living there. Such a provision is susceptible to very broad interpretation.

Ambiguous terms in an insurance contract must be construed in favor

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[1] It is not clear what the alternative arrangements for living in a household might be, if one is not physically living there.

of the insured. *Madison Construction Co. v. Harleysville Mutual Insurance Co.*, 557 Pa. 595, 735 A.2d 100 (1999). Here, there is simply no question that Destiny Belle was moving to Erie, Pennsylvania. On June 18, 2000, she came to Erie to live and she stayed in the house of her aunt, where she would be for an indefinite time until she secured a job. Prior to coming to Erie, she had planned the trip, had quit her job and made arrangements to have her children join her. She was welcomed to her aunt's home and she was given a key to the house, which essentially allowed her to come and go as she pleased. During the entire period that she remained at her aunt's house, she certainly had no other place where she lived in Erie. She obviously was not staying with her aunt simply to visit relatives or to spend time at a different location for a vacation. Erie Insurance's policy does not limit the status of "resident" on the basis of the amount of time that one physically lives in a household. Indeed, the policy does not provide any guidelines whatsoever in that regard. While Erie suggests that the status of resident does not apply to one who is "temporarily" living in a household, the policy in no way provides for such a limitation. Nor has Erie pointed to any authority to support its interpretation of the precise language at issue.

As a consequence, it must be concluded that Destiny Belle is eligible for the UM/UIM benefits that she seeks.

ORDER

AND NOW, this 23 day of June, 2004, upon consideration of cross-Motions for Summary Judgment, and the Court finding that Destiny Belle physically lived in the household of Tonya D. Belle, it is hereby **ORDERED, ADJUDGED** and **DECREED** that the Motion for Summary Judgment on behalf of plaintiff Erie Insurance Exchange is **DENIED**. It is further **ORDERED** that the Motion for Summary Judgment on behalf of defendant Destiny Belle is **GRANTED**.

BY THE COURT,
/s/ John A. Bozza, Judge

NANCY L. LEVONDUSKIE, Plaintiff

v.

JEFFREY F. HUGHEY, Defendant

CIVIL PROCEDURE / POST-TRIAL MOTIONS

A request for a directive verdict is untimely where it was not presented in oral or written form at the close of all the evidence and before the jury deliberations. See Pa. R.C.P. 226(b).

CIVIL PROCEDURE / POST-TRIAL MOTIONS

Plaintiff's assertion that the verdict was contrary to the evidence so as to shock one's sense of justice fails. The plaintiff's and defendant's experts were not in agreement that the plaintiff's alleged injuries were caused by the accident.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11656-2001

Appearances: Andrew J. Sisinni, Esq. for the Plaintiff
Donald J. McCormick, Esq. for the Defendant

OPINION

Bozza, John A., J.

This case is before the Court on plaintiff's Motion for Post-Trial Relief seeking a new trial as to damages related to her cervical and lumbar injuries and/or the entry of a directed verdict and/or the entry of judgment not withstanding the verdict in her favor on the issue of causation. Initially, the request for a directed verdict is untimely, as it should have been presented in oral or written form at the close of all the evidence and before the jury deliberations. *See* Pa. R.C.P. 226(b). With respect to the other relief requested, plaintiff asserts that the verdict was contrary to the evidence so as to "shock one's sense of justice."

The plaintiff's complaint asserted that she sustained "bodily injuries" as a result of the rear-end collision that occurred on October 15, 1999 when the defendant's car struck her on an exit ramp. At trial, the plaintiff's case focused on alleged injuries to her shoulders, the cause of which was strongly contested by the parties. In addition, the plaintiff alleged injury to her neck and lower back, though these injuries were not mentioned in her pre-trial statement, and she offered no expert testimony to substantiate these other injuries or show a causal connection between the injuries and the motor vehicle accident.[1] In support of the post-trial motion, the plaintiff points to deposition testimony from the defendant's expert orthopedic surgeon, Dr. Seel, which the plaintiff asserts shows that the neck and lower back injuries were uncontested.

[1] While the plaintiff attempted to offer expert testimony from her Chiropractor, Dr. Prichard, she failed to file a pre-trial report and Dr. Prichard was only permitted to offer testimony as to the facts of the case.

Post-verdict motions are generally precluded where the relief was not requested at trial. *See* Pa. R.C.P. 227.1(b)(1); *Criswell v. King*, 575 Pa. 34, 42, 834 A.2d 505, 510 (2003). However, a challenge to the weight of the evidence is not the type of claim that must be raised before the jury is discharged because it ripens only after the verdict. *Id*. at 45-46, 834 A.2d at 512. A new trial should be granted only where the verdict is so contrary to the evidence as to shock one's sense of justice, not where the evidence is conflicting or where the trial judge would have reached a different conclusion based on the fact presented. *Davis v. Mullen*, 565 Pa. 386, 390, 773 A.2d 764, 766 (2001). Where there is no dispute that the defendant is negligent and both parties' medical experts agree the accident caused the plaintiff some injury, the jury may not find that the defendant's negligence was not a substantial factor in causing at least some of the plaintiff's injuries. *Campagna v. Rogan*, 2003 Pa. Super. 257, 829 A.2d 322 (2003). In this case, after reviewing the record it cannot be said that the experts were in agreement that the plaintiff's alleged neck and lower back injuries were caused by the accident.

Initially, there was testimony that the plaintiff was involved in a previous motor vehicle accident three months prior to the accident at issue and had a history of neck pain for which she sought chiropractic treatment. Records from the plaintiff's emergency room visit to Hamot Medical Center on the day of the accident show that she complained of "neck stiffness", documenting no other injury, and that this resulted in a diagnosis of acute cervical strain. When questioned about this diagnosis during direct and cross-examination, the defendant's expert merely testified that neck and or lumbar strain would be consistent with the mechanism of injury for a rear-end collision. *See* Deposition Transcript of Michael Seel, M.D., January 13, 2004, p. 24-25, 37, 43. Furthermore, in summarizing his opinion regarding the cause of the plaintiff's injuries, he stated the following:

> Q. Okay. Now, if I am understanding your opinion, you are basically saying that this automobile accident has no effect at all (sic) on her body. It did not affect her left shoulder, it did not affect her right shoulder, and it did not affect her cervical strain - or her cervical spine - other than maybe in the emergency room. Is that your opinion?
>
> A. Correct, I believe. So to restate my opinion, I do not feel the motor vehicle accident had any effect on either the left shoulder or the right shoulder for all of the reasons that we have discussed at length. The mechanism of injury and the documentation does suggest a cervical strain, and that's documented in the Hamot emergency room records. However, three days later, by October 18, 1999, her PCP feels that she is much better and she is felt to be able to return to work without restriction and she had normal range of motion of her cervical spine. So although she has sustained a cervical strain as a result of the motor vehicle accident, that appears to be nearly completely, if not functionally completely, resolved by October 18 of 1999. Beyond

that, the other testimony that I can provide is that as of the (sic) February 5, 2003 independent medical examination there was no evidence of any residual problems with her neck and the only radiographic findings were degenerative disk disease.

Q. Okay. You would agree, though, that degenerative disk disease that preexists an automobile accident would make somebody more susceptible to sustaining a cervical injury than if you had somebody with a, let's say, pristine neck, maybe a younger person?

A. There are situations in which preexisting degenerative changes can be aggravated or exacerbated by trauma, and one can superimpose for example fracture or disk herniation or any number of traumatic injuries onto a degenerative spine as a result of a motor vehicle accident. So those are in theory very possible; but in essence, in this case, there is no evidence of that.

Id. at 47. Finally, when asked by defendant's counsel if the medical records indicated any physical change in the plaintiff's condition stemming from the accident, Dr. Seel said "No". *Id.* at 57.

The neck and lower back injuries alleged by the plaintiff did not lend themselves to objective determination, and it was apparent from his testimony that the defendant's expert was basing his opinion on medical records that others had prepared. Additionally, Dr. Seel testified that during his own independent medical examination, more than three years after this accident, the plaintiff had "subjective complaints of pain [that] didn't correlate with any objective findings" and he attributed this evidence of degenerative arthritis of the cervical spine not related to the accident. *Id.* at 35. Ultimately, the evidence regarding the accident itself and the plaintiff's alleged injuries was such that the jury could have quite reasonably concluded that no injury was sustained as a result of this accident, or that the injury was so minimal as to be noncompensable. *See Kennedy v. Sell*, 2003 Pa. Super. 40, 816 A.2d 1153 (2003).

Based on this evidence it is apparent that the alleged injuries to plaintiff's neck and lower back were contested, and as such the jury's determination not to award damages is not inconsistent with its finding that defendant was negligent, and a new trial on the issue of damages is not warranted. Furthermore, because the plaintiff did not request a directed verdict or argue that he [sic] was entitled to compensation for only the neck and lumbar injuries his [sic] request for judgment notwithstanding the verdict is considered waived. *Id.* at 1158. Therefore, the Motion for Post-Trial Relief must be denied.

Signed this 23 day of June, 2004.

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

THERESA A. OAS, Plaintiff

v.

DENNIS N. OAS, Defendant

CONTRACTS

When the words of a contract are clear and unambiguous, the intent is to be found only in the express language of the agreement.

When the language of a contract is unambiguous, courts must interpret its meaning solely from the contents within its four corners, consistent with its plainly expressed intent.

Under Pennsylvania law, to the extent that the court finds that the words of a contract are ambiguous, such words should receive reasonable construction that will accord with the intention of the parties.

If a contract is ambiguous, the court, in order to ascertain the intention of the parties, may consider the surrounding circumstances, parties' situation, and the nature of the subject matter of the agreement.

In determining whether a contract is ambiguous, a court should hear the evidence presented by both parties and then decide whether there are objective indicia that, from the linguistic reference point of the parties, the terms of the contract are susceptible to differing meanings.

DIVORCE / MARITAL SETTLEMENT AGREEMENT

Provision of marital settlement agreement found to be ambiguous where it provided that husband would reimburse wife's increased tax obligation, to be calculated as if wife had no other income, resulting from receipt of alimony.

Husband not entitled to deduct wife's itemized deductions and personal exemptions in calculating husband's obligation to reimburse wife's increased tax obligation as a result of the receipt of alimony.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA FAMILY DIVISION No. 10078 of 2000

Appearances: Charles D. Agresti, Esq. on behalf of Plaintiff
W. Patrick Delaney, Esq. on behalf of Defendant

OPINION

Domitrovich, J., August 13, 2004

This matter is currently before the Court on Defendant's appeal of this Lower Court's Order, dated June 3, 2004, granting Plaintiff's Petition for Special Relief requesting reimbursement for taxes assessed against alimony reported by her. Defendant raises three issues in his Statement of Matters Complained of On Appeal filed pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). This Court will combine and address Defendant's issues as follows: (1) whether the Trial Court properly determined that an ambiguity exists in Paragraph 19.03 of the parties' Marital Property Settlement Agreement; and (2) whether the Trial Court properly determined

that Defendant must reimburse Plaintiff for the additional income tax expense she incurred as a result of reporting alimony as income, consistent with the intent of the parties.

The relevant factual and procedural history is as follows: On November 12, 2002, the Honorable Elizabeth Kelly issued a Final Decree ordering the divorce of Plaintiff, Theresa Oas and Defendant, Dennis Oas, which incorporated the Marital Property Settlement Agreement that the parties had previously entered into on November 6, 2002. On May 11, 2004, Plaintiff filed a Petition for Special Relief, requesting reimbursement from Defendant for income taxes assessed against alimony that she reported on her 2003 federal income tax return, without a reduction for itemized/ standard deductions and personal exemptions. Plaintiff argued that she was entitled to such reimbursement in accordance with Paragraph 19.03 of the parties' Marital Property Settlement Agreement. Defendant filed a reply on May 24, 2004, arguing to the contrary, Plaintiff was only entitled to reimbursement for taxes paid on alimony with a reduction for itemized/ standard deductions and personal exemptions. Accordingly, on May 25, 2004, a hearing was held before this Trial Court to hear oral arguments and to take any necessary testimony. On June 3, 2004, the Trial Court granted Plaintiff's Petition for Special Relief to the extent that Defendant was directed to reimburse Plaintiff within thirty (30) days the sum of $5,716.00, representing the additional income tax Plaintiff paid as a result of reporting alimony as income, consistent with the intent of the Marital Property Settlement Agreement. The Trial Court also directed the parties to utilize the same calculation method for all relevant future years as per their Marital Property Settlement Agreement. Subsequently, on July 1, 2004, Defendant filed the instant appeal to the Pennsylvania Superior Court.

The first issue is whether the Trial Court properly determined that an ambiguity exists in Paragraph 19.03 of the parties' Marital Property Settlement Agreement. *Z & L Lumber Co. of Atlasburg v. Nordquist*, 502 A.2d 697 (Pa. Super Ct. 1985). The Pennsylvania Supreme Court has set forth the basic principles of contract interpretation as follows:

> The fundamental rule in interpreting the meaning of a contract is to ascertain and give effect to the intent of the contracting parties. The intent of the parties to a written agreement is to be regarded as being embodied in the writing itself. The whole instrument must be taken together in arriving at contractual intent. Courts do not assume that a contract's language was chosen carelessly, nor do they assume that the parties were ignorant of the meaning of the language they employed. "When a writing is clear and unequivocal, its meaning must be determined by its contents alone."
>
> Only where a contract's language is ambiguous may extrinsic or parol evidence be considered to determine the intent of the parties. A

> contract contains an ambiguity "if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." This question, however, is not resolved in a vacuum. Instead, "contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts." In the absence of an ambiguity, the plain meaning of the agreement will be enforced. The meaning of an unambiguous written instrument presents a question of law for resolution by the court.

Ferrer v. Trs. Of the Univ. of Pa, 825 A.2d 591, 608 (Pa. 2002) *(citing Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418, 429-30 (Pa. 2001)). In determining whether a contract is ambiguous, a court "should hear the evidence presented by both parties and then decide whether 'there is objective indicia that, from the linguistic reference point of the parties, the terms of the contract are susceptible of differing meanings.'" *Z & L Lumber Co. of Atlasburg v. Nordquist*, 502 A.2d 697 (Pa. Super. Ct. 1985) (citing *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001, 1011 (3d Cir. 1980).

In the instant matter, the parties disputed the meaning of Paragraph 19.03 of the Marital Property Settlement Agreement (hereinafter referred to as the "Agreement"), which was jointly drafted by the attorneys for both parties without the advice of a certified public accountant. Paragraph 19.03 states in relevant part,

> In order to reduce the tax burden to Wife, Husband will reimburse Wife the actual federal tax Wife pays on the alimony payment set forth in Paragraph 16.02 of this Agreement. In order to calculate the tax obligation which Husband will undertake, Wife's accountant, who must be a certified public accountant, shall calculate the tax on the alimony as if Wife had no other income.

In order to make the initial determination as to whether an ambiguity existed in this Paragraph, this Trial Court heard arguments and testimony presented by both parties.

Plaintiff argued in her Petition for Special Relief and in the attached letter written by Peter Delio, that Paragraph 19.03 obligates Defendant to reimburse Plaintiff for the taxes she paid on alimony received without a reduction for itemized/standard deductions and personal exemptions. Under Plaintiffs interpretation of the Agreement, Plaintiff's $30,000.00 in alimony received would be taxed a total of $4,000.00 in accordance with the following computation: 10,000 would be taxed at a rate of 10%, which equals $1000.00; $20,000.00 would be taxed at a rate of 15%, which equals $3,000.00. $1000.00 plus $3000.00 equals $4000.00. In contrast, Defendant argued in his Reply to Plaintiff's Petition for Special Relief, that Paragraph 19.03 obligates Defendant to reimburse Plaintiff

for the taxes that she would pay on $30,000.00, representing alimony received, as if this was the only income that she has. Defendant argued that this amount should be reduced by $14,587.00 in itemized deductions, and $6,100.00 in personal exemptions. Under Defendant's interpretation of this Paragraph, Plaintiff's tax obligation would be $333.00.

In addition, the Court heard credible testimony from a well-qualified expert witness, Peter Delio, who is both an attorney and a licensed CPA. (N. T. 5/25/04 p. 19). It is also noted that Mr. Delio is the accountant for both parties and was responsible for preparing both parties' 2003 personal income tax returns. (N. T. 5/25/04 p. 9). He did not participate in drafting the parties' Marital Property Settlement Agreement; however, he did spend a considerable amount of time attempting to interpret the language of the Agreement in order to compute the income tax implications for both parties. (N. T. 5/25/04 p. 12). Mr. Delio wrote a letter dated April 22, 2004, with his concerns that "in my opinion a CPA cannot calculate the amount of reimbursement due to Mrs. Oas until Paragraph 19.03 is clarified. Please advise." *See Plaintiff's Exhibit A of the Petition for Special Relief and attached to the end of this Opinion.* Mr. Delio unequivocally stated at the time of trial that the language in Paragraph 19.03, when read as a whole, could not be applied to compute income tax liability. (N.T. 5/25/04 p. 13). In fact, Mr. Delio indicated that both sentences in the paragraph read together simply could not be accomplished to compute the tax liability of Plaintiff via federal tax laws because of a conflict between language contained in the first sentence of Paragraph 19.03 and language contained in the second sentence. (N. T. 5/25/04 p. 10). Mr. Delio stated that the language of the first sentence, "to reduce the tax burden to Wife, Husband will reimburse Wife the actual federal tax Wife pays on the alimony payment set forth in Paragraph 16.02 of this Agreement," makes a lot of sense standing alone; however, when combined with the next sentence the Paragraph becomes confusing, conflicting and ambiguous. (N. T. 5/25/04 p. 9, 11). Moreover, the attorneys drafting this Paragraph should have stopped at the first sentence. (N. T. 5/25/04, p. 9-11). Mr. Delio explained that according to this first sentence, to determine the "actual federal tax Wife pays on alimony" and thus the amount of reimbursement owed to Plaintiff, an accountant should compute Plaintiff's tax owed including alimony and Plaintiff's tax owed excluding alimony, and the difference between these numbers is the actual tax Plaintiff paid on the alimony, and thus the amount of reimbursement owed to Plaintiff by Defendant. (N. T. 5/25/04 p. 4-18). However, Mr. Delio continued by explaining that the second sentence, "in order to calculate the tax obligation which Husband will undertake, Wife's accountant...shall calculate the tax on alimony as if Wife had no other income," describes a method of determining the amount of reimbursement owed that does not reimburse Plaintiff for the "actual federal tax" that she incurred as a result of receiving alimony payments from Defendant. (N. T.

5/25/04 p. 10-11). Moreover, Mr. Delio indicated that because of the conflict between sentence one and sentence two of Paragraph 19.03, Plaintiff cannot possibly be reimbursed for the "actual federal tax" on alimony that she paid by utilizing the calculation method suggested in sentence two. (N. T. 5/25/04 p. 10-11). *See also Mr. Delio's letter dated April* 22, *2004 attached to Plaintiff's Petition for Special Relief.*

In order to illustrate this point, Mr. Delio presented to this Trial Court several Exhibits that demonstrated how Plaintiff's income tax obligation would change depending on the way in which the Paragraph was read and interpreted. (N. T. 5/25/04 p. 11-18). Exhibit "A" is a computation of the income tax return that Plaintiff in fact filed with the federal government. Under this method of computation, Plaintiff's total tax owed is $11,062.00. (N. T. 5/25/04 p. 13). Exhibit "B" is a computation of Plaintiff's federal income tax return assuming that Plaintiff's only income is alimony in the amount of $30,000.00. (N.T. 5/25/04 p. 13). Under this method of computation, if a reduction is made for itemized deductions and personal exemptions, Plaintiff's total tax owed is $333.00. (N.T. 5/25/04 p. 13). Exhibit "C" is a computation of Plaintiff's federal income tax return based solely on Plaintiffs other income excluding alimony payments. (N.T. 5/25/04 p. 13-14). Under this method of computation, Plaintiff's total tax owed is $5,346.00. (N.T. 5/25/04 p. 14, 17). Finally, Mr. Delio presented a computation of Plaintiff's federal income tax return that represented the amount of additional income tax that Plaintiff in fact paid as a result of receiving alimony payments and including those payments in income. (N.T. 5/25/04 p. 17-18). To determine this amount, Mr. Delio subtracted $5,346.00 (Exhibit C) from $11,062.00 (Exhibit A). (N.T. 5/25/04 p. 17-18). Under this method of computation, Plaintiff's total tax owed on alimony received is $5,716.00. (N.T. 5/25/04 p. 18).

Defendant claims in his 1925(b) that this Trial Court improperly heard testimony from the expert, and instead should only have applied the "plain meaning" rule of interpretation of contracts. However, as stated above, the Superior Court has held that contractual interpretation does not occur in a vacuum. Instead, "contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts." *Ferrer v. Trs. Of the Univ. of Pa*, 825 A.2d 591, 608 (Pa. 2002) (citing *Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418, 429-30 (Pa. 2001)). In determining whether a contract is ambiguous, a court "should hear the evidence presented by both parties and then decide whether 'there is objective indicia that, from the linguistic reference point of the parties, the terms of the contract are susceptible of differing meanings.'" *Z & L Lumber Co. of Atlasburg v. Nordquist*, 502 A.2d 697 (Pa. Super. Ct. 1985) (citing *Mellon Bank, N.A. v. Aetna Business Credit. Inc.,* 619 F.2d 1001, 1011 (3d Cir. 1980). Thus, the Trial Court properly heard testimony from the expert as to the objective indicia that indicated the terms of the contract are, in fact, susceptible

to more than one reasonable meaning.

In light of the foregoing, this Trial Court found that Paragraph 19.03 of the Marital Property Settlement Agreement contained ambiguous language. Since the language in the first sentence of the Paragraph directly conflicts with the language in the second sentence of the same Paragraph, the Paragraph, as written, is indefinite, doubtful, and uncertain. The Paragraph cannot serve the purpose of reimbursing Plaintiff for the "actual federal tax" she pays on alimony via the method suggested in the second sentence of that paragraph. There exist objective indicia that the terms of the contract are reasonably susceptible of different constructions. The divergent interpretations of the Paragraph proffered by Plaintiff and Defendant as well as the analyses by Mr. Delio demonstrate that the Paragraph may reasonably be understood in more than one sense. Therefore, Paragraph 19.03 of the Agreement is ambiguous and extrinsic clarification was required in order to determine its meaning. Therefore, the Defendant's first issue is without merit.

The second issue is whether the Trial Court properly determined that Defendant must reimburse Plaintiff for the additional income tax expense she incurred as a result of reporting alimony as income, consistent with the intent of the parties.

Initially, when the terms of a contract are clear and unambiguous, the intent of the parties is to be ascertained from the document itself. *Hutchison v. Sunbeam Coal Corp*, 519 A.2d 385, 390 (Pa. 1986). However, when an ambiguity exists, as in the instant case, parol evidence is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is patent, created by the language of the instrument, or latent, created by extrinsic or collateral circumstances. *Steuart. v. McChesney*, 444 A.2d 659, 663-64 (Pa. 1982); *Herr Estate*, 161 A.2d 32, 34 (Pa. 1960). Additionally, while unambiguous contracts are interpreted by the court as a matter of law, ambiguous writings are interpreted by the finder of fact. *Community College of Beaver County v. Society of the Faculty*, 375 A.2d 1267, 1275 (Pa. 1977). Finally, since contracting intent is paramount in the area of contract construction, parol evidence is highly valued as a means of revealing the parties' intent. *Kripp v. Kripp*, 849 A.2d 1159, 1165 (Pa. 2004).

In the instant case, once this Trial Court found this Paragraph was ambiguous, the Trial Court attempted to resolve the ambiguities. To that end, the Trial Court properly examined the broader language of the Paragraph itself to determine the intent of the parties, and also heard testimony from both parties as to their respective intents when entering into Paragraph 19.03 of the Agreement. With regard to the language of the Paragraph, this Court found that the first clause of the first sentence of the Paragraph contained the overarching intent of the disputed paragraph. This sentence states, "In order to reduce the tax burden to Wife, Husband will reimburse Wife the actual federal tax Wife pays on the alimony

payment set forth in Paragraph 16.02 of this Agreement." The remainder of the Paragraph directed the method through which the accountant was to accomplish this goal of "reduc[ing] the tax burden to Wife." As previously determined, the second sentence was susceptible to multiple reasonable interpretations and, thus, ambiguous.

After finding that Paragraph 19.03 was ambiguous, the Trial Court properly looked to parol evidence to determine the intent of the parties when entering the Agreement. *Kohn v. Kohn,* 364 A.2d 350, 356 (Pa. Super. Ct. 1976) (where Superior Court directed that on remand, the lower court should receive "parol evidence" of the parties' intended meanings of the disputed terms); *see also, Kennedy v. Erkman,* 133 A.2d 550, 552 (Pa. 1957) (stating that the primary rule of construction of an agreement is that the intention of the parties is controlling, and where the intention is not clearly expressed, and there is doubt or ambiguity, resort may be had to the surrounding circumstances to ascertain the intention of the parties). The Court heard testimony from both parties as to what they intended as the meaning of the Paragraph. Plaintiff stated that during negotiations before the Master regarding property settlement, Defendant indicated that he would prefer to pay Plaintiff $2,500.00 per month in alimony so that he could take an income tax deduction for such payment. (N. T. 5/25/04 p. 33-34). In recognition of this deduction benefit, Defendant would reimburse Plaintiff for any taxes she incurred due to the inclusion of the alimony payment in her gross income. (N. T. 5/25/04 p. 33-34). It is noted that at the time of the Master's hearing, counsel for Defendant made the following statement on the record:

> We realized that there would be a tax burden that [Plaintiff] would have as a result of the payment of alimony. [Defendant] has agreed to make a further distribution to [Plaintiff] equal to the tax liability that she would bear as a result of the alimony payment. (emphasis added) (N. T. 5/25/04 p. 50).

Plaintiff also stated that at the time of settlement negotiations, Defendant offered her a lump sum payment of $24,000.00 instead of the monthly alimony payment. (N. T. 5/25/04 p. 33-34). However, Plaintiff indicated that she was willing to allow Defendant to pay her alimony instead of taking the lump sum so that he could enjoy the benefit of taking the tax deductions, provided that this did not result in any additional tax liability for herself. (N. T. 5/25/04 p. 34).

Defendant stated that his understanding was that Plaintiff agreed to receive and report $2,500.00 per month as an alimony payment and Defendant would reimburse Plaintiff on the taxes she had to pay only on this alimony and only up to $30,000.00. (N. T. 5/25/04 p. 42). Thus, Defendant's interpretation of the tax calculation would exclude Plaintiff's other income, and include the itemized deductions and personal exemptions taken by Plaintiff. (N. T. 5/25/04 p. 42). *See also Exhibit "B"*. Regarding

a lump sum payment being offered to Plaintiff, Defendant stated that he may have offered a lump sum payment, but he could not recall. (N. T. 5/25/04 p. 43).

Upon considering the language of the Agreement, testimony of the parties and the expert witness, as well as the evidence set forth in the record, the Court finds Plaintiff's interpretation of the intent of the Agreement to be credible in contrast to Defendant's interpretation. This Court finds credible Plaintiff's statement that she would not have entered into an agreement that required her to voluntarily assume additional tax liability so that Defendant could receive the benefit of taking deductions, largely at her expense. Additionally, this Court finds credible Plaintiff's statement that she would have taken the lump sum payment of $24,000.00 instead of the monthly alimony payment, if adverse tax implications were involved. Moreover, this Court is persuaded by Defendant's counsel's statement, made on the record at the time of the Master's hearing and set forth above, which indicated that the purpose of the Agreement's language was to reimburse Plaintiff for tax liability she would incur as a result of Defendant paying alimony to her.

Since the intent of the Paragraph was to allow Plaintiff to claim alimony without having to incur any tax consequences, Mr. Delio's suggested approach of taking the difference between the tax that Plaintiff in fact paid on her 2003 federal income tax return and the tax she would have paid had she received no alimony was the most appropriate way to effectuate the parties' intent and the parties' primary goal of reducing the tax burden on Plaintiff with Defendant receiving his tax advantage in doing so. Under this method of calculation, the two relevant figures were Plaintiff's actual federal income tax obligation as filed, which was $11,062.00 (Exhibit "A") and Plaintiff's federal income tax obligation assuming she received no alimony, which was $5,346.00 (Exhibit "C"). The difference between Plaintiff's federal income tax obligation as filed and her income tax obligation on other income assuming no alimony was $5,716.00. In light of the foregoing, Defendant was directed to reimburse Plaintiff the sum of $5,716.00, representing the additional income tax Plaintiff paid as a result of reporting alimony as income, consistent with the parties' intent and the meaning of the Paragraph in the Agreement. This method would also be applicable to all relevant future years as agreed upon by the parties in the Marital Property Settlement Agreement merit. Therefore, Defendant's second issue is also without merit.

In light of the foregoing, all of Defendant's issues are without merit.

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

ROBERT TAYLOR, Plaintiff

v.

ROBERT B. DAVIS, FREDERICK DAVIDS, MARY LOU DAVIDS, RICHARD KROL, DENISE KROL, BARBARA KROL and SHARON A. FORCE, Defendants

CIVIL PROCEDURE/REAL PARTY IN INTEREST

Pursuant to Pa.R.C.P. 2002, all actions shall be prosecuted by and in the name of the real party in interest. In an action to enjoin interference with various gas wells and to enforce a right of access to properties to operate the wells, a plaintiff who fails to prove in the interest in the wells or the leases enforceable against the named defendants is not a real party in interest. Therefore, a preliminary objection to the complaint will be sustained and the complaint will be dismissed.

Plaintiff may not assert status as a real party in interest as a purported agent of a corporation.

CIVIL PROCEDURE/CORPORATIONS/REPRESENTATION BY COUNSEL

A corporation may not be represented by an officer or a shareholder who is not an attorney. Although the plaintiff may be licensed as an attorney in Kansas, that status does not permit the plaintiff to represent a corporation in a Pennsylvania court. Unincorporated associations, such as a joint venture, must be represented by legal counsel in actions before Pennsylvania courts.

CIVIL PROCEDURE/PRELIMINARY OBJECTION/ INDISPENSABLE PARTIES

A party is indispensable when his or her rights are so connected with the claims being litigated that a decree cannot be entered without impairing those rights. In determining a party's status as indispensable, the court must inquire as to whether the absent party has a right or interest related to the claim, the nature of that right or interest, whether the right or interest is essential to the merits of the issue, and whether justice can be afforded without violating due process rights of the absent party.

In an action seeking injunctive relief prohibiting interference with gas wells and establishing plaintiff's right to access properties on which the wells are located, all landowners covered by a unitization agreement are indispensable parties. A preliminary objection will be sustained and the complaint will be dismissed where the plaintiff has failed to join all landowners covered by the unitization agreement.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 11571-2004

Appearances: Robert Taylor, Pro Se
Thomas A. Pendleton, Esquire, for Davis, Krol, and Davids
Sharon A. Force, Pro Se

OPINION AND ORDER

This matter comes before the Court on plaintiff's Complaint (action at law), a Complaint for Injunctive Relief (action at equity) and Motion for Preliminary Injunction, as well as Defendants', Robert B. Davis, Richard Krol, Denise Krol, Barbara Krol, Frederick Davids and Mary Lou Davids Preliminary Objections to plaintiff's Complaint, and Defendants' Memorandum of Law in Opposition to Preliminary Injunction.[1]

I. PROCEDURAL HISTORY

On May 3, 2004, plaintiff filed a Complaint (action at law), a Complaint for Injunctive Relief (action at equity), and a Motion for Preliminary Injunction. Within these pleadings, the plaintiff asserts that a joint venture between himself and Rafael Rojas owns and manages the operation of oil and gas leases and wells on defendants' properties. Plaintiff avers that the defendants are interfering with these wells and his right to access the defendants' properties in order to operate them.

On May 12, 2004, plaintiff filed a supplemental affidavit and brief in support of the motion for preliminary injunction.

On June 2, 2004, the defendants, Robert B. Davis, Richard Krol, Denise Krol, Barbara Krol, Frederick Davids and Mary Lou Davids filed a Memorandum of Law in Opposition to Motion for Preliminary Injunction. Within their Memorandum, defendants assert that plaintiff is not a real party in interest and defendants' exclusion of plaintiff from their properties is not actionable.

On June 3, 2004, the defendants, Robert B. Davis, Richard Krol, Denise Krol, Barbara Krol, Frederick Davids and Mary Lou Davids filed Preliminary Objections to plaintiff's Complaint alleging that defendant is not the real party in interest, failed to join all indispensable parties, failed to state a cause of action and that certain business entities with whom the plaints [sic] alleges an affiliation with can not bring suit due to their failure to register to do business in Pennsylvania.

Hearings were held on the injunctive request on June 2 and June 10, 2004. The hearing was continued in order for the Court to rule upon legal issues that arose.

On or about July 7, 2004, Plaintiff filed its reply to Defendants' Preliminary Objections.

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[1] As of the date of this opinion, the defendant, Sharon A. Force, has failed to file a response to plaintiff's pleadings. She did, however, appear pro se at the hearing.

II. FACTUAL HISTORY

History of Leases[2]

On October 30, 1973, Robert and Helen Davis (lessors) entered into an oil and gas lease with Eastern Gas and Oil ("Eastern") as lessees. On or about December 19, 1981, Stanley A. Krol (lessor) entered into an oil and gas lease with Envirogas, Inc. ("Envirogas") On April 2, 1982, Perry and Evelyn Davids (lessors) entered into a lease with Columbia Gas Transmission Corp. ("Columbia").

Plaintiff asserts that at some point during the history of this case, Blackfoot Cherokee Energy, Inc. ("Blackfoot") and Columbia provided a Declaration - Notice of Unitization (undated) to Stanley Krol, Jerry and Dorothy Sayban, John Greggs, Paul Lyons, William Lyons, Lynn Lyons and Samuel Lyons. However, this has not been conclusively established. This unitization agreement reflected the following leases:[3]

> Tract 1 - On October 16, 1973, Andrew Krol granted a lease to Eastern, Eastern assigned the lease to Columbia on January 8. 1974. (On April 13, 1978. Andrew Krol transferred the lease to Stanley Krol).
> Tract 2 - On July 10, 1979, Jerry and Dorothy Sayban granted a lease to Granada Energy Co. ("Granada"). Granada assigned the lease to Blackfoot on October 1, 1981.
> Tract 3 - On October 15, 1973, John and Julie Sayban granted a lease to Eastern. Eastern assigned the lease to Columbia on January 8, 1974.
> Tract 4 - On July 11, 1974, Paul and Helen Lyons granted a lease to Royal Resources Corp. ("Royal") Royal assigned the lease to Columbia on August 6, 1974. (On April 26, 1980, the Lyons transferred the lease to Paul II, Lynn, Samuel and William)

On or about June 16, 1983, Blackfoot and Columbia purportedly signed a Declaration - Notice of Unitization addressed to Robert and Helen Davis, Barbara Davis, Richard Crego, George and Alice Gregor, Lois Bacon. Richard and Meredyth Raw and Francis and Bernice Richards. This unitization agreement reflected the following:

> Tract 1 - On October 16, 1973, Robert and Helen Davis granted a lease to Eastern. Eastern assigned this lease to Columbia on 1/8/74.

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[2] After a review of the pleadings and documentation provided by plaintiff, this Court discovered several gaps in the chain of title of the wells and property, as well as the assignment of leases. Although this Court attempted to reconstruct the lease history as best it could, it was unable to account for all leases at issue in the lawsuit.

[3] Other than what is referenced in these alleged unitization agreements, there is no evidence that these assignments were made.

Tract 2 - On October 16, 1973, Robert and Helen Davis granted a lease to Eastern. Eastern assigned this lease to Columbia on January 8, 1974. (The Davis' granted a portion of the lease to Barbara Davis on March 13, 1980.)

Tract 3 - On October 16, 1973, Robert and Helen Davis granted a lease to Eastern. Eastern assigned this lease to Columbia on January 8, 1974.

Tract 4 - On October 1, 1973, George and Alice Gregor granted a lease to Eastern. Eastern assigned this lease to Columbia on January 8, 1974.

Tract 5 - On December 7, 1973, Lois Bacon, Richard and Meredyth Rawa granted a lease to Eastern. Eastern assigned this lease to Columbia on January 14, 1974.

Tract 6 - On July 1, 1974, Francis and Bernice Richards granted a lease to Royal. Royal assigned this lease to Columbia on July 8, 1974.

On January 30, 1992, Sequoia Master Limited Partnership and Sequoia Management Company, Inc. (assignor) and Greenridge Oil, Inc. (assignee) entered into an Agreement, Assignment and Bill of Sale of certain oil and gas leases and lands and wells. Attached to the agreement was a list of oil and gas leases affected by the agreement, including wells located within Amity township. (See, plaintiff's Exhibit 7[4]). This list includes the last names of Krol, Davids, Richards, and Davis.

On January 31, 1992, a 10% interest in the oil and gas leases was assigned by Greenridge Oil, Inc. to Mid American Natural Resources, Inc.

On March 12, 1992, an Agreement to Purchase Existing Leases and Wells was entered into between Mid American Natural Resources, Inc. (seller) and Rafael H. Rojas (buyer). Rojas signed as buyer and John Gravanda signed as President of Mid American. At the injunction hearing, two different documents purporting to be that Agreement were brought to this Court's attention. Though both agreements appeared to be similar, they varied in that Rojas' signature is different and, importantly, each agreement included different Exhibits. (See, plaintiff's Exhibits 4 and 4A)

On August 12, 1992, a Request to Transfer Well Permit or Registration from Mid American (signed by John N. Gravanda, president of Mid American Natural Resources) apparently transferred the well permits or registration to Penta Oil Corporation. Rojas signed as president of Penta Oil Corporation and plaintiff signed as agent. (See, plaintiff's Exhibit 5)

During the injunction hearing, the plaintiff provided this Court with a copy of an "Agreement Concerning Oil and Gas", dated June 6, 2003, which refers to plaintiff's alleged 35% ownership and Rafael Rojas' 65%

[4] References are to the injunctive hearing exhibits.

ownership in unspecified wells. Additionally, it references a joint venture between both Rojas and plaintiff. However, it does not specify which oil and gas wells are affected nor, importantly, reflect any transfer of title or interest to the plaintiff. (See, plaintiff's Exhibit 2)

III. LEGAL DISCUSSION

A. Plaintiffs Request for Injunctive Relief

In granting a preliminary injunction, the Pennsylvania Supreme Court has held that the following six elements must be met:

> First, a party seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. Second, the party must show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings. Third, the party must show that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. Fourth, the party seeking an injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits. Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity. Sixth and finally, the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest.

Summit Towne Centre, Inc. v. Shoe Show, 828 A.2d 995, 1001 (Pa.2003). (citations omitted)

Pennsylvania Rule of Civil Procedure 2002, which is applicable to any civil action or proceeding at law or equity, provides the following.

(a) Except as otherwise provided in clauses (b), (c) and (d) of this rule, all actions shall be prosecuted by and in the name of the real party in interest, without distinction between contracts under seal and parol contracts.

(b) A plaintiff may sue in his or her own name without joining as plaintiff or use-plaintiff any person beneficially interested when such plaintiff
   i. is acting in a fiduciary or representative capacity, which capacity is disclosed in the caption and in the plaintiff's initial pleading; or
   ii. is a person with whom or in whose name a contract has been made for the benefit of another.

(c) Clause (a) of this rule shall not apply to actions where a statute or ordinance provides otherwise.

(d) Clause (a) of this rule shall not be mandatory where a subrogee is a real party in interest.

After its review of the pleadings, exhibits and evidence introduced at the hearing, this Court concludes that plaintiff has failed to prove that he holds any interest in the wells or leases vis-à-vis the defendants. The March 12, 1992 Agreement to Purchase Existing Leases and Wells was between Mid-American and Rojas. Neither the plaintiff, nor Penta are parties to the agreement. Furthermore, plaintiff has failed to produce any evidence demonstrating that Rojas transferred an interest in the leases or wells to him.[5]

As defendants also correctly point out in their responsive pleadings, the Request to Transfer Well Permit or Registration is only between Mid American and Penta Oil Corporation. Plaintiff is listed only as an agent for Penta Oil. As an agent, plaintiff is not a real party in interest and, importantly, cannot prosecute this lawsuit in his own name. *See, Philadelphia Facilities Management Corporation v. Biester,* 431 A.2d 1123 (Pa. Cmwlth 1981). Furthermore, Penta Oil Corporation is not a party.

Plaintiff may not bootstrap standing by asserting that as an agent for Penta, he can prosecute this lawsuit. Furthermore, a corporation cannot be represented by a corporate officer or shareholder who is not an attorney. *Walacavage v. Excell 2000, Inc.*, 480 A.2d 281, 283-84 (Pa. Super. 1984); *Smaha v. Landy,* 638 A.2d 392, 397 (Pa.Cmwlth 1994). The plaintiff is not a licensed attorney in Pennsylvania, although he may be so licensed in Kansas.

Plaintiff asserts he is a real party in interest on the basis of the purported joint venture between himself and Rojas. However, there is insufficient evidence that the joint venture exists or that plaintiff has any interest in the leases in question. Therefore, he is not a real party in interest. Furthermore, an unincorporated association, such as a joint venture, must be represented by counsel in actions before Pennsylvania courts and most administrative agencies. *See, Spirit of Avenger Ministries v. Commonwealth,* 767 A.2d 1130-1131 (Pa. Cmwlth. 2001). In light of his status, the plaintiff is not authorized to represent a joint venture before this Court and cannot proceed in his own name.

B. Preliminary Objections

Preliminary objections are governed by Pa. R. Civ. P. 1028. The statute provides that:

(a) Preliminary objections may be filed by any party to any pleading and are limited to the following grounds:

(1) lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form

[5] There are also gaps in the ownership history of the leases.

or service of a writ of summons or a complaint;
(2) failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;
(3) insufficient specificity in a pleading;
(4) legal insufficiency of a pleading (demurrer); and
(5) lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action; and
(6) pendency of a prior action or agreement for alternative dispute resolution.

Preliminary objections should be sustained only in cases clear and free from doubt that the facts pleaded by the appellant are legally insufficient to establish a right to relief. *Werner v. Zazyczny,* 681 A.2d 1331, 1335 (Pa. 1996).

For those reasons stated above, the Court must sustain defendants' preliminary objections because plaintiff is not a real party in interest and he has failed to join all indispensable parties to this action.
Under Pennsylvania law, a party is indispensable when:

> ...'his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights.' *Sprague v. Casey,* 520 Pa. 38, 48, 550 A.2d 184, 189 (1988). 'The basic inquiry in determining whether a party is indispensable concerns whether justice can be done in the absence of' him or her. *CRY, Inc. v. Mill Serv., Inc.*, 536 Pa. 462, 469, 640 A.2d 372, 375 (1994). In undertaking this inquiry, the nature of the claim and the relief sought must be considered. *See, Id.*, at 469, 640 A.2d at 375-76. Furthermore, we note the general principle that, in an action for declaratory judgment, all persons having an interest that would be affected by the declaratory relief sought ordinarily must be made parties to the action. *See, Mains v. Fulton.* 423 Pa. 520, 523, 224 a.2d 195, 196 (1966).

City of Philadelphia v. Commonwealth, 838 A.2d 566, 581-82 (Pa. 2003)

In *Mechanicsburg Area Sch. Dist. v. Kline,* 494 Pa. 476, 431 A.2d 953, (1981), the Pennsylvania Supreme Court posed the following four Questions to determine when a party is indispensable:

1. Do absent parties have a right or interest related to the claim?
2. If so, what is the nature of that right or interest?
3. Is that right or interest essential to the merits of the issue?
4. Can justice be afforded without violating the due process rights of the absent parties?

Id. at 956.

In the case sub judice, plaintiff has failed to join all of the landowners covered by the unitization agreement. Since plaintiff's request affects the non-party landowners interests in their properties under the unitization

agreement, they are indispensable parties to the lawsuit.

IV. CONCLUSION

Based upon the above, the Court finds that plaintiff is not a real party in interest to the action and has failed to join all indispensable parties. Therefore, it will dismiss the Complaint for Injunctive Relief and Motion for Preliminary Injunction and sustain defendants' preliminary objections to the Complaint. In light of this analysis, the Court need not address the remaining issues raised by defendants' preliminary objections and Memorandum of Law in Opposition to Preliminary Objection.[6]

ORDER

AND NOW, this 9th day of August, 2004, for the reasons set forth in the accompanying opinion, it is hereby **ORDERED** as follows:

1.) the plaintiff's Complaint for Injunctive Relief is hereby **DISMISSED**;

2.) the untitled Motion requesting permission to join additional parties submitted, but not filed, is **DENIED** (See Exhibit "A"); and,

3.) the defendants' preliminary objections to plaintiff's Complaint are hereby **SUSTAINED**. It is further **ORDERED** that all actions currently pending at this docket number are dismissed.

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

[6] In light of this Court's opinion and the confusing nature of the pleadings, the Court will deny the plaintiff's motion requesting suspension of the proceedings for joinder of other parties. (That motion was submitted to the court but never filed with the Prothonotary.) If he wishes to proceed, he must re-file this action on behalf of the proper parties, against all indispensable parties and through counsel.

CHARLES R. McCAIN and PATRICIA A. McCAIN, his wife, Plaintiffs

v.

ALEX ROOFING, INC., Defendant

CIVIL PROCEDURE/POST-TRIAL MOTIONS/JNOV

When reviewing a motion for judgment notwithstanding the verdict, the evidence must be viewed in the light most favorable to the verdict winner, who must be given the benefit of every reasonable inference of fact. Any conflict in the evidence must be resolved in the verdict winner's favor. The two grounds upon which judgment n.o.v. may be entered are (1) where the moving party is entitled to judgment as a matter of law, and (2) where the evidence was such that no two reasonable minds could disagree that the outcome should have been in favor of the moving party.

Eichman v. McKeon, 824 A. 2d 305 (Pa. Super. 2003) (citations omitted).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW NO. 12319-2002

Appearances: Mark E. Mioduszewski, Esquire for the Plaintiffs
Paul Geer, Esquire for the Defendant

OPINION

Anthony, J., August 9, 2004

This matter comes before the Court on cross Motions for Post-Trial Relief and Plaintiffs' Motion for Delay Damages. After a review of the record and considering the arguments of counsel, the Court will deny Plaintiffs' Motion for Post-Trial Relief as well as Defendant's Motion for Post-Trial Relief. The factual and procedural history is as follows.

The instant litigation arose out of a fire that occurred when Defendant was replacing the roof on a barn at Plaintiffs' farm. As a result of the fire, the barn and its entire contents were destroyed. Plaintiffs filed suit to recover the losses associated with the fire. Following a jury trial, a verdict was returned for Plaintiffs, and damages were awarded as follows:

1. Damages to the McCain's barn	$500,000.00
2. Damages to the contents of the McCain's barn	75,000.00
3. Expenditures by the McCains as a result of the fire	62,200.00
Total award to the McCains	$637,200.00.

Plaintiffs filed a motion for post-trial relief setting forth three bases for a new trial and a request for a judgment notwithstanding the verdict. Defendant also filed a motion for post-trial relief; however, Defendant is not actively seeking a new trial, but rather filed its motion solely to preserve issues for purposes of appeal.

Plaintiff's Motion for Post-Trial Relief

Plaintiffs first request a new trial on the basis that the Court erred in

refusing to permit the recovery of the cost of replacing their barn. This issue was raised before trial in a motion in limine regarding the proper measure of damages. Plaintiffs have maintained that they are entitled to recover the cost to replace their barn, in this case between $1,257,633.71 and $1,973,735.09. Defendant maintained that Plaintiffs could only recover the fair market value of their barn as it was immediately before the fire. This issue was thoroughly briefed and argued prior to trial, and in an Order dated May 21, 2003 this Court ruled that the fair market value of the barn, rather than the replacement cost, was the proper measure of damages. *See* Order dated May 21, 2003. The jury's award of $500,000 for the loss of the barn was in accord with the testimony regarding the fair market value of the Plaintiffs' barn. Accordingly, Plaintiffs' motion for a new trial on the basis that they should be permitted to recover damages based upon the cost of replacing the barn is denied.

Plaintiffs also move for a new trial on the basis that the Court erred in refusing to allow them to recover the replacement cost of the tools, machines and equipment destroyed in the fire. Again, this issue was fully discussed prior to trial, and the Court ruled that, generally, the proper measure of damages for the contents of the barn was the market value of the property, not the replacement cost. *See* Order dated May 21, 2003. However, the Court ruled that evidence of the replacement cost of some could be presented if Plaintiffs could show that the items were of special value. *See id.* (citing *Lynch v. Bridges & Co. Inc.*, 678 A.2d 414 (Pa. Super. 1996). This was not error. Accordingly, Plaintiffs' motion for a new trial on the basis that they should be permitted to recover the replacement cost of the contents of the barn is denied.

In their third request for relief, Plaintiffs contend that the Court erred in dismissing their claim for punitive damages. The Court addressed this issue in its Order of March 9, 2004. As discussed therein, the Court did not find any evidence of conduct that was so outrageous or egregious as to warrant an award of punitive damages. *See* Order dated March 9, 2004. This was not error. Accordingly, Plaintiffs' motion for a new trial on the basis that they should be permitted to present their claim for punitive damages to a jury is denied.

Finally, Plaintiffs move for a judgment notwithstanding the verdict. Plaintiffs contend that the award of incidental expenses was against the weight of the evidence. Plaintiffs request that an additional award of $133,298.71, the cost of boarding their horses following the fire, be added to the jury award.

> When reviewing a motion for judgment notwithstanding the verdict, the evidence must be viewed in the light most favorable to the verdict winner, who must be given the benefit of every reasonable inference of fact. Any conflict in the evidence must be resolved in the verdict winner's favor. The two grounds upon which judgment n.o.v. may be

> entered are (1) where the moving party is entitled to judgment as a matter of law, and (2) where the evidence was such that no two reasonable minds could disagree that the outcome should have been in favor of the moving party.

Eichman v. McKeon, 824 A.2d 305 (Pa. Super. 2003)(citations omitted).

There is no dispute that Plaintiffs boarded their horses at the Willows Equestrian Center (hereinafter "Willows") and then at their son's farm following the fire. The evidence established that Plaintiffs boarded the horses at Willows for a few months at the cost of $4,500 per month. Thereafter, Plaintiffs had a barn constructed on their son's property, and they paid their son between $3,600 and $4,500 per month for a period of three years to board their horses. No horse barn was constructed on Plaintiffs' property following the fire. There was also testimony that there were stables on Plaintiffs' property that could have housed the horses as well as hay remaining on Plaintiffs' property that had not been damaged by the fire. The jury's verdict merely makes an award for incidental damages incurred by Plaintiffs. The jury was not asked to break down its award for incidental damages. It may well be that the jury found it was unreasonable for Plaintiffs to board their horses when they could have sheltered them on their own property. It may also be that the jury found the son's testimony regarding the money he expended to board his parents horses was not credible. Thus, the Court cannot find that no two reasonable minds could disagree that Plaintiffs should have recovered the full amount of money expended to board the horses. Accordingly, Plaintiff's request for a judgment notwithstanding the verdict is denied.

Defendant's Motion for Post-Trial Relief

Defendant has also filed a motion for post-trial relief. Defendant has informed the Court that it is not actively seeking a new trial, but it has filed the instant motion merely to preserve issues in the event that Plaintiffs pursue an appeal. Although Defendant's motion is rendered moot given the Court's ruling on Plaintiffs' post-trial motion, the Court will address Defendant's arguments for purposes of appellate review.

Defendant first contends that the Court erred in permitting testimony regarding the replacement cost of Plaintiffs' barn to be admitted at trial. As discussed above and in this Court's Order of May 21, 2003, the Court had ruled prior to trial that Plaintiffs could recover the fair market value of their barn and not the replacement cost of the barn. The testimony about the replacement cost of the barn did not come in during Plaintiffs' case in chief, but rather came in during the cross-examination of Defendant's real estate expert, David King.

In his expert report, Mr. King explained that in determining the fair market value of the Plaintiffs' barn, he used the sales comparison approach and the cost approach. For purposes of the cost approach, Mr. King utilized the replacement cost figures arrived at by Glenn Kress. Mr. Kress estimated

that it would cost $1,257,633 to replace Plaintiffs' barn. Mr. King used this figure and adjusted it downward to find the fair market value of the barn. Plaintiffs were then permitted to offer the testimony of their expert, Daniel Jones, who estimated that it would cost $1,973,735.09 to replace Plaintiffs' barn.

This was fair cross-examination given the scope of Mr. King's report. Thus, it was not error for the Court to allow testimony about Mr. Jones' estimate to replace the barn. Even if it was error to permit this testimony, such error was harmless. The jury clearly followed the Court's instruction that they could only award the fair market value of the barn and not the replacement cost. Accordingly, Defendant's motion for a new trial on the basis that the Court erred in allowing Mr. Jones's estimate of replacement cost to be admitted is denied.

Defendant further argues that the Court erred in not striking the testimony about the market value of tractors that were destroyed in the fire. At the time of trial, the Court found that Defendant was not unfairly surprised by the testimony regarding the market value of the tractors that were destroyed in the fire. The Court did not err in admitting this testimony. Accordingly, Defendant's motion for a new trial on the basis that the Court should have stricken the testimony about the market value of Plaintiffs' tractors is denied.

ORDER

AND NOW, to-wit, this 9 day of August 2004, it is hereby ORDERED and DECREED that:

Plaintiffs' Motion for Post-Trial Relief is DENIED; and

Defendant's Motion for Post-Trial Relief is DENIED.

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

ROBERT GOLEMBIEWSKI, Plaintiff

v.

ABBY LYLE, Defendant

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary judgment may only be granted in those cases where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

In a motion for summary judgment, the moving party bears the burden of proving that no material fact exists.

In determining whether to grant a motion for summary judgment, the court must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party.

In a motion for summary judgment, the non-moving party may not simply rest upon the pleadings.

In a motion for summary judgment, the non-moving party, if it bears the burden at trial, must produce evidence of facts essential to its cause of action in order to defeat a motion for summary judgment.

INSURANCE / AUTOMOBILE INSURANCE / LIMITATIONS ON COVERAGE

Under the limited tort option, a party may only seek compensation for economic loss caused by the negligence of another; he is precluded from seeking any non-economic losses unless he can establish that he has suffered a serious injury.

INSURANCE / AUTOMOBILE INSURANCE /SERIOUS INJURY

"Serious injury," as defined by the Motor Vehicle Financial Responsibility Law, is defined as 'a personal injury resulting in death, serious impairment of body function or permanent serious injury.'

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 12571-2002

Appearances: George Schroeck, Esquire for the Plaintiff
Marcia Haller, Esquire for the Defendant

OPINION

This matter comes before the Court on Defendant's Motion for Partial Summary Judgment. After a review of the record and considering the arguments of counsel, the Court will grant the motion. The factual and procedural history is as follows.

The instant action arises out of an automobile accident involving vehicles operated by Plaintiff Robert Golembiewski and Defendant Abby Lyle. On August 2, 2000, Plaintiff had stopped at the intersection of Route 97 and Schultz Road in Erie, Pennsylvania. He was struck from behind by

the vehicle driven by Defendant. At the time of the accident, Plaintiff had selected the limited tort option under his policy of automobile insurance.

Plaintiff did not seek immediate medical attention for any injuries sustained during the accident; however, on the following day Plaintiff complained of low back and left shoulder pain and had trouble getting out of bed. *See* Depo. at 42. Plaintiff had suffered a previous back injury in 1998. *See* Depo. at 11. That injury had caused him to take light duty work for a year. *See id.* Plaintiff had also suffered back pain in 1997. *See id.* at 18-19. He had just returned to full duty work shortly before the instant accident. *See id.* at 10.

Two days after the accident Plaintiff went to see his family physician. *See* Depo. at 42. On August 9, 2000, Plaintiff went to the emergency room because he was still in pain. *See id.* at 44-45. On August 9, 2000, Plaintiff returned to his family physician's office. He told his physician that he was feeling somewhat better, and "his pain [was] almost back to his baseline pain that he had from his previous Workman's Comp injury." Def.'s Motion for Partial Summ. J., Ex. C. His physician recommended physical therapy and a stretching routine. *See id.* Plaintiff did see the physical therapist, but stopped going in June of 2001. *See* Depo. at 47. Plaintiff has not had any treatment for his low back pain, other than seeing his family physician from time to time, since June of 2001. *See id.* at 50 & 55.

Plaintiff only missed three or four days of work following the accident; however, he occasionally experienced back spasms that required him to miss work. *See* Depo. at 5 & 7. Additionally, he did not submit a claim for lost wages to his insurance company. *See* Depo. at 6. Sometime in 2002, Plaintiff suffered a shoulder injury. *See* Depo. at 7. He had surgery on the shoulder June 4, 2002. *See id.* Plaintiff's back continues to be stiff in the mornings, he continues his stretching regime, and is still experiencing slight pain in his back. *See id.* at 56-57. He does not suffer any pain in his left shoulder. See *id.* at 58. At the time of his deposition on May 6, 2003, Plaintiff stated that he was unemployed and that the unemployment was the result of a layoff because of lack of work. *See* Depo. at 4.

Plaintiff filed the instant lawsuit alleging that Defendant was negligent and seeking both economic and non-economic damages. Defendant filed this motion for partial summary judgment and brief in support. Argument was scheduled, and Plaintiff filed his brief against partial summary judgment the day before the argument. Argument was held in chambers at which time both parties were represented by counsel. Counsel for Defendant was granted additional time in which to file a brief in response to Plaintiff's untimely brief.

Defendant moves for partial summary judgment on Plaintiff's claim for non-economic damages. Specifically, Defendant contends that Plaintiff has not suffered a serious injury as that term is defined in the case of *Washington v. Baxter,* 719 A.2d 733 (Pa. 1998), and its progeny. The Court agrees.

The standard for summary judgment is well-settled. Summary judgment may be granted only in those cases in which the record clearly shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See Ertel v. Patriot-News*, 544 Pa. 93, 674 A.2d 1038 (1996). The moving party has the burden of proving that no genuine issues of material fact exist. In determining whether to grant summary judgment, the court must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party. *See id.* However, the non-moving party may not simply rest upon the pleadings. *See* 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. *See* Pa.R.C.P. 1035.2. Only when the facts are so clear that reasonable minds cannot differ, may a court properly enter summary judgment.

Plaintiff had selected the limited tort option on his motor vehicle insurance policy. As such, he is eligible to seek compensation for economic loss sustained in a motor vehicle accident caused by the negligence of another, but he is precluded from maintaining an action for any non-economic losses unless he can establish that he has suffered a "serious injury." *See Washington, supra;* 75 Pa.C.S. § 1705(d). A "serious injury" is defined as "a personal injury resulting in death, serious impairment of body function or permanent serious disfigurement." 75 Pa.C.S. § 1702.

Here, Plaintiff does not argue that his injury resulted in death or permanent serious disfigurement. Rather, he contends that his back pain limits his ability to work as a welder. In determining whether a plaintiff has suffered a serious impairment of bodily function, the Court must conduct inquiry into two areas:

> a) What body function, if any, was impaired because of injuries sustained in a motor vehicle accident?
>
> b) Was the impairment of the body function serious? The focus of these inquiries is not on the injuries themselves, but on how the injuries affected a particular body function. Generally, medical testimony will be needed to establish the existence, extent, and permanency of the impairment . . . . In determining whether the impairment was serious, several factors should be considered: the extent of the impairment, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors. An impairment need not be permanent to be serious.

Washington, supra.

Here, Plaintiff has not provided the Court with any evidence of any body function that has been impaired as result of the car accident.

Plaintiff's deposition establishes that he suffered back pain in the days immediately following the accident and that he continued with physical therapy for one year after the accident. However, there is no testimony and no evidence that establishes that Plaintiff is unable to work, walk, perform day-to-day activities, engage in hobbies, etc. Plaintiff did state that he has to be careful when lifting things, but he can lift 40-50 pounds.

Plaintiff's Brief Against Partial Summary Judgment does argue that Plaintiff's back pain limits his ability to work as a welder and has forced Plaintiff to seek re-training in the field of computer networking. There is absolutely no evidence to support this contention. The Court notes that in his deposition of May 6, 2003, Plaintiff testified that he had been working full time as a welder, was laid off at the time of the deposition, but that he could be called back if business picked up. *See* Depo. at 4-5. There is no mention of an inability to function as a welder or of the need to re-train for a new career.

The Court finds it telling that Defendant has not sought medical treatment for his back pain since June of 2001 other than to occasionally see his family physician. Moreover, Plaintiff's testimony establishes that he only missed three or four days of work after the accident. In a doctor's note nine days after the accident, Plaintiff is reported to have told his family physician that his pain was almost back to the level of pain he had experienced from his previous Worker's Comp injury. Plaintiff has provided no evidence that would demonstrate that his ongoing back pain is the result of the car accident at issue rather than the result of his previous back injury.

In sum, the Court finds that there is no evidence that Plaintiff has suffered a serious impairment of bodily function. Thus, Plaintiff is not eligible to recover non-economic damages. Accordingly, Defendant's motion for partial summary judgment is granted.

ORDER

AND NOW, to-wit, this 23 day of August 2004, it is hereby ORDERED and DECREED that Defendant's Motion for Partial Summary Judgment is GRANTED.

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

CATHERINE ELIZABETH WALSH

v.

DENNIS BORCZON, MD and ST. VINCENT HOSPITAL

GROSS NEGLIGENCE / SUFFICIENCY OF EVIDENCE

In the absence of willful misconduct or gross negligence, a physician or other authorized person who participates in a decision that a person be examined or treated by a mental health provider under the Mental Health Procedures Act, 50 P.S. §§ 7101 *et seq*., shall not be civilly or criminally liable for such decision or for any of its consequences. 50 P.S. § 7114.

GROSS NEGLIGENCE / SUFFICIENCY OF EVIDENCE

The immunity provided by the Mental Health Procedures Act, 50 P.S. §7114, extends to institutions that provide mental health care. 50 P.S. § 7114.

GROSS NEGLIGENCE / SUFFICIENCY OF EVIDENCE

The term *gross negligence* means a form of negligence where the facts support substantially more than ordinary carelessness, inadvertence, laxity, or indifference. The behavior of the defendant must be flagrant and grossly deviate from the ordinary standard of care.

GROSS NEGLIGENCE / SUFFICIENCY OF EVIDENCE

While the issue of whether a given set of facts satisfies the definition of gross negligence is a question of fact to be determined by a jury, a court may take the issue from the jury and decide the issue as a matter of law if the case is entirely free from doubt and no reasonable jury could find gross negligence.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary judgment may be granted only in those cases in which there are no genuine issues of material fact and the moving party is entitled to relief as a matter of law. Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case on which it bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law. The court must view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

GROSS NEGLIGENCE / SUFFICIENCY OF EVIDENCE

A patient receiving voluntary out-patient treatment is not subject to the Mental Health Procedures Act and therefore need prove only ordinary negligence, not gross negligence, in the rendering of such treatments.

CIVIL PROCEDURE / PLEADINGS/AMENDMENT

While amendments to pleadings are to be liberally granted absent prejudice to the non-moving party, amending a complaint to include a new cause of action beyond the statute of limitations results in prejudice to the adverse party and is not allowed.

GROSS NEGLIGENCE / SUFFICIENCY OF ALLEGATIONS

A cause of action for gross negligence is different from ordinary negligence, and an amendment to raise gross negligence for the first time proposes a different kind of negligence and different cause of action.

PLEADINGS / AMENDMENTS / STATUTE OF LIMITATIONS

Where the plaintiff sought to allege a new form of negligence, namely gross negligence, beyond the statute of limitations, the court properly denied the plaintiff's motion for leave to file amended complaint.

GROSS NEGLIGENCE / SUFFICIENCY OF EVIDENCE

As a physician's treatment of the plaintiff for mental health arguably could be considered to be voluntary outpatient treatment not covered under the Mental Health Procedures Act, 50 P.S. § 7101 *et seq*, there were issues of material fact with regard to the physician's conduct as being ordinary negligence or gross negligence, only the form of which was covered under the immunity of the statute.

GROSS NEGLIGENCE / SUFFICIENCY OF EVIDENCE

Where the plaintiff's expert opined that the defendant's physicians and the defendant's hospitals not attempting to reach the patient when she did not show up for her appointment and then failing to try to have her committed civilly, there was no way to know from expert's report what it was that made these mistakes so egregious that they constituted "gross negligence;" and without such meaningful explanation the plaintiff failed to state a *prima facie* case for gross negligence.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 12313 -2000

Appearances: Mark Fischer, Esq. for the Plaintiff
John M. Quinn, Jr., Esq. for St. Vincent
Francis J. Klemensic, Esq. for Dr. Borczon

OPINION

Bozza, John A., J

This matter is currently before the Court on the 1925(b) Statement of Matters Complained of on Appeal filed by plaintiff, Catherine Elizabeth Walsh. This case involves a psychiatric malpractice action arising from the defendants' alleged failure to properly evaluate and treat Ms. Walsh's mental condition, which she claims led her to undergo an abortion despite her religious convictions. The alleged facts of the case may briefly be summarized as follows. Ms. Walsh had an extended history of mental illness and sought treatment from Dr. Borczon and other mental health providers, consisting of both inpatient and outpatient treatment and drug therapy, over the course of many years. In early July of 1998 Ms. Walsh discovered she was pregnant and attempted to contact Dr. Borczon to determine whether she should discontinue her medications in light of the pregnancy. A Psychiatric Support Services contact sheet dated July 8, 1998 notes that she in fact had discontinued her medications due to the

pregnancy.[1] This resulted in an exacerbation of her mental condition and delusions that there was something alien in her body that focused on her fetus.

According to Ms. Walsh, she sought help from a combination of mental health providers including both defendants during the period when she discontinued her medications and her symptoms worsened. Dr. Borczon was on vacation at this time and could not be reached, but her records reflect that Dr. Stephen Mory of St. Vincent Community Mental Health Center was consulted in his absence and recommended that she refrain from taking the medications until she could consult with Dr. Borczon. On July 22, 1998, Ms. Walsh was admitted to St. Vincent Hospital (hereinafter "St. Vincent" for inpatient psychiatric treatment. Records indicate that Dr. Ann McDonald was the primary physician responsible for her treatment at St. Vincent, and that Ms. Walsh informed her that she was pregnant. On July 23,1998, Ms. Walsh was discharged from St. Vincent as unimproved.[2] Ms. Walsh failed to attend a follow-up appointment with Dr. Borczon scheduled for July 31, 1998. On August 6, 1998, she terminated her pregnancy. Thereafter, she resumed taking her medications and as her condition improved she suffered significant mental trauma due to her decision to undergo an abortion.

After initiating her case with a Writ of Summons, filed July 6, 2000, Ms. Walsh filed her Complaint on September 28, 2000, alleging negligence on the part of the defendants that ultimately resulted in the termination of her pregnancy and severe mental trauma due to her religious convictions.[3] Dr. Borczon and St. Vincent each filed an Answer and New Matter, on April 24, 2001 and May 9, 2001 respectively, asserting immunity based on the Mental Health Procedures Act (hereinafter "MHPA"), 50 P.S. 7101 *et seq.* A prolonged discovery period then ensued. On April 29, 2004, St. Vincent filed a Certification II, and a hearing was scheduled for May 25, 2004. At the hearing, plaintiff's counsel informed the Court that her expert, Dr. Stotland, was no longer participating in the case due to retirement.[4] The Court subsequently issued an order listing the case for the June 2004

[1] While the parties dispute whether the plaintiff was in fact advised by Dr. Borczon to discontinue her medications or did so on her own, Ms. Walsh asserted she did stop taking her prescribed medications about that time.

[2] St. Vincent asserts that this was done against medical advice due to the patient's desire to be discharged.

[3] The Complaint was later amended on April 20, 2001, after the plaintiff retained new counsel.

[4] The plaintiff initially listed Dr. Nada Stotland as her expert witness in discovery materials, and the doctor provided expert reports regarding Dr. Borczon, dated November 6, 2001, and St. Vincent, dated February 15, 2002. Thereafter, the defendants were informed that Dr. Stotland would no longer be participating in the case due to her retirement, and Dr. Lawson Bernstein would provide expert testimony for purposes of trial.

Trial Term, and requiring the plaintiff to provide the defendants with her pre-trial narrative and the report of her substituted expert by June 4, 2004. A pre-trial conference was scheduled for June 7, 2004.

On June 4, 2004, three days before the scheduled pre-trial conference, Dr. Borczon and St. Vincent each filed a Motion to Exclude Expert Testimony and/or Motion for Judgment on the Pleadings and/or Motion for Summary Judgment. Because the pre-trial conference was already scheduled, argument on the motions took place at that time. During the conference plaintiff's counsel did not dispute the applicability of the MHPA with regard to either defendant. Instead, he argued that the evidence of record was sufficient to support a claim for gross negligence. Also at that time, both defendants objected to four new theories of negligence contained in the report of plaintiff's second expert, as they were made well beyond the statute of limitations. As reflected in the Court's June 11, 2004 Memorandum Opinion, the plaintiff ultimately agreed to withdraw all assertions of error not alleged in her initial expert's reports. Thereafter, the thrust of plaintiff's counsel's argument was that she should be permitted to file a second Amended Complaint to assert gross negligence in order to overcome the limited immunity provided under Section 7114 of the MHPA.

On June 9, 2004, plaintiff's counsel filed a number of pleadings including a Motion for Leave to File Amended Complaint, yet none disputed applicability of the immunity provisions of the MHPA with respect to either defendant.[5] By Order dated June 11, 2004, this Court denied Ms. Walsh's Motion for Leave to File Amended Complaint based on the expiration of the statute of limitations, and granted each defendant's Motion for Summary Judgment. Ms. Walsh then filed her Notice of Appeal *pro se* on July 8, 2004. On July 23, 2004, Mark Fischer, Esquire and Thomas Anderson, Esquire filed a 1925(b) Statement of Matters Complained of on Appeal on behalf of Ms. Walsh, and on July 26, 2004, they entered an appearance on her behalf.

In her timely 1925(b) Statement of Matters Complained of on Appeal. Ms. Walsh raises seven assertions of error:

1. Whether this Honorable Court committed an error of law and/or fact in holding that "it is undisputed that the defendants in this matter have a form of limited immunity as set forth in the Mental Health Procedures Act."

[5] On June 9, 2004, counsel for Ms. Walsh filed the following: Pre-Trial Narrative Statement; Motion for Leave to File Amended Complaint; Response to Defendant St. Vincent Health Center's Motion to Preclude Expert Testimony and/or Motion for Judgment on the Pleadings and/or for Summary Judgment; Response to Judgment on the Pleadings; Reply to Defendant Dennis Borczon, M.D.'s Motion to Preclude Expert Testimony and/or Motion for Judgment on the Pleadings and/or Motion for Summary Judgment; and Motion in Opposition to Defendant's Motion for Summary Judgment.

2. Whether this Honorable Court erred in applying the immunity provisions of the Mental Health Procedures Act to Dr. Borczon, where plaintiff has plainly pled facts, and submitted expert reports. showing that Dr. Borczon' s acts related, in part, to voluntary outpatient treatment and care not covered by such immunity provisions. Specifically, plaintiff has pled facts regarding acts or omissions of Dr. Borczon which plainly occurred prior to, and subsequent to, plaintiff's admission into St. Vincent Hospital. *See McKenna v. Mooney,* 565 A.2d 495 (Pa. Super. 1989 (Immunities of act do not apply to malpractice action based on treatment of voluntary outpatient).
3. Whether this Honorable Court committed an error of law and/or fact in finding that there was no evidence presented by plaintiff from which a jury could find that the defendants committed gross negligence in their care of plaintiff.
4. Whether a genuine issue of material fact exists as to whether defendants committed gross negligence in their care of plaintiff.
5. Whether it can be inferred from the facts provided by plaintiff in her Amended Complaint, expert reports and other discovery that defendants were grossly negligent in their care of plaintiff.
6. Whether this Honorable Court properly applied the standards for summary judgment.
7. Whether this Honorable Court committed an error of law in denying plaintiff's Motion for Leave to File Amended Complaint, where plaintiff would not be adding new allegations of misconduct in the proposed Amended Complaint but would merely be clarifying that the misconduct previously described constitutes gross negligence.

(1925(b) Statement, ¶¶1 - 7). As explained below, assuming that the Superior Court does not find that the issues relating to Dr. Borczon are waived, it would appear that there are issues of material fact regarding applicability of the immunity provisions of the MHPA to Dr. Borczon and the resulting standard of negligence by which his actions should be evaluated. However, the plaintiff's remaining assertions of error are without merit.

I. Immunity Under the Mental Health Procedures Act

Ms. Walsh's first and second assertions of error concern this Court's application of the immunity provisions of the MHPA. Ms. Walsh points specifically to the Court's Memorandum Opinion, dated June 11, 2004, which states "it is undisputed that the defendants in this matter have a form of limited immunity as set forth in the [MHPA]." (1925(b), ¶1) (emphasis added). Additionally, with respect to the claims against Dr. Borczon, she cites *McKenna v. Mooney,* 565 A.2d 495 (Pa. Super. 1989), for the proposition that said immunity does not apply to voluntary outpatient

treatment.

Initially, the Court emphasizes that plaintiff's counsel did not dispute the applicability of the immunity provided under the MPHA with respect to either defendant when these motions were presented at the pre-trial conference. In fact, none of the plaintiff's pleadings filed in response to the defendants' Motions for Summary Judgment even raises this issue. As such, there was no indication on the record that plaintiff's then-counsel did not accept the notion that the immunity applied. Consequently, this was not the focus of the Court's attention during the proceedings, and the Court had no way of knowing it was an issue. Now, after learning for the first time that the applicability of the immunity provision of the MHPA to Dr. Borczon is contested, and upon review of the applicable law it is apparent that the plaintiff's position may well have merit.

The MHPA establishes rights and procedures for all involuntary treatment, whether on an inpatient or outpatient basis, and for voluntary inpatient treatment of mentally ill persons. *See* 50 P.S. §7103. In addition, the Act provides limited immunity to mental health providers from civil and criminal liability for certain decisions regarding the treatment of a patient. *Farago v. Sacred Heart General Hospital,* 522 Pa. 410, 414, 562 A.2d 300, 302 (1989.) With regard to this immunity, Section 7114 states:

> In the absence of willful misconduct or gross negligence...a physician...or any other authorized person who participates in a decision that a person be examined or treated under this act, or that a person be discharged, or placed under...outpatient care. . .shall not be civilly or criminally liable for such decision or for any of its consequences.

50 P.S. § 7114. This immunity extends to institutions that provide mental health care. *Farago,* 562 A.2d at 303; *See also Downey v. Crozer-Chester Medical Center,* 2003 Pa. Super. 51, 817 A.2d 517; *Allen v. Montgomery Hospital,* 548 Pa. 299 696 A.2d 1175, 1179 (1997) (stating that hospitals providing inpatient psychiatric care are included within the provisions of the MHPA). The Act defines treatment to include "diagnosis, evaluation, therapy, or rehabilitation needed to alleviate pain and distress and to facilitate the recovery of a person from mental illness and shall also include care and other services that supplement treatment and aid or promote such recovery." 50 P.S. §7104; *See also Downey,* 817 A.2d at 525.

In this instance, St. Vincent participated in the decisions to admit Ms. Walsh for inpatient treatment at its facility and later discharge her, purportedly at her own request.[6] Ms. Walsh asserts that the abortion is a consequence of these treatment decisions. As such, this Court

[6] See footnote 2.

determined that St. Vincent is immune from civil or criminal liability for these decisions, and for any of their consequences. Dr. Borczon's treatment, however, both pre-dated and post-dated her inpatient treatment at St. Vincent. As such, it would arguably be considered voluntary outpatient treatment, which is not covered under the MHPA. *See McKenna v. Mooney,* 565 A.2d 495 (Pa. Super. 1989); *See also McHale v. Cole,* 119 Pa. Commw. 334, 547 A.2d 485 (1988) (stating a patient receiving voluntary out-patient treatment is not subject to the [MHPA]). Furthermore, Dr. Borczon's involvement in the decision to admit Ms. Walsh to St. Vincent Hospital is unclear based on the record. Therefore, issues of material fact remain regarding whether his actions would be covered under the immunity provisions of the MHPA. If the evidence adduced at trial revealed that his involvement in Ms. Walsh's treatment was limited to voluntary outpatient treatment he would not be covered under the MHPA, and could ultimately be held responsible for acts of general negligence.

Had counsel for the plaintiff in anyway indicated that the applicability of the gross negligence standard was at issue this matter could have been efficiently and correctly resolved. Instead counsel's entire focus in both his pleadings and argument was limited to the sufficiency of the averments in the complaint to state a claim for gross negligence. Indeed a request for leave to file an amended complaint to allege gross negligence was filed and a new expert report including an opinion by a psychiatrist that Dr. Borczon's conduct constituted gross negligence was presented.

II. Gross Negligence

Ms. Walsh's third, fourth, fifth, and sixth assertions of error contest the sufficiency of the record with regard to allegations of gross negligence for purposes of summary judgment. Specifically, Ms. Walsh suggests that gross negligence could have been inferred from the evidence of record such that a genuine issue of material fact existed that merited trial. As stated above and notwithstanding the plaintiff's failure to raise this issue in a timely manner prior to disposition of the defendant's motion for summary judgment, this Court believes that issues of material fact remain regarding the applicability of the gross negligence standard to the determination of Dr. Borczon's liability. However, with regard to St. Vincent, the record indicates Ms. Walsh failed to establish that it acted in a grossly negligent manner. Moreover, should the Superior Court find that the failure to object to the applicability of the gross negligence standard waived any further argument in that regard, this Court maintains that the evidence of record against Dr. Borczon was insufficient as a matter of law to constitute gross negligence.

Summary judgment may be granted only in those cases in which there are no genuine issues of material fact and the moving party is entitled to relief as a matter of law. *Harleysville Insurance Cos. v. Aetna Cas. & Sur.*

Ins. Co., 568 Pa. 255, 795 A.2d 383 (Pa. 2002). "Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case on which it bears the burden of proof . . . establishes the entitlement of the moving party to judgment as a matter of law." *Young v. Pennsylvania Department of Transportation*, 560 Pa. 373, 744 A.2d 1277 (2000). The Court must view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Pennsylvania State University v. County of Centre*, 532 Pa. 142, 615 A.2d 303 (1992).

As previously explained, pursuant to Section 7114 of the MHPA, this Court determined that St. Vincent is immune from civil and criminal liability absent gross negligence or willful misconduct.[7] In *Bloom v. Dubois Regional Medical Center,* our Supreme Court defined gross negligence, stating:

> [T]he legislature intended the term gross negligence to mean a form of negligence where the facts support substantially more than ordinary carelessness, inadvertence, laxity, or indifference. The behavior of the defendant must be flagrant, grossly deviating from the ordinary standard of care."

409 Pa. Super. 83, 597 A.2d 671,679 (1991). Later, in *Albright v. Abington Memorial Hospital,* the Supreme Court noted:

> While it is generally true that the issue of whether a given set of facts satisfies the definition of gross negligence is a question of fact to be determined by a jury, a court may take the issue from a jury, and decide the issue as a matter of law, if the conduct in question falls short of gross negligence, the case is entirely free from doubt, and no reasonable jury could find gross negligence.

548 Pa. 268, 696 A.2d 1159, 1164-65 (1997). The *Albright* court further noted that where a plaintiff asserts gross negligence but establishes only ordinary negligence, summary judgment is not precluded. *Id*. at 1165.

Ms. Walsh's first Amended Complaint asserts that Dr. Borczon was negligent 1) in removing her from her medications based on the pregnancy without providing increased support and monitoring, 2) in failing to respond to her telephone calls and requests for assistance or schedule an appointment to assess her mental condition as it deteriorated, and 3) in failing to arrange coverage by another physician and/or psychiatrist during the period he was unavailable to the plaintiff. *See* Amended Complaint, ¶18. However, the report of Ms. Walsh's second expert, Dr. Bernstein, clarifies that Dr. Borczon was out of town when Ms. Walsh discovered she was pregnant. According to the plaintiff's expert, when Ms. Walsh discovered the pregnancy she contacted her case manager

[7] The plaintiffs 1925(b) Statement focuses solely on assertions of gross negligence.

who attempted to reach Dr. Borczon, and upon failing to do so consulted with Dr. Mory, of the St. Vincent Community Mental Health Center.[8] The next day, Ms. Walsh called the Center to inquire as to whether she should be tapered from her medications. Ms. Walsh's pre-trial narrative incorporates this report "to summarize the facts and issues of contention in the herein case." See Pl.'s Pre-Trial Narrative, p.l. With regard to St. Vincent, Ms. Walsh's Amended Complaint asserts negligence 1) in failing to recognize her severe state of mental deterioration and the likelihood that she would cause harm to herself or her unborn child, 2) in discharging plaintiff and/or permitting her to discharge herself prior to any improvement in her mental state, and 3) in failing to adequately and appropriately monitor the plaintiff following her discharge. *See* Amended Complaint, ¶19. Dr. Bernstein's report notes, "On 7/23/98 Ms. Walsh was allowed to sign out of the hospital (putatively against medical advice although this is not documented in the chart)." *See* Attachment to Pl.'s Pre-Trial Narrative, p. 2.

Dr. Bernstein's expert report recognizes that Ms. Walsh "had a longstanding history of severe & chronic psychiatric disease(s) ... [which includes] a history of erratic treatment compliance, frequent symptomatic exacerbation and required multiple psychiatric hospitalizations prior to the event in question." *Id.* at 1. In opining on the actions of the defendants with regard to Ms. Walsh's treatment, Dr. Bernstein concluded "none of the physicians involved in this matter appreciated (or even appeared to recognize or adequately assess) the role of withdrawal in this patient's clinical crisis." *Id.* at 3. He further stated, "In summary, this patient's acute clinical crisis, decompensation, iatrogenic withdrawal and exacerbation of pre-existing psychiatric diseases was either ignored, underappreciated and or/mismanaged by the Drs. and facilities noted above." *Id.* The Court reviewed the allegations contained in the first Amended Complaint in conjunction with those portions of the plaintiff's expert report that were admitted into the record by agreement of the parties pursuant to the statute of limitations in the light most favorable to the plaintiff. In doing so, the Court concluded that they were not indicative of "a form of negligence where the facts support substantially more than ordinary carelessness, inadvertence, laxity, or indifference." *Bloom*, 597 A.2d at 679. Furthermore, neither defendant's behavior was asserted to be "flagrant, grossly deviating from the ordinary standard of care." *Id.* Indeed the expert report only speaks in the most general way about the gross negligence issue. Dr. Bernstein simply added a paragraph stating that all the defendants "substantially deviated" from the standard of care without indicating what it was about the deviation

[8] The report states "Dr. Morey (sic) (without seeing the patient) then 'recommended no medication, consult Dr. Borczon on 1/13/98'."

that made it "substantial" or how it constituted gross rather than ordinary negligence. In the case of Dr. Borczon, the plaintiff's expert originally opined that his mistake involved not attempting to reach his patient when she didn't show up for her appointment and then failing to try to have her committed civilly. There was no way to know from Dr. Bernstein's report what it was about these mistakes that made them so egregious that they constituted "gross negligence". The lack of any meaningful explanation is equally applicable to the actions of St. Vincent. As such, the plaintiff failed to state a *prima facie* case for gross negligence as defined by the Supreme Court in *Bloom.*

III. Motion to File Amended Complaint

Ms. Walsh's final assertion of error involves this Court's denial of her Motion for Leave to File Amended Complaint. According to Ms. Walsh, the proposed Amended Complaint "would not be adding new allegations of misconduct. . . but would merely be clarifying that the misconduct previously described constitutes gross negligence." (1925(b), ¶7). Rather than alleging additional facts to support her claims, Ms. Walsh's proposed amendment entailed the addition of the word "gross" to the Complaint.[9] For the reasons stated below, Ms. Walsh's assertion that the Court erred in denying her motion is without merit.

Under Pennsylvania law, amendments to pleadings are to be liberally granted absent prejudice to the non-moving party. *See Bata v. Central-Penn National Bank of Philadelphia,* 448 Pa. 355, 293 A.2d 343 (1972). Amending a complaint to include a new cause of action beyond the statute of limitations results in prejudice to the adverse party. *See Reynolds v. Thomas Jefferson University Hospital,* 450 Pa. Super, 327, 344, 676 A.2d 1205, 1213 (1996). The statute of limitations applicable to cases of medical malpractice is two years. *See* 442 Pa. C.S.A. §5524. Furthermore, a new cause of action arises where an amendment proposes a different kind of negligence. *Reynolds,* 450 Pa. Super. at 338-39, 676 A.2d at 1210-11; *See also Willett v. Evergreen Homes,* 407 Pa. Super. 141, 595 A.2d 164 (1991) (emphasizing that a cause of action for gross negligence is different from one for ordinary negligence), *Hall v. Dreszer,* 43 Pa. D & C 3rd 442 (1985), *affirmed without opinion* 356 Pa. Super. 609, 512 A.2d 729 (1986). Through her amendment, Ms. Walsh sought to allege a new form of negligence, namely gross negligence, well beyond the statute of

[9] Similarly, the only deviation between the addendum to Dr. Bernstein's report, attached to the plaintiff's Motion in Opposition to Defendants' Motion for Summary Judgment, and the initial report was the following sentence, "Both Dr. Borczon, Dr. McDonald and St. Vincent's substantially deviated from the standard of care and acted with gross negligence in this matter, for the reasons noted above." As the Superior Court stated under similar circwnstances in *Downey,* "Because the addendum does not attempt to set forth or refer to any material facts not otherwise contained in his earlier report, we are unable to afford any weight to what appears to be an upward modification of his earlier professional opinion." 817 A.2d at 527.

limitations. As such, the Court properly denied the plaintiff's Motion for Leave to File Amended Complaint.

For the reasons set forth above, this Court's Order dated June 11, 2004 should be affirmed with respect to the claims against St. Vincent. Additionally, if the Superior Court determines that Ms. Walsh's assertions regarding immunity for Dr. Borczon were not waived, issues of material fact remain such that the case should be remanded to the trial court for purposes of trial.

Signed this 31 day of August, 2004.

ORDER

AND NOW, this 11 day of June, 2004, upon consideration of plaintiff Catherine Walsh's Motion for Leave to File an Amended Complaint, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that the Motion is **DENIED**. *Hall v. Dreszer.* 43 Pa. D & C 3rd 442 (1985); affirmed without opinion, 356 Pa. Super. 609, 512 A.2d 729 (1986).

FURTHER, it is **ORDERED**, **ADJUDGED** and **DECREED** that the defendant Dennis Borczon's Motion to Preclude Expert Testimony and/or Motion for Judgment on the Pleadings and/or Motion for Summary Judgment is **GRANTED** to the extent that summary judgment is granted with regard to the cause of action for negligence, and further, that defendant Saint Vincent Health Center's Motion to Preclude Expert Testimony and/or Motion for Judgment on the Pleadings and/or Motion for Summary Judgment is **GRANTED** to the extent that summary judgment is granted with regard to the cause of action for negligence.

BY THE COURT,
/s/ **John A. Bozza, Judge**

LOUIS A. ENSANI, Trustee of the Patricia A. Dresch Living Trust, and Executor of the Patricia A. Dresch Estate, Plaintiff

v.

PRUDENTIAL SECURITIES INCORPORATED, GE LIFE and ANNUITY ASSURANCE COMPANY, and SANDRO J. FRANCANI, Defendants

JUDGMENTS / MOTION TO STRIKE

A motion to strike a judgment operates as a demurrer to the record and will be granted if a fatal defect or irregularity appears on the face of the record or judgment. A court may only look at the facts of record at the time judgment was entered to decide if the record supports the judgment.

JUDGMENTS / MOTION TO STRIKE JUDGMENT

If a motion to strike is granted, the effect is to destroy the original judgment and place the parties in a position as if the judgment had never been entered.

CIVIL PROCEDURE / NON PROS

Defendants were not required to provide to either an individual or to his attorney notice of a petition for non pros where that person was not a party to the action at that time.

CIVIL PROCEDURE / JUDGMENT/DEFAULT JUDGMENTS

Rule 237.1 does not require service of a petition for non pros, as that rule does not apply to a judgment entered by an order of court as in the instant case. Rule 237.1, Pa. R. Civ. P.

CIVIL PROCEDURE / NON PROS

Where a plaintiff in a representative capacity is removed from his duties and no new plaintiff is substituted for him, failure to substitute a new plaintiff may result in non pros of the action if the plaintiff delays too long in making the voluntary substitution and as a result of the action languishes unreasonably. Rule 2352, PA. R. Civ. P.

CIVIL PROCEDURE / NON PROS

A praecipe to discontinue an action was a nullity when it was filed by attorneys who had not entered an appearance of record on behalf of the purported successor trustee/plaintiff and where there was no documentation to verify that the purported successor trustee had actually assumed the duties of a trustee.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 11146-2002

Appearances: Stephen Hutzelman, Esq. and Percy L. Isgitt, Esq. for the Plaintiff
Nicholas Vari, Esq. for Defendants Prudential and Francani
Roger Taft, Esq. for Defendant GE Life and Annuity Assurance Co.

OPINION

Anthony, J., July 7, 2004

This matter comes before the Court on a Petition to Open or Strike Judgment filed on behalf of Sven Ali Kuhnle, Successor Trustee of the Patricia A. Dresch Living Trust. After a review of the record and considering the arguments of counsel, the Court will deny the motion. The factual and procedural history is as follows.

The instant action arises out of the circumstances surrounding a $1,000,000.00 life insurance policy purchased by Patricia A. Dresch. In February of 1994, Patricia Dresch approached Defendant Sandro J. Francani, a financial advisor and broker for Defendant Prudential Securities, Inc. (hereinafter "Prudential Securities"), for assistance in dealing with her personal financial matters, estate planning, and investing. It has been alleged that Mr. Francani advised Mrs. Dresch to purchase a life insurance policy. On or about September 7, 1994, Mrs. Dresch applied for and subsequently purchased a $1,000,000.00 policy from the Life Insurance Company of Virginia. The Life Insurance Company of Virginia is now Defendant GE Life and Annuity Assurance Company (hereinafter "GE Life"). The first payment on the policy was paid from the account Mrs. Dresch had established with Prudential Securities. As of December 9, 1998, the Patricia A. Dresch Living Trust was the named beneficiary of the proceeds from the insurance policy. Louis A. Ensani, Mrs. Dresch's brother-in-law, was named the trustee of the Patricia A. Dresch Living Trust. Mrs. Dresch's children, Julie S. Staubo[1] and Stephen L. Dresch, were named as second and third successor trustees respectively.

The life insurance policy required an annual premium payment to be made on or before November 3 of each calendar year. The policy included a thirty-one day grace period. In the event that the premium was not paid by November 3 of the calendar year, the policy would be automatically re-instated if payment was made within thirty-one days. Sometime prior to November 3, 2000, an annual premium notice was issued by GE Life. It has been alleged that a copy of the notice was sent to Mr. Francani at Prudential Securities.

By this time, Mrs. Dresch was in ill health. She was declared incompetent on or about December 16, 2000. On January 4, 2001, Mr. Ensani and Ms. Staubo went to Mr. Francani's office to discuss Mrs. Dresch's financial affairs. At that time, Mr. Francani advised them that it was incumbent upon them to determine the status of the life insurance policy. Mr. Francani provided them with the phone number for GE Life. It has been alleged that Mr. Ensani asked Mr. Francani to determine when the premium was due

[1] There is some confusion as to whether Ms. Staubo's proper name is Julie S. Staubo or Julie D. Staubo. For consistency's sake, the Court will refer to her as Julie S. Staubo as that is how she is identified in the Trust.

on the life insurance policy. It has further been alleged that Mr. Francani advised Mr. Ensani that he was unable to determine whether or not the premium has been paid.

On January 8, 2001, Mr. Ensani phoned GE Life and was told that he would not be given any information until he had provided the company with a Power of Attorney. That same day, Attorney Debra Shamoun Baltus provided information that Mr. Ensani was the designated attorney-in-fact for Mrs. Dresch pursuant to a Durable Power of Attorney. Mrs. Dresch died on January 11, 2001. Mr. Fancani phoned GE Life on January 12, 2001 and was informed that the policy had lapsed on January 4, 2001 for non-payment of the premium. GE Life further informed Mr. Fancani that no death benefit would be paid from the policy because of the non-payment.

On or about January 25, 2002, Attorney Stephen Hutzelman filed a Petition for an Order Requiring Supervision, for Construction of Will Regarding Successor Trustee, Requiring Trustee to Account, Requiring Trustee to Provide Information and Documents, Allowing Trustee to Resign, Appointing Successor Trustee, Appointing Guardian Ad Litem, and Ordering Certain Relief in Erie County Orphan's Court. *See* Hutzelman Dep. Ex. 2. The Petition was filed on behalf of Julie S. Staubo as one of the beneficiaries of the Patricia A. Dresch Living Trust. *See id.* The Petition alleged, inter alia, that Mr. Ensani had failed to keep the beneficiaries informed of the administration of the Trust, and further alleged that Mr. Ensani had failed to file suit against GE Life for Non-payment of a death benefit. The Petition indicated that Ms. Staubo had sought Mr. Ensani's resignation as trustee as early as July 26, 2001. *See id.* The Petition also sought to have Ms. Staubo named as the successor trustee until further order of the court. *See id.*

On March 26, 2002, Mr. Ensani, as the trustee of the Patricia A. Dresch Living Trust, filed suit against Prudential Securities, GE Life, and Mr. Francani for breach of contract, breach of fiduciary duty, negligence, negligent breach of contract, and unfair trade practices. The Complaint alleged, inter alia, that Mr. Francani had breached an oral contract he had with Mrs. Dresch. Specifically, it was alleged that Mr. Francani had agreed to monitor the status of Mrs. Dresch's life insurance policy and pay the premium out of her Prudential account in the event that the premium had not been paid. Additionally, it was alleged that Mr. Francani had a duty to advise Mrs. Dresch and Mr. Ensani of the imminent lapse of her policy and that he should have ascertained the status of the life insurance policy when Mr. Ensani and Ms. Staubo were in his office. Attorney John Wingerter represented Mr. Ensani in his capacity as trustee at the time the Complaint was filed.

On May 13, 2002, GE Life, Prudential Securities, and Mr. Francani filed Preliminary Objections to the Complaint. In or about the early part of June

2002, Mr. Ensani agreed to resign as trustee of the Patricia A. Dresch Living Trust. *See* Hutzelman Depo. Ex. 6. However, it appears that he remained the named trustee until a successor trustee could be obtained. *See id.* Ex. 7. On July 29, 2002, Attorney Hutzelman wrote to Attorney Wingerter explaining that he believed Merrill Lynch was willing to accept the position of trustee and would accept the responsibilities of the position in the near future. *See id.*

On September 26, 2002, the Court granted the Preliminary Objections in part, dismissing the claims for negligence, negligent breach of contract, and unfair trade practices. Plaintiff was granted permission to amend the Complaint which he did on October 14, 2002. The Amended Complaint contained one count of breach of contract and one count of breach of fiduciary duty against all three defendants. In the beginning of November, 2002, GE Life, Prudential Securities, and Mr. Francani filed Preliminary Objections to the Amended Complaint. Attorney Hutzelman advised Knut Staubo, Julie S. Staubo's husband, that Preliminary Objections had been filed and would likely be heard in January of 2003. *See* Hutzelman Depo. Ex. 9. Indeed, the Court scheduled argument on the Preliminary Objections for January 29, 2003.

On or about December 4, 2002, Mr. Ensani formally resigned as the trustee of the Patricia A. Dresch Living Trust. *See* Hutzelman Depo. Ex. 11. The following day, Attorney Hutzelman advised Mr. Staubo of the resignation and that the release and transfer document had been forwarded to Merrill Lynch. *See id.* Ex. 12. Attorney Hutzelman further informed Mr. Staubo that Mr. Ensani was now completely "out of the loop" as far as the trust was concerned. *See id.*

On January 28, 2003, the day before argument was to be heard on Defendants' Preliminary Objections, counsel for Prudential and Mr. Francani faxed the Court to inform it of an apparent change in the trustee of the Trust. *See* Hutzelman Depo. Ex. 14. Attorney Nick Vari informed the Court that he had received a fax from Merrill Lynch Trust Company that day indicating that Mr. Ensani had resigned as trustee as of December 4, 2002, and that Merrill Lynch had assumed the duties of trustee as of January 13, 2003. *See id.; see also* Ex. 21. Enclosed with the fax was a copy of a notarized Appointment of Successor Trustee and Acceptance of Appointment signed by Danita J. Wright of Merrill Lynch Trust Company on January 27, 2003. It appears that this information was not conveyed to Attorney Wingerter, counsel for Mr. Ensani in his duties as trustee, until he received a copy of Attorney Vari's fax. *See id.*

The parties appeared before the Court on January 29, 2003 at the time scheduled for argument on the Preliminary Objections. Defendants raised the issue of standing at the time of the argument. The Court agreed that Mr. Ensani lacked standing to continue to pursue the lawsuit on behalf of the Trust given his resignation. At the time, it was believed that Merrill

Lynch had been named successor trustee. The Court informed the parties that it would withhold ruling on the Preliminary Objections until the successor trustee had been substituted for Mr. Ensani.

On January 29, 2002, Attorney Wingerter requested that Attorney Hutzelman provide him with name and the address of the person who should be substituted in the caption. *See* Hutzelman Depo. Ex. 14. That same day, Attorney Wingerter wrote to Attorney Hutzelman about the status of the case. Attorney Wingerter stated:

> On January 29 Argument on the Plaintiff's Amended Complaint was held before Judge Fred P. Anthony. At the time of the Argument the change in Trustee was duly noted by the Court. The Court has indicated that for this litigation to proceed, we must have a document from all of the trustees, Merrill Lynch Trust Company, Julie D. Staubo (if she is serving as a co-trustee) and Stephen L. Dresch (if he is serving as a co-trustee), acknowledging their substitution as Plaintiffs in the above litigation. Should the Plaintiffs timely fail to consent, the Complaint will be dismissed with prejudice and all of the claims for the $1,000,000.00 life insurance policy will be lost.
>
> It is our understanding that prior to Merrill Lynch agreeing to serve as Trustee you provided them with a copy of the Amended Complaint which you obtained from us so they could review that prior to accepting the trusteeship.
>
> With that in mind, we have prepared Acknowledgment and Consent to be executed by the respective parties as outlined above. It is imperative that this matter be resolved without delay or the above adverse resolution will occur.

Hutzelman Depo. Ex. 15. The following day, Attorney Hutzelman forwarded copies of Attorney Wingerter's letter to Merrill Lynch and Julie S. Staubo. *See id.* Ex. 16. Attorney Hutzelman advised them that he needed to provide Attorney Wingerter with an immediate response and warned them that delay may endanger the lawsuit. *See id.*

On February 6, 2003, Mr. Staubo sent an e-mail to Attorney Hutzelman indicating that Merrill Lynch was no longer willing to serve as trustee and that an alternative trustee was needed. *See* Hutzelman Depo. Ex. 22. On February 10, 2003, Mr. Staubo sent a second e-mail to Attorney Hutzelman discussing his desire to have a "warm body" represent the Trust and suggesting several possible alternatives. *See id.* Ex. 18. It seems the beneficiaries had difficulty identifying a person who would be willing to serve as trustee as it appears that they were of the opinion that no corporate trustee would be willing to assume the duties given the lawsuit filed against GE Life and Prudential. Attorney Hutzelman suggested that a Mr.

Ronan might be willing to serve as trustee. *See id.* Ex. 27. On March 20, 2003, Mr. Staubo suggested that a conference call with Attoneys Hutzelman and Wingerter and Mr. Staubo might be the most efficient way to decide how to move forward with the lawsuit. *See id.* Ex. 28.

On April 16, 2003, Attorney Wingerter wrote Attorney Hutzelman to inform him that his firm would be filing a petition to withdraw as counsel. *See* Hutzelman Depo. Ex. 29. He asked Attorney Hutzelman to inform the beneficiaries of his intention. *See id.* Attorney Hutzelman informed Mr. Staubo of Attorney Wingerter's intention the following day. *See id.* Ex. 30. On April 29, 2003, Attorney Wingerter sent Attorney Hutzelman a second letter regarding his intent to withdraw from the case. That letter stated:

> As you are aware, we have indicated that we are withdrawing as counsel for the Plaintiffs [sic] in the above-captioned case. We have corresponded with you in that regard previously and requested that you provide us with the name of new counsel. To date we have not received any information regarding the new counsel.
>
> Unfortunately this is consistent with the previous lack of cooperation that has tainted this litigation. Originally, we believed that this was a very sound claim, but due to the inactions of the [Beneficiaries], either on their own or with advice of counsel, the case has now become severely tarnished.
>
> Please advise immediately.

Hutzelman Depo. Ex. 31. Attorney Wingerter formally presented his motion to withdraw to the Court on June 10, 2003. The motion was granted that same day, and a copy of the Order was served on Attorney Hutzelman as a courtesy. On June 12, 2003, Attorney Hutzelman forwarded a copy of the Order granting the withdrawal to Mr. Staubo.

On June 16, 2003, Mr. Staubo e-mailed Attorney Hutzelman to inform him that the new trustee was Mr. Sven Ali Kuhnle of Houston, Texas and asked him to inform the Court of Mr. Kuhnle's appointment and provide it with his address. *See* Hutzelman Depo. Ex. 38. Despite Mr. Staubo's request, this information was not relayed to the Court. Attorney Hutzelman responded to the e-mail the following day to inform Mr. Staubo that they still needed to select a new attorney to pursue the insurance litigation. *See id.* Ex. 39. That same day, June 17, 2003, Attorney Hutzelman provided counsel for Defendants with Mr. Kuhnle's name and address. *See id.* Ex. 40. He further indicated that a substitution of parties would be filed in the near future. *See id.*

As of mid-July 2003, nearly six months after the argument on Defendants' Preliminary Objections, no successor trustee had been substituted for Mr. Ensani. Consequently, Defendants' Preliminary Objections were still pending before the Court. In an effort to ascertain

the status of the litigation, the Court drafted a letter to Merrill Lynch. *See* Correspondence of July 18, 2003. The Court believed that Merrill Lynch was still the trustee of the Patricia A. Dresch Living Trust. The Court informed Merrill Lynch that Attorney Wingerter and his firm had been permitted to withdraw from the case. *See id.* The Court asked the trustee to indicate whether or not it was intending to continue with the action. *See id.* Merrill Lynch was asked to respond by July 21, 2003. *See id.* Copies of the letter were sent to Attorney Hutzelman both by Merrill Lynch and by counsel for GE Life. Attorney Craig Murphey, counsel for GE Life, also pointed out to Attorney Hutzelman that they had not been provided with any verification of Mr. Kuhnle's appointment as trustee. *See* Hutzelman Depo. Ex. 42.

Attorney Hutzelman forwarded copies of Attorney Murphey's letter and the Court's letter to Mr. Staubo on Friday, July 18, 2003. *See* Hutzelman Depo. at 62; Ex. 43. The e-mail indicated that he needed instructions from Mr. Staubo on the following Monday. *See id.* On July 21, 2003, Attorney Hutzelman wrote the Court indicating that Merrill Lynch was managing some assets of the trust, but it was not serving as trustee. *See id.* Ex. 44. The letter further informed the Court that a Mr. Sven A. Kuhnle of Houston, Texas was now the trustee, but the letter did not provide an address for Mr. Kuhnle. *See id.* Attorney Hutzelman wrote that the parties definitely wished to continue with the action and were in the process of selecting new counsel. *See id.* He anticipated that Ms. Staubo and Mr. Dresch would be in a position to act by mid-August. *See id.* A copy of the letter was provided to Ms. Staubo but not Mr. Dresch. *See id.*

By the end of August, the Court had not received any information that a new attorney had been retained, and no attorney had entered an appearance on behalf of the trust. The Wednesday following the Labor Day holiday the Court issued the following Order dismissing Defendants' preliminary objections:

> AND NOW to-wit, this 4th day of September, 2003, it is hereby ORDERED and DECREED that the Preliminary Objections filed on behalf of Defendants Prudential Securities, Inc.; GE Life and Annuity Insurance Company; and Sandro J. Francani are **DISMISSED** without prejudice to re-file at a later date.
>
> The named Plaintiff in this action, Louis A. Ensani, who brought this suit as the Trustee of the Patricia A. Dresch Living Trust, is no longer serving as the trustee. Accordingly, he lacks standing to continue the suit, and the Court is without authority to render a decision on this matter at the current time. If Plaintiff's successor decides to continue with the instant action, Defendants may again bring their Preliminary Objections before the Court.

Order of Sept. 4, 2003

On September 3, 2003, counsel for Prudential and Mr. Francani filed a Petition for Non Pros. The Court issued a Rule to Show Cause directing

Respondent to file an answer to the Petition and setting a date for a hearing on October 31, 2003. *See* Order of Sept. 4, 2003. The Order directed Prudential and Mr. Francani to serve a copy of the Order on all parties. A copy of this Order was served on Attorney Hutzelman. Counsel for Prudential and Mr. Francani further served a copy of the Order on Ms. Staubo and Merrill Lynch.

On September 9, 2003, Attorney Hutzelman wrote to Mr. and Ms. Staubo and Mr. Dresch and stated, in pertinent part:

> The Judge bad been inquiring into the case and I advised him as to the identity of the new Trustee and of the need to have counsel appointed to replace Mr. Wingerter. I had discussions with Knut Staubo shortly before he planned to take a trip, but have heard nothing in the meantime.
>
> If you wish to protect your interests in this case, it is very important that you give this matter your immediate attention.
>
> I have enclosed a copy of an Order of Court Granting Rule to Show Cause requiring certain action to be taken by you within twenty days or by September 24, 2003. This Order was entered in regards to a Petition for Rule to Show Cause Why Judgment of Non Pros Should Not be Entered. Judgment Non Pros [sic] is entered in cases where there has been a failure to prosecute the claim.
>
> It is extremely important that you take the appropriate action at once.

Hutzelman Depo. Ex. 50. Mr. Staubo responded via e-mail the next day. He informed Attorney Hutzelman that Attorney Percy Isgitt was handling the case from Houston and that all decisions and discussion should be channeled through him. *See id.* Ex. 52. Attorney Hutzelman provided Mr. and Ms. Staubo and Attorney Isgitt with a copy of Attorney Vari's correspondence. *See id.* Ex. 54. Therein Attorney Hutzelman stated, in part:

> I received an E-Mail from Knut Staubo indicating that Attorney Percy Isgitt was now handling this matter. I have never had any contact with the new Trustee and thus am not authorized to take any action on your behalf. Unless and until I receive some authorization, I can do nothing. I believe it, however, important that I again pass this correspondence onto [sic] you so that you will be fully aware of that [sic] is going on.

Id.

On October 8, 2003, GE Life also filed a Petition for Non Pros. The Petition was served on Attorney Hutzelman, Ms. Staubo, and Merrill Lynch. The Court issued a Rule to Show Cause why GE Life's Petition for Non Pros should not be entered and scheduled a hearing for the matter

for the same time as the hearing on Prudential and Mr. Francani's petition. *See* Order of October 17, 2003. The Court directed GE Life to serve a copy of the Order on all parties. A copy of the Court's Order was served on Attorney Hutzelman who, in turn, forwarded a copy to Attorney Isgitt on October 20, 2003. *See* Hutzelman Depo. Ex. 61. Attorney Hutzelman also wrote to counsel for Defendants that same day to inform them that Attorney Isgitt was representing the interests of the Trust and to provide them with his address and fax number. *See id.* Ex. 62. On October 21, 2003, counsel for GE Life sent to Attorney Isgitt copies of the two Petitions for Non Pros and Court Orders. *See id.* Ex. 64. No response to the Petitions was ever filed.

At approximately 12:30 P.M. on October 31, 2003, roughly one hour before the scheduled hearing on the Petitions for Non Pros, the Erie County Prothonotary's Office received a fax copy of a Praecipe and Power of Attorney for Satisfaction and/or Termination. The Praecipe indicated that the instant lawsuit was settled, discontinued, ended without prejudice and costs paid. The Praecipe was signed by Joseph J. May, Esquire for Attorney Hutzelman. A courtesy copy of the Praecipe was faxed to the undersigned's Chambers by Attorney Isgitt. *See* Hutzelman Depo. Ex. 70. Attorney Isgitt purported to be counsel for Sven Ali Kuhnle, Successor Trustee of the Patricia Dresch Living Trust. *See id.* Attorney Isgitt did not enter an appearance on behalf of Mr. Kuhnle. Additionally, Attorney Isgitt did not provide the Court with any documentation to verify that Mr. Kuhnle was trustee of the Patricia A. Dresch Living Trust, and he did not attempt to substitute Mr. Kuhnle as Plaintiff in the instant case. It appears that after attempting to discontinue the instant lawsuit, Mr. Kuhnle filed an identical lawsuit in a court in Texas.

The Court held the hearing on the Petitions for Non Pros as scheduled. No one appeared on behalf of the Trust. On November 10, 2003, the Court entered the following Order:

> AND NOW to-wit, this 10 day of November 2003, upon consideration of the Petitions for Rule to Show Cause Why Judgment of Non Pros Should Not Be Entered filed on behalf of Defendants Prudential Securities, Inc. and Francani and Defendant GE Life and Annuity Assurance Co., it is hereby ORDERED and DECREED that the Petitions for Non Pros are GRANTED, and the above-captioned action is DISMISSED with prejudice.
>
> On September 4, 2003, this Court issued a rule to show cause on Plaintiff to appear and show cause why a judgment of non pros should not be entered against him. The rule directed Plaintiff to file a response to the petition within twenty days and scheduled a hearing for October 31, 2003. Plaintiff did not file a response to the petition. Rather, approximately one hour prior to the time set aside for a hearing on the petition, the Court received a fax copy of what appears to be

a request to discontinue the instant action. The "Praecipe and Power of Attorney for Satisfaction and/or Termination" is signed by Attorney Stephen H. Hutzelman, who has not entered his appearance on behalf of Plaintiff. Additionally, the Praecipe is accompanied by a letter from an attorney in Texas who has not entered an appearance either. The letter from Attorney Percy L. Isgitt indicates that he is the attorney for Sven Ali Kuhnle who is the successor Trustee of the Patricia Dresch Living Trust. However, Attorney Isgitt made no attempt to substitute Mr. Kuhnle as the Plaintiff.

Since neither attorney represents any legal interest in this action, the Court proceeded to conduct the scheduled hearing at which time it concluded that Defendants have failed to exercise due diligence in proceeding with reasonable promptitude, that Plaintiff has no compelling reason for the delay, and that Defendants have suffered actual prejudice as a result of the delay in this case. *See Jacobs v. Halloran*, 551 Pa. 350, 710 A.2d 1098 (1998). Despite prompting from the Court, Plaintiff has failed to move this case beyond the preliminary objection stage. Indeed, the case is unable to move forward at this point because Mr. Ensani was removed as the trustee on or about January 28, 2003. Thus, he lacks standing to act on behalf of the trust. The successor trustee has not asked that he be substituted as the Plaintiff in the action. Moreover, counsel for Mr. Ensani have withdrawn their appearance. The result is that there is no Plaintiff of record and no counsel of record. Defendants are faced with a situation where they are unable to engage in discovery and are unable to even attempt to preserve evidence that may disappear while they wait to see if the suit will continue. Defendants have also indicated to the Court that Mr. Ensani, who would be a crucial witness, has left the jurisdiction. Finally, the Court finds Mr. Francani has suffered actual prejudice to his reputation as a result of having to report the fact that there is a lawsuit pending against him when filing a U-4 form with the National Association of Securities Dealers (NASD).

For all the foregoing reasons, the Court finds that Plaintiff has failed to proceed with reasonable promptitude, there is no valid reason for the delay, and Defendants have suffered actual prejudice as a result. Accordingly, a judgment of non pros is entered in favor of Defendants Prudential Securities, Inc. and Francani as well as in favor of Defendant GE Life and Annuity Assurance, Co. The above-captioned action is dismissed with prejudice.

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

A copy of the Order was served on counsel for Defendants as well as Attorney Hutzelman. *See* Order dated Nov. 10, 2003.

On January 16, 2004, two months after the Judgment of Non Pros was entered, Attorney Hutzelman filed the instant Petition to Open or Strike Judgment of Non-Pros on behalf of Sven Ali Kuhnle, Successor Trustee of the Patricia A. Dresch Living Trust. Defendant GE Life filed an Answer and New Matter to Petition to Open or Strike Judgment of Non Pros. Defendants Prudential and Francani also filed an Answer to the Petition to Open or Strike Judgment of Non-Pros as well as a Motion to Strike the Petition. On March 8, 2004, Attorney Hutzelman filed a sworn statement from Sven Ali Kuhnle indicating that he was the duly appointed Successor Trustee of the Patricia A. Dresch Living Trust. Attorney Hutzelman filed an Answer to Prudential and Francani's Motion to Strike and a Reply to New Matter of GE Life.

The Court held an evidentiary hearing on Mr. Kuhnle's Petition to Open or Strike on April 2, 2004. Following the hearing, Attorney Hutzelman filed a Brief in Support of the Motion to Strike Judgment. GE Life filed a reply brief, and Prudential and Francani joined in support of GE Life's position. At the hearing on the Petition to Open or Strike, counsel for Mr. Kuhnle abandoned his request to open the Judgments. Accordingly, the Court will only address his Petition to Strike.

A motion to strike a judgment operates as a demurrer to the record and will only be granted if a fatal defect or irregularity appears on the face of the record or judgment. *See Manor Bldg. Corp. v. Manor Complex Assoc., Ltd.*, 435 Pa. Super. 246, 645 A.2d 843 (1994). "A court may only look at the facts of record at the time judgment was entered to decide if the record supports the judgment." *Erie Ins. Co. v. Bullard*, 839 A.2d 383 (Pa. Super. 2003)(citing *Triangle Printing Co. v. Image Quest*, 730 A.2d 998 (Pa. Super. 1999)). If a motion to strike is granted, the effect is to destroy the original judgment and place the parties in a position as if the judgment had never been entered.

Mr. Kuhnle contends that the entry of Judgment of Non Pros was improper because he had not been personally served with notice of the Petitions for Non Pros or the Orders issuing Rules to Show Cause prior to the time set for the hearing on the Petitions. Mr. Kuhnle contends that service of a notice of intent to take action which is served on an attorney who has not entered an appearance, rather than on the party, is not effective to support an entry of judgment against the party. In support of his position, Mr. Kuhnle directs the Court's attention to the cases of *Erie Ins. Co. v. Bullard*, 839 A.2d 383 (Pa. Super. 2003), and *Giallorenzo v. American Druggists' Ins. Co.*, 301 Pa. Super. 294, 447 A.2d 974 (1982). The Court finds both cases to be distinguishable.

In *Bullard*, Erie Insurance Company (hereinafter "Erie") filed a complaint seeking declaratory judgment against its insured. Bullard failed to file an answer, and Erie sent a notice of its intent to praecipe for entry of default judgment to Arthur Alexion, Esq. Mr. Alexion had previously represented

Bullard at a deposition, but he had not filed an appearance on behalf of Bullard. Indeed, Mr. Alexion was not authorized to practice law. The Superior Court found that the default judgment was void *ab initio* because the notice of intent was not served upon Bullard, the party against whom judgment was to be entered, as is required by Pa.R.C.P. 237.1(a). The Superior Court found that this was a facial defect on the record that rendered the judgment against Bullard void.

In *Giallorenzo,* counsel for the plaintiffs wrote to defense counsel and explained that he would enter a default judgment against defendant if an answer was not filed within ten days. As in *Bullard*, no notice was sent directly to the defendant. Thereafter, counsel for the plaintiffs filed a praecipe for judgment for want of an answer and assessment of damages. The trial court struck the judgment and the Superior Court affirmed finding that the plaintiffs had not complied with Rule 237.1 again finding that a written notice of intent to file the praecipe had not been sent to the party against whom judgment was to be entered.

In the case at bar, the Court first notes that Mr. Kuhnle was not a party of record at the time the Petitions for Non Pros were filed, at the time the Court issued Rules to Show Cause or at the time of the hearing on the Petitions for Non Pros. At no time was Mr. Kuhnle a party to the instant action. Thus, Mr. Kuhnle was not a party against whom judgment was to be entered. Accordingly, Defendants were not required to provide Mr. Kuhnle with notice.

The Court also notes that the Petitions for Non Pros at issue were not filed pursuant to Pa.R.C.P. 237.1 as was the case in *Bullard* and *Giallorenzo*. Rule 237.1 governs entry of judgments for non pros by praecipe where the plaintiff has failed to file a complaint. The Rule clearly indicates that it does not apply to a judgment entered by an order of court as was the case here. *See* Pa.R.C.P 237.1(b)(1).

Copies of the Petitions for Non Pros were served on Attorney Hutzelman as a courtesy because he appeared to be in contact with the beneficiaries of the Trust as well as the purported successor trustee. Copies were not served on Mr. Ensani, the plaintiff listed in the caption of the lawsuit, because there was documentation showing that he had resigned as trustee. Rather, the Petitions were served on Ms. Wright at Merrill Lynch who was the last documented trustee for the Trust.

Mr. Kuhnle also argues that the Petition to Strike Judgment should be granted because he discontinued the suit on October 31, 2003 prior to the hearing on the Petitions for Non Pros. As the Court noted when it granted the Petitions for Non Pros, the Praecipe to Discontinue was filed by attorneys who had not entered appearances of record on behalf of the purported successor trustee. *See* Order of Nov. 10, 2003. Additionally, the Praecipe provided no documentation to verify that the purported successor trustee had actually assumed the duties of trustee. Accordingly,

the Praecipe to Discontinue was a nullity and the Court properly found that it had no bearing on the litigation.

Mr. Kuhnle further contends that the Court lacked authority to enter the Petitions for Non Pros. In its Order dismissing Defendant's Preliminary Objections, this Court stated that they were being dismissed because Mr. Ensani lacked standing to continue the instant lawsuit and that the Court was without the authority to render a decision on the Preliminary Objections at the time. *See* Order of Sept. 4, 2003. Mr. Kuhnle contends that this statement is now the law of the case and that the Court lacked the authority to enter the Judgments of Non Pros because a new trustee had not been substituted as the Plaintiff at the time the Judgments were entered.

Other than his statement that the Court's Order of September 4, 2003, was the law of the case, Mr. Kuhnle offers no authority for his position that a judgment of non pros cannot be entered where a plaintiff, who is suing in a representative capacity only, is removed from his duties and no new plaintiff is substituted for him. Were the Court to accept Mr. Kuhnle's position as correct, then such a case could languish indefinitely with absolutely no opportunity for a defendant to end the litigation. This simply cannot be accurate.

Mr. Kuhnle contends that the proper procedure to have been followed was for Defendants to compel him to substitute himself in the instant litigation pursuant to Pennsylvania Rule of Civil Procedure 2352. The Rule provides:

> (a) The successor may become a party to a pending action by filing of record a statement of the material facts on which the right to substitution is based.
>
> (b) If the successor does not voluntarily become a party, the prothonotary, upon praecipe of an adverse party setting forth the material facts shall enter a rule upon the successor to show cause why the successor should not be substituted as a party.

R.C.P. 2352. The Rule does not impose any time limits for a party to voluntarily become party or for an adverse party to compel the substitution of a successor, but the commentary to the Rule makes it clear that failure to substitute a new plaintiff leaves open the possibility of a judgment non pros:

> With respect to the voluntary substitution of a plaintiff, the time will generally be unlimited. Substitution may be made at any time until final judgment, and perhaps even thereafter, for purposes of execution. The plaintiff, of course, is subject to the general rule of non pros for failure to prosecute the action with diligence. If the plaintiff delays too long in making the voluntary action, and as a result the action languishes unreasonably, the substitution may be refused, which in practical effect will mean the non pros of the action.

Goodrich Amram 2d § 23S2(a)(4) (2000). Thus, it is clear to the Court that it had the authority to enter the judgment of non pros and that Defendants were not required to compel the substitution of Mr. Kuhnle prior to petitioning for non pros.

Mr. Kuhnle does cite to one case for the proposition that a judgment may not be entered against a successor who has not yet been substituted as a party; however, the Court finds that case to be distinguishable from the case at bar. In *Commonwealth v. Pladas,* 79 Pa. D. & C. 235 (Schuylkill County 1952), the Commonwealth obtained a verdict against Pladas for expenses incurred while the Commonwealth cared for his daughter at a state hospital. The defendant filed motions for judgment n.o.v. and a new trial, but died before argument on the motions was heard. The Commonwealth filed a suggestion of death and suggested that defendant's executors be substituted as defendants, but made no formal request to have the executors substituted as parties. The trial court struck the case from the argument list finding that "[s]ince they are not parties to the action, no order or judgment may validly be entered either in their favor or against them." *Id.* (citing *Hill et al. v. Truby,* 117 Pa. 320 (1887)(holding that if the record shows the death of defendant but fails to show that defendant's personal representatives became parties to the action, either by their voluntary appearance or in consequence of adverse process served upon them, the record is fatally defective, and will not support a judgment against the personal representatives.).

In *Pladas,* the trial court refused to hear argument where defendant's executors had not yet been named parties to the actions. *Pladas* dealt only with the issue of the substitution of a successor defendant. It did not deal with the entry of a judgment of non pros. As the Court noted above, there must be some mechanism for a defendant to end a lawsuit where no successor plaintiff is forthcoming or can be located.

For all the foregoing reasons, the Petition to Open or Strike Judgment filed on behalf of Sven Ali Kuhnle is denied.

ORDER

AND NOW, to-wit, this 4 day of July 2004, it is hereby ORDERED and DECREED that the Petition to Open or Strike Judgment filed on behalf of Sven Ali Kuhnle is DENIED. The Motion to Strike Petition filed on behalf of Defendants Prudential Securities, Inc. and Sandro J. Francani is DENIED.

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

GANNON UNIVERSITY, Appellant

v.

CITY OF ERIE ZONING HEARING BOARD, Appellee

and

BALDWIN BROTHERS, INC. and BALDWIN/RUBINO ASSOCIATES , Intervenors

ZONING

Under Section 614 of the Pennsylvania Municipalities Planning Code, a zoning officer must administer the zoning ordinance in accordance with its literal terms and does not have the power to permit any construction or any use or change of use that does not conform to the zoning ordinance.

ZONING / NONCONFORMING USE

Where a zoning ordinance does not contain a registration provision for nonconforming uses, a zoning officer does not have the authority to register it in any manner nor do the zoning officer's actions establish a vested right in a nonconforming use.

It is not enough that a use "closely" meets the requirements of a use definition in a zoning ordinance.

A pre-existing nonconforming use arises when a lawful existing use is subsequently barred by a change in a zoning ordinance.

ZONING / APPEAL

Where the trial court takes no additional evidence in a land use appeal, the court is limited to determining whether the zoning board abused its discretion or committed an error of law.

A zoning board abuses its discretion when the findings of fact are not supported by substantial evidence.

Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

All appeals from land use decisions must be filed within 30 days after entry of the decision or order being challenged.

Time limits on land use appeals of zoning board decisions are jurisdictional.

The time limit for an appeal from the issuance of a zoning permit does not begin to toll until after the challenging party has actual notice, or knowledge, or reason to believe that a zoning permit has been issued.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA No. 15106 - 2003

Appearances: Evan Rudert, Esq. for the Appellant
Sumner E. Nichols, II, Esq. for the Appellee
Timothy M. Zieziula, Esq. for the Intervenors

OPINION

Bozza, John A., J.

This case is before the Court on a Land Use Appeal filed by Gannon University (hereinafter Gannon) challenging the denial of its previous

appeal to the City of Erie Zoning Hearing Board (hereinafter Board). The previous appeal stemmed from the Board's issuance of a zoning certificate to Baldwin Brothers, Inc. and Baldwin/Rubino Associates (hereinafter Baldwin) allowing use of the property located at 137 West 2nd Street (hereinafter Property) as a Group Care Facility. After the instant appeal was filed Baldwin intervened in the case. Gannon objects to the Board's decision, asserting that it is contrary to the evidence presented at the hearing, arbitrary and capricious, and constitutes an abuse of discretion and/or is contrary to law. The facts of the case are summarized below.

On August 20, 1971, Academy Homes, a predecessor of Baldwin, and Extended Care Centers, Inc., a potential lessee, applied for a permit to construct a three-story building on the Property. At that time it was zoned High Density Residential (R-3), allowing certain permitted and conditional uses, including hospitals.[1] A permit was issued on September 3, 1971, listing the Property as a "medical building", and Extended Care Centers, Inc. went on to operate the residential physical rehabilitation facility under the name Lake Erie Institute of Rehabilitation (hereinafter LEIR).

The citywide Zoning Ordinance was amended in 1980 to include a new use category for "Group Care Facility". It was defined as:

> An establishment that provides room and board to persons who are residents by virtue of receiving supervised specialized services limited to health, social, *rehabilitative* or housing *services provided by a governmental agency, their licensed or certified agents or other responsible non-profit social service corporation.* Supervision shall be provided by at least two responsible adults on duty on the premises on a 24-hour-a-day basis. The residents of the facility need not be related to each other.

(Zoning Ordinance, Article 6) (emphasis added).[2] This new use was not added as a permitted or conditional use in R-3 Districts, the zoning scheme that applied to LEIR. In 1987, the Ordinance was again amended to create Waterfront Districts, including Waterfront Commercial Districts[3] (WC). The WC Districts were designed for residential, commercial, recreational and historical uses, and all uses were conditional. With this amendment the LEIR property was rezoned WC, and while hospitals continued to be

[1] The term "hospital" is not otherwise defined in the Ordinance.

[2] As reflected in the 1981 Edition of the Ordinance, Group Care Facilities were confined to areas zoned as Transitional Use Districts (T-1). *See* Sec. 202.20, 204.13. Consequently, though group care facilities were included as a new use definition, they were not among the permitted or conditional uses allowed in R-3 Districts.

[3] As the Waterfront Districts developed, subcategories WC-1 and WC-2 were created, and the Property is currently zoned a WC-2 District.

allowed as a conditional use there was no provision allowing for a "Group Care Facility" as a conditional use.

LEIR operated its facility on the property until roughly August of 1998, when it merged with Healthsouth, Inc. The residential patients were subsequently moved to another Healthsouth facility over a period of time. In October of 2000, Healthsouth notified Baldwin that it would not renew the lease for the Property, and all equipment was removed from the Property prior its expiration on August 30, 2001. The facility was then turned over to Baldwin on September 30, 2001. In March of 2001, Baldwin advertised the property for sale, and met with various parties interested in the property. Baldwin also investigated the possibility of converting the property for use as office space, going so far as to consult with an architect, but did not follow through with this option. Ultimately, Baldwin bid on a contract with the Department of Corrections for a pre-release center in November of 2002, and was selected as a finalist for the project in January of 2003.

Pursuant to the Commonwealth's contract, the lessor was responsible for determining whether the proposed site was properly zoned. As such, Baldwin contacted the Zoning Office to check on the zoning status of the Property. On January 16, 2003, Dan Dowling, Field Zoning Officer[4], sent a letter to Baldwin indicating as follows:

> The last use of this property was a physical rehabilitation clinic operated by LEIR. I have determined that this falls into the definition of a "Group Care Facility". The proposed use as a pre-release center by the state also falls into the "Group Care Facility" definition.

Thereafter, Baldwin's bid was accepted on May 1, 2003. On July 2, 2003, Assistant Solicitor Gerald Villella issued a legal memorandum indicating his agreement with the zoning officer's determination, and the Zoning Office issued the zoning certificate authorizing a change of nonconforming use ,within the existing structure to accommodate the pre-release center that same day.

On July 7, 2003, Louis A. Colussi, who held the previous contract for the pre-release center, filed an appeal with the Board, which was docketed and scheduled for public hearing on August 12, 2003. On July 29, 2003, the Board sent out a notice of the hearing, which Gannon received on July

[4] Pursuant to 53 P.S. § 10614, " ... The zoning officer shall administer the zoning ordinance in accordance with its literal terms, and shall not have the power to permit any construction or *any use or change of use* which does not conform to the zoning ordinance." (emphasis added). *See also Hosford v. Zoning Hearing Bd.*, 111 Pa. Commw. 64 (1987) (noting that when a zoning ordinance does not contain a registration provision for nonconforming uses, a zoning officer does not have the power to register it in any manner, nor do the officer's actions establish a vested right.)

31, 2003. Thereafter, Gannon attended the hearing and subsequently filed a separate appeal on August 28, 2003. The two appeals were consolidated and a public hearing took place on November 11, 2003. At its December 9, 2003 meeting, the Board voted to deny Gannon's appeal. Gannon then filed the instant Notice of Land Use Appeal on December 15, 2003. The written Decision of the Board was issued on December 26, 2003.

When there is no additional evidence or testimony submitted to the trial court, the scope of review is limited to a determination of whether the board committed an abuse of discretion or an error of law. An abuse of discretion will only be found where the Board's findings of fact are not supported by substantial evidence, which is "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion," *Valley View Civic Association v. Zoning Board of Adjustment*, 501 Pa. 550, 555, 462 A.2d 637, 640 (1983). As explained below, this Court finds that the Board committed an error of law in determining that the use of the Property fit within the use definition of a Group Care Facility. Therefore, the Board's denial of the prior appeal will be reversed.

I. Timeliness of Appeal

Before examining the substantive issues presented the Court must first address the threshold issue of timeliness of appeal. Baldwin asserts that Gannon's appeal to the Board, filed 57 days after the zoning certificate was issued, was untimely. Furthermore, Baldwin argues that Gannon failed to meet its burden of proof to demonstrate that it did not know or have reason to know that a certificate had been issued in order to toll the time period for filing an appeal. In response, Gannon argues that it did not have actual notice that the zoning certificate had been issued until July 31, 2003, when it received notice of an impending public hearing on a related appeal from the issuance of the zoning certificate. As such, Gannon's appeal was filed within thirty days of actual notice.

According to Section 914.1(a) of the Pennsylvania Municipalities Code, 53 P .S. §10914.1(a):

> No person shall be allowed to file any proceeding with the board later than 30 days after an application ...has been approved by an appropriate municipal officer, agency or body if such proceeding is designed to secure reversal or to limit the approval in any manner unless such person alleges and proves that he had no notice, knowledge or reason to believe that such approval had been given.

Time limits on appeals of zoning board decisions are jurisdictional. *Lycoming Burial Vault Co. v. Zoning Hearing Board*, 421 Pa. Commw. 294, 298, 399 A.2d 144, 146 (1979). However, in order to have a reasonable right of appeal a challenging party should not be barred unless they had knowledge of the issuance of a permit in sufficient time to file an appeal within the specific period of time. As such, the time limit for an appeal from

the issuance of a zoning permit does not begin to toll until after the challenging party has actual notice, or knowledge or reason to believe one has been issued. *See Haaf v. Zoning Hearing Bd.*, 155 Pa. Commw. 608, 625 A.2d 1292 (1993). In some instances the knowledge requirement can be satisfied by proof of constructive notice that an appealable event has occurred. *See Seneca Mineral Co. v. McKean Township Zoning Hearing Board*, 124 Pa. Commw. 389, 556 A.2d 496 (1989) (holding that construction taking place on a previously unimproved lot provided constructive notice to protestants that a permit had been issued).

In this instance, the Board concluded that copies of the zoning certificate, posted at two locations on the property on July 3, 2003, were too small to provide effective notice. This was not manifestly unreasonable, particularly where there was no posting requirement contained in the Ordinance. Furthermore, the "construction" that took place on the Property beginning on or about July 28, 2003, entailed interior and exterior painting, re-keying locks, looking at the roof to check for leaks, replacing windows, sweeping, cleaning, cutting down bushes, pressure washing the exterior of the building, sealing and re-striping the parking lot and picking up weeds from the landscaping", which were characterized by Matthew Baldwin as maintenance-related work. (November 11, 2003 Hearing Transcript, p. 70, 73). While Baldwin argues that these activities were significant enough to establish constructive notice, they were not indicative of the fact that a zoning certificate allowing a change in nonconforming use had been issued, nor were they inconsistent with prior use of the building such that Gannon would be put on notice of any change in use.[5] As such, based on the record, it was not manifestly unreasonable for the Board to conclude that Gannon did not have notice prior to receipt of the public hearing notice on July 31, 2003. The Gannon Appeal was subsequently filed on August 28, 2003, which was within the 30-day period after actual notice. Therefore the appeal was timely filed.

II. Group Care Facility Definition

The Board's decision to issue the zoning certificate was premised on its conclusion that LEIR had been operating as a Group Care Facility. (Zoning Hearing Board Decision, Conclusions ¶4.) Based on this determination the Board went on to conclude that there was a

[5] In further support of its contention that Gannon had notice that the certificate had been issued prior to July 31, 2003, Baldwin points to two newspaper articles appearing on June 25, 2003, that discussed the possibility of a pre-release center on the Property. The articles do not indicate that a zoning certificate was issued, and in fact the certificate was not issued until July 2, 2003. If anything, the articles merely put Gannon on notice that a permit might be issued in the future. In contrast, Section 914.1(a) of the Municipalities Planning Code refers to the point at which a protestant had notice, knowledge or reason to believe that a Zoning Certificate was issued.

pre-existing nonconforming use on the Property. Whether a proposed use meets the definition relied upon is a question of law, and as such the Board's determination is subject to review. *See Diversified Health Assocs. v. Zoning Hearing Bd.*, 2001 Pa. Commw. LEXIS 452, 781 A.2d 244 (2001). Therefore, the Court must first determine whether LEIR's prior use satisfies the use definition of a Group Care Facility, i.e. whether it was an establishment offering room and board to residents receiving supervised specialized rehabilitative services provided by a governmental agency, their licensed or certified agents or other responsible non-profit social service corporation.

According to Baldwin, LEIR's use of the property entailed providing long-term specialized services to its residents in the nature of physical and mental rehabilitation. Therefore, it argues, the Group Care Facility definition fits *more closely* with the actual activities of LEIR. Furthermore, Baldwin submits that when this use definition was added to the Ordinance it became applicable to LEIR. However, Baldwin's application of the definition fails to satisfy the additional requirement that services be provided by a government agency, its licensed or certified agent or other nonprofit organization. While Baldwin argues that the definition should be interpreted to apply to any entity that is licensed, the plain language of the Ordinance doesn't say that. Rather it provides that the operator of a Group Care Facility must be a government agency, "their licensed or certified agents", or a nonprofit organization. *See* Ordinance, Article 6. It is obvious that LEIR was not a government agency. Further, the record is void of any evidence to support the conclusion that it was an agent of the government. Finally, the record clearly indicates that LEIR and Healthsouth both operated as for-profit entities. *See Layne v. Zoning Bd. of Adjustment*, 64 Pa. Commw. 258, 439 A.2d 1311 (1982) (noting that a for-profit entity cannot meet the Group Care Facility definition) *rev'd on other grounds* 501 Pa. 224, 460 A.2d 1088 (1983). LEIR's use of the property never met the requirements of a Group Care Facility. It is not enough that a use "closely" meets the requirements of a use definition in a zoning ordinance. Therefore, it was legal error for the Board to conclude that because LEIR's use of the property "more closely" fit the definition of a Group Care Facility than that of a hospital it should be treated as such and therefore constitute a non-conforming use.

Assuming *arguendo* that the activities of LEIR fit the definition of a Group Care Facility, the Board's conclusion that it was a pre-existing nonconforming use would still be in error. A pre-existing nonconforming use arises when a *lawful existing use* is subsequently barred by a change in a zoning ordinance. *See* P.S. §10107 (13.1). In *Scalise v. Zoning Hearing Board*, the Commonwealth Court noted:

> It is axiomatic that the right to maintain a pre-existing nonconformity extends only to uses that were legal when they came into existence.

> The enactment of a new ordinance cannot have the effect of protecting a pre-existing illegality.

756 A2d 163, 166 (2000). Though the Group Care Facility use definition was added to the Ordinance in 1980, it was never included as a permitted or conditional use in the R-3 District. As such, if LEIR were operating a Group Care Facility prior to the adoption of the 1987 amendments it would have been doing so illegally as no such use was ever allowed in an R-3 District. Therefore, the 1987 amendment creating the Waterfront Districts could not operate to confer nonconforming use status. *See Hager v. W. Rockhill Twp. Zoning Hearing Bd.*, 2002 Pa. Commw. LEXIS 232, 795 A.2d 1104 (2002); *See also Lantos v. Zoning Hearing Bd.*, 153 Pa. Commw. 591, 621 A.2d 1208 (1993). To the extent that the Board concluded that at some time relevant to these proceedings a Group Care Facility was a permitted use in an R-3 District it committed legal error and its decision on the basis must also be reversed.

The Court notes that it was the Board's erroneous determination that LEIR's use was a pre-existing nonconforming use that led to the Board's conclusion that Section 306 of the Ordinance, requiring a recommendation from the Planning Commission after public meeting and City Council approval prior to changes in conditional uses, did not apply. As such, based on the above reasoning this issue is moot. Furthermore, because this Court has determined that no prior nonconforming use existed, there is no need to address Gannon's argument that Baldwin abandoned the nonconforming use.

An appropriate order shall follow.

ORDER

AND NOW, to-wit, this 30 day of September, 2004, upon consideration of the Land Use Appeal filed by Appellant, Gannon University, and argument thereon, the Court finding that the City of Erie Zoning Hearing Board erred as a matter of law as explained in the attached Opinion, it is hereby **ORDERED, ADJUDGED and DECREED** that the decision of the Board denying the prior appeal is hereby **REVERSED**, and the zoning certificate is **REVOKED**.

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

LISA R. MILLER, Plaintiff

v.

THOMAS A. MILLER, Defendant

APPEAL / CONCISE STATEMENT

Where a party raises numerous issues in a concise statement of matters complained of on appeal, the court is mindful of the presumption that there is no merit to any of them. A statement raising 13 matters and purporting to incorporate by reference a four page list of issues previously specified in a Motion for Reconsideration will invoke the court's discretion to consolidate those matters into a statement of a single issue which encompasses all of the issues which have not been waived.

FAMILY LAW / SUPPORT / OBJECTIONS NUNC PRO TUNC

Pa.R.C.P. 1910.12(e) allows a party ten (10) days from the date of an interim order entered following a support conference to file written objections. Mere inadvertence of counsel is no excuse for a failure to file objections. Courts are without power to extend the time fixed by a statute simply as a matter of indulgence.

The burden is on the petitioner seeking to file objections *nunc pro tunc* to establish prejudice and mere contentions without evidentiary basis are insufficient to establish prejudice. The court also notes that the defendant is not precluded from filing another petition to modify, thereby supporting the conclusion that the petitioner was not prejudiced by the dismissal of the motion to file objections *nunc pro tunc*.

FAMILY LAW / SUPPORT / OBJECTIONS NUNC PRO TUNC / BREAKDOWN IN COURT'S MACHINERY

A court has the authority to permit the filing of objections *nunc pro tunc* where there has been a breakdown of the court's machinery. Where the court finds as a factual matter that the Domestic Relations office was open during its normal and customary business hours on the last day of the ten (10) day period, the petitioner's claim of a breakdown in the court's machinery will be denied.

Court filing offices need not remain open 24 hours per day and where a statute or rule requires filing on or before a given date, it is to be interpreted as that portion of the day comprising the ordinary and customary business hours of the filing office.

The inconsistent arguments of the attorney for the petitioner to the effect that 1) his runner arrived at the courthouse prior to the closing of the filing office but did not reach the filing office until it had closed for the day, or 2) that the filing office closed early, both being without evidentiary foundation, failed to establish a breakdown in the court's machinery which would justify the filing of exceptions *nunc pro tunc*.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA Docket No.: 9902957 PACSES Case No.: 047101643

Appearances: Mary Payton Jarvie, Esq., on behalf of Plaintiff
Dennis Williams, Esq. on behalf of Defendant
Thomas S. Kubinski, on behalf of Erie County Domestic Relations Support Office

OPINION

Domitrovich, J. September 28, 2004

This matter is currently before the Court on Defendant's Statement of Matters Complained of on Appeal, filed by and through Defendant's appellate counsel, Dennis Williams, Esquire, pursuant to Pa.R.A.P. 1925(b).

Defendant has raised a total of thirteen matters in his Concise Statement of Matters Complained of on Appeal and purports to incorporate by reference a four-page list of issues contained in Defendant's Motion for Reconsideration. This Lower Court notes that in *Education Resources Institute, Inc. v. Cole,* where Appellant had raised eighteen claims on appeal, the Superior Court referred to the well settled principle, that "when an appellant raises an extraordinary number of issues on appeal, as in this case, a presumption arises that there is no merit to them." *Education Resources Institute, Inc. v. Cole*, 827 A.2d 493, 501 (Pa. Super. Ct. 2003) (citing *Estate of Lakatosh*, 656 A.2d 1378, 1380 n.1 (Pa. Super. Ct. 1995)). Furthermore, "the caliber of appellate advocacy is measured by effectiveness, not loquacity." *United States v. Hart*, 693 F.2d 286, 287 n.l (3rd Cir. 1982). Here, counsel has raised thirteen issues in Defendant's 1925(b) Concise Statement of Matters Complained of on Appeal, and is quite loquacious in his apparent attempt to turn his Concise Statement into something that is anything but concise. Moreover, four of Defendant's claims are moot as this Court conducted an evidentiary hearing regarding Defendant's Motion for Reconsideration on September 17, 2004, at which, it is noted, defense counsel failed to appear.[1] Furthermore, three of Defendant's claims are waived pursuant to Pa. R.A.P. 302(a) and, therefore, are not cognizable on appeal since Defendant raised them for the first time on the same day he filed Notice of Appeal, or in the alternative, are meritless as Defendant has failed to present this Lower Court with any evidence whatsoever to support his claim that this

[1] Defendant's following claims are moot: (1) "the Court, in denying the Motion to Allow for the Filing of Exceptions *Nunc Pro Tunc* without a hearing abused its discretion;" (2) "the Court in summarily dismissing the matter without a hearing to determine whether or not the hearing officer had made specific error, was an abuse of discretion;" (3) "19.10.12(e) provides for 10 days rather than 10 business days, Defendant's counsel and/or his agents were at the Courthouse within 10 days, however, could not file said document because the office was closed; the Court in failing to conduct a hearing to determine those specific facts, and issue a ruling thereon, abused its discretion;" and (4) "it is an abuse of discretion to deny relief without hearing and/or comment"

Trial Court or the Erie County Domestic Relations Department arbitrarily follows or applies Pa.R.C.P. 1910.12(e).[2]

In light of the foregoing, this Trial Court will consolidate Defendant's thirteen matters presented in his Statement of Matters Complained of on Appeal into the following overarching issue, which encompasses all of Defendant's issues: whether this Trial Court erred in denying Defendant's Motion to Allow the Filing of Objections *Nunc Pro Tunc.*

The rather lengthy factual and procedural history of these parties' support case is as follows: Plaintiff and Defendant were married on February 14,1987. Two children were born of the marriage, Tara N. Miller, born December 28,1990, and Trey C. Miller, born February 16, 1994. Plaintiff and Defendant separated on August 7, 1999. Plaintiff filed her first Complaint for Support against Defendant on October 27, 1999. In separate Orders dated November 4, 1999, the Honorable Ernest DiSantis directed Plaintiff and Defendant to appear at a conference before a Domestic Relations officer on December 30, 1999. Upon Plaintiff's written request to postpone said hearing, on December 17, 1999, the Domestic Relations Office issued a Notice canceling the conference scheduled for December 30, 1999.

On February 14, 2000, Plaintiff's counsel sent the Domestic Relations Office a letter indicating Plaintiff wished to proceed forward with a support hearing concerning her original October 27, 1999 Complaint for Support. In separate Orders, each dated February 25, 2000, the Honorable Ernest DiSantis directed Plaintiff and Defendant to appear before a domestic relations support conference officer on April 27, 2000. Upon Plaintiff's request, the Honorable Ernest DiSantis signed an Order on March 27, 2000, rescheduling the April 27, 2000 conference to May 16, 2000.

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[2] Defendant waived the following claims as he effectively raised them for the first time on appeal. The first mention of these claims was in Defendant's Motion for Reconsideration, which was filed on the same day as Defendant's Notice of Appeal. By raising the claim for the first time on the same day Notice of Appeal was taken, this Trial Court was deprived of any opportunity to consider the claim prior to the appeal being taken. Furthermore, counsel could have advanced these claims at the September 17, 2004 hearing; however, he failed to even make an appearance. In the alternative, if the claims are not waived, the following claims lack merit as counsel failed to present any evidence in support thereof, despite adequate opportunities to do so: (1) "the Court's summarily dismissing the Petition to Allow for the Filing of Objections *Nunc Pro Tunc* pursuant to Rule 1910.12(e) was arbitrary and an abuse of discretion, in light of the fact that the Court itself allowed for the filing of Exceptions beyond 10 days rather than within the 10 days set forth in Rule 1910.12(e), thus establishing that the rule's application is arbitrary;" (2) "the Court abused its discretion in failing to allow the filing of Exceptions *Nunc Pro Tunc* in light of the fact that Erie County arbitrarily follows rule 1910.12(e) and in the instant case did not follow 1910.12(e) (allowing for the filing of Exceptions 11 days after the Order);" and (3) "it is an abuse of discretion to punish the Petitioner [Defendant] for failing to comply with a specific rule of procedure, yet, Erie County arbitrarily applies said Rule."

Prior to the conference hearing being held on May 5, 2000, Plaintiff requested by letter to no longer pursue her Complaint in Support of the parties' two minor children and spousal support. The Domestic Relations Section of the Common Pleas Court of Erie County recommended to the Court that Plaintiff's Complaint for Support, filed on October 27, 1999, be dismissed without prejudice. Thereupon, the Court accepted Plaintiff's request for withdrawal and cancelled the conference scheduled for May 16, 2000.

On July 23, 2001, Plaintiff filed her second Complaint in Support of the parties' two minor children and for spousal support against Defendant. In separate Orders, each dated July 31, 2001, the Honorable Ernest DiSantis directed the parties to appear at a support conference on September 18, 2001. On September 18, 2001, the Domestic Relations Office recommended as a Final Order: $1,176.14 for Plaintiff's monthly income; $3,750.70 for Defendant's monthly income; and $1,564.89 per month, effective July 20, 2001, for Defendant's monthly support payment for his two minor children and this spouse. Subsequently, the Court issued a Final Order incorporating said recommendations, and also indicating Defendant's arrearages were set at $3,069.78, and due in full IMMEDIATELY. (emphasis in original).

On January 16, 2002, Plaintiff filed a Petition for Emergency Special Relief, requesting the Court temporarily lift the Defendant's non-support lien in order to enable the parties to sell their marital real estate. Defendant was more than $3,000.00 in support arrearages at this time. In an Order filed on January 16, 2002, the Honorable William R. Cunningham directed that the transfer of the parties' real estate proceed without Defendant fulfilling the obligation of the child and spousal support lien, and also directed that the lien would be reinstated against Defendant after the January 18, 2002 closing on the marital real estate was finalized.

On April 10, 2003, Defendant filed a Petition for Modification of his Support Order dated September 18, 2001. Defendant had requested a review of said Support Order regarding the parties' minor children's summer daycare. On April 22, 2003, the Honorable Elizabeth Kelly filed Orders for earnings report, health insurance information and subpoenas for both Plaintiff and Defendant, requesting each party respectively supply the Court with information required by the earnings report and health insurance coverage report on or before May 1, 2003. On April 24, 2003, the Honorable Elizabeth Kelly directed each of the parties to appear at a support conference in the Domestic Relations Section on May 28, 2003. On June 18, 2003, the undersigned judge dismissed without prejudice Defendant's April 9, 2003 Petition to Modify Support since Defendant failed to provide proper documentation of his wages. No Exceptions or Appeal followed.

On October 6, 2003, the Honorable Elizabeth Kelly issued an Order of

Attachment of Unemployment Compensation Benefits, directing the Department of Labor and Industry, Bureau of Unemployment Compensation Benefits and Allowances to attach the lesser of $364.98 or 55% of the Unemployment Compensation benefits otherwise payable to Defendant. Furthermore, in an Order dated November 14, 2003 regarding Plaintiff's Petition for Contempt of Support Order, Judge Kelly directed that on or before November 24, 2003, Defendant would make the following payments: $399.00 to reimburse Plaintiff for one-half of the parties' 2002 summer day care expenses; $459.50 to reimburse Plaintiff for one-half of the parties' 2003 summer day care expenses; $287.60 for payment of the Grandview School After Care Program; $90.30 reimbursement for the July 2001-July 2002 uninsured medical expenses; $972.27 as reimbursement for the July 2002-July 2003 uninsured medical expenses; and $155.00 for payment of an orthodontist balance to be paid directly to the orthodontic provider's collection agency. Furthermore, Defendant was directed to pay $656.25 on or before January 13, 2004 to Mary Payton Jarvie, Esq. for payment of attorney fees, incurred by Plaintiff in preparation and presentation of her Petition for Contempt of Support Order. Finally, Plaintiff was directed to provide Defendant with documentation of the 2002 and 2003 summer day care services on or before December 15, 2003. No Exceptions or Appeal followed.

On May 27, 2004, Defendant filed the most recent Petition for Modification of the September 18, 2001 Support Order, in which he alleged he was entitled to a decrease in his support obligations because: (1) he no longer collected Unemployment Compensation Benefits; (2) he was unemployed and without income; and (3) he was seeking employment. Furthermore, Defendant requested that the Support Order no longer obligate him to pay spousal support since the parties planned to divorce.

On May 26, 2004, the Domestic Relations Office issued to the parties a Notice to Appear for a conference on June 29, 2004. Furthermore, on June 7, 2004, the Honorable Elizabeth Kelly directed each of the parties to appear on June 29, 2004 for Defendant's requested Modification of Support conference. According to the Summary of Trier of Fact, attached hereto as Exhibit A, on June 29, 2004, Plaintiff appeared at the support conference with Attorney Mary Payton Jarvie, and Defendant appeared *pro se.* Defendant argued that his support obligation should not be based on his earning capability while he was employed with the U.S. Department of Labor since he had been terminated from that position in August, 2003, and had been unable to obtain gainful employment since that time. Plaintiff argued that Defendant's support obligation should be based on his prior earning capability when he was employed with the U.S. Department of Labor based on the fact that Defendant had been *terminated* from that position.

Following the support conference, the Domestic Relations Section of

the Court of Common Pleas of Erie County recommended an Interim Order of Support, dated July 14, 2004, which stated, "based upon the Court's determination that the Payee's [Plaintiff's] monthly net income is $2,096.16, and the Payor's [Defendant's] monthly net income is $3,750.70, it is hereby ordered that the Payor [Defendant] pay to the Pennsylvania State Collection and Disbursement Unit $1,195.21 a month payable monthly...Arrears set at $12,665.50 as of July 14, 2004 are due in full IMMEDIATELY." (emphasis in original). The Domestic Relations Office also issued a Summary of Trier of Fact, dated July 15, 2004. Said Interim Order and Summary of Trier of Fact were attached to a Notice of Right to Request a Hearing, which specifically and clearly stated the parties had until **July 26, 2004** to request a hearing de novo before the Trial Court at which Objections to the Interim Order could be heard. Furthermore, on the reverse side of the Notice of Right to Request a Hearing was the paperwork required to request such a hearing, which included a checklist of possible Objections to the Interim Order. This paperwork also stated that the last date on which a party could demand a hearing was July 26, 2004. The Interim Order, Summary of Trier of Fact, and Notice of Right to Request a Hearing were all time-stamped in the Domestic Relations Office on July 16, 2004. Therefore, pursuant to Pa.R.C.P. 1910.12(e), the Order specifically allowed the parties ten days within which to file written Objections to the Interim Order.

On July 27, 2004, the Interim Order of Support issued by the Domestic Relations office became a final order of support, pursuant to Pa.R.C.P. 1910.12(g), since Exceptions had not been filed within the requisite ten (10) day period. On August 2, 2004, a Petition for Contempt was entered against Defendant because Defendant had failed to pay support and provide information in accordance with the July 14, 2004 Order. Furthermore, the Petition indicated Defendant's arrearages as of August 2, 2004 amounted to $13,744.81. Subsequently, on August 5, 2004, Plaintiff signed an Acknowledgment of Contempt Proceedings against Defendant.

On August 4, 2004, nine days after the filing deadline on which a party could file Exceptions to the Interim Support Order, Defendant filed a Motion to File Objections *Nunc Pro Tunc* with notification to opposing counsel, Attorney Jarvie, that he was seeking an Order granting said relief in Motion Court. On August 4, 2004, this Trial Court heard arguments and was available to hear any possible testimony in Motion Court regarding Defendant's Motion to File Objections *Nunc Pro Tunc.* At said hearing, Defendant's own counsel, Attorney Williams, argued his version of the events that transpired; however, Attorney Williams did not present testimony by his runner, nor did Attorney Williams provide proof that he appeared at the Support Office the next day. Attorney Williams indicated Defendant appeared at Attorney Dennis Williams' office on July 26, 2004,

the last day on which to file Exceptions, and indicated he wished to file Exceptions to the recommendations of the hearing officer. (N. T. 8/4/04 p. 3). Attorney Williams was not at his office at this time; however, Attorney Williams' secretary was able to discuss Defendant's matter with Williams over the phone. (N. T. 8/4/04 p. 3). Attorney Williams directed his secretary to complete the form and file it. (N. T. 8/4/04 p. 3). Attorney Williams' secretary gave the form to his runner in the office, and on the afternoon of July 26, 2004, his runner brought said form and other items that she was filing to the Courthouse. (N. T. 8/4/04 p. 3). Attorney Williams admitted that his runner arrived at the Courthouse before 4:30 pm, which is the close of the Courthouse's business day; however, his runner filed other matters in other offices prior to arriving at the Domestic Relations Office at an undisclosed time. (N. T. 8/4/04 p. 3-4). When his runner arrived at the Domestic Relations Support Office to file Defendant's form, the office had already closed for the day. (N. T. 8/4/04 p. 3). On the morning of July 27, 2004, Attorney Williams alleged he went to the Support Office to file Defendant's form; however, that office informed him that he was too late to file it, as the final date on which either party could request a hearing de novo was July 26, 2004. (N. T. 8/4/04 p. 3).

At this hearing, opposing counsel, Attorney Jarvie appeared on Plaintiff's behalf and argued, "The rules are in place for a purpose. . . I've been involved with this [case] for three to four years. This is a pattern that Mr. Miller does. He goes to a lawyer the day before or in the eleventh hour of filing. It enormously can harm my client. Not only does Mr. Miller owe me thousands in fees that he has failed to pay, he owes a thousand dollars of arrears that he has failed to pay. Judge Connelly has put him in jail twice already. Miraculously on his entry to jail he pays his support payment from wherever he gets it. He missed the time to file. He should have been in Mr. Williams' office even a day early when Mr. Williams was there. At this time I think Mr. Miller is too late." (N. T. 8/4/04 p. 4-5).

On August 4, 2004, this Lower Court issued an Order denying Defendant's Motion to File Objections *Nunc Pro Tunc*. On August 11, 2004, Defendant filed his Notice of Appeal from the aforementioned Order simultaneously with his Motion for Reconsideration. On August 11, 2004, this Trial Court issued an Order directing Defendant to file his Concise Statement of Matter Complained of on Appeal within fourteen (14) days, pursuant to Pa. R.A.P. 1925(b). On August 16, 2004, Defendant filed his Statement of Matters Complained of on Appeal, pursuant to Pa.R.A.P. 1925(b).

On September 13, 2004, at Attorney Williams' request, this Trial Court issued a Rule to Show Cause as to why Defendant's Motion for Reconsideration should not be granted, and scheduled a hearing for September 17, 2004 at 8:45 am, as Defendant had specifically requested another hearing in his Motion for Reconsideration. Said Order was sent

via first class mail to both Mary Payton Jarvie, Esq. and Dennis Williams, Esq. On September 17, 2004, this Trial Court held an evidentiary hearing regarding Defendant's Motion for Reconsideration. Mary Payton Jarvie, Esq. appeared on Plaintiff's behalf, and Defendant appeared without counsel. Upon the Court's inquiry as to the whereabouts of Dennis Williams, Esq., Defendant indicated he had received the phone call from Attorney Dennis Williams' office on September 15, 2004, at which time Defendant was informed that a hearing had been scheduled for September 17, 2004, and that Defendant should be present. (N.T. 9/17/04 p. 4). Furthermore, Defendant stated, "It's my understanding he [Attorney Williams] was supposed to be here." (N. T. 9/17/04 p. 4). This Trial Court was surprised by Attorney Williams' absence from the hearing as he had specifically requested an evidentiary hearing in his Motion to Reconsider; nevertheless, this Court was constrained to conduct the hearing as scheduled without Attorney Williams' presence. Attorney Williams provided the Court with no request for a continuance, and has never explained to this Trial Court his absence in this Court proceeding where he is counsel of record. He also failed to obtain substitute counsel to replace him if he was unavailable to appear.

At said Motion for Reconsideration hearing, Mark Causgrove, the Director of Domestic Relations for the Court of Common Pleas of Erie County, stated, that over the past eight years the Domestic Relations Office has maintained regular business hours of 8:00 am to 4:30 pm every day that the Courthouse is open. (N. T. 9/17/04 p. 5-6). Mr. Causgrove stated that the Domestic Relations Office never closes its front financial payment window before 4:30 pm, which is where runners are accustomed to filing all documents. (N. T. 9/17/04 p. 6). Furthermore, Mr. Causgrove indicated that he performed an independent investigation of this matter, which included a discussion with Stephanie Young, the Domestic Relations employee who was present at the Domestic Relations' front payment window on July 26, 2004. (N. T. 9/17/04 p. 6). Mr. Causgrove confirmed that the payment window was in fact open until 4:30 pm on July 26, 2004. (N. T. 9/17/04 p. 6). Following the evidentiary hearing, on September 17, 2004, this Trial Court dismissed Defendant's Motion for Reconsideration, as defense counsel failed to avail himself of the opportunity to present any persuasive, credible evidence in support of his claim that this Lower Court's order should be vacated.

Defendant's only issue on appeal is whether this Trial Court erred in denying Defendant's Motion to Allow the Filing of Objections *Nunc Pro Tunc.*

In *Wellons v. Metropolitan Life Insurance Company,* a verdict was entered in favor of the plaintiff, and the defendant failed to file Exceptions to the verdict within ten (10) days, as required under the applicable statute. *Wellons v. Metropolitan Life Insurance Company,* 444 A.2d 173,

174-75 (Pa. Super. Ct. 1982). Moreover, counsel for the defendant requested leave to file Exceptions *Nunc Pro Tunc* four (4) days after the relevant ten (10) day period in which to file Exceptions had elapsed *Id.* at 175. The lower court denied defendant's request. The Superior Court held that the lower court had not committed an abuse of discretion in denying defendant's request to file Exceptions *Nunc Pro Tunc*, as the record clearly demonstrated that the only reason that Exceptions were not timely filed was because of counsel's inadvertence. *Id.* at 175-76.

> The only reason that Exceptions were not timely filed in the instant case was the inadvertence of counsel who represented the Appellants. . .Appellants offer no grounds other than neglect for the failure to file timely Exceptions, and merely argue that they will be greatly prejudiced in these circumstances if they are not permitted to proceed *Nunc Pro Tunc.* It is well established that contentions of prejudice are insufficient to support the granting of the relief sought by the Appellants in the circumstances of the instant case. *Id.* at 175.

Furthermore, in a factually similar case, the Superior Court stated,

> The critical issue is appellant's failure to file Exceptions to the Court's verdict. In requesting that she be allowed to file Exceptions *Nunc Pro Tunc*, appellant has not demonstrated any reasons why her previous failure to file Exceptions should be excused. . .Based upon the present record, we agree with the lower court that the failure to file timely Exceptions or to move to file late Exceptions must be attributed to mere inadvertence, which is not a sufficient excuse.

Springs Farms, Inc. v. King, 409 A.2d 1363, 1364 (Pa. Super Ct. 1979). "If inadvertence of counsel were a valid reason for disregarding the time limitation rules of our Supreme Court, then they might as well not have any rules at all." *E.J. McAleer & Co., Inc. v. Iceland Products, Inc.* 381 A.2d 441, 444 (Pa. 1977). Furthermore, "where a statute fixes the time within which an act must be done...courts have no power to extend it, or to allow the act to be done at a later day, as a matter of indulgence." *Overmiller v. D.E. Horn*, 159 A.2d 245, 247 (Pa. Super. Ct. 1960).

In the instant case, counsel petitioned this Lower Court to file Objections *Nunc Pro Tunc* nine days after the relevant ten day filing period pursuant to Pa.R.C.P. 1910.12(e) and (f). Furthermore, Defendant's argument in his Statement of Matters Complained of on Appeal that "Petitioner's counsel and/or his agents had arrived at the Courthouse while it was open before the end of the business day, but could not file said documents because the support office was closed," now suggests two different reasons purporting to explain the untimely filing of Exceptions: first, that the Domestic Relations Support Office allegedly closed early on July 26, 2004; or second, that counsel and/or his runner acted carelessly and missed the deadline for filing.

Defendant's first explanation for his failure to file Exceptions in a timely manner is meritless. At the hearing before this Trial Court on September 17, 2004, it was established through the credible testimony of Mark Causgrove, the Director of Domestic Relations for the Court of Common Pleas of Erie County, that the Domestic Relations Office did not close early on July 26, 2004. Furthermore, Defendant has offered no evidence whatsoever to contradict this testimony. Therefore, Defendant cannot prevail on a claim that his Exceptions were not timely filed because of an error on the part of the Domestic Relations Office.

Furthermore, Defendant's second explanation for his failure to file Exceptions in a timely manner is also meritless. Counsel or counsel's runner failed to make a priority of the filing of Defendant's Exceptions on the last day available for filing. Counsel or counsel's runner opted to make priorities of other matters and filed other documents at the Courthouse before trying to file Defendant's Exceptions. Furthermore, at the August 4, 2004 hearing, Attorney Williams specifically stated, "He [Defendant] didn't miss the time [to file], I did." (N. T. 8/4/04 p. 5). Attorney Williams not only explicitly admitted that the filing was untimely, but also admitted that it was entirely his own fault that Objections were not timely filed. Attorney Williams has raised no plausible reason for his failure to file timely aside from his own carelessness. As stated above, it was established that the Domestic Relations Office was open and available to accept any filings. Therefore, counsel's inadvertence remains as the only reason for which Defendant's Exceptions were untimely filed, which, according to the Pennsylvania Superior Court, is not an excuse sufficient to justify the filing of Objections *Nunc Pro Tunc. Wellons v. Metropolitan Life Insurance Company,* 444 A.2d 173, 175 (Pa. Super. Ct. 1982); *Springs Farms, Inc. v. King,* 409 A.2d 1363,1364 (Pa. Super. Ct. 1979).

Furthermore, Defendant claimed in his Statement of Matters Complained of on Appeal, "the Court in summarily denying the Petition to Allow for the Filing of Exceptions *Nunc Pro Tunc,* without first establishing prejudice to the Plaintiff or Defendant and/or harm to the Plaintiff or Defendant, was an abuse of discretion." Initially, this Lower Court did not summarily deny Defendant's Petition; rather, this Lower Court heard arguments in Motion Court on August 4, 2004; this Lower Court held an evidentiary hearing on September 17, 2004 to allow the parties to expand on their arguments; and this Lower Court thoroughly reviewed the record and all arguments and testimony in making its decision to deny Defendant's Petition. Moreover, it is the Defendant's obligation to advance reasons why this Court should permit this untimely filing; this Trial Court has no burden of proof to establish that prejudice existed, and this Trial Court certainly cannot infer that prejudice existed without any proof thereof. Defense counsel had multiple opportunities to

present to this Court that his client would be prejudiced by a decision to deny his Motion to file *Nunc Pro Tunc;* however, Attorney Williams never did so. Rather, counsel merely made a blanket assertion of prejudice in Defendant's Statement of Matters Complained of on Appeal. At the August 4, 2004 hearing, Defendant had an opportunity to present reasons in support of his mere allegations of prejudice, to justify the Court's granting Defendant's Motion to File *Nunc Pro Tunc;* however, Defendant failed to do so. In his Motion for Reconsideration, Defendant had the opportunity to articulate reasons in support of his mere allegations of prejudice, to justify the Court's granting Defendant's Motion to File *Nunc Pro Tunc;* however, Defendant again failed to do so. In his Statement of Matters Complained of on Appeal, Defendant had the opportunity to articulate reasons in support of his mere allegations of prejudice, to justify the Court's granting Defendant's Motion to File *Nunc Pro Tunc;* however, Defendant again failed to do so. Finally, at the September 17, 2004 hearing, Defendant had the opportunity to present reasons in support of his mere allegations of prejudice, to justify the Court's granting Defendant's Motion to File *Nunc Pro Tunc;* however, Attorney Williams failed to even make an appearance at said hearing. Mere contentions of prejudice are insufficient to support the allegation that Defendant should be permitted to file *Nunc Pro Tunc*. *Wellons v. Metropolitan Life Insurance Company*, 444 A.2d 173, 175 (Pa. Super. Ct. 1982). In requesting that Defendant be allowed to file Objections *Nunc Pro Tunc*, counsel has failed to offer any specific claims of prejudice, which might persuade this Court to excuse Defendant's failure to file timely Exceptions. As this Lower Court has no burden of proof to establish that prejudice would result from its decision to deny Defendant's petition, and as this Lower Court cannot simply infer that prejudice existed, Defendant's claim fails.

Finally, this Lower Court notes Defendant is not precluded from re-filing a new Petition to Modify the September 18, 2001 Support Order, based on a change of circumstances. As of the date of this Opinion, Defendant had not filed a new Petition. The fact that Defendant could file a new Petition to Modify the September 18, 2001 Support Order lends support to the position that Defendant was not prejudiced by this Lower Court's dismissal of his Motion to File Objections *Nunc Pro Tunc*.

Furthermore, Defendant claimed in his Statement of Matters Complained of on Appeal, "the Court has great latitude in effecting justice, and to summarily dismiss Petitioner's [Defendant's] Petition to Allow for the Filing of Exceptions *Nunc Pro Tunc*, without first attempting to effectuate justice is an abuse of discretion." Initially, it is noted that this Lower Court did not summarily dismiss Defendant's Petition. To the contrary, this Trial Court provided Defendant due process by hearing Defendant's Motion to Allow the Filing of Objections *Nunc Pro Tunc*

and thoroughly considered Defendant's Petition prior to denying it. This Trial Court, at Defendant's counsel's request, also held another hearing, an evidentiary hearing, on September 17, 2004, in order to establish facts regarding the validity of Defendant's claims. The argument raised by Attorney Williams at the August 4, 2004 hearing, which is recorded in the transcript, establishes that counsel's untimely filing of Defendant's Exceptions was due to his own inadvertence. Counsel has presented no argument to otherwise explain his untimely filing; counsel has presented no argument that might justify permitting the filing of Exceptions *Nunc Pro Tunc;* and no breakdown exists in the Court's machinery. Therefore, this Trial Court had significant grounds on which to deny Defendant's Petition to File *Nunc Pro Tunc,* and to dismiss Defendant's Motion for Reconsideration.

Moreover, inadvertence of counsel is not a valid reason for disregarding the time limitation set forth in Pa.R.C.P. 1910.12(e) and (f). If inadvertence of counsel was an acceptable reason for disregarding a statutory time bar for filing, then there might as well not be a rule stating time limitations for filing. *E.J. McAleer & Co., Inc. v. Iceland Products, Inc.* 381 A.2d 441, 444 (Pa. 1977). Pa.R.C.P. 1910.12(f) specifically states that Exceptions maybe filed within ten (10) days after the date of the hearing officer's report, and this court has no power to extend this deadline merely as a matter of indulgence.

The Pennsylvania Superior Court has permitted the filing of Exceptions *Nunc Pro Tunc,* pursuant to Pa.R.C.P. 1910.12(e), in instances where there has been a "breakdown of the court's *machinery." Fichthorn v. Fichthorn,* 533 A.2d 1388, 1389 n.l (Pa. Super. Ct. 1987). In *Fichthorn,* the Court stated,

> We note that the parties' Exceptions appear to have been untimely filed. Pa.R.C.P. 1910.12(e) states that Exceptions to the hearing officer's report must be filed within ten days after the conclusion of the hearing. Matters not covered by the Exceptions are deemed waived unless leave is granted to file Exceptions raising those matters. Instantly, the Recommendation was dated December 26, 1986; however, both parties did not file their Exceptions until January 7, 1987, 12 days later. Although normally we would consider the parties' issues on appeal to have been waived, we are mindful that the notice of the Recommendation which was sent to the parties stated that they had until January 9, 1987 to file Exceptions. This permitted Exceptions to be filed 14 days after the Recommendation. Since the parties obviously relied upon this erroneous representation, we shall excuse the tardiness inasmuch as it was due to the breakdown in the court's machinery. However, we strongly caution the Domestic Relations Office of Lancaster County that the time constraints promulgated in Rule 1910.12(e) must be strictly complied with in the future.

Id. at 1389, n.l.

Similarly, in *Everhardt v. Akerley*, the Pennsylvania Superior Court held that a party could file Exceptions *Nunc Pro Tunc* where the party's late filing of Exceptions was caused by reliance upon erroneous information provided in a letter from the Lebanon County Court of Common Pleas' Domestic Relations Office, indicating that Exceptions were due thirty (30) days from the date of the Order, rather than the requisite ten (10) day period, pursuant to Pa.R.C.P. 1910.12(e) and (f). *Everhardt v. Akerley*, 665 A.2d 1283, 1285-86 (Pa. Super. Ct. 1995).

Unlike the factual scenarios present in *Fichthorn* and *Everhardt*, this Trial Court found there was no "breakdown in the court's machinery" in the instant case justifying the filing of Exceptions *Nunc Pro Tunc.* As previously stated, at the hearing before this Trial Court on September 17, 2004, Mark Causgrove, the Director of Domestic Relations for the Court of Common Pleas of Erie County, testified credibly, that over the past eight years the Domestic Relations Office has maintained regular business hours of 8:00 am to 4:30 pm every day that the Courthouse is open. (N. T. 9/17/04 p. 5-6). Mr. Causgrove stated that the Domestic Relations Office never closes its front financial payment window before 4:30 pm, which is where runners are accustomed to filing all documents. (N. T. 9/17/04 p. 6). Furthermore, Mr. Causgrove indicated based on his independent investigation of this matter, which included a discussion with Stephanie Young, the Domestic Relations employee who was present at the Domestic Relations' front payment window on July 26, 2004, he could confirm that the payment window was in fact open until 4:30 pm on July 26, 2004. (N.T. 9/17/04 p. 6).

In the instant case, the facts simply fail to demonstrate that a breakdown in the Court's machinery occurred. If, for example, facts existed indicating that the Domestic Relations office closed early on July 26, 2004 or that the Courthouse was closed on July 26, 2004, then those facts would cause this Court to find that a breakdown in the Court's machinery or clerical error occurred, thus justifying the untimely filing of Defendant's Exceptions. However, those facts simply do not exist in the instant case. To the contrary, facts exist indicating that the Courthouse was open on July 26, 2004, and that the Domestic Relations office did not close before 4:30 pm on July 26, 2004. The only reason that Defendant's Objections were untimely filed was because of counsel's carelessness, as Attorney Williams specifically claimed at the August 4, 2004 hearing when he stated, "He [Defendant] didn't miss the time [to file], I did." (N.T. 8/4/04 p. 5). If counsel and/or his agent had given more attention to the fact that July 26, 2004 was the last day on which Defendant's Objections could be filed, and prioritized this filing, then Defendant's Objections could have been filed in a timely manner, as the Domestic Relations front window was open and available to accept all filings until 4:30 pm on July 26, 2004. Furthermore, Attorney Williams failed to present any

testimony, even from his own runner, for the Court to hear first-hand the events that occurred on the final day for filing. Therefore, no breakdown in the Court's machinery occurred to justify permitting the filing of Defendant's Exceptions *Nunc Pro Tunc.*

Furthermore, Defendant states in his Statement of Matters Complained of on Appeal, that Pa.R.C.P. "1910.12(e) provides for 10 days rather than 10 business days; Defendant's counsel and/or his agents were at the Courthouse within 10 days, however, could not file said document because the office was closed." Defendant's claim is ambiguous and fails to articulate a clear issue. His statement could mean either one of two things: first, that Defendant is claiming that he complied with Pa.R.C.P. 1910.12(e) or (f) by being available to file his Exceptions on the tenth day, although not on the tenth day during the Courthouse's regular business hours; or second, that Defendant is claiming that he should be permitted to file Exceptions *Nunc Pro Tunc* since he was available to file them later than the business hours at the Domestic Relations Office, but still within the twenty-four hour final day for filing.

Defendant's possible first claim is easily dismissed, as Pa.RC.P. 1910.12(f) clearly states, "within ten days after the date of the report by the hearing officer, any party may **file** exceptions to the report." (emphasis added). The Rule does not merely require a party to be available or ready to file Exceptions; the Rule requires a party to in fact file Exceptions within the requisite time period. As Defendant failed to actually file Exceptions within ten days, this issue fails.

Defendant's possible second claim is also easily dismissed. Initially, this Court notes that it would be absurd to interpret every statute containing a time requirement for filing documents to mean that documents could be filed up to the twenty-fourth hour of the final day of filing, irregardless of regular business hours. Such an interpretation would necessarily require Courthouses to remain open for filing twenty-four hours per day, which is simply not the case in Erie County. Furthermore, another Pennsylvania Common Pleas Court addressed this issue, stating, "we are of the opinion that the word 'day' as understood in the statute, which requires filing on or before a given date, means that portion of the calendar day which comprises the ordinary and customary business hours of the office in question. *Glinsky Appeal,* 15 Pa. D. & C.2d 238; (1957). This Lower Court agrees with the Common Pleas Court of Lackawanna County that the word "day" in Pa.R.C.P. 1910.12(e) and (f) must be interpreted to mean the portion of the calendar day comprising the ordinary and customary business hours of the Domestic Relations office. The record demonstrates that on July 26, 2004, the Domestic Relations office was open during its ordinary and customary business hours: 8:00 am to 4:30 pm. Therefore, this issue also fails.

Moreover, Defendant has failed to present any legally cognizable

reason for the failure to comply with Pa.R.C.P. 1910.12(f). Therefore, this Lower Court did not commit reversible error by denying Defendant's request that he be permitted to file Exceptions *Nunc Pro Tunc*.

In conclusion, this Lower Court notes that Attorney Williams has failed to substantiate and corroborate on the record, the facts which he alleged transpired on July 26, 2004 and shortly thereafter. Initially, Attorney Williams' claim that he appeared at the Domestic Relations Office on the morning of July 27, 2004, remains unsubstantiated and uncorroborated. Attorney Williams did not even obtain a time-stamped document from the Office of Domestic Relations validating this claim, nor did he obtain a written statement from said Office indicating that he was there. Furthermore, Attorney Williams offered no testimony from an employee of said Office to confirm his claim. Finally, instead of immediately petitioning the Court to file Objections *Nunc Pro Tunc* following the Support Offices' alleged rejection of the Objections on July 27, 2004, Attorney Williams waited nine days to do so. Furthermore, Attorney Williams notified opposing counsel he was seeking an Order permitting the late filing of Defendant's Exceptions; however, he did not request a Rule to Show Cause at that time. He opted instead to argue his case in Motion Court without any supporting testimony. At this August 4, 2004 hearing, Attorney Williams argued one explanation for his failure to file timely Exceptions: that his runner failed to appear at the Domestic Relations Office on time. Attorney Williams presented no witnesses, such as his runner, to validate his argument. However, for the first time, in his Motion for Reconsideration, he suggested another explanation: the Court's offices had closed early on July 26, 2004. The Court gave Attorney Williams the benefit of the doubt and issued a Rule to Show Cause hearing, which he requested for the first time in his Motion for Reconsideration. Everyone appeared at this hearing except for Attorney Williams. Even the Defendant, Attorney Williams' client, appeared at said hearing. As previously stated, Attorney Williams has never explained to this Trial Court his absence in a Court proceeding where he remains counsel of record. Attorney Williams suggests, on one hand, that his runner failed to appear at the Domestic Relations Office on time on July 26, 2004, and he also suggests, on the other hand, that the Domestic Relations Office closed early on July 26, 2004. His change in explanation from the runner's malfeasance of prioritizing this filing before the closing of business for the entire Courthouse at 4:30 pm to the alternate explanation of the Domestic Relations Office closing early is inconsistent. More importantly, Attorney Williams has failed to corroborate any of his arguments by presenting any evidence on the record in support thereof, despite ample opportunities to do so.

In light of the foregoing, all of Defendant's issues lack merit.

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

KATHY AND KENNETH SPAEDER, individually, and as the parents and natural guardians of KATIE LYNN SPAEDER

v.

JOSH WARREN, SHANE M. BRAENDEL, TONY BOOTS, MARK BROOKS, GREG BYERS, HENRY CARPENTER, BRENT DORMAN, CHRISTOPHER HALL, ZACK HALL, JOSH MALLETTE, JUSTIN MASON, JAMES R. FLOWERS, WILLIAM NASH, JEREMY NASH, LINDSEY WALKER, CHARLIE DICKS, JONATHAN J. CLARK, NICK JOHNSON, CHRIS LYONS, FRANCE SCA SCAVELLA, MICHELLE HALL MCKEEL and STEVEN MCKEEL

MOTION FOR SUMMARY JUDGMENT

Summary judgment may be granted only in those cases in which there are no genuine issues of material fact and the moving party is entitled to relief as a matter of law.

Where the non-moving party bears the burden of proof on an issue, that party may not merely rely on its pleading in order to survive summary judgment.

A non-moving party's failure to adduce sufficient evidence on an issue essential to the case on which it bears the burden of proof establishes the moving party's entitlement to judgment as a matter of law.

The Court must view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

It is the plaintiff's burden in response to a motion for summary judgment to come forward with sufficient evidence to support his claim.

NEGLIGENCE

In order to state a claim for negligence, a plaintiff must establish that (1) the defendant owed a legally recognized duty of care to the plaintiff; (2) the defendant breached that duty; (3) there was a causal relationship between the defendant's breach of duty and the harm to the plaintiff; and (4) the plaintiff suffered damage or actual loss.

Mere knowledge of a dangerous situation, even by one who has the ability to intervene, is not sufficient to create a duty to act.

A narrow exception to the non-duty rule exists in instances involving a special relationship, such as with common carriers, homeowners, or personal care homes, wherein a duty to exercise reasonable care under the circumstances will be imposed for risks arising out of that relationship.

Absent a special relationship, an individual has a general duty to avoid exposing others to reasonably foreseeable risk of injury.

Knowledge of another's injury does not impose a duty to render assistance to the injured person.

Under Pennsylvania law, there is no duty to speak without prior existence of another duty, i.e. the duty to render assistance.

Negligently providing false information may lead to liability where another takes action due to reasonable reliance on the information which ultimately leads to harm.

Plaintiff failed to show that defendant had a duty of care where plaintiff and defendant attended a party at which alcohol consumption and marijuana use allegedly led to plaintiff's fall through a sliding glass door rendering her quadriplegic.

Allegations that defendant concealed plaintiff in order to avoid discovery of plaintiff's fall were insufficient to impose a duty of care upon defendant.

Defendant's failure to inform his mother of plaintiff's fall insufficient to impose liability on defendant.

Defendant did not have a duty to correct friend's statement to friend's mother and inform her of plaintiff's fall.

NEGLIGENCE/SUFFICIENCY OF THE EVIDENCE

__While questions of negligence and causation must be left to the jury, the sufficiency of the evidence is within the trial court's discretion.

Evidence was insufficient to infer that Defendant participated in moving plaintiff after she fell to avoid her discovery.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11836-2002

OPINION

Bozza, John A., J.

This matter is currently before the Court on the 1925(b) Statement of Matters Complained of on Appeal filed by Plaintiffs, Kathy and Kenneth Spaeder, individually, and as the parents and natural guardians of Katie Lynn Spaeder. The case stems from a personal injury action filed by the plaintiffs for injuries sustained by Ms. Spaeder when she fell out of a tree house while attending a birthday party at the home of Defendants, Michelle Hall McKeel and Steven McKeel on October 6, 2001. The plaintiffs filed suit naming the McKeel's and a number of children attending the party. Upon completion of discovery, Defendant Shane Braendel filed a Motion for Summary Judgment, asserting that the plaintiffs failed to demonstrate that there was a legally recognized duty on the part of Mr. Braendel.[1] Prior to argument on the motion, the plaintiffs filed a Motion to end Complaint to include additional allegations regarding Mr. Braendel. A hearing on the motions was conducted on April 28, 2004. On June 16, 2004, after reviewing the respective briefs, the Court granted the plaintiffs' Motion to Amend Complaint and also granted the defendent's Motion for Summary Judgment. On September 2,

[1] While a number of other defendants filed similar motions, the plaintiffs reached settlements with these defendants prior to the scheduled hearing.

2004, the plaintiffs filed the instant appeal.

In their 1925(b) statement, the plaintiffs assert "...there are issues of fact as to the existence of a duty in a breach thereof by Defendant Shane Braendel."[2] (l925(b) Statement, p.4). In support of their position the plaintiffs point to the following questions: (1) whether Mr. Braendel was part of a group surrounding Ms. Spaeder after the fall "in order to hide her from sight"; (2) whether Mr. Braendel "attempt[ed] to conceal Ms. Spaeder's presence when Ms. McKeel emerge (sic) from the house"; (3) whether Shane Braendel was aware that Ms. Spaeder had been injured and/or of the extent of her injuries; and (4) whether Mr. Braendel was involved in the marijuana smoking which purportedly led to the opening of the sliding door. *Id.* at 5. The plaintiffs argue that the resolution of these issues is necessary to a determination of Mr. Braendel's liability and therefore must be resolved by a jury. For the reasons set forth below this Court concluded that the plaintiffs' position was incorrect because they failed to establish that Mr. Braendel owed a duty to Ms. Spaeder, and even if a duty had existed plaintiffs failed to present sufficient evidence to prove that it was breached. In reaching this conclusion the Court resolved all material factual disputes in favor of the plaintiffs.

Summary judgment may be granted only in those cases in which there are no genuine issues of material fact and the moving party is entitled to relief as a matter of law. *Harleysville Insurance Cos. v. Aetna Cas. & Sur. Ins. Co.*, 795 A.2d 383 (Pa. 2002). Where the non-moving party bears the burden of proof on an issue that party may not merely rely on its pleadings in order to survive summary judgment. *Murphy v. Duquesne Univ. of the Holy Ghost,* 565 Pa. 571, 777 A.2d 418 (2001). A non-moving party's failure to adduce sufficient evidence on an issue essential to the case on which it bears the burden of proof establishes the moving party's entitlement to judgment as a matter of law. *Young v. Pennsylvania Department of Transportation,* 560 Pa. 373 744 A.2d 1276, 1276 (2000). The Court must view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Pennsylvania State University v. County of Centre*, 532 P 142, 615 A.2d 303 (1992).

The facts of the case may be briefly summarized as follows. On October 6, 2001, the McKeels hosted a joint birthday party for Mrs.

[2] Plaintiffs, relying primarily on the Restatement (Second) of Torts, assert eight possible sources of duty including (1) negligent misrepresentation involving increased risk of harm; (2) duty to act when prior conduct is found to be dangerous; (3) duty to aid another harmed by actor's conduct; (4) negligent performance of undertaking to render services; (5) duty of one who takes charge of another who is helpless; (6) intentionally preventing assistance; (7) negligently preventing assistance; and a common law duty that arises from foreseeable harm. (1925(b) Statement, p.4-5).

McKeel's sons, Defendants Chris and Zack Hall. The other named defendants attended the party, which began in the early evening and lasted late into the night with a number of kids spending the night at the McKeel home. During the evening, the kids spent time in a two-story tree house in the backyard, where they drank alcohol and smoked marijuana. At an unknown point in the evening, a sliding glass door on the second floor of the tree house was opened and was obscured by a blind covering the door. The door was opened to permit marijuana smoke to exit the room, and the blind was dropped to conceal the illegal activity from view. Ms. Spaeder arrived at the party sometime after 10:00 PM, and at some later point she came up to the second floor of the tree house, stepped backwards toward the open doorway, and fell to the ground below. A group of kids gathered around her, and she was subsequently moved at least two times before eventually being taken into the McKeel house.

The defendant was present in a group of young people who had gathered around Ms. Spaeder when she was on the ground. Mr. and Mrs. McKeel were not informed of the accident until the next morning, to avoid punishment for underage drinking and marijuana smoking. At some point after the plaintiff fell Mrs. McKeel emerged from the back door of the house and asked what was going on. Her son Chris made a comment to the effect that they were just talking about football stories. Although the evidence was very limited, it has been assumed for purposes of summary judgment that Mr. Braendel was present during this exchange. It has also been assumed that Mr. Braendel was in the tree house either smoking marijuana or with a group that was doing so sometime between 6:00pm and 7:00pm. Mr. Braendel was aware that Ms. Spaeder was injured and believed that she might have had a broken leg. At some point after the fall the defendant called his mother for a ride home, telling her he was uncomfortable with the drinking that was going on. After Mr. Braendel left, the remaining kids moved the plaintiff in order to conceal her condition. Tragically, as a result of her fall Ms. Spaeder suffered serious injuries and is now a quadriplegic.

In order to state a claim for negligence, a plaintiff must establish that: (1) the defendant owed a legally recognized duty of care to the plaintiff; (2) the defendant breached that duty; (3) there was a causal relationship between the defendant's breach and the harm to the plaintiff; and (4) the plaintiff suffered damage or actual loss. *Ney v. Axelrod*, 1999 Pa. Super. 8, 723 A.2d 719, 721 (1999). The fact that an accident occurred and that one knows about it does not, in and of itself, entitle the plaintiff to a verdict. Rather, the plaintiff must also show that the defendant owed some duty that was breached. *Id*. In *Clayton v. McCullough* the Superior Court noted:

> Although each person may be said to have a relationship with the world at large that creates a duty to act where his own conduct places

> others in peril, Anglo-American common law has for centuries accepted the fundamental premise that mere knowledge of a dangerous situation, even by one who has the ability to intervene, is not sufficient to create a duty to act.

448 Pa. Super. 126, 130, 670 A.2d 710, 712 (1996) *quoting Elbasher v. Simco Sales Service of Pennsylvania*, 441 Pa. Super 397, 657 A.2d 983, 984-85 (1995); *See also* Restatement (Second) of Torts §314. This is true regardless of the severity of the injury or the ease of providing assistance. Restatement (Second) of Torts §314, Comment (c). A narrow exception to the no-duty rule exists in instances involving a special relationship, such as with common carriers, homeowners, or personal care homes, wherein a duty to exercise reasonable care under the circumstances will be imposed for risks arising out of that relationship. *See generally Feeney v. Disston Manor Pers. Care Home Inc.*, 2004 Pa. Super 114; Restatement (Second) of Torts §314(A). As such,

> [w]hen considering the question of duty, it is necessary to determine whether a defendant is under any obligation for the benefit of the particular plaintiff and, unless there is a duty upon the defendant in favor of the plaintiff which has been breach, there can be no cause of action based upon negligence.

J.E.J. v. Tri-County Big Brothers/Big Sisters, 1997 Pa. Super LEXIS 800, **5, 692 A.2d 582, 584 (1997) (citations omitted). Therefore, absent a special relationship all that remains is a general duty to avoid exposing others to a reasonably foreseeable risk of injury. *Schmoyer by Schmoyer v. Mexico Forge*, 37 Pa. Super. 159, 165, 649 A.2d 705, 708 (1994). While questions of negligence and causation must be left to the jury, the sufficiency of the evidence is within the trial court's discretion. *Id.* at 163-64, 707.

Initially, Plaintiffs assert that Mr. Braendel was aware of the severity of Ms. Spaeder's injuries and failed to render assistance to her. The record does not contain evidence from which it could be reasonably concluded that the defendant was aware of the extent of the plaintiff's injuries. It only reveals that the defendant believed that she had a broken leg. Regardless of the extent of one's knowledge or belief, simply knowing that a person has suffered an injury does not impose a duty to render assistance. See *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959); Restatement (Second) of Torts §314. Furthermore, it is apparent from the record that there was no special relationship between Ms. Spaeder and Mr. Breandel that would trigger an exception to the no-duty rule. While there are limited circumstances where liability attaches to one who, without a duty to do so, undertakes to render aid to another, there was absolutely no evidence that Mr. Braendel provided any assistance to the plaintiff.[3]

Therefore, the plaintiffs have failed to demonstrate under any of these potentially applicable theories that Mr. Braendel was under a legal duty to Ms. Spaeder.

Not withstanding the absence of a duty to render aid, it is the plaintiffs' position that the defendant concealed Ms. Spaeder's condition from the homeowners and thus increased the risk of harm to her. In support of their position that the issue of concealment should be presented to a jury, the plaintiffs can point to only three pieces of evidence: the fact that Mr. Braendel was standing with the group that had gathered around Ms. Spaeder when she was on the ground, the fact that he was present when Chris Hall told his mother that they were just telling football stories, and the fact that he didn't tell his mother during their phone conversation that the plaintiff had been injured, specifically, it appears that plaintiffs contend that Mr. Braendel should have intervened and corrected or further explained Chris's statement to his mother. However, pursuant to Pennsylvania law there is no duty to speak without the prior existence of another duty, i.e. the duty to render assistance. In *English v. Lehigh County Authority*, the Superior Court recognized that pursuant to the Restatement (Second) of Torts § 311, negligently providing false information to another can lead to liability where another takes action due to reasonable reliance upon the information that ultimately results in harm. 286 Pa. Super 312, 335, 428 A.2d 1343, 1356 (1981). The *English* Court emphasized that such liability "is predicated on *the transmission of false information* ... [and does not apply to] one who negligently failed to inform another." *Id.* at 1356-1367 (citations omitted). Assuming Mr. Braendel was present at the time Chris's statement was made, Mr. Braendel did not provide the false information, nor did he have a duty to correct another's misstatement.

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[3] The Restatement Second of Torts recites the circumstances under which the "Good Samaritan" doctrine is applicable:

> One who undertakes gratuitously or for consideration, to render services to another which he should recognize as necesary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increased the risk of harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts §323. Additionally, Restatement (Second) of Torts § 324 states:

> One who, being under no duty to do so, takes charge of another who is helpless to adequately aid or protect himself is subject to liability to the other for any bodily harm caused to him by (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge; (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other is a worse position than when the actor took charge of him.

Filter v. McCabe, 1999 Pa. Super 43, 733 A.2d 1274, 1277 (1999) (citations omitted).

There is insufficient evidence in the summary judgment record as a matter of law to support the plaintiffs' theory that Mr. Braendel actively concealed Ms. Spaeder's condition from the McKeels or anybody else. It is the plaintiffs' burden in response to a motion for summary judgment to come forward with sufficient evidence to support their claims. *Young v. Pennsylvania Department of Transportation*, 560 Pa. 373, 744 A.2d 1276 (2000). One of the contentions that the plaintiff would be required to prove at the time of trial is that Mr. Braendel actually concealed her condition. The fact that he was present for some undetermined period of time with a group of young people who were standing around Ms. Spaeder is insufficient to prove this contention. This conclusion does not change simply because Mr. Braendel did not report to his mother during a brief phone conversation that someone at the party may have broken her leg. There is no evidence that he discussed with anyone a plan to conceal her, or that he participated in any steps to do so. The record reveals that it was others who took affirmative action to hide her by covering her and moving her to avoid discovery. By the time those things occurred Mr. Braendel had gone home.

Finally, the plaintiffs allege that because there is an issue of fact as to whether or not Mr. Braendel participated in smoking marijuana, which they assert led to the door being opened, he could ultimately be held liable for causing the fall. The only evidence cited in support of the plaintiffs' allegation that Mr. Braendel was smoking marijuana is a statement made by Jonathan Clark that upon arriving at the party between 5:30pm and 6pm he went to the second floor of the tree house and was told by Shane that "they were smoking weed." (Clark Depo, p. 25-26). Mr. Clark stated that he did not see this take place, and he did not seek clarification from Mr. Braendel as to whether he had been smoking. Mr. Clark testified that the sliding glass door was closed at that time, and though he remained in the tree house for fifteen to thirty minutes he did not see or smell marijuana. *Id.* at 26. Furthermore, Ms. Spaeder did not arrive at the party until sometime between 10:00pm and 11:00pm.

The deposition testimony from Jonathan Clark indicates a possibility that Mr. Braendel could have been smoking marijuana early in the evening. It also indicates that the door was closed at that time. Therefore, assuming this allegation is true for purposes of ruling on the motion for summary judgment, the plaintiffs have failed to adduce sufficient evidence to establish a duty on his part, or a breach of that duty. There is no evidence that Mr. Braendel was aware at any time of a door being open, no evidence that he at any time opened the door, no evidence that he concealed the open door or that he was aware that it was hidden from general view, and no evidence that he was aware that Ms. Spaeder was anywhere near the door at any time during the evening. Simply being present at the location where an accident subsequently occurred five hours later is insufficient to give rise to

liability. *See Schmoyer by Schmoyer v. Mexico Forge,* 437 Pa. Super. 159, 165, 649 A.2d 705, 708 (1994) (noting that evidence indicating playmate was in close proximity when child fell off Spin Around, and may have been pushing Spin Around sometime before accident was insufficient to impose liability).

In this instant case, viewing all the evidence in the light most favorable to the plaintiff, the evidence of record was insufficient to establish any duty or breach of duty on the part of Mr. Braendel that could result in liability, and as such the Court properly granted his Motion for Summary Judgment. Because Pennsylvania law says with certainty that no recovery is possible under these facts the Order should be affirmed.

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