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

COURTS OF COMMON PLEAS

HONORABLE ELIZABETH K. KELLY ---------- President Judge
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HONORABLE MICHAEL E. DUNLAVEY ---------- Judge
HONORABLE JOHN J. TRUCILLA ---------- Judge
HONORABLE JOHN GARHART ---------- Judge

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TRUST OF HENRY ORTH HIRT, Settlor
Trust Under Agreement Restated December 22, 1980
With Respect to Susan Hirt Hagen
No. 100-1998
and
TRUST OF HENRY ORTH HIRT, Settlor
Trust Under Agreement Restated December 22,1980
With Respect to F. W. Hirt
No. 101-1998

TRUSTS

A direct competitor in insurance market is not the best selection for successor corporate trustee where corpus of trust was comprised of insurance company stock.

Trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.

The existence of a potential conflict of interest is sufficient to disqualify an entity or an individual from acting as a trustee.

Proposed successor corporate trustee's business in insurance market was in direct conflict with trust's corpus.

Trust agreement did not require corporate trustee to be publicly-held entity.

Size of proposed corporate trustee was not determinative in selection process where (1) proposed trustee's resources were irrelevant inasmuch as trust contained only one asset; (2) proposed trustee provided no continuity of management team; (3) company whose stock comprised trust corpus was considering entering banking industry, further providing a conflict of interest between it and proposed trustee; and (4) proposed corporate trustee would impose a guaranteed minimum fee of 1.3 million dollars in addition to a yearly base fee.

TRUSTS / UNDUE INFLUENCE

Separate banking relationship between proposed corporate trustee and insurance company could influence proposed trustee's ability to act independently with regard to trust's corpus.

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

OPINION

This Court has been called upon to name a corporate trustee for a trust created by H.O. Hirt in 1967. The relevant parties have identified three possible candidates. Extensive hearings have been held and voluminous documents filed in support of each candidate. After considerable deliberation, the Sentinel Trust Company is selected as the corporate trustee. This Opinion is written to explain the basis for Sentinel's selection.

THE CREATION OF THE H. O. HIRT TRUST

In January 1925, H.O. Hirt took a significant risk. He left a secure job with the Pennsylvania Indemnity Exchange to organize a new reciprocal insurance exchange along with his friend O. G. "Ollie" Crawford. The Erie officially began operating out of two rooms on the third floor of the Scott Building on April 20, 1925.[1] Due to the sales abilities of H. O. Hirt and Ollie Crawford, about thirty-one thousand dollars in working capital was raised. The two co-founders were each able to invest the sum of one thousand dollars. The remaining monies were from other local investors, mostly wholesale grocers and suppliers who knew H. O. Hirt.[2]

During the same time period, H. O. Hirt was also starting a family. Mr. Hirt was married in 1923 to Ruth Louise Peterson. On October 8, 1925, their union produced Frank William Hirt, who was named after his paternal grandfather. Ten years later, Susan Ruth Hirt was born.[3]

Hence, 1925 was a challenging year for H. O. Hirt. His wife of two years gave birth to their first child. According to H. O. Hirt, he went four months without any income, borrowed five thousand dollars to start the Erie Insurance Exchange, which when added to other debts, left him "$8,000.00 in the hole".[4]

Ollie Crawford worked as a Vice-President from 1925 until 1933, when he sold his interest in The Erie and retired to Florida.[5] Meanwhile, H. O. Hirt continued to be the engine that drove the Company. He served as Secretary and Manager (CEO) from 1925 until 1931. H. O. Hirt was President and Manager (CEO) of The Erie from 1931 until 1976, when he was succeeded by his son. He remained on the Board of Directors until 1981, when he was succeeded by his daughter. He continued as "Director Emeritus" until his death on June 19, 1982.[6] The Erie enjoys its present health and success due to the business acumen, charisma, compassion, loyalty and leadership of H. O. Hirt.

Since 1925, the Erie Indemnity Company has served as the attorney-in-fact for the Erie Insurance Exchange. The principal business of Erie Indemnity Company is the management of the Erie Insurance Exchange, a reciprocal insurance exchange.[7] The early focus of The Erie was the

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[1] At times the Erie Indemnity Company and the Erie Insurance Exchange will be collectively referred to as The Erie.

[2] This Court thoroughly enjoyed reading ***H. O. Hirt In His Own Words*, Second Edition, 1994**. This Opinion is replete with excerpts from the book. The facts from this paragraph are found on Page XVI. All refernces to this book hereinafter will be *In His Own Words*.

[3] Frank William Hirt is hereinafter referred to a F.W. Hirt and Susan Ruth Hirt is referred to by her married name of Susan Hagen.

[4] *In His Own Words* at Page 33.

[5] *In His Own Words* at Page 30.

[6] *In His Own Words* at Page XVI.

[7] It is called a reciprocal insurance exchange because policyholders are exchanging insurance contracts thereby creating a pool of assets to indemnify any policyholder through the attorney-in-fact.

automobile insurance business. Over the years, The Erie expanded into other lines of insurance, including property/casualty and life insurance.

The Erie has enjoyed strong and steady growth. It is now a Fortune 500 company and is ranked fourteenth in the United States for writing auto insurance and twenty-third in property/casualty insurance. The Erie currently does business in eleven states and the District of Columbia.[8] The Erie is one of the largest employers in Erie County and one of the region's best corporate citizens.

There are two forms of stock for the Erie Indemnity Company. Class A stock is non-voting and publicly traded on the NASDAQ. Class B stock is the voting stock. Over the course of his career, H. O. Hirt acquired 76.22 percent of the Class B stock of Erie Indemnity Company.

In 1967, H. O. Hirt created an inter vivos trust. Upon his death in 1982, the trust begat two testamentary trusts, one for each of his children. The corpus of each trust was an equal amount of Class A and Class B stock.

Each of the two testamentary trusts have similar terms. The trusts are administered by three co-equal trustees: two individual trustees and a corporate trustee. All trust decisions are made by a majority vote of the trustees.[9] The corporate trustee is not a beneficiary of the trusts. The original corporate trustee was Mellon Bank N.A. The individual trustees have always been F. W. Hirt and Susan Hagen.

PROCEDURAL HISTORY

The present selection of a corporate trustee is the culmination of a series of events which began in 1998 when Susan Hagen initiated legal action to remove Mellon Bank as the corporate trustee. Hagen contended that Mellon Bank's active participation in the insurance field created a conflict of interest. Before the resolution of the conflict issue, Mellon Bank resigned.

Thereafter, Bankers Trust Company of New York (Bankers Trust) was selected as Mellon's successor. Bankers Trust soon found itself in a similar position as Mellon Bank. Bankers Trust was acquired by Deutsche Bank. Because of the insurance operations of Deutsche Bank, Bankers Trust tendered its resignation as a trustee, which was accepted effective upon the appointment of a successor trustee.

Thereafter, the parties engaged in a nationwide search for a replacement. At the end of the search, Susan Hagen tendered Sentinel Trust Company as a candidate. F.W. Hirt recommended First Union Bank. These candidates were presented by the parties at a hearing on December 15, 1999.

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[8] The Erie does business under the umbrella of The Erie Insurance Group which is comprised of The Erie Insurance Exchange, Flagship City Insurance Company, Erie Insurance Company, Erie Insurance Property and Casualty Company and Erie Insurance Company of New York. F. W. Hirt Brief, p. 4, fn 11.

[9] With the exception discussed on p. 9.

This case was then complicated by the fact that the proposed fees for each of these candidates would likely exceed the annual income of the trusts. Through the extensive work of the individual trustees, a joint funding plan was submitted and approved by Order dated May 17, 2002. A timely appeal was taken from this Order by Laurel Hirt, daughter of F. W. Hirt. By Order dated August 7, 2003, the Superior Court of Pennsylvania affirmed the funding plan. The Supreme Court declined Laurel Hirt's allocatur request by Order dated October 5, 2004.

Once again the parties engaged in the search process. Susan Hagen renominated Sentinel Trust Company. F. W. Hirt submitted the successor to First Union Bank, Wachovia Bank N.A. A third candidate emerged from this process, namely Shepherd Asset Corporation, as formed by Laurel Hirt. On October 4, 2005, evidence was adduced in support of these three candidates. The parties thereafter filed written Briefs.

The record reflects the candidacy of Sentinel Trust Company (Sentinel) is supported by Susan Hagen. Her brother, F. W. Hirt, urges the selection of Wachovia Bank N.A. (Wachovia). Wachovia is also supported by certain descendents of F. W. Hirt, specifically Elizabeth A. Vorsheck, Michelle A. Vorsheck-Conrad, Valerie A. Vorsheck and William J. Vorsheck, Jr., each of whom are contingent beneficiaries. Shepherd Asset Corporation (Shepherd) is supported by Laurel Hirt and her mother, Audrey Hirt.

Although Erie Indemnity does not have legal standing regarding this selection, a resolution adopted by the Board of Directors of Erie Indemnity Company recommending certain qualifications for the corporate trustee was considered.

THE SETTLOR

Each of these candidates offer different strengths and have provided this Court with a true disparity of choices. In arriving at a decision, the most important factor was the intent of the Settlor, H. O. Hirt. *See In Re Benson*, 615 A.2d 792, 794 (Pa. Super. 1992).

Fortunately, H. O. Hirt was a prolific writer. He began a weekly newsletter for The Erie called The Bulletin, which he edited from 1931 until 1976. In addition, there are available a number of his personal letters and several of his speeches.[10] Also, the various trust instruments signed by H. O. Hirt offer crucial guidance.

The circumstances of H. O. Hirt's life were considered. From a modest and humble beginning in life, H. O. Hirt went on to build a company which enriched the lives of his family, employees and members of his community. H. O. Hirt was deeply loyal to all of the people who worked for The Erie. He had nicknames for most of the sales agents.[11] He truly

[10] As published *In His Own Words*.

[11] *In His Own Words*, Page 34.

cared about the maintenance workers.[12] When The Erie started to offer pensions in 1949, H. O. Hirt made sure Ollie Crawford received a pension even though Crawford had retired sixteen years earlier.[13] He invariably gave credit to all of the employees for the success of The Erie.[14]

Likewise, H. O. Hirt was genuinely concerned for the policyholders. He recognized the importance of loyalty and service to the policyholders. In fact, The Erie was built on the principle "To provide its policyholders with as near perfect service, as is humanly possible, and to do so at the lowest possible cost."[15]

H. O. Hirt reduced this principle to the motto "The Erie is Above All in Service". He almost always referred to this motto in The Bulletin.

In addition to his loyalty to employees and policyholders, H. O. Hirt exhibited a fundamental sense of fairness. It seemed to truly pain H. O. Hirt to have to cancel an insurance policy.[16] It also appeared he would underwrite policies to help out Erie residents who otherwise may not find insurance.[17] H. O. Hirt's compassion may have been in part the result of his harrowing experience in surviving tuberculosis during his late twenties.

H. O. Hirt also possessed astute business skills. Prior to starting The Erie, he turned a grocery business with "the poorest location in Erie" into one of the most prosperous "food emporiums" in all of Erie County.[18] Many of the business practices H. O. Hirt utilized in the grocery business were later applied in the insurance business, including quality service and attractive pricing.

H. O. Hirt was a well-educated man. In an era when attending college was difficult for many people, H. O. Hirt found a way to graduate from Wittenberg College.[19] H. O. Hirt's early career as a high school teacher reflected his appreciation for the importance of education. Through the years, he would stress the value of education to The Erie employees.[20]

H. O. Hirt also kept abreast of the trends and legal developments in the insurance field. He was active in national and state associations; frequently he was asked to be a key speaker at conferences. H. O. Hirt deserved the numerous awards he received for his work in the insurance field and in the community.

He was vocal in legislative matters, even urging his employees to

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[12] *In His Own Words*, Page 48.
[13] *In His Own Words*, Page 29.
[14] See, e.g., "A Salute" to employees, *In His Own Words*, Page 55.
[15] *In His Own Words*, Page XVI.
[16] See, e.g., "To Cancel or Not to Cancel" *In His Own Words*, Page 104.
[17] See, e.g., "The Power of Life and Death" *In His Own Words*, Page 81.
[18] *In His Own Words*, Pages 45, 46.
[19] He was fortunate to receive several loans from his mother and sister, all of which he paid off at six percent interest. *In His Own Words*, Page XII.
[20] *In His Own Words*, Pages 44, 45.

be involved in legislation affecting the insurance business. H. O. Hirt knew the importance of insurance and was very proud to be part of the business.

The people who knew H. O. Hirt emphasized his "enthusiasm, common sense, fair dealing, strong work ethic and thriftiness...".[21] H. O. Hirt was justifiably admired by many people.

THE TRUST INSTRUMENTS

H. O. Hirt created these trusts to preserve that which was most dear to him. Foremost, he protected the interests of his family. He openly expressed his concern for the well-being of employees and policyholders of The Erie. By placing 76.22 percent of the voting stock into these trusts, H. O. Hirt clearly intended for the trusts to allow his family, employees and policyholders to continue to prosper.

In selecting the corporate trustee, the nature of the trusts was considered. The corpus of the trusts now consists of only one asset, at least 76.22 percent of the Class B stock of Erie Indemnity Company.[22] This is not a trust with a diversified portfolio of marketable securities requiring sophisticated investment knowledge and advice. The main responsibility of the trustees is to decide how to vote on matters coming before Class B stockholders, primarily whom to elect to the Board of Directors of the Erie Indemnity Company. H. O. Hirt expected his trustees to be familiar with the work of reciprocal insurers and to cooperate with the Board of Directors of Erie Indemnity "to keep Erie Insurance Exchange in the best of health." Article 4.03(B).

The administrative duties of the trusts are uncomplicated. The corporate trustee collects dividends from its only asset and distributes them to the beneficiaries. Appropriate tax documents need to be prepared and filed. Until the eruption of litigation in 1998, Mellon Bank was charging an annual fee of ten thousand dollars to handle all of the responsibilities of the corporate trustee.

A student of history, H. O. Hirt wisely divided the power within the trusts. By establishing three co-equal trustees, he created a situation for his children to control The Erie as long as they were in agreement. However, neither child could grow more powerful than the other.

H. O. Hirt had the foresight to provide for a neutral arbiter in the form of a disinterested, but equal third trustee. The corporate trustee serves as the deciding vote when there are differences between the individual trustees. This arrangement insures that any dispute between the individual trustees can be resolved by the corporate trustee before it can adversely affect the ownership and control of The Erie. This diffusion of

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[21] *In His Own Words*, Page V.

[22] By virtue of the sale of Class B stock by other owners, the two trusts may now own 82.31 % of the Class B stock. See Hagen Brief, Page 4, Footnote 2.

power protects H. O. Hirt's family as well as the employees and policyholders of The Erie.

However, it has also allowed for the current situation, wherein the sharp differences between the individual trustees has positioned the corporate trustee to be the decisive voice in exercising the rights of the controlling block of voting shares. As aptly described by Laurel Hirt, the corporate trustee is presently the "de facto" owner of Erie Indemnity Company.[23]

In addition to being a neutral arbiter, the corporate trustee holds the most fundamental power of the trusts. H. O. Hirt specifically provided that any decision to sell Class B shares or to terminate the trusts required the affirmative vote of the corporate trustee. *See* Article 4.04 (even the majority vote of the two individual trustees would not override the negative vote of the corporate trustee). Also, the corporate trustee has a vote in selecting a successor individual trustee should the need arise. Article 5.0l. The corporate trustee is at the center of every major decision needed of the trustees. Hence, the corporate trustee must be an established entity capable of independent and sound judgment.

H. O. Hirt executed the original Trust Agreement on April 7, 1967. He entered into a "Trust Agreement" restating the Trust by document dated December 17, 1970. Thereafter, he signed a "First Amendment to Restated Trust Agreement" on May 5, 1971 and a "Second Amendment to Restated Trust Agreement" on September 27, 1973. A "Third Amendment to Restated Trust Agreement" was dated January 30, 1976. He then executed a "Second Restated Agreement H. O. Hirt Trust" on January 17, 1978. The last relevant document, titled "First Amendment to Second Restated Agreement, H. O. Hirt" was dated and signed by H. O. Hirt on December 22, 1980.

It is obvious by the number of these documents over the years that H. O. Hirt gave continual thought to the terms of these trusts. As part of these amendments, H. O. Hirt changed the method by which a successor corporate trustee was appointed. Originally, the individual trustees selected a successor corporate trustee. However, by the "First Amendment to Second Restated Agreement H. O. Hirt Trust", dated December 22, 1980, H. O. Hirt empowered the Common Pleas Court to appoint a successor corporate trustee. *See* Article 5.02

In the trust documents, there are no instructions regarding the qualifications of the corporate trustee. There are no mandatory or minimum credentials. H. O. Hirt never specified that the corporate trustee has to be a publicly traded corporation or a national bank. Neither did H. O. Hirt rule out a private trust company. He simply expected the trustees to be familiar with the reciprocal insurance business and to work cooperatively with the Board of Directors to keep The Erie in the best of health.

[23] Laurel Hirt Brief at Page 20.

Against this backdrop of salient factors, each candidate will now be reviewed.

SHEPHERD ASSET TRUST

Shepherd was formed as a private family trust company by Laurel Hirt. The sole purpose of Shepherd is to serve as the corporate trustee for the H. O. Hirt trusts. Shepherd is organized and registered to do business in Pennsylvania.

Shepherd has five possible members of its Board of Directors. Four members are independent of The Erie and collectively have experience in the insurance, banking, legal and/or accounting field. The fifth member is Laurel Hirt, who has worked for Erie Indemnity Company in the underwriting and securities departments. She is also Shepherd's only shareholder and employee to date.

Proponents of Shepherd tout its single focus (serving only the H. O. Hirt Trusts); lack of profit motive (keeping fees within the income of the trusts); lack of conflict of interest with competing insurance operations; its location in Erie County in proximity to The Erie and to H. O. Hirt's home community; the opportunity for the second and third Hirt generations to participate; and conformity to the intent of H. O. Hirt, who favored family involvement in his business.[24]

Unquestionably, Shepherd would appeal to H. O. Hirt's frugality. After all, H. O. Hirt was so thrifty that he once encouraged an employee to do as he had done and use a wad of chewing gum to hold a chair castor in place rather than buy a new castor.[25] He also had "my old overcoat fixed up for its seventh winter."[26] He never bought a new automobile until he was over fifty years old.[27]

It is unfortunate that the differences which have arisen between the individual trustees have resulted in a situation in which the annual fee of the corporate trustee has ballooned from ten thousand dollars to a proposed sum well over four hundred thousand dollars. These circumstances would not sit well with H. O. Hirt. It is likely he would have done what his granddaughter Laurel Hirt did in seeking an alternative way to control costs. Laurel Hirt can be very proud of her efforts in forming Shepherd.

Shepherd is an appealing candidate because of its fee structure and singular purpose. By keeping its fees within the annual income of the trusts, the corpus would never need to be invaded to sell Class B shares. Also, because of its raison d'etre, Shepherd would never be in a position

[24] "There has been a Hirt associated with insurance since 1918". *In His Own Words*, Page XX. H. O. Hirt's reference is in part to his brother John, who began working with the Pennsylvania Indenmity Company in 1918.

[25] *In His Own Words*, Pages 47, 48.

[26] *In His Own Words*, Page 96.

[27] *In His Own Words*, Page 48.

to compete with The Erie in the insurance, banking or any other field.

Ultimately, what disqualified Shepherd from selection is the fact it cannot effectively serve as a tie-breaker to resolve family disputes. To the contrary, Shepherd perpetuates the opportunities for continued family differences. Shepherd is not independent nor free from the family dynamics. At all times Shepherd would be owned and controlled by members of the extended Hirt family.

Those family members concerned with who gets appointed to the Board of Erie Indemnity Company will want to have a role in who gets appointed to the Board of Directors of Shepherd. The result is simply a change of battlefields. The battle for the Board of Erie Indemnity would be determined by the battle for the Board of Shepherd.

This case has already created fault lines throughout the Hirt family. F. W. Hirt and Susan Hagen are at odds with each other on almost all matters. Regarding the corporate trustee, F. W. Hirt's descendents, the Vorsheck family, side with him. But F. W. Hirt's daughter, Laurel Hirt, disagrees with her father and with her sibling's family. Also, we have F. W. Hirt disagreeing with his wife Audrey Hirt.

Thus, the first generation brother disagrees with the first generation sister. The second generation of siblings disagree. A father disagrees with one child but not another. We have a wife disagreeing with her husband. We have a daughter agreeing with her mother but not her father. These family disputes are part of at least seven years worth of public litigation and show no immediate sign of abatement.

Given these circumstances, Shepherd is not in a position to serve as a neutral arbiter in disputes among the individual trustees and for the Hirt family. As the Superior Court observed:

> "(W)e also note that Appellant's proposal to pack Shepherd Asset Company's Board of Directors with interested Hirt family members creates friction with the Settlor's overarching scheme of having a neutral and independent corporate trustee."

In Re Trust of Hirt, 832 A.2d 438, 454 (Pa. Super. 2003).

At a time when there is such deep-seated disharmony within the Hirt family, an untested family trust company is not a viable option. As conceded by Laurel Hirt's expert, "(t)he governance process they require of families is both a boon and a bane of private trust companies. Organizing a FTC is a major step usually requiring widespread support within a family."[28]

Further, Shepherd has no experience or history of serving as a corporate trustee. It is not realistic or feasible to expect a start-up corporation with

[28] Laurel Hirt Exhibit 1, Tab IV. John P. C. Duncan, *The Private Trust Company: It's Come of Age*, Trusts and Estates, August 2003 at p. 50.

one employee to become the de facto owner of a Fortune 500 company. While Laurel Hirt's entrepreneurial and fiscal efforts are commendable, the present circumstances do not make Shepherd the appropriate choice.

WACHOVIA BANK N.A.

Wachovia is a very impressive candidate. It is a public corporation with net income exceeding five billion dollars. *See* F. W. Hirt Exhibit G, Wachovia 2004 Annual Report. Wachovia is the fourth biggest bank in the country and the third largest provider of trust services. *Id.*

What sets Wachovia apart from the other two candidates is its status as a publicly-traded national bank with deep and diverse resources. Supporters of Wachovia also value the security of knowing that Wachovia, unlike the other two candidates, is heavily scrutinized by a host of federal regulatory entities, including the Office of the Comptroller of the Currency ("OCC") (a division of the Department of Treasury), the Federal Deposit insurance Corporation (FDIC) and the Federal Reserve Board. In addition, the Sarbanes - Oxley Act of 2002 adds additional eyeballs on Wachovia's activities.

Proponents contend that only Wachovia has the resources, experience and financial stability to serve as the corporate trustee. Further, the uncontrovertible point is made that H. O. Hirt selected a national bank as the original corporate trustee. The succeeding corporate trustee, Bankers Trust, is a national bank. Therefore, the logical extension of H. O. Hirt's intent would be to appoint another national bank such as Wachovia.

For all of these reasons, Wachovia is a very appealing candidate. In other circumstances, Wachovia would be an easy and obvious choice. However, under the present facts, Wachovia's strengths do not compel its selection for at least the following reasons.

The Insurance Marketplace is Different Now

While H. O. Hirt's choice of Mellon Bank may be indicative of his intent to select a national bank, the mere selection of Mellon Bank is not dispositive. What cannot be ignored is that the insurance marketplace is distinctively different now. During H. O. Hirt's lifetime, Mellon Bank was legally prohibited from selling insurance. To his knowledge, banks could never be in the insurance business nor could insurance companies be in the banking business.

It was not until fifteen years after H. O. Hirt's death that banks could sell insurance in Pennsylvania. *See* 40 Pa. C.S.A. §221.1-A et seq. The reins were loosened at the federal level in 1999 with the Gramm-Leach-Bliley Act, 15 U.S.C. §671 et seq., which allows banks to be in the insurance business and insurance companies to be in the banking business. Banks have found insurance to be a lucrative source of revenue and have been aggressive players in the insurance market.

Banks like Wachovia advertise their insurance products extensively,

including on the Internet. A prospective insurance customer would find this enticement on Wachovia's website: "Whatever your insurance needs are, you can easily research and get quotes on the coverage you are interested in. And for many of our policies, you can apply right on line." F. W. Hirt Exhibit 3.

Wachovia is rightfully proud of its success in selling insurance. Wachovia has publicly stated:

> "Wachovia insurance services will now have 46 offices in 22 states and Washington D.C. and nearly 1800 employees. The insurance brokerage firm will have estimated 2005 revenues of more than $400 million, **making it one of the top ten insurance brokerage firms in the nation**."

See Hagen Exhibit 19. (Emphasis added).

In 2004, Wachovia reported four hundred million dollars in revenue on insurance premium volume in excess of two billion dollars. F. W. Hirt Exhibit 6. It is possible that Wachovia will soon equal or pass the premium volume of The Erie.[29] In a published comment by Wachovia Insurance Services CEO, Stewart McDowell. Wachovia deems its insurance competition to be "...everyone who operates in this space is a competitor of ours at one point or another." *See* Hagen Exhibit 20. The Erie operates in the same "space" as Wachovia.

Setting aside momentarily the question of whether Wachovia has a disabling conflict of interest, this Court finds that H. O. Hirt would have a difficult time allowing a direct competitor to serve as the tie-breaking trustee of trusts that contain his most prized material asset, the controlling stock of his company, which he is leaving for the benefit of his children. H. O. Hirt would undoubtedly be aware of the huge footprint Wachovia has made in the insurance market.

This Court is convinced that if H. O. Hirt were alive today and saw the advertising and competition posed by banks, he would not be comfortable in selecting Wachovia. H. O. Hirt was fiercely loyal to his sales agents. Since 1925, the sole method by which The Erie sells insurance is through its agents. It is not hard to imagine H. O. Hirt's concern if he had sales agents complaining to him about losing customers to banks such as Wachovia. The selling of insurance policies is a zero sum game. For every customer Wachovia secures, that is one less customer for The Erie's agents. Throughout his career, H. O. Hirt was always aware of the "number of apps" (applications for insurance) The Erie was receiving. It is hard to believe that H. O. Hirt's loyalty to his sales agents and his company would be so shallow that he would make Wachovia the swing vote of the controlling block of stock for the

[29] In 2004, the premium volume of The Erie was approximately four billion dollars.

Erie Indemnity Company.

Consider also that H. O. Hirt was an active part of the creation of Class A and Class B shares of Erie Indemnity Company. The minutes of the 119th meeting of the Board of Directors of Erie Indemnity Company as held on March 11, 1954 reflect that the Board of Directors opted to create Class A and Class B shares of stock of Erie Indemnity Company. The stock was divided because "the Directors considered means to reduce the possibility of a forced sale by the estate of any large stockholder and the chance that voting stock would fall into the hands of competitors or other interests unfriendly to the continued independent existence of Erie Indemnity Company and the Exchange. The solution was to divide the stock into voting and non-voting shares." *See* Laurel Hirt Exhibit 6.

The latter concern is relevant here, the possibility that voting stock and possibly the control of the company could fall into the hands of competitors. By creating Class A shares which are publicly traded but have no voting rights, the Board protected the company. The Erie's competitors could access the Class A stock, but that was not a threat since Class A is non-voting. It is illogical, therefore, that a sharp businessman like H. O. Hirt would then allow the controlling block of voting stock to be entrusted to a direct competitor as the swing vote in his family trusts. This result would defeat the stated purpose of the Board's action in 1954 of which H. O. Hirt took part.

In sum, the landscape of the insurance business is much different today then when H. O. Hirt was alive. Banks can now legally compete with The Erie in the underwriting and selling of insurance policies, Wachovia could soon be on the same level of premium volume as The Erie and/or surpass it. Without even reaching the issue of whether there exists a disabling conflict of interest for Wachovia, given H. O. Hirt's steadfast loyalty to his employees and his desire to protect the interests of his family, H. O. Hirt would not have made a direct competitor the swing vote of the controlling block of Class B stock. By rough analogy, it is hard to imagine Henry Ford making Walter P. Chrysler the decisive vote of the Ford family trusts.

Whether the Corporate Trustee Must Be a Public Company

Proponents of Wachovia contend that only a public company can serve as the corporate trustee. Such a requirement was never reduced to writing by H. O. Hirt. This contention assumes that a publicly traded company would have more knowledge of a publicly traded company such as the Erie Indemnity Company. This assumption is illusory. Publicly traded companies do not have a monopoly on the knowledge of how Erie Indemnity Company functions. Sentinel and Shepherd have the same access as Wachovia to any public information about Erie Indemnity Company.

Notably, at all times two of the three trustees are private individuals and

not publicly traded companies. Hence, if the two individual trustees vote the same way, then the controlling stock of Erie Indemnity Corporation is managed by two individuals, neither of whom is a publicly traded company.

The parties have tendered three candidates, only one of which is a publicly traded company. Because of all the variables in this case, Wachovia should not be selected simply because it is a publicly traded company.

The Size and Resources of Wachovia

F. W. Hirt argues that Wachovia should be selected because its resources "dwarf" that of the other two candidates. It is true Wachovia is far bigger than Sentinel and Shepherd combined. However, Wachovia's size creates problems because of its transient relationship teams and its institutional hierarchy. Also H. O. Hirt was not enamored with the size of a company.

In terms of personnel, the relationship team tendered by Wachovia is exceptional. Wachovia is offering the services of one of its subsidiaries called Calibre, a business unit located in Philadelphia, Pennsylvania. Calibre is headed by Susan Mucciarone, who is a bright and very capable executive. She is in the midst of an enviable career which began in accounting and then blossomed in the securities field. While she is relatively new to the trust business and the H. O. Hirt trusts, there is no question she would exercise the trustee duties in a responsible manner.

Ms. Mucciarone is surrounded by a "deep bench" of investment, legal, insurance, accounting and other support services. Indeed, Wachovia is an attractive candidate because of its depth of available resources, most of which are covered within the base fee proposed by Wachovia.

A major difficulty with Wachovia's personnel, however, is that the relationship teams have only been temporary. Wachovia cannot escape the fact that all seven members of the relationship team presented in 1999 are no longer with First Union/Wachovia. In fact, an interim representative team has since departed such that the present relationship team from Wachovia is now the third cast in six years. By her own admission, and understandably so, Susan Mucciarone hopes to expand her career beyond Calibre. It is of concern that by the time Wachovia personnel would become familiar with these trusts, the beneficiaries and The Erie, they would be moving on in their careers.

There is also the question of the relevance of the resources offered by Wachovia. Susan Mucciarone's "A plus team" is comprised of Robert Gallagher and Harry Dittmann, each of whom have a long history of managing portfolios for wealthy families. However, the portfolio in this case consists of only one asset which cannot be sold except in two limited scenarios. This is not a case where the trust corpus consists of a diverse pool of marketable securities or assets. The corporate trustee is not required to provide investment advice. Thus, many of the resources

of Wachovia are not relevant to this engagement.

For the responsibilities of the corporate trustee, including the need to analyze the health of the Erie Indemnity Company and the insurance industry, there are no measurable differences in personnel between Calibre and the other two candidates.

Importantly, the size of a corporation was not determinative for H. O. Hirt. To his knowledge, bigger did not necessarily mean better. Consider this excerpt from an advertisement written by H. O. Hirt:

GREAT SIZE EQUALS
GREAT STRENGTH

????

> **THIS** is one of the most common of all the many fallacies current in the field of insurance. Agents frequently attempt to win sales for their very large company with the argument that all the virtues, especially strength, necessarily are to be found in large companies only.
>
> **HISTORY** does not bear out this contention in the insurance field any more than in the banking or other fields. Those whose business experience spans only the past eight or nine years know that some of the biggest banks, locally and nationally, as well as some of the biggest insurance companies went down to ruin in the last great depression while many of the smallest banks and insurance companies came through without a scratch (or a loan from the R.F.C.)

See Hagen Exhibit 3

H. O. Hirt wrote this ad to help his agents rebut the sales pitches from large insurance companies. It is prophetic that H. O. Hirt would include banks in this advertisement. H. O. Hirt also recognized the fallacy of a company's size when he wrote:

> In the field of insurance there have been scores and scores of so called "Old Line" Stock Companies, with millions of assets and many of them doing a nation-wide business, which have boasted of their size, strength and stability, and yet because of the lack of a "life saving" assessment clause, these "unsinkable" companies have sunk to the ocean's bottom and left their trusting policyholders to SINK OR SWIM - in other words, to take care of their own tremendous losses themselves.

Excerpted from a brochure H. O. Hirt wrote in the late 1920's. *In His Own Words*, Page 65.

Having built a Fortune 500 company from the ground up, H. O. Hirt knew that size alone was not the reason to select an insurance company or a bank.

The institutional structure of Wachovia is also a concern. Susan Mucciarone's decisions are subject to review and/or change by higher authority within Wachovia. Ms. Mucciarone's immediate supervisor is Dan Prickett. In turn, Dan Prickett reports to Stan Kelly, the head of Wealth Management and also the head of Wachovia's insurance operations. Mr. Kelly reports to Ken Thompson, the President and CEO of Wachovia.[30] The result is that within the hierarchy of Wachovia, there are at least three individuals who can override Susan Mucciarone's decisions. Hence, if any individual trustee or any officer or director of Erie Indemnity Company is unhappy with the action or a potential decision by Susan Mucciarone, she could possibly be influenced, overridden or replaced by one of several superiors.[31]

On at least one prior occasion, the CEO of Erie Indemnity Company attempted to meet directly with the CEO of Deutsche Bank to influence the corporate trustee vote for directors of Erie Indemnity Company. *See* Letter of Stephen A. Milne, President/CEO of Erie Insurance Group dated September 1, 2000 and marked "Urgent, Personal and Confidential". By this letter it is clear officers of Erie Indemnity Company were going over the head of the trust officers in appealing directly to the CEO of Deutsche Bank.

Such interaction is a concern because Erie Indemnity Company has several banking relationships with Wachovia separate from any relationship created by these trusts. Erie Indemnity Company has a number of large depository accounts with Wachovia. H. T., p. 184. The securities subsidiary of Wachovia derives fees in excess of one hundred and ten thousand dollars from its business with the Erie Indemnity Company. *Id.* According to the 2004 Annual Reports, since 2002 The Erie has purchased Wachovia stock or notes carrying a fair market value of over nine million dollars.[32] As a result, there are deeply entangling financial relationships between the Erie Indemnity Company and Wachovia.

These relationships could be used as leverage by the officers or directors of Erie Indemnity Company to influence Wachovia's decisions affecting

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[30] Hearing Transcript. October 4, 2005, p. 150. All references hereinafter will be "H.T."

[31] As Susan Mucciarone candidly admitted "...there are many people who have a higher standing than me in the organization that can exert inference and control." H. T., p. 175. She does not rule out the possibility that Dan Prickett could influence her decisions, *Id.* p. 177.

[32] Chronologically, on June 5, 2002, Wachovia Bank NA Notes were purchased at a cost of $3,995,900.00; on February 3, 2004 Wachovia Corporation Senior Notes were bought at a cost of $997,710.00 and on November 1, 2004 Wachovia Corporation common stock was bought at a cost of $3,954,152.00. The Annual Report lists the fair market value of these purchases at $9,090,322.00. *See* Hagen Exhibits 24-26. This record does not reflect if any purchases were made in 2005.

the Hirt trusts. These relationships handcuff Wachovia's ability to act independently. Indeed it is the opportunity to have financially entangling relationships with the corporate trustee, with the accompanying access to upper management, which may explain the position of Erie Indemnity Company since 1999 regarding the successor corporate trust.[33]

By contrast, Sentinel is not susceptible to these entanglements. There are no separate banking relationships between the Erie Indemnity Company and Sentinel, nor can there ever be since Sentinel does not accept depository accounts. The Erie Indemnity Company is unable to buy the stock or notes of Sentinel on the public market. Because the relationship team from Sentinel is headed by its CEO, there is no opportunity to go over the head of the trust administrator within Sentinel. The economic interests of Sentinel cannot be leveraged by any third party.

Because of the transient history of its relationship teams, the lack of a need, for many of Wachovia's resources, the entangling financial relationships with Erie Indemnity Company and H. O. Hirt's recognition that a bigger corporation is not necessarily better, Wachovia's size does not warrant its selection.

This opinion will be continued in the next issue of the Erie County Legal Journal, Vol. 89, No. 2 - January 13, 2006

[33] In 1999, Erie Indemnity openly endorsed the candidacy of First Union. By its resolution in 2005, Erie Indenmity, through its recommended qualifications, tried to eliminate all candidates but Wachovia. The gaping hole in the Board's resolution is that it allows room for a direct competitor, be it a bank or another insurance company with a trust department subsidiary, to be named corporate trustee. The Board's resolution is squarely inconsistent with the Board's action under H. O. Hirt in 1954 in creating Class B stock.

This is not to infer that any current officer or director of Erie Indenmity Company will attempt to exercise undue influence on the corporate trustee. The point is simply that because of these entangling relationships, Wachovia is vulnerable to economic pressures. The focus of this concern is on Wachovia and not Erie Indenmity Company.

TRUST OF HENRY ORTH HIRT, Settlor
Trust Under Agreement Restated December 22, 1980
With Respect to Susan Hirt Hagen
No. 100-1998
and
TRUST OF HENRY ORTH HIRT, Settlor
Trust Under Agreement Restated December 22,1980
With Respect to F. W. Hirt
No. 101-1998

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

This opinion is continued from last week's issue of the Erie County Legal Journal, Vol. 89, No. 1 - January 6, 2006

OPINION

The Need for Federal Regulatory Overview

The three candidates differ in their business mission. Wachovia has an expansive history of seeking revenue sources. For example, it has merged with other companies. It has gone into various businesses, including insurance. Wachovia seeks investments in its stock from the public. Wachovia holds deposit accounts. Wachovia provides trust services. Wachovia has a subsidiary in the securities market.

Wachovia has chosen to do business in regulated fields. As such, there is a need for extensive oversight of Wachovia's activities to protect the investments of stockholders, depositors and trust beneficiaries. The federal oversight is not only necessary to protect Wachovia's customers, but also to reduce any need for tax dollars to subsidize any losses incurred by wrongdoing within Wachovia.

Thus there is a need for the FDIC to monitor Wachovia's depository accounts. There is a need for the Office of the Comptroller to have access to Wachovia to ensure a proper review of activities and assets. Given the corporate scandals of the last decade, which spawned the Sarbanes-Oxley Act of 2002, there is a need to monitor the accounting and reporting of public corporations like Wachovia.

The other two candidates have made business decisions much different than Wachovia. Rather than seeking revenue sources through depository accounts, commercial loans, mortgage lending, securities brokerage, insurance, etc., Sentinel has intentionally narrowed its focus to developing trust relationships with affluent families. Sentinel has made a conscious business choice to keep the number of trust relationships limited to provide the maximum amount of attention to each client.

Shepherd takes this Mission one step further because its only client would

be the Hirt trusts. Because of their business missions, neither Sentinel nor Shepherd need to be regulated by the FDIC, the Federal Reserve or the Office of the Comptroller of Currency.

There is nothing any of these federal regulatory bodies can do regarding the discretionary decisions of the trustee. For example, the main responsibility of the corporate trustee, to help select the Board of Directors of the Erie Indemnity Company, is not subject to change by any regulatory body.

The fact that Wachovia is exposed to more stringent regulation than the other two candidates is not dispositive. Wachovia has chosen to seek profits in regulated fields that Sentinel and Shepherd have not entered. Given the nature of the trust corpus there is little need for federal regulatory oversight. Therefore, the federal regulatory oversight of Wachovia does not merit its selection.

Conflicts of Interest for Wachovia

There are many layers of conflicts of interest which preclude Wachovia's ability to serve as a corporate trustee. Despite its legal position in this case, Wachovia is in direct competition with The Erie. A disabling conflict of interest exists because of Wachovia's insurance activities. At a minimum, the appearance of a conflict of interest would cast a cloud over all action by Wachovia. Secondly, Wachovia has a conflict of interest as it relates to any decision by the Erie Indemnity Company to enter the banking business. Thirdly, there are economic and financial relationships between Wachovia and the Erie Indemnity Company which handicap Wachovia's ability to serve independently. Each of these conflicts will be reviewed seriatim.

Wachovia cannot deny it is competing with The Erie. In a filing with the Securities Exchange Commission, Wachovia states:

> "Our subsidiaries face substantial competition in their operations from banking and non-banking institutions, including savings loan associations, credit unions, money market funds and other investment vehicles, mutual funded advisory companies, Brokerage firms, **insurance companies**, leasing companies, credit card issuers, mortgage banking companies, investment banking companies, finance companies and other types of financial service providers, including internet only financial service providers."

Form 10-K, as filed by Wachovia with the SEC covering the year 2004. *See* Laurel Hirt Exhibit 7. (Emphasis added).

Wachovia is directly competing with The Erie in selling all lines of insurance in every jurisdiction in which The Erie does business. For every policy that Wachovia sells, that is one less policy sold by sales agents for The Erie and one less policy underwritten by The Erie. As one of the top ten insurance brokerage firms in the nation, Wachovia can have a direct

and adverse economic impact on The Erie.

Wachovia's attempt to downplay this conflict by distinguishing between brokering and underwriting insurance is meaningless. By its own admission, Wachovia is legally capable of underwriting insurance. *See* Laurel Hirt Exhibit 7. If Wachovia is not already underwriting insurance, it is a simple business decision away from doing so.

Supporters of Wachovia contend that under Pennsylvania law, Wachovia's insurance operations do not disqualify it from serving as the corporate trustee. This contention ignores both the Restatement of Trusts and the Pennsylvania Supreme Court.

In the Restatement of Trusts (Second), which has been adopted in Pennsylvania, the duty of loyalty of a trustee is in relevant part:

§170. Duty of Loyalty

> (1) The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.
>
> . . .
>
> **Comment on Subsection (1)**:
>
> a. *Fiduciary relation.* A trustee is in a fiduciary relation to the beneficiary and as to matters within the scope of the relation he is under a duty... not to enter into competition with him without his consent....
>
> . . .
>
> p. *Competition with the beneficiary.* A trustee violates his duty to the beneficiary if he enters into a substantial competition with the interest of the beneficiary....
>
> . . .

See Restatement (Second) of Trusts, § 170.

It is the duty of the trustee to work solely in the interest of the beneficiary and to not compete with the beneficiary without consent. In the case sub judice there are trust beneficiaries who are not consenting to Wachovia's competition in the insurance business. Under the Restatement of Trust (Second), Wachovia would be in breach of a duty of loyalty by competing with the interests of the beneficiaries.

The Pennsylvania Supreme Court has removed a trustee who worked for a business which at times competed with the corpus of the trust. Specifically, in *In Re Homes Trust*, 139 A.2d 548 (Pa. 1958), an ex son-in-law went to work for a competitor of the family business of his former wife. Meanwhile, the ex son-in-law (named Raker) continued to act as a trustee for a trust holding stock in the family business of his former spouse. The two businesses only partially competed. Nonetheless, the Supreme Court of Pennsylvania affirmed a finding that the employment relationship was "antagonistic to the demanding standard of loyalty owed

by Mr. Raker in his fiduciary capacity to this trust." *Holmes* at 551.

According to the Supreme Court "it would seem, therefore, that the existence of a potential conflict of interest would thus be sufficient to disqualify Mr. Raker from continuing to act as Trustee." *Holmes* at 551. Like most ethical questions, even the appearance of a conflict of interest should be avoided for a Trustee. *See Bogert, Trusts and Trustees* (2nd E. Rev. 1993) ("It is not necessary that the trustee shall have gained from the transaction in order to find that it is disloyal. If the dealing presented conflict of interest and consequent temptation to the trustee, it will be voided at the option of the beneficiary regardless of the gain or loss to the trustee." *Id.* at 247-48).

Whether it is perceived or actual conflict of interest, a trustee cannot be in competition with the corpus of the trust. By directly competing with The Erie, an actual, if not a perceived, conflict of interest exists for Wachovia. At a minimum, there would be inherent suspicion about Wachovia's motives.[34]

This is not a situation where Wachovia is simply holding non-voting stock of one of its competitors or owning a minority percentage of voting stock. If selected, Wachovia could be the swing vote for the controlling block of Class B shares and would be the de facto owner of Erie Indemnity. Hence, Wachovia could have an immediate and direct impact on the business operations of one of its primary competitors.

Alternatively, the argument is made that Bankers Trust has effectively served as a corporate trustee for six years despite the fact that it is in the insurance business. This argument overlooks the reason Bankers Trust submitted its resignation - it recognized its own conflict of interest. The only reason Bankers Trust has served for six years is because of the complications associated with the funding plan. At the time Bankers Trust was appointed, it was not in the insurance business. This Court has never appointed a corporate trustee which has actively and directly competed with The Erie and there is no reason to do so now.

Wachovia's conflict of interest can be considered in another equally troubling scenario. The Board of Directors of Erie Indemnity Company has an ongoing decision to make whether to get involved in the banking business. Thus, Wachovia could be thrust into a situation in which it would have to decide whether to allow The Erie to become one of its competitors in the banking industry. If it so desired, Wachovia could possibly keep The Erie out of the banking business. This type of decision is a patent

[34] Ms. Mucciarone candidly acknowledged that "I'm coming to have an appreciation for the appearance of that conflict of interest." H. T., p. 186. In fairness to this witness, she also said several times that the conflict issue was irrelevant because of the integrity of Wachovia employees in adhering to the code of conduct.

conflict of interest for Wachovia.

Further, if The Erie were to go into the banking industry, then Wachovia would be a competitor with The Erie not only in insurance, but in banking. This Court cannot find that H. O. Hirt would want the deciding vote of his family trusts to be held by a direct competitor of The Erie in the insurance and banking businesses.

The third conflict of interest relates to the separate relationships between Wachovia and Erie Indemnity Company. As discussed, Wachovia derives significant revenues from its depository accounts with Erie Indemnity and through securities fees. Erie Indemnity Company and Wachovia own stock in each other. There is the possibility of disseminating confidential information, albeit unintentionally, which could expose Erie Indemnity and/or Wachovia to claims of insider trading. There is the possibility that Wachovia could cause the market price of Class A shares of Erie Indemnity to increase and therefore increase Wachovia's fee as the corporate trustee. At a minimum, these relationships create entanglements which could, or appear to, affect decisions made by Wachovia as a corporate trustee.

Wachovia's various conflicts of interests, even if each is only a perceived conflict, need to be considered in the context of the fiduciary duty owed by the corporate trustee. As the Pennsylvania Supreme Court has recognized "(t)he requirement of loyalty of a trustee is the most intense fiduciary relationship in our law." *Holmes supra*. at 551. In the colorful and often quoted words of Judge Cardozo:

> "Many forms of conduct permissible in the work-a-day world for those acting at arms length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending. ...Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.' *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (N.Y., 1928). Sections 921 and 331(5) of the Fiduciaries Act of 1949 state that the court shall have exclusive power to remove a trustee 'when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office'."

As quoted in *Holmes*, *supra* at 551.

The fiduciary duty owed by the corporate trustee is the highest duty in the law. Because of Wachovia's competing insurance operations, possibly competing banking business and its financially entangling relationships, Wachovia cannot assume the exacting fiduciary duties of the corporate trustee.

Uncompromising Integrity

Wachovia contends that any concern for any possible conflict of interest

should be allayed by virtue of Wachovia's written code of conduct titled "Uncompromising Integrity". *See* F. W. Hirt Exhibit 6. This Court accepts as credible the testimony of Attorney Michael J. Halloran that Wachovia's code of conduct is among the best in the trust business. Further, there is no reason to question the integrity or honesty of any member of the proposed relationship team from Wachovia.

Experience has shown, however, that written corporate policies are no guarantee against unethical, unscrupulous or criminal behavior. Because of the frailties of human nature, particularly when there is an opportunity for substantial gain, a written code of conduct has limited utility.

There is a free-flow of interaction among the trust, insurance and other departments of Wachovia. Indeed, because of the ability to access information from these various departments, Wachovia is argued to be the best candidate. Yet it is not foolhardy to believe that confidential information could be unintentionally disclosed from the trust department or by devious methods outside the trust department. Remember, the insurance business of Wachovia operates within the same Wealth Management Division as Calibre. Wachovia's written code of conduct does not provide a sufficient firewall between these two departments or even the pretense of a "Chinese Wall".

The fact that ethical standards are in writing does not compel compliance. For example, the Pennsylvania Crimes Code is in writing yet thousands violate it every day. Wachovia's written code of conduct does not absolve it of any conflict of interest in this case nor does it prevent conduct that could be detrimental to the health of The Erie and/or the Hirt trusts.

Wachovia's Fee Proposal

Advocates argue Wachovia's fee proposal is more favorable than Sentinel's proposal. It is hard to argue Wachovia's fee proposal is more favorable than that of Shepherd.

One of the advantages of Wachovia's fee proposal is that included within the base fee are a host of business, accounting and legal services. By contrast, Sentinel would be charging on an hourly basis for billable time for members of its relationship team.

There are several similarities in the fee proposals of Wachovia and Sentinel. Each is assessing a base fee tied to the value of Class A stock. As computed, Sentinel would be charging a base fee of $415,000 per annum, Wachovia a base fee of $420,000 per annum. Both seek reimbursement for expenses, including outside consultants. Neither Wachovia nor Sentinel commit to a cap on the reimbursement of expenses. At the beginning of a year, neither Wachovia nor Sentinel can definitively state what its fee will be by the end of the year. Accordingly, it is difficult to determine which of the two fee proposals is more favorable to the trusts.

There are differences in the fee proposals of Wachovia and Sentinel. Unlike Sentinel, Wachovia is imposing a surcharge of thirty percent of any expense greater than seventy-five thousand dollars per year. Not only is there no cap on this surcharge, but the result is a pure windfall to Wachovia, especially if the protracted litigation among the individual trustees continues.

Also different from Sentinel, Wachovia is imposing a guaranteed minimum fee of 1.3 million dollars. The justification for this fee is offered by Ms. Mucciarone:

> "**A.** Yes. We'd be entitled to receive the minimum of $1.3 million.
>
> **Q.** From Wachovia's perspective, what is the rationale for this provision?
>
> **A.** Well, the rationale for this provision really centers around our intention to be named as a trustee for the long-term. And we--it also reflects the fact that should we be fortunate enough to be named, we will invest a significant amount of time and resources to become, you know, educated as well as we can on a number of matters pertaining to this trust. It would be a significant investment of time and resources and this really protects the organization from the unlikely event that, you know, Wachovia is somehow removed as trustee after having invested all that time and resources."

H. T., Page 134.

This justification would not be acceptable to H. O. Hirt. After all, a base fee beginning at $420,000.00 per year should be sufficient for the education of bank personnel. By imposing a minimum fee, Wachovia is looking out for its own interest rather than that of the trusts.

Wachovia's fee proposal gives it flexibility to seek an increase based on the Consumer Price Index (CPI) or the price of Class A stock of Erie Indemnity Company. In so doing, Wachovia has eliminated any downside risk for its fees. In the event the Class A stock declines in value, Wachovia could simply use the CPI to increase its fees. Under this scenario, Wachovia fees could be increased at the same time the value of the Class A stock decreases or the performance of The Erie is poor. Wachovia is not marrying its fees to its performance on behalf of the trusts. This arrangement would not appeal to the frugality or business sense of H. O. Hirt. Again this fee arrangement looks out for the interest of Wachovia rather than the trusts.

On the whole, Wachovia's fee proposal does not command its selection as corporate trustee.

Wachovia in Review

Wachovia strengths are not prevailing in this unique situation. Many of its resources are not relevant to a trust containing one asset. Given

of mergers in the banking industry as well as the consistent turnover of personnel, Wachovia's size and structure are at best a neutral factor. Wachovia has a perceived and actual conflict of interest in competing with the trust corpus in the insurance business and possibly in the banking business. Regardless of whether a conflict of interest exists, H. O. Hirt, who was part of the creation of Class B stock to protect the company, would not want a competitor as the swing vote of his family's trust. There are other economic ties between Wachovia and Erie Indemnity Company which could compromise Wachovia's ability to act in the best interest of the trusts, or at least appear to do so. Accordingly, Wachovia is not the best candidate to serve as the corporate trustee of the H. O. Hirt trusts.

SENTINEL TRUST COMPANY

Sentinel offers the most suitable credentials to handle the unique demands of these trusts. Sentinel's business purpose, history, personnel and structure make it the best candidate. Sentinel is an established entity capable of making the independent, sophisticated decisions demanded of the corporate trustee.

Sentinel was founded from the need to provide customized trust services, particularly for trusts involving a family business spanning multiple generations. Because of its niche in the trust business, Sentinel is well positioned to serve the needs of the Hirt trusts.

Sentinel has intentionally imposed a ceiling of serving twenty families. Currently, its client list consists of eighteen families. Hence, Sentinel has not overextended itself. In fact, Sentinel can pay careful and close attention to the needs of the Hirt trusts. Sentinel has proven its interest and ability to serve these trusts by virtue of its active interest and understanding of these trusts since 1999.

Sentinel is not a fly-by-night operation. Sentinel has always operated at a profit with earnings and clients growing each year. Its net worth is now between seven and eight million dollars. Sentinel administers one hundred and eighty-nine trusts with approximately 1.25 billion dollars in assets under administration. Sentinel presently has twenty-nine employees, which is sufficient to handle the responsibilities of the corporate trustee.

Sentinel is authorized to operate as a trust company in Pennsylvania by the Department of Banking. *See* Sentinel Exhibit 1. Sentinel has worked with Pennsylvania trust counsel since 2000. Thus, Sentinel is able to navigate the terrain of trust law in Pennsylvania.

Sentinel presents with a stable and experienced relationship team. D. Fort Flowers is a chartered financial analyst who has been President/CEO of Sentinel since January, 1997. Mr. Flowers has served as an individual trustee since 1987 and as a corporate trustee since 1997. By way of his testimony in 1999 and 2005, Mr. Flowers has demonstrated

a thorough understanding of the Hirt trusts and what is required of the corporate trustee.

Assisting Mr. Flowers are two individuals with extensive experience in the trust business. Robert J. Sweeney is an Executive Vice President of Sentinel. He has been in the trust and banking business since 1973, including service as an executive vice-president of a bank and vice-president of a trust company. He is a certified trust and financial adviser.

Susan Prejean has been involved in the administration of trusts since 1981. Before joining Sentinel in 1998, she was a Senior Administrative Officer in Texas for Northern Trust Company for eighteen years. She is also a certified trust and financial advisor and past president of the Houston Business and Estate Planning Council.

Also available to assist is Ross W. Nager, who joined Sentinel in 2002. Mr. Nager was the founding head of the family wealth planning practice for Arthur Anderson. He also has a lengthy history in working with affluent families in the governance and succession of family businesses. Mr. Nager would serve as a back-up to Mr. Flowers.

Sentinel has an investment committee comprised of members of the Board of Directors and certain Officers. The committee meets monthly to exercise the investment authority of Sentinel. Notably, there are members of the investment committee that have been directors of a publicly traded company. Fort Flowers was a Director of Coastal Banc Corp, a publicly traded company. In addition, one member of the investment committee served on the Board of Georgia Pacific Corporation, one member served as a Director of Group Maintenance American Corporation and one member was Chairman and President of Coastal Banc Corp. H. T., p. 43. One of the directors of Sentinel worked for five years with the American National Insurance Company and served on its finance committee. H. T., p. 44. Hence the investment committee consists of members knowledgeable of publicly traded companies and the insurance business.

The structure of Sentinel makes it an appealing candidate. All decisions will ultimately be made by Fort Flowers as the CEO of Sentinel. However, Mr. Flowers will have the benefit of the experience and input from his relationship team and investment committee. Given their combined experience, education, training and business backgrounds, Mr. Flowers and his team at Sentinel are well qualified to make the complex decisions demanded of the corporate trustee.

Importantly, with the CEO as the head of the relationship team, there is no opportunity for any party to attempt to bypass the trust administrator by going to a higher level of management. Further, the trusts would not be affected by the career goals of the relationship team. Fort Flowers can go no higher than his present position of CEO.

Sentinel also offers stability in its personnel. Fort Flowers has no reason to leave Sentinel nor likelihood of being removed. Mr. Sweeney has been

with Sentinel since its inception. The same relationship team that was offered in 1999 remains, with the addition of Ross Nager.

Sentinel is regulated by the Texas Department of Banking, which issued Sentinel's charter and can revoke it. Annually, the Department of Banking examines the fiduciary files and fiduciary actions of Sentinel. H. T., p. 32. In addition, an independent auditor examines Sentinel's policies and procedures and the application thereof. H.T., p. 71. Sentinel and its personnel are subject to all federal and state criminal and civil laws.

Therefore, Sentinel is not operating in a legal vacuum. Whilte Sentinel is not subject to the same federal regulatory review as Wachovia, there is sufficient scrutiny of Sentinel to safeguard the interests of the Hirt trusts.

A concern has been voiced whether Sentinel could withstand a surcharge of the trustees. The argument is made that the value of the two trusts (approximately 300 million dollars) would mean that Sentinel does not have the resources to meet even a 10% surcharge of the trustees. The empirical facts support this contention, but the law and the likelihood of a surcharge do not make the argument persuasive.

A surcharge is warranted only as an extreme legal measure. There are not many cases involving the surcharge of a trustee. The highest reported surcharge ever in Pennsylvania was for the sum of $312,500.00. *See In re Ray, Incompetent*, 14 Pa. Fid. Rep. 2d 245 (1994).

The administration of the trusts is simple: collect the dividends and pay the beneficiaries, expenses and taxes. All of the income and expenses are easy to track. There are two natural auditors overseeing these matters, the individual trustees. In addition, the contingent beneficiaries can monitor the paper trail. Hence there is little, if any, opportunity for the corporate trustee to waste the trusts or administer them in a manner warranting a surcharge.

Also, the corporate trustee is not the sole trustee. Any action by the corporate trustee has to be in accord with at least one of the individual trustees. Therefore, the likelihood of a surcharge of the corporate trustee is very remote. It is also unlikely that Sentinel would engage in any behavior that could expose it to ruinous liability or cost it one of its better clients.

As presently capitalized, Sentinel could pay a surcharge of approximately seven to eight million dollars. In addition, Sentinel would secure an errors and omissions insurance policy linked to these trusts providing an additional ten million dollars in protection. Accordingly, there are sufficient assets to handle any potential exposure in the rare event of a surcharge.

Among the other criticisms is that these trusts would become one of Sentinel's biggest sources of revenue. This criticism is of little impact. To the contrary, it is fair to assume that like most businesses or professions, Sentinel will pay close attention to one of its bigger clients. As part of its

business mission, Sentinel has intentionally kept its client list manageable so that it can pay particular attention to the Hirt trusts.

Sentinel does not have any actual or apparent conflicts with the trusts. Sentinel is not in the insurance business. Sentinel does not broker or underwrite any insurance. Although several of its unrelated trust clients may hold stock in insurance companies, this does not place Sentinel in the insurance business. Nor is Sentinel an attractive candidate for acquisition by or merger with any insurance company.

In the event the Board of Directors of Erie Indemnity Company opts to go into the banking business, Sentinel will still not be a competitor. Sentinel does not offer any commercial or personal loans. Sentinel is not in the mortgage lending business. It does not hold deposit accounts for customers. In fact, the narrow purpose of Sentinel's existence assures it will not have a conflict of interest with The Erie.

Sentinel has no separate economic ties to Erie Indemnity Company. Sentinel has no depository relationships with Erie Indemnity Company nor does Sentinel derive any fees from Erie Indemnity Company. Neither Sentinel nor Erie Indemnity Company can affect the stock price of the other. Therefore, there are no financially entangling relationships which could compromise Sentinel's ability to act independently.

Sentinel has also been criticized because of its location in Houston, Texas rather than Pennsylvania. This criticism is specious. Wachovia is headquartered in Charlotte, North Carolina and has thousands of out-of-state clients. Because communications are readily available by videoconference, e-mail, fax, Internet, etc. there is little need to have a company headquarters in Pennsylvania. To the extent the corporate trustee needs to be familiar with Pennsylvania trust laws, each of the three candidates are similarly situated because each would rely on Pennsylvania trust counsel.

Also considered was the ability of Sentinel to serve as a corporate trustee for the life expectancy of the trust. The trusts are measured in time by the life of Michelle Vorsheck-Conrad. Given her chronological age of twenty-three years old coupled with actuarial tables, it is possible the trusts could be in existence for up to seventy-eight years from the present.

The principal representative from Sentinel, Fort Flowers, is in his early forties and cannot reasonably be expected to work for the next seventy-eight years. However, Sentinel is not a one person operation. Sentinel has a relationship team familiar with the Hirt trusts. Sentinel has an investment committee to work for this client. Ross Nager is positioned to take over the responsibilities in the event Flowers is unavailable for any reason. This arrangement is no different than what the other candidates could offer.

CONCLUSION

Sentinel is best positioned to be the next corporate trustee. It has the specific business purpose, trust experience, personnel and stability

necessary for this engagement. Sentinel does not have any conflicts of interest or entangling financial relationships. The structure of Sentinel enables it to be an independent and neutral arbiter of disputes among the individual trustees. Sentinel has the ability to make the sophisticated decisions required of the corporate trustee.

Most importantly, the selection of Sentinel is consistent with the life experiences and intent of H. O. Hirt.

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

IN THE MATTER OF THE ESTATE AND PERSON OF ETHYL M. CORBETT, An Incapacitated Person

INCAPACITATED PERSONS / GIFTING

The court has discretionary authority pursuant to 20 Pa.C.S. §5536 to substitute its judgment for that of an incapacitated person. This authority includes the power to make gifts. The court's authority is discretionary and the court is not obligated to exercise the power to make gifts.

INCAPACITATED PERSONS / GIFTING

The process of substitution of the court's judgment for that of the incapacitated person allows for the adoption of a plan of gifts to minimize taxes or to carry out a lifetime giving pattern of the incapacitated person, if the court is first satisfied that assets exist which are not required for the maintenance, support and well being of the incapacitated person.

The court declines to exercise its authority to authorize gifting where the petitioner fails to establish a significant reduction in current or prospective taxes, fails to establish that the gifting carries out a lifetime pattern of giving established by the incapacitated person, and fails to establish that the incapacitated person has assets which are not needed for her maintenance, support and well-being. The court further finds that the incapacitated party did not intend to permit gifting, which finding is based upon the trust and will executed by the incapacitated person.

INCAPACITATED PERSONS / GIFTING

The court will not authorize a plan of gifting where the petitioner fails to establish that the incapacitated person's quality of care will remain at its current level by qualifying for Medicaid benefits. In making this determination the court considers the loss of the option of living in a single-occupant nursing home room and the loss of certain therapies only available to self-paying individuals, as well as the lack of a guarantee that the Medicaid program will not change and impact upon the incapacitated person's eligibility to receive services and care.

INCAPACITATED PERSONS / EQUAL PROTECTION / GIFTING

It is not a violation of equal protection for the court to deny the petition to authorize gifting in light of the court's determination that preservation of the incapacitated person's assets for her own welfare and enjoyment is in the incapacitated person's best interests.

INCAPACITATED PERSONS / GUARDIAN'S AUTHORITY

Pursuant to the Probate, Estates and Fiduciaries Code, a guardian is permitted to collect rents and income, make reasonable expenditures necessary to preserve an incapacitated person's residence, and to liquidate personal property to make funds available for an incapacitated person's care. A guardian may also request court permission to sell an incapacitated person's home.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION NO. 89-2005

Appearances: James Steadman, Esq., on behalf of Plaintiff
Andrew Coates, Esq., Department of Public Welfare

ORDER

AND NOW, to wit, this 26th day of January, 2006, after a hearing before this Court concerning Tammy L. Mitchell's Petition for Permission to Engage in Estate Planning and Transfers of Real and Personal Property Under 20 Pa.C.S.A. §5536(b), filed by and through Attorney James R. Steadman, in which Petitioner requests that the Court authorize her to gift one half of Ethyl Corbett's assets, totaling approximately $63,775.75, to Ethyl Corbett's daughter, Sandra Lee Corbett, who is also guardian of the person of Ethyl Corbett, it is hereby **ORDERED, ADJUDGED, AND DECREED** that said Petition is **DENIED** for the following reasons:

1. 20 Pa.C.S. §5536(b) is a discretionary rule. Although 20 Pa.C.S.§5536 authorizes the Court to substitute its judgment for that of the incapacitated person, and, in that capacity, to make gifts on behalf of the incapacitated person, the Court is under no obligation to utilize this power. Rather, 20 Pa.C.S. §5536, states, "In the exercise of its judgment for that of the incapacitated person, the court, first being satisfied that assets exist which are not required for the maintenance, support and well-being of the incapacitated person, *may* adopt a plan of gifts which results in minimizing current or prospective taxes, or which carries out a lifetime giving pattern." (emphasis added);
2. Pursuant to 20 Pa.C.S. §5536, the Petitioner has not satisfied the Court that gifting, in this matter, will result in a significant reduction in current or prospective taxes, for the benefit of Ethyl Corbett. Furthermore, the Petitioner has failed to establish that gifting one-half of Ethyl Corbett's assets, or approximately $63,775.75, at this time, would carry out a lifetime giving pattern, established by Ethyl Corbett. This Court finds that based on the testimony presented at both the January 24, 2006 hearing, as well as at the January 4, 2006 hearing concerning a separate Petition, Ethyl Corbett did not engage in a pattern of gifting during her lifetime;
3. Pursuant to 20 Pa.C.S. §5536, after considering the testamentary and inter vivos intentions of Ethyl Corbett, insofar as they can be ascertained, this Court finds that Ethyl Corbett did not intend to permit gifting. On February 13, 1997, at the age of eighty-one, Ethyl Corbett executed a revocable Division and Distribution of Trust Property, with the assistance of counsel, H. Valentine Holz. Furthermore, only one year ago, on January 5, 2005, at the age of

ninety, Ethyl Corbett executed her Last Will and Testament, with the assistance of counsel, H. Valentine Holz. If Ethyl Corbett had intended to implement the giving plan proposed by the Petitioner, she would have discussed this matter with her attorney, and established an estate plan providing for gifting at the time she was preparing other estate documents, including the revocable Division and Distribution of Trust Property and/or her Last Will and Testament. This Court finds that Ethyl Corbett's recent execution of these estate planning documents, but lack of any document providing for "half-a-loaf" estate planning, to be relevant and compelling evidence of her testamentary and inter vivos intentions concerning gifting.

4. The Petitioner failed to establish that the quality of Ethyl Corbett's care would remain at the present level if she qualified for Medicaid benefits, instead of continuing to self-pay for care. If Medicaid paid for Ethyl Corbett's care, she would no longer have the option of living in a single-occupant nursing home room, and she would no longer have the option of pursuing certain therapies that are available only to self-paying individuals, among other things. Furthermore, there exists no guarantee that the Medicaid program will not change during Ethyl Corbett's lifetime, which could potentially impact her eligibility to receive services and care in the future. In fact Medicaid laws are scheduled to change in the very near future. By continuing to self- pay for care, Ethyl Corbett will remain entitled to the services and level of care she currently receives, or may desire or require in the future.
5. Pursuant to 20 Pa.C.S. §5536, this Court finds that since Ethyl Corbett does not possess assets that are not required for her maintenance, support, and well-being, gifting is not a viable option. As of January 19, 2006, the combined value of all of Ethyl Corbett's assets, including her residence, bank accounts, jewelry, and household furnishings total only $127,551.50. *See Petitioner's Exhibit B.* Furthermore, the only monthly income available to Ethyl Corbett, including Social Security, three Standard Life Insurance Company policies, and an Erie Family Life pension, totals $1,927.02 per month. *See Petitioner's Exhibit D.* Ethyl Corbett's cost of care, including nursing home expenses, prescription medications, incontinence supplies, care for her dog, and miscellaneous personal expenses, totals approximately $5,200.00 per month, and, therefore, exceeds her monthly income. The Petitioner's proposed "half-a-loaf' estate plan provides no benefit to Ethyl Corbett, and would exhaust existing assets that could be used for the maintenance, support and well-being of Ethyl Corbett. Moreover, all of Ethyl Corbett's assets are required for her maintenance, support and well-being. Contrary to the Petitioner's claim, Ethyl Corbett is not being denied equal protection

by this Court's denial of the instant Petition. Rather, Ethyl Corbett is afforded even greater protection under the Court's supervision, assuring the preservation of Ethyl Corbett's assets for her own welfare and enjoyment. Gifting $63,775.75 of Ethyl Corbett's assets to Sandra Lee Corbett, would eventually render Ethyl Corbett penniless, which is contrary to the best interests of Ethyl Corbett.

6. This Court notes that pursuant to 20 Pa.C.S. §§5521(b), 5522 and 5141, Tammy Mitchell is permitted to take steps to mitigate Ethyl Corbett's debts, such as by collecting rents and income from Ethyl Corbett's home, and making reasonable expenditures necessary to preserve the home. The Court further notes that pursuant to Pa.C.S. §§5521(b) and 5151, as guardian of the estate of Ethyl Corbett, Tammy Mitchell is permitted to take steps to liquidate Ethyl Corbett's personal property, in order to make funds available to pay for her care. Furthermore, Tammy Mitchell may re-petition the Court to obtain permission to sell Ethyl Corbett's home.

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

CHRISTINA WAITE, Plaintiff

v.

JBC LEGAL GROUP, P.C., JACK H. BOYAJIAN AND MARV BRANDON, Defendants

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary judgment may be granted only where the record, when viewed in the light most favorable to the non-moving party, and with all doubts resolved against the moving party, demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. It is only when facts are so clear that reasonable minds cannot differ that summary judgment should be entered.

TRADE REGULATION / FAIR CREDIT EXTENSION UNIFORMITY ACT / DEBT COLLECTION

The Fair Credit Extension Uniformity Act, 73 P.S. §2270, *et seq.*, was enacted to establish what constitutes unfair methods of competition and unfair or deceptive acts or practices regarding debt collection. The Fair Credit Extension Uniformity Act accomplishes this goal by adopting the same standard under Pennsylvania law for debt collection practices as is established under federal law.

TRADE REGULATION / FAIR CREDIT EXTENSION UNIFORMITY ACT / ASCERTAINABLE LOSS

A violation of the Fair Credit Extension Uniformity Act is deemed by the statute to constitute a violation of the Unfair Trade Practices and Consumer Protection Law, 73 P.S. §2270.5(a). Under the Unfair Trade Practices and Consumer Protection Law, it is necessary to sustain a private cause of action that the plaintiff establish an ascertainable loss of money or property, real or personal. Thus, to sustain a private action under the Fair Credit Extension Uniformity Act, it is necessary that the plaintiff establish an ascertainable loss of money or property.

TRADE REGULATION / UNIFORM TRADE PRACTICES AND CONSUMER PROTECTION LAW / REMEDIES

Remedies available for a violation of the Unfair Trade Practices and Consumer Protection Law are broadly construed to fit the circumstances and to deter violations of the Act. The Uniform Trade Practices and Consumer Protection Law was meant to supplement common law tort and contract remedies and courts have sanctioned application of several damage assessment schemes under the Act. Consistent with the purpose of the Unfair Trade Practices and Consumer Protection Law to prevent fraud and to place consumers on an equal footing with more sophisticated parties, the Supreme Court has held that the provisions of the Unfair Trade Practices and Consumer Protection Law should be liberally construed.

The court cannot rule on a motion for summary judgment that the plaintiff is unable to establish an ascertainable loss as this is a factual issue with respect to which the plaintiff is entitled to present evidence.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 10677-2005

Appearances: Stephen H. Hutzelman, Esq. for Waite
Thomas Lent, Esq. for JBC, Boyajian and Brandon
Andrew Schwartz, Esq. for Waite

OPINION

Before the Court is a Motion for Summary Judgment in which the Defendants argue Plaintiff must prove an ascertainable loss of money or property to recover under present consumer protection laws. Defendants claim Plaintiff cannot prove such a loss and ask the case be dismissed.

The Defendants are correct that Plaintiff must prove an ascertainable loss of money or property to recover. However, this type of loss can be established from all of the factual circumstances. The remedies available to Plaintiff are broad and must be liberally construed. It is for the factfinder to determine whether Plaintiff has suffered an ascertainable loss of money or property.

Therefore, the Defendants' Motion for Summary Judgment is GRANTED in part and DENIED in part.

FACTUAL PROCEDURAL HISTORY

On October 21, 1999, Plaintiff purchased $42.37 in goods with a personal check at an Ames department store. Complaint, ¶ 10. Plaintiff's account had insufficient funds to honor the check. She claims that she satisfied the debt but is unable to confirm payment with a receipt. Defendants allege that Plaintiff never made an attempt to satisfy the bad check debt. Defendants' Motion for Summary Judgment, ¶ 7.

On December 19, 2003, Plaintiff filed for Bankruptcy. Complaint, ¶ 6.

On April 6, 2004, Defendants purchased the dishonored check debt. Defendants' Motion for Summary Judgment, ¶ 4. On April 8, 2004, Defendants mailed Plaintiff a letter demanding payment in the amount of Plaintiff's check and an additional $30.00 service charge. Complaint, ¶ 11. On May 13, 2004, Defendants sent another letter demanding payment for the original charge and the additional fee. Complaint, ¶ 12.

Plaintiff filed this lawsuit on February 19, 2005. In a four Count Complaint, Plaintiff alleges various violations of the consumer protection laws. Plaintiff seeks recovery for actual damages, treble damages, attorney fees and punitive damages.[1]

On March 9, 2005, Defendants filed a Notice of Removal to Federal

[1] An Amended Complaint can be found in the record as Attachment A of Defendants' Motion for Summary Judgment. Plaintiff's Amended Complaint is dated April 27, 2005 but has yet to be filed with the Prothonotary .

District Court. After a hearing on April 14, 2005, the District Court remanded the case to the Erie County Court of Common Pleas.

On June 15, 2005, the Defendants filed a Motion for Summary Judgment. On August 24, 2005 the Plaintiff filed a response. On August 25, 2005 Defendant filed a Reply thereto.

LEGAL STANDARD

Summary judgment may be granted only in those cases in which the record clearly shows that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Capek v. Devito*, 767 A.2d 1047, 1048 (Pa. Super. 2001). The moving party has the burden of proving that no genuine issue of material fact exists. *Rush v. Philadelphia Newspaper*, 732 A.2d 648, 650 (Pa. Super. 1999). In determining whether to grant summary judgment, the trial 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. *Potter v. Herman*, 762 A.2d 1116, 1117-18 (Pa. Super. 2000).

Summary judgment is proper only when the uncontroverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record and submitted affidavits demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Only when the facts are so clear that reasonable minds cannot differ may a trial court properly enter summary judgment. *Basile v. H & R Block, Inc.*, 761 A.2d 1115, 1118 (Pa. 2000).

WHETHER PLAINTIFF MUST PROVE AN ASCERTAINABLE LOSS

Defendants contend Plaintiff's case must be dismissed because Plaintiff has not established an ascertainable loss of money or property. The Plaintiff responds the current consumer laws do not require proof of an ascertainable loss to recover. Hence, the threshold question is whether Plaintiff must prove an ascertainable loss of money or property.

Plaintiff claims the Defendants violated Pennsylvania's Fair Credit Extension Uniformity Act ("FCEUA"), 73 P.S. § 2270 et seq. Effective June 27, 2000, the FCEUA superseded the Pennsylvania Debt Collection Trade Practices Regulations.

Plaintiff concedes that to recover under Pennsylvania's former debt collection regulations, a plaintiff had to prove an "ascertainable loss." Plaintiff claims the FCEUA changed the law and allows a private consumer to recover even without an ascertainable loss.

In essence, Plaintiff's position is that the new FCEUA creates strict liability. Plaintiff argues, "[t]he 'ascertainable loss' requirement was eliminated when the FCEUA was passed. Otherwise, there was no purpose to the changes from the Pa.Code [sic] to the FCEUA." Opposition Brief at 4.

There is no authority for Plaintiff's position. Plaintiff acknowledges

that since the FCEUA was passed, no published Pennsylvania court case has held that a consumer does not need an ascertainable loss to assert a claim under the FCEUA. Plaintiff's position is untenable.

The scope of the FCEUA is to establish "which shall be considered unfair methods of competition and unfair or deceptive acts or practices with regard to the collection of debts." 73 P.S. §2270.2. The FCEUA identified prohibited acts by debt collectors or creditors. Regarding debt collectors, the FCEUA states "(it) shall constitute an unfair or deceptive debt collection act or practice under this Act if a debt collector violates any of the provisions of the Fair Debt Collection Practices Act. . ." 73 P.S. §2270.4(a). This provision simply made the standard for debt collectors the same in Pennsylvania as it is under federal law.

More importantly, a violation of FCEUA constitutes a violation of a consumer protection law known as the Unfair Trade Practices and Consumer Protection Law (UTPCPL). Specifically, the FCEUA provides "if a debt collector or creditor engages in an unfair or deceptive debt collection act or practice under this Act, it shall constitute a violation of the Act of December 17, 1968 (P.L. 1224, No. 387) known as the Unfair Trade Practices and Consumer Protection Law". 73 P.S. §2270.5(a). This statutory provision clearly incorporates the UTPCPL into the FCEUA. Contrary to the Plaintiff's contention, the FCEUA does not supplant or repeal the provisions of the UTPCPL.

To recover under the UTPCPL, a private party must establish an ascertainable loss of money or property:

> § 201-9.2. Private actions
>
> (a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any *ascertainable loss* of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, may bring a private action to recover actual damages or one hundred dollars ($ 100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars ($ 100), and may provide such additional relief as it deems necessary or proper. The court may award to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorney fees.

73 P.S. § 201-9.2 (emphasis added).

In construing the two statutes *in pari materia,* the requirement remains that a private action brought under the FCEUA requires a showing of an ascertainable loss of money or property. *See* also *Williams v. Empire Funding Corp.*, 227 FRD 362 (ED Pa. 2005). (A District Court refused to certify proposed members of a class action because they could not prove an ascertainable loss of money or property.)

WHETHER PLAINTIFF HAS AN ASCERTAINABLE LOSS

The Defendants contend the Plaintiffs cannot prove any actual or ascertainable loss of money or property and therefore this case must be dismissed. The Defendants view is much too narrow. The remedies available for a violation of the UTPCPL have been broadly construed to fit the circumstances of each case, including fashioning a remedy that deters a violation of the UTPCPL.

In *Agliori v. Metro Life Insurance Company*, 879 A.2d 315 (Pa. Super. 2005), the Superior Court was expansive in customizing relief for a violation of the UTPCPL. Specifically, the Superior Court stated:

> "The UTPCPL does not provide a formula for calculation of "actual damages", and, as noted recently by the Third Circuit Court, the Pennsylvania Supreme Court has not to date interpreted this statutory term. Case law does, however, make clear that the UTPCPL was meant to supplement - not to replace - common law remedies. In addition, as previously noted by this Court, the statutes prohibited acts and practices are not divided into "tort-like" versus "contract-like" violations; rather, all prohibited acts and practices are listed together in §2(4). Consistent with the melding of statutory and common law tort and contract remedies, our case law has sanctioned the application of several damage assessment schemes under the UTPCPL."

Agliori, 879 A.2d at 319. (Internal citations omitted).

In *Agliori*, *supra*., the Superior Court awarded damages under the UTPCPL greater than the Trial Court. In so doing, the Superior Court stated:

> "We believe that our decision in this case is supported — if not mandated — by the purpose of the UTPCPL. Decisions by our Supreme Court and this Court have stressed time and again the deterrence function of the statute. *See Weinberg v. Sun Co., Inc.*, 565 Pa. 612, 618, 777 A.2d 442, 446 (2001); *Monumental Properties*, 459 Pa. At 458-61, 329 A.2d at 816-17; *Toy v. Metropolitan Life Ins. Co.*, 863 A.2d 1, 10 (Pa. Super. 2004); *Metz*, 714 A.2d at 450 *322 (stating that the intent and purpose of the UTPCPL are "to curb and discourage ... future [fraudulent] behavior [in consumer-type cases]"); *Johnson*, 698 A.2d at 638-39. If the court permits the appellee-defendants simply to repay what is owed the consumer under the fraudulently induced contract, the deterrence value of the statute is weakened, if not lost entirely. We cannot accept such an evisceration of the statutory goals."

The Pennsylvania Supreme Court has stated that the purpose of the UTPCPL is to prevent fraud and place the consumer on equal footing with more sophisticated parties. *See Commonwealth v. Monumental Properties*,

459 Pa. 450, 329 A.2d 812 (1974). Consistent with these purposes, the Pennsylvania Supreme Court has held that the provisions of the UTPCPL should be liberally construed. *Id* at 459-60, 329 A.2d at 816-17.

Given this background, the Plaintiff is entitled to present evidence establishing whether an ascertainable loss has occurred and what remedy is appropriate. The final determination must be made by the factfinder and not as a matter of Summary Judgment.

CONCLUSION

The Plaintiff must establish an ascertainable loss of money or property to recover under the FCEUA or the UTPCPL. It is a question of fact whether such a loss has been proven.

ORDER

AND NOW to-wit this 9 day of November 2005, after oral argument, the Defendants' Motion for Summary Judgment is **GRANTED** to the extent Plaintiff must prove an ascertainable loss of money or property to recover. The aspect of the Motion requesting dismissal of the case is **DENIED** because it is a factual determination whether such a loss occurred.

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

CENTEX HOME EQUITY CORP., n/d/b/a CENTEX HOME EQUITY COMPANY, LLC., Plaintiff

v.

CAROL ZOE BLOSS-FULTON a/k/a CAROL ZOE FULTON, Defendant

CIVIL PROCEDURE / FORECLOSURE / COUNTERCLAIMS

Rule 1148, Pa. R. Civ. P., governing counterclaims and mortgage foreclosure action, must be interpreted narrowly. A counterclaim in a mortgage foreclosure action is cognizable if it alleges fraud in the inducement to the mortgage but not if it alleges fraud in the inducement to the contract of sale.

CIVIL PROCEDURE / PRELIMINARY OBJECTIONS

Generally, preliminary objections in the form of demurrers should be sustained when the facts averred are clearly insufficient to establish the pleader's right to relief. Moreover, the trial court must recognize as true all well-pleaded material facts set forth in the complaint and all inferences fairly deducible from those facts.

CIVIL PROCEDURE / PRELIMINARY OBJECTIONS

When considering preliminary objections in the form of a demurrer, conclusion of law and unjustified inferences are not admitted by the pleadings; and the trial court must resolve the intrinsic worth of the preliminary objections solely on the basis of the pleadings and not on testimony or evidence outside the complaint. A demurrer confronts the pleadings insisting that, under the cause of action, relief cannot be granted under any theory of law.

CIVIL PROCEDURE / PLEADINGS

Rule 1019(a), Pa. R. Civ. P., requires pleadings to allege material facts on which a cause of action is based in a concise and summary form, and a court must ascertain whether the facts alleged are sufficiently specific so as to enable the defendant to prepare his defense. Material facts are ultimate facts, i.e., those facts essential to support the claim.

MORTGAGE / CONSUMER PROTECTION

Mortgage transactions constitute "trade or commerce" within the scope of Pennsylvania's Unfair Trade Protection and Consumer Protection Law (UTPCPL), 73 P.S. §§ 201-1 et seq.; and the statute is to be liberally construed to effectuate its intent to prevent fraud.

CONSUMER PROTECTION / MORTGAGES

The Mortgage Bankers and Brokers Act, 63 P.S. §§ 456.301 et seq., deals with licensure of mortgage brokers; and since nothing in the defendant's pleadings relate to an issue of licensure, the plaintiff's preliminary objection to the defendant's counterclaim based on same would be sustained.

CONSUMER PROTECTION / TRUTH-IN-LENDING

The Truth-in-Lending Act , 15 U.S.C. §§ 1601-14 et seq., and the Home

Ownership and Equity Protection Act, 15 U.S.C. § 1639, require mortgage lenders to disclose specific information to a mortgagor; Pennsylvania has an equivalent statute, the Loan Interest and Protection Law, 41 P.S. §§ 401 et seq.

CIVIL PROCEDURE / FORECLOSURE / COUNTERCLAIM

An action in mortgage foreclosure is strictly an *in rem* proceeding, and the purpose of a judgment in mortgage foreclosure is solely to effect a judicial sale of the mortgage property. Accordingly, because a mortgage foreclosure is not an action for money damages, one cannot allege a violation of the Truth-in-Lending Act as a counterclaim.

CONSUMER PROTECTION/REAL ESTATE SETTLEMENT PROCEDURES ACT

The Real Estate Settlement Procedures Act (RESPA), 12 U. S. C. §§ 2601 et seq., protects consumers from unnecessarily high settlement charges and abusive mortgage practices and prohibits kickback and referral fee arrangements whereby any payment is made or a thing of value is furnished for referral of real estate services; but it does not proscribe payment to any person of bona fide salary or compensation or other payment for services actually performed.

CONSUMER PROTECTION / FORECLOSURES / COUNTERCLAIMS

As the Real Estate Settlement Procedures Act, 12 U.S.C. § 2615, states that the act shall not affect the validity or enforceability of any loan agreement or mortgage, that statute does not apply when no facts indicate that the plaintiff/mortgagee bought from or sold residential real estate to a defendant

CONSUMER PROTECTION / LIMITATION OF ACTIONS

Under the Truth-in-Lending Act, 15 U.S.C. § 1640(e), a mortgagor cannot assert an affirmative claim against a mortgagee beyond one year; but a defendant-mortgagor can assert a counterclaim as a defense beyond the one-year statute of limitations.

CONSUMER PROTECTION / STATUTE OF LIMITATIONS

Under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2614, a demand pleaded by way of set-off or counterclaim is regarded as an affirmative action and, unlike matters of pure defense, is barred by passing of the specified period of limitation.

REAL ESTATE SETTLEMENT PROCEDURES ACT / LIMITATION OF ACTIONS

The statute of limitations under the Real Estate Settlement Procedures Act, 12 U.S.C. §614, may be tolled when a plaintiff-mortgagor provides evidence of fraudulent concealment by a defendant-mortgage lender.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 11445 of 2005

Appearances: Bonnie Dahl, Esquire for the Plaintiff
John H. Moore, Esquire for the Defendant

OPINION AND ORDER

This case comes before the Court on Plaintiff's, Centex Home Equity Corp., preliminary objections to Defendant's, Carol Zoe Bloss-Fulton, counterclaims.

I. Background of the Case

Defendant and her deceased husband, Herbert M. Fulton,[1] signed a mortgage agreement with the Plaintiff on December 13, 1999 for the property located at 10040 Concord Road, Union City, PA 16438. Plaintiff alleges that Defendant defaulted on the mortgage and note due November 1, 2004 and each month thereafter. Defendant alleges that Plaintiff has refused to credit her payments and therefore, is not in default of the mortgage.

II. Procedural History

Plaintiff filed a civil action/mortgage foreclosure on April 15, 2005, which was reinstated on June 2, 2005. The Defendant filed Preliminary Objections and a Supporting Brief on June 23, 2005.

Plaintiff filed an amended civil action/mortgage foreclosure on June 30, 2005. The Defendant filed an Answer to Complaint in Mortgage Foreclosure and Counterclaim on July 19, 2005. Plaintiff filed Preliminary Objections to Defendant's Counterclaim on August 9, 2005. Defendant filed an Amended Answer to Complaint in Mortgage Foreclosure and Counterclaim on August 24, 2005.

Plaintiff filed Preliminary Objections to Defendant's Amended Counterclaim on September 12, 2005. Defendant filed Answers to Plaintiff's Preliminary Objections on September 22, 2005. Plaintiff filed a Brief in Support of Plaintiff's Amended Objections to Defendant's Amended Counterclaim on September 30, 2005. Defendant filed a Brief in Response to Plaintiff's Preliminary Objections on October 13, 2005.

Defendant attempts to assert a counterclaim under the following statutes: (1) Pennsylvania's Unfair Trade Protection and Consumer Protection Law (UTPCPL), 73 P.S. §201-1 et seq.; (2) Consumer Equity Protection Act (actually the Mortgage Brokers and Bankers Act, 63 P.S. §456.301 et seq.; (3) Truth-in-Lending Act (TILA), 15 U.S.C. §1601 et seq.; (4) Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §2601 et seq.; and (5) Home Ownership and Equity Protection Act, 12 U.S.C. §1639. Plaintiff requests that this Court dismiss the Defendant's counterclaims because: (1) they lack specificity; and (2) are inapplicable to a mortgage foreclosure.

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[1] Mr. Fulton died August 11, 2004.

III. Legal Discussion

Pennsylvania Rules of Civil Procedure 1141-1150 govern mortgage foreclosure actions. A mortgage foreclose action is "an action at law to foreclose a mortgage upon any estate, leasehold or interest in land but shall not include an action to enforce a personal liability." Pa.R.C.P. 1141(a); *First Wis. Trust Co. v. Strausser*, 653 A.2d 688, 693 fn.4 (Pa. Super. 1995).

Additionally, a defendant "may plead a counterclaim which arises from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff's cause of action arose." Pa.R.C.P. 1148.[2] The rule governing counterclaims in mortgage foreclosure actions must be interpreted narrowly. *Chrysler First Business Credit Com. v. Gourniak*, 601 A.2d 338, 341 (Pa.Super. 1992). A counterclaim in a mortgage foreclosure action is cognizable if it alleges fraud in the inducement to the mortgage, but not if it alleges fraud in the inducement to the contract of sale. *Cunningham v. McWilliams*, 714 A.2d 1054, 1057 (Pa.Super. 1998).

Preliminary objections are governed by Pa.R.C.P. 1028, 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 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);
>
> (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.

---

[2] See also Pa.R.C.P. 1031 (Counterclaim), which states:

(a) The defendant may set forth in the answer under the heading "Counterclaim" any cause of action cognizable in a civil action which the defendant has against the plaintiff at the time of filing the answer.

(b) A counterclaim need not diminish or defeat relief demanded by the plaintiff. It may demand relief exceeding in amount or different from that demanded by the plaintiff.

Generally, preliminary objections in the form of demurrers should be sustained when the facts averred are clearly insufficient to establish the pleader's right to relief. *HCB Contractors v. Liberty Palace Hotel Associates*, 652 A.2d 1278, 1279 (Pa. 1995). Moreover, when taking into account a motion for a demurrer, the trial court must recognize as true "'all well-pleaded material facts set forth in the complaint and all inferences fairly deducible from those facts.'" *Yocca v. Pittsburgh Steelers Sports. Inc.*, 854 A.2d 425, 436 (Pa. 2004) (quoting *Small v. Horn*, 722 A.2d 664, 668 (Pa. 1998)).

Additionally, "conclusions of law and unjustified inferences are not admitted by the pleadings," *Lobolito, Inc., v. North Pocono Sch. Dist*., 755 A.2d 1287, 1289 n.2 (Pa. 2000), and the trial court must resolve the intrinsic worth "of the preliminary objections 'solely on the basis of the pleadings' and not on testimony or evidence outside the complaint." *Ins. Adjustment Bureau. Inc. v. Allstate Ins., Co.*, 860 A.2d 1038, 1041 (Pa. Super. 2004) (quoting *Williams v. Nationwide Mut. Ins. Co.*, 750 A.2d 881, 883 (Pa. Super. 2000)); see also *Texas Keystone, Inc., Pennsylvania Department of Conservation and Natural Resources*, 851 A.2d 228, 239 (Pa.Cmwlth. 2004). A demurrer confronts the pleadings insisting that under the cause of action, relief cannot "'be granted *under any theory of law.*'" *McNeil v. Jordan*, 814 A.2d 234, 238 (Pa. Super. 2002) (emphasis original) (quoting *Sutton v. Miller*, 592 A.2d 83, 87 (Pa. Super. 1991)).

Pa.R.C.P. 1019(a) requires pleadings "to allege the material facts on which a cause of action ... is based ... in a concise and summary form," and a court must ascertain whether the facts alleged are "'sufficiently specific so as to enable defendant to prepare his defense.'" *Smith v. Wagner*, 588 A.2d 1308, 1310 (Pa. 1991) (quoting *Baker v. Rangos*, 324 A.2d 498, 505-506 (Pa. Super. 1974)). 'Material facts' are 'ultimate facts,' i.e., those facts essential to support the claim. *The General State Authority v. The Sutter Corporation*, 356 A.2d 377, 381 (Pa.Cmwlth. 1976); See also, *The General State Authority v. The Sutter Corporation*, 403 A.2d 1022, 1025 (Pa.Cmwlth. 1979).

1) WHETHER THE DEFENDANT HAS PROPERLY ASSERTED A COUNTERCLAIM UNDER THE PENNSYLVANIA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW (UTPCPL)?

Mortgage transactions constitute "trade or commerce" within the scope of UTPCPL. *In Re Smith*, 866 F.2d 576, 581-82 (3rd Cir. 1989); see also *Apgar v. Homeside Lending, Inc. (In re Apgar*), 291 B.R. 665, 684 (E.D.Pa. 2003). The Statute is to be liberally construed to effectuate its intent to prevent fraud *Burkholder v. Cherry*, 607 A.2d 745, 749 (Pa.Super. 1992) (to sustain counterclaim, defendant-mortgagor needed to prove fraud).

Therefore, the Plaintiff's preliminary objection to the Defendant's counterclaim shall be overruled.

2) WHETHER THE DEFENDANT HAS PROPERLY ASSERTED A COUNTERCLAIM UNDER THE CONSUMER EQUITY PROTECTION ACT?

Defendant's counterclaim raised purportedly under the Consumer Equity Protection Act actually appears to be an attempt to invoke the Mortgage Bankers and Brokers Act, 63 P.S. §456.301 et seq. That statute deals with licensure of mortgage brokers. Nothing in the Defendant's pleadings relate to an issue of licensure.

Therefore, the Plaintiff's preliminary objection shall be sustained.

3) WHETHER THE DEFENDANT HAS PROPERLY ASSERTED A COUNTERCLAIM UNDER THE TRUTH IN LENDING ACT (TILA)?

The Defendant raises a counterclaim under the Truth in Lending Act (TILA), 15 U.S.C. §1601-14 et seq., and §1639 (Home Ownership and Equity Protection Act). TILA, *inter alia*, requires mortgage lenders to disclose specific information to a mortgagor. *Szczubelek v. Cendant Mort. Comp*, 215 F.R.D. 107, 127-28 (Dist.Ct.N.J. 2002). Pennsylvania has an equivalent statute entitled the Loan Interest and Protection Law, 41 P.S. §401 et seq. *In Re Smith*, supra.

An action in mortgage foreclosure is strictly an *in rem* proceeding and the purpose of a judgment in mortgage foreclosure is solely to effect a judicial sale of the mortgaged property. *N.Y. Guardian Mortg. Corp. v. Dietzel*, 524 A.2d 951, 953 (Pa. Super. 1987); *Fleet Real Estate Funding Com. v. Smith*, 530 A.2d 919, 924 (Pa.Super. 1987). Because it is not an action for money damages, one cannot allege a violation of TILA as a counterclaim. *N.Y. Guardian*, supra; see also *Mellon Bank, N.A. v. Pasqualis-Politi*, 800 F.Supp. 1297, 1301 (W.D.Pa. 1992); 15 U.S.C. §1640(e).

Therefore, the Plaintiff's preliminary objection shall be sustained.

4) WHETHER THE DEFENDANT HAS PROPERLY ASSERTED A COUNTERCLAIM UNDER THE REAL ESTATE SETTLEMENT PROCEDURES ACT (RESPA)?

The Real Estate Settlement Procedures Act (RESPA), 12 USCS §2601 et seq., protects consumers from unnecessarily high settlement charges and abusive mortgage practices (see §§ 2604 & 2606). It also prohibits kickback and referral fee arrangements whereby any payment is made, or "thing of value" is furnished (see §2607(a)) for referral of real estate services but it does not proscribe payment to any person of bona fide salary or compensation or other payment for services actually performed (under §2607(c)(2)). *Moreno v. Summit Mortg. Com.*, 364 F.3d 574, 576 (5th Cir. 2004); *Apgar*, supra at 677; *Szczubelek*. supra at 123-24; see esp. §2614.

However, the statute states:

> Nothing in this Act shall affect the validity or enforceability of any sale or contract for the sale of real property or any loan, loan agreement,

> mortgage, or lien made or arising in connection with a federally related mortgage loan.

12 U.S.C. §2615. A court has no reason to believe that RESPA applies when no facts indicate that a plaintiff bought from or sold residential realty to a defendant. *Kicken v. Valentine Production Credit Ass'n*, 628 F.Supp. 1008 (D.Neb. 1984), aff'd, 754 F.2d 378 (8th Cir. 1984).

The Defendant has failed to sufficiently allege a counterclaim under this statute. Therefore, the Plaintiff's preliminary objection shall be sustained.

5) WHETHER THE DEFENDANT'S TILA AND RESPA COUNTERCLAIMS ARE BARRED BY A STATUTE OF LIMITATIONS?

Plaintiff argues that the Defendant is barred from raising counterclaims under TILA and RESPA because the claims are beyond the statutes of limitations. Respectively, the statute of limitations for TILA and RESPA are outlined in 15 U.S.C. §1640(e) and 12 U.S.C. §2614.

Under TILA, the statute of limitations runs one year from the date of the alleged violation. Under RESPA, the statute of limitations runs three years from the date of the violation for §2605 and one year from the date of the violation of §§2607-08.[3] *Ramadan v. Chase Manhattan Corp.*, 156 F.3d 499, 502-03 (3rd Cir. 1998); *Pedraza v. United Guar. Corp*., 114 F.Supp.2d 1347, 1351-53 (S.D.Ga. 2000), 313 F3d 1323 (11th Cir. 2002).

Under TILA, a mortgagor cannot assert an affirmative claim against a mortgagee beyond the one-year statute of limitations, but a defendant-mortgagor can assert a counterclaim as a defense beyond the one-year statute of limitation. *Household Consumer Discount Co. v. Vespaziani*, 415 A.2d 689, 693-94 (Pa. 1980); *Public Loan Co. v. Hyde*, 406 N.Y.S.2d 907, 63 A.D.2d 193, (3rd Dept. 1978); aff'd 390 N.E.2d 116, 417 N.Y.S.2d 238, 247 N.Y.2d 182 (1979).

Where TILA specifically denotes an exception to the statute of limitations in the case of counterclaims, RESPA is silent. See 15 U.S.C. §1640(e); 12 U.S.C. §2614. However, the statute of limitations may be tolled when a plaintiff-mortgagor provides evidence of fraudulent concealment by a defendant-mortgage lender. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 31-32 (3rd Cir. 1995); *Moll v. U.S. Life Title Ins. Co.*, 700 F.Supp 1284 (S.D.N.Y. 1988). But, a demand pleaded by way of setoff or counterclaim is regarded as an affirmative action, and, unlike matters of pure defense, is barred by passing of specified period of limitation. *Household Consumer Discount. Co. v. Vespaziani*, 387 A.2d 93 (Pa.Super. 1978), rev'd on other grounds, 415 A.2d 689 (Pa. 1980).

In the instant case, the Defendant's TILA counterclaim is not barred, but

[3] However, actions brought by the Secretary, the Attorney General of any State, or the insurance commissioner of any State may be brought within 3 years from the date of the occurrence of the alleged violation.

the Defendant's RESPA counterclaim is barred by the statute of limitations. Therefore, the Plaintiff's preliminary objection to this counterclaim shall be overruled in part, and sustained in part.

IV. Conclusion

Based upon the above, this Court concludes that the Plaintiff's preliminary objections to Defendant's counterclaims shall be: (1) overruled in part; and (2) sustained in part, as reflected in the opinion. In the future, it would be helpful if the Defendant set out her counterclaims in separate sections, each dealing with one statute and/or counterclaim.

ORDER

AND NOW, this 17th day of November 2005, for the reasons set forth in the accompanying opinion

(1) Plaintiffs first preliminary objection is OVERRULED;

(2) Plaintiff's second, third, and fourth preliminary objections are SUSTAINED;

(3) Plaintiffs fifth preliminary objection is OVERRULED IN PART, and SUSTAINED IN PART as reflected in the accompanying opinion; and

(4) Defendant shall be afforded twenty (20) days from the date of this order to file an amended pleading in response to this Court's ruling on preliminary objections 4 (RESPA claim) and 5 (RESPA claim: fraud allegations). The Defendant shall not be afforded an opportunity to amend the other counterclaims or portions thereof, because the applicable law bars recovery.

BY THE COURT:
/s/ **ERNEST J. DISANTIS, JR., JUDGE**

ALLIED BUILDING INSPECTIONS, Plaintiff
v.
TOWNSHIP of MILLCREEK and BUILDING INSPECTION UNDERWRITER of PENNSYLVANIA, INC., Defendants

FAIRVIEW TOWNSHIP and HARBORCREEK TOWNSHIP, Intervenors

CIVIL PROCEDURE / SUMMARY JUDGMENT

Any party may move for summary judgment after the relevant pleadings are closed. Summary judgment is appropriate where the moving party proves there are no genuine issues of material fact when the record is reviewed in the light most favorable to the non-moving party and that the moving party is entitled to judgment as a matter of law. The non-moving party may not rest upon allegations of its pleadings but must set forth by affidavit or otherwise specific facts showing a genuine issue for trial.

POLITICAL SUBDIVISIONS / PENNSYLVANIA CONSTRUCTION CODE

The language of a statute which is clear may not be disregarded to pursue legislative intent or spirit but must be read in accordance with the plain meaning and common usage of the statute's provisions.

The provision of the Construction Code stating that a municipality may not prohibit a Construction Code official from performing inspections is not violated by an ordinance provision providing for the retention of a third-party agency to perform all services pertaining to review and approval of plans, applications, inspection and other functions required under the Uniform Construction Code. The ordinance does not prohibit registered Code officials other than those with whom the township contracts from performing inspections other than Construction Code approval or from performing inspections in municipalities which have not opted into the Construction Code. The Code also does not require acceptance of inspections by registered Code officials for purposes of the Construction Code. Accordingly, the ordinance and agreement with a third-party agency are not violative of the Construction Code.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION LAW No. 14074 - 2004

Appearances: Richard T. Ruth, Esq. for Allied Building Inspections
Evan E. Adair, Esq. for Millcreek Township
Paul Burroughs, Esq. for Fairview Township
Matthew McLaughlin, Esq. for Building Inspection Underwriters
Joseph S. Berarducci, Esq. for Building Inspection Underwriters
Robert C. Ward, Esq. for Harborcreek Township

Matthew D. Coble, Esq. - *Amicus Curiae* Pa Builders Association
Thomas L. Wenger, Esq. - *Amicus Curiae* PA State Association of Township Supervisors

OPINION

Anthony, J., December 22, 2005

This matter comes before the Court on Motions for Summary Judgment filed on behalf of Defendant Millcreek Township and Defendant Building Inspection Underwriter of Pennsylvania, Inc. After a review of the record and considering the arguments of counsel, the Court will grant the motions. The factual and procedural history is as follows.

On November 10, 1999, the General Assembly enacted the Pennsylvania Construction Code which became effective in April of 2004. In early 2003, Defendant Township of Millcreek (hereinafter "Millcreek") along with Harborcreek and Fairview Townships began working on a possible system of intermunicipal administration and enforcement of the Construction Code. The townships drafted an agreement that called for identical or substantially identical ordinances and adopted and provided for the administration of the Construction Code through a single retained third party agency. In April of 2004, the townships advertised a request for proposals to provide plan review, building code official, construction code official, inspection and related services for all three townships. The contract to administer the intermunicipal system was awarded to Defendant Building Inspection Underwriters of Pennsylvania, Inc. (hereinafter "BIU'). Plaintiff Allied Building Inspections (hereinafter "Allied Building") bid on the project but was not awarded the contract. Between June 29, 2004 and July 8, 2004, all three townships enacted the ordinances to administer and enforce the Construction Code.

On November 8, 2004, Allied Building instituted the instant action for declaratory relief challenging Millcreek's contract with BIU and seeking a declaration that requiring all inspections within Millcreek be performed by an entity affiliated with BIU violated the Construction Code. Specifically, Allied Building asked the Court to:

> (1) Find Millcreek Township's delegation of authority to BIU to refuse to accept inspections by non-BIU Construction Code Officials who meet the requirements of Chapter 7 and remain in good standing violative of 35 P.S. 7210.501(d);
> (2) Direct Millcreek Township and BIU to accept inspections from non-BIU Construction Code Officials who meet the requirements of Chapter 7 and remain in good standing; and
> (3) Allow non-BIU Construction Code Officials to perform UCC [Construction Code] inspections and issue permits in Millcreek Township.

Fairview and Harborcreek Townships were granted permission to intervene. Millcreek filed a motion for summary judgment which was joined by Fairview and Harbrocreek. BIU also filed a motion for summary judgment. Allied Building responded to both motions, and amicus briefs were filed on behalf of both sides. Argument was held in chambers at which time 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). 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.

The Construction Code provides, in pertinent part:

> (a) ADOPTION OF ORDINANCE.—
>
> (1) In order to administer and enforce the provisions of this act, municipalities shall enact an ordinance concurrently adopting the current Uniform Construction Code as their municipal building code and the current International Fuel Gas Code. Municipalities may adopt the Uniform Construction Code and incorporated codes and the International Fuel Gas Code by reference.
>
> (b) MUNICIPAL ADMINISTRATION AND ENFORCEMENT. — This act may be administered and enforced by municipalities in any of the following ways:
>
> (1) By the designation of an employee to serve as the municipal code official to act on behalf of the municipality for administration and enforcement of this act.
>
> (2) By the retention of one or more construction code officials or third-party agencies to act on behalf of the municipality for administration and enforcement of this act.

(3) Two or more municipalities may provide for the joint administration and enforcement of this act through an intermunicipal agreement under 53 Pa.C.S. Ch. 23 Subch. A (relating to intergovernmental cooperation).

(4) By entering into a contract with the proper authorities of another municipality for the administration and enforcement of this act. When such a contract has been entered into, the municipal code official shall have all the powers and authority conferred by law in the municipality which has contracted to secure such services.

(5) By entering into an agreement with the department for plan reviews, inspections and enforcement of structures other than one-family or two-family dwelling units and utility and miscellaneous use structures.

(d) REGISTRATION.— Nothing in this act shall allow a municipality to prohibit a construction code official who meets the requirements of Chapter 7 and remains in good standing from performing inspections in the municipality. This section does not alter the power and duties given to municipalities under subsection (b)(l), (3) and (4).

35 P .S. § 7210.501

Where the words of a statute are clear, a reviewing court is not free to disregard the language of the statute in order to pursue legislative intent or the spirit of the statute. Where the language of a statute is clear, we must read the statute's provisions in accordance with their plain meaning and common usage.

Commonwealth, Dep't of Transp., Bureau of Driver Licensing v. Lear, 151 Pa. Commw. 138, 616 A.2d 185 (1992)(citations omitted); 1 Pa.C.S. §1903(a),

Here, the Construction Code is abundantly clear. A municipality may retain "one or more construction code officials or third-party agencies to act on behalf of the municipality for administration and enforcement of this act." 35 Pa.C.S.A. § 7210.501(b)(2). This is precisely what the Ordinance enacted by the Townships does. The Ordinance provides:

3.01 UCC Administration All services pertaining to review and approval of construction plans, UCC application for permits, inspection of construction, consideration of requests for variances or extensions of time under the UCC, administrative enforcement of the UCC and this Ordinance, issuance of a UCC certificate of occupancy, notices to the Township's Zoning Administrator and representation in proceedings before the board of appeals and, as witness(es), in civil

> or criminal enforcement proceedings prosecuted by the Township shall be performed by the building code official(s), construction code official(s) and other persons employed or contracted by the firm retained by the Township under written contract to provide such services. The Township shall not perform any such services itself or through its employees.

Millcreek Township Ordinance 2004-9. In accordance with Construction Code section 501(b)(2), the Townships contracted with BIU to administer the UCC for the Townships.

Plaintiff contends that section 501(d) of the Construction Code prohibits the Townships and BIU from refusing to accept inspections from entities or individuals not affiliated with BIU and requires that the Townships and BIU accept inspections from such parties. Section 501(d) provides: "Nothing in this act shall allow a municipality to prohibit a construction code official who meets the requirements of Chapter 7 and remains in good standing from performing inspections in the municipality."

There is nothing in Millcreek's Ordinance or in the Agreement with BIU that prohibits registered code officials from performing inspections in the Townships. The Ordinance and Agreement with BIU do not prohibit code officials from performing inspections for reasons other than Construction Code approval, such as inspections prior to the transfer of real estate, nor does it prohibit them from performing inspections in municipalities that have not opted into the Construction Code. Moreover, Section 501(d) does not require that a municipality accept inspection of a registered code official for the purposes of the Construction Code. Thus, the Court does not find that the Townships' Ordinance and Agreement are violative of the Construction Code

ORDER

AND NOW, to wit, this 22 day of December 2005, it is hereby ORDERED and DECREED that the Motions for Summary Judgment filed on behalf of Defendant Millcreek Township and Defendant Building Inspection Underwriter of Pennsylvania, Inc. are GRANTED.

BY THE COURT:
/s/ **FRED P. ANTHONY, J.**

GEORGE LUVINE, Plaintiff
v.
ERISCO INDUSTRIES, Defendant/Employer
and
RELIANCE INSURANCE CO., Insurance Carrier

WORKERS' COMPENSATION

The Pennsylvania Workermen's Compensation Security Fund, which succeeded the original insurer upon the latter's solvency, stands in the shoes of the insurer; and where the Workmen's Compensation Judge's order specifically indicated that the defendant/employer and/or its insurance company must make certain payments, it is logical to assume that the Workmen's Compensation Judge's subsequent denial of certain payments applies to both the defendant/employer and its insurance company, now represented by the fund.

CIVIL PROCEDURE / LAW OF THE CASE

The law of the case doctrine states that (1) upon remand for further proceedings, a trial court may not alter the resolution of a legal question previously decided by the appellate court in the matter; (2) upon a second appeal, an appellate court may not alter the resolution of a legal question previously decided by the same appellate court; and (3) upon transfer of the matter between judges of coordinate jurisdiction, the transferee trial court may not alter the resolution of a legal question previously decided by the transferor trial court.

CIVIL PROCEDURE / LAW OF THE CASE

The doctrine of the law of the case does not apply and does not allow the plaintiff/employee to refuse to mark a judgment satisfied because of outstanding costs associated with his attempt to execute on the judgment in the Court of Common Pleas despite the fact that the court had previously denied a motion to prevent execution, where the Commonwealth Court on appeal specifically noted that the issue of costs and fees associated with plaintiff's attempt to execute on the judgment was moot.

EXECUTION

The sheriff may abandon a levy if the sale of the property levied upon is not held within six months after levy unless the proceedings are stayed or the time for sale is extended by the court. Pa. R.C. 3120.

EXECUTION

Where the sheriff's department returned the writ of execution marked "no sale" and six months had expired after levy, an order denying a motion for stay for execution would not have any effect on a subsequent attempt to execute on the judgment.

RES JUDICATA / WORKER'S COMPENSATION

A decision of a workmen's compensation judge can have preclusive effect in subsequent workers' compensation proceedings as well as later

civil and administrative proceedings.

CIVIL PROCEDURES / RES JUDICATA

A judgment rendered by the court having jurisdiction of parties and subject matter, unless reversed or annulled in some proper proceeding, is not open to contradiction or impeachment in respect to its validity, verity, or binding effect by parties or privies in any collateral action or proceeding.

CIVIL PROCEDURE / WORKER'S COMPENSATION

Where plaintiff entered judgment but failed to execute on that judgment and costs and counsel fees associated with plaintiff's attempts to execute on the judgment were specifically denied in the context of the underlying workmen's compensation proceeding, the defendants demonstrated that the judgment was satisfied; and the court did not err in granting a motion to compel satisfaction of the judgment.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 13133 - 2002

Appearances: Kevin A. Barron, Esquire for Luvine
Joseph J. May, Esquire for Erisco Industries
Thomas Gladden, Esquire for Reliance Insurance Co.

MEMORANDUM

Bozza, John A., J.

This matter is before the Court on the 1925(b) Statement of Matters Complained of on Appeal filed by plaintiff, George Luvine. Because the case stems from an underlying workmen's compensation claim and the plaintiff's attempts to execute on the resulting award, a brief history of that case follows. After sustaining an injury at work on February 18, 1997 while employed by Erisco Industries ("Erisco"), Mr. Luvine filed a claim that was denied by his employer's workmen's compensation insurer, Reliance Insurance Co. ("Reliance"). Subsequent appeals to a Workmen's Compensation Judge (WCJ) and the Workmen's Compensation Appeal Board (WCAB) resulted in affirmance of the denial of benefits. On October 3, 2001, while the plaintiff's appeal was pending with the Commonwealth Court, Reliance was declared insolvent and was succeeded by the Pennsylvania Workmen's Compensation Security Fund ("Fund"). Thereafter, in an Opinion and Order dated August 6, 2002 the Commonwealth Court reversed the WCAB and awarded benefits retroactive to the date of injury.[1]

[1] By prior Order, dated September 12, 2001, the Commonwealth Court noted that Mr. Luvine could recover the costs associated with his appeal if he was successful. These costs totaled $784.82. *See* September 6, 2002 Praecipe for Judgment, Exhibit 1.

Intending to challenge the Commonwealth Court's ruling, the defendants filed an Application for Supersedeas with the Commonwealth Court along with a Petition for Allowance of Appeal to the Supreme Court on September 5, 2002. When the Commonwealth Court denied the application on September 25, 2002, defendants filed another Application for Supersedeas with the Supreme Court dated October 2, 2002. On February 19, 2003 the Supreme Court denied both the petition and the supersedeas. Upon receiving notification of the Supreme Court's decision on February 24, 2003 the Fund immediately instituted payments. Mr. Luvine, however, objected to the fact that these payments did not commence within thirty days after the Commonwealth Court's decision awarding benefits, so he filed a Petition for Penalties requesting a penalty of 50% for failure to pay, plus counsel fees for an "unreasonable contest" and payment of costs. In a May 28, 2004 Decision and Order granting the petition in part, the WCJ imposed a penalty of only 10% plus counsel fees, based on his determination that there was no reasonable basis for the contest. In addition, the WCJ determined that Mr. Luvine was entitled to payment of some costs. In addressing the issue of costs, the WCJ stated:

> In his time log and Bill of Costs, the Claimant has listed the hours he expended in the proceedings he initiated in the Court of Common Pleas of Erie County. In addition, his Bill of Costs also contains many items relating to the said action. However, I am of the opinion that the said hours and costs are not reimbursable to the Claimant, and have, therefore, denied that portion of his counsel fees and costs.

(WCJ Decision, Discussion) (emphasis added). In light of this language, the WCJ's subsequent Order states:

> The Defendant and/or its insurance carrier is hereby ordered and directed to pay a penalty...with interest...[and] further ordered and directed to pay Claimant's counsel fees and the Bill of Costs, which are related to the Claimant's Claim Petition; however, no counsel fees and costs shall be paid which were incurred in the action that the Claimant filed in the Court of Common Pleas in Erie County.

(WCJ Decision, Order) (emphasis added). Cross-appeals were taken to the WCAB, which reversed the WCJ in a Decision dated March 20,2005. Mr. Luvine then appealed to the Commonwealth Court, which affirmed the WCAB in an Opinion and Order dated August 23, 2005, finding that where the Fund took over responsibility for an insurance carrier the Fund was not within the contemplation of the statute permitting an award of penalties and thus the Fund was not required to pay them. In a footnote to its decision, the Commonwealth Court noted that based on its ruling the issue of costs and fees associated with plaintiff's attempt to execute on the judgment was moot.

Returning to the case at issue, on September 6, 2002, thirty days after the Commonwealth Court's decision awarding benefits, Mr. Luvine filed a Praecipe for Judgment in the amount of $30,000, plus $784.82 in costs associated with that appeal, in the Court of Common Pleas of Erie County, and judgment was entered that same day.[2] Thereafter, he attempted to execute on the judgment over the objection of the defendants based on their continued efforts to appeal the underlying decision.[3] On October 7, 2002 defendants presented a Motion for Stay of Execution/Petition for Special Injunction to the Honorable John J. Trucilla, attempting to prevent said execution. Judge Trucilla issued an Order granting a stay that same day, "pending final decision by the Pennsylvania Supreme Court on the Application for Supersedeas and Petition for Allowance of appeal or until further order of court." *See* October 7, 2002 Order (emphasis added). After argument[4] held on November 27, 2002, and upon review of each party's position and the information in the record relative to the underlying matter at that time, this Court denied the motion and petition by Order dated December 31, 2002 and filed January 2, 2003. Thereafter, the defendants communicated their intention to appeal this order, as indicated in a letter from plaintiff's counsel to the Erie County Sheriff's Department dated January 8, 2003,[5] requesting that the Sheriff "hold off on any re-posting of the property pending the outcome of this appeal." The defendants timely filed their Notice of Appeal on January 29, 2003, along with an Application for Stay or Injunction Pending Appeal. The plaintiff filed a Response to the application on February 3, 2003, and argument was scheduled to take place before this Court on March 7, 2003. Prior to argument, however, the Supreme Court denied the Petition for Allowance of Appeal, and the defendants filed a Praecipe for Discontinuance on March 3, 2003 because the application was moot. Thereafter, on April 3, 2003 the Sheriff's Department returned the Writ of Execution to the Prothonotary's Office marked "No Sale".

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[2] While the initial Praecipe only named Erisco, an identical Praecipe for Judgment was filed on September 20, 2002 naming Reliance, though said company had already been deemed insolvent and the Fund had been named as its successor in interest.

[3] On September 24, 2002, in response to the plaintiff's Petition to Direct Sheriff to Break and Enter, this Court issued and Order permitting the Erie County Sheriff's Department to levy and execute against any and all property located at Erisco's place of business.

[4] It appears from other documents in the record that the plaintiff filed a Motion to Lift the Stay/Injunction, and the defendants filed a Response, though those documents were not contained in the official record.

[5] A copy of this letter was subsequently docketed April 3, 2003 as part of the Sheriff's file returned to the Prothonotary's Office indicating "No Sale".

No further action was taken until September 7, 2005, when Erisco filed a Motion to Compel the Satisfaction of a Judgment and a Motion for Stay of Execution/Petition for Special Injunction[6] due to the plaintiff's attempts to proceed with the Sheriff's Sale. In the interim, the WCJ issued the May 28, 2004 Decision and Order denying all costs and counsel fees associated with the plaintiff's attempts to execute on the judgment in the Erie County Court of Common Pleas. Though the parties sought further review by the WCAB and the Commonwealth Court, and addressed the issue of costs and fees associated with plaintiff's attempts to execute on the judgment, this aspect of the underlying decision was not reversed. In fact, the Commonwealth Court specifically noted that the issue was moot in light of its ruling. On September 19, 2005 the Court issued an Order granting a stay pending final resolution of the matter.

While the Fund has paid the judgment and associated costs ordered in underlying the worker's compensation proceedings Mr. Luvine refuses to mark the judgment satisfied, arguing that there is an outstanding amount of $579.28 associated with his attempts to execute on the judgment in the Court of Common Pleas of Erie County. Notwithstanding the Commonwealth Court's ruling that the issue is moot, Mr. Luvine asserts that he is proceeding to recoup these costs from the employer, not the Fund. The Fund, however, stands in the shoes of the Insurer. Where the WCJ's Order specifically indicated that "the defendant/employer and/or its insurance company" must make certain payments, it is logical to assume that the WCJ's subsequent denial of certain payments applies to both the defendant/employer and its insurance company, now represented by the Fund. Furthermore, the language of the Order is reflective of the fact that while some insurers are self-insured, others obtain workmen's compensation coverage via an insurance company.

Mr. Luvine argues that pursuant to the *law of the case doctrine* this Court is bound by its December 31, 2002 Order denying a previous Motion for Stay of Execution/Petition for Special Injunction. The *law of the case doctrine* states as follows:

> (1) upon remand for further proceedings, a trial court may not alter the resolution of a legal question previously decided by the appellate court in the matter; (2) upon a second appeal, an appellate court may not alter the resolution of a legal question previously decided by the same appellate court; and (3) upon transfer of a matter between trial judges of coordinate jurisdiction, the transferee trial court may not alter the resolution of a legal question previously decided by the transferor trial court.

[6] While the certificate of service on each motion is dated September 6, 2005, the Motion for Stay of Execution/Petition for Special Injunction was not docketed until November 17, 2005.

Commonwealth v. Viglione, 2004 Pa. Super 22 (2004). None of these circumstances are present in the subject case. Furthermore, the Sheriff's Sale was postponed at the plaintiff's own request due to the defendants' appeal, and the plaintiff took no action after the discontinuance. Pursuant to Pa. R.C.P. 3120, referencing Abandonment of Levy:

> The sheriff may abandon the levy if
>
> ...
>
> (2) sale of the property levied upon is not held within six (6) months after levy, unless the proceedings are stayed or the time for sale is extended by the court.

In this case, the court did not issue a stay, nor extend the time for sale. As such, the Sheriff's Department returned the Writ of Execution to the Prothonotary's Office marked "No Sale", and the plaintiff would be required to file another Writ of Execution to execute on the judgment. Therefore, the December 31, 2002 Order would not have an effect on a subsequent attempt to execute on the judgment. Finally, while the issue of the propriety of the amount of the judgment was not addressed at the time that this Court issued its December 31, 2002 Order relative to plaintiff's first attempt to execute on the judgment, the interim ruling by the Commonwealth Court in the context of the penalty petition has resulted in a change in the circumstances of the case.

In *Yonkers v. Donora Borough*, 702 A.2d 618 (Pa. Commw. 1997), the plaintiff, a police officer who was injured on the job, was awarded benefits under both the Workman's Compensation Act and the Heart and Lung Act. Thereafter, the Borough successfully petitioned to terminate the workers' compensation benefits, and subsequently utilized the WCJ's conclusion with respect to the issue of disability to terminate benefits under the Heart and Lung Act. In granting the Borough's preliminary objections to the plaintiff's appeal the court noted, "A decision of a [WCJ] can have preclusive effect in subsequent workers' compensation proceedings...as well as later civil and administrative proceedings." *Id.* at 62 (citations omitted).

While not controlling on the issue at hand, the following case is also instructive. In *Clayton v. City of Philadelphia*, 2004 Phila. Ct. Com. Pl. LEXIS 430 (2005), the plaintiff was awarded both disability benefits and workers' compensation benefits. A WCJ held that the City was not entitled to a credit or offset for the disability payments because it failed to take the necessary steps to protect its interests. Despite this, the City filed a notice of offset, which was dismissed by the common pleas court, after which the City took an appeal and requested supersedeas. Supersedeas was denied and the plaintiff obtained a judgment against the City, which it unsuccessfully attempted to open. Finding that the City was in reality attempting to set aside a lawful denial of supersedeas by the WCAB and a judgment clearly authorized by the Workers' Compensation Act, the

court stated:

> It is well established that a judgment rendered by a court having jurisdiction of parties and subject matter, unless reversed or annulled in some proper proceeding, is not open to contradiction or impeachment, in respect to its validity, verity or binding effect, by parties or privies, in any collateral action or proceeding.

Id. at *6.

In the instant case, the plaintiff entered judgment but failed to execute on that judgment. Thereafter, costs and counsel fees associated with his attempts to execute on the judgment were specifically denied in the context of the underlying workmen's compensation proceeding. As such, the defendants demonstrated that the judgment was satisfied, and the Court did not err in granting their Motion to Compel Satisfaction of the Judgment.

For the reasons set forth above, this Court's Order of November 17, 2005 should be affirmed.

Signed this 18 day of January, 2006.

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

ACE VIKING ELECTRIC MOTOR CO., INC., Plaintiff

v.

RONALD R. HEETER, Defendant

CONTRACTS / RESTRICTIVE COVENANTS

As a general rule restrictive covenants are enforceable if they are ancillary to employment, supported by consideration and reasonably necessary for the protection of the employer. The restrictions imposed must be reasonably limited in duration and geographic extent. *Hess v. Gebhard & Co.*, 808 A.2d 912 (Pa. 2002). Restrictive covenants of up to two years have been upheld. *Viad Corp. v. Cordial*, 299 F. Sup.2d 466 (W.D. Pa. 2003).

CIVIL PROCEDURE / PRELIMINARY INJUNCTION

A Court will grant a preliminary injunction if it determines that:

(1) the rights of the plaintiff are clear;
(2) the injunction is requested to prevent irreparable harm;
(3) greater injury would result by refusing the injunction rather than by granting it; and
(4) the preliminary injunction will properly restore the parties to the status that existed prior to the alleged wrongful act.

Both the time of the restriction and the geographic scope must be reasonable. It is a drastic legal remedy. *Herman v. Dixon*, 141 A.2d 576 (Pa. 1958).

TORTS / RESTRICTIVE COVENANTS

A plaintiff demonstrates a *prima facie* case if:

(1) the defendant agreed to the covenant;
(2) the covenant is enforceable; and
(3) that the defendant is violating the covenant.

The defendant must demonstrate that the burden is unreasonable.

CIVIL PROCEDURE / INJUNCTION

In order to obtain an injunction a plaintiff must have clean hands. The conduct of plaintiff's agent relative to comments he made concerning the defendant's wife taints the plaintiff's claim for equitable relief; said relief is therefore denied.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 14422 - 2005

Appearances: Daniel J. Pastore, Esquire for the plaintiff
Stanley G. Berlin, Esquire, for the defendant

OPINION

This case comes before the Court on the plaintiff's Petition For Preliminary Injunction. After conducting a hearing and evaluating the evidence of record and the parties' Findings of Fact and Conclusions of

Law, the Court issues this opinion.

I. FINDINGS OF FACT

1. The plaintiff, Ace Viking Electric Motor Co., Inc. ("Ace Viking") is a Pennsylvania business corporation with its principal place of business located at 222 East 30th Street, Erie, Pennsylvania, 16510. The founder and principal officer is Patrick Horwath.

2. The defendant, Ronald R. Heeter, is an adult individual and a resident of Erie County, Pennsylvania,

3. Electric Repair Technologies, LLC ("ERT") is a Pennsylvania business performing electric motor repair in the vicinity of the City of Erie, but predominantly 75 miles from the plaintiff's facilities located at 5323 Woodside Drive, Erie, Pennsylvania. Dennis Horwath is the plant manager.

4. Ace Viking has been in the business of servicing, selling, rebuilding, redesigning, repairing and re-engineering electric motors and related products since 1979. The motors vary in size from the size of a fist to five tons, although it has serviced an eight-ton motor. They are generally under one hundred horse power. They are primarily AC, but some are DC.

5. Its customers are industrial, municipal school districts, hospitals, etc.

6. Ace Viking's business covers a geographic area of approximately 80 miles encompassing Erie County and portions of New York and Ohio.

7. The customers with whom Ace Viking and its competitors do business typically utilize both AC and DC electric motors and look to repair shops such as Ace Viking to service whatever electric motors and related equipment a customer may have.

8. Other businesses in the region which engage in the same lines of business as Ace Viking include Pennsylvania Electric Motor Service Company, LeBoeuf Electric, Westburgh Electric and Lyons Electric.

9. Electric motor repair shops in the region in which Ace Viking does business all service both AC and DC electric motors of various sizes.

10. ERT is also a business performing electric motor repair with a geographic area outside the metropolitan Erie area with a general, but sole business more than 75 miles from the plaintiff's facilities.

11. ERT repairs primarily DC motors in excess of 100 horse power.

12. It is customary in the business in which Ace Viking is involved for businesses to keep confidential their pricing, customer lists, and proprietary processes and procedures.

13. Most of the motors which ERT repairs are DC and are considerably larger that those serviced by plaintiff (in excess of 100 horse power).

14. Ace Viking employs six motor technicians and office staff. The loss of one technician is disruptive to its business.

15. Mr. Heeter commenced employment at Ace Viking in March 1997. This was his first job after graduating from high school. At that time he

earned approximately $6.00 per hour.

16. Prior to commencing work at Ace Viking, Mr. Heeter received general electrical training during high school, which included such subjects as residential house wiring.

17. While employed at Ace Viking, Mr. Heeter was taught to service, repair and rebuild electric motors and related equipment. Mr. Heeter was also taught the skills for servicing DC motors, and was in the process of being trained to wind armatures on DC motors.

18. In November 2002, Mr. Heeter was sent to a class specifically related to DC motor repair.

19. Mr. Patrick Horwath determined that it costs Ace Viking approximately $30,000 to train an employee in this field.

20. While employed at Ace Viking, Mr. Heeter was taught the full range of skills for servicing AC motors, including how to wind an AC motor.

21. While employed at Ace Viking, the defendant regularly worked on AC motors but did occasionally work on DC motors. He also performed a number of other duties including clerical, inventory, pick-up and delivery and janitorial services.

22. The business of Ace Viking and ERT are substantially similar, although not identical.

23. The training and skills Mr. Heeter achieved at Ace Viking are valuable to his employment at ERT.

24. During the course of his employment, defendant became familiar with a number of Ace Viking's customers. In addition he was acquainted with general price information and the inventory system.

A. THE AGREEMENT

25. During 2002-03, Ace Viking, like a number of Erie businesses, suffered as a result of an economic downturn.

26. In approximately late December 2002, Mr. Heeter and a co-employee at Ace Viking, George Gross, considered leaving their employment at Ace Viking and taking jobs at Horwath Electric Company ("Horwath Electric").[1] Horwath Electric was a direct competitor for Ace Viking. Dennis Horwath, the estranged brother of Patrick Horwath, ran that business.

27. In late December, 2002, Horwath Electric was engaged in the electric motor repair business in the Erie area selling, servicing and repairing AC and DC motors.

28. The job available at Horwath Electric would have paid Mr. Heeter more than he was earning at Ace Viking.

29. Although Mr. Heeter testified that he did not meet with Horwath Electric representatives to discuss a job, ERT's witness, Dennis Horwath, testified that he met with two employees of Ace Viking to discuss hiring these employees; one was Mr. Gross.

[1] This company eventually went bankrupt. Mr. Dennis Horwath was involved in this business.

30. In late December 2002, Mr. Heeter was aware that Mr. Gross advised Pat Horwath of Ace Viking that Mr. Gross and Mr. Heeter had considered taking jobs at Horwath Electric.

31. If Mr. Heeter and Mr. Gross had left Ace Viking to go to Horwath Electric, it would cause a significant disruption to Ace Viking's operations and represent a loss of investment Ace Viking had made in training these employees.

32. After Patrick Horwath was advised that Mr. Gross and Mr. Heeter had considered taking jobs at Horwath Electric, he decided to seek non-compete and non-disclosure agreements from some of its employees, including Mr. Heeter.

33. Ace Viking management representatives asked Mr. Heeter and another employee, Mr. Gross, whether they would be willing to sign a non-compete and non-disclosure agreement ("Agreement") in exchange for $1.00 per hour contract payment for each hour worked. The purpose of this agreement was to protect Ace Viking's interest and to "buy the defendant's loyalty".

34. As reflected in plaintiff's Exhibit 2 (the Agreement), the Agreement provided additional compensation as consideration in the amount of $1.00 per hour worked over and above the base rate of pay for the defendant's position. See, ¶ 1 at p. 2.[2] Confidential information was defined in ¶ 2 of the agreement. Furthermore, the duration of the Agreement was for an 18-month period. See,¶ 2 (b)(ii). The geographic area was 75 miles of any office where Ace Viking did business at the time of the execution of the agreement. ¶ 2 (b)(ii). The term "competitive businesses" as defined within the scope of the restrictive covenant: ". . . include, but are not limited to, owning or working for a business of the following type: electrical apparatus sales and/or service as well as heating, ventilation and air-conditioning (HVAC), sales and/or service, including the repair, reconditioning and remanufacturing of electric motors and related equipment." ¶2 (b)(iv).

35. This Agreement was voluntary and Mr. Heeter had the right to refuse to sign it.

36. The defendant was presented with the Agreement on January 19, 2003 and the following day met with Patrick Horwath and his son, Jeffrey Horwath to discuss and review the Agreement.

37. Jeffrey Horwath read the Agreement to Mr. Heeter. Mr. Heeter initialed each page as it was read to him and signed it on the last page of the Agreement.

38. Mr. Heeter testified that he understood the terms of the Agreement. He agreed to all its terms.

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[2] These references are to the Agreement.

39. Mr. Heeter testified that he understood that by signing the Agreement, he would be getting, separate and apart from any wage, $1.00 per hour for every hour he worked in exchange for giving up his right to work for a competitor for the time set out in the Agreement.

40. At the time Mr. Heeter signed the Agreement, he understood that Ace Viking was "buying his loyalty".

41. At the time he executed the Agreement, Mr. Heeter did not intend to leave the employment of Ace Viking and wanted the additional $1.00 per hour.

42. At the time Mr. Heeter signed the Agreement, Mr. Heeter was given the option to continue to work at Ace Viking, not sign the Agreement and, in that event, he would not receive the separate $1.00 per hour contract payment.[3]

43. At the time Mr. Heeter executed the Agreement, he had not been promised a raise of $1.00 per hour for that year.

44. During the course of his employment, Mr. Heeter received periodic raises that varied in amounts.

45. On or about October 4, 2005, Mr. Heeter quit his employment at Ace Viking. He commenced his employment at Electric Repair Technologies, Inc. ("ERT") a day or two later.

46. Ace Viking's representatives do not anticipate that Mr. Heeter will divulge confidential information, i.e., customer lists.

B. PLAINTIFF'S CONDUCT

The following findings relate to a comment made by one of the principals of Ace Viking, Joseph Horwath, regarding the defendant's wife.

47. Joseph Horwath is one of Ace Viking's managers.

48. Bradley Miller was an employee of Ace Viking who terminated his employment with Ace Viking on or about October 6, 2005.

49. In July, 2004, on a day when Mr. Heeter was not at work, Joseph Horwath told Miller something to the effect: "His two-bit whore-wife doesn't help".

50. Miller relayed this information to the defendant on approximately July 27th of that year.[4]

II. LEGAL DISCUSSION AND CONCLUSIONS OF LAW

As a general rule, restrictive covenants are enforceable in this Commonwealth if they are ancillary to employment, supported by consideration and reasonably necessary for the protection of the employer. The restrictions imposed must be reasonably limited in duration and

[3] At the time that the contract payments began, the defendant was earning $10.00 per hour at Ace Viking.

[4] The defendant testified that he learned of this comment shortly before he left in October, 2004 and that this was the reason for his termination. The court finds Mr. Miller's testimony the more credible on this point.

geographic extent. *Hess* v. *Gebhard* & *Co.*, 808 A.2d 912, 917 (Pa. 2002). Furthermore, restrictive covenants of up to two years have been upheld. See *e.g., Viad Corp. v. Cordial*, 299 F. Sup.2d 466, 477 (W.D. Pa. 2003) (collecting cases).

A preliminary injunction is an equitable remedy. Before a preliminary injunction should be granted, the Court must determine that: (1) the rights of the plaintiff are clear; (2) the injunction is requested to prevent irreparable harm; (3) greater injury would result by refusing the injunction rather than by granting it; (4) and the preliminary injunction will properly restore the parties to the status that existed prior to the alleged wrongful act. Both the time of the restriction and the geographic scope must be reasonable. It is a drastic legal remedy. See *Herman v. Dixon*, 141 A.2d 576, 577 (Pa. 1958).

A plaintiff demonstrates a *prima facie* case if: (1) the defendant agreed to the covenant; (2) the covenant is enforceable; and (3) that the defendant is violating the covenant. The defendant must demonstrate that the burden is unreasonable.

Customer lists, pricing and proprietary processes and procedures of a competitive business can constitute protectable trade secrets under Pennsylvania law.

Based upon the above, this Court reaches the following legal conclusions:

1. The defendant voluntarily entered into the Agreement with Ace Viking.

2. The Agreement was ancillary to his employment.

3. The Agreement was supported by adequate consideration (the contract price of $1.00 per hour of work).

4. The Agreement was reasonably necessary to protect the employer Ace Viking's legitimate interests.

5. The Agreement provides for a reasonable duration and geographic scope.

6. In order to obtain equitable relief (such as an injunction), the plaintiff must have "clean hands". The conduct of plaintiff's agent, Joseph Horwath, relative to the comments he made concerning the defendant's wife taints the plaintiff's claim for equitable relief.

ORDER

AND NOW, this 20th day of January, 2006, for the reasons set forth in the accompanying opinion, it is hereby ORDERED that:

1. From the date of this order, the defendant shall be precluded from continuing employment with ERT for a period of 6 months.

2. For a period of 6 months from the date of this order, the defendant shall comply with all other terms and conditions of the Agreement entered into by the parties which is the subject of this action.

3. The defendant shall be relieved of any obligations under the Agreement if at any time within the 6 month period he reimburses the plaintiff the amount of $6,038.86 which represents the consideration he received as part of the Agreement.

4. The parties shall be responsible for their own costs and attorneys fees associated with this action

BY THE COURT:
/s/ **ERNEST J. DISANTIS, JR., JUDGE**

DOROS N. MICHAELIDES, M.D., Plaintiff

v.

SANNER OFFICE SUPPLY, Defendant

CIVIL PROCEDURE / TRIAL

A trial judge is prohibited from communicating with the jury *ex parte* to prevent the court from unduly influencing the jury and to afford counsel an opportunity to become aware and to seek to correct any error which might occur. Where there is no showing either that the court's action may have influenced the jury or that its directions were erroneous, then the reason for the rule dissolves.

CIVIL PROCEDURE / TRIAL

Only those *ex parte* communications between a court and jury which are likely to prejudice a party will require reversal. Incidental communications between the court and jury are less likely to create a risk of prejudice.

CIVIL PROCEDURE / TRIAL

When the jury was merely informed that the courthouse closed at 4:30 p.m. and that the court needed to know how long deliberations would continue so that appropriate arrangements could be made, there was no coercion or prejudice; and such incidental communication did not provide the basis for a new trial.

NEGLIGENCE / PROXIMATE CAUSE

For there to be a recovery based on negligence, the negligence must have been a substantial factor in bringing about the accident. A substantial factor is an actual factor, a real factor, although the result may be unusual or unexpected, but it is not an imaginary or fanciful factor or a factor having no connection or only an insignificant connection with the accident.

NEGLIGENCE / PROXIMATE CAUSE

A factual cause that is necessary to allow a recovery for negligence does not mean that it is the only, primary, or even the most important factor in causing the injury; a cause may be found to be a factual cause as long as it contributes to the injury in a way that is not minimal or insignificant.

NEGLIGENCE / PROXIMATE CAUSE

The trial court's description of the extent to which a defendant's negligence must be a substantial cause did not significantly differ from the description of factual cause as described in new suggested jury instructions; and as the court fully and accurately conveyed the applicable law, the trial court's failure to use the Suggested Civil Jury Instruction was not a basis for a new trial.

EVIDENCE / COMPROMISES

Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept a valuable consideration or

compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability or invalidity of the claim or its amount. Rule 408, Pa. R. E.

EVIDENCE / COMPROMISES

An offer to compromise is generally defined as the settlement of differences by mutual concessions or an adjustment of conflicting claims.

EVIDENCE / COMPROMISES

A demand letter from the plaintiff to the defendant did not suggest a compromise, and its admission into evidence did not violate the rule prohibiting the admission of an offer to compromise.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW NO. 11204-2003

Appearances: Michael J. Koehler, Esquire for the Plaintiff
Craig R.F. Murphey, Esquire for the Defendant

OPINION

Anthony, Jr., November 22, 2005

This Opinion is filed in response to Plaintiff's Concise Statement of Matters Complained of an Appeal. For the reasons that follow, the judgment of the Court should be affirmed. The relevant factual and procedural history is as follows.

The instant action arose out of a fall that occurred when the office chair in which Plaintiff was seated allegedly collapsed. Plaintiff sustained a closed head injury which he asserts eventually forced him to close his medical practice. Plaintiff instituted this lawsuit by complaint alleging that Plaintiff had negligently repaired the chair shortly before this incident. The case was tried to a jury. The jury found that Defendant was negligent in the repair of the office chair but that Defendant's negligence was not a substantial factor in bringing about Plaintiff's injuries. Plaintiff filed a post-trial motion which was denied. This timely appeal followed.

Plaintiff's first allegation of error is that the Court improperly communicated with the jury during its deliberations. Specifically, Plaintiff contends that the Court erred "in having it's [sic] Tip Staff communicate ex-parte with the jurors during their deliberating in that the communication indicated to the jurors that there is a time limit on the deliberations and had the effect of hastening the verdict without proper deliberation of the complex medical evidence in this case." This allegation is without merit.

Here, the communication between the tip staff and the jury dealt with the business of the courthouse schedule. The jury began deliberations at approximately 2:40 P.M. As the hour neared 4:30 P.M., the time when the courthouse closes for the day, the Court instructed the tip staff to inquire of the jurors whether they were close to a verdict and would be

running past the close of business or not. This is done so that the Court can inform the Sheriff's Office as to whether or not security personnel will need to remain at the courthouse. The jurors informed the tip staff that they were not close to reaching a verdict and would probably need to return on Monday to continue deliberations. The tip staff then called the attorneys for the parties and asked them to return to the courtroom so that they could discuss whether the deliberations would continue for a period of time into the evening or if the jury should simply be dismissed with instructions to return on Monday morning. During the time that it took for the attorneys to return to the courthouse, the jury announced that it had reached a verdict. After the verdict was recorded, the following exchange took place:

> MR. KOEHLER: On behalf of the plaintiff, it's my understanding when we were called over here that the jurors were not close to a verdict and that they were told that they were going to be brought back after the weekend.
>
> THE COURT: What we do when we approach 4:30 is we ask the jurors if they've reached a verdict or close to it because courthouse security has to be notified. They have to stay on if there are parties in the courthouse. So they discuss to determine from juries whether or not we're going to be running over or not. So I always have to make an inquiry of the jurors if that's going to be the case.
>
> MR. KOEHLER: Okay.
>
> THE COURT: They told the tipstaffs that they thought they would be -- that they would not be able to reach a verdict today and that we would probably have to go over till Monday. So we were quite surprised that they reached a verdict like they did.
>
> MR. KOEHLER: Okay. I would just put on the record -- put on the record an objection to informing the jury that they would have to come back on Monday because I believe that the juries -- to continue their deliberations in a time limit is put on them; that if they don't reach their verdict by 4:30, they're going to come back after the weekend.
>
> THE COURT: No, you misstated it. They weren't told they had to reach a verdict by 4:30. They were told that the courthouse hours close at 4:30; if they were going to stay longer, then we have to notify court security and we have to know how long it was going to be in terms of reaching a verdict. If they come in and they tell me, "Judge, we don't think we're going to reach a verdict at any time soon," then

most likely I was going to ask them to come back on Monday. And I wanted to talk to the two of you so that when we brought the jury in and made that inquiry if you were in agreement with them coming back on Monday rather than continuing today. So that's what I thought we were going to do.

MR. KOEHLER: Okay. But I guess my understanding is that the jury informed the Court about ten minutes ago that they did not feel that they would reach a verdict any time shortly and then they were told that they would then have to come back on Monday.

THE COURT: Not in those terms, not in those terms. I tried to correct that for you, and I am not going to repeat what I just said.

MR. KOEHLER: All right. That's fine, your Honor.

MR. MURPHEY [Counsel for Defendant]: Just for the record, though, Judge, so the jury was not told that they were going to have to come back Monday?

THE COURT: Well, if they didn't reach a verdict today, they would have to come back Monday.

MR. MURPHEY: No, no, no, but were they told?

THE COURT: That they would have to come back Monday?

MR. MURPHEY: Yeah.

THE COURT: Certainly not by the Court.

MR. MURPHEY: Okay. That's --

THE COURT: I had no communications with them.

MR. MURPHEY: You were not going to do that until counsel came back and they were in open court?

THE COURT: I wanted to talk to the two of you --

MR. MURPHEY: Right.

THE COURT: -- about where it appeared that we were at.

MR. MURPHEY: Okay.

THE COURT: And inquire about the feasibility of keeping them later tonight or having them come back Monday.

MR. MURPHEY: So you were going to get input from counsel before that?

THE COURT: That's right. I had asked the tipstaffs to contact you to come in to discuss that particular issue.

MR. MURPHEY: Okay.

MR. KOEHLER: Okay. I wanted to know whether the jury was informed that if they didn't reach a verdict by 4:30 that they would be coming back the next day; and part of the inquiry was made of them that if they didn't reach a verdict by 4:30, that they would have to come back on Monday until they reached a verdict.

THE COURT: No, because until I talked to you, I didn't know how long we would go today. But I did have to notify court security by 4:30 of whether we were staying or not staying.

MR. MURPHEY: And the jury wasn't told either one of those things except they needed to let you know if they had made a verdict?

THE COURT: That we were going to have to resolve the question of how long we were going to go.

MR. MURPHEY: All right. Okay. Thank you, your Honor.

N. T., April 22, 2005 at 30-34.

"Only those *ex parte* communications between a court and jury which are likely to prejudice a party will require reversal." *Commonwealth v. Bradley,* 501 Pa. 25, 459 A.2d 733 (1983). Incidental communications between the court and the jury are less likely to create a risk of prejudice. *See id.*

The reason for prohibiting a trial judge from communicating with a jury ex parte is to prevent the court from unduly influencing the jury and to afford counsel an opportunity to become aware and to seek to correct any error which might occur. Where there is no showing either that the court's action may have influenced the jury or that its directions were erroneous, then the reason for the rule dissolves.

Id. (citing the dissent in *Kersey Mfg. Co. v. Rozic*, 422 Pa. 564, 222 A.2d 713 (1966)). As Justice Musmanno stated in his dissent to *Argo v. Goodstein*, 424 Pa. 612, 228 A.2d 195 (1967), *overruled by Commonwealth v. Bradley, supra:*

> Suppose the jury sends to the judge a note with the following question: "What time shall we break off for lunch?" And the judge, without calling in counsel, sends back a note with the two words: "Twelve o'clock." According to the Majority ruling in *Gould v. Argiro*, and its ruling today, a new trial would have to be ordered because the judge did not call in counsel to confer with them as to the time the jury might munch on a sandwich and swallow a piece of pie. I would say that the judge who would assemble tipstaves, clerks, and sheriffs and have them scurry through the courthouse, into lawyers' offices and the public square to look for lawyers so that they might convene with the judge to discuss the time the jury should bend over a bowl of soup, should have his head examined, regardless of the pompous declaration by the Majority that "the rule enunciated by us is and must be prophylactic."

This is precisely the kind of inquiry that was made to the jury. They were merely informed that the courthouse closed at 4:30 and that the Court needed to know how long deliberations would continue so that the appropriate arrangements could be made.

The instant case is not like that presented in *Welshire v. Bruaw*, 331 Pa. 392, 200 A. 67 (1938). In *Welshire*, the tipstaff, who was intoxicated, entered the jury room a number of times and coerced the jury into reaching a verdict by telling them that the judge would "give them the devil" if they did not reach a verdict by 9:30.

Here, there was no coercion. The jurors were not told that they needed to reach a verdict by 4:30. The tipstaff merely asked the jurors where they stood so that he could inform courthouse security if they would be required to stay beyond the courthouse's normal working hours. This is the kind of incidental communication between the court staff and the jurors which does not cause any prejudice to the parties. Indeed, Plaintiff has not demonstrated that he was prejudiced by the communication with the jury. He speculates that the jurors may have hastened their decision because they did not want to have to return to deliberate on Monday morning. But the record demonstrates that it was the jurors, and not the tipstaff, who indicated that they might have to return on Monday. *See* N.T., April 22, 2005 at 31. As the Court stated on the record, it fully intended that if the jurors would indicate they were not close to reaching a verdict and that the Court would meet with counsel to decide if it should dismiss them for the weekend with instructions to return on Monday. Any pressure that the jurors may have felt to reach a verdict so that they did not have

to return after the weekend was self-imposed; it was not the result of the limited contact they had with the tipstaff.

As this was merely an incidental communication between the tipstaff and the jury which resulted in no prejudice to Plaintiff, there is no basis for a new trial.

Next, Plaintiff contends that the Court erred by not instructing the jurors with respect to legal cause by utilizing Pennsylvania Suggested Standard Civil Jury Instruction No. 3.25.

> In examining [the trial court's] instructions, [the appellate court's] scope of review is to determine whether the trial court committed clear abuse of discretion or error of law controlling the outcome of the case. Error in a charge is sufficient ground for a new trial, if the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue. A charge will be found adequate unless "the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to fundamental error." A reviewing court will not grant a new trial on the ground of inadequacy of the charge unless there is a prejudicial omission of something basic or fundamental. In reviewing a trial court's charge to the jury, [the reviewing court] must not take the challenged words or passage out of context of the whole of the charge, but must look to the charge in its entirety.

Stewart v. Motts, 539 Pa. 596, 654 A.2d 535, 540 (Pa. 1995)(citations omitted). At trial, the Court gave the following instruction:

> Now, in order for the plaintiff to recover in this case there must be more than just negligence. There has to be proof that if there is negligence, that that negligence must have been a substantial factor in bringing about the accident. This is what the law recognizes as legal cause: A substantial factor is an actual, a real factor, although the result may be unusual or unexpected, but it's not an imaginary or fanciful factor or a factor having no connection or only an insignificant connection with the accident. It has to be a real factor. So that's what's required. There has to be negligence and then the negligent conduct has to be a substantial factor in bringing about the accident.

N. T., April 22, 2005 at 7.

Suggested Instruction No. 3.25 was amended in 2003 to suggest the use of the term "factual cause" rather that "substantial factor." The "new" Suggested Instruction provides:

> The plaintiff must prove to you that the defendant's conduct caused the plaintiff's damages. This is referred to as "factual cause." The question is: "Was the defendant's negligent conduct a factual cause

in bringing about the plaintiff's damages?"

Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. An act is a factual cause of an outcome if, in the absence of the act, the outcome would not have occurred.

[In order for conduct of a party to be a factual cause, the conduct must not be fanciful or imaginary, but must have played a real role in causing the injury. Therefore, in determining factual cause, you must decide whether the negligent conduct of the defendant was more than an insignificant factor in bringing about any harm to the plaintiff. Under Pennsylvania law, conduct can be found to be a contributing factor if the action or omission alleged to have caused the harm was an actual, real factor, not a negligible, imaginary, or fanciful factor, or a factor having no connection or only an insignificant connection with the injury. However, factual cause does not mean it is the only, primary, or even the most important factor in causing the injury. A cause may be found to be a factual cause as long as it contributes to the injury in a way that is not minimal or insignificant.

To be a contributing factor, the defendant's conduct need not be the only factor. The fact that some other cause concurs with the negligence of the defendant in producing an injury does not relieve the defendant from liability as long as [his][her] own negligence is a factual cause of the injury.

The negligence of a defendant may be found to be a factual cause of a plaintiff's harm even though it was relatively minor as compared to the negligence of [the other defendant or] the plaintiff. In effect, the test for factual causation has been met when the conduct in question has such an effect in producing the harm as to lead reasonable persons to regard it as one of the contributing causes that is neither insignificant nor inconsequential considering all of the circumstances.]

Pennsylvania Suggested Standard Civil Jury Instruction No. 3.25.

Plaintiff contends that the Court erred in using the "old" substantial factor language rather than the "new" factual cause language. While the Court agrees that the substantial factor charge can be somewhat confusing to jurors, the Court does not find the new factual cause language to be an improvement on the substantial factor charge - it is merely different language, and the Court does not find the new language to be less confusing for jurors. Additionally, the Court notes that the Pennsylvania Suggested Standard Civil Jury Instruction are just that - *suggestions.* The Court is not compelled to use them. The Court is only required to fully and accurately convey the applicable law. The Court's instruction did that.

As the Court's instruction to the jury on the issue of substantial factor was an accurate statement of the law, there is no basis for a new trial.

Finally, Plaintiff contends that the Court erred in permitting defense counsel to mention, in his opening statement, a demand letter Plaintiff had sent to Defendant. The relevant portion of the opening statement at issue provided:

> At any rate, two weeks after this incident, Mr. Sanner [Defendant] gets a letter -- and it's dated August 8th of 2001 -- and in that letter Dr. Michaelides [Plaintiff] is demanding compensation for pain, for suffering, for loss of earnings for those two weeks since he had had that accident.

N. T., April 19, 2005 at 9-10. The letter which counsel paraphrased was later admitted into evidence. It is axiomatic that counsel is permitted to discuss admissible evidence during his opening statement. *See Wagner v. Anzon, Inc.*, 684 A.2d 570 (Pa. Super. 1996).

Moreover, this was not an improper reference to an attempt to settle the claim as has been asserted by Plaintiff. Generally, an offer to compromise is not admissible at trial. *See Rochester Machine Corp. v. Mulach Steel Corp.*, 498 Pa. 545, 449 A.2d 1366 (1982). The Pennsylvania Rules of Evidence provide:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Pa.R.E. 408.

An offer to compromise is generally defined as the settlement of differences by mutual concessions; an adjustment of conflicting claims. *See Rochester Machine, supra.* In *Rochester,* the plaintiff leased property to the defendant. The plaintiff sent a letter to the defendant with an itemized list of damages the defendant had alleged caused during its use of the premises. The defendant responded by letter to the list of damages accepting responsibility for some of them and explaining why it did not feel it was responsible for others. The Supreme Court found that the plaintiff's letter was not an offer of compromise, and defendant's letter was not a settlement offer or a counter-settlement offer. The *Rochester* court noted that there was nothing in either letter to suggest a compromise. "Rather

it is nothing more, or less, than what it purports to be, an admission of liability with respect to some items of damages and a disclaimer of liability with respect to others. There is no suggestion in the letter of efforts to negotiate a compromise." *Id.*

Here, Plaintiff's letter to Defendant was a demand letter not unlike the one discussed in *Rochester.* The letter itself made absolutely no mention of effort to compromise Plaintiff's claim and neither did defense counsel's description of Plaintiff's letter during his opening statement. Accordingly, the description of the letter was not in violation of Pa.R.E. 408.

For all the foregoing reasons, the judgment of the Court should be affirmed.

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

JAMES BORN, Plaintiff

v.

HARBORCREEK SCHOOL DISTRICT; SUSAN CHASE, Individually and in her Official capacity as Teacher; CYNTHIA HIMES, individually and in Her Official Capacity as President, Harborcreek School District Board; MARK J. KUHAR, Individually and in his Official Capacity as Solicitor, Harborcreek School District; WILLIAM T. O'NEIL, Individually and in his Official Capacity as Assistant Superintendent, Harborcreek School District; DONALD PAPESCH, Individually and in his Official Capacity as Principal, Harborcreek School District; JESSICA SIDUN; DAVID SMITH, Individually and in his Official Capacity as Superintendent of Harborcreek School District; ERICA SMITH; and JODI TEODORSKI, Defendants

CIVIL PROCEDURE / PLEADING / PRELIMINARY OBJECTIONS

The question presented by preliminary objections in the nature of a demurrer is whether on the facts averred, the law says with certainty that no recovery is possible. *Shick v. Shirey*, 716 A.2d 1231 (1998).

CIVIL PROCEDURE / PLEADING / PRELIMINARY OBJECTIONS

In ruling on preliminary objections the Court must accept as true all well-pleaded material allegations in the petition for review as well as all inferences reasonably adduced therefrom. *Allentown School District v. Commonwealth of Pennsylvania*, 787 A.2d 635 (Pa. Commw. Ct. 2001).

Preliminary Objections are only to be sustained in cases where the law is clear and free from doubt. *Pennsylvania AFL-CIO v. Commonwealth*, 757 A.2d 917 (Pa. 2000). Where any doubt exists as to whether a demurrer should be sustained, the matter must be resolved in favor of overruling the demurrer. *Shick, supra.*

CIVIL PROCEDURE / PLEADINGS

In a suit against a government official in an official capacity the real party in interest is the government entity and not the named official. *Montanye v. Wissachickon School District*, 2003 WL 22096122 *6 (E.D. Pa. 2003) (*quoting Hafer v. Melo*, 502 U.S. 21 (1991)).

CIVIL PROCEDURE / PLEADINGS

In an action for civil conspiracy and abuse of process, the real party defendant would be the Harborcreek School District. However, intentional torts against municipal entities are barred by Pennsylvania law. Political Subdivision Tort Claims Act, 42 Pa. C.S.A. §8541 et seq., granting municipal agencies immunity from liability for all state law tort claims.

The Harborcreek School District is a local agency within the meaning of the Tort Claims Act. *Kessler v. Monsour et. al.*, 865 F.Supp. 234, 241 (M.D. Pa. 1994). Additionally, none of the eight statutory exceptions delineated under the Act apply in this case. Thus, the District is immune from liability for the intentional torts of civil conspiracy and abuse of process as alleged

in plaintiff's amended complaint. Defendant's preliminary objections are granted.

NEGLIGENCE / GOVERNMENTAL IMMUNITY

Pennsylvania recognizes absolute immunity for high public officials from intentional tort liability. *Matta v. Burton*, 721 A.2d 1164 (Pa. Commw. Ct. 1998); *Holt v. Northwest Pa. Trng. Prtshp. Consrtm., Inc.*, 694 A.2d 1134 (Pa. Commw. Ct. 1997). Tort claims against the School District Board President and the School Superintendent are dismissed.

NEGLIGENCE / GOVERNMENTAL IMMUNITY

An assistant superintendent who may have influenced the school district's decision to intervene in a Department of Education proceeding does not create liability in either his individual or official capacity.

NEGLIGENCE / GOVERNMENTAL IMMUNITY

A school teacher does not qualify as a high public official. *Wagner v. Tuscarora School District*, 2005 WL 2319141, *8 (W.D. Pa. 2005).

NEGLIGENCE / GOVERNMENTAL IMMUNITY

A municipal solicitor will not be liable to third parties unless the solicitor engaged in a course of conduct amounting to fraud and manifesting malice toward the party adversely affected by a municipality's decision.

CONTRACTS / FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Disputes arising under a collective bargaining agreement must be arbitrated pursuant to 43 P.S. §1101.903. Plaintiff's failure to exhaust the mandatory arbitration proceedings under its collective bargaining agreement divests the Court of subject matter jurisdiction.

CONTRACTS / BREACH OF CONTRACT

The elements of the cause of action for breach of contract are the following:

(1) the existence of a contract;
(2) a breach of duty imposed by the contract; and
(3) resultant damages.

Plaintiff cannot establish that the Harbor Creek School District breached a duty imposed by the contract as the school district had no duty under the collective bargaining agreement to refrain from intervening in a Department of Education investigation. In fact the district has an expressed statutory right to intervene in such a proceeding. 24 P.S. §2070.13(4)

CONSTITUTIONAL LAW / DUE PROCESS

The Pennsylvania Constitution establishes reputation as a fundamental right, which cannot be abridged by government without compliance with state constitutional standards of due process. However, the plaintiff received due process in every legal setting and therefore his constitutional claim fails. As students initiated claims against the plaintiff, the District and its agents/employees were following proper procedural guidelines established for the protection of students in investigating the claim.

CIVIL CONSPIRACY

In order to succeed under a civil conspiracy claim, plaintiff must show that two or more persons combine or agree intending to commit an unlawful act or do an otherwise lawful act by unlawful means. The complaint must allege the following:

(1) combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an un-lawful purpose;
(2) overt act done in pursuance of common purpose; and
(3) actual legal damage.

CIVIL CONSPIRACY

Bare allegations of conspiracy, without more, are insufficient to survive a demurrer. *Brown v. Blaine*, 833 A.2d 1166 (Pa. Commw. Ct. 2003). The failure to plead actual damages is not fatal to a claim of civil conspiracy. *Smith v. Wagner*, 588 A.2d 1308 (Pa. Super. 1991). A claim of civil conspiracy cannot be pled without also alleging an underlying tort. The plaintiff failed to plead a fact sufficient to prove the underlying tort, intentional interference with an existing contractual relation. Further actions taken by an attorney in the course of providing legal representation to his client are absolutely privileged. *Brown v. Delaware Valley Transport Program*, 539 A.2d 1372 (Pa. Super. 1988).

The student defendants were not protected by the absolute privilege of judicial immunity for the allegations that the students conspired and made false claims against the plaintiff. Many of the purported actions occurred before and/or separate from any judicial proceeding.

TORTS / ABUSE OF PROCESS

To establish a claim for abuse of process it must be shown that the defendant:

(1) used a legal process against the plaintiff;
(2) primarily to accomplish a purpose for which the process was not designated; and
(3) harm has been caused to the plaintiff.

Werner v. Plater-Zyberk, 799 A.2d 776 (Pa. Super. 2002).

As the Department of Education was the moving party in a Professional Standards and Practices Commission hearing pursuant to 24 P.S. §2070.9(a), its action is separate from any action of the defendants. Hence, plaintiffs failed to show that defendants used the legal process against him through the Department of Education proceeding. Additionally the plaintiffs failed to allege that the defendants used this process primarily for a purpose for which the process was not designed.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 10487 OF 2005

Appearances: James Lieber, Esq. for Plaintiff Born
James Marnen, Esq. for Defendants Kuhar, Sidun, E. Smith, and Teodorski
Thomas W. King, III, Esq. and
Ronald T. Elliot, Esq. for Defendants Harborcreek School District, Chase, Himes, O'Neil, Papesch, and D. Smith

OPINION

Before the Court are Preliminary Objections filed by all of the Defendants. After oral argument, Preliminary Objections by Harborcreek School District, Susan Chase, Cynthia Himes, Mark J. Kuhar, William T. O'Neil, Donald Papesch and David Smith in both their official and individual capacities are hereby **GRANTED**. As to Defendants Jessica Sidun, Erica Smith and Jodi Teodorski, their Preliminary Objections are **DENIED**. The result is Plaintiff's Complaint is dismissed against all Defendants except the three students, Sidun, Smith and Teodorski

FACTUAL/PROCEDURAL HISTORY

On March 26, 1999, Harborcreek School District suspended Plaintiff from his high school teaching position with the District pending an investigation into allegations of misconduct with three female students. Amended Complaint, ¶ 13. On April 28, 1999, the District converted Plaintiff's paid suspension into an unpaid suspension pending dismissal. Amended Complaint, ¶ 15. On September 27, 1999, Plaintiff was criminally charged with Indecent Assault and Corruption of the Morals of a Minor for his alleged conduct with Defendant Jessica Sidun. Amended Complaint, ¶ 17. On September 25, 2000, Plaintiff was criminally charged with Indecent Assault, Corruption of the Morals of a Minor and Luring a Child into a Motor Vehicle for his alleged conduct with Defendant Jodi Teodorski. Amended Complaint, ¶ 19.

On February 11, 2001, Plaintiff was notified that the Pennsylvania Department of Education was investigating his alleged conduct with female students. Amended Complaint, ¶ 20.

Despite testimony against him by Defendants Teodorski, Sidun and Smith, Plaintiff was acquitted of all criminal charges on May 25, 2001. Amended Complaint, ¶ 24, 25.

On September 13, 2002, an arbitrator sustained Plaintiff's grievance against the District and reinstated Plaintiff to his position with full back pay and without loss of seniority. Amended Complaint, ¶ 35. Defendants Teodorski, Sidun and Smith all testified against Plaintiff during his eight-day arbitration hearing. Amended Complaint, ¶ 32.

On March 20, 2003, the District moved to intervene in the Commonwealth's proceedings. Amended Complaint, ¶ 36. Hearings were held in October, 2003; February, 2004; and May, 2004. Amended

Complaint, ¶ 37. On December 30, 2004, the Hearing Officer recommended that Judgment be entered in Plaintiff's favor. Amended Complaint, ¶ 38. By Order dated March 23, 2005, the Professional Standards and Practices Commission adopted the Hearing Officer's recommendation and dismissed
the charges against Plaintiff. Amended Complaint, ¶ 40.

On February 8, 2005, Plaintiff filed a Praecipe for Writ of Summons issued on February 9, 2005. A Complaint was filed against the various defendants on May 11, 2005. The Defendants filed Preliminary Objections on June 30, 2005. Defendants filed briefs in support of their Preliminary Objections on July 5, 2005.

Plaintiff filed a four (4) Count Amended Complaint on July 20, 2005. In Count I, Plaintiff claims Breach of Contract against the District. Count II argues a violation of Article 1, Section 1 of the Pennsylvania Constitution against the District, Himes, Chase, Papesch, O'Neil, Smith and Kuhar. Count III alleges Civil Conspiracy against Kuhar and students Sidun, Smith and Teodorski. In Count IV, Plaintiff claims Abuse of Process by Himes, Papesch, O'Neil, Smith and Kuhar.

Preliminary Objections and briefs in support were again filed by all the Defendants. Plaintiff filed Answers to the Preliminary Objections. On October 3, 2005, oral arguments were held thereon.

LEGAL STANDARDS

The question presented by preliminary objections in the nature of a demurrer is whether on the facts averred, the law says with certainty that no recovery is possible. *Shick v. Shirey*, 716 A.2d 1231, 1233 (1998). In ruling on preliminary objections, the Court must accept as true all well pleaded material allegations in the petition for review, as well as all inferences reasonably adduced therefrom. *Allentown School District v. Commonwealth of Pennsylvania*, 782 A.2d 635, 638 (Pa. Commw. Ct. 2001). Preliminary objections are only to be sustained in cases where the law is clear and free from doubt. *Pennsylvania AFL-CIO v. Commonwealth*, 757 A.2d 917 (Pa. 2000). Where any doubt exists as to whether a demurrer should be sustained, the matter must be resolved in favor of overruling the demurrer. *Shick, supra*.

ALLEGATIONS OF TORT LIABILITY AGAINST HARBORCREEK SCHOOL DISTRICT

Plaintiff directly sues Harborcreek School District for Breach of Contract and violation of Article 1, Section 1 of the Pennsylvania Constitution. He sues the District's employees and agents for Abuse of Process and Civil Conspiracy.

In a suit against a government official in an official capacity, "the real party in interest...is the government entity and not the named official..." *Montanye v. Wissachickon School District*, 2003 WL 22096122, *6 (E.D. Pa. 2003) *(quoting Hafer v. Melo*, 502 U.S. 21, 25 (1991)). Hence, by

bringing this action for Civil Conspiracy and Abuse of Process against Harborcreek's agents and employees, the real party defendant is the Harborcreek School District. However, intentional torts against municipal entities are barred by Pennsylvania law. The Political Subdivision Tort Claims Act, 42 Pa. C.S.A. § 8541 et. seq., grants municipal agencies immunity from liability for all state law tort claims. *Smith v. School District of Philadelphia*, 112 F.Supp.2d 417, 424 (E.D. Pa. 2000).

Harborcreek School District is a local agency within the meaning of the Tort Claims Act. *See Kessler v. Monsour et. al.*, 865 F. Supp. 234, 241 (M.D. Pa. 1994). None of the eight exceptions to the Act under 42 Pa.C.S.A. § 8542 apply in this case. Thus, the District is immune from liability for the intentional torts of Civil Conspiracy and Abuse of Process alleged in Plaintiff's Amended Complaint against District agents and employees. Therefore, Plaintiff's tort claims will not survive Defendant's Preliminary Objections as against the Defendants in their official capacities and the District as the real party in interest.

ALLEGATIONS OF OFFICIAL AND INDIVIDUAL LIABILITY AGAINST DISTRICT EMPLOYEES AND AGENTS

Plaintiff filed his Amended Complaint against Defendants Chase, Himes, Kuhar, O'Neil, Papesch, and David Smith individually and in their official capacities as employees and agents for the District. The United States Supreme Court makes a distinction between personal-capacity suits and official-capacity suits stating:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

Kentucky. v. Graham, 473 U.S. 159, 166 (1985) (citations omitted).

As discussed above, Plaintiff's claims against individual Defendants in their "official capacities" must fail because they are "legally indistinct" from Plaintiff's claims against Harborcreek School District. Hence Preliminary Objections are granted on all counts as to Defendants Chase, Himes, Kuhar, O'Neil, Papesch and David Smith in their official capacities as agents or employees for Harborcreek School District.

Preliminary Objections must also be granted to Defendants Cynthia Himes and David Smith in their individual capacities. Pennsylvania

recognizes absolute immunity for certain officials.[1] School superintendents as well as school board presidents are considered "high public officials" and are absolutely immune from intentional tort liability. *Matta v. Burton*, 721 A.2d 1164, 1166 (Pa. Commw. Ct. 1998); *Holt v. Northwest Pa. Trng. Prtshp. Consrtm., Inc*, 694 A.2d 1134, 1140 (Pa. Commw. Ct. 1997) (holding that County commissioners acting in their official capacity as high public officials were absolutely immune from liability for claims of intentional infliction of emotional distress and intentional interference with contractual relations.) Accordingly, Plaintiff's tort claims against Cynthia Himes, in her individual capacity as Harborcreek School District Board President and David Smith, in his individual capacity as Superintendent, must also be dismissed.

As to Susan Chase, Mark J. Kuhar, William O'Neil, and Donald Papesch, "[the] determination of whether a particular public officer is protected by absolute privilege depends on the nature of his duties, the importance of his office, and particularly whether or not he has policy-making functions." *Lindner v. Mollan*, 677 A.2d 1194, 1198 (Pa. 1996) (*citing Montgomery v. City of Philadelphia*, 140 A.2d 100, 102 (1958)).

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[1] There is conflicting legal authority regarding whether Pennsylvania's Political Subdivision Tort Claims Act abrogated high public official absolute immunity in civil suits. The Commonwealth Court held that superintendents could be found to have waived their immunity if they engaged in willful misconduct. *Petula v. Mellody*, 631 A.2d 762 (Pa. Commw. Ct. 1993); *See also, Wagner v. Tuscarora School District*, 2005 WL 2319141 (M.D. Pa. 2005) (holding that school superintendents and board members qualified as high public officials but the defense of official immunity did not shield them from immunity from acts constituting a crime, actual fraud, actual malice or willful misconduct.) Contrary authority states:

> This Court has never called into question, much less overruled, the common law doctrine of absolute privilege for high public officials. Moreover, our lower courts have consistently relied upon the doctrine. Furthermore, our courts have agreed that Section 8550 of the PSTCA does not abrogate the common law doctrine of absolute privilege for high public officials. These courts have limited their application of Section 8550 of the PSTCA only to render an employee of a local government agency subject to civil suit for willful misconduct, where that employee did not qualify as a "high public official" for purposes of the common law doctrine of absolute privilege.

Lindner v. Mollan, 677 A.2d 1194, 1196-1197 (Pa., 1996) (internal citations omitted). *See also, Thornbury Noble, Ltd. v. Thornbury Tp.* 2002 WL 442827, *19 (E.D. Pa., 2002) (holding absolute immunity protects high officials from civil suits for intentional interference with prospective contractual relations). Assuming *arguendo,* high public official immunity is not absolute and the immunity is waived by willful misconduct or malice, Defendants' Preliminary Objections must nonetheless be granted because Plaintiff failed to plead misconduct by either Defendant. Plaintiff's only allegation is that Himes or Smith may have made the decision to intervene in the Department of Education proceedings. Amended Complaint, ¶ 102. There is no allegation the conduct of David Smith or Cynthia Himes constituted actual malice or willful misconduct. Plaintiff's claims against both Defendants in their individual capacities must be dismissed.

Defendant Susan Chase, Teacher

Plaintiff brings his action against Susan Chase individually and in her official capacity as a teacher in the Harborcreek District. By examining the nature of a teacher's duties, the importance of the position and whether a teacher traditionally has policy-making functions, the position of teacher does not qualify for absolute immunity as a "high public official," *See Wagner v. Tuscarora School District*, 2005 WL 2319141, *8 (W.D. Pa. 2005) (finding that teachers do not qualify as high public officials).

However, Plaintiff fails to plead any misconduct with respect to Defendant Chase. There are no facts alleged giving rise to any cause of action against Chase.

Further, Chase does not serve in any supervisory or administrative position where she could make decisions affecting the Plaintiff. As such, she is not part of any governmental deprivation of any of the Plaintiff's rights. Hence, Defendant Chase's Preliminary Objections as to her liability in both her official and individual capacity are granted.

Defendant William O'Neil, Assistant Superintendent

Plaintiff brings his action against William O'Neil, individually and in his official capacity as Assistant Superintendent. Plaintiff claims that "[b]ased on information and belief, the decision to act as an intervener in the Department of Education proceedings was made by Smith, Kuhar, *O'Neil*, Papesch, and/or Himes." Amended Complaint, ¶ 102. By examining the nature of the duties of an assistant superintendent, the importance of the position and whether it traditionally has policy-making functions, the position of assistant superintendent may qualify for absolute immunity as a high public official. However, this issue need not be reached in resolving the Preliminary Objections.

The only claim Plaintiff makes against Defendant O'Neil is that he may have influenced Harborcreek's decision to intervene in the Department of Education proceedings. Giving Plaintiff the benefit of assuming O'Neil actually participated in the decision to intervene, such conduct is not criminal, fraudulent nor willful misconduct.

Further, Plaintiff fails to allege any facts to support a finding that O'Neil acted outside the scope of his position as employee and/or agent for the district or that he acted with malice or willful misconduct. As will be discussed, Harborcreek School District had a legal right to request to intervene. The exercise of this right does not create liability for O'Neil.

Plaintiff fails to plead facts that would state a cause of action against O'Neil. Hence, O'Neil's Preliminary Objections as to his liability in both his individual and official capacities for all claims must be granted.

Defendant Donald Papesch, Principal

Plaintiff brings his action against Donald Papesch individually and in his official capacity as a principal in the Harborcreek School District. Plaintiff claims that Defendants Papesch and Kuhar concealed and/or failed

to adequately pursue exculpatory information relative to Born's alleged misconduct with female students. Amended Complaint, ¶ 74. Plaintiff also alleges that Defendant Papesch may have coerced female students to alter or change their prior criminal trial testimony in preparation for their testimony in front of the arbitrator. Amended Complaint, ¶ 88. Further, Defendant Papesch purportedly failed to carefully record his conversations with students regarding allegations against Born and failed to inform Born of any exculpatory information gained from the conversations. Amended Complaint, ¶ 77, 79.

As a principal in the Harborcreek School District, Defendant Papesch does not qualify for absolute immunity as a high public official. "Unlike school superintendents and school board members, principals and teachers do not qualify as high public officials..." *Wagner v. Tuscarora School District*, 2005 WL 2319141, *8 (W.D. Pa. 2005). Further, Plaintiff pleads willful misconduct and Defendant Papesch is therefore not entitled to the same immunity as his employer, Harborcreek School District, under the Political Subdivision Tort Claims Act. *See Smith v. School District of Philadelphia*, 112 F.Supp.2d 417, 424 (E.D. Pa. 2000). Hence, the substance of Plaintiff's claim as to Defendant Papesch's individual liability will be addressed hereafter.

Defendant Mark Kuhar, Solicitor

Plaintiff brings his action against Mark Kuhar individually and in his official capacity as solicitor of Harborcreek School District. The role of a municipal solicitor has been explained by the Superior Court:

> Generally, an attorney is not liable to third persons for the tortious conduct of a client. Thus, under the general rule a municipal solicitor cannot be held liable for acts committed by municipal office holders as it is the office holder, and not the attorney, who has the authority to make the final decisions on municipal matters and the solicitor's role is limited to an advisory one. A solicitor's advice may be accepted or rejected by the municipal office holder. His duty, however, is to the entity which retains him not to the public at large or to persons who stand in an adverse relationship to the municipal entity.
>
> However, an attorney is personally liable to a third party when he is guilty of fraud, collusion, or a malicious or tortious act himself and he is liable when he encourages and induces another to commit a trespass.
>
> Thus, it is clear that in order to be held liable to persons who have dealings with a municipal entity, the municipal solicitor must have engaged in a course of conduct amounting to fraud and manifesting malice towards the party adversely affected by the municipality's decision.

Urbano v. Meneses, 431 A.2d 308, 314 (Pa. Super. 1981) (Watkins, J.,

concurring and dissenting) (citations omitted).

Plaintiff claims that "Kuhar's actions constituted a crime, actual fraud, actual malice or willful misconduct," Amended Complaint, ¶ 132. He further argues "Kuhar, Papesch and/or the District in connection with the arbitration hearings coerced the female students to alter or change their prior criminal trial testimony in order to make their arbitration testimony more credible." Amended Complaint, ¶ 88.

Plaintiff pleads willful misconduct and similar to Papesch, Kuhar is also not entitled to the same immunity as his employer, Harborcreek School District. The substance of Plaintiff's claim against Kuhar's individual liability will be addressed hereafter.

COUNT I - BREACH OF CONTRACT

Plaintiff claims that the District breached its contract when it "continued to attempt to remove Born from his teaching position by intervening in the Department of Education proceedings to strip Born of his teaching license...." Amended Complaint, ¶ 114.

Pennsylvania law requires that disputes arising under a collective bargaining agreement be arbitrated. 43 P.S. § 1101.903. Plaintiff claims that he "discussed the School District's intervention with his union and was told that the District could intervene in the Department of Education proceedings." Amended Complaint,¶ 116. This Court lacks subject matter jurisdiction over Plaintiff's Breach of Contract claim because he failed to exhaust the mandatory arbitration procedures under his collective bargaining agreement. *See Shumake v. Philadelphia Board of Education*, 686 A.2d 22, 24 (1996) (upholding trial court's non-suit in Breach of Contract Action because teacher had failed to exhaust the mandatory arbitration procedures under the collective bargaining agreement and therefore deprived the trial court of subject matter jurisdiction).

Assuming *arguendo* there is subject matter jurisdiction, Plaintiff's Breach of Contract claim would nonetheless fail on the merits. The elements of a cause of action for Breach of Contract are the following: (1) the existence of a contract; (2) a breach of duty imposed by the contract; and (3) resultant damages. *Corestates Bank, N.A. v. Cutillo*, 723 A.2d 1053, 1058 (Pa. Super. 1999). Plaintiff cannot establish the second element of a Breach of Contract Action, that Harborcreek School District breached any duty owed to the Plaintiff.

There is no duty under the collective bargaining agreement requiring the District not to intervene in a Department of Education investigation. The District has an express statutory right to intervene in such a proceeding. 24 P.S. §2070.13 (4). The District's exercise of this right does not constitute a breach of contract with the Plaintiff.

What Plaintiff overlooks is that it is for the Department of Education to determine whether to conduct an investigation. The District cannot be held liable for a decision to investigate the Plaintiff made by the Department

of Education.

Because there was no contractual duty breached, Plaintiff does not have a cause of action for Breach of Contract against Harborcreek School District. This claim is dismissed.

COUNT II - VIOLATION OF THE PENNSYLVANIA CONSTITUTION

Plaintiff claims that because of Defendants' actions in violation of Article 1, Section 1 of the Pennsylvania Constitution, he suffered emotional harm, damages to his professional reputation and damage to his snow removal and landscaping business. He states that Defendants deprived Plaintiff of his right to his good reputation "without just cause in violation of Article 1, Section 1 of the Pennsylvania Constitution." Amended Complaint, ¶ 120.

The Pennsylvania Constitution provides:

> § 1. **Inherent rights of mankind.**
> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and *reputation,* and of pursuing their own happiness.

Pa. Const. Art. 1, § 1 (emphasis added).

"[T]he Pennsylvania Constitution establishes reputation as a fundamental right, which cannot be abridged by government without compliance with state constitutional standards of due process." *Brozovich v. Dugo*, 651 A.2d 641, 644 (Pa. Commw. Ct. 1994). In the case sub judice, Plaintiff received due process in every legal setting and therefore he has no constitutional claim.

Plaintiff avers that Harborcreek School District and its employees and agents did not initiate the claims of inappropriate contact against Plaintiff to soil Plaintiff's reputation. Rather, the student defendants initiated those claims and the District and its agents/employees merely responded by following procedural guidelines established for the protection of the students. Amended Complaint, ¶ 14.

The Pennsylvania Supreme Court has interpreted Article 1, Section 1 of the Pennsylvania Constitution to establish the right of "acquiring, possessing and protecting property" (including reputation) and no State shall deprive a person of that property without due process of law. *R. v. Com., Dept. of Public Welfare*, 636 A.2d 142, 152 (Pa. 1994).

Plaintiff does not allege any deprivation of any procedural or substantive due process. He has had a jury trial and an arbitration hearing. Plaintiff has been acquitted of any criminal wrongdoing. Plaintiff has been re-instated to his teaching position with full back pay, seniority and all relevant benefits. Plaintiff fails to allege any conduct by the Defendants that denied him any form of due process. Accordingly, Plaintiff does not have a constitutional claim.

COUNT III - CIVIL CONSPIRACY

Plaintiff argues that Defendants conspired to deprive Plaintiff of his occupation by intervening in the Department of Education Proceedings, participating in the hearings, falsely testifying/procuring false information, suppressing or failing to pursue exculpatory evidence and "attacking" Plaintiff based on false allegations. Plaintiff's Memorandum in Opposition to Preliminary Objections, p. 15. To succeed under Civil Conspiracy, Plaintiff must show that:

> [T]wo or more persons combine or agree intending to commit an unlawful act or do an otherwise lawful act by unlawful means. To state a cause of action for conspiracy, the complaint must allege the following (1) combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) overt act done in pursuance of common purpose; and (3) actual legal damage. A complaint alleging civil conspiracy must allege facts showing the existence of all the elements, and if the plaintiff is unable to allege facts that are direct evidence of the combination and its intent, he must allege facts that, if proved, will support an inference of the combination and its intent. Bare allegations of conspiracy, without more, are insufficient to survive a demurrer.

Brown v. Blaine, 833 A.2d 1166, 73 (Pa. Commw. Ct. 2003).

Although Plaintiff failed to plead actual damages, this is not fatal to his claim.

> While it is true that in an action for civil conspiracy damages are awarded for the injury done by the conspiracy, P.L.E. Conspiracy § 26, it is not necessary that appellant plead specific amounts of out of pocket losses in order to survive a demurrer. Instantly, the damages which appellant pleaded were those resulting from the publication of defamatory falsehoods. Such damages customarily include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Thus, averments in the amended complaint that appellant suffered damage to his reputation, embarrassment and a substantial and permanent loss of earning capacity are sufficient to plead a cause of action for civil conspiracy.

Smith v. Wagner, 588 A.2d 1308, 1312 (Pa. Super. 1991) (internal citations omitted).

Plaintiff acknowledges that a claim of Civil Conspiracy cannot be pled without also alleging an underlying tort. Plaintiff's Memorandum in Opposition to Preliminary Objections, p. 13. Plaintiff argues that the underlying tort to his Civil Conspiracy claim is Intentional Interference with an Existing Contractual Relation. *Id.*

To establish his claim for Intentional Interference with a Contractual

Relation, Plaintiff must prove the existence of a contractual relation, purposeful action by the defendant to harm the relation, absence of a privilege or justification and legal damage. *Strickland v. University of Scranton*, 700 A.2d 979, 985 (Pa. Super. 1997) (citation omitted).

As to Defendant Kuhar, Plaintiff fails to plead facts that would establish the third element of Intentional Interference with a Contractual Relation, the absence of privilege or justification. Pennsylvania law affords an absolute immunity protecting the actions of an attorney while representing a client in a judicial proceeding.

In *Brown v. Delaware Valley Transport Program*, 539 A.2d 1372 (Pa. Super. 1988), the defendants sought and received court permission to remove a decedent's organs for transplantation after being unable to identify the decedent and locate his next-of-kin. Decedent's family members sued the Transplant Program, its officers, the hospital and the hospital's attorney. *Brown*, 539 A.2d at 1373. The trial court dismissed all claims[2] against the attorney for the actions he took while representing the hospital. *Id.* The Superior Court affirmed judgment of the trial court holding the claims against the attorney were based on action taken by him in the course of providing legal representation to his client and were "absolutely privileged." *Id.* at 1374.

Likewise, in *Buschel v. Metrocorp*, 957 F.Supp. 595, 599 (E.D. Pa. 1996), a journalist sued various defendants, including a magazine's attorney for Tortious Interference with Existing Contractual Relationship. The journalist alleged that the attorney "maliciously and intentionally interfered with the existing contractual relationship" between himself and the magazine. *Buschel*, 957 F. Supp. at 599. The Court found that the journalist's claim failed because the attorney acted with a *privilege* to protect what he believed to be the interest of his client. *Id.* (emphasis added).

Plaintiff fails to establish that Kuhar acted outside the scope of representing his client, Harborcreek School District. Hence, the averments of Plaintiff's Amended Complaint fail to state a cause of action against Defendant Kuhar that would take Kuhar's actions outside the privilege. The claim of Civil Conspiracy against Defendant Kuhar in his individual capacity must be dismissed.

Defendants Sidun, Smith and Teodorski argue that they are also "protected by the absolute privilege of judicial immunity." Reply Brief, at p. 6. Pennsylvania Superior Court has held, "The purpose for the privilege is to preserve the integrity of the judicial process by encouraging full and frank testimony." *Panitz v. Behrend*, 632 A.2d 562, 564 (Pa. Super.

[2] The complaint contained six counts including mutilation of a corpse, intentional inflection of emotional distress, civil conspiracy, malicious use of process, assault and battery and negligent inflection of emotional distress.

1993). Plaintiff alleges that the students conspired and made false claims against him so that Plaintiff would be removed him from his teaching position. Many of their purported actions occurred before and/or separate from any judicial proceeding. Clearly, the Student Defendants' alleged conduct is not within the sphere of communication that judicial immunity was designed to protect. No legal authority exists that would provide the Student Defendants with an absolute privilege for the conduct Plaintiff alleges. *See Bochetto v. Gibson*, 860 A.2d 67, 68 (Pa. 2004).[3] Therefore, Preliminary Objections by Student Defendants Sidun, Smith and Teodorski must be denied.

COUNT IV - ABUSE OF PROCESS

Plaintiff claims the Defendants' conduct in initiating, continuing or procuring proceedings against him were criminal, fraudulent, with actual malice or was willful misconduct. Amended Complaint, ¶ 136, 139. As discussed above, claims against Defendant's Himes, O'Neil, and David Smith in both their official and their individual capacities must be dismissed. Hence, this claim can only address the Abuse of Process allegations against Defendants Papesch and Kuhar in their individual capacities.[4]

The Pennsylvania Superior Court defines Abuse of Process as

> "[T]he use of legal process against another primarily to accomplish a purpose for which it is not designed." To establish a claim for abuse of process it must be shown that the defendant (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused to the plaintiff. Abuse of process is, in essence, the use of legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process. Thus, the gravamen of this tort is the perversion of legal process to benefit someone in achieving a purpose which is not an authorized goal of the procedure in question.

Werner v. Plater-Zyberk, 799 A.2d 776, 785 (Pa. Super. 2002) (internal citations omitted).

The averments in Plaintiff's Amended Complaint are not sufficient to establish that Papesch and Kuhar "used the legal process" against Plaintiff. "The term 'use', in the context of an abuse of process claim requires that a party actively seek and employ a legal process primarily for the purpose

[3] An attorney's act of transmitting malpractice complaint to freelance reporter was an extrajudicial act outside of the regular course of the judicial proceedings and judicial privilege did not apply to provide absolute immunity. *Bochetto v. Gibson*, 860 A.2d 67, 68 (Pa. 2004).

[4] Plaintiff pled malice and/or willful misconduct on the part of both Defendants pursuant to 42 Pa.C.S. §8550 thereby disqualifying them from official immunity under 42 Pa.C.S. § 8545. Amended Complaint, ¶ 74, 88.

of harming an adverse party." *Hart v. O'Malley,* 647 A.2d 542, 551 (Pa. Super. 1994). Plaintiff claims that "Defendants took an active part in the initiation, continuation or procurement of civil proceedings against Plaintiff before an administrative board, the Department of Education..." Amended Complaint, ¶ 134.

Plaintiff's allegation is belied by Department of Education procedures. Pennsylvania Department of Education proceedings are brought before the Professional Standards and Practices Commission pursuant to 24 P.S. § 2070.9(a). It is the Department of Education that is the moving party, not the School District. After the Department of Education conducts a review of the allegations and initiates the hearing process, the Commission determines whether an interested school district's request to intervene will be permitted. 24 P.S. §2070.13(c)(4); 1 Pa.Code §§35.27-35.32. The decision by the Department of Education is separate from any action by any of the Defendants. Hence, Plaintiff's facts as alleged fail to show that Defendants "used the legal process" against him through the Department of Education proceeding.

Moreover, Plaintiff fails to address an essential element of the tort of abuse of process; that it was used primarily for a purpose for which the process was not designed. The Pennsylvania Superior Court has found:

> A cause of action for abuse of process requires "[s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process...[;] there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions,"

Hart v. O'Malley, 647 A.2d 542, 552 (Pa. Super. 1994) (internal citations omitted).

Further, the Court also found:

> An attorney is liable for abuse of process when the acts complained of are his own personal acts of others wholly instigated and carried on by him. An attorney cannot be liable for doing nothing more than carrying out the process to its authorized conclusion, even though with bad intentions.

Hart, 647 A.2d at 553.

Plaintiff did not allege that Defendants acted on their own or instigated the Department of Education proceedings. Further, there is nothing that would indicate that they did anything more than carry out any of the processes and procedures to its conclusion.

The claim of Abuse of Process alleging the Defendants took an active part in the initiation, continuation or procurement of civil proceedings against Plaintiff before the Department of Education must fail. The right to intervene in the procedure is expressly authorized by law and Plaintiff makes no factual assertions supporting the argument that Defendants

initiated the legal process against the Plaintiff to accomplish a purpose for which the process was not designed. Accordingly, Plaintiff's claims against Defendants Kuhar and Papesch in their individual capacities are dismissed.

CONCLUSION

Plaintiff has failed to allege facts that would make recovery possible as to Defendants Harborcreek School District, Susan Chase, Cynthia Himes, Mark J. Kuhar, William T. O'Neil, Donald Papesch, and David Smith. Hence, their Preliminary Objections are **GRANTED.**

If Plaintiff's allegations are correct, Defendants Sidun, Smith and Teodorski conspired to make purportedly false allegations against Plaintiff to interfere with his employment. The student defendants are not protected by immunity or privilege for their alleged actions. Hence, Preliminary Objections by Defendants Jessica Sidun, Erica Smith and Jodi Teodorski are **DENIED**.

ORDER

AND NOW to-wit this 23 day of November, 2005, after oral argument, the Preliminary Objections by Defendants Harborcreek School District, Susan Chase, Cynthia Himes, Mark J. Kuhar, William T. O'Neil, Donald Papesch, and David Smith, all in both their individual and official capacities are hereby **GRANTED**.

Preliminary Objections by Defendants Jessica Sidun, Erica Smith and Jodi Teodorski are hereby **DENIED**. This case is dismissed against all Defendants except Jessica Sidun, Erica Smith and Jodi Teodorski.

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

WILLIAM T. DUNN and ELIZABETH G. DUNN, Plaintiffs

v.

CHRISTINE M. DIVENS, as personal representative of WILLIAM C. DIVENS, SR., DECEASED, and JANET M. DIVENS, DECEASED, Defendant

CIVIL PROCEDURE / SUMMARY JUDGMENT

Any party may move for summary judgment after the relevant pleadings are closed. Summary judgment is appropriate where the moving party proves there are no genuine issues of material fact when the record is reviewed in the light most favorable to the non-moving party and that the moving party is entitled to judgment as a matter of law. The non-moving party may not rest upon allegations of its pleadings but must set forth by affidavit or otherwise specific facts showing a genuine issue for trial.

REAL ESTATE / STATUTE OF FRAUDS

The Statute of Frauds requires that an agreement for the sale of real estate must be in writing setting forth the essential terms of the contract and signed by the seller. The essential terms required to form a valid contract for the sale of real estate are the names of the parties, an adequate description of the property, and the consideration or purchase price for the property.

REAL ESTATE / STATUTE OF FRAUDS / CONSIDERATION

Consideration is defined as a benefit or a loss or detriment. A detriment is found where the promisee has done something he or she was not bound to do or abstain from doing something he or she is otherwise entitled to do. The consideration must be actually bargained for as the exchange.

Where the grantors remain in possession of the real estate for the remainder of their lives, and the grantees had no obligation to pay taxes, maintenance or insurance or to perform any labor to maintain the premises, and were not otherwise required to abstain or refrain from doing anything they were entitled to do, there is no consideration for the promise to transfer the real estate. As there was no benefit to the grantors, and no detriment to the grantees, the purported bill of sale is unenforceable under the Statute of Frauds for lack of consideration.

REAL ESTATE / TRUST / CONDITIONS UPON TRANSFER

Where a trust instrument requires transfer of an interest in trust property by an appropriate instrument and surrender to the trustees of the certificate for trust property, the lack of consideration prevents the bill of sale from serving as an appropriate writing. Further, the person named on the books of the trustees as the certificate holder is the absolute owner as the existing certificate was never surrendered to the trustees and is not currently in the possession of the plaintiffs.

REAL ESTATE / CONTRACT INTERPRETATION / INTENT

In contract construction the intention of the parties is paramount and, where the contract is written, the intention is to be ascertained from the

writing itself where the terms are unambiguous. Intent is to be determined from the outward and objective manifestations of the parties rather than their undisclosed and subjective intentions. The bill of sale is unambiguous and clearly manifests an objective and outward intent on the part of the grantors to sell the property to the grantees. Later intentions expressed in their joint will have no impact upon the validity of the document. The bill of sale fails, nonetheless, under the Statute of Frauds for lack of consideration.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11811 - 2004

Appearances: Kathleen Hayne Robertson, Esq. for Plaintiffs
Joseph A. Yochim, Esq., for Defendants

OPINION

Connelly, J., February 10, 2006

Procedural History

Presently before the Court are cross Motions for Summary Judgment. William T. Dunn and Elizabeth G. Dunn (hereinafter collectively as "Plaintiffs") filed a Complaint in Action for Declaratory Judgment on May 19, 2004, against Christine M. Divens (hereinafter "Defendant") as personal representative of the Estate of William C. Divens, Sr., deceased, and Janet M. Divens, deceased. On July 9, 2004, Defendant filed an Answer and New Matter. Plaintiffs filed a Reply to New Matter on July 28, 2004. On March 2, 2005, Defendant filed a Motion for Judgment on the Pleadings, which was denied by the Honorable Fred P. Anthony on April 15, 2005. Thereafter, on October 28, 2005, Plaintiff filed a Motion for Summary Judgment (hereinafter "Plaintiffs' MSJ") and an accompanying brief in support thereof (hereinafter "Plaintiffs' Brief"). Defendant filed a separate Motion for Summary Judgment (hereinafter "Defendant's MSJ") and accompanying brief (hereinafter "Defendant's Brief") on November 17, 2005. On November 21, 2005, Defendant filed a Brief in Opposition to Plaintiffs' Motion for Summary Judgment. Plaintiffs filed a Reply to Defendant's Motion for Summary Judgment (hereinafter "Plaintiffs' Reply") on December 16, 2005.

Facts

On or about September 29, 1998, the Divens, together as husband and wife, executed a "Bill of Sale" transferring ownership of "Cottage Five" located on Lot 5 of Old Lake Road Summer City Trust In West Springfield, Pennsylvania to Plaintiffs. *Plaintiffs' MSJ*, ¶ 1. The Bill of Sale was signed by the Plaintiffs on October 5, 1998 in the presence of a notary public. *Plaintiffs' Brief*, p. 1. The Bill of Sale states as follows:

Bill of Sale

We, "Janet M. and William C. Divens, Sr." are selling Cottage Five, which is located on Lot 5 of Old Lake Road Summer City Trust Property, 13478 Old Lake Road, West Springfield, Pennsylvania, 16443.

The land was formerly known as the Dumar Farm.

The Buyers are Mr. and Mrs. William T. Dunn, 7010 W. Winchester Ave., Lawton, Oklahoma 73505.

The property is to remain with Mr. and Mrs. William C. Divens, Sr. till their death and they are to pay all taxes, maintenance fees and insurance till that time.

Defendant's Brief, p. 1. The original Bill of Sale has not been located. *Defendant's Brief,* p. 3. A copy of the original, notarized Bill of Sale was attached to Plaintiffs' Complaint. *Defendant's Brief,* p.1.

On June 30, 2000, the Divens executed a joint Last Will and Testament. *Defendant's Brief,* p. 8. The June 30, 2000, Will provided, in pertinent part, that Cottage Five of Old Lake Road Summer City Trust was to be kept intact for family members use. *Id.* Janet M. Divens passed away on October 11, 2001. *Plaintiffs' MSJ,* ¶ 3. On January 12, 2003, William C. Divens passed away. *Plaintiffs' MSJ,* ¶ 3. Defendant, as executrix of the Estate of William C. Divens, has not, to date, transferred ownership of Cottage Five to Plaintiffs. *Plaintiffs' MSJ,* ¶ 4.

The certificate for Cottage Five is subject to the Old Lake Summer City Trust Agreement and Declaration of Trust (hereinafter "Trust"), which is dated September 19, 1986. *Defendant's Brief,* p. 6. Paragraph Four of the Trust dealing with the transfer of certificates states as follows:

Section Four
Transfer of Certificates

The certificates herein shall be transferable by an appropriate instrument in writing and by the surrender to trustees or to the person designated therefore by them, but no transfer shall be of any effect as against trustees until it has been recorded upon the books of trustees kept for that purpose. On the transfer and surrender, and recording thereof in the trust books, a new certificate shall be issued to the transferee. In case of a transfer of only part of the beneficial interest evidenced by a certificate, a new certificate for the residue shall be issued to the transferor. The person in whose name a certificate stands on the books of the trust shall be deemed to be treated as the absolute owner thereof for all purposes hereof, and until the existing certificate is surrendered and the transfer is recorded as required above, trustees shall not be affected by any notice, actual or constructive, of any transfer.

> Any person becoming entitled to share in consequence of the death or bankruptcy of any certificate holder, or in any way other than by transfer in accordance with the preceding paragraph, may receive a new certificate for the beneficial interest and be recorded on the books of the trust as the owner thereof, upon the production of proper evidence thereof and the delivery of the existing certificate to trustees or any person designated by them. Until such evidence is produced and the existing certificate is surrendered, trustees shall not be affected by any notice of the change in title.

Law

Summary judgment is appropriate in cases where the record clearly shows that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. *Ertel v. The Patriot - News Company,* 674 A.2d 1038, 1041 (Pa. 1996). Pursuant to Pa.R.C.P. 1035.2 any party may move for summary judgment, in whole or in part, after the relevant pleadings are closed. *Id.* It is the burden of the moving party to prove that no genuine issues of material fact exist and therefore, the record is reviewed in the light most favorable to the non-moving party. *Id.* All doubts as to the existence if a genuine issue are to be resolved against the moving party. *Id.* However, the non-moving party may not rest upon the mere allegations or denials of its pleadings. *Id.* Rather, a non-moving party must set forth, either by affidavit or otherwise, specific facts showing that there is a genuine issue for trial. *Id.*

Both parties to this action agree that the Bill of Sale, which purports to transfer the certificate to Cottage Five, was executed by the Divens on September 28, 1998. The parties also agree that all issues of fact have been determined by the pleadings, interrogatories, and discovery. The dispute between the parties lies in the legal interpretation of the Bill of Sale and Trust documents. It is therefore appropriate for the Court to grant summary judgment. However, the issue now becomes which motion for summary judgment is proper.

Plaintiffs' position is that the Bill of Sale is a valid legal document, binding on the parties, properly transferring ownership of Cottage Five. Defendant denies that the Bill of Sale had any legal effect on the ownership of Cottage Five. Defendant argues that the Bill of Sale was legally ineffective for several reasons including (1) that the Bill of Sale runs afoul of the Pennsylvania Statute of Frauds, (2) the Bill of Sale does not set forth any consideration for the passing of title to Cottage Five, (3) the Bill of Sale is not an appropriate instrument under the requirements of the Old Lake Road Summer City Declaration and Trust to transfer the certificate to Cottage Five, (4) the joint will executed by the Divens evidences an intention not to sell Cottage Five to the Plaintiffs. *Defendant's MSJ*, ¶ 8.

Statute of Frauds

The Statute of Frauds requires that any agreement for the sale of real estate must be in writing and be signed by the seller. *Keil v. Good*, 356 A.2d 768, 771 (Pa. 1976). See also 33 P.S. §1. To satisfy the Statute of Frauds, the writing must set forth the essential terms of the contract. *Brister v. American Lumber Corporation*, 50 A.2d 672 (Pa. 1947), *Long v. Brown*, 582 A.2d 359, 361 (Pa.Super. 1990). If an essential element is missing or incompletely stated, the writing is insufficient under the Statute of Frauds. *Brister, supra*.

The essential terms required to form a valid contract for the sale of real estate are the names of the parties, an adequate description of the property, and the consideration or purchase price paid for the property. *GMH Associates v. Prudential Realty Group*, 752 A.2d 889, 900 (Pa.Super. 2000).

Plaintiffs aver that the Bill of Sale satisfies the requirements of the Statute of Frauds because it is a written memorandum, which is signed by the sellers (the Divens), the terms of the transfer are sufficiently indicated, and the property is adequately described. *Plaintiffs' MSJ*, ¶ 9. Defendant alleges that the Bill of Sale is unenforceable under the Statute of Frauds because the writing does not set forth consideration for the transfer of Cottage Five. *Defendant's Brief*. p. 6.

Attached to Plaintiffs' complaint was a copy of an original Bill of Sale dated September 29, 1998. Neither party disputes that the Bill of Sale is a written memorandum purporting to transfer ownership of Cottage Five. Likewise, neither party disagrees that the Bill of Sale was signed by both Mr. and Mrs. Divens as the sellers. The description of Cottage Five as set forth in the Bill of Sale was not challenged as being inadequate. The dispute between the parties lies in whether the Bill of Sale set forth any consideration for the transfer of Cottage Five.

Consideration

"Consideration is defined as a benefit to the promising party, or a loss or detriment to the party to whom the promise is made." *Stelmack v. Glen Alden Coal*, 14 A.2d 127,128 (Pa. 1940).

The test for determining whether the promisee has suffered a detriment is whether, at the request of the promisor, the promisee has done something he was not bound to do or has abstained from doing something they are otherwise entitled to do. *Commonwealth Trust Company General Mortgage Investment Fund* Case, 54 A.2d 649, 651-652 (Pa. 1947). "The detriment incurred must be the "quid pro quo" or the price of the promise...". *Stelmack, supra.*

In determining whether the promisor received a benefit, a promise to do what the promisor is already bound to do is not consideration. *Commonwealth Trust Company, supra* at 651. "Consideration must actually be bargained for as the exchange for the promise." *Stelmack, supra.*

Plaintiffs concede that the Bill of Sale does not set forth "traditional" consideration, which they specify as a certain sum of money. *Plaintiffs' Brief,* p. 6. However, it is Plaintiffs' position that they suffered a detriment by essentially allowing Mr. and Mrs. Divens to retain a life estate in Cottage Five. *Id.* Defendant argues that there is no language in the Bill of Sale indicating that the Plaintiffs suffered a detriment by not taking immediate possession of Cottage Five. *Defendant's Brief,* p 4.

In simply allowing the Divens to remain in possession of Cottage Five until the time of their deaths, Plaintiffs suffered no detriment. No action was required which resulted in a disadvantage or detriment to the Plaintiffs. Likewise, Plaintiffs did not undertake any obligations in reliance on the promise to buy Cottage Five. Plaintiffs were not required to pay the taxes, maintenance, or insurance fees on the property nor did they perform any labor to maintain the premises from the date of the purported purchase of the cottage. The Bill of Sale also did not require Plaintiffs to abstain or refrain from doing anything that they were entitled to do before the Bill of Sale was executed.

Furthermore, the Divens, as the promisors, received no benefit from the alleged sale of Cottage Five. They were still required, after the Bill of Sale was executed, to pay all costs associated with ownership of Cottage Five including the taxes, maintenance, and insurance fees. This is an obligation that the Divens had prior to signing the Bill of Sale.

The Bill of Sale conferred no benefit to the Divens as the promisors, nor did impose a detriment on the Plaintiffs as the promisees. It is therefore, unenforceable under the Statute of Frauds for lack of consideration.

Trust

Plaintiffs argue that the plain reading of Section Four of the Trust indicates that any appropriate instrument in writing is sufficient to transfer a trust certificate. *Plaintiffs' Brief,* p. 7. Failure to record the transfer on the books of the trust, according to Plaintiffs' interpretation, affects only the relationship between the trustees and the transferee. Plaintiffs further allege that, according to Section Four, once sufficient evidence of the transfer is provided to the trustees, a new certificate may be issued and the transfer is recorded on the books. *Id.* Defendant's position is that the Bill of Sale is not an appropriate instrument under the Trust Agreement. *Defendant's Brief,* p. 6.

The term "appropriate writing" as used in the Trust document is not defined. The legal definition of a bill of sale is "an instrument for conveying title to personal property, absolutely or by way of security". *Black's Law Dictionary,* 178 (8th ed. 2004). Personal property is defined as "any moveable or intangible thing that is subject to ownership and not classified as real property". *Id.* at 1254. In accordance with the legal definition, a bill of sale is not an appropriate instrument to transfer real property. However,

the Court is cognizant of the fact that the proper construction of a contract does not necessarily depend upon the name of the document given it by the parties. *Pappas v. Lucas*, 124 A.2d 161, 162 (Pa.Super. 1956).

The Court has already determined that the Bill of Sale is unenforceable under the Statute of Frauds because it lacks consideration. For this reason, the Bill of Sale is not an "appropriate writing" under the Trust Agreement. However, even assuming *arguendo* that the Bill of Sale was an "appropriate writing" for purposes of the Trust Agreement, Section Four sets forth additional requirements that have not been met.

Under the first paragraph of Section Four the writing transferring the certificate is to be surrendered to the trustees and recorded in the books. There has been no evidence presented by the Plaintiffs that this was ever accomplished. That paragraph goes on to state that until the existing certificate is surrendered, the persons named on the books as the certificate holder is to be deemed and treated as the absolute owner. Again, there is no evidence that the existing certificate was ever surrendered. The second paragraph of Section Four allows an alternate means for a person to obtain a new certificate in their name. However, this provision still requires delivery of the existing certificate and proper evidence of the transfer of ownership. Plaintiffs do not have in their possession the existing certificate to Cottage Five. Plaintiffs are also unable to provide proper evidence as to their ownership of Cottage Five. In their possession, Plaintiffs have only a copy of the Bill of Sale, which fails as an unenforceable contract for lack of consideration.

Contract Interpretation - Intent of the Parties

"In construing a contract, the intention of the parties is paramount...". *Tuscarora Wayne Mutual v. Kadlubosky,* 2005 WL 3291981, 3291983 (Pa. Super. 2005). The intent of the parties to a written contract is ascertained from the writing itself where the contract terms are unambiguous. *Gustine Uniontown Associates v. Anthony Crane Rental,* 2006 WL 163641, 163646 (Pa.Super. 2006) *citing Kripp v. Kripp*, 849 A.2d 1159 (Pa. 2004). It is the outward and objective manifestations of the parties' assent, as opposed to their undisclosed and subjective intentions that matter when determining intent. *Long, supra* at 363.

Defendant argues that the joint will executed by the Divens approximately three years after the Bill of Sale was signed evidences an intent on the part of the Divens not to sell Cottage Five to Plaintiffs. *Defendant's Brief,* p. 8. Defendant further notes Plaintiffs' inability to produce or locate the original Bill of Sale, which Defendant presumes has been destroyed as evidence of the Divens' intent to retain ownership of the Cottage. *Id.*

A plain reading of the Bill indicates that the terms used in the Bill of Sale are ascribed their ordinary meanings and are therefore unambiguous. The Bill of Sale clearly manifests an objective and outward intent on

the part of the Divens to sell Cottage Five to the Plaintiffs by the use of the language "are selling" in the first paragraph of the Bill of Sale. The Divens' later intentions as expressed in their joint will to retain possession of Cottage Five, have no impact on the validity on the Bill of Sale. Despite the intention expressed by the Divens in the Bill of Sale to sell Cottage Five to Plaintiffs, the Bill of Sale fails under the Statute of Frauds for lack of consideration and is therefore unenforceable.

ORDER

AND NOW, TO-WIT, this 10th day of February, 2006, for the reasons set forth in the foregoing Opinion, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that the Motion for Summary Judgment filed on behalf of Plaintiffs, William T. Dunn and Elizabeth G. Dunn is **DENIED**. Summary Judgment is **GRANTED** in favor of the Defendant, Christine M. Divens, as Executrix of the Estate of William C. Divens, Sr.

BY THE COURT:
/s/ Shad Connelly, Judge

EDNA L. LINGENFELTER, Plaintiff

v.

LEVCO MANAGEMENT, INC., PAL ASSOCIATES, A.L. LEVINE and PETER L. LEVINE, individually and t/d/b/a PAL ASSOCIATES, Defendants

v.

NORTHWEST SAVINGS BANK, SALLY'S BEAUTY COMPANY, INC., and SHAWN THOMPSON, Additional Defendants

STATUTE OF LIMITATIONS / NEGLIGENCE / LEAP YEAR

The statute of limitations requires that actions in negligence be commenced within two years. There is no statute addressing the effect of a leap year on the statute of limitations for negligence actions.

The definition of a "year" found in the Statutory Construction Act, 1 Pa.C.S. §1991, states that a year normally means a calendar year unless indicated otherwise by the context. The court finds that in the context of a personal injury action wherein a leap year falls between the date of accident and the date of commencement of an action is such a situation where the legislature clearly intended that a year means something other than the usual calendar year of 365 days. To hold otherwise, and to bar an action because of one day delay that is not the result of a deliberate action by the plaintiff, would achieve an absurd result not intended by the legislature and warned against by courts which have considered this issue.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION - LAW No. 10900 - 2005

Appearances: W. John Knox, Esq., Attorney for Plaintiff
Linda L. Prett, Esq., Attorney for Defendant Levco Mgmt, et al.
Thomas Lowery, Esq., Attorney for Defendant Northwest Savings Bank
Edmond R. Joyal, Jr., Esq., Attorney for Defendant, Shawn Thompson

OPINION

Connelly J., January 18, 2006

Procedural History

Plaintiff, Edna L. Lingenfelter (hereinafter Plaintiff), filed a Complaint in negligence on March 8, 2005 against Levco Management, Inc., PAL Associates, A.L. Levine, and Peter L. Levine (hereinafter Defendants). Plaintiff seeks damages for injuries allegedly sustained in a slip and fall accident on March 8, 2003 at the K-Mart East Plaza located in Erie, Pennsylvania.

On July 18, 2005, Defendants filed an Answer, New Matter and Cross-Claim to Plaintiff's Complaint, arguing that Plaintiff's action was barred by the two-year statute of limitations as required by 42 Pa. C.S. §5524 (2). (See Defendants' New Matter, ¶ 10. Defendants later filed a Motion for Judgment on the Pleadings with a supporting brief on December 7, 2005, again raising that the statute of limitations barred Plaintiff's suit. Specifically, Defendants argue that 2004 was a leap year with a total 366 days, thus Plaintiff's action is one day past the statute of limitations. On January 5, 2006, Plaintiff filed a Response to Defendant's Motion for Judgment on the Pleadings with a supporting brief. The Court addresses this matter now.

LAW

Actions in negligence must be commenced "within two years". 42 Pa. C.S.A. § 5524 (2). There is strong policy in Pennsylvania courts favoring the strict application of statutes of limitation. *Booher v. Olczak,* 2002 Pa.Super. 106,797 A.2d 342.

Based upon the Court's own research, there is no particular Pennsylvania civil case that addresses the effect of a leap year on the statute of limitations for negligence. However, as Plaintiff's supporting brief points out, the issue has been addressed by the Pennsylvania Commonwealth and Supreme Courts as well as the Third Circuit. (*See* Plaintiff's Brief in Opposition to Defendants' Motion for Judgment on the Pleadings pp. 2-3.) The Court finds the cases cited by Plaintiff to be persuasive.

Under Pennsylvania law, the word "year", as used in a personal injury statute of limitations, consists of 366 days when leap year occurs during the period to be calculated. *LaRosa v. Cove Haven, Inc.,* 840 F.Supp. 319 (M.D.Pa.1993). *LaRosa* is remarkably on point to the case at bar, except it is a federal case based upon diversity of jurisdiction.[1] The case involved a personal injury action in negligence where defendant claimed that plaintiff's suit was one day past the statute of limitations due to the leap year of 1990. The *LaRosa* Court observed:

> We note initially that "year" means "calendar year," "unless the context clearly indicates otherwise," 1 Pa.C.S. § 1991. We believe that, in this context, when the legislature used the phrase "a period of two years" they clearly mean a quantity of time, *i.e.,* 24 months running from anniversary date to anniversary date. Therefore, the court concludes that "[o]rdinarly and in the common acceptance, a 'calendar year' is three hundred and sixty-five days save leap year... and a calendar year is composed of twelve months, varying in length..."

[1] In *LaRosa*, the plaintiff resided in New York and suffered injuries at defendant's place of business in Pennsylvania.

At 321, citations omitted, emphasis added.

The "context" in this case indicates that a leap year fell between the time the Plaintiff was allegedly injured and the date she filed her negligence complaint against Defendants. The fact that a leap year is 366 days, and not the usual "calendar year" of 365 days, clearly indicates that the definition of year as contained in Section 1991 is inapplicable here.

In *Bethlehem Steel Corporation v. Workers' Compensation Appeal Board (Zima)*, 777 A.2d 1245 (2001), the Pennsylvania Commonwealth Court ruled against the Interpretation of a "calendar year" as limited to the period from January 1 until December 31. Otherwise, the court held, "[s]uch a construction would yield an absurd result." At 1248-1249, citing 1 Pa.C.S. § 1922 (1).[2]

The *Bethlehem Steel* Court based its reasoning on the Pennsylvania Supreme Court's decision in *Commonwealth v. Fenati*, 501 Pa. 106, 748 A.2d 205 (2000). There, the Defendant's PCRA petition was held to be timely filed, overruling the Superior Court's determination that he missed it by one day due to the leap year of 1996. The *Fenati* Court explained:

> In order to determine what constitutes a "year," we turn first to the Statutory Construction Act which defines this term as consisting of a "calendar year". 1 Pa.C.S. § 1991. This is not the end of our inquiry, however, as our calendar years are not all of equal length. Most years consist of a 365 day cycle. Yet, every fourth year is a "leap year" in which one "leap day" is added to the calendar in order to correct for the imprecision in our calendar year vis-a-vis the solar cycle...
>
> During the leap years, we do not view the leap day as somehow being separate and apart from the rest of the calendar year; rather, it is commonly recognized that in these leap years, a year consists not of 365 days but rather of 366 days...
>
> We find that this common sense approach to defining what constitutes a "calendar year" is the most logical and hereby endorse it.

At 109-110, n.3 omitted, emphasis added.

This Court cannot ignore the fact that a leap year occurs every four years, and thus will often fall within a statute of limitations period. To

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[2] 1 Pa.C.S. § 1922 (1) reads: In ascertaining the Intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used:

> 1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.

hold that Plaintiff's action is barred simply because of one day that is not a result of Plaintiff's deliberate action would achieve the "absurd result" the *Bethlehem Steel* Court warned against. Therefore, the Court adopts the common sense reasoning of *LaRosa* and *Fenati*, and finds that the occurrence of a leap year during a statute of limitations period does not bar negligence actions filed on the second anniversary date of a plaintiff's alleged injury.

ORDER

AND NOW to-wit, this 18th day of January, 2006, after review of the briefs submitted by counsel and the reasons set forth in the foregoing opinion, Defendants' Motion for Judgment on the Pleadings is hereby **DISMISSED**.

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

RACHEL OBERLANDER, and CHRISTOPHER OBERLANDER her husband, Appellants

v.

WATERFORD TOWNSHIP, Appellee

v.

ANTHONY LONGSTREET, Appellee

CIVIL PROCEDURE / POST-TRIAL MOTIONS / WAIVER

Pursuant to Pa.R.C.P. 227.1, a claim must be asserted in pretrial or trial proceedings and raised in a post-trial motion to be preserved for review. Grounds not specified are deemed waived unless leave is granted upon cause shown to specify additional grounds. The motion must state how the grounds were asserted in pretrial proceedings or at trial. Where the appellant in her motion for post-trial relief fails to state how the grounds were asserted in pretrial proceedings or at trial and fails to provide a record of objections, the claims are waived.

Appellant did properly preserve her challenge to jury instructions by timely objection.

CIVIL PROCEDURE / TRIAL / JURY INSTRUCTIONS

A trial court has great discretion in the formulation of a jury charge. A charge is adequate unless, when read in its entirety, the charge is confusing, misleading or contains an omission tantamount to fundamental error. Further, an objecting party must also demonstrate that the erroneous instruction may have affected the jury's verdict.

AGENCY / MASTER/SERVANT / JURY CHARGE

A master/servant relationship is a form of agency wherein the principal employs an agent and controls or has the right to control the physical conduct of the agent as well as the results of the work. Agents who retain control over the manner of doing the work are not servants.

A master is vicariously liable for the servant's negligent acts committed within the scope of his employment because of the right to exercise control over the physical activities of the servant. A master will be barred from recovery by the contributory negligence of the servant acting within the scope of employment.

The court finds that the existence of a master/servant relationship is a factual question for determination by the jury where the plaintiff, after a fight with her husband, asks the driver to take her to her parents' home, and testifies that the driver acted at her direction. The court will not overturn the jury's finding of agency.

CIVIL PROCEDURE / POST-TRIAL MOTIONS / NEW TRIAL

A new trial may be granted on the basis that the verdict is against the weight of the evidence only where the verdict shocks one's sense of justice and a new trial is necessary to rectify the situation. A new trial may be granted solely on the issue of damages where the damage issue is not intertwined with the liability issue and where the issue of liability has

been fairly determined or is free from doubt. Where the parties stipulate that the amount of medical expenses was $19,995.00, and the jury's award was for $12,000.00 worth of past medical expenses with no award for loss of earnings and earning capacity or for pain and suffering, the court finds the award to be against the weight of the evidence and grants a new trial as to damages only.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 14445 of 2003

Appearances: Kevin Barron, Esq. for Oberlander
John Dodick, Esq. for Waterford Township

OPINION

Before the Court is an appeal from the Order dated October 13, 2005 granting (in part) Appellant's Motion for Post-Trial Relief. The issues in this appeal are waived, moot and/or without merit

PROCEDURAL/F ACTUAL HISTORY

This case was initiated after a one-car motor vehicle accident on February 22, 2003. Rachel Oberlander (hereinafter "Appellant") was injured as a passenger in a vehicle operated by Anthony Longstreet. On October 28, 2003, Appellant and her husband, Christopher Oberlander, filed a civil complaint against Waterford Township (hereinafter "Township"). Appellant claimed that the Township was negligent by failing to use correct signs to warn of a sharp bend in the road. The Township joined Anthony Longstreet as an Additional Defendant.

On August 10, 2005 a jury found Appellant 40% negligent, Anthony Longstreet 60% negligent and the Township 0% negligent. *See* Jury Interrogatories, ¶ 7. The jury also found that Anthony Longstreet and Appellant's contributory negligence were both substantial factors of Appellant's harm. *See* Jury Interrogatories, ¶¶ 4, 6.

The jury awarded Appellant $12,000 for past and future medical expenses. *See* Jury Interrogatories ¶ 10. The jury determined that Appellant had not sustained a permanent loss of bodily function as a result of the accident. *See* Jury Interrogatories, ¶ 9.

The jury also determined that Anthony Longstreet was acting as Appellant's agent at the time of the accident. *See* Jury Interrogatories, ¶ 11. The jury found that Appellant's agency with Anthony Longstreet accounted for forty (40) percent of Appellant's contributory negligence. *See* Jury Interrogatories ¶ 12.

Appellant challenged the verdict by filing a Motion for Post-Trial Relief on August 16, 2005. Appellant's motion requested Judgment Notwithstanding the Verdict (hereinafter "JNOV") arguing that the jury charge of agency prejudiced the Appellant because an agency relationship had not been

presented. Motion for Post-Trial Relief, ¶ 1(a). Further, Appellant claimed that the failure of the jury to accept testimony that Appellant suffered a permanent loss of bodily function shocked the conscious and required a JNOV. Motion for Post-Trial Relief, ¶ 1(b). Likewise, Appellant argued that the stipulated amount of her past medical expenses was $19,995 and the jury award of only $12,000 also requires a JNOV. Motion for Post-Trial Relief ¶ 1(c). In conclusion, Appellant claimed that the jury's refusal to award damages for past and future pain and suffering shocked the conscious and also required a JNOV. Motion for Post-Trial Relief, ¶ 1(d)(e).

By Order of Court dated October 12, 2005, Appellant's Motion for Post-Trial Relief was granted in part. A new trial on the issue of damages was granted. In all other respects, Appellant's Motion was denied.

On October 18, 2005, Appellant filed a Notice of Appeal. The Superior Court returned the appeal for corrections. On October 31, 2005, Appellant filed an Amended Notice of Appeal. Appellant filed a Statement of Matters Complained of On Appeal on November 2, 2005. This Opinion is in response thereto.

DISCUSSION

Appellant argues that based on the lack of evidence showing agency, a jury charge of agency was improperly given. Statement of Matters Complained of on Appeal, ¶ 1. Appellant claims that the jury's award of $12,000 for past medical expenses shocks the conscious and requires a new trial. Statement of Matters Complained of on Appeal, ¶ 2. Further, Appellant argues that the jury's refusal to grant an award for damages for permanent loss of bodily function shocks the conscious and requires a new trial. Statement of Matters Complained of on Appeal, ¶ 2, 3. Appellant again challenged the jury charge regarding vicarious liability and agency claiming it "clouded the issue of liability" and warrants a new trial in *toto.* Statement of Matters Complained of on Appeal, ¶ 4. Additionally, Appellant states, "Plaintiffs incorporate their Motion for a New Trial as if set forth in full." Statement of Matters Complained of on Appeal, ¶ 5. A careful review of Appellant's filed Motions yields no Motion for a New Trial to incorporate. Rather, Appellant's Motion for Post-Trial Relief requested JNOV for each claim with a boilerplate request for a trial de novo in the conclusion.

WHETHER APPELLANT HAS WAIVED ALL ISSUES ON APPEAL FOR FAILURE TO COMPLY WITH PA. R. CIV. P. 227.1

In order to preserve an issue for review, it must be objected to at trial and raised in a post-trial motion pursuant to Pa. R. Civ. P. 227.1. *Monschein v. Phifer*, 771 A.2d 18, 22 (Pa. Super. 2001). The Pennsylvania Commonwealth Court applied this rule in *Hinkson v. Com., Dept. of Transp.*, 871 A.2d 301, 303-304 (Pa. Cmwlth. Ct. 2005) after the defendants filed a Motion for Post-Trial relief with nine grounds for JNOV and four grounds for a new trial. However, the defendants' motion failed

to articulate how the claims were asserted in pre-trial or trial proceedings.[1] *Hinkson*, 871 A.2d at 304. In finding the defendants waived all issues for purposes of appeal by failing to state how the grounds were previously asserted, the Commonwealth Court stated:

> Pa. R.C.P. No. 227.1 (b)(2) (emphasis added) provides that post-trial relief may not be granted unless the grounds for relief, (2) are specified in the motion. The motion *shall state how the grounds were asserted in pre-trial proceedings or at trial.* Grounds not specified are deemed waived unless leave is granted upon cause shown to specify additional grounds. The rule's Explanatory Comment-1983 states:
>
> Subdivision (b)(2) specifies the requisites of the motion for post-trial relief. It *must state* the specific grounds for the relief sought and "*how the grounds were asserted in pre-trial proceedings or at trial.*" In requiring the motion to state the specific grounds therefor, motions which set forth mere "boilerplate" language are specifically disapproved. A post-trial motion must set forth the theories in support thereof so that the lower court will know what it is being asked to decide." The *requirement* that the motion state *how the grounds were raised at trial* indicates compliance with the requirements of and subdivision (b)(l) that there be a timely objection in pre-trial proceedings or at trial.

Id (internal citations omitted).

In the case sub judice, Appellant's Motion for Post-Trial Relief sets forth five grounds for JNOV but does not state how any of the grounds were asserted in pre-trial proceedings or at trial. Appellant also fails to provide any record of such objections. Accordingly, with the exception of his claim challenging the jury charge, Appellant's claims are waived.

WHETHER THE JURY WAS PROPERLY CHARGED ON THE ISSUE OF AGENCY AND VICARIOUS LIABILITY

Appellant claims that it was improper to charge the jury on agency and the charge clouded the issue of liability. Statement of Matters Complained of on Appeal, ¶¶ 1, 4.

The record reflects the jury charge:

> THE COURT: Now in this case the plaintiff has the burden of proof as to any claim of negligence that the plaintiff is asserting and as to any damages that the plaintiff is seeking. Now, the Defendant Waterford Township is contesting not only negligence, but is saying

[1] *See also County of Delaware v. J.P. Mascaro & Sons, Inc.*, 830 A.2d 587 (Pa. Super. 2003) (holding that the failure to state specifically how grounds for relief were raised in pre-trial proceedings or at trial does not waive the issues that the issues are proper properly preserved for appeal).

that Rachel Oberlander herself was contributorily negligent. And there are two possible scenarios in which the Township is making that argument to you.

The first scenario is that the Township is claiming that if you believe what Anthony Longstreet said to Trooper Stuckey when he was interviewed on the night of this accident, then, in fact, the plaintiff was engaged in a sexual act which would have distracted the driver and been a form of contributory negligence for the accident.

The other possibility for contributory negligence is that of an agency relationship. And the Township is saying that Anthony Longstreet on that night in question was acting as the agent of Rachel Oberlander. It's for you to determine whether in fact Anthony Longstreet was the agent of Rachel Oberlander.

Now agency is a relationship that exists when one person, who is called a principal, in this case the Township is alleging that Rachel Oberlander is the principal, obtains another person called an agent, in this case the Township is alleging that Anthony Longstreet is the agent, to perform a service or services on her behalf and subject to her right of control, and the agent consents to act in that manner. It is the right to control that is conclusive and if such right exists, even though not exercised, the relation of principal and agent may be found to be present.

It's for you to determine from all the evidence received, the nature of the relationship then and there existing between the parties and whether an agency relationship existed between Rachel Oberlander and Anthony Longstreet. Now, if you find that an agency relationship existed, then as a matter of law the principal is liable for the acts of the agent done within the scope of the agency.

And so the Township is saying that Longstreet is the agent of Oberlander and therefore Longstreet's negligence gets imputed to Oberlander. In other words, Oberlander assumes the liability as the principal for the conduct of her agent. As I indicated to you, the Township is claiming that the plaintiff is contributorily negligent in those two potential scenarios.

Obviously, the Plaintiff, Rachel Oberlander, is contesting each of those propositions. The burden is not on the Plaintiff to prove her freedom from contributory negligence, it is the defendant that has the burden of proving contributory negligence by a fair preponderance of the credible evidence.

Jury Trial Transcript (Jury Charges), August 10, 2005, pp. 8-10.

Initially, it should be acknowledged that Appellant properly preserved her claim pursuant to Pa.R.C.P. No. 227 by timely objection to the jury charge on agency. *See* Jury-Trial Day 3 Transcript (Discussion on Agency), August 10, 2005, p. 5. The Pennsylvania Superior Court has found that the trial court has "great discretion" in forming jury instructions:

> We review the trial court's jury instructions for an abuse of discretion or legal error controlling the outcome of the case. A jury charge will be found to be adequate unless, when read in its entirety, the charge confused the jury, misled the jury, or contained an omission tantamount to fundamental error. It must appear that the erroneous instruction may have affected the jury's verdict. Consequently, the trial court has great discretion in forming jury instructions.

Atwell v. Beckwith Machinery Co., 872 A.2d 1216, 1222 (Pa. Super. 2005).

Appellant references *Smalich v. Westfall*, 269 A.2d 476 (Pa. 1970) to support her argument that the charge of agency was improper. Appellant contends, "the facts in the present case clearly did not prove a master/servant relationship and it was therefore improper to charge the jury with such." Statement of Matters Complained of on Appeal, ¶ 1. Pursuant to *Smalich*:

> A master is a species of principal, and a servant is a species of agent: 'A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the Physical conduct of the other in the performance of the service. A servant is an agent employed by a master to perform service in his affairs whose Physical conduct in the performance of the service is controlled or is subject to the right to control by the master:' Thus a master not only controls the results of the work but also may direct the manner in which such work shall be done, and a servant, in rendering the agreed services, remains entirely under the control and direction of the master: 'Those rendering service but retaining control over the manner of doing it are not servants. They may be agents, agreeing only to use care and skill to accomplish a result and subject to the fiduciary duties of loyalty and obedience to the wishes of the principal...' Because a master has the right to exercise control over the physical activities of the servant within the time of service, he is vicariously liable for the servant's negligent acts committed within the scope of his employment: Therefore, the master is likewise barred from recovery against a negligent defendant by the contributory negligence of his servant acting within the scope of his employment:
>
> In essence, we now recognize that, contrary to what we have said in many prior automobile accident cases, only one of the three relationships discussed above, that of master-servant, gives rise to

> vicarious liability for negligence. Perhaps many of the harsh results sometimes associated with the imputation of contributory negligence can be attributed to our mistaken assumption that a principal is vicariously liable for the negligent acts of his agent. We therefore now state unequivocally that only a master-servant relationship or a finding of a joint enterprise will justify an imputation of contributory negligence.

Smalich v. Westfall, 269 A.2d 476, 481-482 (Pa. 1970).

Appellant argues that the jury should not have received a charge of agency because the facts did not show a master/servant relationship. Yet, the precise nature of the relationship between the driver and the passenger is a question of fact for the jury to determine. *Smalich*, 269 A.2d at 483.

The jury listened to Appellant's testimony that Appellant had a fight with her husband and "wanted to go talk to my mother" on the evening of the accident. *See* Jury Trial Transcript (Testimony of Rachel M. Oberlander) August 9, 2005, p. 10 (hereinafter R.M.O.T.). Appellant further testified that she asked Anthony Longstreet to drive her to her parent's home in her vehicle. *See* R.M.O.T. p. 11. The record reflects Appellant's responses during cross-examination by the Township's attorney:

> MR. DODICK: Your husband had indicated previously that he didn't know that Anthony was going to actually take the vehicle?
>
> APPELLANT: No, he didn't
>
> MR. DODICK: That Anthony told him he wanted to get something out of it and the next thing he knew, he was driving away?
>
> APPELLANT: That's what I told Anthony what to do [sic].
>
> MR. DODICK: You told Anthony not to tell your husband that he was taking the vehicle?
>
> APPELLANT: Right.
>
> ...
>
> MR. DODICK: You told Anthony not to tell your husband that he was taking the vehicle and just ask for the keys to get something out of it?
>
> APPELLANTS: Correct.

See R.M.O.T. p. 29.

Appellant testified that Longstreet acted at her direction. The record reflects:

> MR. DODICK: Let's talk about this trip to your parents' house. You asked Anthony Longstreet to drive you out to your parents' house that evening in your vehicle?

APPELLANT: Yes.

MR. DODICK: And you had made that specific request upon him, correct?

APPELLANT: Yes.

MR. DODICK: And he had no business to go to your parents' house, that was solely for your purpose?

APPELLANT: Yes.

MR. DODICK: So he agreed that he would drive you out to your parents' house and back home because you didn't have a driver's license because of your vision problem and because you wanted to go to talk to your parents?

APPELLANT: Yes.

MR. DODICK: Okay. There was no other reason why Anthony Longstreet would have made that particular trip, correct?

APPELLANT: No.

MR. DODICK: And in terms of Anthony Longstreet driving your vehicle, he had never drove your vehicle prior to that particular evening, correct?

APPELLANT: Correct.

MR. DODICK: And as a matter of fact, you were never even in a vehicle with Anthony Longstreet when he was driving before that particular evening?

APPELLANT: Correct.

MR. DODICK: Now in terms of the driving, you gave Mr. Longstreet permission to operate your vehicle, to drive you to your parents' house so that you could talk to them?

APPELLANT: Yes.

MR. DODICK: Okay. So by that I'm assuming that you also had the permission to tell him not to drive your vehicle, correct?

APPELLANT: Yes.

MR. DODICK: He only did it with your permission?

APPELLANT: Hm-mm.

. . .

MR. DODICK: When you were leaving and you told him a couple times, and I think you did tell him more than once, to slow down, is that correct?

APPELLANT: I told him twice.

MR. DODICK: Okay. You never asked him to pull the vehicle over and say stop it right now?

APPELLANT: No, it — the vehicle was completely under control.

MR. DODICK: Okay. But you, for whatever reason, felt compelled to tell him to slow down. You had some concern and that's why you told him to slow down, correct?

APPELLANT: Yes and no.

MR. DODICK: Okay. You had no concern?

APPELLANT: I felt that he was in control of the vehicle. On the same note, I know that sometimes my vehicle speeds up a little bit when you hit the accelerator. It sped up more than what you would think it would.

MR. DODICK: Okay.

APPELLANT: It had a touchy gas pedal sometimes.

MR. DODICK: Let's put it this way, if you had any concern about Mr. Longstreet's driving and the operation of your vehicle, it's your vehicle, you could have told him: Stop it. Pull over right now, correct?

APPELLANT: Yes.

MR. DODICK: But you did not do that?

APPELLANT: No.

See R.M.O.T. pp. 34-36

After hearing the testimony and receiving the jury charge, the jury found that Longstreet was Oberlander's agent. On the facts, such a conclusion is justified under the law. Appellant does not contend the jury instructions did not accurately inform the jury of the law. Instead, Appellant's objection was the lack of a factual basis for an instruction on agency. The record does not support Appellant's contention.

WHETHER APPELLANT'S REQUEST FOR A NEW TRIAL ON THE ISSUE OF DAMAGES IS MOOT

By Order dated October 12, 2005, Plaintiff was awarded a new trial solely on the issue of damages. Appellant complains that the stipulated amount of past medical expenses was $19,995 yet the jury only awarded $12,000.[2] "The general rule for granting a new trial on the basis that it is against the weight of the evidence allows the granting of a new trial only when the jury's verdict is contrary to the evidence as to shock one's sense of justice and a new trial is necessary to rectify this situation." *Lanning v. West*, 803 A.2d 753, 765 (Pa. Super. 2002). Likewise, the Pennsylvania Superior Court has held:

> Pennsylvania has adopted a rule permitting the grant of a new trial limited solely to damages under certain specific circumstances. A new trial limited to the issue of damages will be granted where: (1) the issue of damages is not "intertwined" with the issue of liability; and (2) where the issue of liability has been "fairly determined" or is "free from doubt." *Id.*

Monschein v. Phifer, 771 A.2d 18, 21 -22 (Pa. Super. 2001).

After deliberations, the jury determined the amount of causal negligence attributable to the parties and returned percentages reflecting its decision. The jury found that Appellant sustained no damage amount for past and future loss of earnings and earning capacity or for pain and suffering. The jury awarded Appellant $12,000 for past medical expenses. The $12,000 award was against the weight of the evidence. Hence, a new trial was awarded on the issue of damages.[3]

Appellant acknowledges in his 1925(b) Statement, "This court did indeed issue an Order on October 12, 2005 granting a new trial as to damages only." Statement of Matters Complained of on Appeal, ¶ 2.

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[2] The Jury may have arrived at $12,000 by multiplying the amount of past medical expenses, $19,995 by 60% as a result of finding Appellant 40% contributorily negligent. *See* Jury Interrogatories, ¶ 7, 12.

[3] Appellant asked for JNOV seven times in her Motion for Post-Trial Relief. In her conclusion, she makes one boilerplate request for a new trial by stating, "WHEREFORE, plaintiff hereby requests this Honorable Court to enter JNOV and order a trial de novo." *See* Motion for Post-Trial Relief.

Accordingly, this issue is moot.

WHETHER APPELLANT REQUIRES A NEW TRIAL OR JNOV ON THE ISSUE OF THE JURY'S FINDING OF NO PERMANENT DISABILITY

Question number nine (9) in the jury interrogatories stated, "Do you find that the plaintiff, Rachel Oberlander, sustained a permanent loss of bodily function?" *See* Jury Interrogatories. The jury answered "no" finding that Appellant was not permanently unable to do or perform bodily acts that she was able to perform prior to sustaining the injuries.

Appellant argues, "The failure of the jury to find that the Plaintiff, Rachel Oberlander, suffered a permanent loss of bodily function shocks the conscious and requires a new trial." Statement of Matters Complained of on Appeal, ¶ 3. Notably, Appellant did not request a new trial in her Motion for Post-Trial Relief. Instead, on the issue of permanent loss of bodily function, Appellant requested a JNOV. *See* Motion for Post-Trial Relief, ¶ 1(b).[4] Accordingly, Appellant has waived this issue for failing to specify her claim in post-trial motions. *See Hall v. Owens Corning Fiberglass Corp.*, 779 A.2d 1167, 1169 (Pa. Super. 2001).

Additionally, Appellant appears to be asking for both JNOV and a new trial simultaneously and interchangeably. However, the basis for granting a new trial is different from that of granting a JNOV. The Pennsylvania Superior Court explained:

> A JNOV can be entered upon two bases: (l) where the movant is entitled to judgment as a matter of law; and/or, (2) the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered for the movant. When reviewing a trial court's denial of a motion for JNOV, we must consider all of the evidence admitted to decide if there was sufficient competent evidence to sustain the verdict....Concerning any questions of law, our scope of review is plenary. Concerning questions of credibility and weight accorded the evidence at trial, we will not substitute our judgment for that of the finder of fact....A JNOV should be entered only in a clear case. Our review of the trial court's denial of a new trial is limited to determining whether the trial court acted capriciously, abused its discretion, or committed an error of law that controlled the outcome of the case. In making this determination, we must consider whether, viewing the evidence in the light most favorable to the verdict winner, a new trial would produce a different verdict. Consequently, if there is any support in the record for the trial court's decision to deny a new trial, that decision must be affirmed.

Parker v. Freilich, 803 A.2d 738, 744 (Pa. Super. 2002) (internal citations omitted).

[4] *See* footnote two (2) above.

Appellant is not entitled to a new trial or a JNOV on the issue of her alleged permanent loss of bodily function from the accident. First, Appellant was properly denied a new trial because the verdict was not against the weight of the evidence.[5] The Pennsylvania Superior Court has held:

> "One of the least assailable grounds for the exercise of such power [*i.e.*, granting a new trial,] is the trial court's conclusion that the verdict was against the weight of the evidence and that the interests of justice therefore require that a new trial be awarded; especially in such a case is an appellate court reluctant to interfere." [The Pennsylvania Supreme Court] has repeatedly emphasized that it is not only a trial court's inherent fundamental and salutary power, but its duty to grant a new trial when it believes the verdict was against the weight of the evidence and resulted in a miscarriage of justice. Although a new trial should not be granted because of a mere conflict in testimony or because the trial judge on the same facts would have arrived at a different conclusion, a new trial should be awarded when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.

Angelopoulos v. Lazarus PA Inc., 884 A.2d 255, 259 (Pa. Super. 2005).

Donald J. Viscusi, M.D., testified as the plaintiff's expert. However, Dr. Viscusi's testimony during cross-examination indicated that Appellant's surgery to repair the damage caused by the accident had been successful. Pursuant to the record:

> MR. DODICK: Tell you what, let's talk about this: The success of the operation in terms of the mechanical aspects of that surgery in terms of the actual procedure that was undertaken, did you have any documentation that would indicate from an objective standard, or a standpoint that there was any problem with that procedure?
>
> VISCUSI: No. The operative report was very well detailed, and the spinal cord was decompressed. So it was a success from that standpoint.
>
> MR. DODICK: Okay. And in terms of any of the hardware that was installed when they did that procedure, that was all well in place and the fusion had taken well. And that's basically the optimal thing you are looking for in that surgical procedure, correct?

[5] A claim challenging the weight of the evidence is not the type of claim that must be raised before the jury is discharged. It is a claim that ripens only after the verdict and is preserved as long as it is raised in timely post-verdict motions. *Criswell v. King*, 834 A.2d 505, 512 (Pa. 2003).

VISCUSI: Yes, it is.

MR. DODICK: Okay. I note that you did have some radiographs that were done after the procedure. Those did not show any indication that there would be a problem with the procedure or the hardware, or any problem with her spine from an objective standpoint other than the fact that she did have this injury and did have it repaired?

VISCUSI: That's correct.

MR. DODICK: And would it be fair to say that the individual level of pain of those patients with the same type of procedure [as Appellant had] would vary?

VISCUSI: Yes.

MR. DODICK: Okay. Now, you did make reference to the fact that she became pregnant and that affected her recuperation from the surgery. Could that also affect the actual procedure itself and create a condition that might cause her problems?

VISCUSI: Yes.

MR. DODICK: You were aware of the fact — I think you reviewed Doctor Borden's records, you were aware in reviewing — that's Docket [sic] Geston, that she was actually advised against getting pregnant because of the injuries she had, is that correct?

VISCUSI: I believe so.

MR. DODICK: And you would deem that to be a reasonable restriction that would have been imposed upon her?

VISCUSI: As much as that's a restriction, yes.

. . .

MR. DODICK: She told Doctor Geston she had a [pain level of] six and told you she had a pain level of eight?

VISCUSI: That was an average, yes.

MR. DODICK: Okay. And it was indicated that she had left leg pain as well. Again, is there any way that you can determine, other than her telling you she had left leg pain, whether, in fact, she did have pain in her leg or not?

VISCUSI: No.

MR. DODICK: You said that she estimates she can stand and/or walk for forty-five minutes and sit for approximately thirty minutes. And that was at the time that you saw her February 16, 2005, correct?

VISCUSI: That was the response Miss Oberlander gave me to a direct question, yes.

MR. DODICK: And you have been here throughout the day for this particular trial, correct?

VISCUSI: Yes.

MR. DODICK: And we started about 9 o'clock and you noted that Miss Oberlander has been sitting throughout the course of the trial, at least as of today, correct?

VISCUSI: Well, she just recently came back into the courtroom, so —

MR. DODICK: I mean up until.

VISCUSI: Standing and walking.

MR. DODICK: All right. You saw her sitting for more than thirty minutes at a time?

VISCUSI: Yes.

See Jury Trial Transcript (Day 2) August 9, 2005, pp. 92, 93-94, 95-96 (hereinafter D.2.T.).

As part of his independent medical review of Appellant's permanent injuries, Dr. Viscusi reviewed a functional capacity evaluation by physical therapist Sean Seth. *See* D.2.T. p. 82. Dr. Viscusi testified that Seth's assessment revealed that Appellant was magnifying her symptoms, did not have a limp, had "inappropriate illness behavior," and showed symptom exaggerations. *See* D.2.T. pp. 105, 106, 115.

Further, the record reflects inconsistencies in Appellant's own testimony:

MR. DODICK: I want to ask you a couple questions about the problems that you had with your back, and I had made reference to this a couple times previously. But your doctor gave you strict warnings about getting pregnant with your back condition, isn't that true?

APPELLANT: Yes.

MR. DODICK: Okay. And as a matter of fact, your back was doing better for a period of time after you had your surgery until you gave birth?

APPELLANT: Not really.

MR. DODICK: Not really?

APPELLANT: It felt a little bit better during the pregnancy itself.

MR. DODICK: Okay. But after you gave birth, didn't you say that's when your back started killing you?

APPELLANT: Yeah, because I wasn't able to wear the back brace any longer. I wasn't wearing the back brace any more, and that's when I was able to start bending and moving.

MR. DODICK: In the last couple of months you were wearing the back brace and you — then you don't wear it?

APPELLANT: The first couple of months of my pregnancy I wore the back brace.

MR. DODICK: Okay.

APPELLANT: Then after awhile I got too big to wear it. I had to stop wearing it. And afterwards I wasn't wearing it any more, so I was able to bend and move, which is what I wasn't able to do during the time I wore it.

MR. DODICK: Well, that again is something different than you had indicated in your deposition.

See R.M.O.T. pp. 42-43.

The record reflects further inconsistencies in Appellant's testimony upon direct examination and also on cross-examination:

MR. BARRON: Can you do the hobbies and the sports and activities you did before the accident?

APPELLANT: Mostly.

MR. BARRON: Okay. Can you still do the bicycling and things of that nature that you did?

APPELLANT: I was able to.

MR. BARRON: No, I mean after the accident now?

APPELLANT: No.

MR. BARRON: Why can't you do it after the accident now?

APPELLANT: It's too much on my back.

MR. BARRON: Okay. And what do you mean by that, too much on your back?

APPELLANT: If I hit a bump the wrong way, it really, really hurts. I can't use my left leg as like I used to. There is lots of pain in it. When I put a lot of pressure on it. I'm afraid of falling.

. . .

MR. BARRON: Do you think that you could perform those job functions (employee duties at Arby's and Subway) now given your back condition?

APPELLANT: No.

MR. BARRON: Why is that?

APPELLANT: Because I can't sit or stand long enough. It's too much pressure on my back to be standing that long on those concrete floors.

. . .

MR. DODICK: All right. You just said here today in court a couple seconds ago that during your pregnancy, the first couple of months your back felt better because that's the time you were able to wear the back brace?

APPELLANT: Right.

MR. DODICK: And then toward the end of your pregnancy —

APPELLANT: Without the back brace.

MR. DODICK: — without the back brace. That's when it got worse?

APPELLANT: What I meant during the part of the pregnancy without

> the back brace, my back was still okay but I wasn't able to do all the moving because I was so big from being pregnant. After I gave birth, that's when I realized how hurt I still was.
>
> MR. DODICK: When you gave your testimony though, you said you felt better during your pregnancy, and your answer was toward the last couple of months.
>
> APPELLANT: Right. Without the help of the back brace is what I was referring to.
>
> MR. DODICK: So without the back brace you felt better?
>
> APPELLANT: Right.
>
> MR. DODICK: I thought you said: "With the back brace." And then it said: "After you gave birth, you felt worse." You said, "The day I gave birth, it hurt so bad. My back was just killing me."
>
> APPELLANT: Yes.

See R.M.O.T. pp. 19-20, 23, 44-45.

The jury had sufficient evidence to find no permanent loss of bodily function. The jury's verdict was clearly made consistent with the weight of the evidence. There was no miscarriage of justice. A new trial would not produce a different verdict.

Likewise, Appellant's request for a JNOV was also properly denied. The Superior Court has held:

> "[T]he entry of a judgment notwithstanding the verdict ... is a drastic remedy. A court cannot lightly ignore the findings of a duly selected jury." [T]he evidence must be considered in the light most favorable to the verdict winner, and he must be given the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his favor. Moreover, [a] judgment n.o.v. should only be entered in a clear case and any doubts must be resolved in favor of the verdict winner. Further, a judge's appraisement of evidence is not to be based on how he would have voted had he been a member of the jury, but on the facts as they come through the sieve of the jury's deliberations.

Education Resources Institute, Inc. v. Cole, 827 A.2d 493, 497 (Pa. Super. 2003) (internal citations omitted).

Considering the evidence in the light most favorable to the Township as the verdict winner, there is sufficient competent evidence to support

the jury's verdict that Appellant had no permanent loss of bodily function from the February 22, 2003 motor vehicle accident. Appellant's Motion for JNOV was properly denied.

CONCLUSION

For all of the foregoing reasons, this appeal must be denied.

BY THE COURT:

/s/ **WILLIAM R. CUNNINGHAM, JUDGE**

IN THE MATTER OF A.J.D.J. & U.M.J.

APPELLATE PROCEDURE / Pa. R.A.P. 1925(b) STATEMENT

Pursuant to Pa. R.A.P. 1925(b), an appellant must file a statement of matters complained of on appeal when ordered to do so by the trial court. Any issue not raised in a statement of matters complained of on appeal is deemed waived. This rule is to be strictly construed to provide uniformity and a decision by a lower court to address issues raised in an untimely filed Pa. R.A.P. 1925(b) statement does not save those issues from waiver.

Where the appellant, the Office of Children and Youth, files a concise statement of matters complained of on appeal one day after its due date, the rule of strict construction requires that all issues be deemed waived.

FAMILY LAW / ADOPTION / PRESERVATION OF ISSUES

The failure of the Office of Children and Youth to raise issues at the time of a hearing constitutes a waiver of those issues. There is no post-trial practice and exceptions are not permitted in involuntary termination and adoption matters and any issue which is not raised at the time of a hearing is deemed waived for purposes of appellate review.

APPELLATE PROCEDURE / PRESERVATION OF ISSUES

Pursuant to Pa. R.A.P. 2117(c), an appellant has the obligation to demonstrate where an issue has been raised or preserved for appellate review. As the Office of Children and Youth will be unable to demonstrate in the record where it preserved its appellate issues and has failed to timely raise the issues in its concise statement of matters complained of on appeal, it will be unable to comply with the requirement of Pa. R.A.P. 2117(c) requiring an indication in the record as to where the appellant preserved the appellate issues and OCY has thereby waived all of its issues for appellate review.

FAMILY LAW / ADOPTION / PRESERVATION OF ISSUES

The filing of a notice of withdrawal of consent and motion for rehearing does not preserve appellate issues as there is no post-trial practice in cases arising under the Adoption Act nor may exceptions or motions for reconsideration be considered by the court. This result is in keeping with the policy goals of permanency, finality of process and stability in the best interests of children.

APPELLATE PROCEDURE / STANDING

Pursuant to Pa. R.A.P. 501, an appeal may be taken by a party aggrieved by the order. The Office of Children and Youth was not directly and adversely affected by the decrees granting the voluntary relinquishment of parental rights and realizing the primary objective of the Office of Children and Youth to terminate the parental rights of the natural parents and to pursue adoption proceedings. As the Office of Children and Youth was not aggrieved by the decisions, it lacks standing to advance this appeal pursuant to Pa. R.C.P. 501.

FAMILY LAW / ADOPTION / JURISDICTION

The lower court lacks jurisdiction to discuss the substantive merit of the issues raised by the Office of Children and Youth where there has been a failure to timely file a Pa. R.A.P. 1925(b) statement, a failure to preserve any issues by raising those issues at the hearing, and a lack of standing to pursue the instant appeal.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 124 IN ADOPTION 2005

Appearances: James Beveridge, Esq., on behalf of the Erie County Office of Children and Youth, Appellant
Matthew Urban, Esq., on behalf of the natural mother, Appellee
Karen Klapsinos, Esq., on behalf of the natural father, Appellee
Michael Nies, Esq., on behalf of A.J.D.J. & U.M.J., Appellees

OPINION

Domitrovich, J. March 9, 2006

This matter arises from the appeal of the Erie County Office of Children and Youth, (hereinafter referred to as OCY) from three separate Decrees, to which OCY consented in writing and verbally on the record, entered by this Lower Court on December 5, 2005 after a hearing, allowing the natural mother to relinquish voluntarily her parental rights and duties as to U.M.J. to OCY; allowing the natural mother to relinquish voluntarily her parental rights and duties as to A.J.D.J. to OCY; and allowing the natural father to relinquish voluntarily his parental rights and duties as to A.J.D.J. to OCY. Approximately one month after this Lower Court had entered its Final Decrees, and one week after OCY had filed its Notice of Appeal, OCY then filed a "Notice of Withdrawal of Consent," attempting to withdraw its consent to the three Decrees, entered on December 5, 2005, in direct violation of Pennsylvania Orphans' Court Rule 7.1 (e) and (g), prohibiting the filing of exceptions and the reconsideration of a final Order in cases arising under the Adoption Act. OCY's invalid withdrawal of its consent to the VR petitions forms the basis of the instant appeal. In the two Decrees, one with regard to each child, concerning the natural mother, to which OCY consented, this Lower Court stated that after consideration of the natural mother's two separate Petitions for Voluntary Relinquishment of Parental Rights (hereinafter referred to as VR petition) this Lower Court found that the natural mother had relinquished voluntarily forever all of her parental rights and duties to her minor children, U.M.J. and A.J.D.J., both of whom had been in the care of OCY for a minimum period of

three days, pursuant to 23 Pa.C.S. §2501. Furthermore, in the one Decree concerning the natural father, to which OCY consented, this Lower Court stated that after consideration of the natural father's Petition for Voluntary Relinquishment of Parental Rights (hereinafter referred to as VR petition) this Lower Court found that the natural father had relinquished voluntarily forever all of his parental rights and duties to his minor child, A.J.D.J., who had been in the care of OCY for a minimum period of three days, pursuant to 23 Pa.C.S. §2501. This Lower Court notes that neither the natural mother nor the natural father filed an appeal from any of these three Decrees.

OCY raised six issues in its Pa. R.A.P. 1925(b) Statement of Matters Complained of on Appeal;[1] however, OCY filed its Pa. R.A.P. 1925(b) Statement in an untimely manner. Therefore, as an initial matter, this Lower Court will address the issue of whether OCY waived all of its appellate issues by failing to comply with this Lower Court's January 5, 2006 Order, directing it to file a Concise Statement of Matters Complained of on Appeal within fourteen days, pursuant to Pa. R.A.P. 1925(b). Subsequently, this Lower Court will address the following two additional procedureal issues, assuming arguendo that OCY had filed a timely Pa. R.A.P. 1925(b) Statement: (1) whether OCY waived all of the issues presented in its untimely filed Pa. R.A.P. 1925(b) Statement, by failing to raise any of these issues at the time of the December 5, 2005 hearing, and by raising them for the first time on appeal, in direct contravention of Pa. R.A.P. 302; and (2) whether OCY has standing to advance the

[1] Specifically, OCY raised the following issues on appeal: (1) "by not acknowledging the affect of the withdrawal of the Consent of the Agency which is required pursuant per 23 Pa.C.S. §2501;" (2) "converting termination proceedings to relinquishment under §23 Pa.C.S. 2303 which requires at least 10 days before hearing and further under sections (b)(1) requiring ten days notice to both parents as well as (b)(2) notice that the parties have a right to representation by a lawyer;" (3) "parents were confused as to their relinquishment of their rights to an agency under §23 Pa.C.S. 2501 or relinquishment to adult intending to adopt a child under 23 Pa.C.S. 2502;" (4) "the Agency filed a Petition to Involuntarily Terminate Parental Rights to [A.J.D.J.] under 23 Pa.C.S. 2512 and further §2513 requires that the petition be filed no less than 10 days before hearing. This was in compliance with the involuntary termination proceedings however after conversion of Termination of Parental Rights to Relinquish of Parental Rights there was no such time period offered, but was considered by the Court as being waived;" (5) "there was never a petition filed by any party to terminate or relinquish the rights to [U.M.J.], which make all proceedings as to this child void and without any basis in law;" (6) "the apparent representation of the parents by Attorney Andrezeski who appeared as the attorney for the maternal grandfather as there was an obvious conflict of interest especially considering that he was interested in the placement of [U.M.J.] who was not a subject of these proceedings initially."

instant appeal, since OCY was not aggrieved by the Decrees entered by this Lower Court on December 5, 2005, pursuant to Pa. R.A.P. 501.

This Lower Court notes that since OCY waived all of its appellate issues by failing to file a timely Pa. R.A.P. 1925(b) Statement, since OCY waived all of its appellate issues by raising them for the first time on appeal, and since OCY has no procedural standing to present the instant appeal, this Lower Court lacks jurisdiction to engage in a discussion concerning the substantive merits of the issues OCY now raises on appeal.

As an initial matter, this Lower Court will discuss whether OCY waived all of its appellate issues by failing to comply with this Lower Court's January 5, 2006 Order, directing it to file a Concise Statement of Matters Complained of on Appeal within fourteen days, pursant to Pa. R.A.P. 1925(b). Pursuant to Pa. R.A.P. 1925(b),

> The lower court forthwith may enter an order directing the appellant to file of record in the lower court and serve on the trial judge a concise statement of the matters complained of on the appeal no later than 14 days after entry of such order. *A failure to comply with such direction may be considered by the appellate court as a waiver of all objections to the order, ruling or other matter complained of* (emphasis added).

In *Commonwealth v. Lord,* the Supreme Court of Pennsylvania held, "in order to preserve their claims for appellate review, Appellants must comply whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to [Pennsylvania Rule of Appellate Procedure] 1925." *Commonwealth v. Lord,* 719 A.2d 306, 309 (Pa. 1999); *Commonwealth v. Castillo,* 2005 Pa. LEXIS 3119, p.13 (Pa. 2005); *Kanter v. Epstein,* 866 A.2d 394, 400 (Pa. Super. Ct. 2004). Any issue not raised in a Statement of Matters Complained of on Appeal will be deemed waived. *Lord, supra* at 309. Recently, in *Commonwealth v. Castillo,* 2005 Pa. LEXIS 3119, p.13 (Pa. 2005) the Supreme Court of Pennsylvania addressed the matter of whether the Superior Court of Pennsylvania could review an issue that was not raised in a timely Pa. R.A.P. 1925(b) Statement. In reaffirming the bright-line rule set forth in *Commonwealth v. Lord,* the Supreme Court of Pennsylvania stated,

> The Lord/Butler rule remains necessary to insure trial judges in each appealed case the opportunity to opine upon the issues which the appellant intends to raise, and thus provide appellate courts with records amendable to meaningful appellate review. This firm rule avoids the situation that existed prior to Lord where trial courts were forced to anticipate which issues the appellant might raise and appellate courts had to determine 'whether they could conduct a 'meaningful review' despite an appellant's failure to file a Pa. R.A.P.

1925(b) statement or to include certain issues within a filed statement.' *Casillo, supra* at p.13. (internal citations omitted).

The Supreme Court of Pennsylvania stated that the strict construction of the *Commonwealth v. Lord* rule provided for uniformity of results in the intermediate appellate courts. The Supreme Court of Pennsylvania explained,

> Allowing for discretion regarding timeliness will result in inconsistencies. For example, when faced with the lack of a timely Pa. R.A.P. 1925(b) statement, one trial court might file quickly and efficiently an opinion waiving all issues, while another might address the issues it believes the appellant will raise, and still another might delay filing an opinion until a statement is received. If the appellant in each hypothetical case eventually files an equally untimely statement, the appellate court in the first case would waive the issues that the trial court waived, while in the second two scenarios, under current Superior Court precedent, the appellate court could address the issues so long as the trial court addressed the same issues in its opinion. As a result, the same factual situation could produce diametrically opposed results depending on how quickly a trial court files its opinion after the expiration of the Pa. RA.P. 1925(b) filing period. As referenced above, we decline to adopt a position which will yield unsupportable distinctions between similarly situated litigants. *Casillo, supra* at pp.12-13.

Finally, the Supreme Court of Pennsylvania specifically stated, "we specifically voice our disapproval of prior decisions of the intermediate courts to the extent that they have created exceptions to Lord and have addressed issues that should have been deemed waived," including *Commonwealth v. Alsop,* 799 A.2d 129 (Pa. Super. 2002) and *Commonwealth v. Ortiz,* 745 A.2d 662 (Pa. Super. 2002), in which the Superior Court of Pennsylvania found that issues raised in untimely filed Pa. RA.P. 1925(b) had not been waived since the trial court discussed these issues its Pa. R.A.P. 1925(a) Opinion. *Casillo, supra* at p.15. The Supreme Court of Pennsylvania suggested that a lower court's decision to address the merits of issues raised in an untimely filed Pa. R.A.P. 1925(b) Statement would not "save" those issues from waiver. *Casillo, supra* at p.15. Moreover, the Supreme Court of Pennsylvania held that issues not raised in a timely-filed 1925 (b) Statement would be deemed waived on appeal. *Id.*

In the instant matter, on January 5, 2006, this Lower Court filed an Order, directing OCY to file a Concise Statement of Matters Complained of on Appeal, pursuant to Pa. R.A.P. 1925(b), within fourteen days. Therefore, OCY had until January 19, 2006 to file its 1925(b) Statement, setting forth

the issues it intended to raise on appeal. The record demonstrates, however, that on January 20, 2006, OCY filed its untimely Pa. RA.P. 1925(b) Statement. Pursuant to the express language of Pa. R.A.P. 1925(b), as well as the Pennsylvania Supreme Court's recent decision in *Commonwealth v. Casillo*, it is clear that OCY waived all of its appellate issues by failing to file a timely Pa. R.A.P. 1925(b) Statement. Although OCY was only one day late in filing its Pa. R.A.P. 1925(b) Statement, the Supreme Court of Pennsylvania mandates the strict construction of this Rule of Appellate Procedure, in order to provide for consistency of results among similarly situated litigants. Accordingly, OCY has waived all of the issues it now advances on appeal, and, therefore, the instant appeal fails.

Assuming *arguendo* that OCY had not waived all of its appellate issues by failing to file a timely Pa. R.A.P. 1925(b) Statement, the instant appeal presents two additional procedural issues, which this Lower Court will address after outlining the factual and procedural history of this case, which is relevant to these remaining issues. U.M.J. was born on July 31, 1998 and is presently seven years old. A.J.D.J. was born on November 10, 2000 and is presently five years old. The natural mother of both children is an Appellee in the instant case. The natural father of A.J.D.J. is an Appellee in the instant case. The identity of the natural father of U.M.J. is unknown. (N.T. 12/5/05 pp.16-19). Both children were previously adjudicated dependent, and have been under the care, supervision, and control of Erie County Office of Children and Youth. On October 13, 2005, OCY filed a Petition for Involuntary Termination of ParentaI Rights of the natural mother as to A.J.D.J., a minor child. On October 13, 2005, OCY filed a separate Petition for Involuntary Termination of Parental Rights of the natural father as to A.J.D.J., a minor child. OCY also filed a Citation and Notice, directing the natural mother to appear for an IVT-right to amend hearing, scheduled for December 5, 2005, in order to show cause why her parental rights as to A.J.D.J. should not be terminated. OCY filed a separate Citation and Notice, directing the natural father to appear for an IVT-right to amend hearing, scheduled for December 5, 2005, in order to show cause why his parental rights as to A.J.D.J. should not be terminated. In these Citations and Notices, both the natural mother and the natural father were informed of their right to be represented by counsel during the IVT proceedings, and their right to appointed counsel if they could not afford legal representation.

Accordingly, on December 5, 2005, an IVT-right to amend hearing was held before the undersigned judge, concerning OCY's Petitions for Involuntary Termination of Parental Rights of the natural mother and the natural father, at which the natural mother and natural father both appeared *pro se.* At the beginning of the hearing, Attorney Beveridge, on behalf of OCY, asked the natural father whether he intended to voluntarily

relinquish his parental rights or proceed to involuntary termination of parental rights hearings. (N.T. 12/5/05 p.4). The natural father responded, "I would like to file for joint custody or something...Like both share custody or something...[With] my pops, my dad." (N.T. 12/5/05 p.4). The natural father stated, "I don't want to give up my rights because like I say, if my dad have him and something happen to my dad in the long run and I gave away my rights, then what's going to happen to my son?" (N.T. 12/5/05 p.4). Attorney Beveridge also asked the natural mother whether she intended to voluntarily relinquish her parental rights or proceed to involuntary termination of parental rights hearings. (N.T. 12/5/05 p.5). The natural mother responded, "I just want the best for my son. I wish he could come home with me, but it's not going to happen." (N.T. 12/5/05 p.5). The natural mother then indicated that she wanted to pursue an IVT trial. (N.T. 12/5/05 p.5).

Subsequently, the undersigned judge asked Attorney Anthony Andrezeski, who represents the biological grandfather and the step-grandmother of A.J.D.J. and U.M.J., whether he wanted an opportunity to speak with the natural parents. (N.T. 12/5/05 p.5). Although Attorney Andrezeski represents the grandparents, the grandparents were not a party to the IVT instant proceeding, and Attorney Andrezeski did not have an adverse interest in this matter. (N.T. 12/5/05 pp.8-9). Attorney Andrezeski stated he would like to speak with them, and, therefore, Attorney Andrezeski spoke privately, off the record, with the natural parents. (N.T. 12/5/05 p. 6). Attorney Beveridge never objected to Attorney Andrezeski speaking with the natural parents.

After Attorney Andrezeski finished speaking with the parents, he informed the court that he began the conversation with the natural mother and the natural father by informing them that he does not represent them and he is not their attorney. (N.T. 12/5/05 p.6). Attorney Andrezeski then told the natural parents that he believed it was in the best interests of A.J.D.J. to relinquish their parental rights voluntarily. (N.T. 12/5/05 p.6). Attorney Andrezeski addressed concerns of the natural parents, and emphasized to the natural parents to consider the best interests of A.J.D.J. (N.T. 12/5/05 p.6). Attorney Andrezeski stated that A.J.D.J. had progressed developmentally in placement, and, moreover, asked the parents to seriously consider their decision to pursue IVT proceedings or VR proceedings, and to proceed in the best interests of the child. (N.T. 12/5/05 p.7).

Subsequently, the natural father stated, "if it's in his best interest, then I do what's best for him, that's all I want, to see what's best for both of them, [U.M.J.] and [A.J.D.J.]" (N.T. 12/5/05 p.7). The undersigned judge then asked the natural father whether he wanted to proceed to an IVT trial, or voluntarily relinquish his parental rights. (N.T. 12/5/05 p.7). The natural father responded, "Rights, I'll give up my rights to him today."

(N.T. 12/5/05 p.7).

At this point, Attorney Beveridge stated that he did not understand what the parents wanted to do. (N.T. 12/5/05 p.7). Attorney Beveridge stated that perhaps the case should be scheduled for trial, in the children's best interests. (N.T. 12/5/05 p.8). The undersigned judge stated, to the contrary, that the natural father had clearly stated he wanted to relinquish his parental rights voluntarily, and no longer wished to proceed to an IVT trial. (N.T. 12/5/05 p.8). Attorney Beveridge did not voice disagreement with this statement, and his actions thereafter show that he did not disagree with this statement. Subsequently, the natural mother also stated that she wanted to relinquish voluntarily her parental rights, and no longer wished to proceed to an IVT trial. (N.T. 12/5/05 p.8). Therefore, the undersigned judge stated that the parents should formally prepare voluntary relinquishment petitions, and present them to this Lower Court. (N.T. 12/5/05 p.8).

Accordingly, Julie Molnar, a Court Coordinator with OCY, stated that she had blank forms for voluntary relinquishment petitions that she would complete for the natural mother and the natural father. (N.T. 12/5/05 p.8). Therefore, the Court took a recess in order to allow Julie Molnar to assist the natural mother and the natural father in completing Petitions for Voluntary Relinquishment. (N.T. 12/5/05 p.9). Subsequently the proceedings resumed, and the Court was presented with the following three separate VR petitions: (1) the natural father's petition to relinquish voluntarily his parental rights as to A.J.D.J.; (2) the natural mother's petition to relinquish voluntarily her parental rights as to U.M.J.; and (3) the natural mother's petition to relinquish voluntarily her parental rights as to A.J.D.J. All three of these VR Petitions included a Consent of the Agency, signed by Attorney Beveridge, stating,

> I, James E. Beveridge, am the solicitor of the Erie County Office of Children and Youth, an approved agency, and am authorized by said agency to execute this Consent. Said agency hereby consents to accept custody of [U.M.J. and A.J.D.J.] until such time as said child is adopted.

Accordingly, the undersigned judge conducted a thorough colloquy with the natural father, concerning his VR Petition with regard to A.J.D.J. (N.T. 12/5/05 pp.9-14). Specifically, the natural father affirmed the veracity of all of the following statements: he intended to relinquish voluntarily his parental rights as to A.J.D.J.; he was not under the influence of any alcohol or drugs; he had not been coerced or threatened by anyone to relinquish voluntarily his parental rights; and he had decided to relinquish voluntarily his parental rights in the best interests of A.J.D.J. (N.T. 12/5/05 pp.9-10). The natural father also stated, "The best interest for my son be for him to keep attending school and church and everything

like he was...And I'm not really fully established yet, and I don't have a job right now, you know, so --" (N.T. 12/5/05 p.10). Attorney Beveridge was satisfied with the colloquy, and did not ask any additional questions of the natural father. (N.T. 12/5/05 p.12). Accordingly, the undersigned judge entered a Decree, granting the natural father's Petition to Relinquish Voluntarily his Parental Rights as to A.J.D.J. Attorney Beveridge did not object to this Lower Court's entry of this Decree.

Subsequently, Attorney Beveridge presented the natural mother's two VR petitions to the Court, stating, "now, Your Honor, we have voluntary relinquishment proceedings for the [natural mother], for her two children, [A.J.D.J. and U.M.J.]" (N.T. 12/5/05 pp.14-15). Therefore, the undersigned judge conducted a thorough colloquy with the natural mother. (N.T. 12/5/05 pp.15-19). Specifically, the natural mother affirmed the veracity of all of the following statements: she was not under the influence of alcohol or drugs; she had not been promised anything in exchange for signing the VR petitions with regard to U.M.J. and A.J.D.J.; she had not been threatened, intimidated, or coerced into signing the VR petitions; and she had decided to relinquish her parental rights voluntarily because it served the children's best interests. (N.T. 12/5/05 p.15). Furthermore, the undersigned judge explained the ten-day filing rule, pursuant to 23 Pa.C.S. §2503, to the natural mother. (N.T. 12/5/05 p.12). The undersigned judge explained that ordinarily, prior to presenting a VR Petition to the Court, the parent files the Petition ten days in advance. (N.T. 12/5/05 p.15). The undersigned judge stated that in circumstances like the instant case, where the natural mother had time to consider relinquishment of parental rights, the parent may choose to waive that ten-day period provided for by 23 Pa.C.S. §2503, which is designed to protect the interests of the parent, not the interests of OCY. (N.T. 12/5/05 pp.15-16). The natural mother indicated that she waived this ten-day period, and, furthermore, the natural mother stated that she also waived the right to file an appeal within thirty days. (N.T. 12/5/05 p.16). Attorney Beveridge did not object to the natural mother's waiver of the ten-day period, provided for by 23 Pa.C.S. §2503. Furthermore, Attorney Beveridge was satisfied with the colloquy, and did not ask any additional questions of the natural mother. (N.T. 12/5/05 p.19). Accordingly, the undersigned judge entered two Decrees, granting the natural mother's Petitions to Relinquish Voluntarily her Parental Rights as to U.M.J. and A.J.D.J.

Despite OCY's clear consent to all three VR petitions, the colloquies, and the Court's Decrees at the time of December 5, 2005 hearing in this matter, on December 30, 2005, OCY inexplicably filed its timely Notice of Appeal from this Lower Court's December 5, 2005 Decrees. In this Notice of Appeal OCY indicated that it appealed from all Orders entered by this Lower Court on December 5, 2005, regarding the relinquishment

of parental rights of both the natural mother and the natural father.[2] Approximately one week after filing its Notice of Appeal, on January 4, 2006, OCY filed a "Notice of Withdrawal of Consent and Motion for Rehearing, in which OCY stated the following: (1) "The Agency withdraws its consent to the Voluntary Relinquishment as to both A.J.D.J. and U.M.J.;" and (2) "A further hearing is requested to determine if the parents are aware of all aspects of the Voluntary Relinquishment and provide them with a forum to affirm their decision," Subsequently, on January 24, 2006, this Lower Court ruled on OCY's Notice of Withdrawal of Consent and Motion for Rehearing, dismissing it on the basis that OCY lacked any procedural vehicle under the Rules to present this Motion to the Court.

Accordingly, the first procedural issue this Lower Court will address is whether OCY waived all of the issues presented in its untimely filed Pa. R.A.P. 1925(b) Statement, by failing to raise any of these issues at the time of the December 5, 2005 hearing, and by raising them for the first time on appeal, in direct contravention of Pa. R.A.P. 302. Pa. R.A.P. 302(a) provides, "issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Therefore, an appellant may not advance an issue on appeal that was not raised before the lower court. Pennsylvania Orphans' Court Rule 7.1 (g) provides, "exceptions shall be the exclusive procedure for review by the Orphans' Court of a final order, decree or adjudication. A party may not file a motion for reconsideration of a final order." Furthermore, the Pennsylvania Orphans Court Rules do not permit the filing of Exceptions in any matter arising under the Adoption Act. Pa. Sup. Orph. Ct. 7.1 expressly states, "no exceptions shall

[2] This Lower Court notes that upon receipt of OCY's Notice of Appeal, the Erie County Office of the Register of Wills forwarded the appeal to the Superior Court of Pennsylvania, Office of the Prothonotary. The record demonstrates that on January 11, 2006, the Erie County Office of the Register of Wills received a letter from Eleanor Valecko, Deputy Prothonotary of the Superior Court of Pennsylvania, advising that counsel for OCY must file a separate Notice of Appeal for each Order from which it seeks to appeal. Therefore, on January 18, 2006, OCY filed three separate Amended Notices of Appeal from each of the three separate Orders entered by this Lower Court on Decmber 5, 2005 at Docket Number 124 of 2005. Specifically, in its first Amended Notice, OCY stated, [OCY] hereby appeals to the Superior Court of Pennsylvania from the Order entered on Termination/ Relinquishment of Parental Rights of [the natural mother], mother of [A.J.D.J.]... on December 5, 2005." In its second Amended Notice, OCY stated, [OCY] hereby appeals to the Superior Court of Pennsylvania from the Order entered on Termination/Relinquishment of Parental Rights of [the natural mother], mother of [U.M.J.]...on December 5, 2005." Finally, in its third Amended Notice, OCY stated, [OCY] hereby appeals to the Superior Court of Pennsylvania from the Order entered on Termination/Relinquishment of Parental Rights of [the natural father], father of [A.J.D.J.]...on December 5, 2005."

be filed to any order in involuntary termination or adoption matters under the Adoption Act, 23 Pa.C.S. Section 2501, [Relinquishment to Agency] *et seq.*" Additionally, the Pennsylvania Superior Court established that Pa. Sup. Orph. Ct. 7.1(e) eliminates post-trial practice in involuntary termination and adoption matters, and this Rule is strictly applied by the Court. *In Re: Adoption of W.R.*, 823 A.2d 1013, 1016 (Pa. Super. Ct. 2003). Therefore, in cases arising under the Adoption Act, in order to preserve an issue for appellate review, the appellant must raise the issue at the time of the hearing before the lower court. Since there is no post-trial practice in cases arising under the Adoption Act, and since exceptions are not permitted in these cases, any issue not raised before the lower court at the time of the hearing will be deemed waived for purposes of appellate review, pursuant to Pa. R.A.P. 302(a).

Additionally, an appellant has the obligation to demonstrate, with citation to the record, that an issue has been raised or preserved for appellate review. *In re Griffin*, 690 A.2d 1192, 1208 (Pa. Super. Ct. 1997). In an appellate brief, the appellant is required to include a statement of the case, pursuant to Pa. R.A.P. 2117(c). Specifically, an appellant must include a "statement of place of raising or preservation of issues. Where under the applicable law an issue is not reviewable on appeal unless raised or preserved below, the statement of the case shall also specify:"

> (1) The state of the proceedings in the court of first instance, and in any appellate court below, at which, and the manner in which, the questions sought to be reviewed were raised.
>
> (2) The method of raising them (e.g. by a pleading, by a request to charge and exceptions, etc.).
>
> (3) The way in which they were passed upon by the court.
>
> (4) Such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g. ruling or exceptions thereto, etc.) as will show that the question was timely and properly raised below so as to preserve the question on appeal.

Furthermore, pursuant to Pa. R.A.P. 2119(e), an appellant must provide,

> A statement of place of raising or preservation of issues. Where under the applicable law an issue is not reviewable on appeal unless raised or preserved below, the argument must set forth, in immediate connection therewith or in a footnote thereto, either a specific cross reference to the page or pages of the statement of the case which set forth the information relating thereto required pursuant to Rule 2117(c) (statement of place of raising or preservation of issues), or substantially the same information.

See also In re Griffin, 690 A.2d 1192, 1208 (Pa. Super. Ct. 1997).

In the instant matter, OCY, by and through Attorney Beveridge, raised six issues on appeal; however, OCY waived all of these issues by failing to raise them at the time of the December 5, 2005 hearing in this matter. The record demonstrates that at the time of the December 5, 2005 hearing, Attorney Beveridge did not object to Attorney Andrezeski speaking with the natural mother and the natural father concerning their decisions to pursue VR proceedings or IVT proceedings. Furthermore, Attorney Beveridge did not clearly object to the natural mother's decision to relinquish voluntarily her parental rights to U.M.J. and A.J.D.J. and the natural father's decision to relinquish voluntarily his parental rights to A.J.D.J. At one point, Attorney Beveridge briefly indicated that he was unsure as to whether the parents wished to pursue VR or IVT proceedings, and that perhaps the matter should be scheduled for an IVT trial. (N.T. 12/5/05 pp.7-8). However, Attorney Beveridge subsequently did not disagree with the undersigned judge when she stated, to the contrary, that the parents had clearly stated that they wanted to relinquish their parental rights voluntarily. Attorney Beveridge also did not raise any objection to the natural parents completing Voluntary Relinquishment Petitions. In fact, Ms. Molnar, a Court Coordinator with OCY, made it her responsibility to provide the parents with the proper VR Petitions, and to assist the parents in completing the necessary forms. Attorney Beveridge certainly could have directed Ms. Molnar not to provide the parents with the Petitions and not to assist them in completing the forms; however, Attorney Beveridge did not do so. Rather, Attorney Beveridge provided his signature and the express Consent of the Agency, pursuant to 23 Pa.C.S. §2501(b), to the natural mother's VR petition with regard to U.M.J., to the natural mother's VR petition with regard to A.J.D.J., and to the natural father's VR petition with regard to A.J.D.J. Furthermore, Attorney Beveridge raised no objection to the colloquies the undersigned judge conducted with the natural mother and the natural father concerning their VR petitions. While the colloquies for voluntary relinquishment were conducted, Attorney Beveridge was helpful, and answered questions the natural father had concerning the future adoption of A.J.D.J. (N.T. 12/5/05 pp. 11-12). Additionally, Attorney Beveridge presented the natural mother's Petition for Voluntary Relinquishment to this Lower Court. (N.T. 12/5/05 p.15).

Moreover, at the time of the hearing in this matter, which arose under the Adoption Act, Attorney Beveridge never raised any of the specific issues that he now raises on appeal in his Pa. R.A.P. 1925(b) Statement. In fact, Attorney Beveridge did not even object to or disagree with the outcome of the proceedings and the Decrees entered by the undersigned judge. Rather, throughout the course of the December 5, 2005 hearing, Attorney Beveridge consented to everything that occurred and raised

absolutely no clear objection. Because of Attorney Beveridge's actions during the December 5, 2005 hearing. OCY's December 30, 2005 Notice of Appeal came as a surprise to this Lower Court. By raising all of the Pa. R.A.P. 1925(b) issues for the first time on appeal, OCY has deprived this Lower Court of the opportunity to evaluate these issues meaningfully.

Additionally, in its appellate brief to the Superior Court of Pennsylvania, OCY will not be able to demonstrate where in the record it raised or preserved any of the issues it now advances on appeal. As previously set forth, pursuant to Pa. R.A.P. 2117(c), appellants must include a statement of the case, indicating where in the record they preserved their appellate issues. In the instant matter, however, OCY cannot comply with Pa. R.A.P. 2117(c) since OCY failed to preserve any of the issues it now advances on appeal. Therefore, as OCY failed to raise any of the issues included in its Pa. R.A.P. 1925(b) Concise Statement of Matters Complained of on Appeal before this Lower Court, OCY has waived all of its issues for purposes of appellate review. Accordingly, the instant appeal is meritless.

This Lower Court notes that on appeal, OCY will likely argue that it preserved its appellate issues by raising them in its January 4, 2006 "Notice of Withdrawal of Consent and Motion for Rehearing," which OCY filed after it filed its Notice of Appeal. In *In re: Adoption of W.R.*, 823 A.2d 1013, 1016 (Pa. Super. Ct. 2003), the Superior Court of Pennsylvania stated there is no post-trial practice in cases arising under the Adoption Act. Furthermore, pursuant to Pa. Sup. Orph. Ct. 7.1 (e) and (g), exceptions are the exclusive procedure for review by the Orphans' Court of a Decree; however, exceptions may not be filed in cases arising under the Adoption Act. Furthermore, the Orphans' Court may not review Motions for reconsideration. Since the instant matter arose under 23 Pa.C.S. §2501 of the Adoption Act, pertaining to voluntary relinquishments, OCY lacked any procedural vehicle to present its "Notice of Withdrawal of Consent and Motion for Rehearing" to this Lower Court. Therefore, under the Pennsylvania Orphans' Court Rules, this Lower Court was proscribed from granting this Notice and Motion, and was constrained to dismiss it on the basis that OCY lacked any procedural vehicle to present it to this Lower Court. Accordingly, any issues raised by OCY in its "Notice of Withdrawal of Consent and Motion for Rehearing" were not preserved for review in the instant appeal.

This Lower Court further notes that there exist strong policy considerations against permitting OCY to withdraw its consent to a VR Petition and against permitting hearings following the entry of a Decree allowing voluntary relinquishment of parental rights, for the purpose of "determin[ing] if the parents are aware of all aspects of the Voluntary Relinquishment and provide them with a forum to affirm their decision." *See OCY's Notice of Withdrawal of Consent and Motion for Rehearing, p.3.* If this Lower Court permitted OCY to withdraw its consent to a VR

Petition after a Final Decree has been entered, then in the interest of fairness and equity, this Lower Court would also have to permit parents to withdraw their consent to VR Petitions, after a Final Decree had been entered. Similarly, if this Lower Court held hearings upon the request of OCY, which could have the effect of upsetting the outcome of a prior VR proceeding, this Lower Court would also have to hold such hearings upon the request of a parent. Allowing post-trial practice in cases arising under the Adoption Act directly conflicts with OCY's goal of providing for permanency, finality of process, and stability in the best interests of children. From a policy perspective, it would be impractical, burdensome, illogical, contrary to OCY's interests, and, most importantly, contrary to the best interests of the children, for this Lower Court to grant a "Notice of Withdrawal of Consent and Motion for Rehearing," filed by OCY or by a parent. Moreover, as OCY failed to raise any of the issues it now advances on appeal before this Lower Court, OCY waived all of its issues for purposes of appellate review.

The second and final procedural issue this Lower Court will address is whether OCY has standing to advance the instant appeal, since OCY was not aggrieved by the Decrees entered by this Lower Court on December 5, 2005, pursuant to Pa. R.A.P. 501. Pursuant to Pa. R.A.P. 501 "except where the right of appeal is enlarged by statute, any party who is aggrieved by an appealable order...may appeal therefrom." The note to Pa. R.A.P. 501 states that the issue of whether or not a party is aggrieved by the lower court's order is a substantive question determined by the effect of the order upon the party. In Pennsylvania it is well established that,

> Pa. R.A.P. 501 limits the right of appeal to 'aggrieved parties.' An 'aggrieved party' is one who has a substantial interest at stake, *i.e.*, an interest that surpasses the common interest of all citizens in procuring obedience to the law, a party who is directly and adversely affected by the decision from which appeal is taken, and whose harm is direct, immediate, and substantial. *Commonwealth v. Williams*, 877 A.2d 471, 478 (Pa. Super. Ct. 2005).

In the instant matter, OCY was not directly and adversely affected by the three Decrees, entered by this Lower Court on December 5, 2005, granting the voluntary relinquishment petitions presented by the natural mother and the natural father, to which OCY consented. Both U.M.J. and A.J.D.J. were dependent children, under the care, supervision, and control of OCY. OCY had an interest in and a duty to provide permanency and stability for these children, which the natural parents were unable or unwilling to provide. In fact, OCY had already filed an IVT Petition with regard to A.J.D.J., and was in the process of pursuing the termination of the parental rights of the natural mother and the natural father. Moreover,

OCY's objective, with regard to U.M.J. and A.J.D.J., was to terminate the parental rights of the natural parents of these children, and to pursue adoption proceedings, in the best interests of these children, and at no point during the December 5, 2005 hearing did Attorney Beveridge indicate anything to the contrary.

In the instant matter, OCY appealed from three Decrees Allowing Relinquishment of Parental Rights and Duties to an Agency, granting the VR Petitions of the natural mother with regard to U.M.J. and A.J.D.J. and granting the VR Petition of the natural father with regard to A.J.D.J. In these Decrees, this Lower Court transferred custody of U.M.J. and A.J.D.J. to OCY, and authorized OCY to consent to the adoption of these children without further consent of or notification to the natural parents. Moreover, through this Lower Court's entry of these three Decrees, OCY realized a primary objective it was working toward with regard to the permanency plans for U.M.J. and A.J.D.J. Clearly, OCY was not aggrieved by the decision of this Lower Court to grant the VR Petitions, presented by the natural mother and the natural father, and enter Final Orders of Court. To the contrary, the Decrees from which OCY now appeals advanced OCY's permanency goals for U.M.J. and A.J.D.J.

Furthermore, this Lower Court notes that OCY provided written consents to the three VR Petitions presented by the natural mother and the natural father, and OCY did not object to this Lower Court's entry of the three separate Decrees from which it now appeals. Had OCY been aggrieved by the decisions announced by the undersigned judge in open court on December 5, 2005, OCY would have objected to those decisions at the time of their entry. Attorney Beveridge, on behalf of OCY, however, raised no such objection. Rather, OCY expressly consented to everything that occurred at the December 5, 2005 hearing, and quietly and inexplicably filed its Notice of Appeal twenty-five days later. OCY, moreover, was not directly and adversely affected by the three Decrees from which it now appeals, and OCY suffered no direct, immediate, or substantial harm from the entry of these Decrees. Accordingly, OCY lacks procedural standing to advance the instant appeal, pursuant to Pa. R.A.P. 501.

Moreover, it is obvious that OCY failed to timely file a Pa. R.A.P. 1925(b) Statement, per the directives of this Lower Court, OCY failed to preserve any of the issues it now advances on appeal by failing to raise them at the time of the December 5, 2005 hearing, and OCY has no procedural standing to present the instant appeal since it was not aggrieved by any of the Decrees entered by this Lower Court on December 5, 2005. Therefore, this Lower Court lacks jurisdiction to engage in a discussion concerning the substantive merits of the issues OCY raises on appeal. Accordingly, for all of the foregoing reasons, the instant appeal fails.

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

KEYSTONE INSURANCE COMPANY, Plaintiff
v.
ABDUL ABDULLAH-MUHAMMED, Now By Change of Name, TECUMSEH BROWN- EAGLE, Defendant

INSURANCE / UIM STACKING

Based on the language contained in a policy of motor vehicle insurance and the insured's designation as a Class II insured, plaintiff was precluded from stacking underinsured motorist (UIM) benefits.

INSURANCE / UIM STACKING

Pursuant to the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 Pa. C.S.A. § 1701 *et seq*., an insurer is required to provide UIM coverage in an amount equal to the amount of bodily injury liability coverage in the policy unless the insured waives the requirement by either rejecting UIM coverage altogether or by requesting lower limits for this type of coverage. 75 Pa.C.S. §1731(b) and (c), 1734.

INSURANCE / UIM STACKING

Where an insured completes a written application for automobile insurance and signs the important notice and applicant's certification, acknowledging an adequate explanation of the coverages, options and exclusions available to him, a conclusive presumption is created that the insured had actual knowledge and understanding of the benefits and limits available to him. See *Smith v. Hartford Ins. Co.*, 2004 Pa. Super. 145, 849 A.2d 277 (2004). As such the plaintiff's written and signed application constituted a written request for lower UIM limits as required by section 1734, and his certification relative to the section 1791 important notice meant that no additional notice or rejection was required when an additional car was added to the policy.

INSURANCE / UIM STACKING

As an occupant of an insured vehicle who is not a named insured or a family member under the terms defined in a policy, an individual is a Class II insured. As such he has not paid premiums or has been specifically intended to be a beneficiary of the policy and is therefore not entitled to multiple coverages under stacking of UIM benefits.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 14166 - 2004

Appearances: James L. Moran, Esquire
William J. Kelly, Esquire

MEMORANDUM

Bozza, John A., J.

This matter is currently before the Court on the 1925(b) Statement of Matters Complained of on Appeal filed by defendant, Abdul Abdullah-Muhammed, now by change of name, Tecumseh Brown-Eagle (Mr.

Brown-Eagle), wherein he challenges this Court's grant of a Motion for Summary Judgment filed on behalf of plaintiff, Keystone Insurance Company (Keystone). Mr. Brown-Eagle was involved in a motor vehicle accident with Mark Hilbert (Mr. Hilbert) on March 12, 1998 while driving a 1995 Mazda MX6 Coup owned and insured by his father, John O. Johnson. The vehicle was insured through Keystone via policy number 3732-5084. He filed a claim for underinsured motorist benefits (UIM) under Johnson's policy after settling his claim against Mr. Hilbert for $15,000.00, representing the limits of liability under Mr. Hilbert's policy with Old Guard Insurance. This declaratory judgment action arose after Mr. Brown-Eagle disputed Keystone's position that the $25,000.00 paid to him was the maximum UIM coverage available under the applicable policy. By Order dated November 8, 2005, this Court granted Keystone's Motion for Summary Judgment. Thereafter, Mr. Brown-Eagle filed a timely Notice of Appeal on December 6, 2005.

In his 1925(b) Statement of Matters Complained of on Appeal, Mr. Brown-Eagle asserts the following:

1. The lower court erred in granting the Motion for Summary Judgment because once a second vehicle was added to the insurance policy secured by James O. Johnson, which listed the defendant as a named driver of one of the insured vehicles, the plaintiff was required to secure new forms from the insured in order to properly reduce the underinsurance coverage to an amount less than the liability limits provided by the policy and to eliminate stacking of the vehicles insured under the policy.

(1925(b), ¶1). For the reasons stated below, the appeal is without merit.

Keystone's Motion for Summary Judgment included two separate justifications for the relief requested. Keystone first argued that Mr. Brown-Eagle's asserted entitlement to UIM benefits in excess of the $25,000 already paid was precluded by Mr. Johnson's selection of UIM coverage of $25,000 per person/$50,000 per accident as demonstrated by the signed application for liability insurance coverage, which constituted a written request for underinsured motorist benefits in an amount less than the liability limits on the policy. In addition, Keystone asserted that, even accepting Mr. Brown-Eagle's assertion that the named insured was entitled to stack UIM benefits under the policy[1], Mr. Brown-Eagle was

[1] Mr. Johnson's application for automobile liability insurance, dated August 26, 1997, includes a signed rejection of stacked uninsured coverage limits. *See* Complaint for Declaratory Judgment, Exhibit B. Thereafter, he amended the policy to add the vehicle in question, a 1995 Mazda MX6 Coup. At that time, however, he did not execute an additional rejection of stacked uninsured coverage limits. As such, Mr. Brown-Eagle disputes the validity of the initial rejection, arguing that the issue is controlled by *In Re: Insurance Stacking Litigation*, 754 A.2d 702 Pa. Super. 2000, and its progeny.

precluded from stacking these benefits based on his designation as a Class II insured and the language contained in the policy.

With respect to Keystone's first basis for relief, Mr. Brown-Eagle asserts that Keystone was required to secure new forms from Mr. Johnson in order to properly reduce the underinsurance coverage subsequent to the addition of the 1995 Mazda MX6 Coup. Pursuant to the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 Pa. C.S.A. § 1701 et. seq., an insurer is required to provide UIM coverage in an amount equal to the amount of bodily injury liability coverage in the policy unless the insured waives the requirement by either rejecting UIM coverage all together, or by requesting lower limits for this type of coverage. *See* 75 Pa. C.S. § 1731(b) and (c), 1734. Rejection of UIM coverage requires strict compliance with the technical requirements laid out in 75 Pa. C.S. § 1731 (c. 1). The only requirement to elect reduced UIM coverage, however, is that the named insured make a "request in writing". 75 Pa. C.S. § 1734; *Lewis v. Erie Insurance Exchange,* 568 Pa. 105, 793 A.2d 143 (2002).

In this instance, Mr. Johnson, the policyholder and first named insured, completed a written application for automobile insurance. According to the application, the desired level of UIM coverage requested was $25,000 per person/$50,000 per accident, unstacked. *See* Complaint for Declaratory Judgment, Exhibit A. The application also included the "Important Notice" described in 75 Pa. C.S. § 1791 - Notice of available benefits and limits, followed by the "Applicant's Certification", which Mr. Johnson signed as indication that all available policy coverages, options and exclusions were adequately explained to him. *See Prudential Property Casualty Ins. Co. v. Pendleton*, 858 F.2d 930, 932 (3rd Cir., 1988) (noting that an insured's signature on the Section 1791 "Important Notice" creates a conclusive presumption that the insured had actual knowledge and understanding of the benefits and limits available, and those ultimately selected). Pursuant to Section 1791, where such notice is provided to the applicant at the time of application for original coverage no other notice or rejection is required. 74 Pa. C.S. § 1791. In commenting on the effect of inclusion of the Section 1791 "Important Notice" in a policy, the Superior Court, in *Smith v. Hartford Insurance Co.,* stated:

> Policies are renewed, vehicles are bought and sold, amounts of coverage change. Yet, in spite of this knowledge, the General Assembly has specifically stated that once the applicant has purchased the policy and been informed of the choices available, no other notice or rejection shall be required.

2004 Pa. Super. 145, 849 A.2d 277 (2004) (emphasis added); *See also Sackett v. Nationwide Mut. Ins. Co.*, 2005 Pa. Super 262, 880 A.2d 1243 (2005) (recognizing that addition of vehicle to existing policy does not create a new policy). As such, Mr. Johnson's written and signed application constituted a written request for lower UIM limits as required by Section

1734, and his certification relative to the Section 1791 "Important Notice" meant that no additional notice or rejection was required when an additional car was added to the policy. Therefore, Mr. Brown-Eagle's first assertion of error is without merit.

Mr. Brown-Eagle also asserts that Keystone was required to secure new forms from Mr. Johnson to eliminate stacking of UIM coverage subsequent to the addition of the 1995 Mazda MX6 Coup. Initially, the Court notes that Keystone conceded that the policy provides for stacking of UIM benefits for the purpose of its motion.[2] *See* Pl,'s Brief in Support of Motion for Summary Judgment, p. 6; See also Pl's Reply to Response for Motion for Summary Judgment, p. 2. The stacking issue, however, was not determinative because Mr. Brown-Eagle was neither the "named insured", nor a "family member" as those terms are defined in the policy.[3] *See* Complaint, Exhibit A, p. 1, Definitions A and F. Rather, at the time of the accident he was an occupant of the insured vehicle, making him a Class II insured. Pursuant to the Pennsylvania Supreme Court's decision in *Utica Mutual Insurance Co. v. Contrisciane,*

> [A] claimant whose coverage is solely a result of membership in this class has not paid premiums, nor is he a specifically intended beneficiary of the policy. Thus, he has no recognizable contractual relationship with the insurer, and there is no basis upon which he can reasonably expect multiple coverage.

504 Pa. 328, 473 A.2d 1005, 1010-11 (1984). In fact, such situations are directly addressed in the policy itself, which states:

> [T]he most we will pay for "bodily injury" sustained by an "insured" other than you or any "family member" is the limit shown on the declarations applicable to the vehicle the "insured" was "occupying" at the time of the accident.

Complaint for Declaratory Judgment, Exhibit A, p. 15. As such, Mr. Brown-Eagle's assertion that he is entitled to stacking of the applicable UIM coverage is without merit. *O'Conner-Kohler v. State Farm Ins. Co.*, 113 Fed. Appx. 472 (3rd Cir., 2004).

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[2] The Court notes that the issue of whether new forms are required to reject stacking on UIM coverage upon adding a car to an existing policy was addressed by the Superior Court in *Sackett v. Nationwide Mut. Ins. Co.*, *supra*. In that case, the Superior Court held that such waivers, once properly executed, continue to bind an insured despite the addition of new vehicles to the policy.

[3] The record reflects that Mr. Brown-Eagle was the son of the first named insured, Mr. Johnson. However, during all times relevant to the policy he resided at a separate address and was thus not a member of Mr. Johnson's household.

For the reasons set forth above, this Court's November 8, 2005 Order should be affirmed.

Signed this 23 day of January, 2006.

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

KENNETH HARDEN, Plaintiff

v

ALWAYNE F. LEWIS, Defendant

CIVIL PROCEDURE / SERVICE / LAMP v. HEYMAN

The *Lamp* rules requires a good faith effort on the part of a plaintiff to notify a defendant that an action has been commenced. The Plaintiff bears the burden of showing that efforts to serve were reasonable. The good faith of the plaintiff is to be evaluated on a case-by-case basis.

The Supreme Court has recently adopted a flexible rather than a strict approach to gauge compliance with requirements of service, ruling that the flexible approach sufficiently protects against stale claims without the necessity of dismissing claims based upon technical failures which do not prejudice the defendant.

CIVIL PROCEDURE / SERVICE / LAMP v. HEYMAN

Where the writ is timely filed, reissued immediately upon receipt of a sheriff's return indicating an inability to serve the defendant, the plaintiff has made numerous efforts to locate the defendant, and plaintiff was granted leave to serve by publication, the court finds that the plaintiff's efforts were reasonably calculated to effectuate service despite delay in attempting to serve at a Chicago, Illinois address found in a police report. Plaintiff engaged in good faith efforts to notify defendant and plaintiff's actions were not intended to stall or thwart the legal process. Preliminary objections raising improper service are therefore overruled.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW NO. 13686 - 2004

Appearances: Joseph E. Fieschko, Jr., Esquire for the plaintiff
Daniel P. McDyer, Esquire for the defendant

OPINION

Bozza, John A.. J

This matter is before the Court on the defendant Alwayne Lewis' Preliminary Objections to the plaintiff's complaint raising lack of jurisdiction and improper service. The history of the case is as follows. The plaintiff's cause of action arises out of a motor vehicle accident which occurred on October 27, 2002, in which the plaintiff Kenneth Harden allegedly suffered various injuries as a result of the defendant running a red light and striking the plaintiff's vehicle. The defendant was subsequently charged with several criminal counts in relation to this accident. The defendant provided two Erie addresses to criminal authorities as a result of these charges: 613 East 13th Street, Upstairs Rear, Erie, PA 16503 and 450 East 21st Street, Erie, PA 16503. These addresses were found on the Subpoena Criminal/Summary Case. A Chicago, Illinois address was also included in a narrative in the Police

Crashing Report, in which an officer obtained the address from the defendant's driver's license.

The plaintiff commenced this action on October 11, 2004 by filing a Praecipe for Writ of Summons, which was delivered on the same date to the Sheriff of Erie County, with instructions to serve the defendant at the two Erie addresses listed on the Subpoena. However, at that time the plaintiff did not attempt to effectuate service on the defendant at the Chicago, Illinois address.

On October 25, 2004, plaintiff was informed by the Sheriff's office that he was unable to serve the defendant at either address. Plaintiff then contacted the District Magistrate, United States Postal Service, the Department of Corrections, and the Erie County Support Office in an effort to locate the defendant. The plaintiff learned at that time that a Bench Warrant had been issued against the defendant, and that the Courts were also unable to locate the defendant.

The plaintiff received the Sheriff's Return on November 15, 2004. The following day, on November 16, 2004, the plaintiff filed his Praecipe to Reinstate Writ of Summons because the original Writ expired on November 10, 2004. On November 17, 2004, the plaintiff's Motion for Special Order of the Court Directing Service by Publication was granted. Pursuant to the Order, the plaintiff served the defendant by publication in the *Erie County Legal Journal* and the *Erie Times News*.

In March of 2004, the plaintiff exchanged correspondence with State Farm Insurance. State Farm Insurance informed the plaintiff that they had notified the defendant's insurance company, Apollo Casualty Company, of the accident. However, Apollo Casualty Company had denied coverage. In addition, State Farm Insurance informed the plaintiff that they had also made numerous attempts to locate the defendant. The plaintiff continued to make efforts to locate the defendant by periodically checking with the Erie County Prison and the Erie County Sheriff Department to see if the Bench Warrant issued against the defendant had been served.

On November 4, 2005 plaintiff retained new counsel. The plaintiff then filed a Complaint in Action at Law on December 1, 2005. The defendant was served by First Class mail and Certified mail at the Chicago, Illinois address. The Complaint served by First Class Mail was not returned, however, the Complaint served by Certified Mail was returned as unclaimed. In addition to serving the defendant, the plaintiff also served Apollo Casualty Company by First Class Mail. Plaintiff made further attempts to find the defendant through searches of on-line white pages.

The defendant filed Preliminary Objections on February 1, 2006, alleging that the plaintiff failed to make a good faith effort to locate and serve the defendant and therefore has resulted in an unnecessary delay in this matter and improper and ineffectual notice of the commencement of

this action.

The issue in this matter is whether the plaintiff's court ordered substitute service by publication in Erie was valid as to effect notice to the defendant; even though an Illinois address was also available in public records at the time the plaintiff filed their Motion for Service by Publication. Based on the record before the Court, it is apparent that the plaintiff's actions were in good faith, and therefore service by publication in Erie was proper; as such, the defendant's Preliminary Objections are overruled.

The rule set forth in *Lamp v. Heyman*, 469 Pa. 465, 366 A.2d 882 (1976) states, "a writ of summons shall remain effective to commence an action only if the plaintiff then refrains from a course of conduct which serves to stall in its tracks the legal machinery he has just set in motion." *Lamp*, 366 A.2d at 889. *Farinacci v. Beaver County Industrial Development Authority*, 510 Pa. 589, 511 A.2d 757 (1986) clarified the *Lamp* rule by noting that the plaintiff must make a good faith effort to notify a defendant of a commenced action. A plaintiff's good faith effort is assessed on a case-by-case basis, and while "there is no mechanical approach to apply to determine what constitutes a good faith effort," the plaintiffs bear the burden of showing that their efforts were reasonable. *Rosenberg v. Nicholson*, 408 Pa. Super. 502, 597 A.2d 145 (1991).

The Pennsylvania Supreme Court recently revisited the *Lamp-Farinacci* rule in *McCreesh v. City of Philadelphia*, 888 A.2d 664, 205 Pa. LEXIS 3083 (2005) to clarify what a plaintiff must do in order to make a good faith effort to give notice of an action to a defendant. In doing so, the Court adopted a flexible approach, as opposed to a strict approach, to the *Lamp-Farinacci* rule, concluding that a flexible approach "sufficiently protects defendants from defending against stale claims without the draconian action of dismissing claims based on technical failings that do not prejudice the defendant." *Id.* 888 A.2d at 666. The *McCreesh* Court stated that the adoption of a single approach was necessary because,

> In applying Lamp and its progeny, the Commonwealth and Superior Courts have formulated inconsistent rules, sometimes dismissing cases due to plaintiffs' failure to comply strictly with the Rules of Civil Procedure and on other occasions reserving the drastic measure of dismissal for only those cases where the defendant has been prejudiced by plaintiff's failure to comply with the rules.

Id. 888 A.2d at 673. The Court further explained that requiring strict compliance replaces a factual good faith inquiry with an objective bright line standard of compliance that is inconsistent with the concept of good faith. *Id*. 888 A.2d at 674.

In the present case the writ was timely filed by the plaintiff, reissued immediately upon return of sheriff, and published as allowed by an Order of Court. (distinguishable from *Lamp*, where the plaintiff instructed the

prothonotary to hold over the writ once it was issued, therefore stalling in its tracks the legal machinery he set into motion); (also distinguishable from *Farinacci,* where the Court found that neglecting a file for more than a month after it was misplaced showed that the plaintiff did not meet the good-faith requirement to effectuate notice of the action's commencement).

While it is true that a Chicago, Illinois address from a driver's license was provided by a police officer in the narrative section of the Police Crashing Report, the defendant was in Pennsylvania, driving a car with Pennsylvania temporary plates, and provided the courts with Erie addresses. The plaintiff's choice to serve the defendant by publication in Erie was reasonably calculated to effectuate service. The plaintiff followed the Pennsylvania Rules of Civil Procedure during the course of this matter, and received the Court's approval in serving the defendant by publication. In addition, since the initiation of this case, the plaintiff has made various efforts to locate the defendant; the plaintiff has been in contact with the Courts, the United States Postal Service, the Department of Corrections, the Erie County Support Office, on-line telephone directories and the defendant's insurance company.

Plaintiff's efforts, including service by publication in Erie, represented a good faith effort to notify defendant that he had been sued. There is nothing in the record to indicate that plaintiff's actions were intended to "stall," or in any way thwart the legal process.

Based on the record before the Court and upon review of controlling authority, and for the reasons set forth above, the defendant's Preliminary Objections are overruled. An appropriate Order will follow.

Signed this 23 day of May, 2006.

ORDER

AND NOW, to-wit, this 23 day of May, 2006, upon consideration of defendant's Preliminary Objections Raising Lack of Personal Jurisdiction Over the Person of the Defendant and Improper Service of Process, and argument thereon, it is hereby **ORDERED, ADJUDGED** and **DECREED** that defendant's Preliminary Objections are **OVERRULED**.

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

Kelly M. Edwards and Demaris L. Edwards t/d/b/a Lakeview on the Lake; Leo E. Gehres, Agnes C. Gehres and James A. Gehres t/d/b/a Vernondale Motel; Maha Laxmi, Inc. t/d/b/a Travelodge; Marp, LLC t/d/b/a Best Western; Paradise Lounge, Inc., t/d/b/a The Flamingo Motel; Riviera Motel, Inc. t/d/b/a Riviera; Scott's Court-Peach, Inc. t/d/b/a Courtyard By Marriott and Ambassador Banquet and Conference Center, Erie, Pennsylvania; Scott's Express-Peach, Inc. t/d/b/a Holiday Inn Express, Erie, Pennsylvania; Scott's I-90 Inc. t/d/b/a Days Inn, Erie, Pennsylvania; Scott's Inn-19, Inc. t/d/b/a Comfort Inn, Erie, Pennsylvania; Scott's Econo Inn, Inc. t/d/b/a Econo Lodge, Erie, Pennsylvania; Scott's Development Co., Inc. t/d/b/a Residence Inn by Marriott, Erie, Pennsylvania; Scott's M6 Erie, Inc. t/d/b/a Motel 6, Erie, Pennsylvania; and Thomas Phillips, Donna Phillips, Tammy Sanfilippo and Gaile Phillips-Smith t/d/b/a The Golden Triangle Motel, Erie, Pennsylvania, Plaintiffs

v.

County of Erie, Pennsylvania; City of Erie, Pennsylvania; and Erie County Convention Center Authority, Defendants

CONSTITUTIONAL LAW / TAXATION

The legislature is afforded wide discretion in matters of taxation. It is presumed that tax authorizations are constitutionally valid, and the burden of proving otherwise rests upon the parties challenging the tax.

CONSTITUTIONAL LAW / TAXATION

Tax legislation will not be declared unconstitutional unless it clearly, palpably, and plainly violates the constitution.

CONSTITUTIONAL LAW / TAXATION

The federal constitution's equal protection clause and Pennsylvania's constitutional requirement that taxation be uniform mandate that classification in a taxing scheme have a rational basis. Pa. Const. Art. VII, §1.

CONSTITUTIONAL LAW / TAXATION

A tax classification is valid when it is based upon a distinction between classes that is not arbitrary and provides a reasonable and just basis for differential treatment. If the tax scheme imposes substantially unequal tax burdens upon persons otherwise similarly situated without a rational justification, the tax is unconstitutional.

CONSTITUTIONAL LAW / TAXATION

With regard to the due process clause of the Fourteenth Amendment, it is necessary to determine whether the exercise of the state's taxing authority bears a fiscal relation to protection, opportunities, and benefits given by the state. The simple question is whether the state has anything for which it can ask a return.

CONSTITUTIONAL LAW / TAXATION

In order to determine whether a tax is a taking without due process

under the Fourteenth Amendment of the United States Constitution or an arbitrary form of classification in violation of equal protection and state uniformity requirements, Pennsylvania utilizes an analysis that requires an assessment of whether the benefits received and the burdens imposed by a tax are palpably disproportionate.

CONSTITUTIONAL LAW / EQUAL PROTECTION

Under both the United States Constitution and Pennsylvania's Constitution, where laws infringe upon certain rights considered fundamental, such as the right to privacy, the right to marry, and the right to procreate, courts supply a strict scrutiny test. Alternatively, where laws restrict the other rights protected under Pa. Const. Art. I, §1, which are undeniably important but not fundamental, Pennsylvania courts supply a rational basis test. According to that test, a law must not be unreasonable, unduly oppressive, or patently beyond the necessities of a case; and the means which employees must have a real and substantial relation to the objects sought to be obtained.

CONSTITUTIONAL LAW / TAXATION

The legislature has made certain findings about the benefits of the development of convention centers and convention center facilities, and these findings have considerable significance and a context of a benefit/burden analysis and must be given great weight by the trial court. 16 P.S. §2399.52 (a) (5) - (6).

CONSTITUTIONAL LAW / TAXATION

Tax legislation will not be declared unconstitutional unless the taxpayer approves that it is clearly, palpably, and plainly violates the constitution.

CONSTITUTIONAL LAW / TAXATION

Where the testimony and evidence presented by the plaintiff hotels in their constitutional challenge to the hotel room rental tax, 16 P.S. §2399.23, conflicted with the testimony and evidence from the defendants city and county of Erie and Erie County Convention Center Authority and where the plaintiffs' evidence was not sufficiently grounded in the economic situation of this particular locality, the plaintiffs' constitutional challenge to the tax under their constitutional rights to uniform taxation, equal protection, and due process must fail.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA No. 12113 - 2005

Appearances: Michael A. Agresti, Esquire for the plaintiffs
Kent Maynard, Jr., Esquire for the plaintiffs
W. Patrick Delaney, Esquire for the defendants
Christopher A. Stump, Esquire for the defendants

OPINION

Bozza, John A., J.

I. Introduction

To a very large extent this is a case about the future and more precisely about the ability to predict it. The plaintiffs (the "Hotel Group") believe that, if the Bayfront Convention Center project is built as planned, they will suffer significant economic consequences. The Erie County Convention Center Authority (the "Authority") has a very different perspective. As planned, the convention center will be built together with an adjacent 200-room Sheraton hotel. The Hotel Group believes that the planned hotel is too large and complains that its construction and operation are being subsidized by the government through the use of the hotel room rental tax (the "hotel tax"). The Hotel Group maintains that because of government support the Sheraton will have a competitive advantage allowing it to lower its prices during periods of low occupancy and take business away from hotels within a certain segment of the market. This, they argue, will result in diminished occupancy rates and significant financial losses. The plaintiffs filed this lawsuit asserting that the imposition of the hotel tax is unconstitutional as a violation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, as well as the Equal Protection and Due Process requirements of the Pennsylvania Constitution.

As the case proceeded, the Hotel Group emphasized that its claim was not directed to the portion of the hotel tax utilized by the Erie Area Convention and Visitors Bureau (the "CVB") for the purpose of promoting tourism. Additional legal claims originally included in the Complaint were dismissed in response to the defendants' preliminary objections.

II. Legal Standard

The legal principles governing the analysis of the constitutional claims asserted in this matter are well established. The Legislature is afforded wide discretion in matters of taxation. It is presumed that tax authorizations are constitutionally valid. The burden of proving otherwise rests upon the parties challenging the tax. *Bold Corp. v. County of Lancaster*, 569 Pa. 107, 801 A.2d 469 (2002); *See also, Leventhal v. Philadelphia*, 518 Pa. 233, 542 A.2d 1328 (1988). Indeed, the challengers of the constitutionality of a tax bear a heavy burden, as tax legislation will not be declared unconstitutional unless it clearly, palpably and plainly violates the constitution. *Leonard v. Thornburgh*, 507 Pa. 317, 321, 489 A.2d 1349, 1351 (1985); *See also, Alco Parking Corp. v. Pittsburgh*, 453 Pa. 245, 255, 307 A.2d 851, 857 (1973) (". . .the burden of proving the classification is unreasonable is a heavy one.")

The federal constitution's equal protection clause and Pennsylvania's

constitutional requirement that taxation be uniform mandate that classification in a taxing scheme have a rational basis. *Leventhal*, 518 Pa. at 239, 542 A.2d at 1331. Pennsylvania's Constitution states, "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." (Pa. Const. Art. VIII, § 1). A tax classification is valid when it is based upon a distinction between classes that is not arbitrary and provides a reasonable and just basis for differential treatment. If the tax scheme imposes substantially unequal tax burdens upon persons otherwise similarly situated without a rational justification, the tax is unconstitutional. With regard to the Due Process Clause of the Fourteenth Amendment it is necessary to determine whether the exercise of the state's taxing authority "...bears a fiscal relation to protection, opportunities and benefits given by the state. The simple question is whether the state has given *anything* for which it can ask a return." *Leventhal*, 518 Pa. at 239, 542 A.2d 1331.

In order to determine whether a tax is a taking without due process under the Fourteenth Amendment to the United States Constitution or an arbitrary form of classification in violation of equal protection and state uniformity requirements, Pennsylvania has utilized an analysis that requires an assessment of whether the benefits received and the burdens imposed by a tax are palpably disproportionate. *Bold Corp.*, 569 Pa. at 116, 801 A.2d 474; *See also, Allegheny County v. Monzo*, 509 Pa. 26, 500 A.2d 1096 (1985). This analysis is rooted in more fundamental principles of constitutional scrutiny embodied in a long history of due process and equal protection jurisprudence, a history that finds the applicable provisions of the United States Constitution and Pennsylvania's Constitution standing in *pari materia* with regard to certain critical concerns. *Leventhal*, 518 Pa. at 239, 542 A.2d 1331; *See also, Commonwealth v. Life Assurance Co. of Pa.*, 419 Pa. 370, 214 A.2d 209 (1965). Both require that,

> Where laws infringe upon certain rights considered fundamental, such as the right to privacy, the right to marry, and the right to procreate, courts apply a strict scrutiny test... Alternatively, where laws restrict the other rights protected under Pa. Const. Art. I, § 1, which are undeniably important, but not fundamental, Pennsylvania courts apply a rational basis test. According to that test, a law must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained.

Nixon v. Dep't of Pub. Welfare, 576 Pa. 385, 839 A.2d 277 (2003); *See also, Gambone v. Commonwealth*, 375 Pa. 547, 101 A.2d 634 (1954). The "rational basis" standard applies equally for purposes of determining

whether a law, including a state and local taxation statute, is violative of due process or equal protection under the Fourteenth Amendment to the United States Constitution, or an arbitrary form of classification in violation of state uniformity standards embodied in Article VIII, §1 of Pennsylvania's Constitution. *Bold Corp.*, 569 Pa. at 116, 801 A.2d 474. While also embracing a rational basis analysis for substantive due process claims, Pennsylvania applies a somewhat more restrictive test. *Nixon*, 576 Pa. 385, 839 A.2d 277.

Turning then to the case at bar, the issue is whether, as applied to the facts here presented 16 P.S. §2399.23 authorizing the imposition of hotel room rental tax is rationally related to furthering some legitimate government purpose. More specifically, the court must determine whether the burden imposed on the plaintiffs by the tax is palpably disproportionate to the benefit conferred. *Monzo*, 509 Pa. at 38, 500 A.2d at 1102. The statute authorizing the tax provides as follows:

> §2399.23. Hotel room rental tax.
>
> (a) The county in which the convention center is located is hereby authorized to impose an excise tax on the consideration received by each operator of a hotel within the market area from each transaction of renting a room or rooms to accommodate transients. The tax shall be collected by the operator from the patron of the room and paid over to the county pursuant to subsection (e) and shall be known as the Hotel Room Rental Tax.
> (b) The rate of tax imposed under this section by the county in which the convention center is located shall not exceed five per centum.
> (c) Eighty per centum of revenues to be received from taxes imposed pursuant to this section shall be annually deposited in the special fund required under subsection (d) for the use of the authority for convention center purposes. Twenty per centum of the revenues to be received from taxes imposed pursuant to this section shall be deposited within thirty days of collection in the tourist promotion agency fund required under subsection (d) until disbursed as provided below.

16 P.S. §2399.23.

Pursuant to this taxing statute, a third class county may impose a tax on the "consideration received" by a hotel operator and collected from a patron. Erie County chose to implement such a tax in 2000 with the adoption of Erie County Ordinance No. 45. Following the formation of the Authority, the county began to collect the proceeds of the five percent (5%) tax in 2001. As specified in the authorizing legislation, eighty percent (80%) of the proceeds were provided to the Authority for the planning and development of the convention center and twenty percent (20%) were turned over to the local tourism agency, the Erie Area Convention and

Visitor Bureau (CVB).

Engaging in a benefit/burden analysis in a case of constitutional significance requires a close examination of all the evidence presented during a trial. As the summary of testimony set forth below demonstrates, fact-driven cases involving fundamentally differing points of view, demand a probing analysis of the testimony and exhibits, particularly expert testimony and inevitably require important credibility determinations. It is the trial courts essential responsibility to judge the credibility of the witnesses, weigh the testimony, and ultimately determine whether the plaintiffs have met their burden of proof. *Bold Corp*., 569 Pa. at 122, 801 A.2d at 477.

III. Summary of Testimony

A non-jury trial was commenced on January 31, 2006 with testimony concluding on February 3, 2006. To facilitate an understanding of the factual issues addressed by the witnesses as well as an appreciation for the extraordinary divergence of their positions, a general and summary of portions of the testimony, not intended as a comprehensive review of a trial record, is in order.

The Hotel Group presented the testimony of two expert witnesses and a number of individuals directly involved in the local hotel business or acquainted with the convention center project. Dr. Haywood Sanders, a professor in the Department of Public Administration at the University of Texas at San Antonio, who has widely written about the difficulties encountered by convention centers and convention center hotels, testified that Hospitality Valuation Services ("HVS"), the company that performed a feasibility study for the Authority supporting the convention center project, had a poor record of performance. Specifically, he noted that HVS's projections about the performance of convention centers and convention center hotels in St. Louis, Missouri, Overland Park, Kansas, Austin, Texas, Myrtle Beach, South Carolina and Omaha, Nebraska significantly missed the mark. Although he did not make precise projections with regard to the performance of the planned convention center and hotel on Erie's bayfront, Dr. Sanders maintained that based on the experiences of other communities, increasing competition and the limitations of the local market, the Bayfront Convention Center project will not be as successful as planned. Among other things, he noted that the site for the project is less than ideal because there are not many amenities within walking distance. He also expressed the view that when publicly financed hotels perform poorly they will lower their prices in order to attract customers from other hotels in the market. In this regard he cited the experience in St. Louis.

Mr. Bruce Walker, president of Source Strategies, Inc., also testified for the plaintiffs as an expert in hotel development. Mr. Walker or his firm annually conduct 75 hotel feasibility studies for developers, predominantly

in Texas. Source Strategies, Inc. publishes a newsletter "Hotel Brand Report" that provides information on hotel industry performance in Texas. Mr. Walker concluded that as a result of the introduction of a new Sheraton hotel adjoining the convention center, the hotels within the Sheraton's competitive segment will suffer decreased room occupancy and lose millions of dollars in revenue. His conclusions were based on specific assumptions concerning the growth in the supply of hotel rooms and the likely rate of increase in room demand in the Erie market. He explained that his assumptions and ultimately his conclusions were based on his view that markets inevitably reach a state of "occupancy equilibrium". In addition, he maintained that the new hotel would not create any demand on its own and that Sheraton is a dying brand that will not be in existence in 10 or 15 years. Mr. Walker made very precise projections concerning the future performance of the convention center and host hotel and its impact on the local hotel market.

The Hotel Group also presented testimony from Nick Scott, the very successful owner of seven hotels in the Hotel Group, and Lisa Titcombe, director of sales and marketing for Scott Enterprises. Ms. Titcombe has considerable experience in the group business side of the local hotel market. Mr. Scott provided extensive background information with regard to the development of his hotel businesses and the challenges that were associated with his success. He described how he had been interested in developing a host hotel for the convention center but could not reach a final agreement with the Authority. He was only interested in building a hotel that was substantially smaller than what was being suggested by the Authority. He expressed his strong view that the Sheraton will be too large for the market. Further, he maintained his belief that the current location for the hotel is less attractive than the site he originally intended to develop. Both Mr. Scott and Ms. Titcombe related that the Erie convention market is limited because of location issues and weather conditions.

They also emphasized the significance of the development of Splash Lagoon in promoting the high occupancy rates in the Scott properties. Ms. Titcombe indicated that there were 68 days last year when all Scott's properties were entirely sold out. Mr. Scott believes that the high occupancy rate in the competition market segment is skewed by the performance of the hotels attached or related to the Splash Lagoon attraction. He noted that other hotels in the area do not have a direct relationship with the water park resort and are not allowed to sell packages to Splash Lagoon. Both Ms. Titcombe and Mr. Scott believe that the Scott properties will receive substantial harm from the development of the Sheraton and receive little or no benefit from the hotel tax. In their view, the convention center would have to exceed projections in order for the hotels to receive any benefit. Ms. Titcombe emphasized that Scott Enterprises will lose corporate accounts

to the Sheraton because public funding will allow its cost structure to be lower than it would have been with a private owner. Both Mr. Scott and Ms. Titcombe testified that they are active members of and participants in the CVB.

Marlene Mosco, president of PNC Bank, and Robert Sloffman, of the Authority, both testified that money from the hotel tax was used to support the obtaining and servicing of a PNC loan used to pay for the "soft" costs associated with the development of the convention center and hotel project. There was further testimony from Ms. Mosco about the HVS study, as well as the services provided by Charlie Johnson who had worked for the Authority for several years. Mr. Sloffman testified that he did not know if the hotel tax could be used for future payments towards the operation of the Sheraton hotel.

Mr. Robert O'Malley, the owner of the Avalon Hotel also testified. Mr. O'Malley indicated that he has been in the hotel business for approximately 30 years and he previously owned or operated eight hotels. He testified that his occupancy never exceeded fifty-eight percent (58%), which is average for the downtown market. Mr. O'Malley concluded that the convention center will under perform and he feels that his property is doomed as demand in the downtown area is low and because the new Sheraton will take away much of his business.

The defendants also called a number of witnesses including two experts from Pricewaterhouse Cooper. Mr. Robert Canton, the director and national practice leader of the Pricewaterhouse Cooper Sports Convention and Tourism Practice, testified as an expert in the area of convention centers and convention center hotel development. He has been involved in the industry for 20 years and has participated in more than 20 studies of the economic analysis of convention centers and related complexes throughout the world. Mr. Canton related his view that a new convention center will be successful in attracting a sufficient number of conventions and other meetings and events each year and that the Sheraton will be successful in attracting a sufficient number of guests to meet its occupancy requirements. He opined that the convention center would generate between 24000 and 32000 room nights within five years of its opening. He further concluded that by the year 2012 the convention center and hotel complex will reach "stabilization" and any detrimental effect on local occupancy rates within the Sheraton's competitive market segment will have dissipated. Moreover, Mr. Canton testified development of the convention center and hotel will have substantial economic benefits to the community at large because of both the nature of construction spending and the economic impact of bringing tens of thousands of visitors to Erie County. Mr. Canton also believes that the additional revenue received by the CVB from the hotel tax will allow it to better carry out its mission of promoting tourism

and attracting events to Erie County. He was critical of Dr. Sanders' evaluation because he believes that the years he used for determining the validity of HVS projections were not indicative of typical years in the hotel industry and therefore did not provide a fair basis of comparison.

The second expert witness presented on behalf of the defendants was Mr. Warren Marr. Mr. Marr is a director and practice leader in Pricewaterhouse Cooper's Hospitality and Leisure Consulting Group, with over 20 years of experience in the hospitality and leisure industry. His group is retained by developers and others to perform market and financial analysis related to the development of hotels, including convention center hotels. He has evaluated projects for the Courtyard by Marriott in 120 markets. Mr. Marr related his opinion that after five years, there will be no harm to the rest of the Erie County hotel market as the result of the presence of the new Sheraton hotel. He agreed that in years one through four there would be a very modest adverse impact on hotel occupancy rates. It was his opinion that the Sheraton is a strong brand and the Starwood was a very good company. According to Mr. Marr, the host Sheraton will garner fifty percent (50%) of the room demand generated by the convention center. Further, he believes the Sheraton will induce its own demand up to 5,000 room nights per year and capture demand for hotel rooms that cannot be met by other hotels in the competitive market segment. As a result, Mr. Marr was confident that the Sheraton would be able to meet its occupancy requirements.

Charlie Johnson, a real estate hospitality consultant, was also called to testify for the defendants. Mr. Johnson stated that he was retained by the Authority to assist them with their plans for a convention center in Erie. In the past he performed feasibility studies for convention centers. He indicated that the addition of the hotel improves the odds of attracting convention center business and believes that the convention center in Erie will be able to attract some national conventions. He recommended that the convention center be built with a host hotel with 200 rooms in order for it to compete with other regional convention centers. Mr. Johnson indicated that he has been involved with approximately 40 similar projects, about 20 in similar sized counties. It was his view that "stabilization" will occur after a six-year period and that the convention center will generate between 18,000 and 35,000 additional hotel room nights by the time of the stabilization period. He did not conduct an actual feasibility study nor did he do a study to evaluate the proper size of the convention center in the Erie market. He believes that the Erie area will benefit from the presence of the convention center through encouragement of downtown revitalization and that there would be an overall economic benefit to the community. Mr. Johnson was largely unable to relate whether the past projects he had been involved in were successful.

The defendants also called John Oliver, the president of the CVB. He related that CVB is a private, non-profit organization supporting the local hospitality and tourist industry. Mr. Oliver indicated that the organization has a budget of just under $750,000 and of that amount, the hotel tax contributes about $420,000. There are about 80 to 85 paid members of the CVB. The Board of Directors includes Mr. Scott and Ms. Titcombe. Mr. Oliver described the work CVB undertakes in an attempt to promote the Erie area and tourism and he indicated that last year there was a large increase in the number of requests they received for assistance and information about Erie. It is his view that the hotel tax is necessary for the CVB to adequately do its job. He noted that because of the increased revenue, they have been able to significantly increase their staff.

Mr. Casey Wells, executive director of the Authority, also testified for the defendants and he described the way in which the hotel tax proceeds were collected and generally distributed. He reviewed the process leading to the development of the current convention center and hotel complex proposal and related how the proceeds from the hotel tax have been used. He also testified that it is anticipated that the hotel will be completed in 2007. He provided further information about the past efforts to negotiate an agreement with Nick Scott for the development of a host hotel and described the assistance and incentives that Mr. Scott was seeking from the Authority. He indicated that the Authority and CVB will be working together as a team to effectively market the convention center. He also testified that no private developer was willing to undertake the host hotel project without some form of public subsidy or assistance. He also related that after the municipal bond money was available, no further hotel tax money was expended for costs associated with the development of the hotel.

The plaintiffs did not present any evidence indicating that the imposition of the tax has been *per se* detrimental to their business or that the collection of the tax from patrons has been burdensome.

IV. Factual Analysis

The fundamental challenge to the court in this case is to determine how the civic center and host hotel will perform in the future. The nature of the testimony for both sides made it clear that such an undertaking is not grounded in science or anything akin to it. To make their respective cases, both the Hotel Group and the Authority have relied largely on the testimony of experts. However, all of the expert testimony was based, at least to some extent, on subjective impressions about the likely course of future events and economic outcomes. While ostensibly these experts had access to much of the same data, they nonetheless came to strikingly different conclusions. Following a thorough review of the record, the court is not at all convinced that either side provided compelling support for their respective positions.

While Dr. Haywood Sanders made a strong case that convention centers and convention center hotels in certain locations have had a poor record of performance, he was not able to satisfactorily demonstrate the relationship between those experiences and what is likely to happen in Erie County. His knowledge and familiarity with the Erie community and its leisure and hospitality market seemed quite limited. Although he pointed to the poor performance of host hotels in a number of communities he did not provide enough information about those communities and their convention center operations to allow for a meaningful comparison. In addition the usefulness of his analysis was limited because of the relatively brief periods he used to evaluate the success of these other projects. While it is fair to say that Dr. Sanders raises serious questions about the general reliability of past HVS studies and about the challenges faced by these sorts of projects, as a predictor of what is likely to happen in the Erie market his conclusions were unconvincing.

Bruce Walker, the plaintiffs' hotel development expert, was less circumspect in his view of the likely negative consequences of the host Sheraton hotel. According to Mr. Walker, there is no doubt that the project is destined to cause economic harm to the hotels in the Sheraton's competitive market segment including six of the properties in the Hotel Group. Importantly, Mr. Walker's view is very dependent on the acceptance of his theory of "occupancy equilibrium". By embracing this theory, he concluded that over time hotel rooms will continue to be added to the local market (in addition to the Sheraton's rooms) until Erie County's state of occupancy equilibrium is realized. He asserts that hotel operators will see that current occupancy rates in the area are very high, behave "rationally" and seek opportunities to enter the market. He maintains that not only will this happen predictably but that it will occur at a remarkably constant rate.

Mr. Walker's theory is based largely, if not exclusively, on his knowledge and experience in the Texas hotel market. Mr. Walker, in a manner not unlike Dr. Sanders, did not offer a convincing explanation as to how average occupancy rates of hotels in certain non-specified Texas communities have anything to do with what is likely to happen in Erie County. Moreover, he did not provide enough information to allow the court to conclude that these Texas markets were sufficiently similar to Erie to provide a useful comparison. Moreover, Mr. Walker's conclusion that the occupancy equilibrium of the comparable Texas hotel markets was fifty-nine percent (59%) was based on average yearly occupancy rates for a period of 20 years between 1985 and 2005. During that time occupancy rates varied from a low of forty-three percent (43%) to a high of sixty-three percent (63%). To ascertain Erie's point of occupancy equilibrium, he simply referred to "historic long-term equilibrium levels" from "Texas small metro markets" and concluded that Erie hotel market

would perform in precisely the same way. He apparently minimized the need for actual long-term data from the Erie market and essentially disregarded local data available for the six-year period, 1999-2005, during which time the occupancy rate significantly exceeded his projections. Of additional concern was the lack of a satisfactory explanation as to why his projections for reaching "occupancy equilibrium" differ depending on whether the convention center and host hotel are in the mix. For reasons not at all apparent from the record, only when the host hotel is built does the Erie market reach the fifty-nine percent (59%) occupancy rate that Mr. Walker identifies as its "historic" point of equilibrium. Without the Sheraton Mr. Walker concludes that occupancy rates would move to 64.2% or closer to a 62% figure that, for entirely incomprehensible reasons, he also regards as a point of equilibrium. The manner in which he used occupancy equilibrium theory did little to support his overall credibility.

Further, Mr. Walker's willingness, in the course of supporting his view that new hotels do not create demand, to make the sweeping and unsubstantiated claim that the Sheraton hotel brand would no longer exist within 10 or 15 years, was of some concern. The only reference to Sheraton's performance is contained in his company's newsletter the "Hotel Brand Report" that was attached to his expert report. In that publication it is noted that, among a number of national brand name hotel chains, Sheraton suffered the lowest revenue losses during the second quarter of 2005 and reported no losses in occupancy. His newsletter further indicates that for the year ending 2005, Sheraton's revenues increased. In addition, the newsletter notes that Starwood, the corporation that owns the Sheraton brand, performed admirably in 2005 and in fact, led the top ten corporations in "REVPAR" during the first quarter of 2005. While this information apparently relates to performance in the Texas market, it certainly does not provide support for the notion that the planned Sheraton is likely to perform poorly because it is going out of existence. Viewing Mr. Walker's testimony in total, the court find's it to be without sufficient credibility to justify his position that the presence of the Sheraton will have a negative impact on the occupancy rates or revenue of the hotels in question.

It is also noteworthy that Mr. Walker did not directly explain how the publicly financed character of the Sheraton would make a difference on its impact on the local hotel market. It did not appear that his analysis was dependent on the nature of the hotel's ownership or the availability of hotel tax funds to support it.

On balance, the court found the testimony of the defendants' experts from Pricewaterhouse Coopers LLP to be more grounded in fact than supposition and their conclusions the result of a more comprehensive, well-reasoned and objective analysis. Both Mr. Warren Marr and Mr. Robert

Canton had considerable practical experience studying and planning for the development of convention centers and convention center hotels throughout the country and providing advice that others relied on in making decisions about specific projects. Each brought a less parochial and more national perspective to their analysis. Both seemed less disposed to speculation in formulating their opinions. Indeed Mr. Canton utilized research expressly conducted by Pricewaterhouse Coopers for the Erie project to support some of his conclusions. However, none of this is intended to suggest, that either expert provided anything akin to a blueprint for the convention center's success.

As with the plaintiff's experts, Mr. Marr's opinion was also dependent in part on a number of assumptions or conclusions without much independent support in the record. For example, he unequivocally stated that the Sheraton would generate demand for 5000 room nights. This is completely contrary to Mr. Walker's inadequately supported view that hotels never create their own demand but there is little or no information in the record that would allow the fact finder to independently evaluate the accuracy of this prediction. And while Mr. Walker made definitive determinations about the rate at which hotel rooms would be added to the market Mr. Marr made none. His projection assumes that no other hotel rooms (other than the Sheraton's) will be added to the market during the entire relevant period. Obviously, if this should prove to be untrue his conclusion may well be inaccurate. Mr. Marr's ultimate conclusion was also based on the very important assumption that the Sheraton will be able to meet its occupancy needs by tapping into the excess demand currently in the market place. In light of the unique circumstances currently responsible for the high occupancy rate it was not at all clear why this was likely to happen. In addition and quite remarkably, neither Mr. Marr nor Mr. Canton was able to point to objective indications of the accuracy of their past projections.

V. Conclusion

While the members of the Hotel Group collect the tax, they do not pay it and they have not taken the position that they are burdened in any way by the mere fact of its existence or from the process of collecting it. Rather they have taken the position that it is the manner in which the tax money is being used that is unreasonably discriminatory and a violation of substantive due process rights. The Hotel Group maintains that by using a portion of the tax proceeds to facilitate and subsidize the development of the planned Sheraton hotel they are being harmed both because they will lose money and because they will receive no other significant benefits. Although the nature of the plaintiffs' claims as well as the facts, give rise to important questions concerning the exact nature of the classification at issue, our Supreme Court has consistently treated private hotel operators as a "class" for purposes of determining the

constitutionality of the hotel tax. Mindful of this now firmly established approach, this court has regarded the plaintiffs as a "class" both for equal protection and uniformity of law purposes. *See, Allegheny County v. Monzo*, 509 Pa. 26, 500 A.2d 1096 (1985); *Bold Corp. v. County of Lancaster*, 569 Pa. 107, 801 A.2d 469 (2002); *Torbik v. Luzerne County*, 548 Pa. 230, 696 A.2d 1141 (1997); *Leventhal v. City of Philadelphia*, 518 Pa. 233, 542 A.2d 1328 (1988).

Following a thorough and careful examination of all of the testimony presented in this case, the court is constrained to conclude that the evidence presented by the Hotel Group was insufficient to prove that the use of the hotel tax to support the development and operation of the Sheraton host hotel will result in significant financial losses to the members of the group or to the local hotel industry in general. It must be emphasized that in reaching this conclusion the credibility of the witnesses was of critical concern. Demonstrating what will likely happen in the future is not easily accomplished for any human endeavor and this case presented no exception. Indeed as the extraordinary divergence of opinion in this case demonstrates, where the task involves predicting the course of business and economic events, the challenge is particularly acute. After an assessment of the credibility of all the witnesses including both the content of their testimony and the manner in which it was presented, this court cannot conclude that the Hotel Group proved that the convention center project is likely to cause them economic harm.

Moreover, it must be noted the Hotel Group has not challenged the benefits associated with the twenty percent (20%) portion of the tax that is utilized by the CVB to promote the local hospitality industry and to attract visitors to Erie County. The record before the court is more than sufficient to conclude that, because of the added revenue from the hotel tax, the CVB is in a substantially improved position to meet its objectives thereby enhancing the economic position of the entire hotel industry in Erie County. Similarly, there is little evidence in the record to refute the defendants' position that substantial economic advantages will flow from the construction, development and operation of the convention center in the future; advantages that stand to benefit the entire community including the hotel industry.

In support of its statutory scheme providing for the imposition of a hotel tax, the legislature made certain findings about the benefits of the development of convention centers and convention center facilities. These findings describe in considerable detail benefits likely to flow from the development of convention centers for all those within relevant communities. 16 P.S. §2399.52(a)(5) - (6). They have been recognized by our Supreme Court as having considerable significance in the context of a benefit/burden analysis and must be given great weight by the trial

court. *Leventhal v. City of Philadelphia*, 518 Pa. 233, 245, 542 A.2d 1320, 1334 (1988). The plaintiffs did not challenge the vast majority of these findings in any material way.

This matter must now be brought to a conclusion by once again noting that the legislature possesses considerable discretion in matters of taxation and that the taxpayer bears a heavy burden demonstrating that a classification for purposes of taxation is unreasonable. *Leonard v. Thornburgh*, 507 Pa. 317, 320, 489 A.2d 1349, 1351 (1985). As has often been reiterated, tax legislation will not be declared unconstitutional unless the taxpayer proves that it "clearly, palpably and plainly violates the constitution". *Commonwealth v. Life Assurance Co. of Pa*., 419 Pa. 370, 377, 214 A.2d 209, 314 (1965). This the plaintiffs have not accomplished.

While the plaintiffs have failed to meet their burden of proving that the hotel tax as applied is unconstitutional, they have without a doubt raised serious and important public policy questions. Legality and wisdom are often not co-occurring values. It is beyond question that the likelihood of this project's future success will depend to a very large extent on the ability of the Authority to manage a complex business enterprise in a way that is beneficial to the entire community. It is clear from the record that a "build it and they will come" approach will not be a sufficient business plan. As the Authority's own expert Robert Canton noted in his report, the goals set for the host hotel will be realized only if the convention center is "professionally and aggressively managed and marketed". Only the future will demonstrate whether the convention center project will meet the projections of the various consultants and experts. Performance expectations for the convention center and host hotel are now clearly articulated in the public record. In that regard, the Hotel Group has made a substantial contribution to the community's ability to hold its government accountable.

ORDER

AND NOW, this 3 day of March, 2006, upon consideration of the Non-Jury Trial in this matter, and for the reasons set forth in this Court's Opinion. It is hereby ORDERED, ADJUDGED and DECREED that the Court finds in favor of the defendants.

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

JAMES B. RAY and MARY E. RAY, Plaintiff

v.

PAUL D. BONNELL and SUSAN M BONNELL, Defendant

CIVIL PROCEDURE/ENTRY OF JUDGMENT ON THE PLEADINGS

Entry of judgment on the pleadings is permitted under Pa. R.C.P. 1034, which provides that after the pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for judgment on the pleadings.

CIVIL PROCEDURE/ENTRY OF JUDGMENT ON THE PLEADINGS

A motion for judgment on the pleadings requires the Court to accept all well-pled allegations of the party opposing the motion as true, while only those facts specifically admitted by the party opposing the motion may be considered against him. Additionally, only the pleadings themselves and any documents properly attached can be considered by the Court when reaching its decision.

CONTRACTS/PAROL EVIDENCE RULE

The purpose of the parol evidence rule is to preserve the integrity of written agreements by not allowing the parties to alter what they chose to put into writing.

CONTRACTS/PAROL EVIDENCE

Parol evidence can be introduced based on a parties claim that there was fraud in the execution of the contract, but not fraud in the inducement of the contract.

CONTRACTS/PAROL EVIDENCE RULE

The parol evidence rule bars any prior representations made by the parties once the parties enter into the sales agreement, which serves as the complete agreement between the parties.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 13093 - 2005

Appearances: Paul F. Burroughs, Esq. for the plaintiffs
Gregory P. Zimmerman, Esq. for the defendants

OPINION

Bozza, John A., J

This case is currently before the Court on a Motion for Judgment on the Pleadings filed by defendants, Paul D. Bonnell and Susan M. Bonnell. The plaintiffs, James B. Ray and Mary E. Ray, assert claims of fraudulent misrepresentation or concealment, negligent misrepresentation or concealment, and violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, that arose when the defendant, Mr. Bonnell, allegedly misrepresented the boundary lines of a piece of residential property.

The defendants had for purchase two lots of property, Lot 84 located at 3605 Westminster Boulevard, Erie, Pennsylvania with a house on the property, and Lot 85, an adjacent open lot of land. The defendants showed the plaintiffs both pieces of property, but the plaintiffs chose to purchase only the property of Lot 84. The parties entered into Sales Agreement on June 3, 2003, whereby the plaintiffs agreed to purchase Lot 84. The agreement and its terms are not in dispute.

The plaintiffs' position is that at the meeting where they were shown both lots of property for sale, the defendants affirmatively identified the boundary lines of Lot 84. Specifically, that the eastern boundary of the property was a row of evergreen trees and from such boundary line a southeastern boundary extended at a diagonal to a survey pin at the southeast corner of the southern boundary. In addition, the western edge of the property extended beyond the edge of a concrete driveway that leads to the house located on the property. Therefore the plaintiffs believed that the entire concrete driveway was located upon the property to be purchased.

The plaintiffs claim they relied on those affirmative representations when choosing to purchase the property and entering into the Sales Agreement. Only after having the land surveyed, approximately a year after purchase, did the plaintiffs become aware that the boundary lines were different than what the defendants' described and actually extended into Lot 85. The survey revealed that the eastern boundary line was, in fact, approximately thirty feet short of the tree line extending directly to the southern boundary; represented to be the eastern boundary and the southeastern boundary by the defendants, and that the driveway was not entirely located upon the purchased property as part of it was located in the common access, and that the parcel of land at 3605 Westminster Boulevard was actually approximately 9,500 square feet smaller than had been represented to them by the defendants.

In the defendant's Motion for Judgment on the Pleadings, they assert that any representations made by the defendants prior to the parties entering into the Sales Agreement are barred by an integration clause contained in the agreement and the operation of the parol evidence rule, thus eliminating any cause of action against the defendants. After a thorough review of the pleadings, and for the reasons set forth below, the Court shall grant the defendant's Motion.

Entry of judgment on the pleadings is permitted under Pa. R.C.P. 1034, which provides that after the pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for judgment on the pleadings. Pa. R.C.P. 1034(a); *Consolidation Coal Co. v. White*, 2005 PA Super 155, 875 A.2d 318, 2005 Pa. Super. LEXIS 918 (2005). A motion for judgment on the pleadings is similar to a demurrer; therefore the trial court must accept all well-pled allegations of the party opposing the motion

as true, while only those facts specifically admitted by the party opposing the motion may be considered against him. *Keil v. Good,* 467 Pa. 317, 356 A.2d 768, 1976 Pa. LEXIS 592 (1976). In addition, only the pleadings themselves and any documents properly attached can be considered by the Court when reaching its decision. Under Pa. R.C.P. 1034, in order to prevail on a motion for judgment on the pleadings, "the moving party's right to prevail must be so clear that a trial would clearly be a fruitless exercise." *Id.*

The defendants' Motion for Judgment on the Pleadings is based on the assertion that, regardless of the nature of the representations made by the defendants to the plaintiffs regarding the property's boundary lines, prior oral representations cannot be introduced where the plaintiff has entered into a contract that contains an integration clause. The Sales Agreement between the parties, in relevant part, includes the following integration clause:

> This Agreement constitutes the entire contract between the parties hereto and there are no other understandings, representations or warranties oral or written, relating to the subject matter hereof. This Agreement supersedes and nullifies all prior or contemporaneous agreements, understandings, negotiations, discussions and warranties, whether oral or written. This Agreement may not be changed, modified or amended in whole or in part, except in writing, signed by all parties.

(Agreement of Sale, ¶ 20).

In *Bardwell v. Willis Co.*, 375 Pa. 503, 100 A.2d 102, 1953 Pa. LEXIS 487 (1953), the Court held that where an alleged prior or contemporaneous oral representation or agreement concerns a subject which is specifically dealt with in a written contract, such as the plaintiffs in the present case are alleging, and the written contract covers or claims to cover the entire agreement of the parties, such as the contract in the present case, the law is, that in the absence of fraud, accident, or mistake, the representation is superseded by the subsequent written contract. Parol evidence construing such representations to vary, modify, or supersede the written contract is inadmissible.

The *Bardwell* Court specifically addressed integration clauses such as the one in the present Sales Agreement as follows:

> What is the use of inserting such clauses in agreements if one of the parties thereto is permitted to prove by oral testimony that he didn't examine and wasn't familiar with the premises or their condition, or that they would not meet the standards which plaintiffs require? There is no averment by plaintiffs that these clauses in the lease were inserted by fraud, accident or mistake; or (we repeat) that any representation was omitted by fraud, accident or mistake; or that the lease did not

> contain the entire contract and agreement between the parties...If plaintiffs relied on any understanding, promises, representations or agreements made prior to the execution of the written contract or lease, they should have protected themselves by incorporating in the written agreement the promises or representations upon which they now rely, and they should have omitted the provisions which they now desire to repudiate and nullify.

Id. The effect of an integration clause is that it makes the parol evidence rule applicable. The purpose of the rule is to preserve the integrity of written agreements by not allowing the parties to alter what they choose to put into writing. *1726 Cherry St. Partnership*, 439 Pa. Super. 141, 653 A.2d 663, 1995 Pa. Super. LEXIS 27 (1995).

In this case it is the plaintiff's position that they were fraudulently induced into purchasing the subject property. Pennsylvania recognizes two types of fraud in contract cases. "Fraud in the execution" of a contract and "fraud in the inducement" to contract. *Id*. "Fraud in the execution" arises in cases where there is a claim that one was fraudulently led to believe that the document that was signed contained terms that were actually omitted. *Id*. "Fraud in the inducement" occurs where the party offering evidence of additional prior representations claims that the representations were fraudulently made, and that but for those representations, he or she never would have entered into the agreement. *Id*.

Notably, *Bardwell* established that parol evidence could be introduced based on a party's claim that there was a "fraud in the execution" of the contract. However, parol evidence cannot be introduced based on a claim that there was "fraud in the inducement" of the contract. *See also Yocca v. Pittsburgh Steelers Sports, Inc.*, 578 Pa. 479, 854 A.2d 425, 2004 Pa. LEXIS 1606 (2004).

In the present case, the plaintiffs allege that the defendant misrepresented the boundaries of the property at the initial meeting between the parties. The plaintiffs further allege that they relied on those representations when choosing to purchase the property. Therefore this is a claim of "fraud in the inducement" and any prior oral representations cannot be offered as evidence in an attempt to vary or modify the terms of the written Sales Agreement. A party cannot assert reliance upon prior oral representations; yet sign a contract denying the existence of those representations. *LeDonne v. Kessler*, 256 Pa. Super 280, 294, 389 A.2d 1123, 1130 (1978).

Although the *Bardwell* formulation is consistently applied to contract cases a limited exception has been recognized that allows parol evidence regarding prior representations to show "fraud in the inducement" in a narrow circumstance. *See Id.* The exception applies in cases that involve the sale of residential real estate pursuant to written agreements

that include integration clauses where there is a claim the property has a hidden defect. *Id*. In these circumstances the Supreme Court of Pennsylvania has permitted the admission of oral representations by sellers concerning the *condition* of the property that later prove to be untrue. Where the buyers allege that they were fraudulently induced to purchase a property through fraud and misrepresentation, the court in *LeDonne v. Kessler* held the applicability of the parol evidence rule is determined by balancing:

> the extent of the parties' knowledge of objectionable conditions derived from a reasonable inspection against the extent of the coverage of the contract's integration clause in order to determine whether that party could justifiably rely upon oral representations without insisting upon further contractual protection or the deletion of an overly broad integration clause.

Id. at 294, 389 A.2d at 1130. The *LeDonne* Court's reasoning for this exception to the parol evidence rule was that buyers of residential real estate are not in a position to fully determine the complete physical condition of the property they are buying, whereas the sellers customarily are. Therefore, Pennsylvania Courts have declined to enforce the parol evidence rule "in so strict a manner as to deny relief to a party who simply could not entirely protect himself from the harm he eventually suffers." *1726 Cherry St. Partnership* at 153, 653 A.2d at 669.

This exception to the parol evidence rule has been applied in circumstances involving latent or hidden defects, not visible defects observable to the buyer. In *LeDonne*, the court concluded that where the buyers had knowledge of the physical appearance of water damage, and they signed an agreement stipulating that they had received no verbal representations (even though the seller had told the buyer there was no problem) as to the condition or quality of these areas, the integration clause precluded oral testimony of pre-agreement representations concerning the noticeable water damage. *LeDonne*, at 292, 389 A.2d at 11329. However the *LeDonne* Court also concluded that the parol evidence rule did not apply to a defect in a septic system that could not have been detected by the buyer's reasonable inspection. *Id*. *See also Mancini v. Morrow*, 312 Pa.Super. 192, 458 A.2d 580 (1983) (parol evidence allowed where water damage was not reasonably discoverable through an inspection of the property and the sellers concealed water damage to the basement by placing objects in front of the affected area); *Ward v. Serfas*, 387 Pa. Super. 425, 564 A.2d 251 (1989) (parol evidence rule barred statements regarding the leakage of the sun deck and the cellar since there was evidence of water leakage visible during their inspection).

In *Youndt v. First Nat'l Bank*, 2005 Pa. Super 42, 868 A.2d 539 (2005) the Court had the opportunity to apply a *LeDonne* analysis at the pleading

stage. In *Youndt,* after purchasing a motel, the plaintiffs filed a claim seeking damages for fraud due to seller's failure to disclose sewer problems with the property. In addition they alleged that one of the defendants affirmatively denied that any problems existed with the property.

The plaintiffs in *Youndt* based their claim of fraud on the failure to disclose a material defect The trial court sustained the defendants' preliminary objections in the nature of a demurrer, and the plaintiffs appealed. The Superior Court held that the demurrer was properly sustained. The Court explained that the plaintiffs' claim was one of "fraud in the inducement" and because the parties had entered into an agreement that contained an integration clause denying all prior representations, the prior alleged misrepresentations could not be introduced to show fraud. *Id.* at 546. The Court held that the plaintiffs' position that a *LeDonne* exception applied was misplaced because the property at issue was commercial real estate and the exception set forth in *LeDonne* was limited to claims arising from a residential real estate transaction. *Id*. at 549.

As in *Youndt,* this case is in the early pleading stage and an analogous approach is required to analyze the issues at hand. Here, the plaintiffs are alleging a "fraud in the inducement" to contract claim. However, their claim arises from a residential real estate transaction. The plaintiffs are alleging that the defendants made an affirmative misrepresentation about the property's boundary lines prior to entering into a contract containing an integration clause, and but for those representations they would not have purchased the property. Accepting as true all of the plaintiffs' factual averments, they cannot as a matter of law prevail against the defendants.

The parol evidence rule bars any prior representations the defendants made to the plaintiffs once the parties entered into the Sales Agreement, which serves as the complete agreement between the parties. The *LeDonne* exception is not applicable here. This exception is meant to protect buyers from latent hidden defects when purchasing a residential property. Obviously boundary lines are important and critical in a sale, however boundary lines are not a defect of the land, latent or otherwise. The plaintiffs had an opportunity to inspect the property and checking the boundary lines required nothing more than looking at the deed or other public documents or having the land surveyed prior to purchase. Unlike the latent defects not observable in the cases that evoke the *LeDonne* exception, inspection of the premises could have adequately disclosed the boundary lines of the property. In addition, once the defendants affirmatively described the boundary lines to the plaintiffs, the plaintiffs had the opportunity to include them in the terms of the contract prior to signing it. Instead they signed an agreement that denied any prior oral or written representations regarding the property.

Therefore, there are no issues of material fact in the present case that would allow this matter to proceed to trial; accordingly, the defendants are entitled to judgment as a matter of law.

An appropriate Order will follow.

ORDER

AND NOW, to-wit, this 16 day of April, 2006, upon consideration of the Defendants' Motion for Judgment on the Pleadings, the argument thereon, and for the reasons set forth in the accompanying Opinion. It is hereby ORDERED, ADJUDGED and DECREED that Defendants' Motion for Judgment on the Pleadings is GRANTED and the plaintiffs' claims are hereby dismissed.

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

COMMONWEALTH OF PENNSYLVANIA

v.

JOSEPH E. HUDAK

CRIMINAL PROCEDURE / THEFT BY UNLAWFUL TAKING

In order to establish probable cause to believe that a defendant committed the crime of theft by unlawful taking or disposition, it is necessary for the Commonwealth to set forth sufficient proof that the defendant:

1. Unlawfully took or exercised unlawful control over;
2. Movable property;
3. Of another;
4. With intent to deprive him thereof.

18 Pa. C.S.A. 3921.

CRIMINAL PROCEDURE / THEFT BY UNLAWFUL TAKING

Where the Commonwealth's evidence only establishes that a defendant may have violated the terms of his contract, the Commonwealth fails to establish probable cause to believe that defendant unlawfully took or exercised control over the property of another.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NOS. 1398 & 1400 of 2005

Appearances: Joseph E. Hudak, Pro Se
Robert Sambroak, Jr., Esquire for the Commonwealth

OPINION

Bozza, John A., J.

This case is before the Court on the Commonwealth's 1925(b) Statement of Matters Complained of on Appeal. Prior to the Commonwealth's filing of its Notice of Appeal, the Court entered an Order on each of these two cases granting defendant's Petition for Writ of Habeas Corpus and dismissing the charges of Theft by Unlawful Taking or Disposition.[1] A similar Order was entered under Docket No. 1401 of 2005 and that matter is also the subject of a Commonwealth Notice of Appeal. In that case, the Court previously filed a Memorandum Opinion setting forth its reasons in support of the Order dismissing the charge of Theft by Unlawful Taking or Disposition.

While the precise facts of each case are distinct, the fact pattern in each is similar. Moreover in each case it appears that the Commonwealth intends to present at trial no more or different evidence than it presented at the time of the preliminary hearings. So, while the Commonwealth's burden of proof (probable cause) at the preliminary hearing is substantially less

[1] 18 Pa. C.S.A. §3921.

stringent from what it would be at the time of trial (beyond a reasonable doubt), the evidence at each proceeding would be essentially the same. In effect, these are cases that present a purely legal issue as, to whether, in light of the Commonwealth's theory of liability, the conduct in question constitutes the crime of Theft by Unlawful Taking or Disposition.

Initially it is important to recognize that the Commonwealth has clearly enunciated the limited theory of theft liability it is pursuing. At a pre-trial hearing conducted in the two cases that are the subject of this appeal, the First Assistant District Attorney Robert Sambroak succinctly stated the Commonwealth's position:

> Our position would be --- I cannot prove that he intended to defraud them when he took the money, so there is no theft by deception. There is no way I can file a theft by deception. Our theory is he took the money for services. He didn't do the work. He was asked to give it back. He didn't give it back. As soon as he was asked to give it back for not doing the work, our theory is he unlawfully exercised control over it.
>
> (Pre-Trial Hearing Transcript, p.2.)

While the Pennsylvania Crime Code provides that at trial, the Commonwealth may proceed on the basis of any theft theory encompassed in the Code subject to the defendant's right to fair notice and opportunity to defend, in this case it is evident that the Commonwealth intends to proceed only on the basis of a §3921 violation.[2] *See*, 18 Pa. C.S.A. §3902; *Commonwealth v. Robichow*, 338 Pa. Super 348, 487 A.2d 1000 (1985). The issue then is whether in the absence of proof of deception in obtaining payment of his legal fee, Mr. Hudak can be convicted of Theft By Unlawful Taking for failing to return some or all of the fee when he breached his contract. With this in mind, the Court shall address the facts of each case separately.

I. Commonwealth v. Hudak, No. 1400 of 2005

In this case the Commonwealth filed a Criminal Complaint and subsequently a Criminal Information against the defendant asserting that he committed two Theft by Unlawful Taking or Disposition offenses relating to fees Mr. Hudak received to represent Eugene Case. A preliminary hearing was conducted at which time the Commonwealth called a single witness, Mr. Case's mother who testified that her son was in jail for various criminal charges when she went to see Mr. Hudak at his office located on Ash Street across from the Erie County Prison. She stated that she wanted

[2] Nor has the Commonwealth suggested that is is proceeding on theory that the defendant committed Theft by Failure To Make Required Disposition Of Funds Received, in violation of 18 Pa. C.S.A. §3927. Therefore, at the time of trial the Commonwealth would be limited to its theory that defendant committed Theft By Unlawful Taking.

Mr. Hudak to represent her son to "help him through his problems" and ". . .get him out of prison." (Preliminary Hearing Transcript, p. 46.) She further testified that she made two separate payments to the defendant, one for $400 and one for $500 and she signed a Fee Agreement,[3] which was admitted into the record. He provided her with receipts for the money he received. She went on to testify that the work she wanted him to do was never completed and she did not receive her money back. There was no testimony that she requested a refund. That was the extent of the evidence in the Commonwealth's case.[4]

II. Commonwealth v. Hudak. No. 1398 (2005)

In this case Mr. Hudak was charged with one count of Theft for stealing money from Mark Pollard. The Commonwealth called one witness to testify at the preliminary hearing. Mr. Pollard testified that he talked to the defendant's paralegal at the Erie County Prison. Although he signed a fee agreement, Mr. Pollard no longer had a copy because he had provided it to a subsequent lawyer. Mr. Pollard agreed to pay Mr. Hudak the sum of $3,500 to handle his appeal. He paid him a total of $1,925 but the defendant failed to file the appeal or take any other action on his behalf. Mr. Hudak did provide him with receipts for the money he was paid. Mr. Pollard did not receive any of his money back. There was no testimony that he requested a refund.

III. Legal Analysis

In each case it is Mr. Hudak's position that the testimony presented at the preliminary hearing was insufficient to establish probable cause to believe that he committed a crime because as a matter of law the conduct in question does not constitute Theft by Unlawful Taking. At the time of a preliminary hearing, it is the Commonwealth's burden to establish a prima facie case by proving that there is probable cause to believe that the defendant committed each element of an alleged crime. *Commonwealth v. Nieves*, 2005 Pa. Super 73, 876 A.2d 423 (2005). In order to establish probable cause to believe that Mr. Hudak committed the crime of Theft by Unlawful Taking or Disposition, it was necessary for the Commonwealth to set forth sufficient proof that he:

1. Unlawfully took or exercised unlawful control over;
2. Movable property;
3. Of another;
4. With intent to deprive him thereof.

18 Pa. C.S.A. §3921.

Accepting as true the testimony presented at the preliminary hearing on

[3] Fee Agreement was not attached to the preliminary hearing transcript or provided to the Court.

[4] Although a transcript and Order relating to a contempt proceeding is affixed to the defendant's Petition for Writ of Habeas Corpus, this was not submitted to the Court as a part of the record.

each of the cases at issue, the Commonwealth failed to meet its probable cause burden. In each instance the evidence was only sufficient to establish that the defendant may have violated the terms of his contracts with his clients. The Commonwealth's evidence indicated that when Mr. Hudak or his agent received money from each client he agreed to perform certain, albeit important, legal services. Although he failed to perform those services as promised, there was no evidence nor does the Commonwealth maintain that he took the money deceptively or without the intent to do what he promised. In such circumstances title to the funds passed to Mr. Hudak and he lawfully possessed the money. *See*, *Commonwealth v. Bartolo,* 225 Pa. Super 277, 310 A.2d 885 (1973). It has been firmly established in the Commonwealth that there can be no "conversion" in these circumstances unless title has not passed or the defendant is not otherwise in lawful possession of the property. *See*, *Commonwealth v. Coward,* 330 Pa. Super 122, 478 A.2d 1383 (1984).[5] Therefore, the Commonwealth failed to establish probable cause to believe that the defendant *unlawfully* took or exercised control over the property *of another.*

The essence of the Commonwealth's position is that Mr. Hudak owed his clients a refund and his failure to provide one constituted a crime. The prosecution's assertion that the act of "unlawful taking" occurred when the defendant failed to return the fees is not supported by the preliminary hearing record which contains no testimony that a refund was requested or otherwise required by the terms of the agreements. Moreover, the Commonwealth has not provided and this Court has not found any legal authority directly in support of this position. While that term "unlawful" is not defined in the Crimes Code, the plain meaning of the term would suggest that the Commonwealth would have to prove that Mr. Hudak had a legal obligation to not only return his fee but to return a particular sum. *See, Black's Law Dictionary* 1536 (7th ed. 1999) (defining "unlawful" as 1. Not authorized by law; illegal; 2. Criminally punishable; and 3. Involving moral turpitude). This is a question that would have to be determined in light of the contractual obligations of the parties. In a case where a refund is available as a contractual remedy, partial performance or other factors affecting the amount of the refund may have to be considered. In short, with the exception of the most obvious case of fraud or trust violation, the very notion of unlawfulness may be subject to serious dispute.

To hold as the Commonwealth suggests would give rise to criminal accusation and arrest in a myriad of contract disputes where it is alleged that a party to a contract failed to perform as promised and didn't for any one

[5] This may be contrasted from circumstances where lawful possession is obtained for other reasons, for theft may be found where one takes property from someone who has lawful possession without having legal title. *Commonwealth v. Rosenzweig,* 514 Pa. 111, 522 A.2d 1088 (1987).

of a number of reasons refund money. It would in effect shift the burden of proof to a putative defendant, who in order to avoid criminal liability or for that matter even getting charged with a crime, has to come forward to demonstrate that he or she has a defense in the law of contract to the conduct that the Commonwealth asserts is criminal. In the circumstances here presented whether the clients were entitled to a refund depends entirely on the provisions of the agreements and the course of performance. Indeed, in Mr. Pollard's case, it was apparent that the defendant's fee was by no means entirely paid. Accepting the government's theory would mean that professional fee disputes, where no fraud or deception is alleged, would be resolved in criminal rather than civil proceedings. Aside from the obvious conceptual issues and questions of fairness, this would be an inefficient and wasteful approach to dispute resolution.

This case is to be distinguished from *Commonwealth v. Robichow,* 338 Pa. Super 348, 487 A.2d. 1000 (1985), where the defendant was charged with Theft By Failure to Make Required Disposition, a violation of 18 Pa. C.S.A. §3902. In *Robichow*, a contractor was required to use funds secured from a customer to secure building materials, which he failed to do. The Superior Court found that the evidence was sufficient to prove that the advance money was fraudulently obtained. In such circumstances the Courts conclude that title and lawful possession had not passed. Here, aside from the fact that the crime charged is entirely different, the prosecution is not attempting to prove that the fees obtained by Mr. Hudak were obtained fraudulently ("I cannot prove that he intended to defraud them when he took the money...").

As noted in this Court's Memorandum in the companion case, it may well be that the Commonwealth made out a prima facie case that Mr. Hudak violated his contractual duty to perform important legal services for his clients or perhaps committed an ethical violation. However, in this Court's view it did not establish probable cause to believe that he committed the crime of theft. For the reasons set forth herein the defendant's Petition For Writ of Habeas Corpus was granted and the charge of Theft By Unlawful Taking or Disposition was dismissed.

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

COMMONWEALTH OF PENNSYLVANIA

v.

KANON JACKSON

CRIMINAL PROCEDURE / WARRANTLESS SEARCHES / HOMES

The Fourth Amendment of the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution forbid police searches without a warrant in circumstances where one has a reasonable expectation of privacy. Absent a recognized privacy interest, a warrant is not required to conduct a search.

CRIMINAL PROCEDURE / WARRANTLESS SEARCHES / HOMES

The protections of the Fourth Amendment to the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution are intended to safeguard the expectation of privacy, particularly in one's home, and to deter police misconduct. A warrantless search of a residence is *per se* unreasonable unless justified by a specific exception to the warrant requirement.

An expectation of privacy requires that the defendant has a possessory interest, a legitimate presence, or a characteristic of ownership which society would recognize as creating an expectation of privacy. One does not ordinarily have a reasonable expectation of privacy in someone else's home.

CRIMINAL PROCEDURE / WARRANTLESS SEARCHES / HOMES

The defendant is without standing to challenge the warrantless entry of a home known to the police to be the residence of another person, where the police knew the identity of the defendant and that he did not live at the home and had no knowledge of any legitimate reason for his presence in the home.

CRIMINAL PROCEDURE / WARRANTLESS SEARCHES / HOMES

A tenant has legal authority to consent to the entry of the tenant's home, including the back yard or curtilage of the property. A police officer with consent of the tenant was thereby authorized to enter the property and the home upon observation of a drug transaction taking place.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 2767 of 2005

Appearances: Office of the District Attorney for the Commonwealth
Kenneth A. Bickel, Esquire for the Defendant

OPINION

Bozza, John A., J,

On January 23, 2006, the defendant, Kanon Jackson, was found guilty by a jury of the following crimes: possession[1], unlawful delivery[2],

[1] 35 P.S. §780-113(a)(16)
[2] 35 P.S. §780-113(a)(30)

possession with intent to deliver[3], and possession of drug paraphernalia[4]. The defendant was also found guilty of loitering in aid of drug offense[5] by the Honorable Ernest J. DiSantis, Jr. On April 3, 2006, the Honorable Ernest J. DiSantis, Jr. sentenced the defendant as follows:

> Count I: Possession - merged with Count III;
>
> Count II: Unlawful Delivery - twelve (12) months to twenty-four (24) months incarceration, concurrent to Count III;
>
> Count III: Possession with Intent to Deliver - costs; thirty-six (36) months to seventy-two (72) months incarceration; 233 days credit for time served;
>
> Count IV: Possession of Drug Paraphernalia - three (3) months to twelve (12) months incarceration, concurrent to Count III;
>
> Count V: Loitering in Aid of a Drug Offense - costs

On May 4, 2006, the defendant filed a Notice of Appeal. Thereafter, on May 18, 2006, he filed a Statement of Matters Complained of On Appeal. Defendant only makes assertion of errors regarding the denial of his pre-trial Motion to Suppress heard before the Honorable John A. Bozza. [6] The defendant asserts inter alia, the denial of the pre-trial Motion to Suppress evidence was in error as:

> 1. "A warrant-less entry into the house where your Defendant was arrested was under taken by the police and as such all evidence should have been suppressed."
> 2. "Officer Deluca was in the back yard or 'curtilage' of the property without consent either express implied or otherwise and as such all evidence should have been suppressed."

(1925(b) Statement, ¶6a-b). For the reasons stated below the defendant's assertions of error are without merit.

At the time of the pre-trial motion hearing, held on December 19, 2005, the Commonwealth presented testimony of Officer William Marucci and Officer Steven DeLuca. The Court notes the following factual summary.

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[3] 35 P.S. §780-113(a)(30)

[4] 35 P.S. §780-113(a)(32)

[5] C.O. §737.02(b)

[6] While the trial was held before the Honorable Ernest J. DiSantis, Jr., this Court conducted the hearing addressing the defendant's pre-trial Motion on December 19, 2005. This Court denied the defendant's pre-trial motion on December 21, 2005.

On June 15, 2005, Officers Marucci and DeLuca of the Neighborhood Action Team[7] responded to a complaint of drug activity at a vacant house located at 260 East 8th Street, Erie, Pennsylvania. At approximately 2:45am, the two officers arrived at 260 East 8th Street and entered the backyard of the property and proceeded to the side entrance door. From that position both officers observed an individual, later identified as Brian Kelly, approach the defendant and ask him "if he could hook him up with a twenty". The defendant and Mr. Kelly were positioned in an area in front of 262 East 8th Street under a streetlight and could be clearly seen and heard by the officers from their position at 260 East 8th Street. From their training and experience as police officers, both officers knew a "twenty" to mean a twenty (20) dollar rock of crack cocaine. The defendant responded yes and invited Mr. Kelly into the house. Upon hearing and observing this, the officers' attention was now focused on what they believed to be a drug deal occurring at 262 East 8th Street, next door to the vacant house. The tenant of 262 East 8th Street was Lisa Skrutsky. The police knew Ms. Skrutsky and that she resided there with her two children. She was not home at the time of the incident, however, both officers had numerous conversations with her in the past, both in person and over the phone, due to ongoing problems with drug activity occurring in and around her home. Ms. Skrutsky had told the police she was having problems with individuals using her house for drug activity without her permission and that she was afraid of a drug ring from Detroit that was infiltrating the area. She believed these people to have guns and feared for her children's, as well as her own, safety. She had informed the Neighborhood Action Team that officers were permitted to go to her house and enter it at anytime.

With this in mind, and recognizing who the defendant was and that he was not a resident of 262 East 8th Street, Officer DeLuca proceeded from between the side of the houses towards the front. Officer Marucci stayed at the side door of 260 East 8th Street and had an unobstructed view through a window into 262 East 8th Street. Officer Marucci observed the defendant and Mr. Kelly as they entered the house, at which point the officer saw Mr. Kelly hand the defendant an undetermined amount of money. The defendant then went upstairs and came right back down and handed Mr. Kelly something, which the officer believed to be drugs. Officer Marucci then radioed to Officer DeLuca, who was approaching the front of the house, that the drug transaction had taken place.

Officer DeLuca went to the front door and found it to be open with only a screen door separating him from the interior of the house. The officer

[7] The Neighborhood Action Team consists of seven Erie County police officers that investigate primarily drug-related complaints, and any high-risk calls for neighborhood watch groups.

observed the defendant sitting on a couch holding a plastic baggie, which contained white rocks, that the officer knew to be crack cocaine. The officer knocked on the door. Once the defendant saw the officer, he began to jam the baggie between the couch cushions. Not knowing whether the defendant was only trying to hide the baggie or whether he was reaching for a weapon, Officer DeLuca immediately told the defendant to show his hands. Officer DeLuca gave two more commands and then drew his weapon and proceeded inside the residence where he told the defendant once more to show his hands. The defendant ultimately acquiesced to the officer's command and Officer Deluca holstered his gun. The officer then took the defendant to another couch and retrieved the baggie and its contents from between the couch cushions.

Officer Marucci was still positioned at 260 East 8th Street at this time and heard Officer DeLuca's commands. He then observed Mr. Kelly walk quickly toward the rear of the house, throw down an object by the stairwell, and then sit on the stairs out of Officer DeLuca's view. Officer Marucci then proceeded to the front door and entered the residence. Upon entering the residence the officer observed Officer DeLuca talking with the defendant. Officer Marucci then went to Mr. Kelly, placed him in custody, looked to where he had seen Mr. Kelly throw an object down, and found a rock of crack cocaine.

The defendant asserts that the Court was in error in not suppressing the evidence due to the police officers' warrantless entry into the house and asserts that all the evidence seized from within the house must be suppressed.[8]

The Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution protect individuals from unreasonable governmental intrusions into their legitimate expectation of privacy. *Commonwealth v. Millner*, 888 A.2d 680, 2005 Pa. LEXIS 3059 (2005). In circumstances where one has a reasonable expectation of privacy, the police are ordinarily forbidden from conducting a search without a warrant. A search warrant signifies that a neutral and detached magistrate was convinced by the police, upon showing of probable cause, that an illegal activity has been or is being committed or evidence of a crime is present. Probable cause exists where the facts and circumstances within the officers' knowledge are sufficient to assure a reasonable person that an offense has been or is being committed. *Commonwealth v. Gutierrez*, 2000 Pa. Super 115, 750 A.2d 906, 909 (2000); *Commonwealth v. Jones*,

[8] The defendant's Statement of Matters Complained of on Appeal offers only, that because the entry into the house was warrantless, all evidence should have been suppressed. The Court assumes the defendant is arguing that this warrantless entry was in violation of the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution.

542 Pa. 418, 424, 668 A.2d 114, 116-117 (1995). In the absence of a recognized privacy interest no such warrant is required. *Commonwealth v. Rekasie*, 566 Pa. 85, 778 A.2d 624 (2001).

The question then becomes whether the defendant had a reasonable expectation of privacy, subject only to reasonable searches and seizures. The expectation of privacy which the Fourth Amendment protects has been held to be the greatest in one's home. *Gutierrez*, 750 A.2d at 909 (citing *Commonwealth v. Shaw*, 476 Pa. 543, 550, 383 A.2d 496, 499 (1978)). Perhaps the most important reason for the existence of the Fourth Amendment is to protect against intrusions into the home. *Id*. (citing *Payton v. New York*, 445 U.S. 573, 585, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980)). Further, the goal of Article I, Section 8 of the Pennsylvania Constitution is to safeguard privacy, as well as to deter police misconduct. *Commonwealth v. Mason*, 535 Pa. 560, 637 A.2d 251 (1993). Hence, a warrantless search of a residence is *per se* unreasonable unless justified by a specific exception to the warrant requirement. *Gutierrez*, 750 A.2d at 909.

In order to establish a defendant had an expectation of privacy, a defendant must have a possessory interest, a legitimate presence, or a characteristic of ownership from which society could recognize as an expectation of privacy. *Commonwealth v. Carlton*, 549 Pa. 174, 701 A.2d 143 (1997). Ordinarily a person does not have a reasonable expectation of privacy in someone else's home. *Commonwealth v. Oates*, 269 Pa. Super. 157, 409 A.2d 12 (1979). Here the police knew who had legitimate possession of the house, knew who the defendant was, knew he didn't live there and did not know of any legitimate reason for his presence. No
contrary evidence is in the record. Therefore, he had no reasonable expectation of privacy and therefore no standing to challenge the warrantless entry of Ms. Skrutsky's house.

It was also readily apparent from the record that there was sufficient evidence for the police to conclude that they had Ms. Skrutsky's permission to enter her house. She had expressly voiced her concern to the police about drug activity at the location of her home and had explicitly authorized the police to enter her house to stop unauthorized individuals from using it for drug transactions. As the tenant she had the legal authority to give consent to enter her house at any time. *Commonwealth v. Lawley*, 1999 Pa. Super 252, 741 A.2d 205 (1999).

The defendant's additional assertion that the Court was in error in denying his motion to suppress because "Officer Deluca was in the backyard or 'curtilage' of the property without consent either express implied or otherwise...." is without merit for the same reasons as stated above. As the facts indicate, Officer DeLuca was initially positioned at the side door of 260 East 8th Street investigating a complaint. Only after observing a drug deal taking place in front of 262 East 8th Street, did he

move alongside the property between 260 and 262 onto the front porch of 262 to announce his presence. As stated above, Officer DeLuca had a right to be on the property of 262 for the tenant, Ms. Skrutsky, gave him permission.

For the reasons set forth above, this Court's Order of December 21, 2005 should be affirmed.

Signed on this 27 of June, 2006.

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

COMMONWEALTH OF PENNSYLVANIA

v.

ROBERT DONAHUE

CRIMINAL PROCEDURE / DRUG AND ALCOHOL ABUSE CONTROL ACT

Pursuant to the confidentiality provisions of the Drug and Alcohol Abuse Control Act, patient records relating to drug or alcohol abuse or dependence may not be released. Disclosure of other patient records may be ordered by the court on application showing good cause.

CRIMINAL PROCEDURE / PRIVILEGE / CONFRONTATION CLAUSE

Pennsylvania does not favor evidentiary privileges and they are accepted only to the extent they further a public good transcending the normal principle of utilizing all rational means to ascertain the truth.

Some privileges are absolute and some are qualified or limited. The court must balance the defendant's right of confrontation against the benefit of a qualified privilege.

CRIMINAL PROCEDURE / CONFRONTATION CLAUSE / DISCLOSURE

The confrontation clause is a trial right, and as such a defendant does not have a right to discover all potentially useful material. Materially exculpatory evidence, *i.e.*, evidence material to a determination of guilt or innocence or affecting the credibility of key prosecution witnesses, must be turned over to the defense whether it is in the possession of the prosecution or the possession of the court. Impeachment evidence, including evidence of fabrication, is exculpatory evidence. There is no general constitutional right to discovery in criminal cases.

CRIMINAL PROCEDURE / CONFRONTATION CLAUSE / PRIVILEGES

For purposes of analysis by a court ruling upon a request for disclosure of arguably privileged information, the Superior Court has recognized three categories of privilege: 1) absolute privileges requiring denial of access to a criminal defendant; 2) statutorily enacted privileges which are not absolute and which may require disclosure to a defendant; and 3) common law privileges which must yield to the constitutional rights of a defendant.

CRIMINAL PROCEDURE / PENNSYLVANIA RAPE SHIELD STATUTE / DRUG AND ALCOHOL CONTROL ACT

The Rape Shield Statute is intended to prevent the focus of a trial from being directed toward the virtue and chastity of the victim as opposed to the culpability of the accused. According to the Rape Shield Statute, evidence tending to directly exculpate the accused is admissible. Evidence of past acts offered to demonstrate action in conformity with prior behavior is unacceptable.

Proffered evidence that the alleged victim did not disclose to treatment

Proffered evidence that the alleged victim did not disclose to treatment center staff difficulties between herself and the defendant and that she did disclose sexual intercourse with another individual are relevant to the issues of credibility, prompt complaint, and the cause of any physical condition and is not barred by the Rape Shield Statute. Further, this information is distinct from drug and alcohol use information and the court may order its disclosure to the defendant.

CRIMINAL PROCEDURE / DRUG AND ALCOHOL ABUSE CONTROL ACT

Records relating to drug or alcohol use by the alleged victim are confidential and non-discoverable. This determination does not preclude the defense from introducing evidence of alleged drug use at the time of the alleged offense. The court will conduct an *in camera* review to determine which information in the records of the drug and alcohol treatment agency's file is discoverable should the trial evidence provide a predicate for its admissibility.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 2789 OF 2005

Appearances: Robert A. Sambroak, Esq. for the Commonwealth
Elizabeth Hirz, Esq. for the Commonwealth
John B. Carlson, Esq. for the Defendant
Thomas M. Lent, Esq. for White Deer Run of Williamsport and Cove Forge BHS of Erie

OPINION AND ORDER

Ernest J. DiSantis, Jr., Judge

This matter comes before the court on White Deer's Motion for Reconsideration.

I. HISTORY OF THE CASE

The Defendant, Robert Donahue, is charged with allegedly sexually abusing his daughter, M.D.[1] The alleged abuse occurred from May of 2002 to May 16, 2005, and started when she was twelve years old.

Defendant filed an Omnibus Pre-trial Motion on November 23, 2005 requesting M.D.'s drug and alcohol rehabilitation records. Defendant asserts that the records provide both exculpatory and impeachment evidence germane to his defense. Specifically, the Defendant requested

[1] One count of rape, 18 Pa.C.S.A. § 3121(1); one count of aggravated indecent assault person less than 13 years old, 18 Pa.C.S.A. § 3125(7); two counts of incest, 18 Pa.C.S.A. 4302; two counts of endangering the welfare of children, 18 Pa.C.S.A. § 4304(a); one count of sexual assault, 18 Pa.C.S.A. § 3124.1; three counts of indecent assault of person less than 13 years old, 18 Pa.C.S.A. § 3126(a)(7); and two counts of corruption of a minor, 18 Pa.C.S.A. § 6301(a)(1).

records from the following institutions: (1) Rape Crisis Center; (2) Office of Child Advocacy; (3) Office of Children and Youth; (4) White Deer Run of Williamsport; (5) Cove Forge BHS of Erie; (6) St. John's Elementary/ Fort LeBoeuf High School; and (7) Children's Protective Services. The Court held argument on December 20, 2005 and subsequently ordered that the Commonwealth produce records of M.D.'s prescribed medications to the Defendant's attorney and that the records of Children's Protective Services be turned over to the Court for an *in camera* review, all within twenty (20) days. The Court denied the rest of the Defendant's request for records.

On February 21, 2006, the Defendant filed a Motion for Discovery and Inspection requesting that drug and alcohol treatment records related to M.D.'s stay at White Deer Run of Williamsport and Cove Forge BHS of Erie (White Deer). On March 8, 2006, the attorney for White Deer filed a Brief and Argument in Opposition to Defendant's Motion for Discovery and Inspection. On April 4, 2006, the Court held argument on the Defendant's motion. In an order dated April 5, 2006, the Court ordered White Deer to produce the requested documents for an *in camera* review. On April 13, 2006, White Deer filed a Motion for Stay; a Motion for Reconsideration; and a Brief in Support of Motion for Reconsideration. On April 19, 2006, Defendant filed a Response to Motion for Stay and to Motion for Reconsideration with a Brief in Support of Defendant's Answers. White Deer filed a Supplemental Brief on May 4, 2006. This Court issued a stay on April 17, 2006 and provided the other parties fourteen (14) days to file a response.[2]

II. LEGAL ANALYSIS

Defendant asserts that M.D.'s White Deer records provide exculpatory and impeachment evidence necessary for his defense.[3] White Deer counters that patient drug and alcohol records are absolutely privileged under Pennsylvania law.

The relevant statute provides that

> All patient records (including all records relating to any commitment proceeding) prepared or obtained pursuant to this act, and all information contained therein, shall remain confidential, and may be disclosed only with the patient's consent and only (i) to medical personnel exclusively for purposes of diagnosis and treatment of the patient or (ii) to government or other officials exclusively for

[2] The Commonwealth filed a Motion for Permission to Use Evidence of Prior Bad Acts and a Motion to Exclude Any Evidence by Defense of Victim's Prior Sexual Conduct on April 28, 2006. On May 8, 2006, the Defendant filed Motions in Limine and a Notice of Intent to Offer Evidence Excepted from the Rape Shield Statute. The Court held argument on May 9, 2006 and deferred ruling until time of trial.

[3] M.D. received treatment at White Deer from May 17, 2005 to May 20, 2005, and from May 23, 2005 to May 26, 2005.

> the purpose of obtaining benefits due the patient as a result of his drug or alcohol abuse or drug or alcohol dependence except that in emergency medical situations where the patient's life is in immediate jeopardy, patient records may be released without the patient's consent to proper medical authorities solely for the purpose of providing medical treatment to the patient. Disclosure may be made for purposes unrelated to such treatment or benefits only upon an order of a court of common pleas after application showing good cause therefore. In determining whether there is good cause for disclosure, the court shall weigh the need for the information sought to be disclosed against the possible harm of disclosure to the person to whom such information pertains, the physician-patient relationship, and to the treatment services, and may condition disclosure of the information upon any appropriate safeguards. No such records or information may be used to initiate or substantiate criminal charges against a patient under any circumstances.

See 71 Pa.C.S.A. §1690.108(b). Under this provision, the records are confidential and may only be disclosed under limited circumstances or after a showing of good cause. However, subsection (c) of the act states:

> All patient records and all information contained therein relating to drug or alcohol abuse or drug or alcohol dependence prepared or obtained by a private practitioner, hospital, clinic, drug rehabilitation or drug treatment center shall remain confidential and may be disclosed only with the patient's consent and only (i) to medical personnel exclusively for purposes of diagnosis and treatment of the patient or (ii) to government or other officials exclusively for the purpose of obtaining benefits due the patient as a result of his drug or alcohol abuse or drug or alcohol dependence except that in emergency medical situations where the patient's life is in immediate jeopardy, patient records may be released without the patient's consent to proper medical authorities solely for the purpose of providing medical treatment to the patient.

See 71 Pa.C.S.A. §1690.108(c).

In support of its position, White Deer cites two Union County Court of Common Pleas opinions authored by Judge Louise O. Knight which held that records from facilities similar to White Deer are absolutely privileged. See *In Re: Petition of the Commonwealth for Release of Patient Records Pursuant to 42 C.F.R. §2.65 and 71 Pa.C.S.A. § 1690.108*, Civil Action No. 00-604, Opinion dated September 26, 2000 (In that case the Pennsylvania Attorney General was conducting an investigation of a physician suspected of massive Medicaid fraud. Judge Knight denied the request.); *In Re: Petition of White Deer Run, Inc. to Quash Search Warrant; Control No. H4949 Issued September 22, 1998*, Civil Action

No. 98-927, Opinion dated October 28, 1998, (Judge Knight quashed a search warrant for a patient's records from White Deer Run. The patient allegedly failed to pay his taxicab fare.). In both opinions Judge Knight compared the Pennsylvania drug and alcohol confidentiality statute to its Federal counterpart, 42 U.S.C. §290dd-2 and 290ee-3 and 42 C.F.R. §2.63-2.65, and concluded that Pennsylvania law, specifically 71 Pa.C.S.A. §1690.108(c), was more restrictive than 71 Pa.C.S.A. §1690.108(b) or the federal statute. She held that records covered by §1690.108(c) were not discoverable under any circumstances. Additionally, Judge Knight failed to find good cause for releasing the records under §1690.108(b).[4]

[4] The term "good cause" is defined under in 42 C.F.R. *§2.6S,* which states:

§ 2.65 Procedures and criteria for orders authorizing disclosure and use of records to criminally investigate or prosecute patients.

(a) Application. An order authorizing the disclosure or use of patient records to criminally investigate or prosecute a patient may be applied for by the person holding the records or by any person conducting investigative or prosecutorial activities with respect to the enforcement of criminal laws. The application may be filed separately, as part of an application for a subpoena or other compulsory process, or in a pending criminal action. An application must use a fictitious name such as John Doe, to refer to any patient and may not contain or otherwise disclose patient identifying information unless the court has ordered the record of the proceeding sealed from public scrutiny.

(b) Notice and hearing. Unless an order under § 2.66 is sought with an order under this section, the person holding the records must be given:

(1) Adequate notice (in a manner which will not disclose patient identifying information to third parties) of an application by a person performing a law enforcement function;

(2) An opportunity to appear and be heard for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order; and

(3) An opportunity to be represented by counsel independent of counsel for an applicant who is a person performing a law enforcement function.

(c) Review of evidence: Conduct of hearings. Any oral argument, review of evidence, or hearing on the application shall be held in the judge's chambers or in some other manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceedings, the patient, or the person holding the records. The proceeding may include an examination by the judge of the patient records referred to in the application.

(d) Criteria. A court may authorize the disclosure and use of patient records for the purpose of conducting a criminal investigation or prosecution of a patient only if the court fmds that all of the following criteria are met:

(1) The crime involved is extremely serious, such as one which causes or directly threatens loss of life or serious bodily injury including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, and child abuse and neglect.

THE LAW OF PRIVILEGE

Generally, Pennsylvania law does not favor evidentiary privileges. *Van Hine v. Department of State of Com.*, 856 A.2d 204, 206 (Pa.Cmwlth. 2004). Courts should accept privileges only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth. *Id*. at 206-07.

Certain types of confidential communications are absolutely privileged, such as psychiatric/psychological treatment records and sexual assault counseling records. See 42 Pa.C.S.A. §5944 (psychiatric records); *Commonwealth v. Dowling*, 883 A.2d 570 (Pa. 2005) (psychiatric records); 42 Pa.C.S.A. §5945.1 (sexual assault counseling records); *Commonwealth v. Wilson*, 602 A.2d 1290 (Pa. 1992) (sexual assault counseling records).

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[4] continued

(2) There is a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution.

(3) Other ways of obtaining the information are not available or would not be effective.

(4) The potential injury to the patient, to the physician-patient relationship and to the ability of the program to provide services to other patients is outweighed by the public interest and the need for the disclosure.

(5) If the applicant is a person performing a law enforcement function that:

(i) The person holding the records has been afforded the opportunity to be represented by independent counsel; and

(ii) Any person holding the records which is an entity within Federal. State, or local government has in fact been represented by counsel independent of the applicant.

(e) Content of order. Any order authorizing a disclosure or use of patient records under this section must:

(1) Limit disclosure and use to those parts of the patient's record which are essential to fulfill the objective of the order;

(2) Limit disclosure to those law enforcement and prosecutorial officials who are responsible for, or are conducting, the investigation or prosecution, and limit their use of the records to investigation and prosecution of extremely serious crime or suspected crime specified in the application; and

(3) Include such other measures as are necessary to limit disclosure and use to the fulfillment of only that public interest and need found by the court.

See 42 C.F.R. §2.65; see also 42 C.F.R. §2.63 and 2.64; 42 U.S.C. §290dd-2 and 290ee-3; see also: *Whyte v. Connecticut Mutual Life Insurance Company*, 818 F.2d 1005 (1st Circ. 1987); *United States v. Corona*, 849 F.2d 562 (II Circ. 1988); In Re: Sealed Case (Medical Records), 381 F.3d 1205 (Dist. of Columbia Circ. 2004).

However, other privileges are qualified or limited, such as the marital, 42 Pa.C.S.A. §5923; attorney-client, 42 Pa.C.S.A. §5928; physician-patient, 42 Pa.C.S.A. §5929; news reporters; 42 Pa.C.S.A. §5942; priest-penitent, 42 Pa.C.S.A. §5943; and school personnel, 42 Pa.C.S.A. §5945; see also *V.B.T. v. Family Services*, 705 A.2d 1325 (Pa.Super. 1998).

DEFENDANT'S RIGHT TO CONFRONTATION.

In many instances involving qualified privileges, a court must balance a defendant's right to confront his accuser. This right is secured under the Sixth Amendment of the United States Constitution, which states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. VI. This right is applicable to state court proceedings through the Fourteenth Amendment. See *Olden v. Kentucky*, 488 U.S. 227 (1988); *Pointer v. Texas*, 380 U.S. 400 (1965).

Correspondingly, the right is also protected by Article 1, Section 9 of the Pennsylvania Constitution, which states in part:

> In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage. . . .

Pa. Const. Art. § 9; see *Commonwealth v. Spiewak*, 617 A.2d 696, 700 (Pa. 1992).

The Confrontation Clause does not constitutionally guarantee access to pre-trial discovery. *Commonwealth v. Carillion*, 552 A.2d 279, 283 (Pa.Super. 1988). Rather it is a trial right. *Pennsylvania v. Ritchie*, 480 U.S. 39, 53-4 (1987). A defendant does not have a right to discover any and all material potentially useful for impeaching a witness. *Id*. "Generally speaking, the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, that the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam) (citation omitted). Thus, "the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these [forgetfulness, confusion, or evasion] infirmities through cross-examination. . . ." *Id*. at 22.

Due process demands that materially exculpatory evidence in the hands of a prosecutor be turned over to the defense. See *Brady v. Maryland*, 373 U.S. 83 (1963). Exculpatory evidence is evidence that is material to a determination of guilt or innocence or affects the credibility of key prosecution witnesses. *Commonwealth v. Redmond*, 577 A.2d 547, 552 (Pa.Super. 1990); see also *United States v. Bagley*, 473 U.S. 667 (1985). Collateral evidence is not materially exculpatory. *Redmond*, supra, at 552. Impeachment evidence, however, does fall within the Brady rule. *Id*. at 578; see also *Bagley*, supra, at 676. Moreover, evidence of fabrication is always exculpatory. *Commonwealth v. Wall*, 606 A.2d 449, 460 n. 16 (Pa. Super. 1992).

Brady also applies to exculpatory materials within the court's possession. *Commonwealth v. Santiago*, 591 A.2d 1095, 1114 (Pa.Super. 1991). "The trial court's obligation to disclose to the defense materially exculpatory information in its possession, like that of the prosecution, exists absent any request." *Id.*, at 1116 (footnote omitted).

This right, however, does not mean that a defendant has unfettered access to files not in his possession, *Ritchie*, supra, at 59-60, nor can a defendant search untrammeled through Commonwealth files in order to argue the relevance of materials found therein. *Id*. "There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one. . . ." *Id*. (quoting *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)).

Relying upon *Ritchie*, supra; *Commonwealth v. Wilson/Aultman*, 602 A.2d 1290 (Pa. 1992), *Commonwealth v. Kennedy*, 604 A.2d 1036 (Pa. Super. 1992)(en banc); and *Commonwealth v. Kyle*, 533 A.2d 120 (Pa. Super. 1987), the Superior Court stated:

> First, a defendant's right to access is dependant upon whether the information is protected by a statutory privilege and whether that privilege is absolute. Information which is protected by an absolute statutory privilege is not subject to disclosure and denial of access to a criminal defendant is required. . . .
>
> On the other hand, a privilege which is statutorily enacted, but which is subject to exceptions, is not absolute and access to a criminal defendant may be required.
>
> *****
>
> Finally, privileges which are not statutorily enacted, but rather are recognized by the common law, must yield to the constitutional rights of a criminal defendant.

Commonwealth v. Eck, 605 A.2d 1248, 1252-53 (Pa.Super. 1992); see generally *Commonwealth v. Herrick*, 660 A.2d 51, 56 and 60-61 (Pa.Super. 1995); *Commonwealth v. Mejia-Arias* (Appeal of Attorney General), 734 A.2d 870 (Pa.Super. 1999).[5]

THE CASE AT BAR

In this case the defense requests discovery of records reflecting information provided by M.D. to drug and alcohol rehabilitation staff. These records are not within the Commonwealth's possession, but rather are under the control of a private treatment facility, White Deer. During prior hearing/arguments on this issue, the defense indicated it wanted, *inter alia:* (1) M.D.'s statements concerning her relationship with her father; (2) her statements concerning sexual activity with others; and (3) her statements relating to drug usage.[6]

The Commonwealth in a motion *in limine* filed in this case argues that the evidence of any prior sexual activity is irrelevant and is barred by Pennsylvania's Rape Shield statute. See 18 Pa.C.S.A. § 3104.

The case of *Commonwealth v. Guy*, 686 A.2d 397 (Pa. Super. 1996) aids this Court in its analysis. *Guy* involved the Commonwealth's interlocutory appeal of the trial court's pre-trial rulings made on a motion *in limine* brought to exclude evidence of prior sexual conduct of an alleged rape victim, as well as a ruling partially granting a defense request for discovery of drug and alcohol-related hospital records for the same alleged victim. *Id*. at 399. The defense sought to introduce evidence that the victim had, in the past, solicited drugs in a bar in exchange for sex with others. *Id*. at 401. This evidence would purportedly be used by the defendant to show that the victim solicited him and that the ensuing sexual activity was consensual.

Relative to the evidence of prior sexual conduct, the trial judge ruled that the contested evidence could be introduced to attack the credibility of the victim should she testify at trial in a manner inconsistent with the proffered evidence. *Id*. The trial court also ruled that drug and alcohol records were subject to an absolute statutory privilege (71 Pa.C.S.A. §1690.108(c)) and could not be used by either the Commonwealth or the appellee in their cases-in-chief. However, he ruled that the statutory privilege could be waived by the victim and the evidence could be used

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[5] While the minimum federal constitutional guarantees are equally applicable to the analogous state constitutional provisions, the state has the power to provide broader standards than those mandated by the federal constitution. *Commonwealth v. Sell*, 470 A.2d 457 (Pa. 1983); see also *Prune-Yard Shopping Center v. Robins*, 447 U.S. 74, 80-82 (1980), *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967).

[6] The Defendant's request is predicated upon his knowledge of a standard questionnaire purportedly used by White Deer.

to impeach her credibility on cross-examination if she testified at trial in a manner at variance with the records. *Id*.

The Superior Court first discussed the applicability of the Rape Shield statute noting:

> The purpose of the Rape Shield statute is to prevent a trial from shifting its focus away from the culpability of the accused towards the virtue and chastity of the victim.

Id. at 400. It further determined that sexual solicitations are within the ambit of the Rape Shield statute. *Id*. Addressing the admissibility of that evidence, it stated:

> As applied to the Rape Shield Law, relevant evidence is that which may tend to directly exculpate the accused by showing *inter alia,* bias, hostility, motive to lie or fabricate, evidence of a sexual encounter with another person on the date in question, or impeachment by use of a prior inconsistent statement. (Citations omitted)...
>
> It is equally true, however, that the same evidence cannot be used to bolster a consent defense when the admitted purpose of the evidence is to prove that the victim acted in conformity with past behavior in the date in question.
>
> To allow such evidence to be introduced at trial would have the immediate and direct effect of shifting the focal point of the trial away from a determination of the events of the night in question to a determination of whether the victim had, in the past, acted in a manner that was less than virtuous. This result is unacceptable. Regardless of whether appellee's proffer is accurate, the victim must not be made to suffer such prejudice, ridicule and humiliation in payment for past indiscretions.

Id. at 401-402.

In the case at bar, the proffer of the defense is that M.D. did not disclose to White Deer staff that there were any difficulties between her and the Defendant and that she disclosed that she had sexual intercourse with another individual (her boyfriend). Unlike the facts in *Guy*, information of a harmonious relationship between the alleged victim and her father would go to the issue of M.D.'s credibility if she testifies at trial that she had been sexually abused by him. It would also be relevant to the issue of prompt complaint. As to M.D.'s sexual contact with another person, this would be evidence providing an alternative explanation for her physical condition if the Commonwealth introduces evidence that the condition of her genitalia was caused by sexual intercourse with her father. Therefore, the evidence, unlike that in *Guy*, would not be barred by the Rape Shield

statute. See *Commonwealth v. Majorana*, 470 A.2d 80 (Pa. 1983).

Based upon the information provided to the Court as part of the hearing/arguments in this case, it would appear that some of the White Deer records may contain information related to these issues. This information is distinct from that related to M.D.'s drug/alcohol usage.

Under the drug treatment act, the Department of Health is required: "to develop and coordinate the implementation of a comprehensive health, education and rehabilitation program for the prevention and treatment of drug and alcohol abuse and dependence". See 71 Pa.C.S.A. §1690.108 et seq.; *In Re Search Warrant Application No. 125-4*, 852 A.2d 408, 413 (Pa. Super. 2004). In that case the Superior Court noted:

> A vital component for ensuring the participation of those in need of treatment is the protection of their confidentiality. Therefore, Section 1690.108 provides that all patient records shall remain confidential and may be disclosed only with the patient's consent and only for specific purposes....

Id. Therefore, both subsections (b) and (c) ensure confidentiality of certain records.

Turning to records that would reflect M.D.'s drug/alcohol usage, this Court, agrees with the *Guy* Court's statement that:

> Certainly, evidence that the victim ingested drugs on the evening in question, prior to the alleged attack, would be relevant to a determination of whether the victim's recall was accurate. Appellee could pursue a line of questioning relative to the victim's state of mind during the time immediately surrounding the alleged attack.
>
> Any other questioning concerning a general history of drug abuse would be collateral to the matter at hand and only serve to sully the reputation of the victim in the eyes of the jury. For this reason, we must disagree with the appellee's averment that "it is necessary to show that this victim in particular had a propensity and a habit for the use of drugs."

Id. at 403.

Based upon defense counsel's proffer in the instant case, this Court finds that M.D.'s general history of drug use that was allegedly disclosed to rehabilitation counselors or staff would be collateral and is not admissible. As this Court noted at one of the hearings/arguments, this does not preclude the defense from introducing evidence at trial of M.D.'s alleged drug usage at the time of the alleged offenses.

Furthermore, this Court concludes that information covered by 71 Pa.C.S.A. §1690.108(b) (all records) is conditionally privileged and may be disclosed for the enumerated reasons or for good cause. This

includes information unrelated to drug usage. Further, § 1690.108(c), which deals specifically with information of drug/alcohol use, contains a conditional release of information in the following circumstances: (1) with the patient's consent, but (a) only to medical personnel exclusively for purposes of diagnosis and treatment of the patient or (b) to governmental or other officials exclusively for the purpose of obtaining benefits due the patient as a result of his/her drug or alcohol abuse or drug or alcohol dependence, or (2) for emergency medical situations where the patient's life is in immediate jeopardy. Based upon its review of the facts, this Court finds that none of the subsection (c) exceptions apply here.

The Court disagrees with the White Deer's position that all the records are confidential and non-discoverable. Only those related to drug/alcohol usage are so protected. Moreover, an *in camera* review is the only way for a Court to determine what records, if any, are discoverable under §1690.108(b), assuming the trial evidence provides a predicate for their admissibility.[7]

III. CONCLUSION

Based upon the above analysis, White Deer's Motion for Reconsideration will be DENIED.

ORDER

AND NOW, this 5th day of June, 2006, for the reasons set forth in the accompanying opinion, White Deer's Motion for Reconsideration is hereby DENIED and it is DIRECTED to turn over the records of M.D. (other than drug/alcohol treatment records) to this Court for an in camera review within ten (10) days of the date of this order.

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

[7] If the general questionnaire, etc...(records that may contain personal history information) are separate from the drug/alcohol treatment records, then the drug/alcohol treatment records would not have to be produced.

IN THE MATTER OF THE ESTATE OF S.G.,
An alleged incapacitated person

FAMILY LAW /INCAPACITATION

An incapacitated person is defined as an adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that [she] is partially or totally unable to manage [her] financial resources or to meet essential requirements for [her] physical health and safety.
20 Pa. C.S. §5501; *In Re: Hyman*, 811A.2d 605, 607 (Pa. Super. Ct. 2002).

FAMILY LAW / INCAPACITATION

Any person who is interested in the alleged incapacitated person's welfare may petition the Court to adjudicate a person incapacitated. 20 Pa.C.S. §5511(a). A person is presumed to be mentally competent and the petitioner has the burden of proving incapacity by clear and convincing evidence. *In Re Myers Estate*, 150 A.2d 525, 526 (Pa. 1959).

FAMILY LAW / INCAPACITATION

Pursuant to 20 Pa.C.S. §5512.1, the Court must consider and make specific findings of fact concerning the following factors in determining whether an individual is incapacitated:

(1) The nature of any condition or disability which impairs the individual's capacity to make and communicate decisions.

(2) The extent of the individual's capacity to make and communicate decisions.

(3) The need for guardianship services, if any, in light of such factors as the availability of family, friends and other supports to assist the individual in making decisions and in light of the existence, if any, of advance directives such as durable powers of attorney or trusts.

(4) The type of guardian, limited or plenary, of the person or estate needed based on the nature of any condition or disability and the capacity to make and communicate decisions.

(5) The duration of the guardianship.

(6) The court shall prefer limited guardianship.

FAMILY LAW / GUARDIANSHIP

Once an individual has been adjudicated incapacitated, the court must determine who should be appointed as guardian. The court must follow the guidelines set forth pursuant to 20 Pa.C.S. §5511(f) as follows:

> The court may appoint as guardian any qualified individual, a corporate fiduciary, a nonprofit corporation, a guardianship support agency under Subchapter F (relating to guardianship support) or a county agency. In the case of residents of State facilities, the court may also appoint, only as guardian of the estate, the guardian office at the appropriate State facility. The court shall not appoint a person or entity providing residential services for a fee to the incapacitated person or any other person whose interests conflict with those of the

incapacitated person except where it is clearly demonstrated that no guardianship support agency or other alternative exists. Any family relationship to such individual shall not, by itself, be considered as an interest adverse to the alleged incapacitated person. If appropriate, the court shall give preference to a nominee of the incapacitated person. (emphasis added).

FAMILY LAW / GUARDIANSHIP

The lower court found that S.G. suffered from Alzheimer's disease and dementia and was no longer capable of handling his financial affairs. The Court found that S.G.'s memory was poor and S.G. wasn't capable of meeting the essential requirements of his life. S.G. was therefore declared an incapacitated person within the meaning of 20 Pa. C.S. §5501.

EVIDENCE / EXPERT WITNESS

To evaluate whether an expert witness is needed, two questions must be answered. Initially the trial court should determine whether the subject on which the witness will express an opinion is so distinctly related to some science, business, profession, or occupation as to be beyond the ken of the average laymen. If so, the next question is whether the witness has sufficient skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth.

EVIDENCE / EXPERT WITNESS

An expert witness needs only to have a reasonable pretension to specialized knowledge on the subject matter for which expert testimony is admissible. The witness's expertise may be based on practical, occupational, or other experiential training; need not have been gained through academic training alone. *Commonwealth v. Doyen*, 848 A.2d 1007, 1014 (Pa. Super. Ct. 2004).

EVIDENCE / EXPERT WITNESS

The court determined that a licensed social worker could testify as an expert with respect to the nature and extent of S.G.'s alleged incapacity.

FAMILY LAW / ORPHAN COURT RULES

Under the rules of Orphans Court it is not the obligation of a party to inform another party which witnesses would testify as an expert witness or to provide expert reports. It is the obligation of a party to petition the court to conduct discovery pursuant to Pa. Orph. Ct. R. 3.6 and Pa. Erie Cty. Orph. LR 3.6.1.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION NO. 412-2005

APPEARANCES: Joseph P. Martone, Esq., on behalf of the daughters of S.G., Appellant 1 and Appellant 2

James R. Steadman, Esq., on behalf of S.G.,
Appellee
Charles D. Agresti, Esq., on behalf of P.G.,
Appellee

OPINION

Domitrovich, J., April 24, 2006

This matter is currently before the Superior Court of Pennsylvania on the appeal of the daughters of S.G. (hereinafter referred to as S.G.), filed by and through their counsel, Joseph Martone, Esq., from the Order entered by this Lower Court on February 22, 2006, dismissing the Appellants' Exceptions to this Lower Court's finding of S.G.'s incapacity and appointment of his wife of twenty-two years, P.G., as plenary guardian of both his person and estate. This Lower Court notes that S.G., who is represented by James Steadman, Esq., has not filed an appeal from this Lower Court's Order. On appeal, the Appellants have raised four issues plus several sub-issues,[1] which this Lower Court will combine and address as the following four issues: (1) whether this Lower Court abused its discretion in determining that P.G. established by clear and convincing evidence that S.G. is an incapacitated person, and, furthermore, whether this Lower Court abused its discretion in appointing P.G., the incapacitated person's wife, as plenary guardian of S.G.'s person and estate; (2) whether this Lower Court abused its discretion in admitting the live expert medical testimony of Ishwer Lal Bharwani, M.D. at the January 31, 2006 hearing; (3) whether this Lower

[1] (1) "The Court erred in adjudicating S.G. an incapacitated person for the following reasons: (a) the court erred in admitting the telephone testimony of Ishwer Bharwani, M.D. The Petitioner failed to provide proper notice to the Counter Petitioners and the Respondent of her intention to call Doctor Bharwani at the time of trial, and did not provide an expert's report to Counter Petitioners and Respondent prior to trial. Doctor Bharwani was permitted by the court to refer to notes and records in his possession, although the Counter Petitioners and Respondent did not have the opportunity to review the Doctor's notes and records; (b) the court erred in admitting the testimony of Joanne Kline as an expert in determining the legal capacity of S.G. The Respondent and Counter Petitioners were not given notice prior to the testimony of Ms. Kline that she was being offered as an expert witness, and did not receive an expert report prior to her testimony. Further, Ms. Kline is not qualified to serve as an expert in determining the legal capacity of S.G.;" (2) "The court erred in appointing P.G. plenary guardian of the person and estate of S.G. for the following reasons: (a) P.G. has an interest adverse to that of S.G. as she is dependent on his financial support; (b) P.G. through use of a previously executed Power of Attorney, transferred assets worth approximately $70,000.00 from the subject's account to her own name; (c) Testimony was submitted that P.G., during the time she served as emergency guardian, did not provide adequate financial support nor personal attention to her husband;" (3) "The court erred in failing to make specific findings of fact concerning the nature and condition or disability of the alleged incapacitated person, the extent of his ability to communicate decisions, and in failing to consider his stated preference to reside with his daughter;" and (4) "The court's decision is arbitrary, capricious and biased,"

Court abused its discretion in admitting the testimony of Joanne Klein, a licensed social worker with substantial experience and specialized knowledge regarding caring for and diagnosing elderly people, who is also a neighbor and friend of S.G., as an expert witness for the limited purpose of describing the evaluation process for diagnosing dementia related illnesses in elderly people; and (4) whether this Lower Court considered the factors set forth in 20 Pa.C.S. §5512.1, where the undersigned judge made specific findings of fact concerning these factors on the record, in the presence of all parties and counsel, at the conclusion of the January 31, 2006 hearing.

Initially, this Lower Court will set forth this Lower Court's findings, as well as the relevant factual and procedural history, concerning the events preceding the instant action. S.G. is presently eighty (80) years old, and P.G., S.G.'s wife, is presently seventy-one (71) years old. S.G. and P.G. have been happily married for twenty-two years. (N.T. 1/31/06 p.39). During their marriage, S.G. and P.G. each executed Powers of Attorney and living wills, designating each other as agent. (N.T. 1/31/06 pp.47-48). Both S.G. and P.G. had prior marriages to other individuals before they married, and both S.G. and P.G. had children from their first marriages. (N.T. 1/31/06 p.39). S.G. has two daughters from his prior marriage, the Appellants to the instant action, and P.G. has two sons from her prior marriage. (N.T. 1/31/06 p.40). Appellant 2 lives in Erie, Pennsylvania, and Appellant 1 lives in Pittsburgh, Pennsylvania. (N.T. 1/31/06 p.40). Although Appellant and Appellant 2 are not P.G.'s biological children, P.G. described her relationship with them prior to December of 2005 as being "very good," and Appellant 1 and Appellant 2 had never voiced any complaints to P.G. concerning the relationship she had with S.G. or the care she was providing for S.G. (N.T. 1/31/06 p.41).

With regard to S.G.'s relationship with his children, the credible evidence presented at the time of the hearing demonstrates that Appellant 1 has kept in very close contact with S.G. since she has lived in Pittsburgh since approximately 2004; however, Appellant 2 has not remained in close contact with S.G. (N.T. 1/31/06 p.49). Appellant 1 visits S.G. in Erie, Pennsylvania occasionally on weekends, and S.G. visits Appellant 1 in Pittsburgh, usually for four-day periods, approximately once every other month. (N.T. 1/31/06 p.50). In contrast, in 2004, Appellant 2 telephoned S.G. only three times. (N.T. 1/31/06 p.50). Appellant 2 has visited S.G. at his home in Erie only once during the two years that S.G. has lived there. (N.T. 1/31/06 p.50). Nevertheless, Appellant 2 does occasionally see S.G. when Appellant 1 comes to Erie to visit. (N.T. 1/31/06 p.50).

In December of 2002, Dr. Ishwer Lal Bharwani diagnosed S.G. with dementia and Alzheimer's disease. (N.T. 1/31/06 p.27). The record demonstrates that S.G.'s symptoms caused by these illnesses have advanced since 2002, and S.G., at times, exhibits delusional and erratic

behavior. In early December of 2005, P.G. began noticing that S.G. was experiencing mood swings and was behaving strangely. (N.T. 1/31/06 p.51). Therefore, P.G. scheduled an appointment for S.G. to see his treating physician Dr. Bharwani. (N.T. 1/31/06 p.66). On approximately December 3, 2005, S.G. told P.G. that he wanted P.G. to telephone his broker at Smith Barney for the purpose of taking S.G.'s name off of the account and placing P.G.'s name on the account instead. (N.T. 1/31/06 p.59). S.G.'s Smith Barney account is worth approximately $82,000.00. (N.T. 1/31/06 p.59). P.G. knew that this request was uncharacteristic of S.G., and P.G. did not want to take any action that S.G. would not have wanted if he had been capable of making those decisions, so P.G. changed the subject, and asked S.G. to help her put up the Christmas lights. (N.T. 1/31/06 p.60). S.G. immediately forgot about his request to contact Smith Barney, and this transaction never occurred. (N.T. 1/31/06 p.60).

On December 8, 2005, S.G. told P.G. that he wanted to telephone Appellant 1, so P.G. dialed the number for him, since S.G. is unable to make a long distance telephone call on his own. (N.T. 1/31/06 pp.51, 53). P.G. heard S.G. tell Appellant 1 that he wanted "to get out of here." (N.T. 1/31/06 p.51). P.G. then left the room and did not listen to the rest of this conversation. (N.T. 1/31/06 p.51). Subsequently, P.G. found S.G. in their bedroom, placing his clothes on their bed. (N.T. 1/31/06 p.51). Appellant 1 then telephoned P.G. to tell her she was coming to Erie to take S.G. to her home in Pittsburgh; however, Appellant 2 was going to pick up S.G. first. (N.T. 1/31/06 p.51). Approximately thirty minutes later, Appellant 2 arrived at S.G. and P.G.'s home, and Appellant 2 packed a bag for S.G., containing four days worth of clothing. (N.T. 1/31/06 p.51). P.G. informed Appellant 2 that S.G. had an appointment with Dr. Bharwani the following week, and he needed to go to it; however, Appellant 2 told P.G. to cancel the appointment. (N.T. 1/31/06 p.66). P.G. checked S.G.'s wallet to make sure he had enough money for a few days, and found that S.G. had $300.00, so P.G. allowed S.G. to leave. (N.T. 1/31/06 p.81). Appellant 2 then took S.G. to a Starbucks to wait for Appellant 1 to arrive and take him to Pittsburgh. (N.T. 1/31/06 pp. 51-52, 138).

P.G. believed that S.G. was probably unreasonably upset with her, which was a normal part of his dementia and Alzheimer's disease. (N.T. 1/31/06 p.52). P.G. indicated that when S.G.'s dementia caused him to become upset with her, he would stay with his daughter Appellant 1 for a few days and then he would miss P.G. and he would return home. (N.T. 1/31/06 p.52). P.G. telephoned Appellant 1 later in the evening after Appellant 1 had taken S.G. to Pittsburgh, to make sure their trip had been safe. (N.T. 1/31/06 p.52). P.G. asked to speak to S.G.; however, Appellant 1 informed P.G. that S.G. did not want to speak to her. (N.T. 1/31/06 p.52). P.G. believed that after a day or two S.G. would want to speak with her and would want to return home. (N.T. 1/31/06 p.52).

However, contrary to P.G.'s expectations, which were based upon past instances, Appellant 1 did not bring S.G. home to Erie after a few days. (N.T. 1/31/06 p.53). Appellant 1 did not allow P.G. to speak with S.G. because Appellant 1 claimed S.G. did not want to speak with P.G. (N.T. 1/31/06 p.53). At the time of the January 31, 2006 hearing, P.G. had not spoken with S.G. since he left for Pittsburgh on December 8, 2005, despite P.G.'s efforts to telephone him. (N.T. 1/31/06 p.53).

On December 13, 2005, while S.G. was in Pittsburgh with Appellant 1, the furnace at S.G. and P.G.'s Erie home stopped working. (N.T. 1/31/06 pp.53, 76). P.G. went to an ATM to obtain cash to pay for the repairs, and she discovered, unexpectedly, that one of the joint checking accounts she shares with S.G. had been depleted by $5,000.00. (N.T. 1/31/06 pp.53, 89). Therefore, the following morning, on December 14, 2006, P.G. went to the bank to determine what had happened. (N.T. 1/31/06 pp.53, 76). P.G. discovered that both of the money market accounts that she shared with S.G. had been closed, and both of the checking accounts she shared with S.G. had been depleted by thousands of dollars. (N.T. 1/31/06 pp.53-54). P.G.'s PNC employee account had a balance of only $5.49, and a withdrawal in the amount of $4,450.00 had been made on December 12, 2005. (N.T. 1/31/06 p.58). In total, $110,000.00 had been withdrawn from four accounts. *See P.G.'s Petition, filed December 15, 2005, p.2; see also Appellants' Counter-Petition, filed January* 6, *2006, p.3; See also Petitioner's Exhibit 2*. Prior to this time in December of 2005, S.G. had never conducted any business transactions with regard to this joint PNC employee account. (N.T. 1/31/06 p.58). The bank informed P.G. that all S.G. had to do to withdraw money from that account was to show his photo ID and provide his Social Security number. (N.T. 1/31/06 p.58). Furthermore, the addresses on all four of S.G. and P.G.'s accounts, which used to contain $110,000.00 more than they did when P.G. went to the bank on December 14, 2005, had been changed to Appellant 1's Pittsburgh address. (N.T. 1/31/06 pp.53- 54). All of these accounts had been in both P.G. and S.G.'s names since a year after they married in 1983. (N.T. 1/31/06 p.54). Aside from his actions in December of 2005, S.G. had never conducted any activities with regard to any of the accounts in 2005. (N.T. 1/31/06 p.59).

It is uncontested that shortly after S.G. went to Pittsburgh, Appellant 1 drove S.G. to consult with an attorney because S.G. stated he wanted to divorce P.G. (N.T. 1/31/06 pp.112, 125). At this meeting, the attorney drew up the paperwork to revoke the Power of Attorney, and S.G. signed this paperwork. (N.T. 1/31/06 p.126). Nevertheless, this paperwork was never filed of record in Erie County, and this paperwork was never introduced as an Exhibit. The attorney also advised S.G. and Appellant 1 to determine the amount of assets owned by S.G. and P.G. (N.T. 1/31/06 p.113). Therefore, Appellant 1 testified that she took S.G. to PNC Bank and allowed S.G. to withdraw $4,500.00 in cash and cashier's checks in

the amount of $105,000.00 in his own name, from joint accounts held by S.G. and P.G. (N.T. 1/31/06 pp.113, 126-127); *See P.G.'s Petition, filed December 15, 2005, p.2; see also Appellants' Counter-Petition filed January 6, 2006, p.3.*

Appellant 1 also testified that she "didn't touch the money and the money didn't go to [her]." (N.T. 1/31/06 p.113). However, subsequently, Appellant 1 admitted she did, in fact, have control over this money, and she stored the cashier's checks in a box in her house for S.G. (N.T. 1/31/06 p.114). S.G. retained control over the $4,500.00 in cash that he withdrew. (N.T. 1/31/06 p.127). Appellant 1 was not concerned about what S.G. might do with all of the money he withdrew. (N.T. 1/31/06 pp.114, 127). This Lower Court found that Appellant 1 had control over these cashier's checks, since she stored them for S.G., and S.G. could have cashed them or transferred them to Appellant 1 or anyone else, if he had desired. (N.T. 1/31/06 p.115).

P.G. stated that on December 14, 2005, after leaving the bank, she understandably "panicked" because $110,000.00 had been withdrawn from the accounts she shared with S.G., and because there was not enough money in their checking account to pay for all of the monthly automatic debits to the account, for items such as health insurance, golf course dues, and condo association fees, and P.G. was not certain if or when she would be able to recover any of the money that had been withdrawn from the accounts. (N.T. 1/31/06 pp.46, 57, 76). Therefore, P.G. utilized her Power of Attorney, which S.G. had executed prior to the onset of his dementia and Alzheimer's disease, and immediately sold 2,000 shares of GE stock, one-fifth of the total GE stock owned by S.G., which was in S.G.'s name, so that she would have available cash, and so she would be able to protect this money from being spent or squandered. (N.T. 1/31/06 pp.57, 78; 73-74). P.G. credibly stated she made this transaction for the purpose of protecting S.G. and the assets he had accumulated. (N.T. 1/31/06 p.78).

P.G. immediately contacted Attorney Agresti seeking legal assistance. (N.T. 1/31/06 p.55). P.G. also attempted to contact Appellant 1 and her husband concerning this alarming financial situation; however, they did not answer P.G.'s calls. (N.T. 1/31/06 pp.55-56). Subsequently, P.G. received a telephone message from Appellant 1's husband, stating that S.G. did not want to speak with her and advising her to seek legal assistance. (N.T. 1/31/06 p.56). P.G. also tried to make additional telephone calls to Appellant 1's house in Pittsburgh; however, P.G. was asked to stop calling them and was advised to call their attorney instead. (N.T. 1/31/06 p.63). P.G. never visited S.G. in Pittsburgh because she believed Appellant 1 probably would not let P.G. into her home, since she would not allow P.G. to call her home. (N.T. 1/31/06 p.83). The Court notes that P.G. is a seventy-one year old woman, who drives locally, and P.G. indicated her discomfort with driving herself to Pittsburgh, a city with which she is

unfamiliar. (N.T. 1/31/06 p.83).

Subsequently, on December 15, 2005, Attorney Agresti, on behalf of P.G., filed an emergency Petition for Adjudication of Incapacity and Appointment of Plenary Guardian of the Estate and Person of S.G., which was properly presented to this Lower Court in Motion Court. Attached to this Petition was an Affidavit from Ishwer Bharwani, M.D., S.G.'s treating physician. In this Affidavit, Dr. Bharwani stated that he had examined S.G. on September 8, 2005, and he had diagnosed S.G. with Alzheimer's disease and dementia. Dr. Bharwani stated that S.G.'s ability to receive and evaluate information and to communicate decisions is impaired. Furthermore, Dr. Bharwani stated that S.G. is unable to manage his financial resources and to meet essential requirements for his physical health and safety. Accordingly, on December 15, 2005, this Lower Court entered an emergency Order, appointing S.G.'s wife, P.G., as temporary, emergency guardian over her husband's estate and person, until a full hearing could be conducted on said Petition, pursuant to Erie County Local Rule of Orphans' Court 14.2.4(e). Furthermore, this Lower Court directed Appellant 1 to render a full accounting of and to transfer to P.G. all funds in her possession, including funds from two PNC bank accounts, and two PNC money market accounts, totaling approximately $110,000.00. Finally, this Lower Court scheduled a Rule to Show Cause hearing for January 31, 2006, and directed Appellant 1 to show cause why S.G. should not be adjudicated incapacitated and why a plenary guardian of his person and estate should not be appointed.

P.G. did, in fact, receive these funds from Appellant 1, four days later, on December 19, 2005, and P.G. returned $10,000.00 of these funds to the joint checking account that pays for all of the S.G. and P.G.'s automatic debits. (N.T. 1/31/06 pp.56-57, 85). Furthermore, P.G. placed another $10,000.00 of the funds that were returned to her in another checking account in her name only. (N.T. 1/31/06 p.57) *See also, Petitioner's Exhibit* 3, Checking Account XXXXXX2699, showing a deposit of $10,000.00 made on December 20, 2005. P.G. also opened a new money market account in her name only and placed the remaining funds that were returned to her, or approximately $90,000.00 in that account, as well as the cash received from the sale of GE stock, or approximately $70,000.00, in order to protect this money until the issues involved in this case were resolved. (N.T. 1/31/06 p.56); *See also, Petitioner's Exhibit* 3, Money Market Account XXXXXX4765, showing a deposit of $90,092.64 made on December 20, 2005, and a deposit of $70,607.70 made on December 28, 2005.

Subsequently, on December 30, 2005, this Lower Court entered an Order, appointing James R. Steadman, Esq., to represent the interests of S.G. at the January 31, 2006 hearing. Subsequently, on January 6, 2006, Attorney Martone, on behalf of Appellant 1 and Appellant 2, filed a Counter-Petition for Adjudication of Incapacity and Appointment of

Plenary Guardian of the Person and Estate of S.G. Strangely, although the title of this Petition suggests that Appellant 1 and Appellant 2 were seeking to adjudicate S.G. incapacitated and appoint themselves are plenary guardians, that is not, in fact, what they were seeking. Paragraph eight of Appellant 1 and Appellant 2's Counter-Petition reads:

> These Petitioners concur that S.G. exhibits symptoms consistent with dementia, and that assistance is necessary for certain activities of daily living. However, these Petitioners aver that plenary guardianship of the person and estate is not necessary or appropriate. These Petitioners also aver that if guardianship is necessary, that they and not P.G. should be appointed guardians for S.G. *See Counter-Petition, filed on January* 6, *2006, p.2.*

In fact, Appellant 1 and Appellant 2 believed their father was not incapacitated and believed that it would be inappropriate to adjudicate him incapacitated or to appoint a plenary guardian. (N.T. 1/31/06 p.4). Nevertheless, Appellant 1 and Appellant 2 desired to be appointed as plenary guardians in the event that the Court determined it was appropriate to adjudicate S.G. incapacitated. As set forth in more detail below, Attorney Martone did not conduct any pre-trial discovery in the interim between filing the Counter-Petition and the date of the hearing.

S.G. did not return home to Erie immediately after the filing of the emergency Petition for Adjudication of Incapacity and Appointment of Plenary Guardian of the Estate and Person of S.G. (N.T. 1/31/06 p.60). S.G. was scheduled to undergo a dementia evaluation in Pittsburgh on January 10, 2006, which Appellant 1 had arranged for him, and P.G. decided it would be too stressful for S.G. to return home to Erie, and subsequently to have to return to Pittsburgh for this appointment. (N.T. 1/31/06 p.63). In fact, Appellant 1 acknowledged that she made a doctor's appointment in Pittsburgh for S.G. because she was concerned S.G. might be having hallucinations, and he might be entering the advanced stages of Alzheimer's disease. (N.T. 1/31/06 p.110). Appellant 1 also admitted that several of the doctor's appointments that occurred in Pittsburgh were scheduled prior to the time S.G. actually came to Pittsburgh. (N.T. 1/31/06 p.120). Therefore, Appellant 1 had planned to go to Erie at some point and bring S.G. to Pittsburgh to attend these appointments. (N.T. 1/31/06 p.120). P.G. desperately wanted S.G. to come home to Erie, but P.G. believed it was better for S.G. if he remained in Pittsburgh until the evaluation could be completed. (N.T. 1/31/06 p.63). P.G. told Appellant 1 that S.G. needed to return home to Erie immediately after this appointment. (N.T. 1/31/06 p.63). However, Appellant 1 did not immediately return S.G. home following his January 10, 2006 appointment. (N.T. 1/31/06 p.63). P.G. telephoned Appellant 1 following this appointment, and Appellant 1 told P.G. that S.G. was fine. (N.T. 1/31/06 p.63). P.G. then asked Appellant

1 if she could drive S.G. home to Erie that weekend. (N.T. 1/31/06 p.63). Appellant 1 responded that S.G. had an additional doctor's appointment the following week, so she could not drive him to Erie that weekend. (N.T. 1/31/06 p.63). P.G. then asked for the telephone number of this doctor so she could confirm this appointment; however, at that point, Appellant 1 told P.G. to contact her attorney with any questions. (N.T. 1/31/06 pp.63-64). It is uncontested that Appellant 1 never returned S.G. to Erie at any point between early December of 2005 and the January 31, 2006 hearing.

Accordingly, a hearing was conducted in this matter on January 31, 2006, concerning P.G.'s Petition for Adjudication of Incapacity and Appointment of Plenary Guardian of the Estate and Person of S.G., and Appellant 1 and Appellant 2's Counter-Petition for Adjudication of Incapacity and Appointment of Plenary Guardian of the Person and Estate of S.G. Upon considering all of the testimony and evidence presented, and after making detailed findings of fact, this Lower Court, entered an Order, dated January 31, 2006, granting the Petition for Adjudication of Incapacity and Appointment of Temporary and Plenary Guardian of the Estate and Person, filed by Attorney Agresti on behalf of P.G., and denying the Counter-Petition for Adjudication of Incapacity and Appointment of Plenary Guardian of the Person and Estate, filed by Attorney Martone on behalf of Appellant 1 and Appellant 2. On February 21, 2006, the Appellants filed Exceptions to the Finding of Incapacity and Appointment of Guardian, which this Lower Court denied on February 22, 2006. Subsequently, on March 6, 2006, the Appellants filed their timely Notice of Appeal to the Superior Court of Pennsylvania.

The Appellants' first issue on appeal is whether this Lower Court abused its discretion in determining that P.G. established by clear and convincing evidence that S.G. is an incapacitated person, and, furthermore, whether this Lower Court abused its discretion in appointing P.G., the incapacitated person's wife, as plenary guardian of S.G.'s person and estate. This Lower Court briefly notes that in their Pa. R.A.P. 1925(b) Statement, the Appellants did not specifically dispute this Lower Court's determination that S.G. is incapacitated; rather, the Appellants limited their issue to whether this Lower "Court erred in appointing P.G. plenary guardian of the person and estate of S.G." *Pa. R.A.P. 1925(b) Statement, p.2.* Nevertheless, this Lower Court will engage in a discussion concerning the reasons for adjudicating S.G. incapacitated, as this matter is integral to the matter of appointment of P.G. as plenary guardian. The procedures for declaring a person incapacitated are set forth in Chapter 55 of the Decedents, Estates, and Fiduciaries Code. *In Re: Hyman*, 811 A.2d 605, 607 (Pa. Super. Ct. 2002). An "incapacitated person" is defined as:

> An adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a

> significant extent that [she] is partially or totally unable to manage [her] financial resources or to meet essential requirements for [her] physical health and safety. 20 Pa.C.S. §5501; *Hyman, supra.*

Pursuant to 20 Pa.C.S. §5511(a), any person who is interested in the alleged incapacitated person's welfare may petition the Court to adjudicate a person incapacitated. Nevertheless, a person is presumed to be mentally competent, and the petitioner has the burden of proving incapacity by clear and convincing evidence. *In Re Myers Estate*, 150 A.2d 525, 526 (Pa. 1959). An appellate court will sustain a finding of mental incompetency only where the evidence is clear and convincing and points unerringly to mental incompetency. *Hyman, supra* at 608; *Myers, supra.* Furthermore, the appellate court will not upset a trial court's determination of incapacity, absent an abuse of discretion. *Hyman, supra* at 609. In addition, pursuant to 20 Pa.C.S. §5518,

> To establish incapacity, the petitioner must present testimony, in person or by deposition from individuals qualified by training and experience in evaluating individuals with incapacities of the type alleged by the petitioner, which establishes the nature and extent of the alleged incapacities and disabilities and the person's mental, emotional and physical condition, adaptive behavior and social skills.

Additionally, pursuant to 20 Pa.C.S. §5512.1, in determining whether an individual is incapacitated, the Court must consider and make specific findings of fact concerning the following factors:

> (1) The nature of any condition or disability which impairs the individual's capacity to make and communicate decisions.
>
> (2) The extent of the individual's capacity to make and communicate decisions.
>
> (3) The need for guardianship services, if any, in light of such factors as the availability of family, friends and other supports to assist the individual in making decisions and in light of the existence, if any, of advance directives such as durable powers of attorney or trusts.
>
> (4) The type of guardian, limited or plenary, of the person or estate needed based on the nature of any condition or disability and the capacity to make and communicate decisions.
>
> (5) The duration of the guardianship.
>
> (6) The court shall prefer limited guardianship.

Once a Court has adjudicated an individual incapacitated, the Court must then determine who should be appointed as guardian. In selecting a guardian, the Pennsylvania Legislature provided the Courts with the following guidance, pursuant 20 Pa.C.S. §5511(f):

> The court may appoint as guardian any qualified individual, a corporate fiduciary, a nonprofit corporation, a guardianship support agency under Subchapter F (relating to guardianship support) or a county agency. In the case of residents of State facilities, the court may also appoint, only as guardian of the estate, the guardian office at the appropriate State facility. The court shall not appoint a person or entity providing residential services for a fee to the incapacitated person or any other person whose interests conflict with those of the incapacitated person except where it is clearly demonstrated that no guardianship support agency or other alternative exists. Any family relationship to such individual shall not, by itself, be considered as an interest adverse to the alleged incapacitated person. If appropriate, the court shall give preference to a nominee of the incapacitated person. (emphasis added).

See also, In Re: Estate of Rosengarten, 871 A.2d 1249, 1256 (Pa. Super. Ct. 2005). Furthermore, the Court must consider all of the evidence presented, as well as the preference of the incapacitated person. *Estate of Haertsch,* 649 A.2d 719,720 (Pa. Super. Ct. 1994). Finally, "the selection of a guardian for a person adjudicated incapacitated lies within the discretion of the trial court whose decision will not be reversed absent an abuse of discretion." *In re Coulter's Estate,* 178 A.2d 742 (Pa. 1962).

In the instant matter, Dr. Ishwer Lal Bharwani provided credible, live, expert testimony, to a reasonable degree of medical and scientific certainty, concerning the nature and extent of the S.G.'s incapacities and disabilities, as well as his mental, emotional and physical condition, adaptive behavior, and social skills, pursuant to 20 Pa.C.S. §5518. Dr. Bharwani has been in practice for nine years, and he specializes in geriatrics and internal medicine. (N.T. 1/31/06 p.27). Dr. Bharwani currently works with the Erie Center on Health and Aging, and S.G. has been a patient of Dr. Bharwani since December of 2002. (N.T. 1/31/06 p.27). In diagnosing S.G., Dr. Bharwani initially conducted an organic evaluation, and determined that Alzheimer's disease and dementia, not other organic factors, were the source of S.G.'s incapacity related issues. (N.T. 1/31/06 pp.27, 38-38). Dr. Bharwani also diagnosed S.G. with several other medical conditions, including high blood pressure, congestive heart failure, high cholesterol, blocked carotids, diabetes, an enlarged prostate, and kidneys functioning at an eighty-four percent level. (N.T. 1/31/06 p.28).

In December of 2002, Dr. Bharwani administered the mini mental examination in order to assess S.G.'s dementia. (N.T. 1/31/06 p.28). At that time, S.G. scored twenty-four points out of a potential thirty. (N.T. 1/31/06

pp.28-29). Dr. Bharwani also noted that S.G. was already taking Aricept to address his dementia-related symptoms at the time that this mini mental examination was administered. (N.T. 1/31/06 p.29). Subsequently, at S.G.'s most recent June 7, 2005 appointment, Dr. Bharwani administered another mini mental examination. (N.T. 1/31/06 p.29). The results of this examination revealed that S.G.'s dementia had worsened, as S.G. only scored twenty-two points out of a potential thirty. (N.T. 1/31/06 p.29). A score of twenty-two indicates that S.G. suffers from mild dementia. (N.T. 1/31/06 p.29). Dr. Bharwani stated that Aricept, the dementia medication that is prescribed to S.G., is designed to prevent dementia from deteriorating at a faster rate. (N.T. 1/31/06 p.29). Aricept does not improve the symptoms of dementia; it merely helps to prevent those symptoms from becoming worse. (N.T. 1/31/06 p.29). Dr. Bharwani mentioned that a stronger dementia medication than Aricept is available, called Namenda, but Namenda normally is prescribed only when an individual scores eighteen points or fewer on the mini mental examination. (N.T. 1/31/06 p.37). This Lower Court notes that while S.G. was living in Pittsburgh with Appellant 1, a Pittsburgh physician who evaluated S.G. did, in fact, prescribe Namenda for S.G. (N.T. 1/31/06 p.117).

Moreover, Dr. Bharwani stated that S.G. has suffered from a gradual deterioration over the past few years. (N.T. 1/31/06 p.33). Dementia involves a downward course that does not improve, and S.G. is showing signs of mental deterioration. (N.T. 1/31/06 p.38). S.G. is no longer capable of remembering simple information after a very short period of time has elapsed. (N.T. 1/31/06 p.30). S.G. is no longer capable of handling his financial affairs and meeting the essential requirements of his life. (N.T. 1/31/06 p.30). Moreover, Dr. Bharwani stated that it was in the best interests of S.G. to appoint a guardian to assist S.G. in conducting the activities of daily living. (N.T. 1/31/06 pp.30, 35-36). Dr. Bharwani stated that provided somebody was in place to care for S.G., S.G. would be safe. (N.T. 1/31/06 pp.36, 38). Dr. Bharwani also noted his observation that P.G. accompanied S.G. to all of his appointments with Dr. Bharwani. (N.T. 1/31/06 p.37).

Furthermore, Joan Klein, a licensed social worker and a friend and next-door neighbor of S.G. and P.G., provided credible testimony concerning S.G.'s mental capacity. Ms. Klein stated that she interacted with S.G. and P.G. on a regular basis, and engaged in informal conversations with them nearly every day. (N.T. 1/31/06 pp.6-7, 14). Ms. Klein stated that when she spoke with S.G., his responses were always delayed, and S.G. always hesitated before responding. (N.T. 1/31/06 pp.7-8). Despite their frequent contact, S.G. had difficulty remembering who Ms. Klein was, and S.G. also had difficulty remembering Kaitlyn, Ms. Klein's six-year-old granddaughter. (N.T. 1/31/06 pp.7-8). Therefore, Ms. Klein and Kaitlyn usually had to reintroduce themselves to S.G. when they saw him. (N.T. 1/31/06 p.8). Ms. Klein identified that S.G. had difficulty thinking of and

recalling names and words during their interactions. (N.T. 1/31/06 p.8). Ms. Klein also stated that she has never seen S.G. initiate and complete a task by himself. (N.T. 1/31/06 p.8). S.G. has to be guided through even simple tasks, such as tossing a ball or planting a shrub. (N.T. 1/31/06 pp.8-9). Ms. Klein indicated that she believed S.G. would be unable to care for himself and keep himself safe without close supervision, like that provided by P.G. (N.T. 1/31/06 p. 1).

P.G. also provided credible testimony concerning S.G.'s mental capacity. P.G. stated that approximately three years ago, she began to notice changes in S.G.'s mental state. (N.T. 1/31/06 p.42). S.G. began forgetting things and S.G. had difficulty managing his checkbook, where he did not have these problems previously. (N.T. 1/31/06 p.42). Furthermore, on one occasion, S.G. became lost on his way to his barbershop, and was missing for two hours. (N.T. 1/31/06 p.42). Based on these concerns, P.G. decided to seek a medical evaluation for S.G. with a specialist in geriatrics, and, therefore, P.G. began taking S.G. to see Dr. Bharwani. (N.T. l/31/06 pp.42-43).

P.G. credibly testified that S.G. is no longer capable of handling his finances and making responsible financial decisions. Therefore, P.G. handles all of the finances for the family, but informs S.G. of her financial decisions and tries to make S.G. feel that he is a part of the financial decision-making. P.G. cooks for S.G. and completes most of the household care; however, P.G. tries to involve S.G. in household upkeep by assigning S.G. simple tasks to complete. P.G. also stated that S.G. requires guidance in dressing himself and in personal hygiene. P.G. also administers S.G.'s medication, and carefully supervises S.G. while he takes his medication in-order to ensure S.G. does not miss doses and does not take it improperly.

Additionally, S.G. and P.G.'s close friends, including B.R., W.W., and J.W., provided credible testimony concerning S.G.'s mental capacity. Both B.R. and W.W. credibly testified that S.G.'s mental capacity has affected his ability to golf. (N.T. 1/31/06 p.92); (N.T. 1/31/06 p.96). S.G. hits his ball in the wrong direction and has difficulty following the course. (N.T. 1/31/06 p.92); (N.T. 1/31/06 p.96). S.G.'s mental capacity has also affected his ability to play pool. (N.T. 1/31/06 p.92). S.G. sometimes forgets who his pool partner is and which balls are his. (N.T. 1/31/06 p.92). S.G. is forgetful and has difficulty finding his car in a parking lot. (N.T. 1/31/06 p.97). S.G.'s conversational skills have also deteriorated, and S.G. has trouble following topics of conversation. (N.T. 1/31/06 p.98). S.G. responds to questions but does not generate any conversation. (N.T. 1/31/06 p.101). Most conversations with S.G. concern events that happened years ago, and not recently. (N.T. 1/31/06 p.94); (N.T. 1/31/06 p.97); (N.T. 1/31/06 p.101).

Finally, S.G.'s confused, delusional testimony provided evidence of his mental capacity. S.G. stated that he initially went to Pittsburgh because his "marital situation ha[d] come to the point [he] couldn't take it anymore." (N.T. 1/31/06 p.152). S.G. explained, "my wife had made some parties and

so forth where I'd say - let's say I felt they were not parties - they were situations where sex was involved and so forth." (N.T. 1/31/06 p.152). S.G. confusedly indicated that P.G. had sex parties and "family" was involved. (N.T. 1/31/06 p.152). S.G. went on to say, "drinking and - heavy drinking and probably sex, yes. I happened to find some sex devices...condoms and things like that littering the house." (N.T. 1/31/06 pp.152-153). S.G. stated that he believed P.G. was having an extramarital affair with "more than one person, surely." (N.T. 1/31/06 p.154). S.G. stated that P.G. had urged him to go to Boston with Appellant 1, apparently so P.G. could engage in "sex parties." (N.T. 1/31/06 p.154). S.G. also stated,

> [P.G.] urged me to go to Boston. I really didn't want to go because I had been to Boston, and I wasn't impressed with the city. But I was going to go, but the airport closed, and there was no air traffic. And I come back to the house, and I found a situation that was very - it was enough that I thought I've got to get out of this...I found a group of people. Walked in the house, it was - that was fixed up like a place of - well, let's say cat house for an expression...My spouse was there and a lot of men.. .I'm sure I had seem some. But when I had - when I came back, they all ran like a bunch of rats. (N.T. 1/31/06 p.154-155).

The undersigned judge asked S.G. whether he called the police regarding this incident, and S.G. replied, "I wouldn't call the police in that location...because they probably were involved." (N.T. 1/31/06 p.155). Subsequently, the undersigned judge asked when this incident occurred, and S.G. stated it happened "a long time ago." (N.T. 1/31/06 p.157). The undersigned judge reminded S.G. that he had recently visited Boston, and S.G. acknowledged that he had visited Boston recently, and he hurt his foot after he tripped on a curb. (N.T. 1/31/06 p.157). S.G. later stated that the "sex parties" did not happen a very long time ago. (N.T. 1/31/06 p.162).

Subsequently, Attorney Steadman, S.G.'s attorney, asked S.G. whether he understood why he was in Court that day. (N.T. 1/31/06 p.158). This Lower Court notes that this question was posed after S.G. had spent an entire afternoon in Court hearing testimony concerning his capacity and the necessity of a guardian. S.G. responded, "I assume to come to some kind of resolution with this marriage." (N.T. 1/31/06 p.159). S.G. then indicated that he believed he was in divorce court. (N.T. 1/31/06 p.159). In conclusion, S.G. stated that his preference was to live with one of his daughters, and not with P.G. (N.T. 1/31/06 p.159).

Moreover, in addition to providing delusional, garbled testimony concerning his incredible belief that P.G. was having extramarital affairs, S.G. also did not even understand why he was in court on January 31, 2006, after he had listened to several hours of testimony concerning his

incapacity and concerning the appointment of a guardian. S.G. was not able to recall the general nature of the testimony that had been provided during the course of an entire afternoon. S.G. was so confused and so deeply involved in his delusion that P.G. was having extramarital affairs, that he was unable to provide logical, rational testimony to this Lower Court, relevant to the issues before this Lower Court.

Accordingly, the evidence presented at the January 31, 2006 hearing establishes that S.G. suffers from Alzheimer's disease and dementia. S.G. is no longer capable of handling his financial affairs and is no longer capable of appointing a responsible person to handle his financial affairs for him. S.G.'s memory is poor and S.G. is incapable of meeting the essential requirements of his life. Dementia and Alzheimer's disease has caused S.G. to be incapable of making responsible decisions, and communicating those decisions effectively. Accordingly, this Lower Court properly determined that S.G. is an incapacitated person, within the meaning of 20 Pa.C.S. §5501, and S.G. is in need of a plenary guardian.

Upon finding that S.G. is an incapacitated person and is in need of a guardian, this Lower Court considered the matter of who should be appointed as his guardian. The credible evidence presented at the January 31, 2006 hearing establishes that S.G. and P.G. have a loving, nurturing relationship. P.G. tries to keep S.G. active and involved in activities that he was interested in prior to the onset of his mental incapacity. In 2005, S.G. and P.G. golfed three to four times per week at the Lawrence Park Golf Club when the weather was nice. (N.T. 1/31/06 p.44). P.G. stated that she has been a member of the Golf Club for approximately eight years, and S.G. has been a member of the Golf Club for approximately fifty years. (N.T. 1/31/06 p.44). P.G. stated that neither she nor S.G. is a great golfer, but they have a lot of fun golfing. (N.T. 1/31/06 p.45). P.G. has read that people with dementia should continue engaging in activities that they enjoyed before the onset of dementia, which is part of the reason why she and S.G. continue golfing together on a regular basis. (N.T. 1/31/06 p.45). P.G. also stated that golfing provides good exercise for S.G. (N.T. 1/31/06 p.45). Furthermore, in the wintertime, S.G. and P.G. frequently go to a Super Wal-Mart store to walk, shop, and get exercise. (N.T. 1/31/06 p.69). S.G. also enjoys playing pool with his friends, and playing games on his computer. (N.T. 1/31/06 pp.62, 68).

Furthermore, P.G. has experience caring for people with dementia. (N.T. 1/31/06 p.45). Specifically, P.G. was a caregiver for her mother over a period of six years when her mother was suffering from dementia, and P.G. also acted as Power of Attorney for her mother. (N.T. l/31/06 p.45). Additionally, P.G. was a caregiver for her aunt over a period of two years when her aunt was suffering from dementia. (N.T. 1/31/06 p.45). P.G. has also developed techniques for dealing with S.G. when he exhibits symptoms of dementia. (N.T. 1/31/06 p.52). When P.G. notices that S.G. is

becoming unnecessarily upset and exhibiting dementia related symptoms, P.G. asks him to do something or asks him to help her with something, and S.G. forgets what was making him feel upset. (N.T. 1/31/06 p.53). P.G. tries to prevent S.G. from dwelling on thoughts that are caused by his illness. (N.T. 1/31/06 p.53).

Additionally, P.G. truly has been S.G.'s caregiver in recent years. P.G. involves S.G. in household care and cleanup by assigning to S.G. tasks to complete. (N.T. 1/31/06 p.61). S.G. helps P.G. clean out the garage and shovel the steps. (N.T. 1/31/06 p.61). S.G. does not perform any cooking, even though P.G. stated that S.G. used be an excellent cook. (N.T. 1/31/06 p.61). P.G. stated that S.G. has forgotten how to cook since the onset of his illness. (N.T. l/31/06 p.61).

P.G. also provides S.G. with guidance in dressing himself and in personal hygiene. (N.T. 1/31/06 p.48). P.G. sometimes has to politely remind S.G. to take a shower. (N.T. 1/31/06 p. 49). Furthermore, sometimes P.G. has to remind S.G. that he has already showered for the day, and it is unnecessary to take another shower. (N.T. 1/31/06 pp.48-49). P.G. also carefully supervises S.G. while he takes his medication in order to ensure S.G. does not miss doses and does not take it improperly. (N.T. 1/31/06 p.61). P.G., moreover, has been providing quality care for S.G. since the onset of his Alzheimer's disease and dementia.

P.G. also actively encourages S.G. to spend time with his family. In the fall of 2005, S.G. made a trip to Boston with his daughter, Appellant 1, to see his granddaughter. (N.T. 1/31/06 pp.49, 121). P.G. consented to S.G. making this trip, and encouraged S.G. to make this trip. (N.T. 1/31/06 p.49). Furthermore, S.G. and P.G. went out to dinner together and went out with their friends on a frequent basis. (N.T. 1/31/06 p.70). S.G. is able to carry on light conversation with P.G. and other people. (N.T. l/31/06 p.68).

Furthermore, since the onset of S.G.'s dementia and Alzheimer's disease, P.G. has handled all of the banking and has made all of the financial decisions on behalf of S.G. (N.T. 1/31/06 pp.46, 59). Nevertheless, P.G. discusses all financial decisions with S.G. (N.T. 1/31/06 p.59). P.G. writes most of the necessary checks; however, P.G. sometimes has S.G. write checks as well, in order to make S.G. feel more involved in the family's finances. (N.T. 1/31/06 pp.46-47). P.G. stated that sometimes S.G. needs to rewrite the checks because he writes down the wrong dollar amount or makes some other error. (N.T. 1/31/06 p.47). P.G. always makes certain that the checks S.G. writes are correct. (N.T. 1/31/06 p.47). P.G. also assists S.G. in making telephone calls, since he is unable to make a call on his own. (N.T. 1/31/06 p.51).

Additionally, despite the serious financial upheaval P.G. experienced while S.G. was living with Appellant 1 in Pittsburgh, P.G. still ordered the necessary prescription medication for S.G., and sent it to Appellant 1 to administer to S.G., and P.G. sent an additional $300.00 to Appellant

1 for S.G. near the end of December of 2005. (N.T. 1/31/06 pp.60, 64, 81); *See also*, Checking account XXXXXX6862, showing a withdrawal of $300.00 on December 23, 2005, with the notation "for Appellant 1." All of the rest of S.G.'s money from his pension and Social Security was directly deposited into his checking account, which pays all of the bills that automatically debit each month. (N.T. 1/31/06 p.82). In December of 2005, P.G. ordered Glyburide, to regulate blood sugar, Lipitor, for cholesterol, Aricept, for dementia, Lasix, for ankle swelling, and Norvasc, Nadoled, and Quinapril for heart disease and high blood pressure. (N.T. 1/31/06 pp.60-61). In January, however, P.G. placed an order for S.G.'s prescription medication, and P.G. discovered that two new prescriptions had been prescribed to S.G. (N.T. 1/31/06 p.65). Specifically, while S.G. had been living in Pittsburgh with Appellant 1, he was prescribed Lexapro, an antidepressant, and Namenda, a dementia drug that is prescribed for patients with moderate to advanced-stage Alzheimer's disease. (N.T. 1/31/06 p.65). As previously set forth, Dr. Bharwani credibly testified that Namenda is typically prescribed for patients that score eighteen points or fewer on the mini mental examination. (N.T. 1/31/06 p.65).

Contrary to the flimsy allegations of the Appellants, S.G. and P.G.'s relationship is not hostile. Specifically, Appellant 1 testified that P.G. "berat[ed]" S.G. by telling him, "you're dribbling, you need a hair dryer," after he urinated on his pants, and Appellant 2 testified that P.G. has told S.G. "you're dribbling, oh, you need a bib." (N.T. 1/31/06 pp.122, 140). These limited instances described by Appellant 1 and Appellant 2 do not describe a troubled, hostile marriage. Informing S.G. that he needs to clean up because he is "dribbling" constitutes caring, not hostility. Furthermore, this Lower Court recognizes the difficulty P.G. must experience on a daily basis acting as sole caregiver to her husband, who is gradually losing his mental functioning.

Moreover, with regard to the quality of the relationship between S.G. and P.G., this Lower Court found credible the testimony of Ms. Klein, S.G. and P.G.'s friend and neighbor who interacts with S.G. and P.G. on a much more frequent basis than Appellant 1 and Appellant 2 interact with S.G. and P.G. Ms. Klein stated that S.G. and P.G. spend most of their time together and enjoy participating in the same activities together. (N.T. 1/31/06 pp.11-12). Ms. Klein was very impressed with how well P.G. cared for S.G., how well P.G. supervised S.G., and how well P.G. anticipated S.G.'s needs. (N.T. 1/31/06 p.12). P.G. is very calm and patient with S.G., and P.G. does not demonstrate anger or hostility toward S.G. (N.T. 1/31/06 p.12). P.G. carefully supervises S.G. so that he does not become involved in any potentially dangerous situation. (N.T. 1/31/06 p.15). Ms. Klein stated that P.G.'s devotion to S.G. was very sincere, and S.G. and P.G. did not exhibit any signs of marital discord. (N.T. 1/31/06 pp.12-13). This Lower Court also found credible the testimony of S.G. and P.G.'s friends, who

live in Erie and spend more time with S.G. and P.G. than do Appellant 1 and Appellant 2. B.R., W.W., and J.W. stated that S.G. and P.G. are like "two little love bugs," they have a good relationship, and they are very caring and respectful of each other. (N.T. 1/31/06 pp.94, 98,101-102).

Furthermore, P.G.'s interests do not conflict with those of S.G. S.G. and P.G. have been married for over twenty years and they have built a life together. S.G. and P.G. have been enjoying their retirement and spend time together golfing, caring for their home, and attending social events with friends. P.G.'s financial and personal goals are the same as those of S.G. P.G. never attempted to unilaterally withdraw any joint money before December of 2005, when she became afraid because S.G., who was suffering from dementia, withdrew $110,000.00 from several of their joint accounts. This Lower Court found that P.G.'s concern and reaction in December of 2005 was reasonable. P.G. took steps to protect the money she and S.G. had accumulated because she feared that this money would be squandered or stolen otherwise. P.G. accurately believed S.G.'s decision-making ability was clouded by his Alzheimer's disease and dementia, and P.G. understandably worried that S.G.'s daughters were not behaving responsibly enough with regard to S.G. and his money, which they were not.

Appellant 1 drove S.G. to consult with an attorney when S.G. informed her he wanted a divorce from P.G. Undoubtedly, S.G.'s desire for a divorce was premised on his delusional belief that his loving wife was engaging in "sex parties" with men, including the local police. Furthermore, Appellant 1 drove S.G. to the bank, facilitating his delusional need to withdraw a large sum of money from several of S.G. and P.G.'s accounts. Appellant 1 even permitted S.G., an Alzheimer's patient with dementia, to keep $4,500.00 in cash on his person. P.G.'s concern for the money that she and S.G. had earned was understandable, and P.G.'s reaction, of creating a temporary shelter for their money by placing it in accounts in her name only, was entirely justifiable.

Furthermore, P.G. stated that once the instant case was resolved, she intended to return all of the money that she placed in accounts in her name for the purpose of protecting it, to the joint checking accounts, joint money market accounts, or GE stock, where the money originally belonged prior to P.G. and S.G.'s withdrawals in December of 2005. (N.T. 1/31/06 pp.57, 79). P.G., however, was not comfortable returning the money into accounts bearing S.G.'s name until this case was resolved, because of S.G.'s recent withdrawal of a large sum of money from joint accounts. (N.T. 1/31/06 p.78).

Additionally, before S.G. developed serious Alzheimer's disease and dementia, on January 4, 2002, S.G. executed a Power of Attorney and a living will, appointing P.G. as his agent. *See Petitioner's Exhibit 1*. Before S.G. became ill with dementia, he provided P.G. with the authority to

make decisions on his behalf in the event that it ever became necessary. P.G. was legally permitted to take steps to protect the money that belonged to S.G. and her, and, in fact, P.G. behaved as a responsible Power of Attorney by doing so. P.G. is not a designing person, and P.G. has never mistreated S.G., mismanaged S.G.'s money, or abused the trust S.G. placed in her. P.G., moreover, acted consistently with the responsibilities imposed on her as Power of Attorney, by protecting the money that she and S.G. had accumulated, and P.G. did not act in an adverse manner.

P.G. also recognizes that S.G. has dementia and has Alzheimer's disease, and P.G. is proactive about seeking treatment for S.G., and P.G. is realistic about S.G.'s abilities and S.G.'s future. P.G. made an appointment with Dr. Bharwani, who specializes in gerontology, for S.G. immediately after she noticed signs of his mental capacity waning. P.G. takes S.G. to Dr. Bharwani on a regular basis. P.G. understands the importance of giving S.G. his medication, and P.G. understands how to care for people who suffer from dementia and Alzheimer's disease.

P.G. is also prepared for the future possibility that S.G.'s mental capacity may decline to the point where she cannot safely care for him. At the January 31, 2006 hearing, P.G. stated that she is happy to care for S.G. in her home, unless there comes a time when his dementia escalates to the point that he becomes physically violent or he begins to wander away. (N.T. 1/31/06 pp.70-71). P.G. has, however, remained realistic about the possibility that S.G. may, at some point, have to live in assisted living or a nursing home. (N.T. 1/31/06 p.71). P.G. stated that people close to her, including her own mother, who have lived at the Regency at South Shore, which is an assisted living facility, and P.G. would consider placing S.G. at this facility. (N.T. 1/31/06 p.71). Furthermore, P.G. stated that Saint Mary's nursing home has a high-quality Alzheimer's ward that is designed in a circular shape so that patients can walk and wander without becoming lost and without feeling trapped or cornered. (N.T. 1/31/06 p.71). P.G. stated that the nurses who work in St. Mary's Alzheimer's ward are required to have specialized dementia education, and they are "fantastic" with the patients. (N.T. 1/31/06 p. 71). Both P.G.'s mother and aunt were patients in St. Mary's Alzheimer's ward, and P.G. indicated that she would consider placing S.G. at this nursing home, in the event that it became necessary. (N.T. 1/31/06 p.71). Moreover, P.G. has thoroughly and intelligently considered assisted living and nursing care options that are available, in the event S.G. requires skilled care. In contrast, Appellant 1 and Appellant 2 do not believe that S.G. is an incapacitated person. Appellant 1 and Appellant 2 maintain the immature viewpoint that their father is mentally capable, their father can care for himself, and their father is not in need of a guardian. It would be dangerous and irresponsible for this Lower Court to appoint Appellant 1 or Appellant 2 as guardian, where they do not believe S.G. needs a guardian.

This Lower Court notes that contrary to the Appellants' assertion in their Pa. R.A.P. 1925(b) Statement against P.G., P.G. did not have an interest adverse to that of S.G. since she was not financially dependent upon S.G. The Inventory of S.G. and P.G.'s assets, prepared and signed by P.G. on January 31, 2006, reveals that P.G. held plenty of assets either jointly or solely in her own name. *See Petitioner's Exhibit* 2, *Inventory.* Specifically, S.G. and P.G. own their condominium as tenants by the entirety, which was valued at $120,000.00. *Id.* Furthermore, S.G. and P.G. own three checking accounts and one money market account with the following four balances: (1) $11,957.08; (2) $5.47; (3) $10,491.97; and (4) $161,001.68. *Id.* In total, S.G. and P.G. own checking accounts totaling $183,456.20. Therefore, S.G. and P.G. own a total of $303,456.20 in joint assets. *Id.* In addition, P.G. also receives a monthly Social Security check and a PNC pension, totaling $547.28 per month. *Id.* Moreover, P.G. certainly is not "dependent" upon S.G.'s financial support, contrary to the Appellants' assertion in their Pa. R.A.P. 1925(b) Statement.

Furthermore, contrary to the Appellants' indication in their Pa. R.A.P. 1925(b) Statement, P.G.'s decision to utilize her Power of Attorney to sell 2,000 shares of GE stock, after S.G. had withdrawn over one hundred thousand dollars from P.G. and S.G.'s joint accounts, was not inappropriate. P.G. never expected that mere days after S.G. left for Pittsburgh, he would withdraw over one hundred thousand dollars from their joint accounts. The joint account that automatically makes debits to pay for items such as health insurance, golf course dues, and condo association fees, had a balance of $5.49, much less than necessary to handle these debits. (N.T. 1/31/06 p.58). As set forth above, P.G.'s decision to sell 2,000 was based entirely on her fear for the security of S.G.'s and her assets. P.G. never would have sold this GE stock had S.G. not withdrawn $110,000.00 from their joint accounts. P.G. was trying to protect the assets she had accumulated with S.G. during their marriage. P.G. is not a designing person. P.G. is a loving wife who has been dutifully caring for her husband while he loses his coherence and lucidity to dementia. No evidence was offered that P.G. ever made a serious financial decision without obtaining S.G.'s input prior to the time she sold the GE stock in December of 2005. In fact, P.G. credibly stated that in early December of 2005, S.G. asked P.G. transfer his Smith Barney account, worth approximately $82,000.00, into her name solely. Although P.G. was legally authorized to complete this transaction, she did not, in fact, complete it because P.G. knew that this request was uncharacteristic of S.G., and P.G. believed he would not have wanted this transfer to occur if he had been fully capable of responsible decision-making. Moreover, in selling 2,000 shares of GE stock, P.G. acted reasonably and responsibly in protecting the funds that belonged to S.G. and herself, in the best interests of S.G.

Additionally, contrary to the Appellants' assertion in their Pa.R.A.P.

1925(b) Statement, P.G. made reasonable efforts to provide for S.G. while he was living in Pittsburgh. This Lower Court found that Appellant 1 prevented P.G. from speaking with S.G., and Appellant 1 refused to communicate with P.G. consistently. In fact, Appellant 1 testified that it caused a significant amount of "turmoil and agitation in the home" when P.G. called, and Appellant 1 also testified that she felt P.G.'s phone calls were "combative and threatening." (N.T. 1/31/06 p.109). Clearly, Appellant 1 did not appreciate P.G.'s telephone calls to her home where S.G. was residing. Appellant 1 refused to speak with P.G. on several occasions, and told P.G. to call Appellant 1's attorney instead. Furthermore, this Lower Court found reasonable P.G.'s deduction that Appellant 1 would not welcome P.G. into her home even if P.G. made the trip to Pittsburgh. This Lower Court also found reasonable P.G.'s indicated discomfort with driving herself to Pittsburgh. P.G. is seventy-one years old and P.G. stated that she drives locally in Erie, and she does not know how to get to or around Pittsburgh. There was never any indication on the record that Appellant 1 offered to pick up P.G. and take her to Pittsburgh to see S.G. Furthermore, Appellant 1 prevented S.G. from returning to Erie in a timely manner by scheduling additional doctor's appointments for S.G. in Pittsburgh after the January 10, 2006 appointment. Moreover, despite P.G.'s attempts to contact and maintain communication with S.G., Appellant 1 did not allow this communication to occur.

In addition, despite the serious financial upheaval P.G. experienced while S.G. was living with Appellant 1 in Pittsburgh, P.G. still ordered the necessary prescription medication for S.G., and sent it to Appellant 1 to administer to S.G., and P.G. sent an additional $300.00 to Appellant 1 for S.G. near the end of December of 2005. (N.T. 1/31/06 pp.60, 64, 81); *See also*, Checking account XXXXXX6862, showing a withdrawal of $300.00 on December 23, 2005, with the notation "for Appellant 1." All of the rest of S.G.'s money from his pension and Social Security was directly deposited into his checking account, which pays all of the bills that automatically debit each month. (N.T. 1/31/06 p.82). P.G. ordered, paid for, and sent to Appellant 1 all of S.G.'s medication in pillboxes with each box containing one day's worth of medication, including Glyburide, to regulate blood sugar, Lipitor, for cholesterol, Aricept, for dementia, Lasix, for ankle swelling, and Norvasc, Nadoled, and Quinapril for heart disease and high blood pressure. (N.T. 1/31/06 pp.60-61). P.G. also purchased and sent to Appellant 1 medication that had been prescribed to S.G. by physicians in Pittsburgh, including Lexapro, an antidepressant, and Namenda, a prescription medication for individuals in the moderate to advanced stages of Alzheimer's disease. (N.T. 1/31/06 p.65). In fact, Appellant 1 could not identify all of the medication taken by S.G., and Appellant 1 did not know which medication S.G. took for each illness. Therefore, when S.G. was visiting Pittsburgh, it was necessary for P.G.

to send all of S.G.'s medication to Appellant 1 in pillboxes with each box containing one day's worth of medication. (N.T. l/31/06 pp.132-133). Furthermore, P.G. telephoned Appellant 1 following S.G.'s January 10, 2006 evaluation in Pittsburgh, to discover how the evaluation went, and to discover when Appellant 1 would be returning her husband to Erie. P.G. also made certain that S.G. had money when he left for Pittsburgh, in addition to the $300.00 P.G. sent to S.G. in Pittsburgh. The evidence of record demonstrates that P.G. missed S.G. very much while he was visiting with Appellant 1 in Pittsburgh, and P.G. wanted S.G. to return to Erie as soon as possible. Based on the foregoing, this Lower Court did not abuse its discretion in appointing P.G. as plenary guardian over S.G., and, therefore, the Appellants' first issue on appeal lacks merit.

This opinion will be continued in the next issue of the Erie County Legal Journal - August 11, 2006, Vol. 89 No. 32

IN THE MATTER OF THE ESTATE OF S.G.,
An alleged incapacitated person

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION NO. 412-2005

APPEARANCES: Joseph P. Martone, Esq., on behalf of the daughters of S.G., Appellant 1 and Appellant 2
James R. Steadman, Esq., on behalf of S.G., Appellee
Charles D. Agresti, Esq., on behalf of P.G., Appellee

OPINION

Domitrovich, J., April 24, 2006

This opinion is continued from last week's edition of the Erie County Legal Journal - August 4, 2006, Vol. 89 No. 31

The Appellants' second issue on appeal is whether this Lower Court abused its discretion in admitting the live expert medical testimony of Ishwer Lal Bharwani, M.D. at the January 31, 2006 hearing. Pursuant to 20 Pa.C.S. 5511(e), a Petition requesting that the Court adjudicate an individual incapacitated and appoint a guardian on behalf of the incapacitated person must contain, among other things, "a description of the functional limitations and physical and mental condition of the alleged incapacitated person." Furthermore, Erie County Orphans' Court Local Rule 14.2.1 states, "The evidence may be in accordance with PEF Code §5518 as provided in the form affidavit provided by the Clerk of the Orphans' Court." It is undisputed that Attorney Martone received Dr. Bharwani' s Affidavit. In addition, this Lower Court notes that contrary to the Appellants' apparent claim in their Pa.R.A.P. 1925(b) Statement, no Pennsylvania Rule of Orphans' Court or Erie County Local Rule of Orphans' Court requires that parties provide one another with notice of intention to call an expert witness, or with information concerning the probable content of an expert's testimony. Furthermore, the record demonstrates that no citation or other directive was issued to the parties, advising them to exchange lists of witnesses within a certain period of time.

In the instant matter, Attorney Agresti properly prepared and filed a Petition, seeking to adjudicate S.G. incapacitated and to appoint P.G. plenary guardian, pursuant to the Pennsylvania and Erie County Local Rules of Orphans' Court. Pursuant to Erie County Local Rule 14.2.1 (c), Attorney Agresti attached as an Exhibit to said Petition, an Affidavit written by Dr. Bharwani, stating that Dr. Bharwani had evaluated S.G., and had

diagnosed S.G. with dementia and Alzheimer's disease. Dr. Bharwani also indicated that S.G.'s ability to receive and evaluate information and to communicate decisions was impaired, and S.G. was unable to manage his financial resources and meet the essential requirements for physical health and safety. Moreover, this Affidavit provided a description of S.G.'s functional limitations and physical and mental condition, pursuant to 20 Pa.C.S. §5511, and also placed Attorney Martone on notice concerning Dr. Bharwani' s evaluation.

On December 15, 2006, this Lower Court granted the emergency relief requested in P.G.'s Petition, and subsequently, a citation was issued to Appellant 1, citing her to appear for a hearing on January 31, 2006 at 1:30 p.m. before the undersigned judge, for the purpose of showing cause why a plenary guardian should not be appointed on behalf of S.G. The record reflects that on December 16, 2005, Attorney Martone accepted service of the December 15, 2005 Order, Affidavit, and the Citation, on behalf of Appellant 1.

Subsequently, in the forty-six days between accepting service of the Order, Affidavit, and Citation, on December 16, 2005 and the January 31, 2006 scheduled trial in this matter, Attorney Martone could have conducted discovery in order to develop his case. Pursuant to Pa. Orph. Ct. R. 3.6 and Pa. Erie Cty. Orph. LR 3.6.1, Attorney Martone could have petitioned this Lower Court for permission to file interrogatories, requesting that Attorney Agresti identify any expert witnesses, such as Dr. Bharwani, he intended to call at the time of the trial, and identify the substance of the facts and opinions to which Dr. Bharwani would testify. *See also, In Re: Hyman*, 811 A.2d 605, 608 (Pa. Super. Ct. 2002), indicating that where a Pennsylvania Rule of Orphans' Court 3.6 and the Local Rules of Orphans' Court are applicable to questions of discovery in incapacity proceedings, the Pennsylvania Civil Rules of Court are not applicable. Furthermore, Attorney Martone could have petitioned this Lower Court to conduct additional discovery aside from interrogatories, including, but not limited to, providing notice of oral or written deposition on Dr. Bharwani. Pa. Orph. Ct. R. 3.6; Pa. Erie Cty. Orph. LR 3.6.1. Attorney Martone also could have petitioned this Lower Court for permission to subpoena Dr. Bharwani's records regarding his evaluation of S.G. Pa. Orph. Ct. R. 3.6; Pa. Erie Cty. Orph. LR 3.6.1. Additionally, Attorney Martone could have requested a continuance of the trial for the purpose of conducting and completing pre-trial discovery, or for the purpose of obtaining the opinion of his own expert, in the event that a continuance had been necessary. However, Attorney Martone decided not to conduct any pre-trial discovery, and decided not to proffer the testimony of his own expert, whether as a matter of trial strategy or otherwise. (N.T. 1/31/06 p.24). Instead, Attorney Martone indicated his desire to move the case forward by filing a Counter-Petition, thereby accelerating the instant case

toward the January 31, 2006 trial. This Lower Court notes that at the time Attorney Martone filed his Counter-Petition, a one-hour hearing had already been scheduled in this matter concerning P.G.'s Petition. When Attorney Martone filed this additional Petition to be heard at the same time as P.G.'s Petition, Attorney Martone neglected to request additional time to hear both Petitions, which was obviously necessary considering the volume of testimony presented by Attorney Martone at the time of the January 31, 2006 hearing.

Furthermore, the record reflects that Attorney Martone was offered the Affidavit and all records prepared by Dr. Bharwani in his evaluation of S.G. First, the Affidavit was served on Attorney Martone, and, therefore, Attorney Martone was placed on notice that Dr. Bharwani had evaluated and diagnosed S.G., and Attorney Martone knew, more specifically, that Dr. Bharwani had diagnosed S.G. with dementia and Alzheimer's disease. Second, the record reflects that prior to trial, Attorney Agresti attempted to serve Attorney Martone with Dr. Bharwani's records concerning his evaluation of S.G. (N.T. 1/31/05 p.25). Attorney Martone, however, refused to accept these records. (N.T. 1/31/05 p.25). Therefore, Attorney Martone was made aware of the existence of Dr. Bharwani's records concerning his evaluation of S.G. that led to the dementia and Alzheimer's diagnoses, which is a critical component involved in disposing of P.G.'s Petition, and Attorney Martone was offered an opportunity to review all relevant medical records. Third, it is uncontested that after Attorney Martone refused to accept Dr. Bharwani's records, Attorney Martone informed Attorney Agresti that he preferred that Dr. Bharwani provide live testimony at the time of the trial, instead of reviewing the doctor's records. (N.T. 1/31/05 p.25). Attorney Martone received exactly what he requested since Attorney Agresti was able to contact Dr. Bharwani at the time of the trial and Dr. Bharwani agreed to provide live testimony. Finally, while providing live testimony, Dr. Bharwani stated that he did not prepare any report with regard to his evaluation of S.G., and Dr. Bharwani further stated that his oral testimony, provided at the time of the trial, constituted his report. (N.T. 1/31/05 p.32). Therefore, Attorney Martone was offered all of the relevant documents pertaining to Dr. Bharwani's evaluation of S.G., and Attorney Martone had ample opportunity to review these documents and prepare to cross-examine Dr. Bharwani, well in advance of the January 31, 2006 hearing. Accordingly, this Lower Court properly overruled all of Attorney Martone's objections to Dr. Bharwani's testimony on the basis of his claim that he did not have notice that Dr. Bharwani would be testifying, and on the basis of his claim that he had not received a physician's report, as these claims are factually inaccurate. Similarly, this Lower Court properly refused to allow Attorney Martone to reserve the right to cross-examine Dr. Bharwani until after he received Dr. Bharwani's records, as he had refused to accept service of any of Dr. Bharwani's records. (N.T. 1/31/06

pp.30-31).

In addition, Attorney Martone was aware that one of the purposes[2] of the January 31, 2006 hearing was to dispose of P.G.'s Petition, by making the following two determinations: whether to adjudicate S.G. incapacitated; and, if so, whether to appoint P.G. as guardian. Attorney Martone was also aware of 20 Pa.C.S. §5518, which states:

> To establish incapacity, the petitioner must present testimony, in person or by deposition from individuals qualified by training and experience in evaluating individuals with incapacities of the type alleged by the petitioner, which establishes the nature and extent of the alleged incapacities and disabilities and the person's mental, emotional and physical condition, adaptive behavior and social skills...

In her Petition, P.G. claimed that S.G.'s incapacity was caused by his dementia and Alzheimer's disease, which Dr. Bharwani diagnosed, as supported by the attached Affidavit. Therefore, Attorney Martone knew that Attorney Agresti would undoubtedly present the expert medical testimony of S.G.'s treating diagnosing physician, Dr. Bharwani, in order to establish the nature of S.G.'s incapacity, pursuant 20 Pa.C.S. §5518. Proving incapacity is a critical, central issue to the instant case, where this Lower Court was asked to dispose of a Petition for Incapacity. Under the relevant Rules and Statutes, this Lower Court could not have adjudicated S.G. incapacitated without considering expert testimony concerning the nature of the specific medical incapacity. This Lower Court recognizes that "the [Pennsylvania] appellate courts have never adopted a rule of evidence which would require the use of expert testimony in all incompetency proceedings without exception," *In re: Estate of Wood*, 533 A.2d 772, 774 (Pa. Super. Ct. 1987). Nevertheless, in the instant case, the testimony of S.G.'s treating, diagnosing physician, who is a medical expert, was necessary. The evidence of record demonstrates that Dr. Bharwani was the only doctor who completed evaluating S.G. for dementia and Alzheimer's disease, and, therefore, he is the only individual who can testify concerning S.G.'s specific incapacity causing diagnoses. Moreover, Attorney Martone certainly was aware of the purpose of and procedures involved in incapacity and guardianship proceedings. Therefore, Attorney Martone was placed on notice, simply though the filing of this Petition and through an understanding of the relevant law, that it would be necessary for Dr. Bharwani to testify at the time of the hearing.

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[2] This Lower Court notes that the other purpose of the January 31, 2006 hearing was to dispose of the Counter-Petition, filed by Attorney Martone on behalf of the Appellants, which Attorney Martone scheduled to be heard at the same time as hearing on P.G.'s Petition.

Moreover, Attorney Martone was provided with all documentation relevant to Dr. Bharwani's evaluation and diagnosis of S.G., Attorney Martone was aware of the nature of incapacity proceedings and the mandates of 20 Pa.C.S. 5518, requiring expert medical testimony to provide evidence of S.G.'s particular incapacity, yet Attorney Martone failed to complete any pre-trial discovery concerning Dr. Bharwani, and accelerated the case toward trial by filing a Counter-Petition. Attorney Martone clearly was on notice that Dr. Bharwani's testimony would be presented at the hearing, having already received an Affidavit, and Attorney Martone could have prepared himself to cross-examine Dr. Bharwani by conducting pre-trial discovery. Therefore, it was not at all prejudicial to the Appellants to permit Dr. Bharwani to testify at the hearing. Furthermore, contrary to the Appellants' apparent assertion in their Pa.R.A.P. 1925(b) Statement, there exists no Pennsylvania Rule of Orphans' Court that obligated Attorney Agresti to provide Attorney Martone with a statement of intent to call Dr. Bharwani or any information concerning Dr. Bharwani. The Appellants have also failed to point to any such rule. Similarly, without requesting a continuance, it was not the obligation of this Lower Court, *sua sponte*, to allow Attorney Martone additional time to prepare his case, where Attorney Martone was on notice that Dr. Bharwani would testify, and where it would have been contrary to the best interests of S.G. to delay this matter.

At no time prior to the hearing or at the time of the hearing did Attorney Martone request a continuance or seek discovery, interrogatories, or a deposition of Dr. Bharwani. Nevertheless, Attorney Martone attempted to delay this case, which would have been contrary to the best interests of S.G. As previously set forth, Attorney Martone scheduled his hearing on his Counter Petition for the same one-hour time slot already allotted for hearing on P.G.'s Petition. Clearly, it would have been impossible for this Lower Court to hear all of the testimony concerning both of these Petitions in only one hour. It appears, therefore, that it was Attorney Martone's strategy to compel this Lower Court to delay this case as early as January 6, 2006, when the Appellants' Counter Petition was filed, by not scheduling enough time for this Lower Court to hear all of the necessary testimony on both Petitions. Nevertheless, at the time of the hearing, the undersigned judge graciously set aside her entire afternoon schedule and stayed into the evening until more than an hour after the courthouse had closed, allowing this case to be heard to conclusion, as scheduled.

Furthermore, at the time of the hearing, in an attempt to delay this matter indefinitely, Attorney Martone objected to Dr. Bharwani providing testimony on the basis that he "[hadn't] been given prior notice a physician [was] testifying." (N.T. 1/31/06 p.25). As previously stated, the nature of incapacity proceedings necessitates the testimony of an expert medical

witness in order to establish the existence of incapacity, pursuant to 20 Pa.C.S. §5518. Furthermore, Attorney Agresti was not obligated under the Rules to notify Attorney Martone a physician was testifying; however, Attorney Agresti did, as required, provide Attorney Martone with Dr. Bharwani's diagnoses by Affidavit, as well as any medical records Attorney Martone wanted to examine. Attorney Martone was placed on notice that Dr. Bharwani would testify at the hearing, Attorney Martone was provided with the information necessary to prepare his case, and Attorney Martone could have conducted pre-trial discovery if he needed more information, but either chose not to do so or failed to do so. Additionally, at the time of the hearing, in attempt to delay the proceedings indefinitely, Attorney Martone refused to cross-examine Dr. Bharwani, and stated that he reserved the right to cross-examine until after he received the records or notes to which Dr. Bharwani referred while providing his testimony. (N.T. 1/31/06 p.30). Attorney Martone, however, waived the right to reserve cross-examination since the record establishes he had notice of Dr. Bharwani's diagnoses by Affidavit and Attorney Agresti attempted to serve Attorney Martone with S.G.'s medical records but Attorney Martone refused to accept it. (N.T. 1/31/06 pp.25, 30-31). Again, Attorney Martone could have utilized this information to prepare his case for the January 31, 2006 trial, and Attorney Martone could have conducted pre-trial discovery in order to develop his case. However, Attorney Martone chose not to do so. Attorney Martone had ample opportunity to prepare his case for the January 31, 2006 trial but failed to do so.

In conclusion, this Lower Court emphasizes that its primary focus at the January 31, 2006 hearing was the best interests of S.G. If this Lower Court had sustained Attorney Martone's objections and had allowed this case to be delayed indefinitely, S.G.'s best interests would not have been served. At the time of the January 31, 2006 hearing, S.G. had been staying with his daughter, Appellant 1, in Pittsburgh for nearly two months. This was not the status quo, as S.G. previously had been living with his wife, P.G., in Erie during their twenty-two year marriage, prior to his visit with Appellant 1. There existed problems regarding Appellant 1's failure to provide proper supervision of S.G.'s finances, and regarding Appellant 1's failure to remain realistic regarding S.G.'s decision-making capacity. Furthermore, before his dementia and Alzheimer's disease advanced, S.G. executed a Power of Attorney and a living will, appointing P.G. as his agent. These documents established S.G.'s desire to have P.G. care for him after he became ill with Alzheimer's disease and dementia, yet P.G. had not had reasonable access to S.G. since early December of 2005. Furthermore, the Appellants were not from Erie and it would have required additional expense to delay the proceedings, to permit Attorney Martone to conduct discovery that he should have conducted prior to the hearing,

and to not hear all of the testimony at the time scheduled to dispose of P.G.'s Petition and the Appellants' Counter-Petition.

Although the Appellants did not raise this issue on appeal, the Court briefly notes that pursuant to Pa.R.E. 614(b), "where the interest of justice so requires, the court may interrogate witnesses, whether called by itself or by a party." *See*, *Panitz v. Behrend*, 632 A.2d 562, 565 (Pa. Super. Ct. 1993), stating that courts retain the discretion to question expert witnesses; *see also*, *Commonwealth v. Johnson*, 459 A.2d 5, 9 (Pa. Super. Ct. 1983), stating, "it remains the right and, at times, the duty of the trial judge to examine witnesses. So long as the trial court examines witnesses for clarification of confusing facts in a brief manner not indicative of bias, no trial error exists."

At the time of the January 31, 2006 hearing in this matter the undersigned judge briefly questioned some of the witnesses concerning facts that were relevant to the matters of whether S.G. should be adjudicated incapacitated and who should be appointed as guardian on his behalf. This Lower Court posed the vast majority of its questions at the conclusion of questioning by the attorneys, and, therefore, the attorneys were provided with the first opportunity to examine the witnesses. Furthermore, Attorney Martone did not object to this Lower Court examining witnesses, nor did he object to any specific question posed by this Lower Court, pursuant to Pa.R.E. 614(c). Therefore, this Lower Court did not err by briefly examining witnesses at the time of the January 31, 2006 hearing.

Moreover, if this Lower Court had sustained Attorney Martone's objections and joined in the delay that Attorney Martone purposefully created, it would have resulted in unreasonable and unnecessary expense, a waste of judicial resources, and potential harm to S.G., who would have remained in Pittsburgh for an indefinite period of time, contrary to the status quo. At the time of the hearing, the undersigned judge noted that justice delayed is justice denied, and, in this case, it would have been a miscarriage of justice to this family for this Lower Court to permit a delay under these circumstances. S.G. deserved permanency in his life, and deserved to have a determination made concerning his mental capacity status and guardianship status at the time that all parties and Attorneys agreed that this determination would be made. This Lower Court disposed of all of the Petitions before it on the date scheduled for trial in this matter, which necessitated including the testimony of Dr. Bharwani, pursuant to 20 Pa.C.S. §5318, in the best interests of S.G. All parties and their attorneys had ample notice of the time of trial and were to be prepared. The Court cannot second-guess any counsel's trial strategy. Therefore, the Appellants' second issue on appeal also lacks merit.

The Appellants' third, related issue, is whether this Lower Court abused its discretion in admitting the testimony of Joanne Klein, a licensed social

worker with substantial experience and specialized knowledge regarding caring for and diagnosing elderly people, who is also a neighbor and friend of S.G., as an expert witness for the limited purpose of describing the evaluation process for diagnosing dementia related illnesses in elderly people. In Pennsylvania, it is well established that the matter of whether an expert is qualified to testify is vested in the discretion of the Court. *Wexler v. Hecht,* 847 A.2d 95, 98 (Pa. Super. Ct. 2004). Furthermore,

> The standard for qualifying an expert witness is a liberal one: the witness need only have a reasonable pretension to specialized knowledge on a subject for which expert testimony is admissible. The witness's expertise may be based on practical, occupational, or other experiential training; it need not have been gained through academic training alone. *Commonwealth v. Doyen,* 848 A.2d 1007, 1014 (Pa. Super. Ct. 2004). (internal citations omitted).

The determination of whether a witness is a qualified expert involves two inquiries:

> When a witness is offered as an expert, the first question the trial court should ask is whether the subject on which the witness will express an opinion is so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layman...If the subject is of this sort, the next question the court should ask is whether the witness has sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth. *Wexler, supra.* (internal citations omitted)

In the instant matter, Joan Klein, a licensed social worker and a friend and next-door neighbor of S.G. and P.G., provided credible testimony to this Lower Court. Initially, Ms. Klein testified regarding her educational and experiential background in social work with elderly people. Ms. Klein earned a master's degree in social work from Case Western University, and is a licensed social worker in the Commonwealth of Pennsylvania. (N.T. 1/31/06 pp.4, 20). Ms. Klein is currently employed as a social worker at a Davita Dialysis Clinic. (N.T. 1/31/06 pp.5, 21). Ms. Klein was previously employed as a social worker at St. Vincent's Health Center and Horizon Health and Metro Health Center, where she provided mental health services for people age fifty-five and older. (N.T. 1/31/06 p.6). Ms. Klein also worked at home health agencies and at local Erie nursing homes as the Director of the Social Work Department. (N.T. 1/31/06 pp.6, 21). Ms. Klein also spent two years working with patients suffering from dementia and serious mental illness in both inpatient and outpatient settings. (N.T. 1/31/06 p.21). Ms. Klein has been employed as

a social worker for several years, and Ms. Klein has consistently worked with people suffering from problems associated with aging. (N.T. 1/31/06 p.6). Moreover, Ms. Klein's employment experience has brought her into contact with people suffering from Alzheimer's disease and dementia, and Ms. Klein has developed expertise in dealing with people with dementia and dementia-related illnesses. (N.T. 1/31/06 p.6).

Accordingly, this Lower Court found that Ms. Klein has a reasonable pretension to specialized knowledge, based on both educational and experiential training, on the subject of elderly persons and the issues faced by the elderly. Furthermore, based upon Ms. Klein's background, this Lower Court determined that Ms. Klein was capable of providing an opinion distinctly related to her area of study and work, beyond that of the average layperson. Finally, this Lower Court determined that Ms. Klein had sufficient knowledge and experience regarding issues related to elderly persons, and Ms. Klein's opinion would be helpful to the Court, as trier of fact, in reaching a decision in this case.

This Lower Court notes that Ms. Klein is a unique witness in the sense that she is a neighbor and friend of S.G., an elderly person with mental capacity issues, and she is also a social worker who has worked with individuals suffering from dementia and has specialized knowledge concerning the care of and diagnosis of mental issues in elderly people. Accordingly, Ms. Klein testified as a layperson during the bulk of her testimony, providing observations and insight concerning her interactions with S.G. and P.G. in her capacity as their neighbor. Subsequently, near the conclusion of Ms. Klein's testimony, the undersigned judge qualified Ms. Klein as an expert witness for the purpose of answering one question: "Based on your training and your qualification, could you answer the question as to the nature and the extent of [S.G.'s] alleged incapacity?" Since Ms. Klein has admittedly never examined S.G., and since Ms. Klein has never reviewed S.G.'s doctor's records, Ms. Klein provided the following general response regarding the way in which she would evaluate any patient who exhibited signs of dementia and/or Alzheimer's disease:

> If S.G. had presented into the emergency room when I was in that capacity, I would have had the ability to access his medical record and review his past history. Certainly the physician would be looking to see if his blood work was off, if he had a simple urinary tract infection, which more times than not present with different behaviors. All those need to be ruled out.
>
> A brain tumor, some other abnormality that could be going on that presents someone as being forgetful or maybe their motor skills had been delayed or they're slowed, that lack of initiation of conversation, response to questions, those kinds of things. Certainly we would rule that out.

> When that comes back and there is nothing there, then that's when you probe deeper. And certainly anyone who has a diagnosis of dementia or it's even a question, there is extensive evaluation that is always done by a psychologist, by the psychiatrist. And all of that information would be gathered, and then the determination would be made. (N.T. 1/31/06 pp.20, 22-23).

Ms. Klein's response was termed in general language and was not specific to S.G. Ms. Klein did not provide any expert testimony concerning S.G.'s specific physical or mental condition, since Ms. Klein had never examined S.G. in a medical setting. Ms. Klein simply provided expert testimony concerning the way in which she would evaluate a patient in S.G.'s situation. Since Ms. Klein had the benefit of seeing S.G. and interacting with S.G. on a regular basis, and since Ms. Klein has specialized knowledge regarding elderly persons, Ms. Klein was capable of formulating and articulating an opinion concerning the medical evaluation process that an individual like S.G. would face. Furthermore, Ms. Klein's response assisted this Lower Court in understanding the steps that a medical practitioner must take in order to ultimately diagnose an individual with dementia or Alzheimer's disease.

In addition, as set forth above, under the Rules of Orphans' Court, it was not the obligation of Attorney Agresti to inform Attorney Martone that Ms. Klein or any other witness, would testify as an expert witness. Furthermore, the record demonstrates that no citation or other directive was issued to the parties, advising them to exchange lists of witnesses within a certain period of time. Therefore, it was the obligation of Attorney Martone to petition this Lower Court to conduct discovery, pursuant to Pa. Orph. Ct. R. 3.6 and Pa. Erie Cty. Orph. LR 3.6.1, in order to learn which witnesses Attorney Agresti planned to call, and in order to prepare his case for trial. Attorney Martone, however, failed to do so. Accordingly, since Ms. Klein was very well qualified to testify as an expert witness concerning the evaluation process for individuals exhibiting symptoms of dementia and Alzheimer's disease, and since Ms. Klein's testimony was helpful to this Lower Court in understanding the importance of ruling out other illnesses and environmental factors prior to diagnosing an individual with dementia or Alzheimer's disease, the Appellants' third issue on appeal also lacks merit.

Appellants' fourth issue on appeal is whether this Lower Court considered the factors set forth in 20 Pa.C.S. §5512.1, where the undersigned judge made specific findings of fact concerning these factors on the record, in the presence of all parties and counsel, at the conclusion of the January 31, 2006 hearing. As previously set forth, pursuant to 20 Pa.C.S. §5512.1, in determining whether an individual is incapacitated, the Court is obligated to consider and make specific findings of fact concerning the following factors:

> (1) The nature of any condition or disability which impairs the individual's capacity to make and communicate decisions.
>
> (2) The extent of the individual's capacity to make and communicate decisions.
>
> (3) The need for guardianship services, if any, in light of such factors as the availability of family, friends and other supports to assist the individual in making decisions and in light of the existence, if any, of advance directives such as durable powers of attorney or trusts.
>
> (4) The type of guardian, limited or plenary, of the person or estate needed based on the nature of any condition or disability and the capacity to make and communicate decisions. . .

Contrary to the Appellants' statement in their Pa. R.A.P. 1925(b) Statement, at the conclusion of the January 31, 2006 hearing, this Lower Court did in fact make specific findings of fact concerning the nature and condition or disability of S.G., as well as the extent of S.G.'s capacity to communicate decisions, in strict compliance with 20 Pa.C.S. §5512.1. Specifically, the undersigned judge stated,

> The court notes for the record that she was fortunate to get Dr. Bharwani on the phone, heard the testimony about the medical and scientific evidence that he testified to a reasonable degree of scientific and medical certainty, that indeed **on the mental status examination, that S.G. had only scored a 22 out of 30, that from there he has shown a gradual deterioration in his mental functioning, and it will only get worse** according to the doctor.
>
> [S.G.] also has - **[S.G.] also has heart failure, high blood pressure, kidney disease and is diabetic. He needs direction to perform daily activities including taking his medication. He cannot remember simple things.** He cannot make good decisions in his best interests...
>
> Because I did take the opportunity to review very carefully the petitions that were filed, the Court finds pursuant to the petition that was filed on behalf of [P.G.], the wife, indeed what she stated in the petition is true and correct, that he is totally unable to manage his financial affairs or his property from the testimony and the court has heard about his physical and mental condition, that indeed pursuant to her petition and her allegations, that **he cannot make and communicate responsible decisions relating thereto including the ability to communicate his need for assistance in these areas.**

The Court further finds because of his impaired mental and physical condition **he lacks capacity to make and communicate responsible decisions concerning his person,** is unable to feed or maintain himself, provide living quarters or to seek needed medical services.

The Court also notes for the record that he is approximately 82 years of age, his domicile is here in this court's jurisdiction in Erie, that indeed **he suffers from dementia, which totally impairs his capacity to receive and evaluate information effectively, and to make and communicate decisions concerning management of his financial affairs and to meet essential requirements for his physical health and safety.** He is totally dependent upon others for assistance in his daily activities. And that was all proven by the testimony, by the expert that testified and by all the information that the court received today.

The Court is also concerned that if she does not find him to be incapacitated and appoint him a guardian, that he could become a victim of designing persons. He's taking out amounts of money from bank accounts, putting them - taking $4,500.00 out in cash, putting resources in his name after going to see an attorney, which he could have had the attorney escrow the amounts. He's taking out all these extreme amounts of money and making them payable to himself without doing any more than that. The court's concerned that indeed he could become a victim of designing persons. **Medical evidence is solid in this case and sound to a reasonable degree of medical certainly.** (emphasis added) (N.T. 1/31/06 pp.169-172).

Furthermore, contrary to the Appellants' assertion in their Pa. R.A.P. 1925(b) statement, this Lower Court did, in fact, consider S.G.'s stated preference to reside with one of his daughters, and this Lower Court heard testimony concerning this preference. Specifically, S.G. stated, "I would want to live with Appellant 1 and - daughter Appellant 1 and her husband or my daughter Appellant 2." Nevertheless, this Lower Court was far more persuaded by S.G.'s clear, written preference to have his wife act as his agent under these circumstances, as set forth in the Power of Attorney and living will executed by S.G. prior to the onset of his dementia and Alzheimer's disease. The testimony presented at the time of the hearing, including the credible expert medical testimony of Dr. Bharwani; the testimony of P.G. that demonstrates her clear understanding of, knowledge of, and compassion for S.G. and his debilitating, degenerative disease; the testimony of Appellant 1 and Appellant 2 that demonstrates their inability and unwillingness to view their father as confused, deteriorating, and easily manipulated and taken advantage of; as well as the garbled, delusional testimony of S.G., demonstrates that S.G. is clearly incapable

of making important decisions in his own best interests. This Lower Court did consider S.G.'s stated preference to reside with his daughters; however, this Lower Court was not persuaded by this preference. Accordingly, as this Lower Court did, in fact, make specific findings of fact concerning the nature of S.G.'s condition and disability, including his inability to communicate and make responsible decisions, and his stated preference to reside with one of his daughters, the Appellants' fourth issue on appeal also lacks merit.

Finally, this Lower Court briefly notes that the Appellants' issue in their Pa. R.A.P. 1925(b) Statement, "the court's decision is arbitrary, capricious and biased" is far too vague for this Lower Court to address, and, therefore, this Lower Court did not address this issue in the instant Pa. R.A.P. 1925(a) Opinion. In Pennsylvania, it is well established:

> When a Court has to guess what issues an appellant is appealing, that is not enough for a meaningful review. When an appellant fails adequately to identify in a concise manner the legal issues sought to be pursued on appeal, the trial court is impeded in its preparation of legal analysis which is pertinent to those issues. In other words, a Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all.

Lineberger v. Wyeth, 2006 Pa. Super. 35, p.17; 2006 Pa. Super. LEXIS 133; *Commonwealth v. Dowling*, 778 A.2d 683, 686-687 (Pa. Super. Ct. 2001) (internal citations omitted).

Accordingly, all of the issues raised by the Appellants on appeal lack merit.

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

COMMONWEALTH OF PENNSYLVANIA

v.

HAROLD BERRY

CRIMINAL PROCEDURE / CONSTITUTIONAL LAW / MOTOR VEHICLE STOP

Section 6308(b) of the Motor Vehicle Code, as amended effective February 1, 2004, changed the standard for a motor vehicle stop from "articulable and reasonable grounds" to "reasonable suspicion." This standard is constitutional in the context of an investigative stop of a vehicle where there is reasonable suspicion the driver is operating the vehicle under the influence.

CRIMINAL PROCEDURE / CONSTITUTIONAL LAW / MOTOR VEHICLE STOP

The standard justifying a motor vehicle stop for violations of the Motor Vehicle Code other than driving under the influence is whether the police have probable cause to believe a violation has been committed. This difference in standards to justify a traffic stop is based upon the purpose of an investigatory stop, which is to obtain additional information regarding the commission of a crime. While there is a need to obtain further information in the situation involving a DUI, an investigative stop will not provide further information with respect to offences such as careless driving, obedience to traffic control devices, and maximum speed limits. Probable cause in these situations requires threshold evidence that the vehicle was in fact being operated in violation of the Pennsylvania Motor Vehicle Code.

CRIMINAL PROCEDURE / SPEEDING / POLICE OFFICER OPINION TESTIMONY

A conviction of speeding in violation of the Motor Vehicle Code cannot be based upon the opinion testimony of a police officer alone. Absent further evidence, a police officer's opinion that a defendant has driven in violation of the posted speed limit cannot suffice to establish probable cause.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 3485 of 2005

Appearances: Christine Fuhrman Konzel, Esq. for the Commonwealth
David G. Ridge, Esq. for the Defendant

OPINION

Bozza, John A., J.

This case comes before the Court on the defendant's Motion for Suppression of Evidence. A hearing was conducted and the Commonwealth called two witnesses to testify regarding the details of the night in question. The testimony of Officer Anthony Chimera and Corporal Smith were similar. The facts may be briefly summarized as follows: On June 4, 2005, Officer Chimera was in front of the Millcreek Township Police Department in his car talking to Corporal Smith who was in another police car. A call

was received from the dispatcher indicating that a citizen had reported following a silver Mercedes Benz that was traveling at a high rate of speed and recklessly on Route 20. The report indicated that there were two male occupants in the vehicle. Very shortly thereafter, the officers could hear the vehicle approaching and then saw the Mercedes at, what each described as "a very high rate of speed".

Both officers had significant experience in traffic enforcement and in estimating the speed of vehicles. Officer Chimera testified that when the vehicle passed him it was going well over the speed limit, which was 40 m.p.h., and he estimated the vehicle going 70 m.p.h. Corporal Smith, who had 14 years of experience and believed he could judge the speed of a vehicle within a couple of miles per hour, testified that he believed the vehicle was proceeding 70 to 80 m.p.h. Officer Chimera attempted to follow the vehicle and after observing the car turn right on Powell Avenue, a short distance from the Millcreek Police Department, he could not see it anymore. He eventually saw the defendant's vehicle in a parking lot on Powell Avenue but proceeded by it and called Corporal Smith, who went to the location, found the Mercedes and approached it after it pulled back into the parking lot of the "Surf N Turf". Thereafter, the defendant was given various field sobriety tests and was ultimately charged with Driving While Under the Influence of Alcohol and violation of 75 Pa.C.S.A. §3714, Careless Driving and §3111, Disregarding Traffic Control Devices.

Although there is no direct testimony concerning the precise reason for the stop, it is apparent that the officers believed that Mr. Berry was driving in excess of the maximum speed limit and driving carelessly. No testimony was elicited concerning the conditions of the roadway or of driving conditions generally at the time of the officers' observations. Nor was there any testimony that, beyond the estimated speed of the vehicle that Mr. Berry was driving erratically. Further, there was no indication of the presence of other cars on the roadway or of pedestrians nearby. There is nothing in the record to indicate that the police officers stopped Mr. Berry's car because of a violation of 75 Pa.C.S.A. §3361, Driving Vehicle at Safe Speed.

The question now before the Court is whether the police were legally justified in stopping Mr. Berry's vehicle. While both the defendant and the prosecutor[1] seem to be in agreement that the applicable legal standard for stopping a motor vehicle is "probable cause" to believe that a person is operating a vehicle in violation of the Motor Vehicle Code, defendant's counsel has properly directed the Court's attention to the decision of the Superior Court in *Commonwealth v. Sands,* 2005 Pa. Super 372, 887 A.2d 261 (2005). In *Sands*, the Court determined that the portion of 75

[1] In its letter brief the Commonwealth notes, "(t)he issue comes down to whether the police had probable cause to stop the vehicle." .

Pa.C.S.A. §6308(b) allowing the police to effect a traffic stop on the basis of "reasonable suspicion" (rather than the previous statute's requirement of "articulable and reasonable grounds to suspect") was constitutional when applied in circumstances where the police believed a motorist was driving while under the influence of alcohol. Nonetheless, the defendant maintains that pursuant to the decision of the Pennsylvania Supreme Court in *Commonwealth v. Whitmyer,* 542 Pa. 545, 668 A.2d 1113 (1995), probable cause is the constitutionally required standard for stopping a motor vehicle in the circumstances of this case.

In *Whitmyer,* the Court concluded there was no legally meaningful distinction between the language of the then existing Motor Vehicle Code authorizing the police to stop a motor vehicle whenever an officer had "articulable and reasonable grounds to suspect" a motor vehicle violation and the traditional constitutional requirement of probable cause, noting that "two standards amount to nothing more than a distinction without a difference". *Id.* at 1116. Probable cause, the court observed, was the applicable constitutional and statutory standard for stopping a vehicle. *See also, Commonwealth v. Cook,* 2004 Pa. Super 449, 865 A.2d 869 (2004). Having concluded that the "articulable and reasonable grounds language" utilized in the statute amounted to a probable cause requirement, the *Whitmyer* Court did not directly discuss whether some standard less than probable cause could be constitutionally justified in motor vehicle stops. However, other cases have addressed the issue.

In *Commonwealth v. Swanger,* 453 Pa. 107, 307 A.2d 875 (1973), the Supreme Court specifically held that before a vehicle could be stopped pursuant to the Motor Vehicle Code, it is necessary for the police to have probable cause to believe a violation had occurred. In *Swanger,* the police had stopped a car for a routine motor vehicle check without evidence of any wrongdoing. Two years later the *Swanger* edict was precisely and emphatically reiterated in *Commonwealth v. Murray,* 460 Pa. 53, 331 A.2d 414 (1975). In *Murray,* the police also had stopped a vehicle without any indication of a motor vehicle violation. The Court, relying on *Swanger,* reversed the trial court, suppressed the evidence of a burglary and stated:

> "A police officer may not interfere with the lawful operation of a single motor vehicle by merely asserting the State's interest in regulating that activity. If the alleged basis of a vehicular stop is to permit a determination whether there has been compliance with the Motor Vehicle Code of this Commonwealth, it is encumbent upon the officer to articulate specific facts possessed by him, at the time of the questioned stop, which would provide *probable cause to believe* that the vehicle or the driver was in violation of some provision of the Code."

Id. at 416 (emphasis added). However, cognizant of the United States Supreme Court's decision in *Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868

(1968), allowing a limited intrusion into a citizen's privacy interest where the police have a reasonable suspicion that "criminal activity may be in progress", the *Murray* Court emphasized that there were circumstances where the police could be justified in making an "investigative" stop of a vehicle without meeting the requisite probable cause standard. *Murray*, 331 A.2d at 419. Such a stop must be based on "objective facts creating a reasonable suspicion that the detained motorist is presently involved in criminal activity". *See, Id.* at 418.

Turning then to the issue at hand, the question is whether anything has happened in the intervening years since *Murray* that has changed the state of applicable constitutional rules. As noted above, the Court in *Whitmyer*, while clarifying the interpretation of statutory language, did not modify the bedrock constitutional standards previously delineated in *Swanger* and *Murray*. However, effective February 2004, Section 6308(b) of the Motor Vehicle Code was amended to change the standard for stopping a motor vehicle from "articulable and reasonable grounds" to "reasonable suspicion" to believe a Motor Vehicle Code infraction had occurred. While the Pennsylvania Supreme Court has yet to address the constitutional sufficiency of this amendment, it was the subject of the Court's analysis in *Commonwealth v. Sands*, 2005 Pa. Super 372, 887 A.2d 261 (2005).

In *Sands*, the Court was confronted with circumstances where a police officer had stopped the defendant's vehicle because he suspected him of driving under the influence (DUI). The officer had observed the defendant's car drift three feet across a fog line on three occasions and then slowly drift back. There was nothing about the condition of the road that would have required this or naturally led to it. The arresting officer had extensive DUI enforcement experience. The Court concluded that the officer had articulable facts supporting his belief that criminal activity was in progress justifying an investigative stop of the vehicle and that, as applied to these circumstances, Section 6308(b)'s "reasonable suspicion" standard was constitutional. It is critical to note that Judge Bender, the author of the panel decision, emphasized that the decision of the Court was limited to cases where there was a reasonable suspicion that a driver was operating a motor vehicle under the influence. "Thus we are not here addressing whether the statute comports with federal and state constitutional protections...where the suspected violation was not DUI." *Id*. at 270.

The question remains whether in the absence of probable cause the police may be justified in seizing a motor vehicle for investigative purposes based on a reasonable suspicion of a violation of the Motor Vehicle Code other than DUI. While not directly answering this question, the Court in *Sands* provided substantial guidance. Noting that the purpose of an investigative stop was to obtain additional information to confirm the commission of

a crime, the Court observed:

> ... (I)t is hard to imagine that an officer following a vehicle whose driver is suspected of driving at an unsafe speed would discover anything further from a stop and investigation. Similarly, if an officer who observes a driver run a red light or drive the wrong way on a one-way street, the officer either does or does not have probable cause to believe there has been a violation of the Vehicle Code. A subsequent stop of the vehicle is not likely to yield any more evidence to aid in the officer's determination.

Id. These observations touch on the very essence of the *Terry v. Ohio* decision where the United States Supreme Court thought it reasonable to allow a brief encounter with a person who an experienced officer observed engaging in behavior indicative of "casing" a jewelry store for a robbery. There was a justifiable need to find out what was in fact occurring. *Terry v. Ohio*, 392 U.S. 88 S. Ct. 1868 (1968).

In this case there was no indication that the police believed that Mr. Berry was operating his vehicle while under the influence. Rather, they believed, indeed had concluded, that he was speeding and driving carelessly. In short, there was nothing further to be accomplished by stopping Mr. Berry's car. The police either observed or otherwise perceived him speeding and driving carelessly or they did not. Indeed, with regard to either violation, it would be hard to fathom the common sense application of a reasonable suspicion standard in light of the explicit justification for allowing a limited intrusion. As noted in *Sands*, the circumstances surrounding these common traffic violations are likely to be quite different from the situation involving suspected DUI. There the police have much to discover following a traffic stop including the critically important physical manifestations of the driver's suspected intoxication. *Sands* at 270. Applying the clearly enunciated principles of *Swanger* and *Murray* to the circumstances of this case, the required legal conclusion is that stopping the defendant's vehicle demanded no less than probable cause to believe that he was speeding and or driving carelessly. This is a result dictated by both the Fourth Amendment of the U.S. Constitution and Article I, §8 of this Commonwealth's Constitution.

The question remains as to whether the Millcreek police had probable cause to believe that Mr. Berry was driving at a speed in excess of the posted limit or in violation of the Motor Vehicle Code's proscription against careless driving. Careless Driving is defined as follows:

> (a) ... Any person who drives a vehicle in careless disregard for the safety of persons or property is guilty of careless driving, a summary offense.

75 Pa.C.S.A. §3714. The applicable speeding provisions are set forth as follows:

Obedience to traffic-control devices

(a) GENERAL RULE.-- Unless otherwise directed by a uniformed police officer or any appropriately attired person authorized to direct, control or regulate traffic, the driver of any vehicle shall obey the instructions of any applicable official traffic-control device placed or held in accordance with the provisions of this title, subject to the privileges granted the driver of an emergency vehicle in this title.

75 Pa.C.S.A. §3111

Maximum Speed Limits

(a) GENERAL RULE.-- Except when a special hazard exists that requires lower speed for Compliance with section 3361 (relating to driving vehicle at safe speed), the limits specified in this section or established under this subchapter shall be maximum lawful speeds and no person shall drive a vehicle at a speed in excess of the following maximum limits:

(3) Any other maximum speed limit established under this subchapter.

75 Pa.C.S.A. §3362.

The question of what constitutes probable cause in a speeding case was indirectly addressed by the Court in *Whitmyer.* There, the Court affirmed the trial court's conclusion that no probable cause existed to believe that the defendant was driving in excess of the speed limit where the officer had clocked the car with his speedometer for less than the three-tenths of a mile the statute required.[2] The Court noted that in such a case there is no further evidence to be obtained that would further an investigation of whether the driver was operating his vehicle at an unsafe speed. Essentially concluding that, in such circumstances probable cause requires threshold evidence that the car was in fact being operated in violation of the Motor Vehicle Code.

In this case, although the actual charge related to the failure to comply with a traffic control device, the basis for the lack of compliance was the belief that the defendant was violating the maximum speed limit. While the charge is creative, it does not change the nature of the legal analysis. In

[2] (a) SPEEDOMETERS AUTHORIZED.-- The rate of speed of any vehicle may be timed on any highway by a police officer using a motor vehicle equipped with a speedometer. In ascertaining the speed of a vehicle by the use of a speedometer, the speed shall be timed for a distance of not less than three-tenths of a mile.

effect the Maximum Speed Limits provisions simply advises the motorist of the practical significance of the numbers posted on a speed limit sign. Simply put, the only evidence of the defendant being in violation of the posted speed limit was the officer's estimate of the vehicle's speed. On the basis of that evidence, Mr. Berry could not have been convicted of exceeding the maximum speed and therefore cannot be found guilty of failing to comply with a traffic-control device. It has been clearly established that a person cannot be convicted of speeding in violation of 75 Pa.C.S.A. §3362 on the basis of a police officer's opinion testimony alone. *Commonwealth v. Martorano*, 387 Pa. Super. 151, 563 A.2d 1229 (1989).

Although in *Commonwealth v. McElroy,* 428 Pa. Super. 69, 630 A.2d 35 (1993), the case relied upon by the Commonwealth, the Court seemed to have reached a contrary conclusion in a somewhat similar factual context, that decision was rendered prior to the Supreme Court's opinion in *Whitmyer*. Moreover, in *McElroy*, the defendant was charged with a violation of 75 Pa.C.S.A. §3361 relating to the failure to drive at a safe speed and there were additional facts supporting the Court's conclusion that the stop was proper. Perhaps most notably, however, the Court in *McElroy* appeared to apply a reasonable suspicion standard in its analysis of the propriety of the traffic stop rather than the constitutionally required probable cause standard recognized in *Whitmyer*. In that regard, the *McElroy* Court stated, "In essence we are faced with a *Terry* stop analysis when assessing the legality of a traffic stop for a violation of the Vehicle Code." *McElroy*, 630 A.2d at 41. On the basis of the analysis set forth above, and in particular the observations of the Court in *Sands*, it is evident that a *Terry* rational is not applicable to the facts presented here.

On the basis of the limited evidentiary record in this case, the Court is constrained to find that the stop of Mr. Berry's car was without probable cause to believe a crime had been committed. An appropriate order follows.

ORDER

AND NOW, this 12 day of July, 2006, upon consideration of the Motion for Suppression of Evidence and argument thereon, and for the reasons set forth in this Court's Opinion, it is hereby ORDERED, ADJUDGED and DECREED that the Motion for Suppression of Evidence is GRANTED.

BY THE COURT,

/s/ **John A. Bozza, Judge**

ROBERT A. PESSIA, individually and as Administrator of the Estate of CHRISTINA A. PESSIA, deceased, Plaintiff

v.

JESSICA L. HAINS PESSIA, COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, and ANGELA K. TORNATORE, Defendants

PRELIMINARY OBJECTION / DEMURRER

Preliminary objections in the nature of a demurrer tests the legal deficiency of the plaintiff's complaint. In determining the legal deficiency of the complaint, the court must accept all material averments as true. The court must ask whether, on the facts averred, the complaint adequately states a claim for relief under any theory of law. The grant of demurrer is proper only if it is certain, based upon the facts averred, that no recovery is possible.

NEGLIGENCE

To prove a cause of action in negligence, a party must prove the following four elements: (1) a duty or obligation recognized by law, (2) a breach of the duty, (3) causal connection between the actor's breach of the duty and the resulting injury, and (4) actual loss or damage suffered by complainant.

NEGLIGENCE / PROXIMATE CAUSE

The mere happening of an accident does not entitle an injured party to recovery. Rather, the injured party must show that the defendant owed him or her a duty of care and that this duty was breached.

NEGLIGENCE / PROXIMATE CAUSE

It is axiomatic that drivers owe each other a duty of care. The law, however, declines to trace a series of events beyond a certain point; and therefore the duty that a driver owes extends only to motorists and pedestrians within his or her immediate zone of danger. The reason is that a duty of care arises only where a reasonable person would recognize the existence of an unreasonable risk or harm to others through the intervention of such negligence. Stated otherwise, the scope of duty is limited to those risks that are reasonably foreseeable by the actor in the circumstances.

NEGLIGENCE / PROXIMATE CAUSE

The mere existence of negligence and the occurrence of injury are insufficient to impose liability upon anyone, as there remains to be proved the link of causation. Proximate cause does not exist where the causal chain of events resulting in plaintiff's injury is so remote as to appear highly extraordinary that the conduct could have brought about the harm. Proximate cause asks whether the negligence was so remote that as a matter of law the actor cannot be held legally responsible for the harm which occurred.

NEGLIGENCE / PROXIMATE CAUSE

Proximate causation is defined as a wrongful act which was a substantial factor in bringing about the plaintiff's harm. The substantial factor test used for determining whether a party's actions were the proximate cause of another's injuries has several factors that must be considered: (a) the number of other factors which contributed in producing the harm and the extent of the effect which they had in producing it, (b) whether the actor's conduct has created a force or series of forces which are in continued and active operation up to the time of the harm or has created a situation harmless unless acted upon by other forces for which the actor is not responsible, and (c) lapse of time.

NEGLIGENCE / PROXIMATE CAUSE

Where the defendant would need reasonably to foresee that the guardrail she struck was damaged in such a way that it would be able to pierce a vehicle in a subsequent collision, that a later driver's negligence would cause a collision into the same guardrail at the precise same location, and that PennDOT would fail to repair the guardrail more than a month after the collision, it would have been "highly extraordinary" that the defendant would have foreseen these factors. Defendant's negligence had come to a complete end, and the decedent was not within the zone of danger created by the negligence which occurred at the time when the vehicle in which the decedent was a passenger collided with the guardrail. The link in the causal chain of events is lacking.

THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 12502 of 2005

Appearances: Mary Speedy Hajdu, Esquire, Attomey for Plaintiff
Craig Murphey, Esquire, Attorney for Defendant, Angela K. Tornatore
Mark Mioduszewski, Esquire, Attorney for Defendant, Jessica Haines Pessia
William Dopierala, Esquire, Attorney for Defendant, Commonwealth of Pennsylvania, Dept. of Transportation

OPINION

Connelly, J., August 9, 2006

Presently before the Court are Preliminary Objections to Second Amended Complaint filed on February 28, 2006, by Angela K. Tornatore (hereinafter "Defendant"). A hearing on Defendant's Preliminary Objections was held before this Court on June 8, 2006.

Facts

This lawsuit arises out of a motor vehicle accident that occurred on

September 24, 2004. Jessica L. Haines Pessia (hereinafter "Ms. Pessia"), an above named defendant, was operating a vehicle in which her daughter, Christina A. Pessia (hereinafter "Christina"), was a passenger. The accident occurred when Ms. Pessia collided with a guardrail located adjacent to Interstate 90 in Erie County. As a result of the accident Christina, age three (3) at the time, sustained fatal injuries and died. The alleged cause of the fatality was part of the guardrail structure that entered the interior of Ms. Pessia's vehicle on the passenger side in which Christina was seated.

On August 22, 2004, some thirty-three days prior to the Pessia accident, Defendant was driving her vehicle along the same stretch of Interstate 90. Defendant reportedly fell asleep and drove off the left shoulder of the interstate, colliding with the guardrail. This was in the same precise location and the same guardrail in which the Pessia accident occurred more than a month later. Defendant's collision caused the blunt end of the guardrail to be damaged and separated from the rest of the guardrail. The guardrail was left in this condition with the sharp end exposed and had not been repaired at the time of the Pessia accident.

Robert A. Pessia (hereinafter "Plaintiff'), the father and executor of the estate of Christina, alleges that the hazard created by Defendant played a material role in causing the fatal injuries sustained by Christina

Conclusions of Law

"Preliminary objections in the nature of a demurrer test the legal sufficiency of the plaintiff's complaint." *Lux v. Ort Trucking, Inc.,* 887 A.2d 1281, 1285 (Pa.Super. 2005). In determining the legal sufficiency of the complaint, the court must accept all material averments as true. *Id.* The court must then ask whether, on the facts averred, the complaint adequately states a claim for relief under any theory of law. *Id.* The grant of demurrer is proper only if there is certain, based upon the facts averred, that no recovery is possible. *Id.*

Defendant alleges that the grant of demurrer is proper because Plaintiff has failed to establish all the elements required to successfully plead a cause of action for negligence. *Defendant's Brief,* p. 3-4.

To prove a cause of action in negligence, a party must prove the following four elements: (1) a duty or obligation recognized by law; (2) a breach of the duty; (3) causal connection between the actor's breach of the duty and the resulting injury; and (4) actual loss or damage suffered by complainant. *Id.* at 1286.

Duty

"The mere happening of an accident does not entitle an injured party to recovery." *Engel v. Friends Hospital*, 266 A.2d 685 (1970). Rather, the injured party must show that the defendant owed him or her a duty of care and that this duty was breached. *Id.*

"[I]t is axiomatic that drivers owe each other a duty of care. . .." *Brim v.*

Wetz, 35 Pa. D. & C. 4th 277, 285 (Pa. Com. Pl. 1996). The law, however, declines to trace a series of events beyond a certain point and therefore the duty that a driver of a vehicle owes, extends only to motorists and pedestrians within his or her immediate zone of danger. *Mazzagatti v. Everingham.* 516 A.2d 672, 677 (Pa. 1986). This is because "A duty of care arises only where a reasonable person would recognize the existence of an unreasonable risk of harm to others through the intervention of such negligence". *Id.* Stated otherwise, the scope of duty is limited to those risks that are reasonably foreseeable by the actor in the circumstances. *Id.*

Defendant alleges that Plaintiff's Complaint lacks legal sufficiency because Defendant did not owe a legally recognized duty to Christina Pessia. *Defendant's Brief,* p.4. Plaintiff, however, argues that Defendant not only owed a duty to other motorists, but owed a general duty imposed on all persons not to place others at risk of harm through their actions. *Plaintiff's Brief,* p. 2.

Although it is clear that Defendant owed a general duty to other motorist, "the determination of a duty of care necessarily entails an analysis of its integral component proximate cause". *Mazzagatti,* at 679. The Court must therefore determine, through the proximate cause analysis set forth below, whether Defendant's negligence in falling asleep was the proximate cause of the fatal injuries sustained by Christina, or stated otherwise whether Christina was within Defendant's "zone of danger" such that Defendant could be held liable for the fatal injury, or again whether it was foreseeable that Defendant's negligence could have caused the death of Christina.

Proximate Cause

"[T]he mere existence of negligence and the occurrence of injury are insufficient to impose liability upon anyone as there remains to be proved the link of causation." *Lux,* at 1286. "Proximate cause does not exist where the causal chain of events resulting in plaintiff's injury is so remote as to appear highly extraordinary that the conduct could have brought about the harm." *Id.* at 1286-1287. Proximate cause asks whether the negligence was so remote that as a matter of law the actor cannot be held legally responsible for the harm which occurred. *Id.*

"Proximate causation is defined as a wrongful act which was a substantial factor in bringing about the plaintiffs harm." *Id.* The substantial factor test used for determining whether a party's actions were the proximate cause of another's injuries has several factors that are to be considered. *Id.* These considerations are:

(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;

(b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the

harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;

(c) lapse of time.

Id.

Defendant alleges that Plaintiff has failed to plead facts sufficient to establish a proximate causal connection between Defendant's accident on August 22, 2004 and the Pessia accident which occurred more than one month later on September 24, 2004. Plaintiff argues that a causal connection is established if the risk of injury to those entering the zone of danger was foreseeable.

Plaintiff alleges that Defendant's negligence in falling asleep and damaging the guardrail created a hazardous condition. This damaged guardrail, Plaintiff argues, was a substantial factor in causing the fatal injuries sustained by Christina because the dangerous condition did not abate until after the Pessia accident, placing Christina within the zone of danger created by Defendant's negligence. Plaintiff further alleges that the thirty-three day lapse in time does not abrogate Defendant's duty owed to other motorists because it was foreseeable that the damaged guardrail, located two to three feet from the edge of the interstate, could penetrate a vehicle. In support of this contention, Plaintiff cites a number of cases which essentially hold that "one who creates a hazardous condition will be held liable to those injured by the condition, even if the injury occurs a substantial time later".

Defendant maintains that, as a matter of law, she could not have foreseen that her accident would subsequently cause the death of someone else thirty-three days later.

Presently before the Court are the very unfortunate circumstances of two similar motor vehicle accidents that occurred on the same stretch of highway some thirty-three days apart. It is undisputed that the guardrail involved in Defendant's accident was the same guardrail that entered the Pessia vehicle in the subsequent accident. This is evidenced from the Police Incident Number from Defendant's collision that was found on the guardrail that entered the Pessia vehicle. This alone, however, is not sufficient to conclude that Defendant's negligence was the proximate cause of the subsequent fatality.

There were a number of other factors which contributed to the death of Christina. Ms. Pessia is alleged to have been negligent in causing her vehicle, in which Christina was a passenger, to collide with the guardrail. Another factor that contributed to the fatality was the Commonwealth of Pennsylvania and the Pennsylvania Department of Transportation's failure, subsequent to Defendant's collision, to repair the guardrail or otherwise safeguard or warn other drivers that the guardrail in that location was damaged.

In order for the Court to hold Defendant liable for negligence under the present facts, it would have been necessary for Defendant to reasonably foresee that the guardrail she collided with was damaged in such a way that it would be able to pierce a vehicle in a subsequent collision. Additionally, it would be necessary for Defendant to foresee that a later driver's negligence would cause a collision into the same guardrail, on the same stretch of the interstate, in the same precise location. Even more unlikely, is that Defendant would had to have foreseen that PennDot would fail to repair the guardrail more than a month after her collision occurred.

It is "highly extraordinary" that Defendant could have foreseen any of the above factors. Defendant's negligence had come to a complete end and Christina was not within the zone of danger created by that negligence at the time when the vehicle in which she was a passenger collided with the guardrail. The link in the causal chain of events is lacking to connect Defendants' original duty owed to other motorists to this particular Plaintiff. Under the circumstances Defendant's negligence was so remote that the Court cannot, as a matter of law, hold Defendant liable. Defendant's Preliminary Objection is therefore proper.

ORDER

AND NOW, to-wit, this 9th day of August, 2006, for the reasons set forth in the foregoing OPINION, it is hereby ORDERED, ADJUDGED and DECREED that Angela K. Tornatore's Preliminary Objections to Plaintiff's Second Amended Complaint are GRANTED. The causes of action directed against Defendant Angela K. Tornatore in the Second Amended Complaint are DISMISSED with prejudice.

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

BRUCE T. MINNICK and DEBORAH O. MINNICK, husband and wife, Appellants

v.

MILLCREEK TOWNSHIP, Appellee

and

WHISPERING WOODS LIMITED PARTNERSHIP, Intervenor

MUNICIPALITIES PLANNING CODE / LAND USE APPEAL / SCOPE AND STANDARD OF REVIEW

Where no additional relevant evidence is taken by the court, the standard of review on appeal from a municipal decision on a subdivision plat application is limited to determination of whether the municipal body committed an abuse of discretion or error of law.

MUNICIPALITIES PLANNING CODE / APPEAL / PRESERVATION OF ISSUES

A party may appeal from the approval of a final plan within 30 days of the decision. A party may not raise issues on appeal from a final plan approval which could have been but were not presented at the time of approval of the preliminary plan or on an appeal from approval of a preliminary plan.

MUNICIPALITIES PLANNING CODE / APPLICATION FOR SUBDIVISION / FINAL PLAN APPROVAL

A developer which obtains preliminary approval is entitled to approval of a final plan which is in accord with the municipality's approval of the preliminary plan.

MUNICIPALITIES PLANNING CODE / APPLICATION FOR SUBDIVISION / DEVIATION FROM ORDINANCE

Municipalities have discretion to approve plans which do not comply literally with local ordinances if the modification will not adversely affect the public interest and is consistent with the purpose and intent of the ordinance. Thus, failure of the supervisors to require that a road be provided through a development to the point where it meets an adjoining unsubdivided property does not constitute an abuse of discretion or error of law.

The lack of access to the property of the adjoining owners does not adversely affect the adjoining owners' ability to fully develop their property. Further, the failure of the adjoining property owners' predecessor in interest to appeal the approval of the preliminary plan prevents the current landowners from contesting the layout of streets.

MUNICIPALITIES PLANNING CODE / SUBDIVISION APPROVAL / REVIEW ON APPEAL

It is not the role of a reviewing court to substitute its judgment for that of township supervisors as to whether a subdivision application should be approved. There is no abuse of discretion where the supervisors' decision to approve the subdivision without requiring street access to an

adjoining parcel is based upon considerations of public safety including traffic issues and concerns with evacuation and access of public safety vehicles. The court finds that isolated comments of supervisors do not demonstrate prejudice, bias, partiality or ill will.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 13502 of 2005

Appearances: Evan E. Adair, Esq. for Millcreek Township
Jeffrey J. Cole, Esq. for the Minnicks
Ryan A. Christy, Esq. for Whispering Woods

OPINION

William R. Cunningham, Judge

Before the Court is a land use appeal from the final approval of a subdivision plan. Based on a finding there was no abuse of discretion or error of law by Millcreek Township Supervisors, this appeal is denied.

PROCEDURAL/FACTUAL HISTORY

In 1998, Whispering Woods Limited Partnership ("Whispering Woods") submitted a preliminary plan application proposing a multi-phase development of a large tract of land in Millcreek Township. On October 30, 1998, the Millcreek Township Board of Supervisors ("Supervisors") issued a formal decision approving the preliminary plan. There was no appeal by any party from this approval.

On January 30, 2004, a tract of land adjacent to Whispering Woods and owned by Lynn P. Alstadt was subdivided into two parcels. Parcel A consists of 1.564 acres and a single family residence. Parcel B contains 5.920 acres. Bruce T. Minnick and Deborah O. Minnick ("Minnicks") purchased Parcel B from Alstadt by deed dated February 17, 2004 along with a 10.313 acre plot adjacent to Parcel B. The 10.313 acre parcel is hereinafter the "Minnick parcel" and is the property most affected by this appeal. Parcel B bears Erie County Tax Index No. (33) 177-565-38. The Minnick parcel bears Erie County Tax Index Number (33) 134-565-39.01.

In total, the Minnicks own over sixteen acres on the western boundary of Whispering Woods. The Minnicks residence is on the 5.92 acre parcel and has a street address of 5725 Thomas Road.

In April, 2005, the Minnicks presented a sketch plan to Millcreek Township officials outlining a proposed subdivision for 14 residential lots, mostly on the Minnick parcel. The Minnicks have not presented or received approval for a formal plan for their development. One of the challenges facing the Minnicks proposal is access to a public roadway.

The Minnicks allege that 85% of the Minnick parcel is separated from Thomas Road by a stream known as Thomas Run. Building a bridge across this stream would cost more than one million dollars and is therefore cost

prohibitive. The Minnicks argue that road access to the large majority of the parcel is "virtually impossible" except through Whispering Woods to the east onto Grubb Road. Hence, the Minnicks are understandably interested in accessing Grubb Road through Whispering Woods.

On June 17, 2005, Whispering Woods submitted its application and final plan for Phase V of its development.

On August 9, 2005, the Millcreek Planning Commission reviewed the application and heard Minnicks' objections to its approval. Relying on Millcreek Township ordinances, the Minnicks contended that final approval of the subdivision should be granted only if Whispering Woods was required to build a road extending to the Minnick parcel thereby allowing Minnicks access through Whispering Woods to Grubb Road. The Minnicks argued that without street access through Whispering Woods, their property would be landlocked.

The Millcreek Planning Commission recommended to the Supervisors that Phase V be approved. One of the conditions suggested by the Commission was that Whispering Woods be required to provide fifty feet of right-of-way for the Minnicks.

On August 23, 2005 the Minnicks and a representative from Whispering Woods appeared before the Supervisors. After hearing from all parties, the Supervisors voted unanimously to approve the Phase V application without requiring Whispering Woods to extend a street to Minnicks' adjacent property or grant a right-of-way as recommended. This decision was formally set forth in a letter dated August 25, 2005.

On September 21, 2005, the Minnicks filed a Notice of Land Use Appeal.

On September 22, 2005, a Writ of Certiorari was issued pursuant to 53 PS § 11003-A.

On September 30, 2005, Whispering Woods filed a Notice of Intervention.

On November 15, 2005, the Supervisors filed a Response to Land Use Appeal.

On November 16, 2005, the Minnicks filed a Motion to Receive Additional Evidence and to Comply with Erie Local Rule 311 (H). After oral argument the Motion was denied by Order dated December 19, 2005.

On March 7, 2006, the Minnicks filed a Brief in Support of its Land Use Appeal. On April 5, 2006, the Supervisors filed a Brief in Opposition to Land Use Appeal. On April 6, 2006, Whispering Woods filed a Brief in Opposition to Land Use Appeal. On April 21, 2006, Minnicks filed a Reply Brief.

On May 24, 2006, the Minnicks filed a Combined Motion Regarding Additional Evidence consisting of a Motion for Reconsideration of the December 19, 2005 Order denying their original Motion to Receive Additional Evidence and a Motion to Receive Additional Evidence

Regarding Timeliness Defense. On June 2, 2006 and in response to said Motion, the Supervisors filed a Supplement to the certified record as well as a Reply. The Combined Motion was denied by Order dated June 7, 2006.

Oral argument on the merits of this appeal was held on August 4, 2006.

SCOPE AND STANDARD OF REVIEW

The Minnicks strenuously argue the de novo standard of review is applicable. The Supervisors and Whispering Woods counter that when no additional evidence is taken in a land use appeal, the findings of the Supervisors are not to be disturbed if supported by substantial evidence.

The Minnicks have requested this Court hear additional evidence. However, the Minnicks had a full opportunity to be heard before the Millcreek Township Planning Commission and the Board of Supervisors. Before both bodies, the Minnicks were represented by current counsel, presented evidence (including a 24 page written submission) and had a court reporter to preserve the record.

There is no additional relevant evidence to be adduced. Indeed, Minnicks counsel candidly admitted at the time of oral argument on the Motion to Receive New Evidence there is no new evidence to submit. Also, there are no new substantive arguments that were not presented to the Supervisors.

The material facts are not in dispute and are part of the certified record. All of the information necessary to review this case is contained in the existing record.

In *Kassouf v. Township of Scott*, 883 A.2d 463, 468 (Pa. 2005), the Pennsylvania Supreme Court explained the trial court's review of a municipal decision about a subdivision plat application. In *Kassouf*, the appellant was a developer appealing the board's decision denying his subdivision application. The Pennsylvania Supreme Court stated:

> [When] the trial court received no additional evidence, its review was limited to determining whether the commissioners had committed manifest abuse of discretion or an error of law.

Kassouf v. Township of Scott, 883 A.2d 463, 468 (Pa. 2005).

The standard of review applicable herein is whether the Supervisors committed an abuse of discretion or an error of law in approving Phase V without requiring Whispering Woods to extend a street to the Minnick parcel.

MUNICIPAL PROTOCOL IN LAND USE DEVELOPMENT PLAN APPLICATIONS

The legislature has set forth the exclusive procedure for the approval of development plan applications in the Pennsylvania Municipalities Planning Code (MPC). *See* 53 P.S. § 10508.

As authorized under the MPC, Millcreek Township has established a two-stage procedure for the approval of development plan applications.

First, an applicant must submit a preliminary plan to the Millcreek Planning Commission. The role of the Planning Commission is advisory, to-wit, making a recommendation to the Supervisors. The binding decision whether to approve a preliminary plan is with the Supervisors.

The second step of the process is the approval of a final plan. An applicant has to proceed first before the Millcreek Planning Commission, which entity makes a recommendation to the Board of Supervisors. The approval of the final plan is ultimately up to the Supervisors.

The MPC further states that before acting on any subdivision plat, the Supervisors may hold a public hearing after giving public notice. See 53 P.S. § 10508(5). However, the MPC does not require the Supervisors to issue findings of fact, except when an application is denied.

Pursuant to the MPC, the Supervisors must render a decision within 90 days following the date of the regular meeting. *See* 53 P.S. § 10508. When the application is not approved, the Supervisors are required to specify in writing the defects found in the application, described the requirements that have not been met and cite to the statute or ordinance relied upon. *See* 53 P.S. § 10508 (2).

Under this process, the approval of a preliminary plan has an important legal consequence because it obligates a municipality to approve a final plan which conforms to the preliminary plan. According to the MPC, "when a preliminary application has been duly approved, the applicant shall be entitled to final approval in accordance with the terms of the approved preliminary application." 53 P.S. § 10508(4)(i). Stated differently, once a municipality approves a preliminary plan and the applicant complies therewith, the applicant is entitled to approval of the final plan as a matter of law.

Consistent with the MPC, Millcreek Township enacted an ordinance providing that the approval of a preliminary plan "constitutes approval of the subdivision as to the character and intensity of development, the arrangement and approximate dimensions of streets, lots, and other planned features." Article VII, Section 5(f) of Millcreek Township Ordinance #65-1, enacted April 1965, titled Subdivision and Land Development Ordinance (hereinafter Ordinance 65-1). This Ordinance further states that an applicant shall be entitled to final approval upon compliance with the terms of an approved preliminary application. Ordinance 65-1, Article VII, Section 5(k).

These provisions protect both the municipality and the developer and provide consistency in the process. A developer who obtains preliminary approval for a development is assured that time and resources are not wasted if the developer proceeds according to the approved preliminary plan. A municipality cannot withhold final approval for a developer who has relied on and acted in accord with the municipality's approval of the preliminary plan.

The most important time to object to the approval of a development plan application is during the preliminary plan stage. The risk a party runs in not objecting prior to the preliminary plan approval, or not filing an appeal therefrom, is that the applicant is entitled to approval of a final plan which is in compliance with the preliminary plan.

WHETHER THIS APPEAL IS TIMELY

The Supervisors and Whispering Woods contend the matters raised by the Minnicks should have been raised prior to the approval of the preliminary plan for Whispering Woods. Thus, the failure to appeal from the approval of the preliminary plan renders this appeal untimely. This argument is unpersuasive.

As it relates to appeals, the MPC states:

> **§ 11002-A. Jurisdiction and venue on appeal; time for appeal**
>
> All appeals from all land use decisions rendered pursuant to Article IX shall be taken to the court of common pleas of the judicial district wherein the land is located and shall be filed within 30 days after entry of the decision as provided in 42 Pa.C.S. § 5572 (relating to time of entry of order) or, in the case of a deemed decision, within 30 days after the date upon which notice of said deemed decision is given as set forth in section 908(9) of this act.

53 P.S. § 11002-A.

There is no dispute the Minnicks filed an appeal on September 21, 2005 from the final approval of Phase V of Whispering Woods. The Minnicks appeal is within thirty days of either the August 23, 2005 Supervisors meeting or the August 25, 2005 formal approval letter from the Supervisors. In either scenario, the Minnicks appeal is timely filed. It is a separate matter whether it is too late in the process for some of the arguments tendered by the Minnicks.

WHISPERING WOODS WAS ENTITLED TO FINAL APPROVAL OF PHASE V AS A MATTER OF LAW

The preliminary plan for Whispering Woods, as approved by the Supervisors in 1998, included, as it must, the location, dimensions and sizes of streets. The approved plan did not make a provision for the extension of any street to Lynn Alstadt's property line. Instead, the street in question for Phase V, Mystic Ridge, was approved as a cul-de-sac which did not extend to Alstadt's property line. It is uncontroverted that Lynn Alstadt did not appeal the approval of the lay-out of streets, including Mystic Ridge.

In analyzing this case, it is important to keep in mind the procedural point in time the Minnicks entered the situation. The matter before the Supervisors in August, 2005 was the final approval of a plan for Phase V of Whispering Woods. What was not before the Supervisors was a review of a preliminary plan or final plan for the Minnicks' property. By law,

the Supervisors were mandated to approve the final plan for Whispering Woods if it was consistent with the terms of the approved preliminary plan.

The certified record does not reflect that Whispering Woods final plan for Phase V deviated in any significant way from the approved preliminary plan. In a Reply Brief, the Minnicks cite a host of deviations, only one of which applies to Phase V (change in lot sizes). The change in lot sizes resulted in fewer lots for Phase V, a welcome change from the municipal perspective since it meant less density and less traffic on to Grubb Road. Notably, the Minnicks do not identify any deviation in the final plan for Phase V that had not received prior municipal approval.

At oral argument, Minnicks counsel cited the location of a storm water management area as the only deviation of concern for Phase V. It is true that the storm water area was not included in the preliminary approval of Phase V. However, storm water plans are not part of a preliminary plan. A developer is not required to incur the significant expense of a storm water plan until after the preliminary plan has been approved. Hence, the subsequent addition of a storm water area does not amount to a deviation since it was not required for the preliminary plan.

Most importantly, the final plan for Phase V was the same as the preliminary plan in the salient fact that no streets were extended to the Alstadt/Minnick property line. This is not a case where the preliminary plan for Whispering Woods called for a street to be extended to the Alstadt/Minnick border only for the street to be eliminated as part of the final approval of Phase V. From the beginning, there was never a street extending to the Alstadt/Minnick boundary.

From October, 1998 until August, 2005, the development plan of Whispering Woods called for Mystic Ridge to be a cul-de-sac with residential lots around it. Obviously, Whispering Woods relied on the 1998 approval of this arrangement in proceeding with the development of Phases I through IV. To now change this approval seven years after the fact works to the detriment of the developer of Whispering Woods, who may have proceeded differently in the first four Phases had the developer known the lots configuration and street design for Phase V would not be approved by the Supervisors.

Because the final plan was in compliance with the conditions of the preliminary plan for Phase V, Whispering Woods was entitled to final approval of Phase V as a matter of law. The Minnicks cannot now litigate matters that should have been presented prior to the approval of the preliminary plan of Whispering Woods or on appeal therefrom.

APPELLANTS' CLAIMS

The Minnicks case is based on three separate provisions of Ordinance 65-1, specifically Article V, Sections 2-J(1); 2-G; and 2-L(2). The Minnicks contend each of these provisions mandate that Whispering Woods extend

a street to their boundary line. These Sections will now be reviewed seriatim.

WHETHER SECTION 2-J(1) PROVIDES RELIEF

Initially, the Minnicks tendered Section 2-J(1) as authority for their position. In their original Brief, the Minnicks argue this Section "has direct, controlling and mandatory application to the issue of access to the Minnick Parcel through Whispering Woods Subdivision." *See* Appellants Brief, pg. 10. The Minnicks also argued the importance of this Section in their written submission to the Millcreek Planning Commission and to the Supervisors. *See* pg. 3 of "Request of Bruce and Deborah Minnick for Requirement of Construction of Access Road" as admitted and contained within the certified record.

Section 2-J(2) states "(m)inor streets in a new development shall be so laid out as to discourage through traffic. However, the provision for the extension and continuation of major streets into and from adjoining areas is required."

The Minnicks seem to advocate that Section 2-J(1) compels street access to the Minnick property "because the Minnick subdivision will be hemmed in by Thomas Run to the west; no through traffic will actually occur." Appellants Brief, pg. 10.

This argument is untenable. As the Minnicks recognize, the primary focus of Section 2-J(2) is to discourage traffic through a development. By extending street access from Whispering Woods to the Minnicks property, the result is more traffic, not less traffic through Whispering Woods. As such, Section 2-J(1) works against Minnicks case, which is perhaps why they retreated from this argument in their Reply Brief. ("The Minnicks acknowledge that this Section is not of primary applicability in this case. Again, it and the other ordinance provisions aside from 2(G) and 2(L)(2) were cited as context." *See* Appellants Reply Brief at pg. 10). At oral argument, Minnicks counsel withdrew any reliance on Section 2-J(1)

Hence, Section 2-J(1) is not a basis of relief for the Minnicks.

WHETHER THE SUPERVISORS WERE COMPELLED TO DENY FINAL APPROVAL OF PHASE V BECAUSE IT LACKED STREET ACCESS TO THE MINNICK PARCEL

The Minnicks claim:

> The Minnicks position arises from a clear, simple requirements [sic] of two provisions of the Millcreek Subdivision & Land Development Ordinance ("S&LDO" or "the Ordinance").
>
> First, the Ordinance provides that "[s]uitable access and street openings for the subdivision of adjacent unsubdivided land *shall* be provided." Ord. No. 65-1. Article V. Section 2-G (emphasis added).

> Second, the Ordinance provides that "[w] hen the subdivision adjoins unsubdivided acreage, new streets *shall* be provided through to the boundary lines of the development with temporary easements for turn arounds." Ord. No. 65-1, Article V. Section 2-L-(2) (emphasis added).

See Appellants Brief in Support, at pp. 8-9.

The gravamen of the Minnicks position is that Article V, Section 2-G and Section 2-L(2) of Ordinance 65-1 each compel the Supervisors to mandate Whispering Woods to provide a street to the boundary line of the Minnick parcel. The Minnicks contend the use of the word "shall" in these two Sections makes it mandatory for Whispering Woods to extend streets to the Minnick boundary.

In further support of their position, the Minnicks rely on the October 30, 1998 letter approving the preliminary plan, which states, in part "(t) he development shall comply with all regulations established by the Township in the subdivision and land development ordinance..." *See* Letter of October 30, 1998 from Attorney Evan Adair to Steve Rapp at pg. 3. The Minnicks maintain this language binds the Supervisors to enforce Article V, Sections 2(g) and 2(L)(2).

The Minnicks couple the October 30, 1998 letter with this provision of the MPC to argue for compulsory action:

> "Where a subdivision and land development ordinance has been enacted by a municipality...no subdivision...shall be laid out, constructed, opened or dedicated for public use or travel...except in accordance with the provisions of such ordinance."

53 P.S. § 10507

The Minnicks arguments are not dispositive for a number of reasons. First, the Minnicks assume an entitlement as a matter of law to have street access through an adjoining development. Nothing in the MPC or within any Millcreek ordinance creates an absolute entitlement or property right for any landowner to access an adjoining development.

Further, the Supervisors are not robots performing the ministerial task of rubber-stamping only those development plans in full compliance with all township ordinances. Instead, as the Minnicks concede, the Supervisors have discretion whether to approve a plan which deviates from a township ordinance. The Supervisors have such discretion under the MPC, *see* 53 P .S. §10512.1 and under Ordinance 65-1 *see* (Section 1).

Our appellate courts have historically recognized the flexibility held by municipalities to approve plans conflicting with the literal enforcement of local subdivision ordinances. In *Morris v. South Coventry Tp. Bd. of Supervisors*, 836 A.2d 1015, 1022 (Pa. Commw. Ct. 2003), an adjacent landowner argued on appeal that the Township improperly granted waivers

from ordinance requirements to approve a subdivision application. The Commonwealth Court held:

> [W]hether or not a township uses that authorization, pursuant to Section 512.1(a) of the MPC, added by the Act of December 21, 1988, P.L. 1329, 53 P.S. § 10512.1(a), the *Board itself* has complete authority to grant waivers "if the literal enforcement will exact undue hardship because of peculiar conditions pertaining to the land in question, provided that such modification will not be contrary to the public interest and that the purpose and intent of the ordinance is observed." 53 P.S. § 10512.1(a).

Morris, 836 A.2d at 1022 (emphasis in original).

In *Levin v. Township of Radnor*, 681 A.2d 860, 863 (Pa. Commw. Ct. 1996), the Court recognized that Section 512.1 of the MPC permits waiver of subdivision requirements. Likewise, in *Valenti v. Washington Tp*., 737 A.2d 346, 349 (Pa. Commw. Ct. 1999), the Court stated "in the case where a developer cannot meet all the conditions of the subdivision ordinance, a township may grant waivers which it deems appropriate in the interest of the township."

Under the MPC and Millcreek ordinances, the Supervisors have authority to approve plans that do not strictly comply with existing ordinances so long as it is not contrary to the "public" interest. The fact the Minnicks do not have access through Whispering Woods to Grubb Road does not impact the public interest. It is only the Minnicks "private" interest in wanting to avoid the expense of building a bridge across Thomas Run that was affected by the Supervisors decision. There is no public interest adversely affected by the approval of Phase V of Whispering Woods.

The Minnicks also argue the Supervisors cannot deviate from enforcing Sections 2-G and 2-L(2) because such a deviation adversely affects the enjoyment of their abutting land. The Minnicks argue that denying them access to Grubb Road through Whispering Woods adversely affects their ability to fully develop their property.

There is no legal authority for the Minnicks position. The Minnicks reliance on the MPC is misplaced because the Section cited by the Minnicks, to-wit: 53 P.S. §10706(3)(1) involves "planned residential developments" which is a concept unrelated to developments such as Whispering Woods.

Further, a property owner in Millcreek Township is not entitled as a matter of law to have a second means of street access. As the public records reflect, the Minnicks already have street access on Thomas Road. Each of the two parcels owned by the Minnicks has frontage on and access to a public street, namely Thomas Road. The Supervisors were not compelled to provide the Minnicks with a second means of street access across and

at the expense of the Minnicks neighbors.

The reality is that when the Supervisors approved the plan for Whispering Woods in 1998 it did not have an adverse affect on any adjoining landowner as evidenced, in part, by the fact no neighbor filed an appeal. At the time the Supervisors committed to Whispering Woods in 1998, the adjoining properties were large lots serving single residences fronting on Thomas Road. None of the neighboring landowners requested a road through Whispering Woods to access Grubb Road. Such access would not have been consistent with the extant use of the Alstadt property.

Thus, it would have made little sense for the Supervisors in 1998 to require Whispering Woods to go to the additional expense of extending streets to adjacent property lines and incurring an economic loss by the reduction of lots when no neighbor was seeking street access through Whispering Woods.

Almost seven years after the preliminary plan was approved, and after the first four phases of Whispering Woods have been developed, the Minnicks now argue that streets should have been included to provide another means of access to their property. The Minnicks arguments are untimely. Among the most important components of a preliminary plan are the location and layout of the streets and lots. The approval of the preliminary plan is an approval of the arrangement and dimensions of the streets. *See* Ordinance 65-1, Article VII, Section 5(f)(i).

The Minnicks cannot now contest the layout of streets as approved in 1998. The Supervisors had the legal authority to approve a plan in 1998 that did not strictly comply with Section 2(G) and (L)(2). Therefore, the Supervisors were not compelled to change the preliminary plan as approved for Whispering Woods by requiring street access to the Minnick boundary.

In reaching this conclusion, this Court is mindful that the Supervisors decision in August, 2005 potentially has an economic consequence to the Minnicks. However, it is a consequence entirely foreseeable prior to the purchase of the Minnicks properties in 2004.

The Minnicks knew or were on notice of the circumstances surrounding the Alstadt property prior to purchasing it. The Minnicks were on public notice that in October, 1998, the Supervisors approved a development plan which did not extend a street to the Alstadt boundaries or otherwise provide access to Grubb Road.

The public record also revealed there was no appeal in 1998 by any party of the approval of Whispering Woods preliminary plan. Therefore, the Minnicks knew or were on notice prior to purchasing the Alstadt property that there had been no approval for street access through Whispering Woods to Grubb Road. Thus, the final approval of Phase V in 2005 did not cut off any preexisting access held by the Minnicks.

The Minnicks also were on notice of the physical characteristics of the Alstadt property. Obviously, the Minnicks were aware that Thomas Run stream separated a large portion of their property from Thomas Road. The problems posed with crossing over Thomas Run to access Thomas Road existed prior to the Minnicks purchase of the Alstadt property.

Therefore, the action of the Supervisors in August, 2005 in approving Phase V of Whispering Woods did not create an adverse affect upon the Minnicks which was not present or in existence prior to the Minnicks purchase of these parcels.

WHETHER THERE WAS AN ABUSE OF DISCRETION OR ERROR OF LAW IN THE FINAL APPROVAL OF PHASE V

In reviewing this matter, it is not the role of this Court to substitute its judgment for that of the Supervisors. In other words, it is not for this Court to separately decide whether the Minnicks should be given street access through Whispering Woods.

Instead, the determination is whether the, Supervisors committed an error of law or an abuse of discretion in granting final approval for Phase V. In deciding whether an abuse of discretion occurred, the analysis is whether the Supervisors decision is supported by substantial evidence. What constitutes substantial evidence is "that evidence which a reasonable man acting reasonably might have utilized in reaching the decision made..." *Robin Corp. v. Board of Supervisors of Lower Paxton Township*, 332 A.2d 841 (Pa. Cmwlth. 1975). An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will, as shown by their evidence of record, discretion is abused. *Howland v. Howland*, 900 A.2d 922, 927 (Pa. Super. 2006).

A review of the minutes of the regular meeting of the Supervisors held on August 23, 2005 establishes there was substantial evidence in support of the Supervisors decision to approve Phase V. Contrary to the Minnicks allegations, the minutes do not reflect the decision was the result of prejudice, bias, partiality or ill will towards them.

On the merits, there were at least five separate reasons articulated by the Supervisors in approving Phase V without street access to the Minnick parcel. Each of these reasons is content-based without reflection of a personal animus toward the Minnicks.

The Supervisors expressed two separate concerns about public safety. One of the concerns was the volume of traffic entering and exiting Whispering Woods from Grubb Road. Because Whispering Woods is in an Agricultural District, the Supervisors had concerns about the density of development. As the meeting minutes reflect, "the traffic that will be generated by the new subdivision would be traveling through Whispering Woods and exiting onto Grubb Road where the Board was trying to limit

that traffic as much as possible, which would be a detriment to what was originally planned." See Exhibit 13 at page 3.

In the words of Supervisor McGrath, "a great deal of thought, time and effort was put into Whispering Woods density and the limitation of the number of vehicles accessing Grubb Road and Thomas Road." Exhibit 13, page 3. To allow street access to the Minnick parcel would increase the density by providing access for fourteen residential lots from the Minnicks.

The Minnicks response is that any density added because of their development would only equate to the original density approved for Whispering Woods. Factually, the Minnicks argument is correct. However, as a matter of policy, the Supervisors nonetheless have a legitimate interest in reducing as much as possible the traffic flow to and from Grubb Road. The concomitant increase in traffic volume utilizing Grubb Road was a plausible reason for the Supervisors decision.

A second issue of public safety cited by the Supervisors were the risks associated with so many homes having a single means of access. If the Minnicks were granted street access as requested, the result would be the extension of a cul-de-sac from Whispering Woods into the Minnick parcel. It would mean that fourteen residential lots from the Minnicks were added to the nine lots at the tip of Mystic Ridge in Whispering Woods (Lots 173 through 181). The number of residential lots having a single means of egress and ingress would more than double. There are safety issues with a cul-de-sac of such length, including evacuation in the event of an emergency and the access of public safety vehicles (police, fire, ambulance, etc.). There is potential liability for Millcreek Township if the extended cul-de-sac created a dangerous condition. These safety issues are a reasonable explanation for the Supervisors vote.

Thirdly, the Supervisors concluded the approval of Phase V does not leave the Minnicks property landlocked. The public record reflects that each of the Minnicks parcels front on and has access to Thomas Road. The fact that the physical characteristics of the property, namely Thomas Run, may preclude the most profitable economic development of the property does not render the Minnicks parcels landlocked.

The Minnicks blur the definition of "landlocked" by framing it only in economic terms. In the common usage of the word, landlocked is the condition of being "enclosed or nearly enclosed by land." See Webster's New Collegiate Dictionary. As a factual matter, the Minnicks are not enclosed or nearly enclosed by land after the final approval of Phase V.

Further the Minnicks can cite no authority that compels Millcreek Township to act in a manner that allows private parties to have the highest economic value or usage of their property. As Supervisor McGrath opined, the Supervisors are not responsible for insuring that all parcels are "developable or to be held responsible for making them developable..." [1]

Exhibit 13, page 3.

The approval of Phase V did not eliminate the economic value of Minnicks properties. The public records reflect that on February 17, 2004, the Minnicks purchased these two parcels for the sum of $125,000.00. The record is devoid of any evidence that the development of Whispering Woods as approved renders Minnicks' properties valueless. Their equity was not instantly dissipated. Whispering Woods had been in the process of development for nearly six years prior to the Minnicks purchase. Obviously, the Minnicks were not deterred from buying the Alstadt properties by the development of Whispering Woods. In fact, a strong economic argument can be made that Whispering Woods increases, rather than decreases, the value of Minnicks' property.

The next reason articulated by the Supervisors was a recognition that not all parcels of property are capable of economic development. As observed by Supervisor Kujawa, Millcreek Township has a park that cannot be further developed. Exhibit 13, page 3.

Lastly, the Supervisors stated this was an issue to be resolved between adjoining private property owners. There was no public interest at stake other than the affect on traffic and public safety. As noted by Supervisor Kujawa, there are no tax dollars involved in the development of Whispering Woods or in any proposed development of the Minnicks property. Exhibit 13, page 5.

The reasons expressed in the certified record for the Supervisors actions constitute substantial evidence in support of the approval of Phase V. The reasons stated of record by the Supervisors are those "a reasonable man acting reasonably might have utilized." *Robin Corp.*, *supra*.

Nonetheless, the Minnicks point to unrelated comments by two Supervisors at the August 23, 2005 hearing to argue the Supervisors decision was the result of personal animus.

In the first instance, Supervisor Curtis referenced a Red Skelton character named "Freddie the Freeloader" to arguably imply the Minnicks were attempting to "freeload" off the developers of Whispering Woods. While this comparison may have been impolite and embarrassing to the Minnicks, the entirety of the remarks of Supervisor Curtis did not establish a bias against the Minnicks. For example, Supervisor Curtis also stated within the same excerpt:

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[1] As discussed, the matter before the Supervisors was not the future development plans of Minnicks property. The Minnicks did not have any application pending before the Supervisors for a future subdivision. Hence, the Minnicks were seeking to compel Whispering Woods to incur the cost of providing street access to a subdivision which may not ever materialize.

> MR. CURTIS:
> I mean, I respect, you know, Bruce for what he's doing and what he's trying to implement here. And I think he probably should have looked into the effect of putting a bridge where you're talking about putting a bridge to Thomas Road before he bought the land. I think he's an astute developer and I think he probably should have considered that before he did it.

Transcript of August 23, 2005, Supervisors meeting, page 21.

In stating his respect for Bruce Minnick and referring to Mr. Minnick as an astute developer, Supervisor Curtis was not manifesting a bias or ill will against the Minnicks.

Separately, Supervisor Kujawa speculated based on hearsay that the Minnicks had received a favorable purchase price for their property by promising Lynn Alstadt they would not develop the property. There is nothing of record to support Kujawa's conjecture. When the record is reviewed as a whole, however, Kujawa's speculation was not the driving force behind the Supervisors decision. Instead, there were a host of legitimate reasons expressed for the Supervisors actions.

In sum, the record does not establish sufficient evidence of ill will or partiality. Thus, the Supervisors did not abuse their discretion or commit an error of law in granting final approval to Phase V.

CONCLUSION

The Minnicks have filed a timely appeal from the final approval of Phase V in August, 2005.

Because there was no need for additional evidence, the appropriate scope of review is whether the Supervisors committed an abuse of discretion or an error of law in approving Phase V without requiring Whispering Woods to extend a street to the Minnick parcel.

The Supervisors had discretion in 1998 to approve a preliminary plan for Whispering Woods that did not extend any streets to the Alstadt/Minnick boundary. At the time the Supervisors committed to the preliminary plan for Whispering Woods, none of the adjoining landowners were requesting street access through Whispering Woods to Grubb Road. The Minnicks predecessor in title, Lynn Alstadt did not request street access nor appeal the preliminary approval of Whispering Woods.

The final approval of Phase V had no impact on any public interest. Instead it is the Minnicks private interest in developing their property without the expense of a bridge which is affected.

The approval of Phase V in August, 2005 did not change any circumstances which were not known to the Minnicks prior to the purchase of their property in 2004. The final approval of Phase V did not eliminate any pre-existing access the Minnicks had across Whispering Woods.

The Minnicks arguments are untimely. The approval of the preliminary plan for Whispering Woods was an approval of the arrangement and dimensions of the streets. The Minnicks cannot contest in 2005 the layout of streets as approved for Whispering Woods in 1998.

An applicant such as Whispering Woods, who presents for approval a final plan which is consistent with the preliminary plan, is entitled to approval of the final plan as a matter of law.

There was not an abuse of discretion or error of law in the final approval of Phase V. The certified record establishes substantial evidence in support of the Supervisors decision. There were at least five separately articulated reasons expressed for the Supervisors position. These were reasons which a "reasonable man acting reasonably might have utilized in reaching the decision made." When viewed as a whole, the Supervisors decision was not the product of prejudice, bias, partiality or ill-will toward the Minnicks.

Accordingly, the decision approving Phase V of Whispering Woods is hereby AFFIRMED.

ORDER

For the reasons set forth in the accompanying Opinion, the land use appeal filed by Appellants is hereby DENIED.

BY THE COURT:
/s/ **WILLIAM R. CUNNINGHAM, JUDGE**

DENNIS MITULSKI

v.

CYNTHIA MITULSKI

FAMILY LAW / DIVORCE / MARITAL PROPERTY RIGHTS

The determination of marital property rights through pre-nuptial, post-nuptial and settlement agreements is permitted in Pennsylvania. Anti-nuptial agreements are interpreted in accordance with traditional principles of contract law.

FAMILY LAW / DIVORCE / MARITAL PROPERTY RIGHTS

Where the parties enter into a post-nuptial agreement that specifically addresses pension fund rights, where there is no patent or latent ambiguities, the agreement is not inherently defective and will be upheld.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 13373-1990

Appearances: Dennis G. Kuftic, Esq. for Dennis Mitulski
Stephen A. Tetuan, Esq. for Cynthia Mitulski

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Domitrovich, J., June 28, 2006

After a thorough review of the testimony and evidence presented at the hearing conducted on June 7, 2006, and after a thorough review of the relevant statutory and case law, this Court hereby enters the following Findings of Fact and Conclusions of Law, regarding Dennis Mitulski's Motion to Modify Qualified Domestic Relations Order.

FINDINGS OF FACT

1. Dennis Mitulski and Cynthia Mitulski married on July 8, 1969.
2. On September 13,1972, during the parties' marriage, Mr. Mitulski began employment with the International Brotherhood of Electrical Workers (IBEW) Local 56.
3. During his employment, Mr. Mitulski earned a pension with the IBEW Local 56 Pension Trust Fund, which becomes payable upon Mr. Mitulski's retirement at the normal retirement age, age 65, which occurs on April 1, 2016.
4. Mr. Mitulski's pension plan provides that if he has a qualifying disability, Mr. Mitulski would be eligible to receive his pension at a date earlier than April 1, 2016 at no reduction.
5. In fact, on January 31, 2005, Mr. Mitulski retired early due to various disabilities and injuries.
6. Mr. Mitulski's employment with IBEW Local 56 was continuous from September 13, 1972 until January 31, 2005.
7. On February 1, 1991, the parties negotiated, agreed to, and signed a Postnuptial Agreement.

8. At the time of the execution of the Postnuptial Agreement, and throughout the course of the divorce proceedings, Ms. Mitulski was represented by Stephen Tetuan, Esq. and Mr. Mitulski was represented by Dennis Kuftic, Esq.
9. With regard to division of Mr. Mitulski's pension, Paragraph 21 of the Postnuptial Agreement states, in relevant part, as follows: "The parties have agreed to divide the proceeds of the Husband's pension fund, completely excluding the annuity, and pursuant thereto, Wife will receive one-half of the Husband's pension fund from the IBEW Local 56 Pension Fund as of the date of the divorce herein."
10. On March 4, 1991, the Honorable Jess Jiuliante entered the Divorce Decree in this matter.
11. On April 10, 1991, Mr. and Ms. Mitulski filed a Petition for Qualified Domestic Relations Order (hereinafter referred to as QDRO) with an attached Consent to Divorce, signed by both Mr. and Ms. Mitulski.
12. With regard to division of Mr. Mitulski's pension, Paragraph C of the QDRO states, in relevant part, as follows: "Effective March 4, 1991, the alternate payee is awarded one-half of the participant's benefits provided by the plan in the ratio that the credited service accrued during the marriage bears to the total credited service when the alternate payee's benefit portion becomes payable."
13. On April 10, 1991, the undersigned judge entered the Qualified Domestic Relations Order in this matter.
14. Every year after 1991, Diana Shaner, a fund administrator with the International Brotherhood of Electrical Workers, forwarded notices to Ms. Mitulski regarding the value of her share of Mr. Mitulski's pension
15. Mr. Mitulski's pension plan utilizes a multiplier in order to convert years of service to an accrued pension benefit amount.
16. At the time of the parties' divorce in 1991, Mr. Mitulski's pension multiplier was $29.00 for years accrued as of April 30, 1983, and $35.00 for years accrued after April 30, 1983.
17. On the date of parties' divorce, Mr. Mitulski's accrued pension benefit was determined by the following formula: $29.00 multiplied by 13.7 years of service, plus $35.00 multiplied by 10.4 years of service, which totals $761.30.
18. If Mr. Mitulski had terminated his employment on the date of the parties' divorce, on his sixty-fifth birthday he would begin receiving pension benefits in the amount of $761.30.
19. Diana Shaner credibly testified that Ms. Mitulski, therefore, is entitled to receive approximately $381.50 per month in pension benefits, which is approximately one-half of the benefits earned by Mr. Mitulski prior to "the date of divorce," pursuant to the

express terms of the parties' Postnuptial Agreement to which both parties contracted.

20. Mr. Mitulski, however, did not terminate his employment as of the date of the parties' divorce, and, therefore, Mr. Mitulski continued to accrue years of service subsequent to the parties' divorce.
21. Following Mr. and Ms. Mitulski's divorce, Mr. Mitulski's pension plan changed, and provided that each active participant in the pension plan would receive a monthly pension at the normal retirement age equal to $58.40 for each year of service.
22. Keith Nichols, an actuary, credibly stated that the $58.40 multiplier applied to all active participants at the time that the multiple increased.
23. Keith Nichols credibly stated that at present, Mr. Mitulski's pension multiplier equals $58.40 for *all* years of service, including those during the marriage to Ms. Mitulski.
24. Keith Nichols credibly stated that had Mr. Mitulski terminated his employment on the date of the parties' divorce, Mr. Mitulski would not be entitled to this additional benefit. Rather, as previously set forth, Mr. Mitulski's pension would be determined by the following formula: $29.00 multiplied by 13.7 years of service, plus $35.00 multiplied by 10.4 years of service, which totals $761.30.
25. Mr. Mitulski accrued a total of 40.2 years of benefit service
26. Multiplying 40.2 years of service by the $58.40 multiplier equals a total monthly pension of $2,347.68 earned by Mr. Mitulski, provided Mr. Mitulski retires at the normal retirement age (age 65).
27. Although the clear terms of the parties' Postnuptial Agreement establish that Ms. Mitulski should receive only $381.50, Keith Nichols interpreted the QDRO language, not the Postnuptial Agreement language, to mean that Ms. Mitulski was entitled to be paid retroactively commencing on January 1, 2005. Therefore, the formula for determining Ms. Mitulski's share of Mr. Mitulski's pension is determined by the following formula: 24.1 years of benefit service were accrued during the marriage, and Mr. Mitulski accrued 40.2 years of benefit service in total. 24.1 years is divided by 40.2 years, which equals approximately .60. Then .60 is multiplied by the total accrued pension amount of $2,347.68, which equals $1,407.44. Mr. Nichols claimed that Ms. Mitulski is entitled to half of this amount, or $703.72 per month, pursuant to the language of the QDRO.
28. Mr. Nichols never saw the parties' Postnuptial Agreement, but rather only saw the QDRO prior to determining the amount of Mr. Mitulski's pension to which Ms. Mitulski is entitled. Therefore, Mr. Nichols's analysis was limited to interpreting the QDRO language only, and not to interpreting the Postnuptial Agreement language.

29. Diana Shaner credibly stated that the QDRO needed to reflect the terms of the Postnuptial Agreement
30. The provision in Paragraph C of the QDRO, stating that Ms. Mitulski is "awarded one-half of the participant's benefits provided by the plan in the ratio that the credited service accrued during the marriage bears to the total credited service when the alternate payee's benefit portion becomes payable," is inconsistent with the provision in the parties' Postnuptial Agreement, stating that Ms. Mitulski "will receive one-half of the Husband's pension fund...as of the date of the divorce."
31. Diana Shaner credibly stated that the QDRO, in this matter, did not accurately reflect the terms of the Postnuptial Agreement
32. Both parties stipulated that it is undisputed that Paragraph 21 of the parties' Postnuptial Agreement is clear and unambiguous and contains no patent or latent ambiguities.
33. Diana Shaner credibly stated that pursuant to the terms of the Postnuptial Agreement, Ms. Mitulski should receive a total of $381.50 per month in pension benefits earned by Mr. Mitulski during their marriage, until "the date of divorce," and no additional benefits accrued by Mr. Mitulski by virtue of his continuing to work after the parties' date of divorce.
34. Diana Shaner credibly stated that it was possible to correct the QDRO to reflect the terms of the Postnuptial Agreement, in which case Ms. Mitulski would be entitled to receive approximately $381.50 per month in pension benefits.
35. Diana Shaner credibly stated that she spoke with Ms. Mitulski via telephone on May 11, 2006, during which Ms. Mitulski inquired concerning her entitlement to a portion of Mr. Mitulski's pension totaling approximately $300.00 per month.
36. Based upon Diana Shaner's credible testimony, this Court finds that it was Ms. Mitulski's expectation to receive only approximately $381.50 per month in pension benefits, and not $703.72 per month,
37. This Court finds Ms. Mitulski's testimony, to the extent her testimony was to the contrary, not to be credible.

CONCLUSIONS OF LAW

In Pennsylvania, it is well established that "the determination of marital property rights through prenuptial, postnuptial and settlement agreements has long been permitted, and even encouraged." *Cioffi v. Cioffi*, 885 A.2d 45, 48 (Pa. Super. Ct. 2005). Furthermore, "antenuptial agreements are interpreted in accordance with traditional principles of contract law." *Sabad v. Fessenden*, 825 A.2d 682, 688 (Pa. Super. Ct. 2003).

When interpreting an antenuptial agreement, the court must determine the intention of the parties. When the words of a contract are clear

> and unambiguous, the intent of the parties is to be discovered from the express language of the agreement. Where ambiguity exists, however, the courts are free to construe the terms against the drafter and to consider extrinsic evidence in so doing. (internal citations and quotations omitted). *Id.*

Additionally,

> A contract will be found to be ambiguous: if, and only if, it is reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning. A contract is not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends; and a contract is not rendered ambiguous by the mere fact that the parties do not agree on the proper construction.
>
> Ambiguity within a contract may be latent or patent. A patent ambiguity appears on the face of the contract and is a result of defective or obscure language. *Id.* A latent ambiguity arises from collateral facts which make the meaning of a written contract uncertain, although the language appears clear on the face of the contract. To determine whether there is an ambiguity, it is proper for a court to hear evidence from both parties and then decide whether there are objective indications that the terms of the contract are subject to differing meanings. *Krizovensky v. Krizovensky*, 624 A.2d 638, 642-43 (Pa. Super. Ct. 1993). (internal citations omitted).

In the instant matter, the parties entered into a Postnuptial Agreement that specifically addresses the matter of Mr. Mitulski's pension plan income. Paragraph 21 of the Postnuptial Agreement provides, "The parties have agreed to divide the proceeds of the Husband's pension fund, completely excluding the annuity, and pursuant thereto, Wife will receive one-half of the Husband's pension fund from the IBEW Local 56 Pension Fund as of the date of the divorce herein."

At the time of the June 7, 2006 hearing in this matter, Attorney Kuftic and Attorney Tetuan both agreed that the language of Paragraph 21 of the parties' Postnuptial Agreement was clear and unambiguous. This Court agrees with both counsel that Paragraph 21 provides clear and unambiguous language, and contains no patent or latent ambiguities. Paragraph 21 of the parties' Postnuptial Agreement does not contain a patent ambiguity, as the contract, taken strictly on its face and without regard to external facts and circumstances, does not contain inherently defective or obscure language. Similarly, Paragraph 21 of the parties' Postnuptial Agreement also does not contain a latent ambiguity, as

collateral facts do not make the meaning of the contract uncertain, and as objective indicia do not subject any of the terms of this contract to different meanings. The terms are specific and clear and, at the time of the June 7, 2006 hearing, no party took issue with the interpretation of any specific term. Moreover, the relevant terms of the parties' contract are not reasonably susceptible of different constructions or capable of being understood in more than one sense when applied to the facts of this case.

Therefore, this Court determined the intent of the parties upon entering the Postnuptial Agreement, based upon the express terms of Paragraph 21 itself. The language contained in Paragraph 21 resolves the conflict involved in the instant case, of whether Ms. Mitulski is entitled to receive any additional pension benefit acquired by Mr. Mitulski after the date of divorce. Paragraph 21 provides, "Wife will receive one-half of the Husband's pension fund...*as of the date of the divorce."* (emphasis added). Paragraph 21 specifically prohibits Ms. Mitulski from receiving any benefit accrued by Mr. Mitulski after the date of their divorce, but rather limits Ms. Mitulski's benefit to that accrued "as of the date of divorce." As no ambiguity exists, the plain meaning of Paragraph 21, of the parties' Postnuptial Agreement must be enforced.

Paragraph C of the parties' QDRO, stating "Effective March 4, 1991, the alternate payee is awarded one-half of the participant's benefits provided by the plan in the ratio that the credited service accrued during the marriage bears to the total credited service when the alternate payee's benefit portion becomes payable" inaccurately reflects the clear and unambiguous terms of the parties' Postnuptial Agreement, to which both parties consented. The parties clearly agreed that Ms. Mitulski was entitled to receive one-half of Mr. Mitulski's pension "as of the date of divorce" and not as of some later date subsequent to the parties' divorce. The QDRO, in this matter, must mirror the express, clear, and unambiguous terms of the parties' previously executed Postnuptial Agreement, and, therefore, the QDRO, entered on April 10, 1991, requires revision.

This Court briefly notes that at the time of the hearing in this matter, Attorney Tetuan cited the case of *Meyer v. Meyer,* 749 A.2d 917, (Pa. 2000). *Meyer,* however, is distinguishable from the instant case. In the instant matter, unlike in *Meyer,* Mr. Mitulski's increased pension benefit was produced by his own efforts and contributions. Had Mr. Mitulski terminated his employment on the date of the parties' divorce, he would not be entitled to the additional benefit of a higher yearly multiplier. Mr. Mitulski is entitled to this higher yearly multiplier because he did, in fact, continue his employment subsequent to the divorce, and Mr. Mitulski did, in fact, make efforts and/or contributions after the date of divorce. Unlike in *Meyer,* in this case, it is clear that the benefit was accrued after the date of divorce, and not during the marriage. Moreover, Ms. Mitulski

voluntarily negotiated and entered into a contract whereby she would receive a portion of Mr. Mitulski's pension based upon its value as of the date of divorce. Ms. Mitulski contracted away her right to receive any future benefit.

The Court reserves the opportunity to make additional findings of fact and conclusions of law, as necessary. For all of the foregoing reasons, this Court enters the following Order, modifying Paragraphs C and D of the parties' Qualified Domestic Relations Order, entered on April 10, 1991.

AMENDED QUALIFIED DOMESTIC RELATIONS ORDER

AND NOW, to wit, this 28th day of June, 2006, after a hearing regarding Dennis Mitulski's Motion to Modify Qualified Domestic Relations Order, filed by and through Dennis Kuftic, Esq., it is hereby ORDERED, ADJUDGED, AND DECREED that Paragraphs C and D of the parties' Qualified Domestic Relations Order, entered on April 10, 1991, are vacated and replaced with the following Paragraphs C and D, consistent with the clear and unambiguous terms of the parties' Postnuptial Agreement, entered on February 1, 1991:

c. Effective March 4, 1991, the Alternate Payee is awarded the actuarial equivalent of one-half of the Participant's accrued benefits provided by the Plan determined as of March 4, 1991. The Alternate Payee can apply for her benefit portion when the Participant attains the earliest retirement age as such term is defined in the Plan and Section 414(p) of the Internal Revenue Code or later if she elects, and further, she has the right to elect options as provided by the Plan except for the joint and survivor benefit.
d. The Alternate Payee shall be treated as the Participant's surviving spouse for the joint and survivor annuity payment and for the pre-retirement death benefit with respect to the death benefit assigned to her pursuant to paragraph "C" above. All other aspects of the Qualified Domestic Relations Order, entered on April 10, 1991, shall remain the same.

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

NANCY J. FULLERTON, Plaintiff

v.

BRANDON MARSH, CHRISTINA M. MARSH and ROBERT MARSH, Defendants

INSURANCE / AUTOMOBILE INSURANCE / FINANCIAL RESPONSIBILITY LAW

A person who owns a registered vehicle but who fails to secure financial responsibility is not entitled to the recovery of first-party benefits even where the owner was injured while driving someone else's vehicle. 75 Pa.C.S. §1714.

INSURANCE / AUTOMOBILE INSURANCE / FINANCIAL RESPONSIBILITY LAW

Every person who owns a currently registered vehicle must have his or her own financial responsibility in order to be eligible to receive first-party benefits. 75 Pa.C.S. §1714.

INSURANCE / AUTOMOBILE INSURANCE / FINANCIAL RESPONSIBILITY LAW

Any person who owns a currently registered, private passenger motor vehicle but who does not have financial responsibility shall be deemed to have chosen the limited tort alternative. 75 Pa.C.S. §1705.

INSURANCE / AUTOMOBILE INSURANCE / FINANCIAL RESPONSIBILITY LAW

The financial responsibility requirements of the financial responsibility law are not met simply because the owner of a registered but uninsured vehicle may be an insured person under the policy of some other owner of a registered vehicle.

INSURANCE / AUTOMOBILE INSURANCE / FINANCIAL RESPONSIBILITY LAW

Liability insurance purchased by a policy holder other than the owner of a registered vehicle and that provides no coverage for the owner of the policy as a driver is not sufficient to meet the financial responsibility requirements of the financial responsibility law.

INSURANCE / AUTOMOBILE INSURANCE / FINANCIAL RESPONSIBILITY LAW

The financial responsibility law does not require an ability to respond to damages in "any accident" but rather the ability to respond in damages for liability on account of accidents arising out of the maintenance or use of a motor vehicle. 75 Pa.C.S. §1702.

INSURANCE / AUTOMOBILE INSURANCE / FINANCIAL RESPONSIBILITY LAW

Where financial responsibility in the form of a liability policy was provided by a spouse from which the plaintiff was separated and where the plaintiff was expressly designated as a "rated driver" instead of an "insured," the plaintiff was an insured person under the policy and had the

ability to respond in damages for accidents arising out of the use of that vehicle of which she and her spouse were co-owners; and accordingly the plaintiff had financial responsibility and was not relegated to the limited tort option.

INSURANCE / AUTOMOBILE INSURANCE / FINANCIAL RESPONSIBILITY LAW

Where the plaintiff's husband from whom plaintiff was separated selected the limited tort option contrary to plaintiff's request and the agreement plaintiff had with her husband, the plaintiff would nevertheless not be limited to the limited tort option where she was not an "insured" addressed by the terms of the financial responsibility law. 75 Pa.C.S. §§1702 and 1705 (b)(2).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW NO. 10093 - 2005

Appearances: Christina S. Nacopoulos, Esquire for the Plaintiff
Gregory P. Zimmerman, Esquire for the Defendants

OPINION

Bozza, John A., J.

Plaintiff, Nancy J. Fullerton, was injured as a result of an automobile accident at the intersection of 21st Street and Greengarden Boulevard in Erie, Pennsylvania on January 31, 2003. At the time of the accident she was operating a 1989 Buick LeSabre owned by both her and her husband, Ronald Fullerton, and properly registered in Pennsylvania. Although Nancy and Ronald Fullerton were married at the time of the accident, they had been separated and living in different residences for more than a year.

Upon separation, Nancy and Ronald Fullerton agreed that she would possess the 1989 Buick and Ronald would take possession of the 1987 Jeep Cherokee. In lieu of paying spousal support, Ronald Fullerton agreed to purchase insurance on the Buick LeSabre with "full tort" coverage. When he purchased the insurance on the Buick LeSabre, he designated himself as the policyholder and on his application for insurance he specified that Nancy Fullerton would be the driver of the Buick. However, Ronald Fullerton purchased a policy that only provided for "limited tort" coverage. The defendants have taken the position that Nancy Fullerton is restricted to limited tort coverage and that her injuries are not sufficiently serious to allow her to maintain an action for damages. In support of their position, they assert two reasons:

1. At the time of the accident she was the owner of a registered vehicle and did not have financial responsibility; and

2. She is an insured under her husband's policy and bound by his "limited tort" selection.

Nancy Fullerton on the other hand maintains that she has full tort coverage because:

1. Even though she was not the policyholder named in the Nationwide policy at issue, she was an "insured person" under the policy and therefore had financial responsibility as required by the MVFRL; and

2. She is not bound by her husband's limited tort selection because, while she is an insured pursuant to the policy, she does not fit within the definition of "insured" provided in the MVFRL, as she did not reside in Ronald Fullerton's household at the time of the accident.

To determine whether Nancy Fullerton has financial responsibility it is first necessary to examine the Nationwide Insurance policy purchased by her husband. The Declaration page lists Ronald Fullerton as policyholder and makes no mention of Nancy Fullerton. However, it is apparent from the correspondence and documents obtained from the Fullerton's insurance broker, the William C. Bush Agency, that one of the "RATED" drivers referred to in the Auto Policy Declarations for the Buick is Nancy Fullerton. Although the term "rated driver" is not defined in either the policy or the MVFRL, it is reasonable to conclude, and it has not been contested, that it refers to a person who would be regularly driving an insured vehicle with the permission of the owner. The term also suggests that the characteristics of rated drivers are an underwriting issue that influences the premium charged to the policyholder.

According to the terms of the policy, Nancy Fullerton was an "insured person" for whom Nationwide Insurance would pay damages which she was legally obligated in the event of an accident. (*See* Policy, Part 1. p. 3, and ADDITIONAL DEFINITIONS, p. 4). She fell within the category of "(c) Any other person using **your insured car**."[1] The term "**Your insured car**" is described in pertinent part as "(a) Any **car** described in the declarations" (*See* Policy, "ADDITIONAL DEFINITIONS USED IN THIS PART," p. 4). Since there were two cars described in the Declarations, the Buick and the Jeep, Nationwide promised to pay damages for which Nancy is legally liable as a result of using either one. The question is whether as an "insured person" under Ronald Fullerton's policy, Nancy Fullerton has met the requirement of having "financial responsibility" pursuant to the MVFRL.

This appears to be an issue of first impression that has not been squarely addressed by Pennsylvania's appellate courts. Recently, however, the Pennsylvania Supreme Court decided a closely related issue in *Swords v. Harleysville Insurance Co.*, 584 Pa. 382, 883 A.2d 562 (2005). In *Swords*,

[1] The policy defines the word "your" as "The policyholder named in the Declarations and spouse if living in the same household". Since Robert Fullerton was identified as the policyholder in the Declarations, and since Nancy Fullerton was not living in his household at the time, "your" refers to Ronald Fullerton.

the father had given his son permission to drive his truck. The son owned his own vehicle that was registered in Pennsylvania but had not purchased insurance for it. While operating his father's truck, the son was involved in an accident and was injured. He made a claim for first-party benefits from his father's insurance carrier, Pennland Insurance Company. That carrier denied coverage on the basis that he did not have financial responsibility and pursuant to §1714 was ineligible for first-party benefits. Section 1714 states as follows:

> "An owner of a currently registered motor vehicle who does not have financial responsibility. . . cannot recover first-party benefits."

75 Pa. C.S. §1714.

The trial court rejected Pennland's position relying on the Pennsylvania Superior Court's decision in *Kafando v. State Farm Mutual Auto Insurance Co.*, 704 A.2d 675, 1998 Pa. Super LEXIS 2 (1998). On appeal, the Superior Court reversed, concluding that *Kafando* was wrongly decided and that for the purposes of §1714, it made no difference that at the time he was injured he was not operating his own uninsured vehicle. In affirming the Superior Court's ruling, the Supreme Court concluded that §1714 precludes the recovery of first-party benefits by an owner of a registered vehicle who failed to secure financial responsibility even where the claimant was injured while driving someone else's vehicle. "Section 1714, thus, requires every owner of a currently registered vehicle to have his or her *own* financial responsibility in order to be eligible to receive first-party benefits." *Swords*, 584 Pa. at 393, 883 A.2d at 568. In reaching its conclusion, the Court found support in the language of §1782 relating to "Manner of providing proof of financial responsibility", which provides "...Proof of financial responsibility may be furnished by filing evidence satisfactory to the department that *all motor vehicles registered in a person's name* are covered by motor vehicle liability insurance. . ." 75 Pa. C.S. §1782 (emphasis added).[2] In addition, the Court pointed to the legislature's clear intent to punish owners of registered vehicles who fail to maintain financial responsibility. *Id.* at 394, 883 A.2d at 570.

While the case at bar does not relate to a claim for first-party benefits, it does involve an analogous circumstance. Section 1705 relating to the selection of limited or full tort benefits includes parallel language to that found in §1714(5):

> "An owner of a currently registered, private passenger motor vehicle who does not have financial responsibility shall be deemed to have

[2] *See*, 67 Pa. Code §221.2 (2006). ***Financial responsibility*** -- A motor vehicle liability insurance policy or program of self-insurance, complying with the requirements of 75 Pa. C.S. § 1787 (relating to self-insurance) and approved by the Department, covering all motor vehicles registered in a person's name.

chosen the limited tort alternative."

75 Pa. C.S. § 1705. Moreover, it appears that the policy goal of penalizing owners of registered vehicles who do not maintain financial responsibility is the same for both §1705(a)(5) and §1714 (relating to first-party benefits).

Defendants have also relied on *Swartzberg v. Greco*, 2002 Pa. Super 48, 793 A.2d 945 (2002). In that case, the Superior Court found that the owner of a registered vehicle who had not purchased his own insurance policy did not have financial responsibility even though his girlfriend did purchase a policy on his vehicle. In *Greco*, the claimant was injured when he was struck by a motor vehicle as a pedestrian. He had not purchased any insurance for his vehicle because his license had been suspended. His girlfriend, who lived with him, purchased liability insurance on his vehicle but listed him as an excluded driver. In these circumstances, the Superior Court concluded that pursuant to §1705(a)(5), Swartzberg was deemed to have chosen the limited tort alternative.

Turning then to the facts of the case at bar, the applicable question is whether Nancy Fullerton's status as a designated or rated driver on her husband's policy was sufficient to meet the MVFRL's requirement that she have financial responsibility. Section 1702 of the MVFRL defines financial responsibility as follows:

> "FINANCIAL RESPONSIBILITY. The ability to respond in damages for liability on account of accidents arising out of the maintenance or use of a motor vehicle in the amount of $15,000.00 because of injury to one person in any one accident, and in the amount of $30,000.00 because of injury to two or more persons in any one accident, and in the amount of $5,000.00 because of damage to property of others in any one accident. *The financial responsibility shall be in a form acceptable to the Department of Transportation."*

75 Pa C.S. §1702 (emphasis added). There is nothing in the record before that Court that indicates what "form" of financial responsibility is acceptable to the Department of Transportation. However, on the basis of the *Greco* decision, it can be concluded that liability insurance purchased by a policyholder other than the owner of a registered vehicle and that provides no coverage for the owner as a driver is not sufficient to meet the financial responsibility requirements of the Act. Moreover, the Supreme Court in *Swartzberg v. Harleysville Insurance Company,* 584 Pa. 382, 883 A.2d 562 (2005), established that the financial responsibility requirements of the Act are also not met for purposes of §1705(a)(5) simply because an owner of a registered but uninsured vehicle may be an insured person under the policy of some other owner of a registered vehicle. Unfortunately, the circumstances of this case do not fit squarely into either of those two scenarios. Unlike either of those two cases, the vehicle in this case is owned by more than one person and at least one of the owners, Ronald Fullerton,

purchased a policy that appears to comply with the requirements of the Act. Furthermore, the other owner, Nancy Fullerton, is designated as the driver of the covered vehicle in the application of insurance and as noted above, is considered to be an "insured person" pursuant to the policy.

The defendants have taken the position that, although she would be able to respond to damages for liability in the event of an accident arising out of her use of the Buick or the Jeep, she would not have liability coverage for all motor vehicle accidents. It is the defendants' position that the MVFRL requires that a person be able to respond in damages for liability arising out of any motor vehicle accident in order to meet the financial responsibility requirements of the Act. For this precise proposition no authority has been supplied. Contrary to the defendants' assertion, §1702 does not expressly state that financial responsibility requires the ability to respond to damages in **"any accident"**. Rather the relevant language states that financial responsibility is "The ability to respond in damages for liability on account **of accidents** arising out of ..." 75 Pa. C.S. §1702 (emphasis added). Moreover, the Pennsylvania Department of Transportation does not appear to have formulated a regulation describing the form of financial responsibility that is acceptable. The only regulatory guidance on this issue is found in the following definition formulated by the Department:

> **Financial Responsibility - A motor vehicle liability insurance policy** or program of self-insurance, complying with the requirements of 75 Pa. C.S. §1787 (relating to self-insurance) and approved by the Department, **covering all motor vehicles registered in a person's name**.

67 Pa. Code §221.2 (2006) (emphasis added).

There is no question that the Buick LeSabre that was co-owned by Nancy Fullerton and her husband and registered in both of their names was covered by a motor vehicle liability insurance policy. It is not at all clear why Ronald Fullerton who, pursuant to the parties' oral separation agreement, had the responsibility to purchase motor vehicle insurance for the Buick, decided not to include Nancy Fullerton as a policyholder but rather as a rated driver. The policy does in fact treat Ronald Fullerton as the policyholder different than Nancy Fullerton as a named insured with regard to coverage for accidents. Nancy Fullerton is only covered, according to the terms of the policy, when using the Buick (Policy, p. 4), while Ronald Fullerton's coverage would seemingly extend to the operation of certain other cars as more fully described in the policy. *Id*. Neither the MVFRL nor the Department of Transportation regulations specify that an owner of a registered vehicle has to be the actual policyholder and the

issue of whether a designated or rated driver - an insured person under the policy - is sufficient is not addressed. And other than stating the minimum amounts of coverage, neither specifies the extent to which one must be able to respond in damages to liability.

Nonetheless, the record in this case does not allow a definitive determination of the exact dimensions of the coverage afforded to the Fullertons. It is interesting to note that under their policy Ronald is not covered with regard to "all" accidents. Indeed, the policy contains a number of exclusions and limitations. *Id.* at 4, 5. Moreover, it cannot be determined whether the mere status as a "rated" driver is inherently less desirable than the status of policyholder because such individuals may fall within different categories of insured persons. Indeed, to accept the defendants' position would require the Court to speculate as to the coverage afforded the parties in a myriad of unknown circumstances.

What is apparent is that Nancy Fullerton co-owned a 1989 Buick LeSabre that was covered by a motor vehicle liability policy purchased by her co-owner. Moreover, Nancy Fullerton was an insured person under the policy and she had the ability to respond in damages and liability for accidents arising out of the use of that vehicle as well as the Jeep. Indeed, it is likely that the premiums of the policy were calculated on the basis of her being designated as the operator of the Buick and there is nothing to indicate that treating her in that regard resulted in some lesser premium than would have been required had she been designated as a policyholder. In these circumstances, denying her the advantage of full tort benefits would not further the goal of the MVFRL to promote a comprehensive and cost-effective system of financial responsibility. And in the absence of any guidelines concerning the "form of financial responsibility" or the extent of coverage required, penalizing her for not being designated as a policyholder would not further any objective of the Act.

In both *Swords* and *Greco*, the claimants were not covered by a policy on the vehicles they owned. In one instance there was no insurance on the car and in the other the claimant was an excluded driver on a policy purchased by someone else. To have allowed those individuals the right to pursue full tort and first-party benefits would be to reward them for failing to purchase motor vehicle liability policies on their own cars and assuring that they were able to "respond in damages" for their own liability. This would most certainly undermine the goals of the Act. The notion is that one must have financial responsibility for personal liability related to the car that one has registered. For the reasons set forth in this analysis, the defendants' Motion for Partial Summary Judgment must be denied.

I. Is Nancy Fullerton bound by her husband Ronald Fullerton's selection of the limited tort option?

When purchasing the Nationwide motor vehicle liability policy covering the two vehicles owned by Ronald and Nancy Fullerton, Ronald selected the limited tort option. This was contrary to Nancy's request and the agreement of the parties that he would purchase the full tort option. Nonetheless, Ronald Fullerton would have paid a premium for a limited tort option policy and that is what was in effect on the date of the accident. As the policyholder and named insured under the policy, the tort-option selected by Ronald Fullerton applies to "all insureds under the private passenger motor vehicle policy who are not named insureds under another private passenger motor vehicle policy." 75 Pa. C.S.A. §1705(b)(2). Nancy Fullerton was not a named insured in the policy but under the terms of the policy was an "insured person" as has been more fully addressed above. It is the plaintiff's position that, because she does not fit within the definition of "insured" as contained in the Definitions section of the Act, she is not bound by her husband's selection. The definition contained in the Act is as follows:

> "INSURED." Any of the following:
> (1) An individual identified by name as an insured in a policy of motor vehicle liability insurance.
> (2) If residing in the household of the named insured:
> (i) a spouse or other relative of the named insured; or
> (ii) a minor in the custody of either the named insured or relative of the named insured.

75 Pa. C.S. §1702.

It is apparent from a plain reading of the definition that Nancy Fullerton does not fall within either of the two applicable categories specified within it. She was not a person named as the insured in the Nationwide policy and she was not a spouse or relative residing in Ronald Fullerton's household. Moreover, the prefatory remarks to the definitions contained in §1702 are as follows:

> "The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise."

The context within which the word "insureds" is used in §1705 does not *clearly* indicate that any other meaning applies.

When interpreting the language of a statute, the court is required to apply well-established rules of statutory construction in order to ascertain the intent of the legislature. *Mishoe v. Erie Ins. Co.*, 573 Pa. 267, 824 A.2d 53 (2003). If the language at issue is clear and free from ambiguity, then the "letter of it is not to be disregarded under the pretext of pursuing its spirit". 1 Pa. C.S. §1921 (b). Here the term "INSURED" is defined in the statute in a manner that is not ambiguous. The defendants have not

suggested otherwise. Therefore, Nancy Fullerton is not bound by her husband's selection of the limited tort option and her Cross Motion for Partial Summary Judgment will be granted.

An appropriate order shall follow.

ORDER

AND NOW, this 22 day of August, 2006, upon consideration of the Defendants' Motion for Partial Summary Judgment and Plaintiff's Cross Motion for Partial Summary Judgment and argument thereon, and for the reasons set forth in this Court's Opinion, it is hereby ORDERED, ADJUDGED and DECREED that Defendants' Motion for Partial Summary Judgment is DENIED and Plaintiff's Cross Motion for Partial Summary Judgment is GRANTED.

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

JOHN YATES and JOHN L. DOMBROWSKI, Plaintiffs
v.
TOWNSHIP OF McKEAN, ERIE COUNTY, PENNSYLVANIA and McKEAN TOWNSHIP SEWER AUTHORITY, Defendants

POLITICAL SUBDIVISIONS

When challenging a purported ouster from an appointed position to the Sewer Authority, the plaintiffs correctly filed an action in mandamus seeking relief. A plaintiff seeking a writ of mandamus has the burden of proving (1) a clear legal right for the performance of the ministerial act or mandatory duty; (2) a corresponding duty by the defendant(s) to perform the act or duty; and (3) the absence of any remedy at law.

The procedure for removal of a sewer authority member is set forth in the Municipal Authorities Act of 1945, 53 Pa. C.S.A. §5601 et seq. (hereinafter the MAA). Under the MAA the only scenario in which the supervisors can unilaterally remove a member of the sewer authority is when the member is unexcused from three consecutive meetings. In this situation the board member may be removed by a municipality within sixty days of their meeting. *See* 53 Pa. C.S.A. §5610(f).

Alternatively the MAA provides a municipality may remove an authority member "for cause by the Court of Common Pleas of the county in which the authority is located after having been provided with a copy of the charges against for at least ten days and after having been provided a full hearing by the Court." 53 Pa. C.S.A. §5610(d). Beyond these provisions, a municipality cannot remove an authority member at will under the MAA.

The MAA is not rendered unconstitutional because it provides for the methods of removal of an authority member.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 10557 - 2006

Appearances: Joseph W. Tinko, Esq. for McKean Twp. Sewer Authority
John J. Shimek, III, Esq. for Twp. of McKean
David D. Black, Esq. for Yates and Dombrowski

OPINION

Cunningham, William R., J.

The present controversy involves a determination of whether Plaintiffs remain members of the McKean Township Sewer Authority. At issue is whether a township board of supervisors has the authority to remove at will a duly appointed and acting member of a municipal authority, in this case, a sewer authority.

Because the attempted ouster of the Plaintiffs from the McKean Township

Sewer Authority (hereinafter Sewer Authority) was not in compliance with the Municipal Authorities Act, the Plaintiffs remain members of the Sewer Authority. Therefore, the Preliminary Objections of all of the Defendants are OVERRULED and the Plaintiffs' Motion for Preemptory Judgment is GRANTED.

PROCEDURAL/FACTUAL HISTORY

There are no material issues of fact in this case. Both Plaintiffs are individuals who reside within the Township of McKean and were duly appointed on January 5, 2004 as members of the Sewer Authority. The term of office of John Yates (Yates) expires in 2009. John L. Dombrowski's (Dombrowski) term expires in 2007.

Both Yates and Dombrowski continued to serve as members of the Sewer Authority into 2005. On September 1, 2005, by majority vote of the McKean Township Supervisors (hereinafter Supervisors), Yates was removed as a member of the Sewer Authority for "making a lot of bad moves during his term on the Sewer Authority."

On December 31, 2005, again by majority vote of the Supervisors, Dombrowski was removed as a member of the Sewer Authority because he "brought the lawsuit against the Township."[1]

The Supervisors appointed Joseph Pilliteri to fill the remainder of the term of office of Yates. Likewise, the Supervisors appointed Edward Hess to fill the remainder of the term of office for Dombrowski.[2]

On February 9, 2006, Plaintiffs filed this case as an action in mandamus against McKean Township and the Sewer Authority. On the following day, the Plaintiffs filed a Motion for Preemptory Judgment.

Preliminary Objections were filed by each Defendant. Subsequently, the Plaintiffs have filed three Amended Complaints, the primary purpose of which was to join all necessary parties. As a result, the present Defendants are the Township of McKean, each of the Supervisors in their individual and official capacities, the McKean Township Sewer Authority and each of the Sewer Authority members (except Plaintiffs).

The Defendants have filed Preliminary Objections to each of the Amended Complaints. The gravaman of the Preliminary Objections is that the Plaintiffs have brought the wrong kind of legal action. Instead of seeking mandamus relief, the Defendants assert the Plaintiffs can only contest their right to hold office by way of a quo warranto action. The Plaintiffs respond that a quo warranto action applies only to a dispute about the original appointment to the office.

The Plaintiffs have also filed a renewed Motion for Preemptory

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[1] The lawsuit referenced is *McKean Township Sewer Authority v. McKean Township Supervisors*, Erie County Docket Number 13637-2005.

[2] On March 8, 2006, Joseph Pilliteri resigned his seat on the Sewer Authority. Pilliteri was then replaced by Eric Dedrick, who is now a named party to this case.

Judgment. The Plaintiffs contend their removal from the Sewer Authority is a legal nullity since the Defendants did not comply with the Municipal Authorities Act. Specifically, the Plaintiffs argue that the Supervisors can remove a Sewer Authority member unilaterally if the member misses three consecutive meetings and the Supervisors affect the removal within sixty days from the last missed meeting. As a second means, the Supervisors could seek removal for cause before the Erie County Court of Common Pleas. The Plaintiffs were not removed for missing meetings or for cause following a judicial determination. Therefore Plaintiffs claim they have never been removed from office.

The Defendants respond that the provisions of the Municipal Authorities Act are unconstitutional. Also, the Defendants contend the Plaintiffs are not entitled to the equitable relief of mandamus since they have available an action at law in the form of quo warranto.

LEGAL STANDARD

In reviewing preliminary objections, the Court must accept as true all pleaded material allegations in the complaint, as well as all inferences reasonably adduced therefrom. *Allentown School District v. Commonwealth of Pennsylvania*, 782 A.2d 635, 638 (Pa. Commw. Ct. 2001). Preliminary objections are only to be sustained in cases where the law is clear and free from doubt. *Pennsylvania AFL-CIO v. Commonwealth*, 757 A.2d 917 (Pa. 2000). Where any doubt exists as to whether a demurrer should be sustained, the matter must be resolved in favor of overruling the demurrer. *Shick, supra*.

In considering a Motion for Preemptory Judgment, the legal standard is the same as utilized for summary judgment matters. Relief will only be granted in the absence of any material factual dispute and the right to relief is clear. *Council of City of Philadelphia v. Street*, 856 A.2d 893 (Pa. Commw. Ct. 2004). The record is examined in a light most favorable to the non-moving party.

Pa. Rule of Civil Procedure 1098 permits entry of a preemptory judgment on a mandamus request if the right to relief is clear.

WHETHER THE PLAINTIFFS HAVE FILED THE APPROPRIATE FORM OF ACTION

The threshold issue is whether the Plaintiffs should have filed an action for quo warranto instead of mandamus. In making this determination, consideration has to be given to the nature of the dispute and the relief sought.

In the case sub judice, it is uncontroverted that the Plaintiffs were properly appointed to the Sewer Authority on January 5, 2004. Also not in dispute is the fact that each Plaintiff served as a duly appointed member of the Sewer Authority until the Supervisors claimed to have removed them in 2005. Hence, there is no challenge to the legality of the original appointment of each Plaintiff. Instead, the Plaintiffs seek relief for their purported ouster from office. As such, the Plaintiffs have filed

the appropriate form of action in seeking mandamus relief.

In analogous situations, mandamus was deemed the proper action when the propriety of a removal from office was at issue rather than the legality of an original appointment.

The Supreme Court of Pennsylvania addressed this issue as far back as *Commonwealth ex rel O'Brien v. Gibbons*, 196 Pa. 97, 46 A. 313 (1900) by stating:

> "There is no contest as to the relator's original title to his seat under a valid election, but only as to the legality of his ouster. If this was not valid, he never has been ousted at all, and mandamus is the proper remedy to prevent his further unlawful exclusion. We have nothing to do with the title of his alleged successor, who was apparently elected by the Board to fill a vacancy that did not exist. This cannot affect the relator. He was admittedly elected to the office, has never been out of it, in contemplation of law, and the mandamus simply compels the respondents to recognize his established right."

Gibbons, 46 A. at 317.

In more current cases, the Commonwealth Court of Pennsylvania has recognized mandamus as the appropriate remedy when the issue was the legality of the ouster rather than the original seating of an official. In *Gernert v. Lindsay*, 2 Pa. Cmwlth. 576, 1971 WL 13016 (Pa. Cmwlth.), the Commonwealth Court held:

> "In the subject case, Plaintiff is seeking to compel his reinstatement to an office heretofore properly held. If he properly holds the office of member of the board according to the law, then mandamus is the proper remedy to effectuate such reinstatement and the defendants' preliminary objections as to this complaint must be dismissed."

Likewise, in *Wolkoff v. Owens*, 12 Pa. Com. Court 74, 314 A.2d 545 (1974) the Commonwealth Court emphasized:

> "Mandamus has been recognized to be the proper action where the main issue is the propriety of a removal from a position which was heretofore properly held and to which reinstatement is being sought."

314 A.2d at 548.

Contrary to the Defendants assertions, the Pennsylvania Supreme Court has yet to repudiate its holding in *Gibbons*, *supra*. There was an opportunity for the Pennsylvania Supreme Court to do so in *Bentman v. Seventh Ward Democratic Executive Committee*, 421 Pa. 188, 218 A.2d 261 (1966). However, in *Bentman*, the Supreme Court stated "mandamus, not quo warranto, was the appropriate action. In mandamus, the chief issue is the propriety of the removal from office; in quo warranto the chief issue is the right or title of one person or another to the office, not the propriety of the removal." 218 A.2d at 263, footnote 2.

In *Gernert*, *supra*, the Commonwealth Court observed:

> "We conclude that the *Gibbons* holding is still the law of Pennsylvania today and are reinforced in our belief by a more recent pronouncement of our Supreme Court in *Bentman v. Seventh Ward Democratic Executive Committee...*"

Gernert, *supra*, at 581.

Because Yates and Dombrowski have an uncontested appointment to the Sewer Authority in January 2004, their original right to hold office is not at issue. Instead, it is the removal of the Plaintiffs from the Board which is at issue. Accordingly, mandamus is the appropriate form of action as filed by Yates and Dombrowski. The Defendants' Preliminary Objections are therefore OVERRULED.[3]

WHETHER THE PLAINTIFFS ARE ENTITLED TO MANDAMUS RELIEF

In seeking a Writ of Mandamus, the Plaintiff has the burden of proving (1) a clear legal right for the performance of the ministerial act or mandatory duty; (2) a corresponding duty by the Defendant(s) to perform the act or duty; and (3) the absence of any remedy at law.

The Defendants contend that Plaintiffs have not established the first or third requirements for a mandamus writ. The third requirement has already been addressed since the remedy at law, quo warranto, is not applicable. The remaining question is whether the Plaintiffs have established a clear legal right to mandamus relief.

The procedure for removing of a Sewer Authority member is set forth in the Municipal Authorities Act of 1945, 53 Pa. C.S.A. §5601 *et seq*. (hereinafter the MAA).

In the case at bar, the parties agree the Supervisors have the power to appoint members of the Sewer Authority. This power is derived both from the Constitution, *see* Article VI, Section 1, and by the MAA. *See* 53 Pa. C.S.§5610(a)(1).

The parties further agree the Supervisors have the authority to remove a member from the Sewer Board. However, the Plaintiffs do not concede the Defendants contention that Sewer Authority members serve at the pleasure of the Supervisors and can be removed at will. Instead, Plaintiffs contend

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[3] This case was complicated by the fact the Supervisors have filled what appeared to be vacancies left by the removal of Yates and Dombrowski. However, this action by the Supervisors should not limit the ability of Plaintiffs to seek relief. To hold otherwise would mean the Supervisors could illegally remove an appointed official but limit their liability for the illegality by immediately appointing a successor. Further, there were no vacancies to fill. The Supervisors may need to answer in a separate matter for the appointments to a non-vacant position.

the MAA circumscribes the method of removal by the Supervisors.

Under the MAA, the only scenario in which the Supervisors can unilaterally remove a member of the Sewer Authority is when the member is unexcused from three consecutive meetings. In this situation, the Board member may be removed by the municipality within sixty days of the third missed meeting. *See* 53 Pa. C.S.A. §5610(f). Beyond this provision, a municipality cannot remove an authority member at will under the MAA.

Alternatively, the MAA provides a municipality may remove an authority member "for cause by the Court of Common Pleas of the County in which the authority is located after having been provided with a copy of the charges against him for at least ten days and after having been provided a full hearing by the Court." 53 Pa. C.S.A. §5610(d).

In this case, neither Plaintiff was removed for failing to attend meetings or for cause after a hearing before the Court of Common Pleas. Hence, neither Yates nor Dombrowski were removed from the Sewer Authority consistent with the terms of the MAA.

The Defendants concede this point. Undeterred, the Defendants argue the removal provisions of the MAA, specifically 53 Pa. C.S.A. §5610(d) and (f), are unconstitutional and the Supervisors retain the ability to remove at will an authority member.

WHETHER THE REMOVAL PROVISIONS OF THE MAA ARE UNCONSTITUTIONAL

In attacking the constitutionality of the removal provisions of the MAA, the Defendants have a heavy burden. It is well established that "legislative enactments are presumed to be constitutional, and this presumption can be rebutted only if the statute clearly, plainly and palpably violates the Pennsylvania Constitution." *South Newton Township Electors v. South Newton Township Supervisors*, 575 Pa. 670, 838 A.2d 643, 646 (2003).

The Defendants position is grounded on their interpretation of Article VI, Section 7 of the Pennsylvania Constitution, which states:

> "All civil officers shall hold their offices on the condition that they behave themselves while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime. Appointed civil officers, other than judges of the courts of record, may be removed at the pleasure of the power by which they shall have been appointed. All civil officers elected by the people, except the Governor, the Lt. Governor, members of the General Assembly and Judges of the Courts of Record, shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate."

The Defendants maintain that the Plaintiffs, as appointed civil officers,

can be "removed at the pleasure of the power by which they shall have been appointed." According to the Defendants, this provision empowers an appointing municipality to remove an authority member at will. Further, the Defendants contend that Article VI, Section 7 prevents the legislature from imposing conditions or limitations on the removal of an appointed official.

The Defendants arguments do not meet their heavy burden of persuasion and proof. Article VI, Section 7 cannot be viewed in a vacuum. The Pennsylvania Constitution also states "all officers, who selection is not provided for in this Constitution, shall be elected or appointed as may be directed by law." *See* Pennsylvania Constitution Article VI, Section 1.

The position of a member of the McKean Township Sewer Authority is not expressly created in the Pennsylvania Constitution. Instead, it only exists by virtue of the MAA. Notably, the Defendants do not contest the power of the state legislature to create through the municipality a sewer authority. It is inherently inconsistent for the Defendants to argue the state legislature has the power to create a position (such as an authority member) but does not have the power to set the parameters of removal of that official.

A number of appellate decisions have discussed whether Article VI, Section 1 grants express and/or implied power for the legislature to establish the method of removal of an office created by the legislature. Historically, the Supreme Court of Pennsylvania interpreted Article VI, Section 1 as providing an implied power for the legislature to establish a method of removal from a position created by the legislature. *See Supervisors of Milford Township*, 139 A. 623 (Pa. 1927).

Decades later, the Pennsylvania Supreme Court elaborated on this power:

> "The legislature, however, may determine different methods of removal for legislatively created officers. Article VI, Section 1, provides that: 'All officers, whose selection is not provided for in this Constitution, shall be elected or appointed as may be directed by law.' The authority so conferred necessarily implies the power to 'establish a method for the incumbent's removal.' *Marshall Impeachment Case, supra*, at 310, 62 A.2d at 33; *Weiss v. Ziegler*, 327 Pa. 100, 193 A. 642 (1937); *Milford Township Supervisors' Removal*, 291 Pa. 46, 139 A. 623 (1927); The Defendants maintain that the Plaintiffs, as appointed civil officers, can be "removed at the pleasure of the power by which they shall have been appointed." According to the Defendants, this provision empowers the municipality to appoint or remove an authority member at will. Further, the Defendants contend that the Legislature has no power to impose conditions or limitations on the removal of an appointed official. *Commonwealth ex rel Vesneski v. Reid*, 265 Pa. 328, 108 A. 829 (1919). This power

> attaches to both legislatively created appointed civil officers. *Watson v. Pennsylvania Turnpike Commission*, 386 Pa. 117, 125 A.2d 354 (1956) and elected civil officers created by the legislature. *Weiss v. Ziegler, supra*; *Milford Township Supervisors' Removal, supra*. The power in regard to elected civil officers is limited, however, by the specific requirement of Article VI, Section 7, that all such officers be removed only for cause. Thus, while the legislature may provide for different methods of removal, different, for example, from impeachment, the method chosen must always be premised on cause, demonstrated after notice and hearing and sufficient, under the Constitution, to permit removal. The 'cause' requirement of Article VI, Section 7, is a broad requirement, expressly applicable to all civil officers, whether they be created by the Constitution or the legislature. The legislature is bound to follow its dictates when it determines a method of removal for an elected civil officer. *See Ritchie v. Philadelphia*, 225 Pa. 511,74 A. 430 (1909)."

Citizens Committee to Recall Rizzo v. Board of Elections, 367 A.2d 232, 245 (Pa. 1976).

A short time later, the Pennsylvania Supreme Court was even more pointed:

> "It is established in this State beyond respectable controversy that, where the legislature creates a public office, it may impose such terms and limitations with reference to the tenure or removal of an incumbent as it sees fit. Whether an appointed civil officer holding a legislatively created office is subject to removal at the pleasure of the appointing power depends upon legislative intent, to be granted from the statute creating or regulating the office."

Sortino v. Singley, 392 A.2d 1337, 1339 (Pa. 1978).

If the inquiry ended at this point, the Defendants would have no authority to rely upon in challenging the removal provisions of the MAA. However, there have been two subsequent cases from the Pennsylvania Supreme Court refining its view regarding the implied powers of the legislature. Neither of the two cases turn the tide for the Defendants.

The Pennsylvania Supreme Court in *In re Petition to Recall Reese*, 665 A.2d 1162 (Pa. 1995) held that Article VI, Section 1 did not give the legislature implied power to enact a recall of an elected official. Specifically, in *Reese*, the Supreme Court held that the recall provisions of a Home Rule Charter of the City of Kingston, permitting the recall of the elected office of mayor, was in contravention of Article VI, Section 7.

A similar result was reached in *South Newton Township Electors v. South Newton Township Supervisors*, 838 A.2d 643 (Pa. 2003). In *South Newton*, the Pennsylvania Supreme Court held that the state legislature did not have authority to enact recall provisions for a township supervisor. Hence, the Supreme Court held the recall provisions of the Second Class

Township Code unconstitutional based on Article VI, Section 7.

Relying on *Reese* and *South Newton*, the Defendants herein argue the state legislature did not have the power to enact the removal provisions of the MAA in contravention of Article VI, Section 7 of the Pennsylvania Constitution. Defendants position is unpersuasive.

Both *Reese* and *South Newton* involved an elected rather than an appointed office. There is a distinct constitutional and conceptual difference between an elected and an appointed official. Persons elected to office reflect the will of the electorate. By contrast, appointments to office, such as a sewer authority board, are not necessarily the expression of the public's will. Indeed, there are few limitations on the power of appointment.

The purpose of Article VI, Section 7, in part, is to protect the electorate's choice by preventing an elected official from the burden and distractions of a recall petition as existed in *Reese* and *South Newton*. Once elected, the office holder can focus on doing the public's business. If the elected official is not serving in a satisfactory manner, the electorate has recourse at the next election.

The same concerns do not exist with respect to appointed officials. The public has little, if any, input in the original appointment. Further, the electorate has little recourse in terms of removing an appointed official from office who is not performing the job. Hence, the constitutional considerations undergirding the *Reese* and *South Newton* decisions are not applicable to this case.

The MAA does not provide that a municipality can remove an authority member at will or at its pleasure. Instead, the MAA contains only one scenario where the municipality can act on a unilateral basis and that is predicated on the appointee missing three consecutive meetings. Otherwise, the municipality has to demonstrate cause for removal in a judicial forum. Importantly, the MAA does not strip a municipality of authority to remove or seek to remove an appointee from the Sewer Authority Board.

To follow the Defendants logic in this case would defeat the purpose of having a separate authority. Under the MAA, a municipality is empowered to create an authority for a host of reasons, mostly service-related. *See* 53 Pa C.S.A. §5607(a). Inherent in the concept of an authority is the ability to operate separately from the municipality. While an authority is not legally independent from a municipality, the authority is not a puppet of the municipality. Under the Defendants constitutional scenario, any authority member whose actions are not in agreement with at least two Supervisors is subject to immediate removal. In fact, taken to its logical end, under the Defendant's interpretation, all of the authority members serve at the whim of the Supervisors and can be replaced at one time without any justification by the Supervisors. The Pennsylvania Constitution was not intended to create such an unhealthy working environment for the public's

business.

As a result, the legislature created a fixed, staggered term of office for authority members, which scheme has passed constitutional muster with the Pennsylvania Supreme Court. In *Watson v. Pennsylvania Turnpike Commission*, 386 Pa. 117, 125 A.2d 354 (1956), the Pennsylvania Supreme Court held constitutional a legislative scheme of fixed, staggered terms for appointments to the Pennsylvania Turnpike Commission. In so holding, the Supreme Court observed:

> The legislature by providing in the Pennsylvania Labor Relations Act staggered expiration dates for fixed terms of Board members of a duration which, if fulfilled, would extend beyond the incumbency of the appointing Governor, thereby evidenced a desire and intent (just as in the case of the Act creating the Pennsylvania Turnpike Commission) that this important Board should at all times be in position to benefit from the counsel of experienced members who have acquired over the years of their tenure a knowledge and understanding of the Board's work so essential to a thoughtful and prudent solution of the many complex problems encountered...It is plain enough that, in the public interest, such Board members were not to be made amendable to political influence or discipline in the discharge of their official duties. Since we may not properly assume that the legislature intended to enact a meaningless and ineffectual (although carefully worded and clearly expressed) statutory provision, Section 4(a) of the Pennsylvania Labor Relations Act must rightly be held to intend that duly confirmed members of the Pennsylvania Labor Relations Board possess tenure for the fixed terms for which they are appointed and may not be removed by the Governor except for cause.

Watson, 125 A.2d at 358.

In the case at bar, the Sewer Authority has fixed, staggered terms of office similar to the Turnpike Commission. To empower the Supervisors to remove a Sewer Board member at will would mean all of the Board members could be removed at one time thereby defeating the purpose of the fixed, staggered arrangement.

The result is chaos and an inability to get the public's business done. As recognized by the Pennsylvania Supreme Court, the fixed, staggered arrangement benefits the public as follows:

> The purpose of the foregoing provision as to the terms of office of the Commissioners (i.e., those first to be appointed and thereafter their successors) is patent. It was designed so that, by the prescribed rotation, the terms of three of the four appointed members *125 of the Commission would always be current. The Act expressly provides

> that three members of the Commission shall constitute a quorum who, for all purposes, shall act unanimously. Were the Commissioners to be held removable at the pleasure of the Governor, the carefully expressed scheme of term rotation would be effectually nullified. If it be countered that the Governor, in appointing to a vacancy created by his dismissal of a Commissioner, would respect the spirit of the Act and appoint a successor for the balance of the unexpired term of the dismissed Commissioner, the answer is that the power so attributed to the Governor would still violate the plain intendment of the Act. He could render all of the offices vacant at one time which, obviously, the Act was specifically designed to make impossible.

Bowers v. Pennsylvania Labor Relations Boards, 402 Pa. 542, 550, 167 A.2d 480 (1961).

The fixed, staggered scheme of authority appointments and removal therefrom has never been held unconstitutional by the Pennsylvania Supreme Court. As applied to the case at bar, the MAA, in empowering a municipality to create an authority with fixed, staggered terms of office, is not rendered unconstitutional because it provided for the methods of removal of an authority member. The legislature has the power to set the terms of removal from an office the legislature created. Accordingly, the challenge to the removal provisions of the MAA must fail.

CONCLUSION

Based on the undisputed facts of this case, this Court finds the Plaintiffs have instituted the appropriate legal action in the form of a request for mandamus relief. Further, the attempted removal of the Plaintiffs by the Supervisors was a legal nullity. The removal provisions of the Municipal Authorities Act are not unconstitutional. Accordingly, the Plaintiffs remain members of the Sewer Authority.

ORDER

AND NOW to-wit this 30th day of June 2006, for the reasons set forth in the accompanying Opinion, the Preliminary Objections of the Defendants are hereby OVERRULED in their entirety.

The Plaintiffs renewed Motion for Preemptory Judgment is GRANTED. It is ORDERED, ADJUDGED and DECREED that Judgment be entered against the Defendants declaring the termination of the Plaintiffs as members of the McKean Township Sewer Authority as a legal nullity, void and of no legal effect. Further, the Township of McKean and the McKean Township Sewer Authority are ORDERED to recognize the Plaintiffs as lawful members of the McKean Township Sewer Authority for the remainder of their terms unless removed from office consistent with the Municipal Authorities Act.

BY THE COURT:
/s/ **WILLIAM R. CUNNINGHAM, JUDGE**

JEANINE MCCREARY, Plaintiff

v.

REDEVELOPMENT AUTHORITY OF THE CITY OF ERIE, Defendant

CIVIL PROCEDURE / PRELIMINARY OBJECTIONS / DEMURRER

A demurrer questions whether recovery is possible on the facts averred. The court must accept as true all well pleaded material allegations and inferences reasonably adduced therefrom and may sustain preliminary objections only where the law is clear and free from doubt.

REAL PROPERTY / AGREEMENTS OF SALE / MERGER

A right of re-entry and reverter is not precluded by the failure to incorporate the right of re-entry and reverter in the language of a deed where the agreement of sale specifically states that its terms do not merge into the deed.

REAL PROPERTY / RE-ENTRY AND REVERTER / DEFAULT

The purchaser of property subject to a right of re-entry and reverter in favor of a redevelopment authority may not challenge the exercise of the right of re-entry and reverter where the agreement of sale grants the redevelopment authority sole discretion to determine whether the purchaser is in default.

REAL PROPERTY / RE-ENTRY AND REVERTER / WAIVER OF DEFENSES

A purchaser acquiring property for nominal consideration and entering into the agreement with the advice of legal counsel may not challenge as unenforceable a provision waiving legal or equitable relief in connection with the exercise of a right of re-entry and reverter where the agreement provides for various remedies and where the waiver of defenses serves the legitimate public policy of protecting marketable title in the redevelopment authority. Claims for lost value of the property, fair market value of the property and future rental income are therefore not cognizable.

REAL PROPERTY / RIGHT OF RE-ENTRY AND REVERTER / INJUNCTIVE RELIEF

A purchaser of property subject to a right of re-entry and reverter is not entitled to injunctive relief where there is no claim asserted for injunctive relief in an amended complaint and the court, searching the amended complaint and a supporting brief, cannot ascertain whether an injunction is sought at the current time and what specific action is to be enjoined. Furthermore, a preliminary injunction may not be issued where the plaintiff has an adequate remedy at law, an injunction would not restore the parties to the status quo existing prior to the alleged wrongful conduct as the building has already been demolished, the plaintiff's right to relief is not clear in light of the court's analysis of the agreement for sale, and because an injunction would adversely affect the public interest in the vigorous and timely rehabilitation of related properties.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 13540 - 2004

Appearances: W. John Knox, Esquire for the Plaintiff
Arthur D. Martinucci, Esquire for the Defendant

OPINION

Cunningham, William R., Judge

The Redevelopment Authority of the City of Erie transferred a blighted parcel of real property to Jeanine McCreary pursuant to a written contract with the understanding McCreary would "rehabilitate" the premises. Not satisfied with McCreary's performance, the Redevelopment Authority reclaimed the property and demolished the building. By way of Amended Complaint, McCreary seeks several forms of relief.

Because McCreary is not entitled to the relief requested pursuant to the contract between the parties, the Preliminary Objections of the Redevelopment Authority were granted. McCreary has perfected a timely appeal and filed a Statement of Matters Complained of on Appeal. This Opinion is in response thereto.

PROCEDURAL/FACTUAL HISTORY

This case begins and ends with a written agreement entered into between the Redevelopment Authority of the City of Erie (Redevelopment Authority) and Jeanine McCreary ("McCreary"). It is uncontroverted that on October 17, 2003, the parties entered into a "Redevelopment Agreement" ("Agreement") pursuant to which the Redevelopment Authority conveyed real property commonly known as 329 East 3rd Street, Erie, Pennsylvania ("the property") to McCreary. Under the Agreement, McCreary was obligated to begin the work within one month and complete the project within one year.[1] In the event McCreary did not comply, the Agreement provided a mechanism for the property to revert to the Redevelopment Authority.

The history of the case at this docket number is somewhat contorted because McCreary was allowed for the sake of convenience and expense to file an amended complaint for cause(s) of action which did not exist at the time this case was originally docketed.

When this case was first filed, McCreary challenged the timeliness of the

[1] Paragraph 3.7 of the Agreement provided: "Commencement and Completion of Construction. The construction of the improvements by the Redeveloper under this Agreement shall be commenced within one (1) month after settlement under Article I and shall be completed to the satisfaction of the Authority within twelve (12) months from the date of settlement," The date of settlement was October 17, 2003.

exercise by the Redevelopment Authority of a right of re-entry/reverter. On March 8, 2004, the Redevelopment Authority filed with the Recorder of Deeds of Erie County a written document exercising its right of re-entry/reverter. In response, McCreary filed a lawsuit at the above docket number. McCreary contended the Redevelopment Authority's exercise of the right of re-entry/reverter was premature under the Agreement because the requisite time period had not passed.

McCreary's request for Summary Judgment was granted by Order dated July 11, 2005 since it was clear the Redevelopment Authority had not allowed for the necessary waiting period under the Agreement before filing a Declaration of Taking. In granting McCreary relief, the Order noted "(n)othing in this Order shall preclude the Redevelopment Authority of the City of Erie from seeking to exercise its right of re-entry/reverter consistent with the Agreement entered into with Jeanine McCreary on October 17, 2003." Neither party appealed from the Order of July 11, 2005. Hence, the relief originally sought by McCreary at this docket number had been granted as of July 11, 2005.

Subsequently, on July 22, 2005, the Redevelopment Authority sent McCreary a letter characterized as a "Notice of Default Pursuant to Paragraph 5.5 of the Agreement" putting McCreary on notice that she was in default of multiple sections of the Redevelopment Agreement. The Notice further identified steps McCreary needed to do to "reactivate this project."

On October 21, 2005, the Redevelopment Authority filed a "Notice of Declaration of Interest and Assertion of Right of Reverter." This Notice of Declaration was recorded with the Erie County Recorder of Deeds in Book Number 1280 at page 1444.

McCreary did not file any legal action in response to the Notice. On November 23, 2005, the Redevelopment Authority demolished the building on the property.

On November 30, 2005, McCreary filed a Motion for Special Injunction at the above docket number seeking to enjoin the Redevelopment Authority from taking any further action on the property. In response, the Redevelopment Authority filed a Motion to Quash. After oral argument, neither Motion was granted. Instead, an Order was entered permitting McCreary to file an amended complaint at this docket number.

On February 7, 2006, McCreary filed a four-count Amended Complaint. In Count I, McCreary seeks legal title and possession of the property to the exclusion of the Redevelopment Authority. In Count II, McCreary requests monetary damages for the purported lost value of the property. In Count III, McCreary alleges the unlawful taking of the property and seeks money damages for future rental income and fair market value. Finally, in Count IV, McCreary argued the Redevelopment Authority breached the contract and owed her money

damages for the improvements and also for future rental income and the fair market value of the property.

The Redevelopment Authority filed Preliminary Objections to the Amended Complaint. After oral argument, an Order was entered on July 19, 2006 granting the Preliminary Objections and dismissing McCreary's Amended Complaint. On August 17, 2006, McCreary timely perfected an appeal to the Commonwealth Court. On September 1, 2006, McCreary filed a Concise Statement of Matters Complained of on Appeal.

In fairness to McCreary, at the time the Statement of Matters Complained of on Appeal was filed, there had been no Opinion rendered by this Court in support of the Order of July 19, 2006. Hence this Opinion is written to explain the rationale for the dismissal of McCreary's Amended Complaint. In so doing, the issues raised in the Statement of Matters will be addressed.

LEGAL STANDARDS

The question presented by preliminary objections in the nature of a demurrer is whether on the facts averred, the law says with certainty that no recovery is possible. *Shick v. Shirey*, 716 A.2d 1231, 1233 (Pa. 1998). In ruling on preliminary objections, the Court must accept as true all well pleaded material allegations in the petition for review, as well as all inferences reasonably adduced therefrom. *Allentown School District v. Commonwealth of Pennsylvania*, 782 A.2d 635, 638 (Pa. Commw. Ct. 2001). Preliminary objections are only to be sustained in cases where the law is clear and free from doubt. *Pennsylvania AFL-CIO v. Commonwealth*, 757 A.2d 917 (Pa. 2000). Where any doubt exists as to whether a demurrer should be sustained, the matter must be resolved in favor of overruling the demurrer. *Shick*, 716 A.2d at 1233.

DISCUSSION

The resolution of this case is based on the uncontroverted facts as pled. The parties do not dispute they entered into the Agreement on October 17, 2003. It was pursuant to this Agreement that McCreary took title to 329 East Third Street subject to the obligations created for her by the Agreement.

Indeed, McCreary relied on the terms of the Agreement when she initiated the lawsuit at this docket number in March, 2004. The Agreement defines the legal relationship and rights between the parties.

McCreary does not allege that she was coerced into entering the Agreement nor does she contend it was a contract of adhesion. Instead, it was an arms-length transaction entered into willingly by both sides with the exchange of legal consideration. Notably, if McCreary successfully rehabilitated the property, the Agreement works for the benefit of both parties. For McCreary, she can make a profit on and/or earn revenue from a property she purchased for $1.00 from the Redevelopment Authority. The benefit for the Redevelopment Authority is the rehabilitation of a

blighted property.[2]

There is no dispute the Redevelopment Authority drafted the Agreement. There is likewise no dispute that McCreary had the benefit of legal counsel, Attorney Laura Mott, in entering into the Agreement. As part of the Agreement, McCreary was clearly waiving certain legal rights and making other concessions to the Redevelopment Authority in whom was vested the power to determine whether McCreary was proceeding in a satisfactory manner.

In general terms, the Agreement provided the Redevelopment Authority with the ability to unilaterally determine whether McCreary was diligently completing the project. If, in the sole discretion of the Redevelopment Authority McCreary was not in compliance, the Redevelopment Authority could cause the property to revert to the authority. Further, should the Redevelopment Authority reclaim the property, McCreary has limited legal recourse.

These were bargained for terms between the parties. In exchange for receiving real property for the sum of $1.00 and the opportunity to make a profit, McCreary conceded certain legal rights to the Redevelopment Authority. To protect itself against a developer who did not proceed with the timely development of the property and to prevent unnecessary delays caused by litigation, the Redevelopment Authority retained the power to revert the property and limit the remedies of the developer.

Against this contractual backdrop, McCreary's claims will be reviewed.

WHETHER THE REDEVELOPMENT AUTHORITY HAS A RIGHT OF RE-ENTRY/REVERTER

McCreary does not dispute the Agreement gave the Redevelopment Authority the right of re-entry/reverter. Specifically, the Agreement provided:

> 5.5 Condition Subsequent: Right of Re-Entry; Right of Reverter. This agreement has been entered into and any deed to the Premises or appurtenant easements from the Authority to the Redeveloper shall contain a provision or limitation to the effect that the conveyance is being made, upon express condition that upon the happening and continuance of any of the events of default as indicated below in subparagraph (1), (2), (3) or (4) then the Authority may enter into the Premises or any the Redeveloper by such deed and revest title to the Premises or any appurtenant easement in the Authority absolutely:

[2] In a "WHEREAS" clause, the parties recognized "...it is the purpose of this Agreement to eliminate the blighted area and to develop thereon a four unit residential building and other improvements to increase the land values in the property area by eliminating economically and socially undesirable land uses for the promotion of the health, safety, convenience and welfare of the citizens of the City of Erie." Page 1 of the Agreement.

> (1) if the Redeveloper shall default in or violate its obligations with respect to the construction of the improvements, including the times provided for the beginning and completion thereof, or shall abandon or substantially suspend construction work, and any such default, violation, abandonment or suspension shall not be cured, ended or remedied within ninety (90) days (one hundred eight (180) days, if the default is with respect to the date for completion of the improvements) after written demand by the Authority so to do;

Redevelopment Agreement, at Paragraph 5.5(1).

The Redevelopment Authority transferred the property by deed dated October 17, 2003 and recorded that day in Book 1077 on page 742 in the Erie County Recorder of Deeds. The deed into McCreary did not contain language about the right of re-entry/reverter. At the same closing on October 17, 2003, the parties signed the Agreement.

Instead of republishing the twenty-three page Agreement within the deed, the parties agreed to separately record a Memorandum of the Agreement:

> "The parties agree that a Memorandum of Agreement shall be recorded in the Office of the Recorder of Deeds for Erie County, PA."

Redevelopment Agreement, Paragraph 6.3

On October 23, 2003, the Redevelopment Authority recorded a "Memorandum of Redevelopment Agreement/Land Disposition Agreement" in Erie County Book 1079 at page 686. The stated purpose of the Memorandum was to "identify the existence of the Agreement/LDA and to specifically place of record the existence of the right of re-entry/reverter in the Redevelopment Authority." See Memorandum of Agreement/Land Disposition Agreement at Paragraph 4.

The Memorandum of Agreement was cross-indexed in the name of Jeanine McCreary and the Redevelopment Authority. Hence, any cursory title search would have revealed the right of re-entry/reverter held by the Redevelopment Authority. At all times McCreary has known, and except for a six day window of time, the public has known, of the right of re-entry/reverter held by the Redevelopment Authority.

McCreary posits that the failure of the Redevelopment Authority to include the right of re-entry/reverter language within the deed means the Redevelopment Authority does not have a right of re-entry/reverter. McCreary contends the common law doctrine of merger precludes the Redevelopment Authority from having or exercising a right of re-entry/reverter. McCreary's position is untenable for a number of reasons.

When McCreary initiated this action she did not contest the right of re-entry/reverter for the Redevelopment Authority. Instead, she correctly argued the Redevelopment Authority had not complied with Paragraph

5.5(1) in waiting 90 or 180 days to exercise the right of re-entry/reverter. McCreary understood that she was bound by the terms of the Agreement and sought to hold the Redevelopment Authority accountable under the same Agreement.[3]

The fact that the Agreement was not incorporated, or at least the provisions regarding the right of re-entry/reverter, into the deed of October 17, 2003 does not negate the existence of nor the enforceability of the Agreement. The parties addressed this very issue when they agreed:

> 6.4 Merger. None of the provisions of this Agreement shall be deemed or are intended to be merged by reason of any subsequent deed, and any subsequent deed which shall be recorded shall not be deemed to affect or impair the provisions, obligations and covenants of this Agreement.

Redevelopment Agreement, Paragraph 6.4.

The parties further agreed that McCreary took title to the property subject to the terms and conditions of the Agreement:

> ". . . thereafter shall convey title to the Premises to the Redeveloper by special warranty deed, which deed shall be delivered at settlement SUBJECT TO THE TERMS AND CONDITIONS OF THIS AGREEMENT."

Redevelopment Agreement, Paragraph 1.2 (emphasis added)

and

> "Subject to the provisions of paragraph 1.7, the Redeveloper shall take title to the Premises IN ACCORDANCE WITH THE TERMS OF THIS AGREEMENT not later than sixty (60) days..."

Redevelopment Agreement, Paragraph 1.6 (emphasis added).

It was the expressed intent of the parties that the common law doctrine

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[3] The Redevelopment Authority contests the ability of McCreary to challenge the existence of the right of re-entry/reverter. According to the Redevelopment Authority, by virtue of the Order of July 11, 2005, the right of re-entry/reverter has been adjudicated as a matter of law. Therefore, the Redevelopment Authority argues the doctrine of res judicata applies establishing their right of re-entry/reverter. Alternatively, the Redevelopment Authority argues McCreary is collaterally stopped from challenging the right of re-entry/reverter.

These arguments by the Redevelopment Authority are misplaced. The existence of the right of re-entry/reverter was not litigated. The initial matter before this Court, which resulted in the Order of July 11, 2005, was the timeliness of the exercise of right of re-entry/reverter and not the existence of it. The issue of whether the Redevelopment Authority held the right of re-entry/reverter was never reached notwithstanding the dicta in the Order of July 11, 2005. Therefore, McCreary is not precluded from now challenging the existence of re-entry/reverter.

of merger did not apply. Their intent, as manifested in writing, was to remain bound by the Agreement and that McCreary took title to the property "subject to the terms and conditions of the Agreement." If their intent were otherwise, there was no need to sign the Agreement at the closing on October 17, 2003 as the deed alone would complete the transaction.

In this case, the deed and the Agreement are not mutually exclusive documents. The deed does not render the Agreement null and void. The parties remain separately bound by the terms of the Agreement. The failure to put language in the deed about the right of re-entry/reverter does not eviscerate Paragraph 5.5 of the Agreement.

In this situation, the deed was a vehicle for passing title to McCreary consistent with the terms of the Agreement. In many respects, this case is similar to an Oregon case in which the issue was whether a contract giving a grantor a reversionary interest merged with a subsequent deed. In *Land Reclamation Inc. v. Riverside Corp*., 492 P. 2d 263 (Or. 1972), the Supreme Court of Oregon held:

> In the present case the evidence definitely establishes that the parties did not intend the deed to memorialize their agreement as to the use of the land. The written contract of April 30, 1970 makes it clear that the deed was simply to serve as the vehicle for passing title to plaintiff... The contract expressly provides for the conveyance of the land, specifies the use to which the land would be put, and sets out in detail the circumstances under which the title would revest in the grantor. There is no rule of law which precludes the parties from using two written instruments rather than one to effectually carry out their agreement.

Id. at 264, 265.

In the case at bar, the terms of the voluminous Agreement were not contained within the deed. However, that does not mean all of the terms of the Agreement are nullified simply because they were not republished within the deed. The Agreement sets forth in more detail the intent and rights of the parties with respect to this property. As recognized by the Oregon Supreme Court, there is no law which prevents parties from using two written documents to effectuate their intent.

In this case, the terms of the Agreement remain in effect and enforceable separate from the deed. Therefore, the Redevelopment Authority retains a right of re-entry/reverter by virtue of the Agreement.

WHETHER THE RIGHT OF RE-ENTRY/REVERTER WAS PROPERLY EXERCISED

This argument has to be considered in a procedural and a substantive context.

Unlike her original contention in this case, McCreary is not presently

complaining about the procedural process employed by the Redevelopment Authority. McCreary tenders no argument regarding the receipt or timeliness of notice. In fact, the public record reflects that on October 21, 2005, the Redevelopment Authority filed a Notice of Declaration of Termination of Interest and assertion of right of re-entry/reverter with the Recorder of Deeds pursuant to its Notice of Default sent to McCreary on July 22, 2005. McCreary never filed any legal action or pleading contesting procedurally the July 22, 2005 Notice of Default or the October 21, 2005 exercise of the right of re-entry/reverter.

It was not until after the building was demolished that McCreary sought injunctive relief on November 30, 2005. Thus, there is no factual dispute about the procedural process employed by the Redevelopment Authority in the exercise of its right of re-entry/reverter.

McCreary does challenge the substantive basis for the exercise of the right of re-entry/reverter. McCreary contends she was not in default and was diligently proceeding with the work, therefore the Redevelopment Authority had no substantive basis to exercise its right of re-entry/reverter.

The problem for McCreary is that she conceded the right to determine her level of compliance to the Redevelopment Authority. An "event of default" regarding the progress of the project is solely in the eyes of the Redevelopment Authority:

> (5) if the Redeveloper, in the opinion of the Authority, fails to prosecute the work upon the Premises vigorously with such force of workmen and mechanics as shall be satisfactory to the Authority; or
>
> (6) if the Redeveloper shall, in the opinion of the Authority, refuse, omit or neglect to furnish and supply a sufficiency of property, materials and/or workmen required to prosecute the work upon the Premises to completion; or

Redevelopment Agreement, Paragraph 5.1(5)(6).

It is the Redevelopment Authority who determines whether the "redeveloper" (McCreary) is proceeding in a satisfactory manner. Therefore, the Preliminary Objections were appropriately granted because it is not for the factfinder, whether it be a jury or a judge, to decide whether the redeveloper was in default. Instead, the parties agreed this determination is solely in the discretion of the Redevelopment Authority.

While McCreary may claim this provision is harsh, it is a term to which she agreed in accepting the property for the sum of $1.00.[4] Further, it is

[4] McCreary makes a powerful argument that Section 5.1 allows the Redevelopment Authority to reclaim the property without any accountability to the redeveloper or in a legal proceeding. As an example, McCreary hypothesizes that a redeveloper could spend significant sums in doing an exemplary job in

a provision clearly designed to protect the public's interest. Paragraph 5.1 allows the Redevelopment Authority to affect the progress of the project. It also eliminates a situation where the Redevelopment Authority and a blighted property are tied up in litigation for extended periods of time to determine whether the redeveloper is in default.

Thus, McCreary cannot challenge the substantive basis for the exercise of the right of re-entry/reverter.

WHETHER THE AMENDED COMPLAINT SETS FORTH A CLAIM FOR RELIEF AVAILABLE TO MCCREARY UNDER THE REDEVELOPMENT AGREEMENT

As part of the consideration exchanged in this case, McCreary agreed, in the event the Authority exercised its right of re-entry/reverter, that she waived certain remedies. Specifically, the Agreement provides:

> [A]ccordingly, the Redeveloper expressly agrees that in the event the Authority. . .reenters the Premises and effects a revestment of title to the Premises under **paragraph 5.5** or 5.7, the Redeveloper **will in no event resort to, and hereby knowingly, voluntarily, intelligently and upon the advise of counsel waives, any and all rights to equitable defense, procedures of court and remedies which prevent the continuing enjoyment or the unequivocal revestment of clear and marketable title to the Authority, including but not limited to any action or counterclaim for specific performance, injunctive relief or any action at law or equity** which may result in the entry of the tendency of any legal or equitable action in the judgment index in the office of the Prothonotary. . . the filing of a lis pendens or any cloud on title with respect to the premises.

Redevelopment Agreement, Paragraph 5.6 (emphasis added).

McCreary argues this provision is unenforceable as it is against public policy. McCreary characterizes it as an "onerous and invalid exculpatory clause" that allows the Redevelopment Authority to act with impunity under the Agreement. McCreary's argument is overreaching.

There are two separate justifications for the enforcement of Paragraph 5.6. First, this provision is limited in scope and other remedies are provided to McCreary under the Agreement. Secondly, this provision is designed to protect the marketable title to the property which is in the public's interest.

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[4] continued
timely developing the property only to have the Redevelopment Authority revert title without explanation or justification. McCreary's hypothetical is true and assumedly was explained to McCreary by Attorney Mott before McCreary signed the Agreement. If this scenario were to occur, the redeveloper does have remedies as discussed later in this Opinion.

The Remedies Available to McCreary

Paragraph 5.6 of the Agreement is limited in scope and effect. Importantly, this provision applies only in the event the Redevelopment Authority has to exercise its right of reverter. In other situations, there are remedies within the Agreement available to McCreary. For example, McCreary can assert:

> 1.7 Inability of Authority to Convey Title. In the event that the Redeveloper shall give proper notice of settlement and the Authority shall be unable to convey to the Redeveloper title as aforesaid within six (6) months of the delivery to the Redeveloper of an executed copy of this Agreement by the Authority, the Redeveloper shall within thirty (30) days thereafter have the following options: (1) taking such title as the Authority can give without abatement of price; (2) notifying the Authority in writing of an intent to request an extension of this Agreement, in which case the parties may agree to an extension of not more than twelve (12) months by separate written agreement, but, in the absence of such agreement within thirty (30) days of such notice, the Redeveloper may exercise only option (1) or (3) of this paragraph; or (3) terminating this Agreement and being repaid all monies paid as security in accordance with paragraph 1.12 hereof, in which event there shall be no further liability or obligation by either of the parties hereunder, all executed copies of this Agreement shall be returned to the Authority and this Agreement shall become null and void. If this Agreement is extended under option (2) and the Authority is unable to convey title as aforesaid within the period of the extension, the Redeveloper may exercise either option (1) or (3) within thirty (30) days of the end of the extension period under option (2).
>
> ....
>
> 5.4 Termination and Cancellation of Agreement. If the event of default occurs before conveyance of all or part of the Premises to the Redeveloper or consists of a failure of refusal to convey or accept conveyance of all or part of the Premises in accordance with the terms of this Agreement, then the aggrieved party may, in addition to any other remedies not inconsistent with such action, cancel this Agreement, subject to the provisions of paragraphs 5.2 and 5.3

Redevelopment Agreement, Paragraphs 1.7 and 5.4.

Under Paragraphs 1.7 and 5.4, McCreary has a host of remedies if the Redevelopment Authority breaches the Agreement. In addition, the Agreement provided for McCreary:

> 5.10 Rights and Remedies Cumulative. The rights and remedies of the parties to this Agreement, whether provided by law or by this Agreement, shall be cumulative, and the exercise by any party of

> any one or more of such remedies shall not preclude the exercise by it, at the same or different times, of any other such remedies for any other default or breach by the other party unless otherwise expressly provided herein.
>
> Notwithstanding the existence of specific remedies such as liquidated damages hereinbefore provided the parties hereto shall have the right to obtain from a court of competent jurisdiction injunctive relief, specific performance and such other equitable remedies as may be permitted by law and not barred under this Agreement.

This is not an Agreement which wholly deprives McCreary of any legal or equitable remedies. McCreary overlooks the fact she originally prevailed in this case pursuant to the Order of July 11, 2005.

Protecting Marketable Title to the Property

Importantly, Paragraph 5.6 is designed to limit claims that could affect marketable title to the premises. As such, this provision is consistent with the policy of the Redevelopment Authority to not allow a property to get entangled in litigation indefinitely.

Without Paragraph 5.6, a redeveloper could forestall the rehabilitation of a blighted property by seeking legal or equitable relief in response to the exercise of the right of re-entry/reverter. Contrary to McCreary's argument, it is not in the public's interest to have the legal title to blighted property clouded by litigation over the redeveloper's progress.

Indeed, that is exactly what McCreary attempts in this case. The parties agreed that "time is of the essence as to provisions of this Agreement." Redevelopment Agreement, Paragraph 6.7. McCreary agreed to finish this project in one year. She further agreed that time was of the essence. It is now October, 2006, three years after the execution of the Agreement by McCreary, and she still wants to litigate the nature of her performance. It is not in the public's interest to allow the property to remain with a redeveloper, who, for whatever reason, is unable to complete the project or prosecute it timely.

Therefore, this Court finds that Paragraph 5.6 is enforceable. McCreary has waived any right to seek legal or equitable relief in her Amended Complaint for the exercise of the right of re-entry/reverter by the Redevelopment Authority. This was not a contract of adhesion nor was McCreary compelled in any fashion to enter into the Agreement. Instead, it was an arms-length transaction in which McCreary readily agreed, with the benefit of legal counsel, to accept property for the sum of $l.00 and in exchange make concessions of certain legal rights and remedies.

What McCreary is entitled to, but which she has not pled, is the recovery of sums payable under Paragraph 5.8 of the Redevelopment Agreement, which states:

(2) second, to reimburse the Redeveloper up to the amount equal to the sum of the purchase price paid by it for the Premises (or allocable to the part thereof) and the monies actually invested by it in making any of the improvements on the Premises or part thereof, less any gains or income withdrawn or made by it from this Agreement.

McCreary's claims for lost value of the property, fair market value of the property and future rental income are not recoverable under the Agreement.

To the extent McCreary's Amended Complaint seeks recovery of expenditures for improving the property, her claim is premature. The Agreement provides a process for the re-sale of the property and the distribution of the sale proceeds. See Paragraph 5.8. Until this process occurs and McCreary is denied any sums due her under Paragraph 5.8(2), McCreary's claim has not ripened.

Accordingly, McCreary's Amended Complaint fails to set forth a claim for relief pursuant to the Agreement.

WHETHER MCCREARY IS ENTITLED TO INJUNCTIVE RELIEF

In the Amended Complaint, McCreary does not specifically assert a claim for injunctive relief. However, in her Brief filed in Opposition to the Preliminary Objections, McCreary contends she has set forth a claim for "injunctive remedies to prevent the Redevelopment Authority from taking further steps to develop the property that was wrongfully taken through the Authority's alleged right of reverter." *McCreary Brief*, p. 13

McCreary also claims she is "seeking injunctive relief to prevent further actions by the Defendant toward the property she purchased and developed arguing that the right of reverter is neither authorized or was not properly triggered by an alleged default." *McCreary Brief*, p. 14.

McCreary's claims are at best vague. What further complicates this matter is several times in her Brief, McCreary contends that the "attack" of the Redevelopment Authority is "premature" since injunctive relief has not yet been requested. See *McCreary Brief*, pp. 13, 14 and 17. Nevertheless, McCreary outlines in her Brief an argument why she is entitled to injunctive relief.

This Court is left to speculate as to whether McCreary is asserting a claim for injunctive relief. If injunctive relief is sought, is it being sought now and what specific action by the Redevelopment Authority is to be enjoined? These questions are not answered by McCreary's Amended Complaint or Brief. Therefore, McCreary's pleadings are deficient and fail to state a claim for injunctive relief.

On the merits, McCreary is not entitled to injunctive relief. To secure a preliminary injunction, a party must establish all of the following:

1. an injunction is needed to prevent immediate and irreparable harm for which there is no adequate remedy at law or compensation by damages;

2. greater injury would result in refusing an injunction than granting it;

3. the injunction would restore the parties to their status as existed prior to the alleged misconduct;

4. the right to relief of the moving party is clear and the moving party is likely to prevail on the merits;

5. the injunction is reasonably suited to abate the offending activity;

6. the injunction would not adversely affect the public interest.

Summit Towne Center Inc. v. Snowshoe of Rocky Mountain, Inc., 573 Pa. 637, 647, 828 A.2d 995, 1001 (Pa. 2003).

In the case sub judice, McCreary cannot establish the first, third, fourth and sixth requirements for a preliminary injunction.

McCreary has a remedy at law by virtue of the Agreement and the damages available pursuant to Paragraph 5.8

An injunction cannot restore the parties to the status quo which existed prior to alleged wrongful conduct since the building has been demolished. An injunction is not the appropriate form of relief under these circumstances.

McCreary's right to relief is not clear. Given the contractual analysis discussed, McCreary is bound by the Agreement and unlikely to prevail on the merits.

Finally, and perhaps most importantly, an injunction would adversely affect the public interest. Unquestionably, the public has an interest in the vigorous and timely prosecution of work to rehabilitate this property. An injunction impairs this interest and allows the property to be enmeshed indefinitely in litigation.

Therefore, McCreary is not entitled to preliminary injunctive relief.

CONCLUSION

McCreary seeks to do in this lawsuit which she is precluded from doing by the Agreement. McCreary wants to prevent the Redevelopment Authority from asserting its right of re-entry/reverter by claiming the right does not exist or was improperly exercised.

The right of re-entry/reverter is alive and well within the Agreement entered into by the parties. Also, McCreary has waived the right to challenge substantively the exercise of the right of re-entry/reverter by the Redevelopment Authority. It is solely up to the Redevelopment Authority to determine the compliance by McCreary.

McCreary has remedies permitted under the Agreement, including seeking recovery of the purchase price and sums actually expended for

work on the project. Any such claim has not ripened yet.

Accordingly, the Preliminary Objections of the Redevelopment Authority were properly granted and McCreary's Amended Complaint dismissed.

BY THE COURT:

/s/ **William R. Cunningham, Judge**

HAHN AUTOMOTIVE WAREHOUSE, INC., Plaintiff,

v.

KLIMEK'S AUTO SUPPLY, INC., Defendant

CIVIL PROCEDURE / SUMMARY JUDGMENT

Summary judgment may only be granted 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.

CIVIL PROCEDURE / SUMMARY JUDGMENT

Where a non-moving party bears a burden of proof on an issue, that party may not merely rely on its pleadings in order to survive summary judgment. 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 established at entailment of the moving party to judgment as a matter of law. The court must hear 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.

SECURED TRANSACTIONS / PURCHASE-MONEY SECURITY INTERESTS

Where, as here, the relative priorities of security interests in personal property were established before Revised Article 9 of the Uniform Commercial Code, 13 Pa. C.S. §§9101 et. seq. took effect in 2001, the former provisions of the Uniform Commercial Code control. 13 Pa. C.S. §9709(a).

SECURED TRANSACTIONS / PURCHASE-MONEY SECURITY INTERESTS

The purchase-money security interests inventory has priority over a conflicting security interest in the same inventory and also has priority in identifiable cash proceeds received on or before the delivery of the inventory to a buyer if a notification states that the person giving the notice has or expects to acquire a purchase-money security interest in inventory of the debtor, describing such inventory by item or type. 13 Pa. C.S. §9312(c).

SECURED TRANSACTIONS / PURCHASE-MONEY SECURITY INTERESTS

The notice by the holder of the purchase-money security interest to a prior holder of a general security interest in the same collateral must specify the inventory subject to the purchase-money security interest by item or type.

SECURED TRANSACTIONS / PURCHASE-MONEY SECURITY INTERESTS

Where the holder of a purchase-money security interest in auto parts notified the prior holder of a general security interest that it had a purchase-money security interest only in "inventory" and did not further describe the purchase-money collateral by item or type with at least a general reference

to the type of parts involved, the security interest of the purchase-money lender would not have priority over the security interest of the prior holder of a general security interest in the same collateral.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA No. 14728-2003

Appearances: Gary Eiben, Esq. for the Intervenor
John W. McCandless, Esq. for the Plaintiff
Richard J. Parks, Esq. for the Defendant

OPINION

Bozza, John A., J.

This action in replevin is currently before the Court on the Motion for Partial Summary Judgment filed by plaintiff, Hahn Automotive Warehouse, Inc. ("Hahn") and the Motion for Summary Judgment filed by the intervenor, CIT Small Business Lending Corporation f/k/a Newcourt Small Business Lending Corporation ("CIT"). The central issue is whether Hahn's purchase money security interest ("PMSI") in Klimek's Auto Supply Inc.'s ("Klimek's") inventory had priority over Hahn's security interest in the same property. The facts of the case may be briefly summarized as follows.

On November 17, 1999, the defendant, Klimek's borrowed $315,000 from CIT. Klimek's entered into a security agreement with CIT dated December 23, 1999, which granted CIT a security interest in Klimek's inventory and other assets. CIT perfected its security interest in Klimek's inventory by filing UCC-l Financing Statements with the Erie County Prothonotary on December 23, 1999 and Pennsylvania Department of State on December 28, 1999. On August 17, 2000, Hahn and Klimek's entered into a security agreement, whereby Klimek's gave Hahn a PMSI in inventory sold by Hahn to Klimek's, together with accounts and other proceeds arising from the sale or disposition of the inventory. Hahn filed a UCC-l Financing Statement with the Erie County Prothonotary and Pennsylvania Department of State on August 28, 2006. By letter, dated August 31, 2000, Hahn notified CIT of their acquired security interest.

In 2003, Klimek's was unable to pay Hahn and as a result, Hahn filed a Complaint in Replevin against Klimek's seeking possession of Klimek's inventory on November 17, 2003. In January 2004 Hahn repossessed a portion of Klimek's inventory and filed a bond and on January 19, 2004, Klimek's notified CIT that Hahn had filed the replevin action. Upon receiving notice of the action initiated by Hahn against Klimek's, CIT was permitted to intervene in the action as a party with a conflicting security interest. On February 28, 2005, CIT filed a Compliant in Replevin as well, claiming a superior security interest in Klimek's inventory. Thereafter,

Hahn filed a Motion for Partial Summary Judgment on May 23, 2006, and CIT filed a Motion for Summary Judgment on June 23, 2006. In its Motion for Partial Summary Judgment, Hahn requests only that this Court find that it has a perfected PMSI in Klimek's inventory, and direct that the case proceed accordingly. Hahn contends that CIT has admitted and/or failed to produce evidence of facts to dispute or contradict that Hahn has a valid PMSI, and therefore their security interest is superior to CIT's security interest. CIT's position is that the notice they received from Hahn on August 31, 2000, regarding Hahn's purchase money security interest in Klimek's inventory was not adequate, and therefore Hahn's security interest is not superior to its own.

Summary judgment may only be granted 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 (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 viewing all the evidence in the light most favorable to the CIT and for the reasons set forth below, the court concludes that CIT is entitled to summary judgment on the issue of the priority of its security interest in Klimek's inventory Article IX of the Uniform Commercial Code governs secured transactions. In Pennsylvania, Article IX is codified in 13 PA Con. Stat. § 9101. In 2000, Article IX was revised and as a result Pennsylvania's version was also revised and those revisions became effective in 2001. However where the relative priorities of security interests were established before Revised Article 9 took effect the former provisions control. Pa.C.S.A. 13 § 9709(a). Therefore, since both Hahn's and CIT's security interests were perfected prior to the revisions, the provisions of former 13 Pa. Con. Stat. § 9312 govern the determination of the priority of these competing claims. *See Interbusiness Bank, N.A. v. First Nat'l Bank,* 318 F.Supp. 2d 230 (M.D. Pa. 2004) (if the relative priorities of the claims were established before Revised Article 9 takes effect. Former Article 9 determines priority).

13 Pa. Con. Stat. § 9312 deals with priorities among conflicting security interests in same collateral. The relevant portion at issue in this case is as

follows:

> ...(C) PURCHASE MONEY SECURITY INTERESTS IN INVENTORY. --A perfected purchase money security interest in inventory has priority over a conflicting security interest in the same inventory and also has priority in identifiable cash proceeds received on or before the delivery of the inventory to a buyer if:
>
> > ...(4) the notification states that the person giving the notice has or expects to acquire a purchase money security interest in inventory of the debtor, describing such inventory by item or type. (emphasis added).

In their August 31, 2000 letter to CIT, Hahn states the following:

> "The undersigned has or expects to acquire a purchase money security interest in inventory sold by it to the debtor referenced above, together with accounts and other proceeds arising from the sale or disposition of the inventory. This security interest shall have the priority over conflicting security interests pursuant to Section 9-312(3) of the Uniform Commercial Code..."

A review of the record indicates that Hahn supplied automotive parts to Klimek's. (Complaint in Replevin ¶3a). The types of automotive parts sold to Klimek's from Hahn are discussed briefly in depositions, which were included as Exhibits to the CIT's Appendix in Support of Motion for Summary Judgment. In its Security Agreement and Financial Statements Hahn described the collateral in which they had a security interest as follows:

> All inventory sold or provided by [Hahn] that is now owned by [Klimek's] or in which [Klimek's] now has any interest, and all inventory sold or provided by [Hahn] and hereafter acquired by [Klimek's] or in which [Klimek's] hereafter acquires any interest, wherever located and whether in [Klimeks'] actual or constructive possession or in the possession of others ("Inventory"). The term "Inventory" includes but is not limited to finished products, packaging materials, work in process, materials used or consumed in [Klimeks'] business, all additions thereto, and any goods returned or repossessed from [Klimeks'] customers, as well as supplies, incidentals and all other items
>
> All [Klimeks'] accounts now or hereafter arising from the sale or other disposition of the Inventory ("Accounts"). The term "Accounts" includes, but is not limited to, [Klimeks'] rights in any and all lockbox arrangements entered into by [Klimek's] and [Hahn] at any time, and all [Klimeks'] rights in cash, instruments or other documents in any lockbox, or derived therefrom.

> All cash and non-cash proceeds of Inventory and Accounts, including insurance proceeds ("Proceeds").

(Hahn's Security Agreement and Financing Statements). CIT's position is that simply stating, "inventory" does not satisfy the notification requirement of § 9312, because it does not describe the inventory by item or type. Hahn's position is that the word inventory reasonably identifies the goods subject to the PMSI, thereby giving CIT adequate notice and satisfying the priority requirements of § 9312.

With respect to the issue of the adequacy of the notice provided by Hahn to CIT, there is only limited guidance in case law. Both parties rely on *Fedders Financial Corp. v. Chiarelli Bros., Inc.,* 221 Pa. Super. 224, 289 A.2d 169, 10 U.C.C. Rep. Serv. (CBC) 880 (1972) to support their positions. Although the legal posture of the parties in *Fedders* differed from that of the parties here, the court addressed the notification requirements of §9312. In *Fedders*, the underlying dispute had to do with Fedders Financial Corp.'s right to re-possess air conditioners it had sold to an appliance dealer. The Appellant, a bank, claimed that the following notification of Fedders PMSI did not adequately describe the inventory "by item or type":

> "Fedders Financial Corporation has, or expects to acquire, purchase money security interest in certain inventory of [Chiarelli], and the proceeds therefrom, which inventory consists of: air conditioners, dehumidifiers, convectors, unit heaters, heating equipment, ranges, refrigerators, washers, ironers, dryers, dishwashers, sewing machines and other domestic and commercial appliances or the like and accessories and replacement parts for any such merchandise, and the proceeds thereof."

The Superior Court held that a creditor "need only give such notification which reasonably identifies the goods" and that the direct specification of 'air conditioners' in the notification letter was sufficient identification of the inventory involved. The court rejected the bank's apparent position that Fedders had to specify the serial numbers of the air conditioners.

In re Beverage Sunn Musical Equipment Co. v. Thomas, (Bankr. MD. Pa. July 28, 1980) the Bankruptcy Court reached a similar conclusion as *Fedders*, that only such notification, which reasonably identifies the goods is required. The notice in the *In re Beverage Sunn Musical Equipment* case described the inventory as "All types of musical instruments including amplifiers, speakers and related parts and accessories, wherever located, sold to Debtor by Sunn Musical Equipment Company."

Hahn argues that the use of the word "inventory" satisfies the *Fedders* requirement that the notification need only reasonably identify the goods. Hahn argues that at the time they sent notification to CIT, they had no

way of knowing what items and types of inventory Klimek's would be ordering in the future and therefore it would have been impractical to identify future inventory. However, Hahn did not offer any specification in their notice to CIT as to the type of inventory they were purporting to claim a PMSI in, they simply stated "inventory." CIT argues that the use of the word "inventory" does not reasonably describe the goods at issue as required by *Fedders* or § 9312.

Hahn also looks to a Bankruptcy Court decision applying Vermont law. In *In re Southern Vermont Supply, Inc.*, 58 B.R. 887, U.C.C. Rep. Serv. 2d (CBC) 532 (Bankr. D. Vt. 1986). The federal bankruptcy court held that a description in a PMSI notification letter was adequate to protect the holder's priority position. However the exact language included in the letter is not clear and the facts seem to indicate that the party to whom the notice was sent refused to accept it and intentionally did nothing to protect its interest. Therefore, the court finds this decision to be of only limited precedential value. Nonetheless the essence of the Court's ruling is in harmony with the holdings of the cases described above. The notice must be sufficient to reasonably identify the inventory that is the subject of the PMSI and it must do so by specifying either the items or the type of inventory.

Here, using only the word "inventory" to describe the extent of Hahn's PMSI is insufficient to meet the requirements of § 9312. Pursuant to § 9312 (c), it is axiomatic that a PMSI will be in inventory and the statute specifically requires the secured party to describe the inventory by item or type. In *Fedders* the PMSI secured party specifically described the inventory as including "air conditioners". In *In re Beverage Sunn Musical Equipment Co. v. Thomas* the notice described the inventory as including "All types of musical instruments including amplifiers, speakers and related parts and accessories..." Both of these descriptions are materially different from simply describing inventory as "inventory." While Hahn is correct that it was not required to specify with precision each of, perhaps thousands of, parts it supplied to Klimek's, it was required to put CIT on notice that it had a PMSI in auto parts and provide at least a general reference to the type of parts involved. To require less would render the description by "item or type" requirement of § 9312 meaningless.

This Court also notes that, a more complete description of the inventory is not found in the Security Agreement, or the Financing Statements of Hahn. Assuming that the general reference to inventory contained in the notice letter gave rise to a duty to make a reasonable inquiry CIT could not have turned to the Security Agreement or Financing Statements to have their question answered.

Therefore, the Court finds after a thorough review of the record that although Hahn had a perfected purchase money security interest in the

inventory it sold to Klimek's, it did not meet the notice requirement of 13 Pa. Con. Stat. § 9312 and therefore CIT's security interest has a priority position. It is not necessary for the court to reach CIT's argument that it was not sufficiently demonstrated that the inventory repossessed by Hahn was properly identified as a part of Hahn's collateral. (However on that question it is apparent that there are material issues fact in dispute [sic]). In addition the record is not adequate to determine the extent to which CIT is entitled to recover any losses from the bond posted by Hahn.

An appropriate order shall follow.

ORDER

AND NOW, to-wit, this 31 day of October, 2006, upon consideration of the Motion for Partial Summary Judgment filed by plaintiff, Hahn Automotive Warehouse, Inc. ("Hahn"), and the Motion for Summary Judgment filed by the intervenor, CIT Small Business Lending Corporation f/k/a Newcourt Small Business Lending Corporation ("CIT'), and argument thereon, it is hereby **ORDERED**, **ADJUDGED and DECREED** that partial summary judgment is **GRANTED** with regard to plaintiff Hahn's motion, in that Hahn possessed a validly perfected purchase money security interest. It is further **ORDERED** that intervenor CIT's motion is **GRANTED** in that CIT's interest is senior in priority to Hahn's conflicting security interest, and CIT's motion is **DENIED** with regard to permitting CIT to recover all remaining amounts due and owing from Klimek's in repayment of the loan from the bond filed with this Court by Hahn, in that the record is insufficient for this Court to make such a determination.

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

KATHLEEN G. SCUTELLA, individually and as Executrix of the Estate of Frank J. Scutella, deceased, Plaintiff

v.

COUNTY OF ERIE and ERIE COUNTY EMPLOYEES RETIREMENT BOARD, Defendants

MUNICIPAL EMPLOYEES / RETIREMENT PLAN/CONTRACT LAW

__Once an employee's rights to retirement benefits are vested, they cannot be denied apart from the terms of the contract agreement. *Abbott v. Schnader*, 2002 Pa. Super, 247, 805 A.2d 547 (2002).

__The plaintiff was a vested member of the Retirement Plan and as such his benefits became contractual obligations of the County. *Id.; see also, Senior Exec. Benefit Plan Participants v. New Valley Corp.*, 89 F.3d 143 (3d Cir. 1996). When interpreting a contract, it is incumbent upon the court to determine the intent of the contracting parties. *Ins. Adjustment Bureau, Inc. v. Allstate Ins., Co.*, 905 A.2d 462 (Pa. 2006). In cases where the party's agreement is in writing, the Court must look to the writing to ascertain the party's intent. *Id*. In the event that the court determines that the contract is ambiguous, that is to say, that it is reasonably susceptible to different constructions and capable of being understood in more than once sense, it is for the fact finder to determine what the parties intended. *Id*. Doubtful language in a contract is strongly construed against the drafter. *Rusiski v. Pribonic*, 511 Pa. 383, 515 A.2d 507 (1986).

With respect to the Retirement Plan language in question, it appears that both parties' interpretations are reasonable and that the contract is susceptible to two different meanings. Therefore the ambiguous language must be read against the drafting party, and therefore provides that because the plaintiff had more than ten years in active service to the County, his estate is entitled to receive a death benefit that includes both his contributions and the County's contributions to the Retirement Plan.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA EQUITY ACTION NO. 60000-2003

Appearances: John B. Enders, Esq. for Scutella
Matthew J. McLaughlin, Esq. for the County of Erie
Thomas S. Talarico, Esq. for Erie County Employees Retirement Board

OPINION

Bozza, John A., J.

Before the Court are the parties' Cross-Motions for Summary Judgement. The facts of this case may be summarized as follows: Frank J. Scutella was employed by the County of Erie as an assistant district attorney from January 25, 1976 until October 12, 1988, a period of 12.71

years. During the time of his employment, he was a "member" of the Erie County Employees' Retirement Plan ("Retirement Plan") and he made contributions as the Retirement Plan required. Because he had been employed by the County for a period of at least eight (8) years, and because upon leaving county service he left his accumulated payroll deductions and interest in his member account, Mr. Scutella was considered to be one hundred percent (100%) vested. As a result, he was entitled to receive a "vested pension" when he reached age 60. At the time he left service in 1988, he received a Retirement Plan statement that indicated he was entitled to a death benefit in an amount equal to both his contribution and the County's contributions to the Retirement Plan.

In early January of 2000, Bradley Foulk took office as Erie County District Attorney. On January 7, 2000, Mr. Scutella was sworn in as an assistant district attorney by Judge Shad Connelly. Although he had not been placed on the County payroll, it was Mr. Foulk's intention to hire Mr. Scutella as a part-time assistant district attorney. The "paperwork" necessary to accomplish this was presented to the County personnel office near the time that he was sworn in. However, it was not approved because no such position was authorized in the district attorney's budget. Nonetheless, Mr. Foulk wanted him to serve as a mentor for less experienced assistant district attorneys and to be on-call to respond to questions from local police agencies and to conduct legal research. In furtherance of his intentions, Mr. Foulk placed Mr. Scutella's name on the office letterhead and he assigned him space in the conference room and consulted with him on various matters.

In furtherance of his duties, Mr. Scutella brought his own special computer and some furniture to the district attorney's office. He was authorized to have typing and other work done by one of the office secretaries and the receptionist would take his calls as needed. He also had use of the district attorney's library and all other resources in the office and he had access to confidential information.

In order to have hired Mr. Scutella as a part-time district attorney, a position had to be created in the district attorney's budget by County Council. Mr. Scutella was aware of the difficulties the district attorney was having in getting him on the payroll but nonetheless continued to perform services. There was no discussion that his pay would be made retroactive to the time he began working in January.

Sadly and unexpectedly, Mr. Scutella died on March 14, 2000 at age 50. As of the date of his death, Mr. Foulk had not received authorization to hire Mr. Scutella and as a consequence, he had received no pay. Thereafter, the district attorney's office entered into a settlement agreement with his estate that provided for the sum of $2,500 as "fair compensation for the services rendered".

Kathleen G. Scutella, individually and as Executrix of the Estate of

Frank J. Scutella, filed this action seeking recovery of the Retirement Plan's death benefit that includes both her husband's contributions as well as the contributions made by the County of Erie. The County of Erie and Erie County Employees' Retirement Board (collectively "the County") rejected Mrs. Scutella's claim maintaining that she was only entitled to receive the amount of her husband's accumulated contributions and interest. The specific portions of the Retirement Plan at issue are set forth as follows:

> 14. Death Benefits
>
> If you should die in active service after age 60 or after ten (10) years of credited service, a lump-sum death benefit will be paid to your designated beneficiary(ies). The benefit will include both your member and county money. The amount is determined by calculating what the pension would be if you had retired at the time of death; the present value of your pension is then paid in a lump-sum as the death benefit. Upon reaching age 60 or after completing ten (10) years of service, you may file with the retirement board choosing to have the death benefit paid as a monthly lifetime pension by your beneficiary rather than a lump sum. The monthly pension is determined by calculating what the pension would have been if you had retired at the time of death and selected an Option Two pension.
>
> 15. Vesting
>
> If you leave the county's employment for any reason after having completed eight (8) years of county service, you are considered to be one hundred percent (100%) vested. You have the right to receive a deferred normal pension, called a "vested pension" upon reaching superannuation retirement age. However, payment of a "vested pension" is contingent upon surviving to superannuation age and upon leaving your accumulated deductions on deposit in your individual member account. The accumulated deductions will continue to earn regular interest during the vesting period. If you choose to withdraw your accumulated deductions, you will forfeit your "vested pension".
>
> If, after vesting, you die before being eligible for a deferred pension, the full amount of your accumulated deductions including interest to the date of death will be paid to your estate or to your designated beneficiary.

According to the County's view, only if a member younger than age 60 dies in "active service" after ten (10) years of "credited service" is he or she entitled to a death benefit that includes both the member's contributions and the County's contributions to the Retirement Plan. In support of its interpretation, the County notes that Section 15 of the Retirement Plan provides that the estate of a member who dies after

completion of eight (8) years of service is entitled to receive only the amount of the decedent's contributions. It is the plaintiff's position that when he died, Mr. Scutella was an Erie County employee and therefore in "active service" and entitled to receive both the decedent's contributions and the County's contributions to the Retirement Plan. In the alternative, the plaintiff maintains that should it be determined that Mr. Scutella was not a county employee at the time of his death, he is still entitled to both contributions because, according to the estate's interpretation of Section 14, the completion of ten (10) years of credited service is sufficient to entitle him to the maximum death benefit. The defendants have denied that Mr. Scutella was an employee of the district attorney's office at the time of his death.

The resolution of the issues before the Court is at least initially a matter of contract interpretation. It is beyond dispute that the Retirement Plan, as set forth in the plan summary, constitutes a contract between the County of Erie and the "Members" of the Retirement Plan. Generally, once an employee's rights to retirement benefits are vested, they cannot be denied apart from the terms of agreement. *Abbott v. Schnader*, 2002 Pa. Super. 247, 805 A.2d 547 (2002). Frank Scutella was a vested member of the Retirement Plan. Once specified conditions set forth in the Retirement Plan were satisfied, Mr. Scutella's benefits became contractual obligations of the County. *Id.: see also, Senior Exec. Benefit Plan Participants v. New Valley Corp.*, 89 F.3d 143 (3d Cir. 1996). When interpreting a contract, it is incumbent upon the court to determine the intent of the contracting parties. *Ins. Adjustment Bureau, Inc. v. Allstate Ins., Co.*, 905 A.2d 462 (Pa. 2006). In cases where the parties' agreement is in writing, the court must look to the writing to ascertain the parties' intent. *Id.* However, in the event that the court determines that a contract is ambiguous, that is to say, that it is reasonably susceptible to different constructions and capable of being understood in more than one sense, it is for the fact finder to determine what the parties intended. *Id.* Moreover, it has long been recognized that doubtful language in a contract is strongly construed against the drafter. *Rusiski v. Pribonic*, 511 Pa. 383, 515 A.2d 507 (1986).

> The language of Section 14 of the Retirement Plan states in relevant part as follows:
>
> "If you should die in active service after age 60 or after ten (10) years of credited service, a lump-sum death benefit will be paid to your designated beneficiary(ies). The benefit will include <u>both</u> your member and county money."

The plaintiff maintains that the first sentence of Section 14 should be interpreted as meaning that there are two ways in which a member is entitled to receive both member contributions and county contributions to the Retirement Plan; one way would be for a member to die after

age 60 while still employed by the County, and the other way would be to have completed ten (10) years of credited service at the time of death, regardless of whether the member was currently employed. The defendants have a different interpretation of Section 14 in part because of the terms of the vesting provision of Section 15 described above. A contract is not rendered ambiguous simply because the parties disagree as to the reading of a provision. *Commonwealth v. Brozzetti*, 684 A.2d 658 (Pa. Commw. Ct. 1996). However, in the circumstances of this case, upon review of the writing in its entirety, it would appear that both parties' interpretations are reasonable and that the contract is susceptible to two different meanings.

The operative sentence of Section 14 when read together with Section 15 is capable of being understood in more than one sense. The sentence uses the word "or" but does not include punctuation that would indicate whether the "die in active service" requirement is part of both the "age 60" provision and the "after ten (10) years of credited services" provision. The placement of a comma following the "die in active service" phrase would have clearly indicated that it applied to both. Without it, the syntax of the two conditions would be disjunctive. While it is true that the language in Section 15 indicates that a vested member is only entitled to receive the full amount of his or her own accumulated deductions upon death, the vesting period required to trigger that requirement is only eight (8) years rather than the ten (10) years of service specified in Section 14.

It is also noteworthy that the County provided to Mr. Scutella a document, near the time he left county employment, that set forth that as of January 1, 1988 he was entitled to a lump sum death benefit of $45,186.37, an amount which would have included both his contributions and the County's contributions to the Retirement Plan. It is apparent that the provisions of the Retirement Plan were drafted by the County and applying the fundamental principles of contract interpretation that ambiguous terms must be construed against the drafter, the Court must accept the plaintiff's position. Therefore, the ambiguous language of Section 14 must be read as providing that because Mr. Scutella had more than ten (10) years in active service to the County, his estate is entitled to receive a death benefit that includes both his contributions and the County's contributions to the Retirement Plan.

Having reached this conclusion, it is unnecessary to resolve the issue as to whether Mr. Scutella was in "active service" to the County when he died or to address the plaintiff's theory of promissory estoppel.[1]

[1] It is observed that the term "active service" in Section 14 is not defined in the agreement and although the parties have framed their argument in terms of Mr. Scutella's status as either an independent contractor or an employee, the circumstances under which one may be considered in active service are not readily apparent.

ORDER

AND NOW, this 27 day of October, 2006, upon consideration of the Cross-Motions for Summary Judgement, and argument thereon, and for the reasons set forth in this Court's Opinion, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that the plaintiff's Motion for Summary Judgement is **GRANTED** and the defendant's Motion for Summary Judgement is **DENIED**.

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

COMMONWEALTH OF PENNSYLVANIA

v.

RILEY LARKINS, JR.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT / DNA TESTING

Regardless of the title given to the document, a motion for DNA testing constitutes a post-conviction petition under the Post-Conviction Relief Act. A motion for DNA testing avoids the one-year time bar of Section 9545 of the PCRA where the motion is filed in advance of a petition to obtain further relief under the PCRA.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT / DNA TESTING

It is necessary that the defendant specify the evidence to be tested. A reference to "sex crimes evidence kit for alleged victims" does not enable the court to know specifically what evidence the defendant is asking to be tested. The motion will be denied where, with respect to one victim, there is no biological evidence and, with respect to two other victims, the biological evidence which was referenced in the record of the trial 27 years ago is no longer in existence.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT / DNA TESTING

The provision of the PCRA providing for DNA testing requires the defendant to present in his motion a prima facie case that 1) the identity or participation by the defendant was at issue in the proceedings that resulted in the conviction and sentencing, and 2) DNA testing, assuming exculpatory results, would establish the applicant's actual innocence. Conclusory allegations in a preprinted form do not satisfy the defendant's obligation to present a prima facie case.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT / DNA TESTING

The defendant fails to present a prima facie case that DNA testing would establish his actual innocence where there is no evidence to be submitted to DNA testing. The court notes that the evidence of defendant's guilt was not limited to physical, biological evidence but included purses of the victims found in the defendant's apartment, positive identification of the defendant by one of the victims, and admissions by the defendant.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA No. 408, 448 & 449 of 1979

Appearances: Office of the District Attorney for the Commonwealth
Riley Larkins, Jr., pro se

OPINION

Bozza, John A., J.

This matter is before the Court on a Motion for Forensic DNA Testing filed by the defendant, Riley Larkins, Jr., on July 25, 2006. The history of the defendant's case may be summarized as follows. On September 12, 1979, the defendant, Riley Larkins, Jr., was found guilty by a jury of the following crimes: two counts of rape[1], two counts of robbery[2], two counts of aggravated assault[3], one count of simple assault[4], and one count of criminal attempt[5] at Dockets 408, 448 & 449 of 1979, which were consolidated for trial. The charges against the defendant stemmed from three separate assaults on three young women. After pursuing various appeals, the defendant was ultimately sentenced on January 24, 1983.[6] The defendant filed a direct appeal on February 10, 1983, and as a result, on December 21, 1984, the Superior Court affirmed the rape, robbery, simple assault, and criminal attempt convictions and vacated the two aggravated assault convictions, ordering that the defendant's sentence be modified accordingly. *Commonwealth v. Larkins*, 448 A.2d 1165 (Pa. Super 1984).

On January 29, 1990, more than five (5) years later, the defendant filed his first PCRA, which was denied by this Court in an Order dated September 12, 1990. Over fourteen (14) years later, on December 9, 2004, the defendant filed a Motion to Correct Illegal Sentence, which

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[1] 18 Pa.C.S.A. §3121
[2] 18 Pa.C.S.A. §3701
[3] 18 Pa.C.S.A. §2702
[4] 18 Pa.C.S.A. §2701
[5] 18 Pa.C.S.A. §901
[6] The defendant was sentenced as follows:
At Docket 408 of 1979:
Count I - Rape - ten (10) years to twenty (20) years incarceration;
Count II - Simple Assault - one (1) year to two (2) years incarceration.
At Docket 448 of 1979:
Count I - Rape - ten (10) years to twenty (20) years incarceration, to run consecutively to Count II of Docket 408 of 1979.
Count II - Robbery - five (5) years to twenty (20) years incarceration, to run consecutively to Count I of this docket.
Count III - Aggravated Assault - five (5) years to ten (10) years incarceration, to run consecutively to Count II of this docket.
At Docket 449 of 1979:
Count I - Robbery - ten (10) years to twenty (20) years incarceration, to run consecutively to Count III of Docket 448 of 1979.
Count II - Aggravated Assault - five (5) years to ten (10) years incarceration, to run consecutively to Count I of this docket.
Count III - Criminal Attempt - five (5) years to ten (10) years incarceration, to run consecutively to Count II of this docket.

treated as a PCRA petition.[7] A Notice of Intent to Dismiss was filed February 16, 2005, after which the defendant filed Objections to the Court's Intent to Dismiss, docketed February 24, 2005. Thereafter, the Court filed a Memorandum Opinion and Order denying the PCRA petition on March 11, 2005. The defendant filed a timely Notice of Appeal on March 18, 2005. On July 27, 2005, the defendant filed a Motion for Forensic DNA Testing, which was dismissed on July 29, 2006, as this Court did not have jurisdiction to entertain the motion because the case was on appeal. The Superior Court affirmed the dismissal of his second PCRA petition on November 15, 2005. On July 25, 2006, the defendant filed this instant Motion for Forensic DNA Testing. The Commonwealth filed a response in opposition to the defendant's motion on August 23, 2006. On September 15, 2006, the defendant then filed a "Reply to Commonwealth's Answers; Re: DNA Testing." Upon review of the Motion for Forensic DNA Testing, the Commonwealth's response, the defendant's reply, and upon a thorough review of the record, for the reasons that follow, the defendant's request for DNA testing shall be denied.

The defendant brings his Motion for Forensic DNA testing pursuant to 42 Pa. Cons. Stat. § 9543.1. This section of the PCRA took effect on September 8, 2002. Thus, there are a limited number of cases reviewing claims that rely on § 9543.1. In pertinent part, § 9543.1 provides as follows:

> § 9543.1. Postconviction DNA testing
>
> (a) MOTION.—
>
> (1) An individual convicted of a criminal offense in a court of this Commonwealth and serving a term of imprisonment or awaiting execution because of a sentence of death may apply by making a written motion to the sentencing court for the performance of forensic DNA testing on specific evidence that is related to the investigation or prosecution that resulted in the judgment of conviction.
>
> (2) The evidence may have been discovered either prior to or after the applicant's conviction. The evidence shall be available for testing as of the date of the motion...
>
> (b) REQUIREMENTS.— In any motion under subsection (a), under penalty of perjury, the applicant shall:
>
> (1) (i) specify the evidence to be tested;
>
> (ii) state that the applicant consents to provide samples of bodily fluid for use in the DNA testing; and
>
> (iii) acknowledge that the applicant understands that, if the

[7] *See Commonwealth v. Payne*, 2002 Pa. Super 115, 797 A.2d 1000 (2002) (noting that an illegal sentence can be addressed within the context of a PCRA petition).

motion is granted, any data obtained from any DNA samples or test results may be entered into law enforcement databases, may be used in the investigation of other crimes and may be used as evidence against the applicant in other cases.

(2) (i) assert the applicant's actual innocence of the offense for which the applicant was convicted;. . .

(3) present a prima facie case demonstrating that the:

(i) identity of or the participation in the crime by the perpetrator was at issue in the proceedings that resulted in the applicant's conviction and sentencing; and

(ii) DNA testing of the specific evidence, assuming exculpatory results, would establish:

(A) the applicant's actual innocence of the offense for which the applicant was convicted;...

42 Pa.C.S.A. § 9543.1. The Court notes that the Pennsylvania Superior Court has held that a motion for DNA testing constitutes a post conviction petition under the Post Conviction Relief Act (PCRA)[8] regardless of the title of the document filed. *Commonwealth v. Young*, 2005 Pa. Super 142, 873 A.2d 720 (2005) (citations omitted). The Superior Court further reiterated that an appellant's motion for DNA testing, filed in advance of utilizing the PCRA as a vehicle to obtain DNA results, avoids the one-year time bar of § 9545. *Id.* Thus here, on its face, the defendant's motion is not time-barred under § 9543.1 and will be addressed on its merits.

Section 9543.1(c)(1)(i) requires the defendant to specify the evidence to be tested. The defendant's Motion for Forensic DNA Testing was posited on a pre-printed form in which he filled in his name, the crimes he was convicted of, the date and term of his sentence, and finally what specific items he requested DNA testing to be performed on. For the specific items to be tested the defendant filled in: "sex crimes evidence kit for alleged victims."

The defendant was convicted of crimes against three women. Lorraine Griffin, Nancy Elizabeth Alexander and Deborah Jean Stahlman. A review of the record makes no indication of "sex crimes evidence kits" for any of the three women. The first victim, Ms. Griffin, although attacked, was not sexually penetrated by the attacker. Therefore no biological evidence was ever taken from her related to the investigation or prosecution that resulted in the judgment of conviction of the defendant. The second victim, Nancy Elizabeth Alexander, was taken to Hamot Hospital after she was attacked. Dr. Dennis Michael Scully testified that vaginal samples, taken from Ms. Alexander, were tested and found to contain semen. The third victim, Ms. Stahlman, was taken to Saint Vincent Medical Center after her attack. Dr. Stanley Wharton testified that tests were conducted

[8] 42 Pa. C.S.A. §§ 9541-46.

on Ms. Stahlman to see if sperm was present in her vaginal area. Those tests produced positive results. In addition, the Pennsylvania State Police, for testing, took Ms. Stahlman's pants that she was wearing at the time of her attack. John A. Robertson, a criminalist with the Pennsylvania State Police crime lab, testified at trial that he analyzed the pants to see if seminal fluid was present, and also analyzed saliva and blood taken from Ms. Stahlman and the defendant. Therefore the only biological evidence that was present with any of the victims was vaginal swabs taken from Ms. Alexander, and vaginal swabs and pants taken from Ms. Stahlman. The Court must assume these are the items the defendant refers to as "sex crimes evidence kit for alleged victims" because no other biological evidence is found to exist in the record.

Assuming that the above stated items are what the defendant requests to have tested, the next problem with the defendant's request relates to § 9543.1(a)(2), which states, "the evidence shall be available for testing as of the date of the motion." Here, twenty-seven (27) years after the defendant's trial, such evidence no longer exists. On August 1, 2006, the Commonwealth was directed to file a response to the defendant's motion. In the Commonwealth's response, dated August 23, 2006, the Commonwealth indicated that they spoke extensively to both the Pennsylvania State Police as well as the Erie Police Department. (Commonwealth's Response 8/23/06, p. 2).

The Pennsylvania State Police, who charged the defendant with crimes relating to Ms. Stahlman, informed the Commonwealth that, "rape kits are destroyed after a certain number of years of the case being finalized, either by conviction or acquittal." *Id*. at 2-3. In addition, the Pennsylvania State Police indicated that they are not in the possession of any property records from 1979 through 1983, including any evidence pertaining to the defendant's case. *Id*. at 3. The Erie Police Department charged the defendant with the crimes against both Griffin and Alexander. The Erie Police Department informed the Commonwealth that there was not any evidence, including "sex crimes kits" or "rape kits," in evidence with their department relating to the defendant's case. *Id*.

Therefore, because no biological evidence exists related to this case (regardless of not knowing specifically what the defendant means by "sex crimes evidence kit for alleged victims") the defendant's motion shall be denied. *See Commonwealth v. Brison*, 421 Pa. Super 442, 618 A.2d 420 (1992) (post-conviction DNA testing is appropriate only where the relevant samples have been preserved); *see also Commonwealth v. Moss*, 455 Pa. Super 578, 689 A.2d 259 (1997) (destruction of hair sample not in bad faith five years after appellant's trial and three years after case had been affirmed on direct appeal).

Even if the sparse biological evidence that was obtained from the victims in 1977 still existed, the defendant's motion fails for other reasons.

Presuming that the evidence which the defendant requests be subjected to DNA testing still existed, § 9543.1(c)(3) requires that the defendant's motion present a prima facie case that 1) identity of or the participation in the crime by the perpetrator was at issue in the proceedings that resulted in the applicant's conviction and sentencing, *and* 2) DNA testing of the specific evidence, assuming exculpatory results, would establish the applicant's actual innocence of the offense for which the applicant was convicted. 42 Pa. C.S.A. § 9543.1(c)(3). The defendant had an obligation to make such a demonstration in his motion and he failed to do so.[9]

In regards to the first victim Ms. Griffin, there was no biological evidence ever left by the attacker. Ms. Griffin testified that there was no penetration or sexual intercourse carried out by her attacker, subsequently there was never any evidence available for DNA testing. Therefore the defendant fails to present a prima facie case that DNA testing would establish his actual innocence. The Court in *Commonwealth v. Heilman*, 2005 Pa Super 19, 867 A.2d 542 (2005) noted, "in DNA as in other areas, an absence of evidence is not evidence of absence."

With regards to the other two victims, Ms. Alexander and Ms. Stahlman, as stated above, the biological evidence that did exist at the time of trial, no longer does. Therefore, there is no evidence to submit to DNA testing as the defendant requests.

Also, the Court finds it noteworthy that the evidence of the defendant's guilt went way beyond any physical evidence. Both Ms. Alexander's and Ms. Griffin's purses were seized from the defendant's apartment upon a search of it. The purses were located in an attic that was only accessible from the defendant's apartment. The two purses were identified by the victims in court as being the purses that were stolen from them at the time of their attacks. In addition, Ms. Stahlman positively identified the defendant at the time of trial as being the man who attacked and raped her. While the defense counsel questioned her accurateness in identifying the defendant, Ms. Stahlman remained steadfast that the defendant was her attacker. The Commonwealth also presented testimony from police officers that the defendant, after being read his rights, admitted to committing rapes in Erie County in the summer of 1977 and taking the

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[9] To meet the requirements of this provision, it is important to note that in the pre-printed form in which the defendant presented his motion, the defendant did not elaborate any further than what was already printed on the form. His motion simply read:

7) The identity of or the participation in the crime by the perpetrator was at issue in the proceedings that resulted in the applicant's conviction and sentencing

8) The DNA testing on the specific items listed in paragraph 3 herein would establish the defendant's actual innocence of the offense(s) for which he was convicted.

victims purses, which was when the victims were attacked. During that admission, the defendant specifically indicated he raped a woman at the location, time, and date in which Ms. Stahlman was raped.

For all the reasons set forth above, an Order shall be entered denying the Defendant's Motion for Forensic DNA Testing. An appropriate order shall follow.

Signed this 7th day of November, 2006.

ORDER

AND NOW, to-wit, this 7 day of November, 2006 upon consideration of the Motion for Forensic DNA Testing filed by the defendant, Riley Larkins, Jr., the Commonwealth's Response in opposition to defendant's motion, the defendant's reply to the Commonwealth's Response, and upon review of the record in this case, it is hereby **ORDERED, ADJUDGED and DECREED** that the defendant's motion is **DENIED**.

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

KAREN O'DAY and JOHNNY O'DAY, her husband, Plaintiffs

v.

DANIEL LOESCH, M.D. and TRI-STATE NEUROLOGICAL SURGEONS, Defendants

EVIDENCE / IMPEACHMENT

In Pennsylvania a witness may not be impeached through evidence of specific instances of conduct which had not resulted in a conviction. Rule 608(b), Pa. R.E.

EVIDENCE / IMPEACHMENT

The court properly allowed evidence that plaintiff's medical expert had had his medical license suspended and had his practice of medicine supervised for 22 months by New York's licensing authorities for failure to adhere to acceptable standards of medical practice because the court was not admitting character evidence pursuant to Pa. R.E. 404 or evidence of the witness' inclination to dishonesty pursuant to Pa. R.E. 608 but rather as evidence of his expertise or lack thereof in neurosurgery.

EVIDENCE / IMPEACHMENT

The fact that the plaintiff's medical expert had his license suspended for failure to adhere to applicable medical standards occurred long ago is for the jury to consider; this is to be distinguished from evidence of prior crimes in certain instances pursuant to Pa. R. E. 609(b).

EVIDENCE / IMPEACHMENT

Not every breach of professional standards is fair game for an open-ended attack on an expert witness' competence; there must be a nexus between the conduct in question and the professional qualifications of the witness.

EVIDENCE / EXPERT TESTIMONY

In Pennsylvania, in order to render an expert medical opinion in a medical professional liability action, the expert must possess an unrestricted physician's license to practice medicine at the time of his testimony. 40 P.S. § 1303.512.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 12774 - 2002

Appearances: Victor H. Pribanic, Esquire for the Plaintiffs
Francis J. Klemensic, Esq. for the Defendant

OPINION

Bozza, John A., J.

On August 17, 2006, the jury returned a verdict on this medical malpractice case in favor of the defendant Daniel Loesch, M.D. Thereafter, the plaintiffs filed a timely Motion for Post-Trial Relief in which they raised a single issue. Mr. and Mrs. O'Day contend that it was error for the

Court to have denied their Motion in Limine seeking to exclude from the jury evidence indicating that the medical expert, Dr. Frank Boehm, had his medical license suspended and had his practice of medicine supervised by the New York State licensing authorities. It is their position that the prejudicial effect of this evidence outweighed its probative value. See, Pa. R.E. 403.

The medical issue at trial had to do with plaintiffs' claim that Dr. Loesch failed to rectify in a timely fashion a problem with the placement of a screw used during Mrs. O'Day's spinal fusion surgery. In support of their position, the O'Days called Dr. Frank Boehm, a neurosurgeon from Utica, New York, to testify. In summary, it was Dr. Boehm's position that Dr. Loesch waited too long to intervene before removing or otherwise adjusting a pedicle screw placed in Mrs. O'Day's vertebrae. According to Dr. Boehm the screw was impinging on a nerve, which caused Mrs. O'Day significant difficulty and ultimately led to the condition known as "foot drop". The defendant presented the testimony of an expert neurosurgeon who expressed a contrary point of view.

After argument, the Court denied plaintiffs' Motion in Limine but limited the defendants to asking Dr. Boehm if his license had been suspended and if he was required to have his practice of neurosurgery monitored to assure that he was complying with applicable standards of care. Specifically, the Court noted that the reason for allowing this limited examination was to challenge Dr. Boehm's credentials as an expert neurosurgeon. Thereafter, plaintiffs' counsel chose to further develop this testimony during his direct examination of Dr. Boehm and to elicit the facts underlying the suspension and monitoring required by New York State authorities. The Court did not allow the evidence to be introduced as a means of impeaching Dr. Boehm's propensity for being a truth teller.

In support of their position, the O'Days have relied on *Petrasovits v. Kleiner,* 719 A.2d 799 (Pa. Super. 1998). In *Petrasovits,* the trial court had refused to allow defense counsel to cross-examine plaintiff's expert neurosurgeon about his suspension from the American Association of Neurological Surgeons for giving improper testimony in another case. The Superior Court upheld the ruling noting that in Pennsylvania a witness may not be impeached through evidence of specific instances of conduct which had not resulted in a conviction. *Petrasovits v. Kleiner,* 719 A.2d 700, 804 (Pa. Super. 1998). (The plaintiffs, in their brief, mischaracterized the suspension as a "suspension of his medical license".) The plaintiffs are incorrect in their assertion that the issue in *Petrasovits* is identical to the one presented here.

In this case, the testimony at issue was not introduced as evidence of Dr. Boehm's veracity or propensity for telling the truth. Rather, it was the Court's judgment that the proffered testimony was relevant to Dr. Boehm's credentials as a neurosurgeon and therefore Pa. R.E. 608(b), concerning

impeachment, is not applicable. The plaintiffs have also argued that they were unfairly prejudiced both because of the reasons for the suspension and the remoteness of the conduct. While these are certainly factors that must be considered in determining admissibility pursuant to Pa. R.E. 403, the Court after weighing all facts concluded that any prejudice did not outweigh the evidence's probative value.

Dr. Beohm's status as a licensed physician and his competence as a neurosurgeon were squarely at issue in the trial. Indeed, on his direct examination he testified that he had been licensed to practice medicine since 1985. (Transcript, Day 1, page 78) It was in that regard that the defendant sought to introduce the fact that his license to practice medicine was suspended in 1994 after he began practicing neurosurgery by the state of New York for 60 days for the failure to adhere to acceptable standards of medical practice. Further, the defendant wanted to show that, even though he was thereafter restored to practice, the New York State licensing authorities required that his practice of neurosurgery be monitored by a fellow neurosurgeon for 22 months to make sure he was complying with required standards of practice. By allowing this line of inquiry, the Court was not admitting character evidence pursuant to Pa. R.E. 404 or evidence of the witnesses' inclination to dishonesty pursuant to Pa. R.E. 608, but rather as evidence of his expertise or lack thereof in neurosurgery. Dr. Boehm was not testifying as a treating physician and the issue in the case was not whether he had performed a surgical procedure correctly. Rather, Dr. Boehm was asking the jury to accept his opinion more than the opinion of another expert because of his qualifications as a physician and neurosurgeon.[1] Therefore, the fact that in 1994 his license to practice medicine had been suspended and that his practice of neurosurgery had to be monitored for essentially two years to assure that he was complying with the standards of care of his specialty was a relevant factor for the jury to consider. Indeed, had Dr. Boehm received an award for his outstanding performance during his internship or perhaps as a staff physician for his efforts in infection control these would have been equally admissible. The fact that these events occurred a long time ago is for the jury to consider. (This is to be distinguished from evidence of prior crimes in certain instances pursuant to Pa. R.E. 609(b). As an expert witness his credentials as a neurosurgeon are of critical importance.

[1] It is noteworthy that pursuant to 40 P.S. §1303.512, that in order to render an expert medical opinion in a medical professional liability action, the expert must possess an unrestricted physician's license to practice medicine. Although Mr. Boehm's status as a licensed physician at the time of his testimony was not at issue, it is apparent that Pennsylvania regards licensing status as some indication of competence.

Indeed, the fundamental issue in an overwhelming number of cases dealing with assertions of medical negligence is the professional judgment of the expert witness. Jurors have to make a selection based in significant part on the professional qualifications of the witness. All experts are not created equal. Expertise in any professional discipline is not simply a matter of acquiring knowledge through the completion of required education and training but also implicates other important attributes as well. Academic proficiency without skill and sound judgment is of limited benefit to a lawyer's or engineer's client or a physician's patient. An expert witness like Dr. Boehm is asking the jury to accept his conclusion, that is to say his judgment, concerning the acceptability of the professional conduct of another physician. A jury should be allowed to know that in an expert witnesses' past his medical judgment was called into question by a government licensing authority to the extent that his ability to practice medicine was restricted and monitored for a significant period.

This is by no means to suggest that every breach of professional standards is fair game for an open-ended attack on an expert witnesses' competence. There must be a nexus between the conduct in question and the professional qualifications of the witness. *See*, *Downey v. Weston,* 451 Pa. 259, 301 A.2d 635 (1973) (alleged breach of medical ethics for improper disclosure of medical records did not bear directly on credibility of the witness). In *Petrasovits*, for example, the conduct of the expert in question had to do with prior testimony and not anything to do with his expertise in medicine, so even had this been offered to attack his competence, it is unlikely it would have been admissible. Had Dr. Boehm merely been investigated or perhaps only reprimanded for a minor matter it may very well be that the scales would tip in favor of preclusion. But here the violation of a standard of practice involved the dispensation of drugs and was regarded as a serious matter by the State of New York.

ORDER

AND NOW, this 27 day of November, 2006, upon consideration of Plaintiff's Motion for Post-Trial Relief, and argument thereon, and for the reasons set forth in this Court's Opinion, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that the Motion is **DENIED**.

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

IN THE MATTER OF THE ESTATE OF JAMIE ADAM PETTIGREW

WRONGFUL DEATH / BENEFICIARIES

A relative seeking damages as a result of the death of a family member must show that he has suffered a pecuniary loss as a result of the death of the decedent. *Hodge v. Loveland*, 690 A.2d 243, 245-46 (Pa. Super. 1997). A parent will be excluding from the statutory class of beneficiaries under 42 Pa.C.S. §8301 when the parent did not suffer any pecuniary loss as a result of a child's death.

In this instance the non-custodial parent did not provide financial, emotional or other support to the child. Support payments pursuant to a support order were not made and arrearages totaling $32,604.66 existed at the time of death. The non-custodial parent also did not provide food, clothing or shelter to the child. This parent also did not provide cards or gifts on holidays, or otherwise participate in activities with the child. The non-custodial parent therefore forfeited any right he had to share in the wrongful death settlement proceeds or any other funds received by the estate of the child.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION NO. 323-2001

Appearances: J. Timothy George, Esq.
Thomas Kubinski, Esq. for the Depart. of Public Welfare
Jeffrey Scibetta, Esq. for the Estate

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Domitrovich, J., November 15, 2006

After a thorough review of the testimony and evidence presented at the hearing conducted on October 31, 2006, the Brief in Support of the Petition for Declaratory Relief, as well as an independent review of the relevant statutory and case law, this Court hereby enters the following Findings of Fact and Conclusions of Law, regarding Lynne Crosby's Petition for Declaratory Relief.

FINDINGS OF FACT

PROCEDURAL HISTORY:

1. On February 11, 2000, Lynne Crosby's fiance, Alan Finnegan, and two of Lynne Crosby's children, Jamie Adam Pettigrew and Haley Rose Finnegan, were traveling on State Route 5 when their automobile was struck by an oncoming motorist, killing all of them.

2. Lynne Crosby, as Administratrix of the Estate of Jamie Adam Pettigrew, filed a wrongful death action against the Estate of Alan Finnegan and the Commonwealth of Pennsylvania, Department of Transportation, for alleged negligence in causing the death of Jamie Adam Pettigrew.

3. Said wrongful death action resulted in a court-approved settlement of $40,000.00 by the Honorable Roger M. Fischer.

4. Jamie Adam Pettigrew's Estate is currently in a position to complete a final accounting and to distribute the balance remaining in said Estate to the appropriate individual(s).

5. Jamie Adam Pettigrew was sixteen years old at the time of his death.

FACTUAL HISTORY AND CREDIBILITY DETERMINATIONS:

6. This Court finds credible the testimony of Lynne Crosby, the mother of Jamie Adam Pettigrew; Michelle Crosby, the maternal aunt of Jamie Adam Pettigrew; Brooke Finnegan, the sister of Jamie Adam Pettigrew; Eric Gray, the cousin of Jamie Adam Pettigrew; Walt Crosby, the maternal grandfather of Jamie Adam Pettigrew; and Susan Bell, a close friend and neighbor of Lynne Crosby whose son was a friend of Jamie Adam Pettigrew.

7. Lynne Crosby and Dean Pettigrew married on August 24, 1983.

8. Lynne Crosby and Dean Pettigrew had one child together, Jamie Adam Pettigrew, born December 24, 1983.

9. During approximately the two years following Jamie Adam Pettigrew's birth, Lynne Crosby, Dean Pettigrew, and Jamie Adam Pettigrew lived with Jamie Adam Pettigrew's maternal grandparents. Subsequently, Lynne Crosby, Dean Pettigrew, and Jamie Adam Pettigrew lived together in an apartment.

10. In approximately 1987, Lynne Crosby and Dean Pettigrew separated.

11. On May 29, 1990, Lynne Crosby and Dean Pettigrew divorced.

12. From the date of Lynne Crosby and Dean Pettigrew's separation in 1987 until the date of Jamie Adam Pettigrew's death on February 11, 2000, Jamie Adam Pettigrew always lived with Lynne Crosby.

13. During approximately the last twelve years of Jamie Adam Pettigrew's life, Dean Pettigrew only spent one week with Jamie Adam Pettigrew when Dean Pettigrew took Jamie Adam Pettigrew to Florida when Jamie Adam Pettigrew was ten or eleven years old. Otherwise, Jamie Adam Pettigrew lived with his mother, not Dean Pettigrew.

14. Jamie Adam Pettigrew was very close to Lynne Pettigrew and his relatives on her side of the family.

15. Jamie Adam Pettigrew enjoyed spending time in Lake City with his aunt, Michelle Crosby, with his maternal grandparents, and with his cousin, Eric Gray.

16. From the date of Lynne Crosby and Dean Pettigrew's separation in 1987 until the date of Jamie Adam Pettigrew's death on February 1, 2000, Dean Pettigrew never petitioned to establish a custody or visitation arrangement regarding Jamie Adam Pettigrew.

17. Although no custody arrangement was in place, Lynne Crosby never restricted Dean Pettigrew's access to Jamie Adam Pettigrew.

18. Dean Pettigrew did not ever see Jamie Adam Pettigrew after this trip to Florida.

19. Dean Pettigrew never sent Jamie Adam Pettigrew a card or a gift on his birthday, on Christmas, on Thanksgiving, or on Easter.

20. Prior to the Florida trip, Dean Pettigrew telephoned Jamie Adam Pettigrew a few times; however, Dean Pettigrew often telephoned at inappropriately late hours when Jamie Adam Pettigrew was sleeping. Furthermore, subsequent to the Florida trip, Dean Pettigrew telephoned Jamie Adam Pettigrew only once, late at night, while Jamie Adam Pettigrew was sleeping, and, therefore, they were not able to talk to each other.

21. Jamie Adam Pettigrew enjoyed playing baseball and football, and enjoyed fishing, hunting, playing video games, skateboarding, and BMX biking; however, Dean Pettigrew never came to one of Jamie Adam Pettigrew's baseball or football games. Moreover, Dean Pettigrew never went fishing or hunting with Jamie Adam Pettigrew, and Dean Pettigrew never played video games with Jamie Adam Pettigrew. Dean Pettigrew never saw Jamie Adam Pettigrew skateboard or ride his BMX bike.

22. In contrast, Lynne Pettigrew played a very active role in Jamie Adam Pettigrew's life.

23. Dean Pettigrew made promises to Jamie Adam Pettigrew to buy him a skateboard; however, Dean Pettigrew never delivered on these promises.

24. When Jamie Adam Pettigrew was approximately five or six years old, Dean Pettigrew made a promise to Jamie Adam Pettigrew to take him to a parade; however, Dean Pettigrew never delivered on this promise.

25. When Jamie Adam Pettigrew was between the ages of five and ten, Dean Pettigrew made promises over the telephone to take Jamie Adam Pettigrew to the movies; however, Dean Pettigrew never delivered on these promises.

26. Dean Pettigrew never attended any parent-teacher conference concerning Jamie Adam Pettigrew; rather, Lynne Crosby attended all of these conferences.

27. Dean Pettigrew never regularly visited with Jamie Adam Pettigrew and never regularly telephoned Jamie Adam Pettigrew

28. A child support order was entered in this case in 1987; however, Dean Pettigrew failed to remain current on his child support obligation.

29. As of October 9, 2000, approximately eight months after Jamie Adam Pettigrew's death, Dean Pettigrew's support arrearages totaled $32,604.66.

30. Jamie Adam Pettigrew was dependent upon Public Assistance for financial support, since Dean Pettigrew failed to make Court-ordered support payments.

31. Due to Dean Pettigrew's disinterest in his son, Walt Crosby, Jamie Adam Pettigrew's maternal grandfather, assumed the responsibility of acting as a father figure to Jamie Adam Pettigrew.

32. Susan Bell unexpectedly encountered Dean Pettigrew at various times, and Susan Bell told Dean Pettigrew to contact Jamie Adam

Pettigrew because Jamie Adam Pettigrew wanted to know Dean Pettigrew. Dean Pettigrew, however, failed to do so.

33. Dean Pettigrew elected to represent himself *pro se* and chose not to testify on his own behalf. Instead he presented the testimony of one witness, his mother, Alice Abbott.

34. This Court does not find credible the testimony of Alice Abbott, the paternal grandmother of Jamie Adam Pettigrew. Ms. Abbott acknowledged that she is elderly and has medical issues and had difficulty answering questions with accuracy. Ms. Abbott also indicated uncertainty in her answers to most of the questions posed to her. Furthermore, this Court specifically finds Ms. Abbott's testimony concerning Jamie Adam Pettigrew's age in photographs not to be credible or accurate, as Ms. Abbott did not indicate any independent recollection of Jamie Adam Pettigrew's age when the photographs were taken; rather, Ms. Abbott merely attempted to guess Jamie Adam Pettigrew's age based on his appearance in the photographs, and Ms. Abbott's guesses were often inconsistent and contradictory.

CONCLUSIONS OF LAW

42 Pa.C.S. §8301 regarding wrongful death actions states,

> An action may be brought, under procedures prescribed by general rules, to recover damages for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another if no recovery for the same damages claimed in the wrongful death action was obtained by the injured individual during his lifetime and any prior actions for the same injuries are consolidated with the wrongful death claim so as to avoid a duplicate recovery.

Furthermore, 42 Pa.C.S. §8301, sets forth the beneficiaries who may be entitled to a benefit received from a wrongful death action:

> The right of action created by this section shall exist only for the benefit of the **spouse, children or parents of the deceased**, whether or not citizens or residents of this Commonwealth or elsewhere. The damages recovered shall be distributed to the beneficiaries in the proportion they would take the personal estate of the decedent in the case of intestacy and without liability to creditors of the deceased person under the statutes of this Commonwealth. (emphasis supplied).

Additionally, "the purpose of the Wrongful Death Act is to compensate certain enumerated relatives of the deceased for the pecuniary loss occasioned to them through deprivation of the part of the earnings of the deceased which they would have received from him had he lived." *Hodge v. Loveland*, 690 A.2d 243, 245-46 (Pa. Super. 1997); *Berry v. Titus*, 499 A.2d 661, 664 (Pa. Super. 1985). Therefore, only individuals

who stand in a "family relation" to the decedent may recover damages. *Hodge supra* at 246.

> A family relation [e]xists between parent and child when a child receives from a parent services or maintenance or gifts with such reasonable frequency as to lead to an expectation of future enjoyment of these services, maintenance, or gifts. The term 'family relation' as thus used does not embrace its comprehensive definition, but is confined to certain phases of family relation between the persons named in the act. . . . Before there can be any recovery in damages by one in that relation for the negligent death of another in the same relation, there must be a pecuniary loss. *Berry supra* at 664; *Manning v. Capelli*, 411 A.2d 252, 254 (Pa. Super. 1979).

Accordingly, in order to establish the existence of a family relation, the relative seeking damages must show that he suffered a pecuniary loss as a result of the death of the decedent. *Hodge supra* at 246.

In the instant matter, pursuant to 42 Pa.C.S. §8301, since Jamie Adam Pettigrew did not have a spouse or children at the time of his death, only his parents, Lynne Pettigrew and Dean Pettigrew are statutorily defined beneficiaries of the benefit received from wrongful death action. However, Dean Pettigrew must be excluded from the statutory class of beneficiaries who are entitled to inherit because Dean Pettigrew did not stand in a family relation to Jamie Adam Pettigrew since Dean Pettigrew did not suffer any pecuniary loss as a result of Jamie Adam Pettigrew's death, as evidenced by this Court's findings, which were based on the testimony before the Court.

During the last twelve years of Jamie Adam Pettigrew's life, Dean Pettigrew did not provide financial, emotional, or other support to Jamie Adam Pettigrew. During this time frame, Dean Pettigrew did not make support payments pursuant to the support order, and at the time of Jamie Adam Pettigrew's death, Dean Pettigrew had accumulated support arrearages totaling $32,604.66. Additionally, in the last twelve years of Jamie Adam Pettigrew's life, Dean Pettigrew did not feed, clothe, or shelter Jamie Adam Pettigrew. Jamie was dependent upon Public Assistance for financial support, since Dean Pettigrew failed to make Court-ordered support payments. Dean Pettigrew also never sent Jamie Adam Pettigrew cards or gifts on special holidays or otherwise, Dean Pettigrew never participated in activities with Jamie Adam Pettigrew, and Dean Pettigrew never watched Jamie Adam Pettigrew participate in activities he enjoyed. Dean Pettigrew never lived with Jamie Adam Pettigrew after Jamie Adam Pettigrew was approximately four years old, and Dean Pettigrew never petitioned for custody of or visitation with Jamie Adam Pettigrew, where Lynne Crosby would have encouraged this. In contrast, Lynne Crosby lived with Jamie Adam Pettigrew throughout his entire life, and provided

for all of his financial, emotional, and other needs.

Moreover, Dean Pettigrew's only involvement in Jamie Adam Pettigrew's life involved one brief trip to Florida in approximately 1994, a handful of telephone calls, and several empty promises. Dean Pettigrew abandoned Jamie Adam Pettigrew prior to the time of Jamie Adam Pettigrew's death, and as a result of this, Jamie Adam Pettigrew's paternal grandfather, Walt Crosby, acted as his father. The evidence establishes that Dean Pettigrew demonstrated a settled purpose of relinquishing his parental claim and of failing to perform his parental duties. *See. Berry v. Titus,* 499 A.2d 661, 665 (Pa. Super. 1985). Dean Pettigrew did not maintain a parental bond with Jamie Adam Pettigrew during the last twelve years of the child's life, even though Jamie Adam Pettigrew himself as a young child tried to change this lack of relationship by making more efforts than his father ever did. Jamie became more disappointed and more frustrated by his father's lack of involvement with him and by his father's empty promises. Dean Pettigrew does not now deserve to benefit from Jamie Adam Pettigrew's Estate, since Dean Pettigrew would have received the same support from Jamie Adam Pettigrew in the future that he provided to Jamie Adam Pettigrew during his lifetime: no support financially, emotionally, or otherwise. Accordingly, since Dean Pettigrew did not stand in a family relation to Jamie Adam Pettigrew and Dean Pettigrew did not suffer any pecuniary loss from the death of his son, Dean Pettigrew must be excluded from the wrongful death distribution.

The Court reserves the opportunity to make additional findings of fact and conclusions of law, as necessary. For all of the foregoing reasons, this Court enters the following Order:

ORDER

AND NOW, to wit, this 15th day of November, 2006, after a hearing concerning Lynne Crosby's Petition for Declaratory Relief, it is hereby **ORDERED, ADJUDGED, AND DECREED** as follows:

1. Dean Pettigrew abandoned his son, Jamie Adam Pettigrew, prior to the time of Jamie Adam Pettigrew's death, and therefore, Dean Pettigrew did not stand in the requisite family relation to Jamie Adam Pettigrew, and, furthermore, Dean Pettigrew did not suffer any pecuniary loss from the death of Jamie Adam Pettigrew, within the meaning of 42 Pa.C.S. §8301, et. seq.

2. By abandoning his son, Jamie Adam Pettigrew, prior to the time of said child's death, Dean Pettigrew forfeited any right that he would have otherwise had as a parent to said deceased child to share in the wrongful death settlement proceeds or any other funds received by the Estate of Jamie Adam Pettigrew due to Jamie Adam Pettigrew's death.

3. Lynne Crosby, the mother of Jamie Adam Pettigrew and Administratrix of the Estate of Jamie Adam Pettigrew, may therefore distribute all of the

remaining proceeds received as a result of the wrongful death of her son, Jamie Adam Pettigrew, to herself as the only person within the required class of persons listed in 42 Pa.C.S. §8301(b) who stands in the required family relation to Jamie Adam Pettigrew and who suffered pecuniary loss within the meaning of 42 Pa.C.S. §8301 as a result of her son's death.

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