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Reports of Cases Decided in the Several Courts of
Erie County for the Year
2007

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ERIE, PA

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

COURTS OF COMMON PLEAS

HONORABLE ELIZABETH K. KELLY ---------- President Judge
HONORABLE SHAD CONNELLY ---------- Judge
HONORABLE STEPHANIE DOMITROVICH ---------- Judge
HONORABLE JOHN A. BOZZA ---------- Judge
HONORABLE WILLIAM R. CUNNINGHAM ---------- Judge
HONORABLE ERNEST J. DISANTIS, JR. ---------- Judge
HONORABLE MICHAEL E. DUNLAVEY ---------- Judge
HONORABLE JOHN J. TRUCILLA ---------- Judge
HONORABLE JOHN GARHART ---------- Judge

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WASTE MANAGEMENT OF PENNSYLVANIA, INC., also known as WASTE MANAGEMENT OF PENNSYLVANIA, INC. - ERIE, Plaintiff,

v.

CAREER CONCEPTS STAFFING SERVICES, INC., formerly known as CAREER CONCEPTS, LTD., Defendant

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT / STANDARD

Summary judgment may only be granted in cases in which there are no genuine issues of material fact and the moving party is entitled to relief as a matter of law. A non-moving party which bears the burden of proof may not merely rely on its pleadings and its failure to adduce sufficient evidence on an issue essential to its case establishes the moving party's entitlement to judgment as a matter of law. The court must view the record in the light most favorable to the non-moving party, resolving all doubts as to the existence of a genuine issue of material fact against the moving party.

CONTRACTS / SUBSTITUTED CONTRACT

A written agreement by which defendant supplies plaintiff with temporary workers can be terminated by a new contract which would, in effect, constitute a substituted contract similar to a novation. Where the party to whom temporary work was to be supplied entered into an agreement with another supplier and where the original supplier agreed to serve as a subcontractor, the parties manifested their agreement to a new contract and their intention to discharge the mutual obligations under the prior agreement.

CONTRACTS / INDEMNITY AGREEMENT / NEGLIGENCE

An agreement to indemnify to the extent damages are caused by the negligence of the indemnifying party is inapplicable where the record contains no evidence of negligence on the part of the indemnifying party.

NEGLIGENCE / ELEMENTS OF CAUSE OF ACTION

The elements of a cause of action in negligence are 1) a duty requiring conformity to a standard of conduct; 2) defendant's failure to conform to the standard; 3) causal connection between the conduct and the injury; and 4) loss or damage. The existence of a duty is a question of law. Summary judgment is appropriate where there is no evidence from which a fact finder could reasonably find a causal relationship between a breach of duty and the injury.

CONTRACTS / FORMATION

A contract, whether oral or written, requires agreement on the essential terms of the contract, in effect, an offer, acceptance, and consideration. It is the essence of Pennsylvania contract law that the parties have a meeting of the minds as to the essential terms of the agreement. Absent an intention to be bound negotiations concerning future terms do not constitute an agreement. Absent evidence of the acceptance by the supplier of temporary workers of all provisions of a proposed agreement, or of a

course of dealing, there is insufficient evidence to establish an agreement and summary judgment is properly entered in favor of the defendant.

CONTRACTS / INDEMNITY / WORKERS' COMPENSATION ACT

The provision of the Workers' Compensation Act, 77 P.S. §481(b), providing that an employer may waive the protection from liability provided by the Act by entering into an indemnity agreement is not applicable where a party liable only because of its status as a statutory employer seeks reimbursement from a company supplying temporary employees.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 10701-2002

Appearances: Jeffrey M. Olszewski, Esq. for the Plaintiffs
John F. Mizner, Esq. for the Defendants

OPINION

(SUPPLEMENTAL)

Bozza, John A., J.

This matter is before the Court on the 1925(b) Statement of Matters Complained of On Appeal filed by plaintiffs, Waste Management of Pennsylvania, Inc., also known as Waste Management of Pennsylvania, Inc. - Erie (Waste Management).[1] The case stems from an accident that occurred on January 14, 1999 when Dwight Brubaker, while working at Waste Management, was run over by a garbage truck and was severely injured. Waste Management is engaged in the business of hauling, disposing, and/or processing municipal and commercial solid waste and Career Concepts Staffing Services, Inc. (Career Concepts) is engaged in the business of furnishing temporary employees. On January 5, 1999 Career Concepts placed Mr. Brubaker with Waste Management. As a result of his injuries, Mr. Brubaker was unable to work, and thereafter filed a claim petition under the Pennsylvania Workers' Compensation Act against Career Concepts and its insurance carrier. Career Concepts and its insurance carrier filed a joinder petition against Waste Management.

On February 23, 2001, Workers' Compensation Judge Carmen Lugo found that Waste Management, and not Career Concepts, was the employer liable for Mr. Brubaker's injury, and entered an Order accordingly. Waste Management did not appeal Judge Lugo's decision, and pursuant to the Order, has paid, and continues to pay for Mr. Brubaker's medical and rehabilitative expenses.

On February 21, 2002, Waste Management filed a Complaint in which it sought reimbursement from Career Concepts for the amount it was obligated to pay for workers' compensation benefits to Brubaker.

[1] The Court previously filed a Memorandum briefly describing its rationale for its decision to grant the defendant's Motion for Summary Judgement.

It asserted two theories of recovery. In Count I, Waste Management maintained that Career Concepts was liable to it as a result of breaching a written contract entered into in 1993 and in Count II, it maintained that Career Concepts is liable on the basis of an oral contract. There was no separate claim made pursuant to what has been characterized as a Temporary Personnel Supply Agreement from 1998.

Subsequently, both parties filed Motions for Summary Judgement. Argument on the Cross-Motions for Summary Judgement was held before this Court on January 13, 2006. Each party asserted that there are no material issues of fact in dispute in support of their respective positions. Following a thorough review of the record, the Court found that there were no material issues of fact in dispute and that as a matter of law, the evidence was insufficient to support the claims of Waste Management. The Court entered an Order on March 3, 2006 granting the Motion for Summary Judgement of Career Concepts and denying the Motion for Summary Judgement of Waste Management. Waste Management then filed a notice of Appeal on April 3, 2006, appealing the March 3, 2006 Order, followed by a timely 1925(b) Statement of Matters Complained of On Appeal.

In their 1925(b) Statement, the plaintiffs assert the following:

> 1. The trial court erred in failing to determine as a matter of law that Career Concepts and Waste Management entered into an oral agreement whereby Career Concepts agreed to indemnify Waste Management for the payment of worker's compensation benefits.
>
> 2. Alternatively, the trial court erred in determining that there was insufficient evidence to submit to a jury the issue of whether there was an oral agreement between Career Concepts and Waste Management whereby Career Concepts agreed to indemnify Waste Management for the payment of worker's compensation benefits.
>
> 3. The trial court erred in determining as a matter of law that there was no meeting of the minds and/or intent to enter into an oral agreement as memorialized by the 1998 Temporary Personnel Supply Agreement whereby Career Concepts agreed to indemnify Waste Management for the payment of worker's compensation benefits on the grounds that the agreement was not executed by Career Concepts.
>
> 4. Alternatively, the trial court erred in failing to submit to a jury the question of whether there was a meeting of the minds and/or intent to enter into an oral agreement as memorialized by the 1998 Temporary Personnel Supply Agreement whereby Career Concepts agreed to indemnify Waste Management for the payment of worker's compensation benefits.

5. The trial court erred in determining that there was no meeting of the minds and/or intent to enter into an oral agreement whereby Career Concepts agreed to indemnify Waste Management for the payment of worker's compensation benefits solely on the grounds that Career Concepts did not sign the 1998 Temporary Personnel Supply Agreement.

6. The trial court erred in determining as a matter of law the 1993 Agreement between Career Concepts and Waste Management was no longer in effect in January 1999.

7. The trial court erred in determining that there was insufficient evidence to submit to a jury the issue of negligence on the part of Career Concepts for failing to properly train and/or place Mr. Brubaker and that Career Concepts was bound by the 1993 Agreement to indemnify Waste Management for such negligence.

(1925(b) Statement, ¶¶1-7). As explained below, the plaintiffs' assertions of error are without merit.

Summary judgement may be granted only in those cases in which there are no genuine issues of material fact and the moving party is entitled to relief as a matter of law. *Harleysville Insurance Cos. v. Aetna Cas. & Sur. Ins. Co.*, 568 Pa. 255, 795 A.2d 383 (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 judgement. *Murphy v. Duquesne Univ. of the Holy Ghost*, 565 Pa. 571, 777 A.2d 418 (2001). A non-moving party's failure to adduce sufficient evidence on an issue essential to his case on which it bears the burden of proof establishes the moving party's entitlement to judgement 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. *Jones v. SEPTA*, 565 Pa. 211, 772 A.2d 435 (2001).

The facts of the case may be summarized as follows. In 1993 the parties entered into a written contract in which Career Concepts provided temporary staffing to Waste Management. The 1993 contract also provided that Career Concepts would indemnify Waste Management under certain circumstances. Specifically the agreement provided:

Career Concepts, Ltd. shall defend, indemnify, save and hold harmless CUSTOMER, its agents, servants, officers, and employees from and against any and all claims, demands, causes of actions and liabilities, of every kind and character, and from and against all outlays, costs and expenses, including attorney's fees, statutory penalties, and legal interest, for bodily injury, sickness, disease or death to any person,

> including an employee of Career Concepts, Ltd. or damage to any property to the extent such injury or damage is caused by negligence of Career Concepts, Ltd., its' employees or agents in connection with, the furnishing of temporary services, except to the extent as may be caused through the sole negligence of Customer its agents, servants, officers and employees.

(Joint Exhibit 1, ¶ 1).

In 1997 Waste Management then entered into an agreement with Outsource International of America, Inc., d/b/a Tandem (Outsource), in which Outsource exclusively provided staffing for Waste Management. Career Concepts became a subcontractor for Outsource and provided staffing to Waste Management pursuant to the new agreement between Waste Management and Outsource. On July 16, 1998 Waste Management merged with USA Waste consequently ending the 1997 Outsource agreement. After the Outsource agreement ended, Career Concepts continued to provide staffing to Waste Management. The rates charged by Career Concepts and paid by Waste Management included an amount to cover Career Concepts' cost for workers' compensation insurance. In 1998, Waste Management sent two different proposed written contracts to Career Concepts referred to as the proposed Temporary Personnel Supply Agreements. Both contained an indemnification clause referred to as "Agency's Indemnity" similar to, but materially different from, a clause contained in the 1993 agreement. Specifically this proposed provision did not limit Career Concepts liability to circumstances where it was negligent. Career Concepts did not sign either proposal.

On January 5, 1999, Career Concepts placed Mr. Brubaker with Waste Management following his request to be placed there. Mr. Brubaker was provided guidance on how to do his job by Waste Management, including, but limited to, where he should stand or sit in the garbage truck and how to operate the garbage compactor. Unfortunately, on January 14, 1999, Mr. Brubaker was run over by a Waste Management garbage truck while working and he was severely injured. As previously stated, Mr. Brubaker filed for Workers' Compensation benefits against Career Concepts, and thereafter Career Concepts joined Waste Management. Waste Management was ultimately found to be the employer responsible for paying Mr. Brubaker's workers' compensation benefits.

A. 1993 Written Agreement with Career Concepts

With regard to Waste Management's claim concerning violation of the 1993 written agreement this court concluded that on the record before it there were no material facts in dispute and that Career Concepts was entitled to judgement as a matter of law. It was evident that the parties terminated their agreement when Waste Management entered into a new temporary worker supply agreement with Outsource and when Career Concepts supplied workers as a subcontractor for Outsource. The new

arrangement was in effect a substituted contract akin to a novation that had the effect of discharging the reciprocal duties of performance of both parties. *Buttonwood Farms, Inc. v. Carson*, 329 Pa. Super. 312, 478 A.2d 484 (1984).

Viewing the facts in a light most favorable to Waste Management reasonable minds could not differ that the contract of 1993 was terminated. In 1998 Waste Management entered into a new agreement with Outsource whereby it agreed that Outsource would be the *exclusive* supplier of staffing, in effect terminating its ability to utilize the services of Career Concepts. Career Concepts manifested its agreement to this new arrangement by subcontracting with Outsource to supply workers to Waste Management. By entering in to the new contractual arrangement and thereafter performing consistent with its terms the parties manifested a clear intention to discharge their mutual obligations under the 1993 agreement. There is no evidence in the record to indicate a contrary intention. Indeed Waste Management proposed a new written agreement that included a materially different indemnification clause following the termination of the Outsource agreement. The record before the Court indicates that the 1993 agreement was no longer in effect at the time the injuries in this case occurred.

Alternately, had it been in effect, the indemnity provision of the agreement would not be applicable in these circumstances as the record contains no evidence of any negligence on the part of Career Concepts with regard to the accident involving Dwight Brubaker. Without a showing of negligence on the part of Career Concepts, there is no obligation to indemnify Waste Management for the cost of paying workers' compensation benefits according to the terms of the 1993 agreement.

In Pennsylvania, the elements of a cause of action based upon negligence are:

1. A duty or obligation recognized by the law requiring the defendant to conform to a certain standard of conduct for the protection of others against unreasonable risks;
2. Defendant's failure to conform to the standard required;
3. A causal connection between the conduct and the resulting injury;
4. Actual loss or damage resulting to the plaintiff.

R.W. v. Manzek, 888 A.2d 740, 2005 Pa. LEXIS 3088 (Pa. December 28, 2005, decided).

The initial element in any negligence cause of action requires a showing that the defendant owes a duty of care to the plaintiff. *Id*; see also *Althaus v. Cohen*, 562 Pa. 547, 756 A.2d 1166, 1168 (Pa. 2000); see also *Gibbs v. Ernst*, 538 Pa. 193, 647 A.2d 882, 890 (Pa. 1994) (Any action in negligence is premised on the existence of a duty owed by one party to

another"). The existence of a duty is a question of law for the court to decide. *Id*. The record here is devoid of evidence that Career Concepts owed to Waste Management a duty to train or test Mr. Brubaker in the safe performance of his job for Waste Management. In fact Waste Management actually trained Mr. Brubaker with regard to his responsibilities on the job. Assuming *arguendo* that there was such a duty, other than an assertion in the Complaint that Career Concepts "failed to adequately test, select, hire and train Mr. Brubaker in the safe performance of his duties..." there is no indication in the record from which a fact-finder could reasonably find a causal relationship between a breach of duty imposed on Career Concepts and Mr. Brubaker's injury.

B. Oral Contract

With regard to Waste Management's claim of an oral contract, the Court found that as a matter of law, the evidence of record was insufficient to establish that the parties entered into an agreement that included a provision by which Career Concepts indemnified Waste Management in the event they were required to pay workers' compensation benefits. Under Pennsylvania law, in order to have a contract, oral or written, there must be an agreement on the essential terms of the contract, in particular, offer, acceptance, consideration or a mutual meeting of the minds. *Jenkins v. County of Schuylkill*, 441 Pa. Super. 642, 658 A.2d 380, 383 (1995). In this case, there is insufficient evidence in the summary judgement record for a jury to conclude that Career Concepts agreed to indemnify Waste Management for its cost of providing workman's compensation benefits to Mr. Brubaker. Waste Management had the burden to come forward with evidence sufficient to defeat a summary judgement motion. This has not been accomplished. The only evidence in support of its position is as follows:

1. The parties had a "course of dealing" that was manifested in the proposed "Temporary Personnel Supply Agreement" that indicated Career Concepts' assent to the indemnification provision. (Brief in Opposition to Defendant's Motion for Summary Judgement at 4-6).
2. The existence of two unsigned proposed Temporary Personnel Supply Agreements.
3. Statements of Charles Campagne of Career Concepts to the effect the parties had an agreement.
4. The fact that part of the fee charged by Career Concepts to Waste Management for supplying workers was intended to cover its own cost for workers' compensation premiums.
5. Statements of an employee of Waste Management that he negotiated terms of the Temporary Personnel Supply Agreements with someone from Career Concepts.

It is the essence of Pennsylvania contract law that in order for a contract to be formed the parties must have a meeting of the minds as to the

essential terms of the agreement. *Id*. Moreover unless there is an intention to be bound negotiations concerning future terms do not constitute an agreement. *Id*.

In this case the evidence is inadequate to establish that the parties manifested an intention to be bound by the "Agency's Indemnity" provision of the Temporary Personnel Supply Agreement. The fact that Career Concepts allocated part of its fee to cover the expense of its own costs for workers' compensation insurance (as well as other costs) is not sufficient to demonstrate an intent to be bound by all the terms of the Temporary Personnel Supply Agreement and specifically the proposed indemnification clause. The undisputed testimony in the record is that Career Concepts was required by law to have such insurance. There is no evidence that the additional amount charged to Waste Management to offset its cost of Workman's Compensation insurance was the result of its acceptance of all of the provisions of the proposed Temporary Personnel Supply Agreements. There was no "course of dealing" evidence presented to indicate that Career Concepts had agreed to indemnify Waste Management for its Workmen's Compensation loses. Indeed this would have been a departure from the parties' prior contractual arrangement.

The assertion that Charles Campagne testified that he reached an agreement with Waste Management is significantly overstated. His deposition reveals that he denied that there was any agreement with the plaintiff beyond supplying personnel for a fee. Specifically he rejected the notion that he agreed to any indemnification term. The notion that a Waste Management employee negotiated the terms of the Temporary Personnel Supply Agreement with someone from Career Concepts is also exaggerated as the record reveals that the individual involved in the discussions, Jeffrey Coyle, did not know who he spoke with nor did he remember what terms were agreed to.

It must also be noted that the court did not accept the defendant's position that the Workers' Compensation Act's (the Act) limitation on indemnity agreements controls the disposition of this issue. Specifically 77 P.S. § 481(b) which contains requirements for such agreements is applicable in circumstances where an employer who is protected from liability under the Act waives such protection by entering into an indemnity agreement with a third party. The relevant portion of the Act provides:

> In the event injury or death to an employee is caused by a third party, then such employee, ... may bring their action at law against such third party, but the employer, ... shall not be liable to a third party in any action at law or otherwise, unless liability for such damages, contributions or indemnity shall be expressly provided for in a *written contract* entered into by the party alleged to be liable prior to the date of the occurrence which gave rise to the action.

77 P.S. § 481(b). This is not the situation presented in this case where Waste Management is only seeking reimbursement for its Workman's Compensation costs and Career Concepts is not waiving its statutory protection. It has not been asserted that Waste Management is paying benefits to Mr. Brubaker because it caused his injuries but rather because it was determined the Waste Management was his statutory employer. This is not to conclude that under the terms of the proposed indemnification provision the limitations of the Act requiring specificity could never be applicable.

Following a thorough review of the record and viewing the evidence in the light most favorable to the non-moving party, Waste Management, the Court was constrained to conclude that there was insufficient evidence to support the plaintiff's cause of action in contract. The record evidence demonstrates that there was neither a written or oral agreement between the parties at the time of Mr. Brubaker's accident that required Career Concepts to indemnify Waste Management for the cost of paying Workman Compensation benefits.

Signed this 23 day of June, 2006.

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

DENNIS PISKORSKI

v.

COMMONWEALTH OF PENNSYLVANIA

MOTOR VEHICLES / INSPECTIONS

In Pennsylvania all motor vehicles must be inspected on an annual basis, and the Department of Transportation must establish a system of annual inspections. 75 Pa. C.S. § 4702(a).

MOTOR VEHICLES / INSPECTIONS

In Pennsylvania the Department of Transportation issues certificates of appointment to operate official inspection stations. 75 Pa. C.S. § 4721.

MOTOR VEHICLES / INSPECTIONS

In Pennsylvania the Department of Transportation supervises and inspects official inspection stations and may suspend the certificate of appointment to a station if it finds it is not properly equipped or conducted or if it has violated or failed to comply with any of the provisions of the applicable statute or regulations. 75 Pa. C.S. § 4724(a).

MOTOR VEHICLES / INSPECTIONS

In Pennsylvania the Department of Transportation may suspend a certificate of appointment issued to a mechanic if it finds that the mechanic has not properly conducted inspections or has violated or failed to comply with any of the provisions of the Vehicle Code or regulations adopted by the Department of Transportation. 75 Pa. C.S. § 4726(b).

MOTOR VEHICLES / INSPECTIONS

In Pennsylvania the inspection procedure of motor vehicles involves an external inspection involving verifying ownership, valid insurance, and financial responsibility as well as examining the exterior of the vehicle followed by an internal inspection of the interior of the vehicle, an "under the hood inspection" of the vehicle, a visual inspection of the emission control system, an inspection of the underside of the vehicle, and a road test. 67 Pa. Code § 175.80.

MOTOR VEHICLES / INSPECTIONS

In Pennsylvania the complete operation of an official inspection station is the responsibility of the owner. Failure to comply with the appropriate provisions of 75 Pa. C.S. § 101-9821 (related to the Vehicle Code) will be considered sufficient cause for suspension of inspection privileges. 67 Pa. Code § 175.51

MOTOR VEHICLES / INSPECTIONS

In Pennsylvania, 67 Pa. Code § 175.51(a)(1)(ii) prohibits the furnishing, lending, giving, selling, or receiving of a certificate of inspection without an inspection. The penalty for the first violation is a one-year suspension of operating privileges, and the penalty for a second violation is a permanent suspension of operating privileges. 67 Pa. Code § 175.51(a)(1)(ii).

MOTOR VEHICLES / INSPECTIONS

In Pennsylvania, 67 Pa. Code § 175.51(a)(1)(iii) prohibits the faulty inspection of equipment or parts. The penalty for the first violation is a two-month suspension of operating privileges, the penalty for a second violation is a one-year suspension of operating privileges, and the penalty for a third and subsequent violation is a three-year suspension of operating privileges. A faulty inspection occurs when a vehicle is partially inspected but not in compliance with 67 Pa. Code § 175.80, and a state inspection sticker is issued.

MOTOR VEHICLES / INSPECTIONS

Committing a faulty inspection pursuant to 67 Pa. Code § 175.51(a)(1)(iii) is considered to be a lesser included offense of furnishing an inspection sticker without an inspection pursuant to 67 Pa. Code § 175.51(a)(1)(ii).

MOTOR VEHICLES / INSPECTIONS

Regulation 175.41(d)(1), 67 Pa Code § 175.41(d)(1), which provides that a certificate of inspection shall be affixed only after completion of the entire inspection, including a road test, is interpreted to require that the certificate of inspection be affixed immediately after the inspection is completed.

MOTOR VEHICLES / INSPECTIONS

Where only a partial, incomplete inspection is performed on one day, a certificate of inspection cannot be issued on a later day unless another complete inspection has been performed on that later day.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 13963 OF 2005

Appearances: John Mead, Esq., on behalf of
Dennis Piskorski, Appellant
Chester Karas, Jr., Esq., on behalf of the Department of Transportation, Appellee

OPINION

Domitrovich, J., July 26, 2006

This matter is currently before the Commonwealth Court of Pennsylvania on the appeal of Dennis Piskorski (hereinafter referred to as the Appellant), filed by and through his counsel, John Mead, Esq., from the Orders entered by this Lower Court on May 31, 2006, permanently suspending the operation of J&W Collision Services as an Official Inspection Station, which is owned by Appellant, and permanently suspending Appellant as an Official Safety Inspector, pursuant to 67 Pa. Code §175.51(a)(1)(ii), as this is Appellant's second violation of this statute.[1] In his Pa. R.A.P.

[1`] In the May 31, 2006 Order, this Lower Court also suspended Appellant's operating privileges as an Official Safety Inspector and as an Official Inspection

1925(b) Statement, Appellant raised one issue, including statements of fact and argument. Specifically, Appellant claims, "his business should have been suspended for performing a faulty inspection, not for providing an inspection sticker without an inspection." Accordingly, the only issue this Lower Court will address on appeal is whether this Lower Court erred in finding Appellant in violation of 67 Pa. Code §175.51(a)(1)(ii), and suspending Appellant's Certificates of Appointment, for furnishing, lending, giving, selling, or receiving a Certificate of Inspection without inspection by an Official Inspector and without inspection by an Official Inspection Station.

With regard to the factual and procedural history of the instant case, Appellant owns and was licensed to operate, at the time of the April 25, 2006 hearing, an Official Pennsylvania Inspection Station, J&W Collision Services, located at 1616 Sassafras Street, Erie, PA 16502. However, on March 24, 2005, the Pennsylvania Department of Transportation suspended Appellant's Certificate of Appointment as an Official Inspection Station and as an Official Safety Inspector, for furnishing, lending, giving, selling, or receiving a certificate of inspection without inspection, pursuant to 67 Pa. Code § 175.51(a)(1)(ii). Since these were Appellant's first violations of 67 Pa. Code §175.51(a)(1)(ii), Appellant's operating privileges were suspended for a period of one year for violating 67 Pa. Code §175.51(a)(1)(ii) as an Official Inspection Station, and for a period of one year for violating 67 Pa. Code §175.51(a)(1)(ii) as an Official Safety Inspector, run consecutively. Appellant did not file an appeal.

Subsequently, on September 22, 2005, the Pennsylvania Department of Transportation once again suspended Appellant's Certificate of Appointment as an Official Safety Inspection Station, as well as Appellant's Certificate of Appointment as an Official Safety Inspector for furnishing, lending, giving, selling, or receiving a certificate of inspection without inspection, pursuant to 67 Pa. Code §175.51(a)(1)(ii). As a result of these violations, Appellant's operating privileges were suspended permanently for violating 67 Pa. Code §175.51(a)(1)(ii) as an Official Safety Inspection Station, since that was Appellant's second violation of 67 Pa. Code §175.51(a)(1)(ii), and were suspended permanently for violating 67 Pa. Code §175.51(a)(1)(ii) as an Official Safety Inspector, since that was Appellant's second violation of 67 Pa. Code §175.51(a)(1)(ii), run consecutively. Subsequently, Appellant filed an appeal to this Lower Court.

[1] continued
Station for a periods of two months each for violating 67 Pa. Code § 175.51 (a)(1)(ii) for improper recordkeeping. However, in his 1925(b) Statement, Appellant did not raise any issue with regard to this portion of this Lower Court's May 31, 2006 Order. Accordingly, this Lower Court will limit its analysis in the instant 1925(a) Opinion to the matter of Appellant's violation of 67 Pa. Code §175.51(a)(1)(ii).

Accordingly, on April 25, 2006, a hearing was held before the undersigned judge concerning this matter. At the time of this hearing, Trooper Peter Harvey provided credible testimony to this Lower Court. Trooper Harvey has been employed as a Pennsylvania State Trooper for approximately fifteen years, and he has been responsible for investigating vehicle fraud for twelve years. (N.T. 4/25/06 p.6). Since 1987, Trooper Harvey has held a Pennsylvania state inspection license for all classes of vehicles operated in Pennsylvania. (N.T. 4/25/06 p.6). In order to obtain this license, Trooper Harvey initially completed the standard requirements of attending one week of classes at the Erie County Vo-Technical School and successfully passing an examination. (N.T. 4/25/06 p.7). In addition to these standard requirements, Trooper Harvey also attended Erie County Vo-Technical School in the field of auto mechanics and received a three-year certificate of achievement and became a certified mechanic. (N.T. 4/25/06 p.7). In connection with Trooper Harvey's employment with the Pennsylvania State Police, Trooper Harvey is a school bus safety inspector. (N.T. 4/25/06 p.7). In this capacity, Trooper Harvey inspects approximately three hundred to four hundred school buses each year. (N.T. 4/25/06 p.7-8). Trooper Harvey also inspects approximately twenty-five vehicles each year while conducting investigations for the Pennsylvania State Police. (N.T. 4/25/06 p.8).

In January of 2004, Trooper Harvey began receiving anonymous complaints that J&W Collision was selling Pennsylvania state inspection stickers without conducting the requisite evaluation. (N.T. 4/25/06 p.12). Trooper Harvey also received a complaint from a mechanic who works in another garage that is located in the vicinity of J&W Collision. (N.T. 4/25/06 p.12). This mechanic informed Trooper Harvey that a customer had approached him at his garage, requesting to speak with "Denny" regarding purchasing an inspection sticker for $20.00. (N.T. 4/25/06 p.12). Trooper Harvey deduced that "Denny" was Dennis Piskorski, the Appellant to the instant action. (N.T. 4/25/06 p.12).

Based upon these complaints, Trooper Harvey initiated an investigation of Appellant and Appellant's business, J&W Collision. (N.T. 4/25/06 p.12). Trooper Harvey contacted Corporal Steven Danko, who is the vice supervisor with the Pennsylvania State Police vice unit in Erie, and requested that he secure a vehicle and travel to J&W Collision to attempt to purchase an inspection sticker. (N.T. 4/25/06 p.12). Corporal Danko did, in fact, obtain a small four by four pickup truck to utilize in the investigation. (N.T. 4/25/06 p.13). Trooper Harvey knew that the pickup truck would not pass a Pennsylvania state inspection because the horn was inoperable. (N.T. 4/25/06 p.13). Trooper Harvey stated that the horn is among the first things a Certified Inspector would check when conducting an inspection, and it is necessary to have an operable horn in order to pass a state inspection. (N.T. 4/25/06 p.13). Preceding the

investigation, Trooper Harvey did not know whether the pickup truck had any other flaws, aside from an inoperable horn, that would cause it to fail a state inspection. (N.T. 4/25/06 p.13).

Upon initiating the investigation of Appellant and J&W Collision in early January of 2004, Trooper Harvey observed J&W Collision to determine how it operated. (N.T. 4/25/06 pp.13-14). Trooper Harvey observed the location of the business and examined the layout of the business. (N.T. 4/25/06 p.14). Trooper Harvey stated that there is only one entrance and one exit to J&W Collision through a single straight driveway. (N.T. 4/25/06 p.14). The garage itself did not have both an entrance and exit; rather, cars had to be driven into the garage and then backed out of the same door from which they entered. (N.T. 4/25/06 p.14). The inspection area at J&W Collision was dark and dirty and cluttered with debris. (N.T. 4/25/06 pp.14-15). There was no automatic vehicle lift in the inspection area. (N.T. 4/25/06 p.15). Trooper Harvey stated that he is not aware of any mechanic who does not use an automatic vehicle lift in conducting a state inspection. (N.T. 4/25/06 p.15). Trooper Harvey also checked the state inspection records in order to determine how many inspections J&W Collision conducted each year. (N.T. 4/25/06 p.14). Trooper Harvey stated that on the day he observed J&W Collision, the garage was closed and no business was being conducted. (N.T. 4/25/06 p.15).

On January 9, 2004, Trooper Harvey and Corporal Danko went to J&W Collision. (N.T. 4/25/06 p.16). Trooper Harvey stood directly across the street from the garage so that he could clearly observe Corporal Danko's interactions at J&W Collision with Appellant. (N.T. 4/25/06 p.18). On that date, Appellant arrived at J&W Collision at approximately 2:20 p.m., and Corporal Danko arrived at approximately 3:05 p.m. (N.T. 4/25/06 pp.16-17). Corporal Danko entered the office area of J&W Collision and spoke with someone inside. (N.T. 4/25/06 p.17). This Lower Court found credible the testimony of Appellant, who was actually present inside of J&W Collision on January 9, 2006, unlike Trooper Harvey, that Appellant conducted an incomplete, partial inspection of the pickup truck on this date. Specifically, Appellant stated that he jacked up the front end of the pickup truck, checked the front end of the truck and visually examined the brakes without using any measuring instrument. (N.T. 4/25/06 pp.50, 55, 58). Appellant stated that he did not remove the tires from the vehicle, and he did not road test the vehicle. (N.T. 4/25/06 pp.55-56). Appellant acknowledged that he knew he was required to road test the vehicle; however, Appellant stated that this requirement was "never enforced." (N.T. 4/25/06 p.56). Appellant also stated that he was aware that the vehicle's horn was not in working condition. (N.T. 4/25/06 pp.55-56). On January 9, 2004, Appellant rejected the pickup truck for an inspection sticker because the pickup truck did not have an emission sticker on it.

(N.T. 4/25/06 p.17). Trooper Harvey noted that since the pickup truck was registered in Clearfield County, it was not necessary for an emission inspection to be conducted prior to completing a safety inspection. (N.T. 4/25/06 p.18).

Subsequently, on January 12, 2004 at approximately 4:30 p.m., Trooper Harvey returned to J&W Collision, and stood directly across the street from the garage so that he could clearly observe Corporal Danko's interactions at J&W Collision with Appellant. (N.T. 4/25/06 p.18). It was not dark outside and Trooper Harvey maintained a clear view of J&W Collision. (N.T. 4/25/06 p.43). Corporal Danko then arrived at J&W Collision in the pickup truck. (N.T. 4/25/06 p.18). Trooper Harvey did not see the pickup truck being inspected on that date. (N.T. 4/25/06 p.18). On this date, the pickup truck was rejected for an inspection sticker because Corporal Danko could not produce valid proof of insurance for the vehicle. (N.T. 4/25/06 p.18). Subsequently, Corporal Danko left J&W Collision without an inspection sticker, approximately fifteen minutes after he had arrived. (N.T. 4/25/06 pp.18, 43).

On January 13, 2004, Trooper Harvey and Corporal Danko returned to J&W Collision. (N.T. 4/25/06 p.20). Again, Trooper Harvey stood across the street from J&W Collision to observe clearly Corporal Danko's interactions with Appellant at the garage. (N.T. 4/25/06 p.20). Appellant arrived at J&W Collision at approximately 2:55 p.m., and Corporal Danko arrived at approximately 3:13 p.m. (N.T. 4/25/06 p.20). Corporal Danko and Appellant entered the office of J&W Collision at approximately 3:26 p.m. (N.T. 4/25/06 p.20). Subsequently, Corporal Danko and Appellant exited the building and approached the pickup truck. (N.T. 4/25/06 p.20). Trooper Harvey saw Corporal Danko and Appellant standing in the vicinity of where the inspection sticker is placed on a vehicle. (N.T. 4/25/06 p.20). Corporal Danko then entered the pickup truck and drove away and Appellant returned to the office of J&W Collision. (N.T. 4/25/06 p.20). Following this interaction, the pickup truck bore a new Pennsylvania state inspection sticker, signed by Appellant. (N.T. 4/25/06 p.21).

Appellant acknowledged that he did not conduct any inspection whatsoever of the pickup truck on January 13, 2004. (N.T. 4/25/06 p.53). Appellant acknowledged that he now recognizes this was a violation. (N.T. 4/25/06 p.54). Appellant acknowledged that he understands that he is required to conduct a fresh inspection of any vehicle each time it comes into his inspection station. (N.T. 4/25/06 p.61). Nevertheless, Appellant indicated that on January 13, 2006 he issued an inspection sticker to the pickup truck on the basis of his prior, incomplete January 9, 2006 inspection. (N.T. 4/25/06 p.61.). Trooper Harvey credibly stated that on January 13, 2004, Appellant did not road test the pickup truck, which is a requirement pursuant to the Department of Transportation's

regulations. (N.T. 4/25/06 p.21). Appellant also acknowledged that he never road tested the vehicle. (N.T. 4/25/06 p.55). Trooper Harvey also stated that Appellant never removed the wheels from the pickup truck, which is also a requirement pursuant to the Department of Transportation's regulations. (N.T. 4/25/06 pp. 21-22). Appellant acknowledged that he never removed the wheels from the pickup truck. (N.T. 4/25/06 p.55). In fact, on January 13, 2004, Appellant did not even pull the pickup truck into the garage of J&W Collision. (N.T. 4/25/06 p.22). Rather, the pickup truck was outdoors during the entire interaction between Corporal Danko and Appellant. (N.T. 4/25/06 p.21). Moreover, Trooper Harvey stated that on January 13, 2004, "it was very obvious that no inspection was conducted on the vehicle." (N.T. 4/25/06 p.22).

Subsequently, Trooper Harvey had the pickup truck inspected at the Pennsylvania State Police Garage. (N.T. 4/25/06 p.22, 24). Trooper Harvey was present for this inspection. (N.T. 4/25/06 p.22). Trooper Harvey noted several defects on the pickup truck. (N.T. 4/25/06 p.22). Specifically, the inspection at the State Police Garage revealed that the pickup truck would fail a state inspection on four bases: (1) the Pitman arm, which is part of the steering mechanism; (2) a defective right upper ball joint; (3) defective front brakes; and (4) an inoperable horn. (N.T. 4/25/06 p.24). Appellant would have discovered these defects had he performed a full inspection of the pickup truck. (N.T. 4/25/06 p.24).

Furthermore, following this investigation, Trooper Harvey obtained Appellant's MV-431 records. (N.T. 4/25/06 p.19). Initially, these records revealed that Appellant had failed to record his January 9, 2004 and January 12, 2004 rejections of the pickup truck for an inspection sticker. (N.T. 4/25/06 p.19). Nevertheless, Appellant did make a record of providing the inspection sticker to the pickup truck in the MV-431 book that belonged to Appellant. (N.T. 4/25/06 pp.25, 27). In his MV-431, Appellant indicated that he had inspected all of the following items, and found them to be in passing condition: (1) registration; (2) tires; (3) steering; (4) exhaust; (5) fuel; (6) glazing and mirrors; (7) lights, wiring and switches; (8) body doors and latches; (9) brake system; and (10) road test. (N.T. 4/25/06 p.28); *See also Commonwealth's Exhibit 3.* Appellant's record suggests that the pickup truck was properly inspected and is a safe vehicle. (N.T. 4/25/06 p.33). Nevertheless, this is clearly not the case, since Appellant did not conduct a complete, proper inspection of the pickup truck, and since the proper inspection that was conducted at the State Police Garage revealed several safety defects. (N.T. 4/25/06 p.34). Following this investigation, Trooper Harvey submitted a report to the Department of Transportation, which was the subject of the suspension Orders imposed by the Department of Transportation on September 22, 2005. (N.T. 4/25/06 p.36).

On May 31, 2006, this Lower Court filed detailed Findings of Fact and

Conclusions of Law, in addition to two separate Orders, finding Appellant in violation of 67 Pa. Code §175.51(a)(1)(ii) for furnishing, lending, giving, selling, or receiving a certificate of inspection without inspection, and suspending Appellant's certification as an Official Safety Inspection Station permanently as this was Appellant's second violation of 67 Pa. Code §175.51(a)(1)(ii), and suspending Appellant's certification as an Official Safety Inspector permanently, as this was Appellant's second violation of 67 Pa. Code §175.51(a)(1)(ii).

Appellant's only issue on appeal is whether this Lower Court erred in finding Appellant in violation of 67 Pa. Code §175.51(a)(1)(ii), and suspending Appellant's Certificates of Appointment, for furnishing, lending, giving, selling, or receiving a Certificate of Inspection without inspection by an Official Inspector and without inspection by an Official Inspection Station. In the Commonwealth of Pennsylvania, all motor vehicles must be inspected on an annual basis, and the Department of Transportation must establish a system of annual inspections. 75 Pa.C.S. §4702(a). The Department of Transportation issues Certificates of Appointment to operate Official Inspection Stations. 75 Pa.C.S. §4721. Pursuant to 75 Pa.C.S. §4724(a),

> The department [of transportation] shall supervise and inspect Official Inspection Stations and may suspend the certificate of appointment issued to a station which it finds not properly equipped or conducted or which has violated or failed to comply with any of the provisions of this chapter or regulations adopted by the department. The department shall maintain a list of all stations holding certificates of appointment and of those whose certificates of appointment have been suspended. Any suspended certificate of appointment and all unused certificates of inspection shall be returned immediately to the department.

Furthermore, pursuant to 75 Pa.C.S. §4724(b), "any person whose certificate of appointment has been denied or suspended...shall have right to appeal," and the trial court shall "take testimony and examine into the facts of the case and determine whether the petitioner is entitled to a certificate of appointment or is subject to suspension of the certificate of appointment..."

In addition to having authority to suspend a Certificate of Appointment of an Official Inspection Station, the Department of Transportation may also suspend a Certificate of Appointment, issued to a mechanic, if "it finds that the mechanic has improperly conducted inspections or has violated or failed to comply with any of the provisions of [the Vehicle Code] or regulations adopted by the department [of transportation]." 75 Pa.C.S. §4726(b).

An inspection sticker may be issued only where "the vehicle or mass

transit vehicle is inspected and found to be in compliance with the provisions of [the Vehicle Code] including any regulations promulgated by the department [of transportation]." 75 Pa.C.S. §4727(b). The procedure certified mechanics must utilize in conducting an inspection is codified at 67 Pa. Code 175.80. In short, the inspection procedure involves an external inspection, involving verifying ownership, valid insurance, and financial responsibility, as well as examining the exterior of the vehicle, followed by an internal inspection of the interior of the vehicle, an "under the hood inspection" of the vehicle, a visual inspection of the emission control system, an inspection of the underside of the vehicle, and a road test. 67 Pa. Code 175.80.

Pursuant to 67 Pa. Code §175.51, "the complete operation of an Official Inspection Station is the responsibility of the owner. Failure to comply with the appropriate provisions of 75 Pa.C.S. §§101-9821 (relating to the Vehicle Code) will be considered sufficient cause for suspension of inspection privileges." 67 Pa. Code §175.51(a)(1)(ii) prohibits the furnishing, lending, giving, selling, or receiving of a certificate of inspection without inspection. The penalty for a first violation of 67 Pa. Code §175.51(a)(1)(ii) is a one year suspension of operating privileges, and the penalty for a second violation of 67 Pa. Code §175.51(a)(1)(ii) is a permanent suspension of operating privileges. Furthermore, 67 Pa. Code §175.51(a)(1)(iii) prohibits the faulty inspection of equipment or parts. The penalty for a first violation of 67 Pa. Code §175.51(a)(1)(iii) is a two month suspension of operating privileges, the penalty for a second violation of 67 Pa. Code §175.51(a)(1)(iii) is a one year suspension of operating privileges, and the penalty for a third and subsequent violation of 67 Pa. Code §175.51(a)(1)(iii) is a three year suspension of operating privileges. A faulty inspection occurs where a vehicle is partially inspected but not in compliance with 67 Pa. Code §175.80, and a state inspection sticker is issued. *Tropeck v. Commonwealth Department of Transportation*, 847 A.2d 208 (Pa. Commw. Ct. 2004). Committing a faulty inspection, pursuant to 67 Pa. Code §175.51(a)(1)(iii), is considered to be a lesser included offense of furnishing an inspection sticker without an inspection, pursuant to 67 Pa. Code §175.51(a)(1)(ii), where the same set of facts support both offenses. *Commonwealth v. Tutt*, 576 A.2d 1186, 1188 (Pa. Commw. Ct. 1990).

The instant case is factually similar to *Commonwealth, Department of Transportation v. May*, 528 A.2d 708 (Pa. Commw. Ct. 1987). In *Commonwealth, Department of Transportation, v. May*, on February 11, 1985, a customer drove a vehicle to a garage, owned by Mr. May, and requested a state inspection. *Id*. at 709. At some point between February 11, 1985 and February 15, 1985, Mr. May conducted a state inspection of the vehicle. *Id*. However, Mr. May refused to issue a state inspection sticker because the vehicle did not have a valid license plate.

Id. The vehicle owner then took possession of the vehicle to prepare it for sale. *Id*. Subsequently, on April 16, 1985, the buyer who purchased the vehicle drove the vehicle to Mr. May's garage, and requested that he issue a state inspection sticker. *Id*. Mr. May refused to issue a state inspection sticker because the vehicle still did not have a valid license plate, and the buyer failed to provide proof of ownership of this vehicle. *Id*. On April 17, 1985, the buyer returned to Mr. May's garage with the proper license and ownership documentation. *Id*. Mr. May then issued the state inspection sticker without re-inspecting the vehicle. *Id*. at 710. The buyer reported this incident to the State Police, and it was discovered that the vehicle had been involved in an accident between Mr. May's February of 1985 inspection and his April of 1985 issuance of the inspection sticker. *Id*.

The Commonwealth Court of Pennsylvania determined that Mr. May's refusal to issue a state inspection sticker in February of 1985 constituted a rejection of the vehicle for inspection purposes. *Id*. Therefore, a new inspection of the vehicle was required in order to issue a state inspection sticker at some later date. *Id*. A state inspection sticker must be affixed immediately after the inspection is completed. *Id*. (emphasis in original); *See also, Commonwealth v. DiMichele*, 575 A.2d 678, 679 (Pa. Commw. Ct. 1990). The Commonwealth Court went on to state,

> Regulation 175.41 (d)(1), 67 Pa. Code §175.41(d)(1), which provides in pertinent part that a certificate of inspection shall be affixed only after completion of the entire inspection, including the road test, might on its face appear to permit the sticker to be affixed at any time, we believe that it inures to the benefit of the public to construe this Regulation as requiring that the certificate be affixed *immediately* after the inspection is completed. A contrary result would permit, as here, a vehicle involved in an accident to be certified as passing inspection, when it in fact contains defects. *Id*. (emphasis in original, internal quotations omitted).

Accordingly, the Commonwealth Court of Pennsylvania determined that no inspection had occurred in April of 1985, and, therefore, Mr. May violated 67 Pa. Code §175.51(a)(1)(ii) for furnishing, lending, giving, selling, or receiving a certificate of inspection without inspection. Therefore, the Commonwealth Court of Pennsylvania reversed the trial court's determination that Mr. May had not violated 67 Pa. Code §175.51(a)(1)(ii), but had violated 67 Pa. Code §175.51(a)(1)(iii).

In the instant matter, consistent with *Commonwealth, Department of Transportation, v. May*, the Department of Transportation proved by a preponderance of the evidence that Appellant, owner of J&W Collision, furnished, lent, gave, sold, or received a certificate of inspection without inspection, pursuant to 67 Pa. Code §175.51(a)(1)(ii). In this case,

Appellant's cursory, incomplete inspection of the pickup truck occurred on January 9, 2004. However, Appellant sold Corporal Danko a state inspection sticker on January 13, 2004, four days after the inspection without conducting a new inspection of the vehicle. Trooper Harvey did not see Appellant conduct any inspection of the vehicle on January 13, 2004, and Appellant acknowledged that he did not conduct any inspection of the vehicle on January 13, 2004, prior to issuing the inspection sticker. As set forth in *Commonwealth, Department of Transportation, v. May*, 67 Pa. Code § 175.41(d)(1), has been interpreted to require that the certificate be affixed *immediately* after the inspection is completed, and not days later. Accordingly, as no inspection whatsoever was conducted on January 13, 2004, the day on which Appellant issued the inspection sticker, Appellant violated 67 Pa. Code §175.51(a)(1)(ii) for furnishing, lending, giving, selling, or receiving a certificate of inspection without inspection.

This Court notes that Attorney John Mead, counsel for Appellant, provided this Court with a trial-level, non-precedential Memorandum from the Honorable Gordon R. Miller, President Judge of Crawford County, Pennsylvania, allegedly in support of his argument that Appellant violated 67 Pa. Code §175.51(a)(1)(iii) for performing a faulty inspection, and not 67 Pa. Code §175.51(a)(1)(ii) for furnishing, lending, giving, selling, or receiving a certificate of inspection without inspection. *Watson Auto Service v. Commonwealth, Department of Transportation, Court of Common Pleas of Crawford County, Pennsylvania, No. 552 of 2005, published in the Crawford County Legal Journal.* This case, however, is factually distinguishable from the instant case. In *Watson Auto Service v. Commonwealth of Pennsylvania, Department of Transportation*, a customer, Todd Williams, brought his vehicle to Watson Auto Service for a state inspection. *Id*. Wayne Cathcart, a certified inspection mechanic and employee of Watson Auto Service, conducted a partial inspection of the vehicle, which did not meet all of the requirements of a state inspection. *Id*. *On the same day* that Mr. Cathcart inspected the vehicle, Mr. Cathcart issued an inspection sticker, and recorded the inspection in his official inspection record. Subsequently, Mr. Williams had difficulty with his vehicle, and filed a report with the Pennsylvania State Police. *Id*. Mr. Watson was then cited for furnishing a certificate of inspection without conducting an inspection and fraudulent recordkeeping, the same offenses that Mr. Piskorski was cited with in the instant case. *Id*.

In *Watson Auto Service v. Commonwealth, Department of Transportation*, Judge Miller determined that since Mr. Cathcart had performed some of the functions, required by 67 Pa. Code 175.80, on the same day which he issued the inspection sticker, it could not be said that Mr. Cathcart performed no inspection, under 67 Pa. Code §175.51(a)(1)(ii). Rather, Mr. Watson and Watson Auto Service had conducted a faulty inspection,

pursuant to 67 Pa. Code §175.51(a)(1)(iii).[2]

The instant case is distinguishable from *Watson Auto Service v. Commonwealth, Department of Transportation* because in the instant case, no inspection whatsoever was conducted on the date on which the inspection sticker was issued. Although Appellant conducted a flawed, incomplete inspection of the vehicle on January 9, 2004, since Appellant rejected the vehicle for an inspection on that date, it was necessary to conduct a completely fresh, proper inspection of the vehicle on January 13, 2004 prior to issuing the inspection sticker. Appellant, however, did not do so. Rather, Appellant issued an inspection sticker to Corporal Danko on January 13, 2004 without conducting any inspection, in contrast to the facts of *Watson Auto Service v. Commonwealth, Department of Transportation*, and in violation of the rule established in *Commonwealth, Department of Transportation, v. May*, requiring a state inspection sticker to be affixed immediately after the inspection is completed. Therefore, this Lower Court did not err in finding Appellant in violation of 67 Pa. Code §175.51(a)(1)(ii), and in suspending Appellant's Certificates of Appointment, for furnishing, lending, giving, selling, or receiving a Certificate of Inspection without inspection by an Official Inspector and without inspection by an Official Inspection Station. Accordingly, Appellant's only issue on appeal lacks merit.

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

[2] This Court notes that the Department of Transportation never filed an appeal to the Commonwealth Court of Pennsylvania, from the Order entered by Judge Miller on January 6, 2006.

BRENDA A. PUNDT, Plaintiff

v.

CITY OF ERIE OFFICERS' AND EMPLOYEES' RETIREMENT BOARD, Defendant

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT / STANDARD

Summary judgment may only be granted if 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. Summary judgment is proper in cases that are clear and free from doubt, where the facts are undisputed and where only one conclusion may reasonably be drawn. A motion for summary judgment filed by the defendant is properly granted where the plaintiff fails to establish one of the elements of the cause of action.

POLITICAL SUBDIVISIONS / PENSION BOARD / ELIGIBILITY

Pursuant to relevant ordinances of the City of Erie, only permanent employees are entitled to pension benefits. Under Pennsylvania law, permanent employment is defined as employment lasting more than one year or for an indefinite timeframe.

POLITICAL SUBDIVISIONS / PENSION BOARD / ELIGIBILITY

Where the plaintiff held the elected position of controller for 12 years, at the conclusion of which the plaintiff and the City of Erie executed an agreement that the plaintiff would be employed as a pension coordinator at a higher rate of compensation than she was paid as the elected controller, where the agreement of employment as the pension coordinator was only for a three-month period, and where the employment was actually terminated after only nine days, the court concludes that the plaintiff was not a permanent employee but was a temporary employee and that she was not entitled to a pension calculated on the higher salary for the position of pension coordinator. The defendant's motion for summary judgment is therefore granted.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 10192-2004

Appearances: Richard T. Ruth, Esq. for the Plaintiff
Evan C. Rudert, Esq. for the Defendant
John B. Enders, Esq. for the Defendant

OPINION

DiSantis, Ernest J., Jr., J.

This case comes before the Court on the Plaintiff's Motion for Summary Judgment (SJM) and Defendant's Cross-Motion for Summary Judgment.

I. BACKGROUND OF THE CASE

Plaintiff served as the elected controller for the City of Erie from

January 1990 until January 7, 2002. At the end of her final term, her salary was $38,000 per year or $3,166.67 per month. Plaintiff was eligible to participate in the City of Erie's Officers' and Employees' Pension Plan (The Plan).[1] The Defendant is a municipal body established by ordinance to interpret and administer The Plan.[2]

Plaintiff alleges that on January 8, 2002, the City of Erie executed an agreement to employ her as a pension coordinator at the rate of $27.50 per hour (or an annual salary of $50,050.00 of $4,170,83 monthly). The terms of the January 8, 2002 agreement provided that it would expire on March 29, 2002, subject to early termination by either party. On January 17, 2002, the City of Erie terminated her employment as pension coordinator effective at 5:00 p.m. on January 18, 2002. Plaintiff worked a total of 56 hours as the pension coordinator between January 9 and January 18, 2002, earning a total gross pay of $1,540.00.

On January 18, 2002, Plaintiff submitted a hand-written letter to the Defendant requesting approval of her pension at the Defendant's meeting scheduled for January 22, 2002. In her request, Plaintiff asked that the effective date and amount of her pension be determined from her January 18, 2002 termination date (at her $50,050.00 salary).

On January 22, 2002, Plaintiff filled out an application for her pension.[3] See Affidavit of Mary Margaret Donikowski, 10/19/05. The Defendant met on that same day, at which, the Plaintiff was present. The minutes of that meeting reflect discussion of Plaintiff's employment as pension coordinator and her pension request. See Affidavit of Mary Margaret Donikowski, 10/19/05. During the course of this meeting, a motion

[1] The Plan provides a retirement benefit of 50% of an officer's or employee's monthly rate of pay at the date of retirement for individuals who retire at sixty years of age or older and who have at least twelve, but less than twenty years of service. There is a *pro rata* reduction for each year less than twenty years of service completed at retirement. There is no dispute that Plaintiff had reached the minimum age requirements (age 62) and worked the minimum number of years (12 years).

[2] City of Erie Ordinance §145.03(a) provides in part: "...It shall be the duty of the Board to register all persons employed by the City, as provided for by ordinance, other than firemen and policemen, and to administer the collection and distributions of the Fund herein provided for, and make such reasonable rules in the premises as the Board may deem necessary to carry into effect the provisions of this article."

[3] The contents of the application are as follows:

> I hereby make application to the City of Erie Officers and Employees Retirement Board for compensation due me under the terms of the Act of Assembly 1945, No. 362, known as the City of Erie Pension Act and by City Ordinance No. 15-1962 signed May 9, 1962 and further amended.

See Exhibit A of Affidavit of Ms. Donikowski. Additionally, the application was signed by the Plaintiff and dated January 22, 2002. The Retirement Board approved the application (signed by Mary M. Donikowski, Secretary) on the same day. The application does not contain any specific monetary amounts.

was made, seconded and passed to approve the Plaintiff's pension at her January 7, 2002, salary ($38,000.00) based on twelve years of service. The Plaintiff did not raise an objection. The Plaintiff asserts that she attended the January 22nd meeting, no testimony was taken, and that the Defendant's normal practice was not followed. See Plaintiff's Second Affidavit, 10/28/05. On February, 2002, plaintiff was sent a memo confirming a pension amount.[4] The Defendant took a second vote on this issue in October 2004 and reached the same result.

On January 20, 2004, the Plaintiff commenced this action against the Defendant by Writ of Summons.

II. PROCEDURAL HISTORY

Plaintiff filed a Praecipe for a Writ of Summons on January 20, 2004 and an Action for Declaratory Relief on November 4, 2004. Defendant filed an Answer and New Matter on December 10, 2004. Plaintiff filed an Answer to New Matter on January 31, 2005. Defendant filed an Answer and Amended New Matter on February 1, 2005.

On July 18, 2005, Plaintiff filed a Motion for Summary Judgment (SJM) with an accompanying brief and appendix. On August 11, 2005, Defendant filed a Motion to Dismiss Plaintiff's Action for Declaratory Relief for Lack of Subject Matter Jurisdiction with an accompanying brief. On August 22, 2005, this Court granted the Defendant's Motion for Extension of Time to Respond to Plaintiff's SJM pending the Court's disposition of the Defendant's Motion to Dismiss. On August 26, 2005, Plaintiff filed a Brief in Opposition to Defendant's Motion to Dismiss. On October 6, 2005, the court held oral argument and on October 27, 2005 allowed the parties to supplement the record with affidavits. On November 9, 2005, the Court issued an opinion and order denying Defendant's Motion to Dismiss.

On December 2, 2005, the Court issued two orders: (1) granting Defendant's Application for Amendment of Order Pursuant to Pa.R.A.P. 1311(b); and (2) amending the November 9, 2005 order to allow the Defendant to pursue an interlocutory appeal on the issue of definition of adjudication.

On December 9, 2005, the Defendant filed a Cross-Motion for Summary Judgment with a Brief in Support of Cross-Motion and in Opposition to Plaintiff's SJM (filed July 18, 2005). On January 10, 2006, Plaintiff filed a Response Brief to Defendant's Cross-Motion.

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[4] The contents of the memo are as follows:

> Brenda [Plaintiff],
>
> The enclosed check is for 25 days of January and the month of February. Your March check will be $948.96 Gross, less: $28.46 - 3%; $108.00 - Fed. Tax; $4.80 - Life Ins.; $807.70 - Net.
>
> Mary Margaret

See Exhibit B of Affidavit of Ms. Donikowski.

On December 29, 2005, the Defendant filed a Petition for Permission to Appeal to the Commonwealth Court. On January 12, 2006, the Commonwealth Court issued an order granting the Defendant-Appellant's petition and staying all pending matters. On June 1, 2006, the Commonwealth Court issued an unpublished memorandum opinion and order affirming the Court's November 9, 2005 order.

The Plaintiff's SJM and Defendant's Cross-Motion are before this Court.

III. LEGAL DISCUSSION.

Motions for summary judgment are governed by Pa.R.C.P. 1035.2. The rule provides that:

> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law:
>
> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> (2) if, after the completion of discovery relevant to the motion including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Ultimately, the court must decide "whether the moving party has established by virtue of a developed pre-trial record, the cause of action or defense pleaded, or whether there is a genuine issue of fact for decision." *Bensalem Township School District v. Commonwealth*, 544 A.2d 1318, 1321-22 (Pa. 1988). A fact is material "if it directly affects the disposition of the case." *Windber Area Authority v. Rullo*, 387 A.2d 967, 970 (Pa. Cmwlth. 1978) (citing *Ryan v. Furey*, 262 A.2d 305, 308-09 (Pa. 1970)). The inquiry in deciding a motion for summary judgment "is whether the admissible evidence in the record, in whatever form, from whatever source, considered in the light most favorable to the respondent to the motion, fails to establish a prima facie case or defense." *Liles v. Balmer*, 567 A.2d 691, 692 (Pa.Super. 1989) (citing *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3rd Circ. 1983)).

Summary judgment may only be granted if the record shows clearly that no genuine issues of material fact exist after review of pleadings, depositions, answers to interrogatories, and admissions, together with supporting affidavits, *Davis v. Res. for Human Dev.*, 770 A.2d 353, 357 (Pa. Super. 2001), and that the moving party is entitled to judgment as a matter of law. *Id.*; see also *Nanty-Glo Boro v. American Surety Co.*, 163 A. 523 (Pa. 1932); *PennCenter House, Inc. v. Hoffman*, 553 A.2d 900, 902-03 (Pa. 1989); *Harleysville Ins. Co. v. Aetna Cas. & Sur. Ins. Co.*,

795 A.2d 383, 385 (Pa. 2002).

Summary Judgment is proper is cases that are clear and free from doubt, *Washington v. Baxter*, 719 A.2d 733, 737 (Pa. 1998); where the facts are undisputed, and only one conclusion may reasonably be drawn. *Askew v. Zeller*, 521 A.2d 459, 463, (Pa.Super. 1987).

A defendant's motion for summary judgment is properly granted where the plaintiff fails to establish one of the elements of his or her cause of action, such as where the defendant owes no duty to the plaintiff, provided that there are no controverted issues of material fact. *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 474 (Pa. 1979).

Continuing:

> 'Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which it bears the burden of proof ... established the entitlement of the moving party to judgment as a matter of law.' Lastly, we will 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. (citations omitted).

Murphy v. Duquesne University of the Holy Ghost, 777 A.2d 418, 429 (Pa. 2001); *Manzetti v. Mercy Hospital of Pittsburgh*, 776 A.2d 938, 944 (Pa. 2001); see also Pa.R.C.P. 1035.3.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

The resolution of the instant motion turns upon whether the Plaintiff's employment under the employment agreement with the City of Erie as a pension coordinator constitutes permanent employment (qualifying her for the pension plan) or as temporary employment (not qualifying her for the pension plan).

> The relevant ordinances of the City of Erie provide the following definitions:
>
> (a) Person means an officer or employee of the City.
>
> (b) Employee means a person in the services of the City, who is either or who is not now adequately protected under all circumstances by pensions authorized by the laws of this Commonwealth and ... shall not apply to any persons hired after the effective date of this amendment (Ordinance 26-1992, passed May 20, 1992) whose employment is less than full time for the City.
>
> (c) Officer means a person elected or appointed to City service. This definition, however, shall not apply to any persons newly elected or appointed to City service on less than a full-time basis after the effective date of this amendment (Ordinance 26-1992, passed May 20, 1992), such as members of Council.

See City of Erie Ordinance, §145.01(a), (b), and (c). The Plan excludes firemen and police who have their own pension plan. See City of Erie Ordinance, §145.02.

The relevant portions of employment agreement state:

> The parties agree that the Employee's position shall be funded entirely by the City Pension Fund(s) for which Employee provides pension coordination services under the terms of this agreement: provided that such payments by the City Pension Funds are legal under applicable law and the terms of the City Pension Fund(s). The parties further agree that the City shall not be responsible for funding the Employee's position and that this agreement shall terminate immediately upon a loss of funding by the City Pension Fund(s) for any reason.
>
> Hourly rate $27.50 not to exceed 35 hours weekly,
> Health benefits as provided to Non-bargaining personnel employed by the City. All other paid time off benefits including holidays, sick time, vacation as the Non-bargaining employee of the City.
> Pension benefits provided to the Non-bargaining employees of the City.
>
> The Employee shall be paid bi-weekly with all employment related deduction, in the same manor [sic] all other pension administration personnel are paid.
>
> Employee's employment shall begin on January 9, 2002 and end on March 29, 2002 unless terminated by either party, with or without cause, and with or without notice. Nothing in this agreement shall constitute or be construed as creating a guarantee of employment for any specific period of time.
>
> The above constitutes the full agreement between the parties as acknowledged by the parties below.

See Employment Agreement, 01/08/02, Exhibit A of Plaintiff's Declaratory Action.[5]

For comparative purposes, the Court has found several definitions of "permanent employment." Pennsylvania agencies under the Governor's jurisdiction have defined "permanent employment" as:

> An employee who is hired with the expectation of being in an active pay status for more than 12 consecutive months or who is hired

[5] The agreement was signed by Plaintiff, Richard E. Filippi (Mayor of City of Erie), and Casimir J. Kwiatowski (Controller for City of Erie). The underlined portions were handwritten.

> with the expectation of being in an active pay status from 9 to 12 consecutive months inclusive and with the expectation of working on an annually recurring basis ...

See *Perry v. State Employees' Retirement System*, 872 A.2d 273, 277 (Pa. Cmwlth. 2005) (quoting Governor's Office of Administration Management Directive 505.7, Chapter 1, Section 1.1) (The court ruled that Plaintiff, an adjunct college professor, was a temporary employee and not a permanent employee although she taught classes as an adjunct professor for over 20 years because she had no expectation of future employment).[6]

The State of California defines "permanent employment" as "provided for by contract, means only that employment is to continue indefinitely and until either party wishes to sever relation for some good reason." See Black's Law Dictionary, 5th Edition, at 1026; *Speegle v. Board of Fire Underwriters of Pacific*, 172 P.2d 867 (Cal.App. 1946).

The West Virginia Supreme Court of Appeals defined "permanent employment position" as "a position intended by the recipient to last for more than one year that is neither a temporary nor seasonal position." See *Preston Memorial Hosp. v. Palmer,* 578 S.E.2d 378 (W.Va. 2003) (The court defined various types of "leased employees" for purposes of a hospital's appeal of a tax assessment).

The Alabama Supreme Court defined "permanent employment" as "employment that is guaranteed so long as the employer is engaged in the same kind of business and needs the service of the employee performing it and the employee is able and willing to perform the job satisfactorily and gives no cause for his discharge." See, *Aldridge v. DaimlerChrysler Corp.*, 809 So.2d 785 (Ala. 2001) (The court applied the definition in a breach of contract, fraud, and promissory estoppel actions against an employer).

The Oklahoma Supreme Court defined "permanent employment" as "employment for an indefinite period, which, in the absence of special consideration, may be arbitrarily severed at any time by either party." See *City of Oklahoma City v. Public Employees Relation Bd.*, 942 P.2d 244 (Okl.Civ.App.Div. 1, 1997) (quoting *Dicks v. Clarence L. Boyd Co.*, 238 P.2d 315 (Okla. 1951) (The court had to determine which employees were represented by a police union).

Pension boards for both the State of Pennsylvania (Perry) and the City of Erie are empowered to determine parameters for acceptance of employees into their respective pension plans. See *Perry, supra*, at 278; 71 Pa.C.S.A.

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[6] Specifically, Plaintiff signed a Scheduling Assignment that explicitly stated "I understand that this scheduling assignment is limited...and temporary, implying no commitment on behalf of the College [Defendant] for future employment and specifically does not provide for tenure."). See *Perry v. State Employees' Retirement System*, 872 A.2d 273, 277 (Pa. Cmwlth. 2005).

§5301(a); 4 Pa.Code §243.2(a); City of Erie Ordinance, §145.03(a). As the cases cited above show, Pennsylvania and her sister jurisdictions have consistently defined "permanent employment" as employment lasting more than one year or of an indefinite time frame.

In the instant case, it is clear that: (1) the Plaintiff signed an employment agreement to serve as the Pension Coordinator for approximately three months; (2) she agreed to word 35 hours/week at a salaried rate of $27.50/ hour or $50,050/annually;[7] and (d) her employment agreement was temporary (three months). See Deposition of Gloria Criscione, 05/05/05, at 12-13, 17 (Exhibit 6 of the Plaintiff's SJM).

Therefore, Plaintiff's employment status did not constitute permanent employment and she is not entitled to a higher pension rate calculated on the basis of $50,050.

DATE: August 28, 2006

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

[7] The Plaintiff argues that her circumstances are similar to two other former City of Erie employees: (1) John Barzano and (2) Donato Leone. Mr. Barzano was Director of Public Works of the City of Erie when his salary increased from $53,167.00 to $72,439.00 on December 17, 2001. Mr. Barzano subsequently retired January 4, 2002, 18 days after his raise. Mr. Leone was Bureau Chief of Public Works for the City of Erie when his salary increased from $47,115.00 to $55,103.00 on December 17, 2001. Mr. Leone subsequently retired on January 25, 2002, 39 days after his raise. Mr. Barzano and Mr. Leone's pensions were approved at the higher rate. However, Plaintiff's situation is different because she worked under a three-month employment contract, while the above two individuals were given raises during the course of their normal employment tenure.

JEFFREY D. BOLAND and PATRICIA A. BOLAND, his wife, Plaintiffs

v.

REAMSTOWN MUTUAL INSURANCE, CO., HOWARD HANNA INSURANCE SERVICES, INC., and HOWARD HANNA REAL ESTATE SERVICES, Defendants

CIVIL PROCEDURE / PRELIMINARY OBJECTIONS

In determining the legal sufficiency of a complaint, the Court must accept as true all well-pled material facts set forth in the complaint and all reasonable inferences deducible from those facts. *Styers v. Bedford Grange Mutual Insurance Company*, 2006 WL 1390581 (Pa. Super. 2006). The grant of demurrer is proper only if it is certain, based upon the facts averred, that no recovery is possible. *Wendt & Sons v. New Hedstrom*, 858 A.2d 631 (Pa. Super. 2004). All doubts are resolved in favor of the pleader. *Atkinson v. Evans*, 787 A.2d 1033 (Pa. Super. 2001).

TORTS / MISREPRESENTATION

The elements required to prove intentional misrepresentation are:

1. a representation;
2. which is material to the transaction at hand;
3. made falsely, with knowledge of its falsity or recklessness as to whether it is true or false;
4. with the intent of misleading another into relying on it;
5. justifiable reliance on the misrepresentation; and
6. the resulting injury was proximately caused by the reliance.

Bortz v. Noon, 729 A.2d 555 (Pa. 1999).

AGENCY / DUTY

When a real estate agent is acting on behalf of an insurance company and when the agent provides the insurance policy to the plaintiffs at the closing, the agent has a duty to inform plaintiffs that the policy may not adequately cover every structure on the property that was purchased.

INSURANCE / DUTY TO DISCLOSE

The duty of an insurance company to deal with the insured fairly and in good faith includes the duty of full and complete disclosure as to all of the benefits in every coverage that is provided by the applicable policy or policies. *Dercoli v. Pennsylvania National Mutual Insurance Company*, 554 A.2d 906 (Pa. 1989).

TORT / NEGLIGENT MISREPRESENTATION

Negligent misrepresentation requires proof of:

1. a misrepresentation of a material fact;
2. made under circumstances in which the misrepresenter ought to have known its falsity;
3. with an intent to induce another to act on it; and
4. which results in injury to a party acting in justifiable reliance on the misrepresentation.

Bortz v. Noon, 729 A.2d 555 (Pa. 1999).

Negligent misrepresentation is essentially the same as intentional misrepresentation except that the speaker need not know his or her words are untrue, but failed to make reasonable investigation as to the truth of the words. (*Id.*)

TORT / NEGLIGENT MISREPRESENTATION

Silence or concealment would be actionable under negligent misrepresentation provided that there was a duty to speak. *Weisblatt v. The Minnesota Mutual Life Insurance Company*, 4 F.Supp.2d 371 (E.D.Pa. 1998).

PRELIMINARY OBJECTIONS

Where it is not certain that from the facts averred that plaintiffs could not recover on a claim of negligent misrepresentation the preliminary objections are denied.

TORT / COMMON LAW FRAUD

There are five elements to establish common law fraud:

1. misrepresentation of a material fact;
2. scienter;
3. intention by the declarant to induce action;
4. justifiable reliance by the defrauded party upon the misrepresentation;
5. damage to the defrauded party.

Colaizzi v. Beck et al., 895 A.2d 36 (Pa. Super. 2006).

Where there is not evidence that the defendants knowingly concealed the amendatory endorsement, the Court granted preliminary objections.

THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION No. 14239 of 2005

Appearances: Gary H. Nash, Esq., Attorney for Plaintiffs
Mark E. Mioduszewski, Esq. Attorney for Defendant Reamstown Mutual Insurance Company
Carl E. Harvison, Esq. and Les A. Goldstrom, Esq., Attorneys for Defendant, Howard Hanna Insurance Services, Inc.
Amy N. Williamson, Esq., Attorney for Defendant, Howard Hanna Real Estate Services

OPINION

Connelly, J., July 27, 2006

Facts

On August 8, 2003, Jeffrey D. And Patricia A. Boland (hereinafter "Plaintiffs") purchased a parcel of real estate located at 7261 Clark Road, Erie, Pennsylvania 16510. *Defendant, Howard Hanna Real Estate Services'*

Preliminary Objections in the Nature of a Demurrer, (hereinafter "HH Real Estate PO"), p. 1, ¶1. The real estate comprised of a house with a two-car attached garage and a barn. *Preliminary Objections to Plaintiffs' Complaint* (hereinafter "HH Real Estate PO"), p. 2, ¶2. Howard Hanna Real Estate acted as Plaintiffs' agent in the purchase of the property. *Id.* at ¶1.

In connection with the purchase of the property, Plaintiffs purchased homeowners insurance policy issued by Co-Defendant Reamstown Mutual Insurance Company (hereinafter "Reamstown") and brokered by Howard Hanna Insurance Services, Inc., (hereinafter "HH Insurance"). *Id.* at ¶3. Coverage under this policy commenced on August 10, 2003. *Id.* At the time of the closing on the property, arrangements for the issuance of the homeowners insurance were provided either by HH Real Estate and/or Insurance. *Complaint in Civil Action* (hereinafter "Complaint"), p. 4. Neither Reamstown nor HH Insurance had an agent present at the time of the closing on the property.

On February 26, 2004, Plaintiffs noticed that the barn roof was sagging and that ice and water infiltration was causing physical harm to the barn. *Id.* at ¶4. Plaintiffs filed a claim with Reamstown for the damages to the barn. *Id.* at p. 3. ¶5. Reamstown subsequently denied the claim due to the lack of coverage pursuant to the terms of the insurance policy and cited an amendatory endorsement to the policy. *Id.* The amendatory endorsement was a separate document that was not attached or provided to Plaintiffs with their copy of the insurance policy. *Complaint*, p. 4, ¶16.

Thereafter, on January 18, 2006, Plaintiffs filed this instant Complaint against Reamstown Mutual Insurance, Co., HH Insurance, and HH Real Estate. Preliminary Objections were filed by HH Insurance on March 9, 2006. Plaintiff filed an Answer to HH Insurance's Preliminary Objections and Brief in Support thereof on April 5, 2006. On April 21, 2006, HH Real Estate filed Preliminary Objections in the Nature of a Demurrer. A Brief in Support of HH Real Estate's Preliminary Objections was filed on May 15, 2006. A hearing on HH Insurance and HH Real Estate's Preliminary Objections was held before this Court on May 22, 2006.

Conclusions of Law

Preliminary objections may be filed by any party to any pleading on the grounds of legal insufficiency of a pleading, a demurrer. Pa.R.C.P. 1028(a)(4). In determining the legal sufficiency of plaintiff's complaint, the court must accept as true all well-pled material facts set forth in the complaint and all reasonable inferences deducible from those facts. *Styers v. Bedford Grange Mutual Insurance Company*, 2006 WL 1390581 (Pa. Super. 2006). The grant of demurrer is proper only if it is certain, based upon the facts averred, that no recovery is possible. *Wendt & Sons v. New Hedstrom*, 858 A.2d 631, 632 (Pa.Super. 2004). "All doubts are resolved in favor of the pleader." *Atkinson v. Evans*, 787 A.2d 1033. 1034 (Pa. Super. 2001).

Howard Hanna Insurance and HH Real Estate both raise Preliminary

Objections in the Nature of a Demurrer as to Counts II and III of Plaintiffs' Complaint.

Misrepresentation

Count II of Plaintiffs' Complaint alleges that HH Real Estate and HH Insurance either intentionally or negligently misrepresented the nature and extent of the insurance coverage under the Reamstown policy. Complaint, p. 7, ¶37

The elements required to prove intentional misrepresentation are:

1. a representation;
2. which is material to the transaction at hand;
3. made falsely, with knowledge of its falsity or recklessness as to whether it is true or false;
4. with the intent of misleading another into relying on it;
5. justifiable reliance on the misrepresentation; and
6. the resulting injury was proximately caused by the reliance.

Bortz v. Noon, 729 A.2d 555, 560 (Pa. 1999).

For a misrepresentation to be actionable it is not necessary that a positive assertion be made, but there may be a concealment of something which should have been disclosed, and which deceives or is intended to deceive another to act upon the concealment to his detriment. *Wilson v. Donegal Mutual Insurance Company*, 598 A.2d 1310, 1315 (Pa.Super. 1991). Mere silence, however, is not sufficient basis for finding liability unless there was a duty to speak. *Id.* at 1316.

The parties agree that Plaintiffs' fraud or intentional misrepresentation claim is actionable, but only if there was a duty on the part of HH Real Estate and/or HH Insurance to inform Plaintiffs about the amendatory endorsement, which excluded coverage on the barn. Plaintiffs allege that both HH Insurance and HH Real Estate had a duty to provide a complete and full insurance policy to Plaintiffs and a duty to inform Plaintiffs that the barn was not covered under the policy. HH Real Estate argues that they are merely a broker who was retained to assist Plaintiffs in the purchase of the property and was not acting as an insurer and therefore had no duty to inform Plaintiffs of the limitations in the policy. *HH Real Estate Brief*, p. 3. HH Insurance argues that they, even as insurers, have no duty to disclose every possible contingency, exclusion, or permutations of coverage. *HH Insurance Brief*, p. 10.

The Court will first address HH Real Estate's contention that it owed no duty to Plaintiffs based upon its status as brokerage agent. The homeowner's insurance policy was purchased at the time of the closing on the property. Neither an agent from Reamstown nor HH Insurance was present at the closing. Only an agent of HH Real Estate was in attendance. The homeowner's policy was provided to Plaintiffs by the HH Real Estate agent at the closing. The policy that was issued to Plaintiffs, specifically, did not include the amendatory endorsement. As the brokerage agent, HH Real Estate was well aware that the property purchased by Plaintiffs included, not only the home and the two-car garage, but the barn as well.

These facts alone indicate that it would be reasonable for Plaintiffs to conclude that the HH Real Estate agent they were dealing with was also an agent for, or associated with, HH Insurance and that the agent was providing adequate coverage for the property and the three structures thereon that were purchased. Additionally, the Court's own inquiry further establishes that Plaintiffs were justified in relying on the HH Real Estate agent.

Howard Hanna's website (www.howardhanna.com) states "Howard Hanna Real Estate Services is Western Pennsylvania. . . largest real estate company and the area's only full-service agency." Listed below this statement is a list of services with links to additional websites. One such service that is listed is the following:

> **Insurance Services**
> Howard Hanna Insurance Services offers a complete line of personal insurance products at competitive prices. We offer insurance for homes, auto, business, life and disability. To learn more about Howard Hanna Insurance Services, click here.

The above "click here" link connects to the following page.

> **Personal Insurance Homeowners**
> You've invested a great deal in your home, so it's important to make sure it's properly protected against an unforeseen loss. Your Howard Hanna Insurance Agent will design a customized insurance plan for you and your family by comparing up to 10 or more major insurance carriers to find you the most competitive rates and the most comprehensive coverage.* And as part of Howard Hanna's "one-stop shopping" convenience, our agents will coordinate with your mortgage loan officer and your Howard Hanna real estate associate to ensure hassle-free service.

The "click here" link for questions and/or additional information opens a request box addressed to Howard Hanna Real Estate, which provides a specific check box for questions regarding insurance.

It is clear from the Howard Hanna website that HH Insurance is a subsidiary of HH Real Estate and that HH Real Estate acted on behalf of HH Insurance when it provided the policy to Plaintiffs at the time of closing. The Court, in reaching this decision, is not holding that a real estate agent has the absolute obligation to explain insurance coverage provided to its clients. However, in this case because the real estate agent was acting on behalf of not only HH Real Estate, but HH Insurance, and where, as here, the real estate agent provided the insurance policy to Plaintiffs at the closing, HH Real Estate had a duty to inform Plaintiffs that the policy may not adequately cover every structure on the property that was purchased.

The Court will next address HH Insurance's contention that they owed no duty to Plaintiffs to explain or disclose all of the nuances of the insurance

policy.

"The duty of an insurance company to deal with the insured fairly and in good faith includes the duty of full and complete disclosure as to all of the benefits and every coverage that is provided by the applicable policy or policies along with all requirements...". *Dercoli v. Pennsylvania National Mutual Insurance Company*, 554 A.2d 906, 909 (Pa. 1989).

Presently, HH Insurance relies on Kilmore v. Erie Insurance Company, 595 A.2d 623 (Pa.Super. 1991) wherein the court, ". . .found no justification in the law to impose the additional burden on insurers that they anticipate and then counsel their insured on the hypothetical, collateral consequences of the coverage chosen by the insured". At 626. The *Kilmore* court went on to state that:

> While we acknowledge insurance is an area in which the contracting parties stand in somewhat special relationship to each other, the relationship is not so unique as to compel this Court to require an insurer to explain every permutation possible from an insured's choice of coverage. Each insured has the right and obligation to question his insurer at the time the insurance contract is entered into as to the type of coverage desired and the ramifications arising therefrom.

Id.

The duty, Plaintiffs argue HH Insurance had, was not to explain some nuance or hypothetical circumstances in which the policy coverage may come into effect, but to explain the basic parameters of the policy such as which structures were covered. Additionally, HH Insurance, especially since no separate agent was present to represent it, had a duty to ensure that the entire policy, including the amendatory endorsement, was provided to Plaintiffs. While Plaintiffs had the right, and possibly the obligation, to question HH Insurance and/or HH Real Estate about the coverage that was purchased, without knowledge of the existence of the amendatory endorsement Plaintiffs would not have reason to question whether the barn was a covered structure.

In the alternative, Count II of Plaintiffs' Complaint alleges that HH Real Estate and HH insurance negligently misrepresented the nature and extent of the homeowner's policy. Howard Hanna Insurance raises a preliminary objection alleging that the negligent misrepresentation claim cannot be successfully pled because silence is not actionable under this theory. In support of its position, HH Insurance relies on *Bortz v. Noon*, 729 A.2d 555 (Pa. 1999). The *Bortz* Court first stated that, "Negligent misrepresentation requires proof of: (1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and; (4) which results in injury to a party acting in justifiable reliance on the misrepresentation". *Id*. at 561. By way of further analysis the *Bortz* Court stated that the elements necessary to prove a claim of

negligent misrepresentation are essentially the same as those required for intentional misrepresentation except that the speaker need not know his or her words are untrue, but failed to make reasonable investigation as to the truth of the words. *Id*. at 561.

Howard Hanna Insurance has interpreted the *Bortz* holding to mean that, in order for negligent misrepresentation to be successfully pled, there must be words that are actually spoken. The facts in *Bortz*, however, were such that there were words that were actually spoken. The *Bortz* court was analyzing the facts as they applied in that case and did not directly address the issue of whether silence is actionable under negligent misrepresentation

The court in *Weisblatt v. The Minnesota Mutual Life Insurance Company*, 4 F.Supp.2d 371 (E.D.Pa. 1998) noted the lack of "guiding precedent" from Pennsylvania courts on the issue of whether silence is actionable under the guise of negligent misrepresentation. *Id*. at 380. The *Weisblatt* court however, stated that silence or concealment would be actionable under negligent misrepresentation provided that there was a duty to speak. *Id*. The *Weisblatt* Court's reasoning was that fraudulent and negligent misrepresentations are often only differentiating under Pennsylvania law on the basis of scienter and that the underpinnings of negligence in tort law make material omissions actionable. *Id*.

While not binding on this Court, the reasoning of the *Weisblatt* holding is persuasive. It is not certain from the facts averred that Plaintiffs cannot recover on the claim of negligent misrepresentation and therefore the preliminary objections as to this claim are denied.

Unfair Trade Practices

Count III of Plaintiffs' Complaint alleges that HH Insurance and HH Real Estate's actions in misrepresenting the nature and extent of the homeowner's insurance policy violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law (hereinafter "UTPCPL"), 73 P.S. §201-1 et seq. *Complaint*, p. 9, ¶48. Specifically, Plaintiffs allege HH Insurance violated 73 P.S. §201-2(4), which states as follows:

> **"Unfair methods of competition"** and **"unfair or deceptive acts or practices"** mean any one or more of the following:
>
> . . .
>
> (v) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;
>
> . . .
>
> (vii) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;
>
> . . .
>
> (xvii) Engaging in any other fraudulent conduct which creates a likelihood of confusion or of misunderstanding.

The Court will first address HH Real Estate and HH Insurances alleged violation of §201-2(4)(xvii). "For a claim to arise under §201-2(4) of UTPCPL, a plaintiff must prove the elements of common law fraud." *Sewak v. Lockhart*, 699 A.2d 755, 761 (Pa.Super. 1997). There are five (5) elements to establish common law fraud: (1) misrepresentation of a material fact; (2) scienter; (3) intention by the declarant to induce action; (4) justifiable reliance by the defrauded party upon the misrepresentation; and (5) damage to the defrauded party. *Colaizzi v. Beck et al.*, 895 A.2d 36, 39 (Pa.Super. 2006).

As the Court has already noted, silence is actionable under a claim for fraudulent conduct when there was a duty to speak. The Court has already determined that HH Real Estate assumed this duty by providing the insurance policy to Plaintiffs at the time of the closing and acting on behalf of HH Insurance. However, the second element required to prove fraud, scienter, requires that either HH Real Estate and/or HH Insurance knowingly concealed or remained silent regarding the amendatory endorsement excluding coverage of the Plaintiffs' barn. Plaintiffs argue that HH Real Estate was aware that the property purchased included the barn. Although HH Real Estate and HH Insurance may have either negligently or recklessly failed to provide Plaintiffs with the amendatory endorsement and inform them of the barn exclusion, there is no evidence that either HH Real Estate or HH Insurance knowingly did so. At most Plaintiffs have established that HH Real Estate and HH Insurance should have made a reasonable investigation into (1) whether the policy specifically provided to Plaintiffs had the amendatory endorsement attached and (2) whether this policy adequately covered the three structures that were purchased. The Court therefore finds that the preliminary objection to Count III of Plaintiffs' Complaint is granted.

ORDER

AND NOW, to-wit, this 28th day of July, 2006, for the reasons set forth in the foregoing **OPINION**, it is hereby **ORDERED, ADJUDGED and DECREED** that Howard Hanna Insurance Services' and Howard Hanna Real Estate Services' Preliminary Objection as to Count II (Misrepresentation) of Plaintiffs' Complaint is **DENIED**. Howard Hanna Insurance Services' and Howard Hanna Real Estate Services' Preliminary Objection as to Count III (Fraud) of Plaintiffs' Complaint is **GRANTED**.

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

LVNV FUNDING, L.L.C., ASSIGNEE OF SHERMAN ACQUISITION, ASSIGNEE OF BANK OF AMERICA, Plaintiff

v.

TINA L. LINDSEY, Defendant

CIVIL PROCEDURE / PLEADINGS

When any claim or defense is based upon a writing, the pleader shall attach a copy of the writing or the material part thereof; but if the writing or copy is not accessible to the pleader, it is sufficient so to state together with the reason and to set forth the substance of the writing. Rule 1019 (i) Pa. R. Civ. P.

CIVIL PROCEDURE / PLEADINGS

In order to meet the requirement that a pleading setting forth a claim based upon a writing have attached thereto a copy of the writing, the plaintiff in a credit card collection action must set forth any contract or credit agreement, written proof of any assignment from the initial creditor to the pleader (and any intermediate assignments), and a statement of account activity.

CIVIL PROCEDURE / PLEADINGS

A signed agreement is not necessary to make a credit agreement enforceable, and a court may look to the conduct of the parties to ascertain acceptance of an agreement when assessing its validity.

CIVIL PROCEDURE / PLEADINGS

A sufficient statement of activity to be attached to the complaint on a bill for a credit card will contain a record of where the card was used, though signed receipts are not necessary.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 14119-2006

Appearances: David R. Galloway, Esq., for the Plaintiff
Elliott J. Ehrenreich, Esq., for the Defendant

OPINION

Connelly, J., January 19, 2007

This matter is before the Court pursuant to Tina L. Lindsey's (hereinafter "Defendant") Preliminary Objections to LVNV Funding, L.L.C.'s (hereinafter "Plaintiff") Complaint.

Procedural and Factual Background

Plaintiff filed its Complaint on October 9, 2006 seeking to collect past due payments on a credit card issued to Defendant. Plaintiff is an assignee of Sherman Acquisition, who was an assignee of Bank of America who issued the credit account. *Complaint*, ¶1. Plaintiff alleges the remaining balance due, owing and unpaid on Defendant's account is $9,541.49. *Id.* at ¶7. Interest has also accrued in the amount of $3,211.81. *Id.* at ¶9.

Plaintiff also seeks attorney fees in the amount of $1,908.30, bringing the total claim to $14,661.60. *Id.* at ¶11. Attached to Plaintiff's Complaint was a document entitled Exhibit "A", which Plaintiff calls the "Statement of Account."

Defendant filed Preliminary Objections and a Brief in Support of the Preliminary Objections. Defendant alleges that Plaintiff's Complaint is defective in four areas. *Preliminary Objections to Plaintiff's Complaint*, ¶¶2-5. First, the Defendant alleges that Plaintiff failed to attach a signed copy of the Credit Agreement. *Id.* at ¶2. Second, Defendant alleges that Plaintiff failed to provide signed receipts from merchants where the credit card was used. *Id.* at ¶3. Third, Defendant alleges that Plaintiff's Exhibit "A", the Statement of Account, is not sufficient documentation to show what activity appeared on the credit account. *Id.* at ¶4. Finally, Defendant alleges that Plaintiff fails to provide any written evidence that Plaintiff is in fact an assignee of Sherman Acquisition, who was an assignee of Bank of America. *Id.* at ¶5. Defendant argues that these four alleged defects in Plaintiff's Complaint violate Pa.R.C.P. 1019(i), and Defendant moves to strike or dismiss Plaintiff's Complaint. *Id.* at ¶6.

Plaintiff responded to Defendant's Preliminary Objections on November 28, 2006. Plaintiff denies that it failed to file a signed copy of the credit agreement, individual credit purchase receipts, a statement of account, or proof of assignment of these claims. *Plaintiff's Response to Defendant's Preliminary Objections*, ¶¶2-5. Plaintiff alleges that Exhibit "A" is a written document that speaks for itself. *Id.* at ¶ 4. Furthermore, Plaintiff filed a Brief in Opposition to Defendant's Preliminary Objections on December 14, 2006 arguing that Plaintiff's Complaint complied with Pa.R.C.P. Rule 1019(a) and that "Defendant should be more than able to draft a suitable answer or response to Plaintiff's Complaint." *Plaintiff's Brief in Opposition to Defendant's Preliminary Objections to Plaintiff's Complaint*, p. 3.

Findings of Law

Pennsylvania Rules of Civil Procedure Rule 1019 clearly sets out the contents of pleadings in civil matters. Rule 1019 is divided into nine (9) subsections, lettered (a) through (i). This Court notes that all nine (9) sections are relevant to the filing of civil pleadings. Specifically, Rule 1019(i) states:

> When any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing.

Pa.R.C.P. 1019(i).

The issue of what documentation is required in a credit card collection action has been brought before Pennsylvania courts before. *Atlantic*

Credit and Finance, Inc. v. Giuliana addressed similar issues to the case at bar. *Atlantic Credit and Finance, Inc. v. Giuliana*, 829 A.2d 340 (Pa. Super. 2003) *appeal denied* 843 A.2d 1236 (Feb. 11, 2004). In *Atlantic*, the plaintiff sought to recover outstanding debt the defendants allegedly charged on a GM card issued to them. Atlantic had purchased the debt from the GM card company. Atlantic failed to attach any contract or credit agreement regarding the account and it failed to attach any proof of the assignment from GM. Atlantic did attach to the complaint one monthly credit sheet, which listed the total due on the account and the interest rate. The Superior Court specifically cited Rule 1019(i), quoted *supra*. The Superior Court remanded the case to the trial court, holding that the defendants' preliminary objections based on the lack of supporting documentation should have been sustained.

The case at bar is directly on point with *Atlantic Credit and Finance*. Plaintiff has merely attached a computer printout, title Exhibit "A", which contains indecipherable codes and numbers. Plaintiff has not attached any proof of an assignment of the credit card debt from Bank of America or Sherman Acquisition. Plaintiff has not attached any contract or credit agreement that would have been sent to Defendant along with the disputed credit card. Plaintiff has also failed to attach a sufficient statement of activity on the account, which the *Atlantic* Court held is required in these recovery actions.[1]

Plaintiff correctly argues that a signed agreement is not necessary to make a credit agreement enforceable. *Plaintiff's Brief in Opposition to Defendant's Preliminary Objections to Plaintiff's Complaint*, pp. 2-3. Although Plaintiff incorrectly cited the supporting caselaw, this Court recognizes that the Pennsylvania Superior Court has held that a court may look to the conduct of the parties to ascertain acceptance of an agreement when assessing its validity. *See Hartman v. Baker*, 766 A.2d 347 (Pa. Super. 2000); *Schreiber v. Olan Mills*, 627 A.2d 806 (Pa. Super. 1993). "As a general rule, signatures are not required unless such signing is expressly required by law or by the intent of the parties...[A]n offer may be accepted by conduct and what the parties do pursuant to the offer is germane to show whether the offer is accepted." *Hartman* at 351. Plaintiff states that "when an individual is issued a credit card account, said individual is sent a copy of a cardholder agreement." *Plaintiff's Brief in Opposition to Defendant's Preliminary Objections to Plaintiff's Complaint*, p.3. Plaintiff also alleges that Defendant used the card and made payments on the account prior to becoming delinquent. *Id.* at 1. Nevertheless, while a *signed* copy of

[1] Defendant's preliminary objection regarding signed receipts from merchants where the credit card was used has no legal precedent or reason for support. A sufficient statement of activity will contain a record of where the card was used. Additional signed receipts are not necessary.

the cardholder agreement is not required, a copy of the agreement sent to potential cardholders along with the credit card is required to establish this claim pursuant to Rule 1019(i) and the holding in *Atlantic Credit and Finance*.

Therefore, in accordance with the foregoing opinion, Defendant's preliminary objections are sustained as to the lack of a credit agreement, statement of account activity, and proof of assignment of Bank of America's and Sherman Acquisition's claims. Plaintiff has thirty (30) days from the date of this Opinion to file an amended complaint with the appropriate documentation.

ORDER

AND NOW, to-wit, this 19th day of January, 2007, for the reasons set forth in the foregoing **OPINION**, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that Defendant's Preliminary Objections are **SUSTAINED**. Plaintiff has thirty (30) days to file an amended complaint with the appropriate documentation.

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

WALT BOWEN, ELIZABETH BOWEN, and PAULA BLOOM trading as THE CORNER TAVERN and GRILLE and J. WAISLEY WILLOW, INC., d/b/a WILLOW'S, Plaintiffs

v.

ERIE COUNTY, PENNSYLVANIA and MARK DIVECCHIO, in his capacity as Erie County Executive, Defendants

STATUTES / LOCAL ORDINANCE / PREEMPTION

State law may preempt local legislative action. Local ordinances conflicting with state law may not be sustained.

CONSTITUTIONAL LAW / NATURAL RESOURCES

The right of the people to clean air under Article 1, Section 27, of the Pennsylvania Constitution is not absolute. The duty of the Commonwealth to conserve natural resources must be balanced with the requirement of the Commonwealth to perform other duties. The Commonwealth Court has given limited guidance in the balancing process by the formulation of a three-part test, potentially applicable in appropriate circumstances, requiring inquiry into compliance with applicable statutes and regulations, the effort made to minimize environment incursion, and whether environmental harm outweighs the benefits.

CONSTITUTIONAL LAW / STATUTES / PRESUMPTION OF VALIDITY

A party pursuing a challenge to the constitutionality of a Pennsylvania statute has a formidable task as there is a strong presumption that acts of the General Assembly are constitutional and a court may not conclude otherwise unless a statute clearly, palpably and plainly violates the Constitution.

CONSTITUTIONAL LAW / NATURAL RESOURCES / CLEAN INDOOR AIR ACT

The three-part test enunciated by the Commonwealth Court is of limited applicability with respect to the Clean Indoor Air Act as it is not asserted that the Act is inconsistent with other statutory or regulatory authority and as the Act does not involve environmental incursion. The third factor, balancing the environmental harm against the benefits of the activity, does not provide an adequate basis for determination of constitutionality where the purpose of the Clean Indoor Air Act is to protect the public health by providing that the air in certain public places would at least be cleaner than was previously the case. Any harm caused under these circumstances is a matter of speculation.

Policies underlying environmental legislation are within the judgment of the legislative branch, which is entitled to great deference in the exercise of its judgment and the strong presumption of constitutionality. The wisdom of the Clean Indoor Air Act is within the scope of legislative consideration rather than judicial determination and the court will not substitute its judgment for that of the legislature. On the record before the court it has not been demonstrated that the Clean Indoor Air Act is clearly, palpably and plainly in violation of the Constitution.

STATUTES / LOCAL ORDINANCE / PREEMPTION

Ordinances which intrude into areas preempted by the Commonwealth are void. Determination of preemption requires the court to ascertain the probable intention of the legislature. Where the legislature has explicitly expressed its intention to preempt, the court must give it full effect.

STATUTES / REPEALER

The legislature may repeal a portion of a statute which has not yet gone into effect. This action constitutes an amendment of legislation prior to the date on which it becomes law. Pursuant to the Statutory Construction Act, 1 Pa.C.S.A. §1977, a repealed statute is not automatically revived when the repealing statute is itself repealed.

Where the Clean Indoor Air Act preemption provision was never actually repealed as the repealer was itself repealed prior to its effective date, the preemption provision remains effective.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - EQUITY NO. 10504 - 2007

Appearances: Eric J. Purchase, Esquire for the Plaintiffs
Wallace J. Knox, II, Esquire for the Defendants

OPINION

Bozza, John A., J.

I. Introduction

In this action the Plaintiffs seek an order enjoining the County of Erie from enforcing a recently enacted ordinance regulating smoking in public places. The thrust of the Plaintiffs' position is that the Pennsylvania legislature has preempted the county from adopting such legislation.

The ordinance at issue, known as the Erie County Smoke Free Air Act of 2006, Erie County Ordinance No. 78, 2006 (the "Smoking Ordinance"), was passed by Erie County Council ("County Council") on December 19, 2006, with an effective date sixty (60) days thereafter. In general, the Smoking Ordinance prohibits smoking in enclosed public places and in "enclosed facilities within places of employment without exception." (§§5-6). Certain areas are exempt. (§9). The Smoking Ordinance provides for penalties for violation. Following denial of Plaintiffs' request for a preliminary injunction, County Council delayed the effective date until March 15, 2006 to allow the Court the opportunity to resolve the legal issues here presented.

It is important to note that the case before the Court does not involve a determination of whether Erie County's smoking ban is good public policy, nor does it contain a challenge to the Smoking Ordinance's constitutionality. The question before the Court is a simple one: Has the Pennsylvania legislature preempted Erie County's right to adopt a smoking

ordinance regulating smoking in public places? Unfortunately, the course of legislation affecting a resolution of this question is, as Allegheny County Common Pleas Judge Michael A. Della Vecchia recently observed, more than a bit confusing.[1]

In 1988 the legislature adopted certain amendments to a law known as the Fire and Fire Prevention Building Regulations Code. 35 P.S. §1151 et seq. These amendments were referred to as the Clean Indoor Air Act. Act 1988-168, PL 1315, No. 168 (Dec. 21, 1998), 35 P.S. 1230.1. The express purpose of the act was to "protect the public health by regulating and controlling smoking in certain public places and at public meetings and in workplaces" throughout Pennsylvania. 35 P.S. § 1230.1. Most importantly, for the purposes of this lawsuit, the Clean Indoor Air Act specifically provided that local governments, largely with the exception of Philadelphia[2], could not pass their own laws concerning the regulation of smoking in public and work places. This provision was contained in Section 15.1 titled "Preemption" codified at 35 P.S. §1235.1 (the "preemption provision") and stated: "This act shall preempt and supercede any local ordinance or rule concerning the subject matter of Sections 3.5 and 10.1 of this act." Section 10.1 of the Clean Indoor Air Act related to the regulation of smoking. 35 P.S. § 1230.1.

It has long been established in this Commonwealth, and the Defendants do not argue otherwise, that state law may preempt local legislative action and that a local ordinance cannot be sustained to the extent it conflicts with a provision of state law. *See e.g., Western Pennsylvania Restaurant Ass'n v. Pittsburgh*, 366 Pa. 374, 77 A.2d 616 (1951); *Harris-Welsh, Inc. v. Dickson City Borough*, 420 Pa. 259, 216 A.2d 328 (1966) ("It is of course self-evident that a municipal ordinance cannot be sustained to the extent that it is contradictory to or inconsistent with a state statute."); *See also Ortiz v. Commonwealth*, 545 Pa. 279, 681 A.2d 152 (1996) (the legislature may limit functions performed by home rule municipalities). Therefore, had this been the end of the legislature's involvement in smoking regulation preemption, the resolution of the issue before the Court would be extraordinarily clear-cut. Unfortunately, it was not.

In 1999 the legislature changed its mind and repealed the preemption provision of the Clean Indoor Air Act when it adopted the Pennsylvania Construction Code Act. Act 1999-45, P.L. 1315, No.168 (Nov. 10, 1999),

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[1] *See, Michael's Bar and Restaurant Inc v. Allegheny County,* Case No. GD 06-29259 at 12 (decided December 22, 2006) ("If ten different judges look at this matter, there could be ten different opinions. . . .") (the Court commenting on the interpretation of the applicable statutes).

[2] The provisions of Section 10.1 did not apply to local rules or ordinances adopted by cities of the second class in effect prior to September 1, 1988. 35 P.S. §1235.1 (b)(1).

35 P.S. §7210.101 et seq. Although this act was largely directed towards the establishment of uniform construction standards and regulations throughout Pennsylvania, it included a provision, Section 1102(a) titled "Repeals" (the "repeal provision") that stated, "The following acts and parts of acts are repealed." 35 P.S. §7210.1102(a). Included in the list was Section 15.1, the preemption provision of the Clean Indoor Air Act. However, and of critical legal significance, the legislature did not make most provisions of the Pennsylvania Construction Code Act effective immediately but rather provided that certain sections including the repeal provision would not go into effect until "90 days following publication of notice in the Pennsylvania Bulletin that the regulations required by this act have been finally adopted." 35 P.S. §7210.1103. As it turned out, it would be more than four years before the regulations were in place and published and that the various provisions of the act became effective on April 9, 2004. In the meantime, the legislature, apparently deciding that it no longer wanted local governments adopting their own version of laws regulating smoking in public places, changed its mind again.

In 2000 the legislature, as a part of a statute amending portions of the Fire and Fire Prevention Building Regulations Code (relating in part to possession of tobacco in schools), adopted a provision repealing its repeal of the preemption section of the Clean Indoor Air Act (the "take-back provision"). It stated

> "As much as section 1102(a) of the Act of November 10, 1999 (P.L. 491, No. 45), known as the Pennsylvania Construction Code Act, as repeals §15.1 of the act is repealed."

Act 2000-128. P.L. 944. No. 128 (December 20, 2000). Given this interesting legislative history, it is understandable that there is some confusion in local government about the current state of Pennsylvania law.

II. Discussion

A. Constitutionality of the Clean Indoor Air Act

The Defendants have argued that, notwithstanding its potential applicability, the preemption provision should not be given effect because the Clean Indoor Air Act violates Article I, Section 27 of the Pennsylvania Constitution. In support of their position, the Defendants presented the testimony of Dr. Bruce W. Dixon, a physician and director of the Allegheny Health Department. Dr. Dixon testified that there is strong evidence of a relationship between inhaling secondhand smoke and lung cancer, coronary heart disease and sudden infant death syndrome. During his testimony, he pointed to the conclusions found in "The Health Consequences of the Voluntary Exposure to Tobacco Smoke: A Report of the Surgeon General". (Defendants' Exhibit 1). That report discusses the health risks associated with inhaling secondhand smoke and in particular

notes that there is evidence of a 20% to 30% increase in the risk of lung cancer and coronary heart disease from secondhand smoke exposure associated with living with a smoker. The report does not indicate the percentage-increased risk associated with other ailments, nor does it indicate the particular levels of exposure required in order for any health risk to materially increase Rather, the report concludes that there is no risk-free level of exposure. It is apparent from the report that the Surgeon General of the United States has concluded that in general the exposure to tobacco smoke by non-smokers is unhealthy.

Although in this case the Court has not been asked to decide whether Erie County's Smoking Ordinance represents sound public policy, it is argued that, because the Clean Indoor Air Act does not entirely, or perhaps to a greater but undefined degree, ban smoking, it runs afoul of the Pennsylvania Constitution's clean air provision. This important question has not been addressed by the Pennsylvania Supreme Court or for that matter by any appellate court of the Commonwealth. Indeed, Erie County has not pointed to any caselaw in support of its position. In essence, it appears that Erie County's position is that since tobacco smoke in the air is unhealthy, only a complete ban of smoking can meet the requirements of Article I, Section 27 of the Pennsylvania Constitution.

In supporting their opposition to the Defendants' constitutional challenge, the Plaintiff's point to the Pennsylvania Supreme Court's decision in *Payne v. Kassab*, 468 Pa. 226, 361 A.2d 263 (1976) (*Payne II)*, where the court observed that Article I, Section 27 rights are not absolute. In *Payne II*, the court was asked to review the plaintiff's challenge to a Department of Transportation road project known as the River Street Project, which had been rejected by a Commonwealth Court judge. Although the facts in *Payne II* have little direct applicability to the facts presented here, the Court did take the occasion to observe that Article I, Section 27 does not speak in "absolute terms" about the rights established therein. Further, the Court observed that:

> The Commonwealth as trustee, bound to conserve and maintain public natural resources for the benefit of all the people, is also required to perform other duties, such as the maintenance of an adequate public highway system, also for the benefit of all the people. It is manifest that a balancing must take place. . .

Id. (citation omitted). Thereafter, the Commonwealth Court in *O'Connor v. Pennsylvania Public Utility Com.*, 136 Pa. Commw. 119, 582 A.2d 427 (1990) affirmed the use of a three-part test for the review of government actions challenged under Article 1, Section 27. That test, originally established by the court in *Payne v. Kassab*, 11 Pa. Commw. 14, 312 A.2d 86 (1973) (*Payne I*), required the following inquiries:

1. Was there compliance with all applicable statutes and regulations

relating to protection of natural resources?

2. Does the record show a reasonable effort to reduce environmental incursion to a minimum?

3. Whether the environmental harm would so clearly outweigh the benefits to be derived that going ahead with the project would be an abuse of discretion.

Id. at 29.

While this approach strongly suggests the kind of balancing test described in *Payne II*, the Supreme Court in *Eagle Envtl. II, L.P. v. Commonwealth*, 584 Pa. 494, 884 A.2d 867 (2005) rejected the notion that a "specific" balancing test was required, but reiterated that there must be a balancing of the duties of the Commonwealth under Article I, Section 27 and the duties of the Commonwealth to provide other needed services. *Id.* at 513. Although the court declined to apply the three-part test set forth by the Commonwealth Court in *Payne I* to the question before it, it did not reject its potential applicability to an Article I, Section 27 challenge in appropriate circumstances.

In pursuing a challenge to the constitutionality of a Pennsylvania statute, the Defendants have a formidable task. There is a strong presumption that the acts of the Pennsylvania General Assembly are constitutional and a court may not conclude otherwise unless a statute is clearly, palpably and plainly violative of the constitution. *Eagle Envtl. II, L.P.* at 515. It is with fundamental principle of constitutional jurisprudence in mind that the Court must begin its inquiry.

At the onset, it must be noted that not only is the right to "clean air" set forth in Article I, Section 27 not absolute, it is not otherwise defined in the Constitution, and neither statutory law nor caselaw provide any guidance as to what constitutes clean air with regard to tobacco smoke. While Pennsylvania has adopted air quality standards consistent with federal regulations formulated pursuant to the Clean Indoor Air Act, 42 U.S.C.A. §7412, they do not include regulations concerning unacceptable levels of tobacco smoke in the air. 25 Pa. Code §124.1. It is apparent that these regulations are intended to control and prevent air pollution in the Commonwealth. *Direnzo Cole Co. v. Dep't of Gen. Servs., Bureau of Purchases*, 825 A.2d 773, 776 (Pa. Commw. Ct. 2003). Moreover, the Defendants have not alleged that any state or federal statute or regulation relating to the quality of air has been violated by the provisions of the Clean Indoor Air Act.

When engaging in the "balancing" analysis required by *Payne II,* the test set forth in *Payne I* provides only a limited conceptual framework for determining the constitutionality of the Clean Indoor Air Act. Because here the challenge is to the adoption of a statutory scheme for the regulation of smoking in public places and not enforcement or other administrative activity, the first two parts of the *Payne I* inquiry must be viewed in a

somewhat different light than as originally intended. For example, in this case there is no assertion that the Clean Indoor Air Act is inconsistent with any other statutory or regulatory authority related to the protection of clean air. Nor does the act involve an "environmental incursion" as the Clean Indoor Air Act actually seeks to reduce the presence of tobacco smoke in the air in public places. The third area of inquiry, however, which focuses more directly on a balancing analysis, suggests that a determination must be made as to whether any environmental harm caused by the Clean Indoor Air Act's limited smoking restriction outweighs the benefits. In this regard, the record before the Court provides an inadequate basis for reaching a definitive conclusion.

At the time that the Clean Indoor Air Act was adopted in 1988, there was no statewide regulatory scheme that limited smoking in public places. Therefore, the Clean Indoor Air Act on its face had the effect of improving what must be conceded as an otherwise less than desirable circumstance of public health. Contrary to the implication of the Defendants, the Clean Indoor Air Act did not sanction or approve of smoking generally, but in fact limited it, albeit in ways some would find insufficient. Any harm that it caused must therefore be a matter of speculation. This is particularly so in light of the absence of any established parameters which would establish when air is considered, for constitutional or any other purpose, sufficiently clean. Obviously, it was the intention of legislature that, after the implementation of the Clean Indoor Air Act, the air quality in at least certain public places would be cleaner than what it was before.

Indeed, the language of the statute indicates that the legislative purpose in adopting the Clean Indoor Air Act was to "protect the public health..." 35 P.S. §1230.1(a). It is reasonable to conclude that in adopting the Clean Indoor Air Act, the legislature balanced the need for having some protection against the detrimental health consequences of indoor smoking against other important economic, social and practical considerations.

It has long been established that the policies underlying environmental legislation are left entirely to the legislative branch, without undue influence from the court. *See Commonwealth, Dep't of Envtl. Resources v. Jubelirer,* 531 Pa. 472, 614 A.2d 204 (1992). Such deference has particular significance where, as here, constitutional mandate has established a requirement that the Commonwealth serve "as trustee" who will "conserve and maintain" important natural resource for the benefit of the people. Pennsylvania Constitution, Article I, Section 27. In such circumstances, it is necessary that a legislature, as the branch of government charged with establishing the laws of the Commonwealth, be provided with great deference in the exercise of its judgment and that the strong presumption that its acts are constitutional be maintained.

Here the Defendants have asked the Court to substitute its judgment for that of the legislature on the basis of epidemiological evidence contained

in the United States' Surgeon General's report as related by Dr. Dixon. Regardless of the accuracy of the studies and validity of expert opinion, this is a matter of legislative consideration rather than judicial determination. It is in the context of public proceedings before the General Assembly where the wisdom of the Clean Indoor Air Act must be debated and the requirements of Article I, Section 27 ascertained. On the record before the Court, the Defendants have not demonstrated that the Clean Indoor Air Act is clearly, palpably and plainly violative of Article I, Section 27 of the Pennsylvania Constitution.

B. Preemption

In keeping with fundamental principles of Pennsylvania law, it has been explicitly recognized that a local ordinance may not intrude into areas preempted by the Commonwealth. *Pittsburgh v. Allegheny Valley Bank*, 488 Pa. 544, 412 A.2d 1366 (1980). Where preemption has occurred such ordinances are void. *See Bussone v. Blatchford*, 164 Pa. Super. 545, 67 A.2d 587 (1949).[3] To determine preemption, it is necessary for the Court to ascertain the probable intention of the legislature. *City of Philadelphia v. Clement & Muller*, 552 Pa. 317, 715 A.2d 397 (1998). Where the legislature has expressed its intention explicitly, the court must give it full effect. *Id.* In this case, the legislature directly stated its intent by specifically providing that the provisions of the Clean Indoor Air Act that relate to the regulation of smoking "...preempt and supercede any local ordinance or rule..." The only question is whether subsequent legislative action had the effect of eliminating the preemption provision. In that regard, the Court is constrained to find that it did not.

Although in 1999, with the adoption of the Pennsylvania Construction Code Act the legislature attempted to repeal the Clean Indoor Air Act's preemption provision, before the repeal provision went into effect it took it back or as it has been described, repealed the repealer. While Erie County argues that the take-back effort was of no consequence because it occurred before the effective date of the Pennsylvania Construction Code Act's repeal provision, it provided no support for such a conclusion. There is nothing in the law of Pennsylvania that prohibits the legislature from repealing a portion of a statute that has yet to go into effect. In this case, what the legislature in effect did when it "repealed" the repeal of the preemption provision was to amend its own prior legislative act before it became law. *See State ex rel. City Loan & Sav. Co. v. Moore*, 124 Ohio St. 256, 177 N.E. 910 (1931).

[3] The rationale for preemption was succinctly expressed by Dr. Bruce W. Dixon in testimony presented by the Defendants when he noted that the last thing that is needed is, "fifty different jurisdictions with fifty different rules".

The Defendants have also argued that Section 15.1, the preemption provision, is not applicable because even if Act 2000-128 took back the Pennsylvania Construction Code Act's repeal provision, the law of statutory construction provides that once a statute has been repealed it is not automatically revived when the repealing statute is itself repealed. While the Defendants' position in this regard is an accurate statement of the law as set forth in the Statutory Construction Act, 1 Pa. C.S.A. §1977, their conclusion is not. The Clean Indoor Air Act, Section 15.1 preemption provision was never in fact repealed and therefore there was nothing about it that needed to be revived. That portion of the Pennsylvania Construction Code Act that provided for the repeal of the preemption provision never became effective, such that at the time the legislature took it back in 2000, Section 15.1 was still in effect and did not need to be revived and remains the law of the Commonwealth. The following chart depicts the history of the legislature's action:

YEAR PASSED	LAW	WHAT IT DID	WENT INTO EFFECT
1988	Clean Indoor Air Act	Regulated smoking in public places and §15.1 "preempted" county regulation	1988
1999	Construction Code Act	Provided for uniform construction standards	2004
		Repealed §15.1 preemption provision Clean Indoor Air Act	Never
2000	Act/No. 2000-128	Repealed or "took back" the repeal provision of the Construction Code Act	2000

That the provision of the Pennsylvania Construction Code Act repealing the preemption provision never went into effect cannot be seriously disputed. An act of the General Assembly can have no application until the date the legislature itself authorizes. *See Farmer's Nat'l Bank & Trust Co. v. Berks County Real Estate Co.*, 333 Pa. 390, 395 A.2d 94, 96 (1939). To find otherwise would be an invitation to arbitrariness and countenance the dangers associated with retroactivity and ex post facto applications. The only conclusion that can be reasonably drawn from the legislative record is that the preemption provision was never effectively repealed and therefore bars Erie County from adopting its own approach to the regulation of smoking in public places.

III. Conclusion

Public debate about the wisdom of the Smoking Ordinance provided the community with the opportunity for thoughtful and sometimes passionate consideration of an important public policy issue. From the standpoint of judicial review, however, the case presented no more than a legal issue, albeit an important one, for resolution. While there may be disagreement about whether adopting the Smoking Ordinance was a wise legislative

decision, there can be no disagreement that ultimately its adoption must comply with the rule of law. Erie County's right to adopt the Smoking Ordinance pursuant to its general grant of police power has been preempted by the General Assembly's adoption of the Clean Indoor Air Act. Whether one agrees with the legislature's decision in that regard is secondary to the obligation of municipalities and citizens alike to pursue matters of public policy only as the rule of law provide.

Having resolved the statutory preemption question as set forth above, it is not necessary to resolve the issues of field preemption and ultra vires as raised in the Plaintiffs' cause of action.

ORDER

AND NOW, to-wit, this 2 day of March, 2007, upon consideration of Plaintiffs' Motion for Injunctive Relief, and hearing thereon, and for the reasons set forth in this Court's Opinion, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** Plaintiffs' Motion for Injunctive Relief is **GRANTED.** It is further **ORDERED** that Erie County is hereby permanently enjoined from enforcing the Erie County Ordinance No. 178, 2006 (known as the Erie County Smokefree Air Act of 2006).

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

INVEST ERIE, Plaintiff

v,

CITY OF ERIE, Defendant

v.

COMMONWEALTH REALTY XI, LLC, Intervenor

CONTRACTS / INTERPRETATION

In interpreting a contract, the court is obligated to give effect to the intent of the parties.

CONTRACT / INTERPRETATION

In interpreting a contract, the intent of the parties must be discerned from the plain meaning of the words in the contract. A court must construe as it is written, giving effect to the clear language and plain meaning of the words.

CONTRACT / INTERPRETATION

A contractual provision allowing the buyer to waive certain conditions precedent to sale of real estate was not ambiguous, and partial summary judgment would be granted subject to the resolution of other factual issues raised by the intervenor.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ACTION IN EJECTMENT NO. 12621-2006

Appearances: Eric S. Yonkin, Esq. and Norman A. Stark, Esq. for the Plaintiff, Invest Erie
Gregory A. Karle, Esq. for the Defendant, City of Erie
Robert C. LeSuer, Esq. for the Intervenor, Commonwealth Realty XI, LLC

OPINION

Bozza, John A., J.

In this civil action, the plaintiff seeks specific performance of an agreement for the sale of real estate. It is now before the Court on Plaintiff's Motion for Summary Judgment. Argument was heard on February 1, 2007. The facts that are not in dispute may be summarized as follows.

The parties entered into a Real Estate Purchase Agreement (Option Agreement) ("Agreement") on May 12, 2004, as more fully set forth as Exhibit "A" of the Plaintiff's Motion for Summary Judgment. The Agreement provided for the sale of certain property identified as "residue of Out Lot 251" by the City of Erie to Invest Erie for the sum of $119,000 but included several conditions that had to be met before the purchaser was obligated to close. These included:

a. securing of proper zoning, variance subdivision and/or special use permits;

b. availability of all necessary utilities;

c. obtaining of certain licenses and permits;

d. the suitability of the property for purchaser's contemplated use at costs acceptable to the purchaser;

e. good marketable and insurable title for purchaser's contemplated use; and

f. the securing of permanent and interim financing upon terms acceptable to the purchaser.

For each of these items, the Agreement specifically recited that it is "...a condition precedent to the Purchaser's obligation to close". The Agreement contained no such language regarding the City of Erie's obligation.

Although the Agreement specified an initial closing date of "on or before November 30, 2004", it further provided that:

> "In the event all conditions precedent to Purchaser's obligation to close are not satisfied (or waived by Purchaser) by December 30, 2004 or such later date as Purchaser shall determine, this Agreement shall be terminated."

The conditions were not met nor did the purchaser waive them by December 30, 2004. However, pursuant to paragraph 14, the parties amended the Agreement on December 29, 2004 extending the "Option Period" until June 30, 2005, unless it was further extended by the parties in writing. On May 30, 2005, the parties executed a further amendment extending the "Option Period" until June 30, 2006, unless it was further extended by the parties in writing. On the occasion of both written amendments, the parties kept all other provisions of the original Agreement unchanged. The effect of both amendments was to modify both the closing date and the purchaser's unilateral right to establish a date by which the conditions precedent had to be satisfied or waived.

According to the terms of the original Agreement, as extended, the purchaser had the sole right to waive any and all of the conditions precedent to closing:

> "Waiver of Conditions Precedent. Both parties shall, after the execution of this Agreement, at all times diligently proceed with the fulfillment of their respective conditions precedent to closing. The Seller shall cooperate fully with the Purchaser and Purchaser shall cooperate fully with Seller in this regard. The Purchaser shall have the unilateral right to waiver any or all of the conditions precedent to closing, or to extend the date by which such conditions must be satisfied."

On June 26, 2006, Invest Erie notified the City of Erie that it waived any and all of the conditions precedent to closing. At that point Invest Erie

was obligated to close on the property by June 30, 2006 and Invest Erie advised the City of Erie that it was ready to proceed. The City of Erie declined to consummate the sale of the property.

In response to Plaintiff's Motion for Summary Judgment, the City of Erie asserts that the provision that allows the purchaser to waive the conditions precedent is ambiguous and therefore parol evidence should be admissible to ascertain the intent of the parties. The Court finds this argument to be without merit. In interpreting a contract, the Court is obligated to give effect to the intent of the parties. *Miller v. Ginsberg*, 2005 PA Super 136, 874 A.2d 93 (2005). The law requires that the intent of the parties must be discerned from the plain meaning of the words in the contract. And as the appellate courts of this Commonwealth have repeatedly noted, "We observe the well-settled rule that when interpreting a contract, a court must construe it as it is written, giving effect to the clear language and plain meaning of the words". *Solomon v. United States Healthcare Sys. of Pa., Inc.*, 2002 PA Super 110, 797 A.2d 346, 349 (2002). The plain meaning of the word "waive" is beyond reasonable debate. Moreover, the City of Erie's position that there is an internal inconsistency in paragraph 4 is the product of a strained and unreasonable interpretation. There is nothing inconsistent nor, for that matter ambiguous, about parties to a contract agreeing to proceed to execute their responsibilities diligently while at the same time giving one party superior rights.

The terms of the Agreement indicate that Invest Erie was given an option to buy the Parade Street property on very favorable terms with regard to the conditions of performance and the timing of the closing. The fact that the City of Erie allowed Invest Erie to have the benefit of waiving the conditions of their purchase while failing to specify the condition it believed to be most essential to protect its interest, does not make the word "waive" ambiguous. Where the contract terms are clear and unambiguous, there is no need to consider other evidence to interpret those provisions. *Id.* While the City of Erie may be correct in its assertion that it did "...not make sense" for the City of Erie to have entered into an agreement like this, the absence of "good sense" does not make an agreement ambiguous.

For the reasons set forth above, the Court shall enter an order granting partial summary judgment. It is further noted that the intervenor's Motion for Summary Judgment was denied on the basis that factual issues remained to be resolved with regard to affirmative defenses to Invest Erie's request for specific performance and a hearing will be scheduled accordingly.

ORDER

AND NOW, this 16 day of February, 2007, upon consideration of Plaintiff's Motion for Summary Judgment and argument thereon, and for the reasons set forth in this Court's Opinion, it is hereby **ORDERED**, **ADJUDGED and DECREED** that partial summary judgment is **GRANTED** to the extent that the Court finds that Invest Erie waived the conditions precedent and exercised its option to close in a timely manner.

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

IRA JOHN DUNN, his successors and assigns, THOMAS A. CALICCHIO, his successors and assigns, and McKEAN REALTY HOLDING, L.L.C., a Pennsylvania Limited Liability Company, its successors and assigns, Plaintiffs

v.

JAMES W. KEIM, JR., individually And as trustee of the JAMES W. KEIM, JR., Living Trust and PATRICIA KEIM, his wife, Defendants

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary judgment may be granted only in instances in which there are no genuine issues of material fact and the moving party is entitled to relief as a matter of law. In determining whether to grant summary judgment, the record must be reviewed in a light most favorable to the non-moving party. All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Jones v. SEPTA*, 565 Pa. 211, 772 A.2d 435 (2001).

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

It has likewise long been the law that a non-moving party who bears the burden of proof on an issue raised by that party may not merely rest on the pleadings in order to defeat a summary judgment motion. See *Murphy v. Duquesne University of the Holy Ghost*, 565 Pa. 571, 777 A.2d 418 (2001).

CIVIL PROCEDURE /MOTION FOR SUMMARY JUDGMENT

Importantly, a non-moving party's failure to adduce evidence on an issue for which the party bears the burden of proof entitled the moving party to judgment as a matter of law. *Young v. Pennsylvania Department of Transportation*, 560 Pa. 373, 744 A.2d 1277 (2000).

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

In the case *sub judice*, there were no genuine issues of any material fact relating to any claim for which the plaintiffs have a burden of proof. Specifically there was no dispute regarding the boundary lines between the parties or the fact that the defendants' wooden deck, concrete pier and concrete jetty encroach upon the plaintiffs' property. Accordingly plaintiffs met their burden of proof for Partial Summary Judgment seeking ejectment and immediate possession.

REAL ESTATE / ADVERSE POSSESSION

To establish adverse possession a party needs to present clear evidence that possession of the property has been actual, continuous, exclusive, visible, notorious, distinct and hostile for a period of twenty-one years or greater. *Flannery v. Stump*, 2001 Pa. Super. 307, 786 A.2d 255 (2001). All of these factors have to coexist continually for a period of twenty-one years or greater.

REAL ESTATE AND ADVERSE POSSESSION

Where a party seeks to tack onto a predecessor in title to assert a claim

for adverse possession, the disputed property must be referenced and included in the deed between the parties. *Baylor v. Soska*, 540 Pa. 435, 441 (Pa. 1995). In the case *sub judice* the defendants could not establish this requirement and their claim for adverse possession fails.

CIVIL PROCEDURE / APPEAL

A party cannot argue on appeal a matter that was not raised in the trial court. Pa. R.A.P. 302(a).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 60011- 2002

Appearances: James D. McDonald, Esq. and
Daniel J. Pastore, Esq. for the Plaintiffs
Craig A. Markham, Esq. for the Defendants

OPINION

Cunningham, William R., J.

This case involves an unfortunate dispute between beachfront neighbors. There are three encroachments by the Defendants on to the Plaintiffs' property. The Defendants concede the encroachments exist but counter they have acquired the property encroached upon by adverse possession. However, the Defendants have failed to adduce any evidence in support of this claim. In fact, the evidence of record defeats any claim of adverse possession.

Partial Summary Judgment was entered in favor of the Plaintiffs and the Defendants have appealed. This Opinion will address the issues raised in the Defendants Concise Statement of Matters Complained of on Appeal.

FACTUAL HISTORY

The Defendants purchased a parcel of property from the Executor of the Estate of Douglas Campbell by deed dated July 27, 1993 (hereinafter the Keim parcel). Situated on the northeast corner of the Hartt Estates Subdivision, the Keim parcel is a beachfront lot to Lake Erie bearing Erie County Tax Index Number (33) 4-1-109.

The Plaintiffs own property which borders the Keim parcel to the east. By deed dated November 10, 1999, Plaintiffs purchased from the Lake Erie Bible Conference a parcel of approximately 8.97 acres (hereinafter the Calicchio parcel). The western boundary of the Calicchio parcel is contiguous with the eastern boundary of the Keim parcel for a distance of 45 feet. The Calicchio parcel also runs to the shores of Lake Erie.

On the Keim parcel is a two story house with a wooden deck and a concrete patio. By survey dated March 12, 2002 by Henry T. Welka and Associates, it was determined the wooden deck from the Keim parcel extends 13 feet over the property line on to the Calicchio parcel. Likewise, the concrete patio from the Keim parcel extends 19 feet over the

property line with the Plaintiffs. Thirdly, there is a concrete pier built by the Defendants predecessor in title, Douglas and Mary Campbell, which is entirely upon the Calicchio parcel and possibly on to the property of the Commonwealth of Pennsylvania. Thus there are three encroachments at issue, respectively referred to as the wooden deck, concrete patio and concrete pier.

Subsequent to the Plaintiffs closing, this legal action was initiated seeking inter alia, possession of the disputed areas and ejectment of the Defendants. On June 9, 2006 the Plaintiffs filed a Motion for Partial Summary Judgment requesting exclusive possession of all areas of encroachment and the removal of the encroachments. The Defendants filed a response thereto on July 12, 2006.

Because there was no factual dispute regarding the respective boundary lines between the parties or the fact the Defendants' encroachments are on the property of the Plaintiffs and the Defendants have failed to adduce any basis for a claim of adverse possession, an Order was entered on November 14, 2006 granting the Plaintiffs Motion for Partial Summary Judgment. The Defendants were given until June 1, 2007 to remove the encroachments.

On December 13, 2007 the Defendants filed a Notice of Appeal. On December 29, 2006, the Defendants filed a Concise Statement of Matters Complained of on Appeal. This Opinion is in response thereto.

LEGAL STANDARD

Summary judgment may be granted only in instances in which there are no genuine issues of material fact and the moving party is entitled to relief as a matter of law. In determining whether to grant summary judgment, the record must be reviewed in a light most favorable to the non-moving party. All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Jones v. SEPTA*, 565 Pa. 211, 772 A.2d 435 (2001).

It has likewise long been the law that a non-moving party who bears the burden of proof on an issue raised by that party may not merely rest on the pleadings in order to defeat a summary judgment motion. See *Murphy v. Duquesne University of the Holy Ghost*, 565 Pa. 571, 777 A.2d 418 (2001).

Importantly, a non-moving party's failure to adduce evidence on an issue for which the party bears the burden of proof entitles the moving party to judgment as a matter of law. *Young v. Pennsylvania Department of Transportation*, 560 Pa. 373, 744 A.2d 1277 (2000).

In the case *sub judice*, there are no genuine issues of any material fact relating to any claim for which the Plaintiffs have a burden of proof. Specifically, there is no dispute regarding the boundary lines between the parties or the fact the Defendants' wooden deck, concrete pier and concrete jetty encroach upon the Plaintiffs' property. Accordingly, Plaintiffs have

met their burden of proof for Partial Summary Judgment seeking ejectment and immediate possession.

The Defendants have not adduced sufficient evidence to establish a claim of adverse possession or even to create a genuine issue of material fact. Since the Defendants have not moved forward on a issue for which they bear the burden of proof, the Plaintiffs are entitled to Partial Summary Judgment as a matter of law.

WHETHER THE DEFENDANTS CAN ESTABLISH ADVERSE POSSESSION AS A MATTER OF LAW

In claiming adverse possession, it is the Defendants burden of presenting "clear evidence" that possession of the property has been actual, continuous, exclusive, visible, notorious, distinct and hostile for a period of twenty-one years or greater. See *Flannery v. Stump*, 2001 Pa. Super. 307, 786 A.2d 255 (2001). All of these factors have to co-exist continually for a period of twenty-one years or greater.

The Defendants have not owned the property for twenty-one years. Hence, for the Defendants to establish a claim of adverse possession, the Defendants must "tack" on to the ownership of their predecessors in title, Douglas and Mary Campbell.

The Campbells acquired title to these premises by deed dated November 10, 1970 from a Virginia and Richard Bannister. See Exhibit C, Plaintiffs Appendix. The Campbells held the property for nearly twenty-three years before conveying it to the Defendants in 1993. The Defendants owned the property for approximately ten years before asserting their claim of adverse possession herein.

If in fact the Campbells intended to claim ownership by adverse possession the areas now claimed by the Defendants, the Campbells needed to include these areas in the deed conveyed to the Defendants. There is no factual dispute that the Campbells failed to do so. To the contrary, the record reflects the Campbells conveyed to the Defendants the exact same property description as conveyed from the Bannisters to the Campbells.

The Pennsylvania Supreme Court has held that when a party seeks to tack on to a predecessor in title to assert a claim of adverse possession, the disputed property must be referenced and included in the deed between the parties. In the words of the Pennsylvania Supreme Court:

> "Accordingly, we hold that the only method by which an adverse possessor may convey the title asserted by adverse possession is to describe in the instrument of conveyance by means minimally acceptable for conveyancing of realty that which is intended to be conveyed. In this case, the predecessor in title did not meet this requirements so far as regards to disputed tack."

Baylor v. Soska, 540 Pa. 435, 441 (Pa. 1995).

In explaining its ruling, the Pennsylvania Supreme Court stated:

> "If the adverse possessors claim is to be passed on to a successor in title, therefore, there must be some objective indicia of record by which it can be discerned with some degree of certainty that a claim of title by adverse possession is being made and that the duration of this claim has been passed on to a successor in title."

Baylor, 540 Pa. at 440.

As noted, the Campbells owned the property for a sufficient amount of time to independently claim adverse possession for all three encroachments prior to conveying the property to the Defendants. Because the Campbells did not include within their deed to the Defendants the property now claimed by the Defendants by adverse possession, there is no privity of estate between the Defendants and the Campbells. As a result, the Defendants cannot tack on to the Campbells time of ownership.

In an attempt to avoid this result, the Defendants contend that *Baylor*, *supra*. is no longer controlling law by virtue of the Supreme Court's subsequent decision in *Zeglin v. Gahagen*, 571 Pa. 321, 812 A.2d 558 (2002). The Defendants argument is unpersuasive.

Zeglin is factually and legally distinguishable from the case at bar. *Zeglin* dealt with a narrow category of cases in which the parties have acquiesced in a boundary. Specifically, the Supreme Court held in *Zeglin* that a mutually recognized boundary manifested by a row of bushes, a pole and a fence could be determined to be the boundary line regardless of whether it was described or conveyed within a deed.

The Supreme Court specifically limited its holding in *Zeglin* as follows:

> "We find the majority view (requiring only privity of possession) better suited to claims brought under a theory of acquiescence in a boundary. We hold, therefore, that tacking is permitted in such context upon sufficient and credible proof of delivery of possession of land not within (but contiguous to) property described by deed of conveyance, which was previously claimed and occupied by the grantor and is taken by the grantee as successor in such interest."

Zeglin 812 A.2d at 566.

Zeglin applies only to cases of an acquiescence in a boundary. In the case at bar, the dispute is not about where a boundary line lies. Nor have the Defendants ever framed their claim as an acquiescence in a boundary. Accordingly, the Defendant's reliance on *Zeglin* is misplaced.

Because there is no privity of estate between the Defendants and the Campbells, the Defendants cannot tack on to the Campbells time of ownership. As a matter of law, the Defendants cannot prove all of the elements of adverse possession existed continually for at least twenty-one years.

WHETHER THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH THE DEFENDANTS CLAIM OF ADVERSE

POSSESSION OR AT LEAST EVIDENCE SUFFICIENT TO CREATE A GENUINE DISPUTE OF MATERIAL FACT

Assuming arguendo the Defendants can tack on to the Campbells, the Defendants contend there was sufficient evidence to establish their ownership of the disputed property by adverse possession, or at least evidence sufficient to create a genuine issue of material fact thereby defeating Plaintiffs request for Partial Summary Judgment.

The Defendants have had ample time to investigate their claim. This case was filed on May 23, 2002. The Defendants filed an Answer, New Matter and Counterclaim on June 30, 2003. The Counterclaim included a claim for adverse possession and/or a prescriptive easement. Hence, the Defendants have been on notice of the Plaintiffs claim since June 7, 2002, and therefore had over four years to engage in discovery to support their claim.

The Defendants initial response to the Plaintiffs' Motion for Partial Summary Judgment was a request for more time to investigate. By Order dated August 11, 2006, the Defendants were given an additional sixty days to engage in discovery and to file any documentary evidence. Thus, the Defendants had three different windows of time to discover and/or file evidence in support of their claim for adverse possession. First, the Defendants had from August 26, 2002, their date of acceptance of the service of the Plaintiffs Complaint until June 9, 2006, when the Plaintiffs filed a Motion for Partial Summary Judgment and a supporting Brief.

The second opportunity was in response to the Plaintiffs Motion. Under Pennsylvania Rule of Civil Procedure 1035.3, the Defendants were required within thirty days to file a response to the Motion and adduce or cite to evidence of record establishing a claim upon which the Defendant bore the burden of proof. On July 12, 2006, the Defendants filed a written response and Brief in Opposition to the Plaintiffs Motion.

The Defendants were given a third opportunity by virtue of the Order of August 11, 2006 granting them an additional sixty days to "place into the record any admissible evidence regarding adverse possession." The only document filed by the Defendants was an Affidavit of Douglas Bannister, son of Virginia and Richard Bannister.

The Defendants have yet to point to what evidence they are relying upon. To the Defendants knowledge as far back as their date of purchase of the property, Douglas and Mary Campbell are deceased. Hence, there are evidentiary constraints on the Defendants ability to prove the intent of the Campbells. The Defendants have not proffered any evidence let alone any "clear evidence" to establish that Douglas and Mary Campbell intended to claim all of the disputed properties by adverse possession and held it in actual, continuous, exclusive, visible, notorious, distinct and hostile fashion.

In their response to the Motion for Partial Summary Judgment, the Defendants attached an application filed in 1980 by the Campbells for a

permit from the Pennsylvania Department of Environmental Resources for the concrete pier on the Plaintiffs property. See Exhibit F of Defendants' Appendix. This application was dated December 13, 1980 and it sought permission to "maintain the 70 foot groin lying northeast of their property line"[1]. A permit was ultimately issued allowing the Campbells to maintain the groin.

The groin is referenced in this litigation as the concrete pier. There is nothing in the application or in the documents collectively marked as Defendants Exhibit F which established the Campbells intent to claim the concrete pier by adverse possession. Viewing the 1980 application for a permit in a light most favorable to the Defendants, it shows the intent of the Campbells to maintain the concrete pier but not necessarily to own it. In fact, the application concedes the groin lies "northeast of their property line" meaning outside of their property line.

Notably, in four subsequent years, 1989 through 1992, the Campbells paid to the Plaintiffs predecessor in title, Lake Erie Bible Conference, the sum of $25.00 per year as a "user fee" for the concrete pier. Likewise, the Defendants paid to the Lake Erie Bible Conference the sum of $25.00 in 1993 for the use of the concrete pier. See Exhibit J, Plaintiffs Appendix. The fact the Campbells and the Defendants paid Lake Erie Bible Conference the sum of $25.00 in five different years as a "user fee" for the concrete pier is inconsistent with any argument the Campbells or the Defendants intended to possess the concrete pier by adverse possession.

Also, the 1980 permit application does not address the Defendants claims regarding the wooden deck and the concrete patio.

The only other evidence submitted by the Defendants is the Affidavit from Douglas Bannister averring that in 1966, he helped build a concrete pad and a set of steps. Douglas Bannister was never an owner of this property. Bannister's Affidavit does not speak to the intent of the record owners, his parents, nor does it establish the intent of the Campbells. In sum, what Bannisters' Affidavit says is that he helped build a concrete pad in 1966. This statement does not make or further the Defendants case.

The Defendants have had over four years to engage in discovery and produce evidence in support of their claim for adverse possession. The Campbells are deceased and left no proof of their intent to claim adverse possession.

The claim of title by adverse possession is an "extraordinary doctrine" requiring "clear evidence". *Flannery v. Stump, supra,* at 258. On the state of this record, the Defendants have not established sufficient evidence to even create a genuine issue of material fact. Accordingly, it was not an

[1] It appears the groin was built in 1971 after a major storm. The purpose of the groin was to protect the northwest corner of the Defendants property from future storm damage.

error to grant Partial Summary Judgment for the Plaintiffs.

THE DEFENDANTS HAVE NOT CREATED A GENUINE DISPUTE OF A MATERIAL FACT BY THEIR REPUDIATION OF A SWORN AFFIDAVIT

Prior to the closing on the Caliccchio parcel, counsel for the Lake Erie Bible Conference approached the Defendants and advised them of the Welka survey results showing the three encroachments. On October 20, 1999, the Defendants executed an Affidavit conceding:

> "that the concrete pier, part of the cement patio, part of the wooden deck and approximately a 25 foot portion of the road on the hairpin curve and a part of the parking area encroaches upon the property presently owned by the Lake Erie Bible Conference to our east (Index Number 33-005-001-161 (per copy of survey attached).
>
> We do by these presents hereby acknowledge that these encroachments exist and that the Lake Erie Bible Conference and their assigns have been letting us use it with their permission only and our use may be terminated at will at their discretion. IN WITNESS WHEREOF, the parties hereto intending to be legally bound, hereby set their hand and seal to these presents the day and year first written above."

See Plaintiffs' Appendix, Exhibit I.

Obviously, in this Affidavit the Defendants openly admit they were encroaching on the Plaintiffs property and their use was permissive, subject to termination at the will of the Lake Erie Bible Conference and its assigns.

The Defendants subsequently filed an Affidavit in response to the Plaintiffs' Motion for Partial Summary Judgment in which the Defendants contend their statements in the October 20, 1999 Affidavit were not true. See Affidavit of James Keim, Exhibit G, Defendants' Appendix. Instead, the Defendants submit they only signed the first Affidavit with the understanding the Plaintiffs would subsequently deed to them the disputed areas. Thus, the Defendants argue there is a genuine issue of fact regarding their Affidavits and therefore summary judgment should not be granted.

This argument by the Defendants is not dispositive for a number of reasons. First, the Defendants have clearly played fast and loose with the truth. Both Affidavits cannot be true and the Defendants are not entitled to the benefit of their disingenuousness.

Secondly, the Affidavit of October 20, 1999 was only proffered by the Plaintiffs for one purpose -- to rebut the claim of adverse possession by the Defendants. While the Defendants subsequent Affidavit recanting the first Affidavit may create an issue of fact regarding their intent on October 20, 1999, these facts do nothing to help the Defendants sustain their burden of proof regarding adverse possession.

Stated differently, the dispute over these Affidavits is not affirmative evidence upon which the Defendants can rely in asserting their claim of adverse possession. At best, giving the Defendants the benefit of their argument on this issue, it means the Defendants have succeeded in rebutting the Plaintiffs argument that the October 20, 1999 Affidavit established the Defendants use was permissive. However, allowing the Defendants to prevail on this point does not create a record for the Defendants in meeting their burden of proof to establish the use was hostile. Accepting as true the Defendants second Affidavit, it means the parties had an agreement to convey the disputed areas. Such an agreement is not evidence the Defendants use of the property was "hostile".

WHETHER THERE WAS ERROR "BECAUSE THE EVIDENCE OF RECORD WAS UNDISPUTED THAT CERTAIN OF THE ALLEGED ENCROACHMENTS OF PLAINTIFFS REAL PROPERTY WERE OPEN, NOTORIOUS AND HAD EXISTED WELL IN EXCESS OF TWENTY-ONE YEARS"

This excerpt from Paragraph 4 of the Concise Statement of Matters is vague. First, the Defendants have not identified to which encroachments this statement applies.

It is not enough to prevail on a claim of adverse possession to allege that "certain" encroachments have been held in an open and notorious fashion for more than twenty-one years. What this may simply mean is that some of the elements for adverse possession exist. However, the Defendants have the burden of proving all of the elements existed continuously for at least 21 years.

Given the vagueness of this allegation, it is waived for appellate review. *In re Estate of Daubert*, 757 A.2d 962 (Pa. Super. 2000). It is also without a basis in the record.

WHETHER THERE WAS ERROR IN THE ORDER OF NOVEMBER 14, 2006 REQUIRING THE DEFENDANTS TO REMOVE "ALL STRUCTURES CREATED OR ERECTED BY DEFENDANTS OR THEIR PREDECESSORS WHICH ARE LOCATED ON PLAINTIFFS PROPERTY"

The Defendants allege error in compelling them to remove the concrete pier which extends into the waters of Lake Erie. According to the Defendants, they cannot be required to remove property which the Commonwealth of Pennsylvania owns and not the Plaintiffs.

As a threshold matter, it has long been the law in Pennsylvania that "title to land bordering on a navigable (waterway) extends to (the) low water mark", *Shaffer v. Baylor's Lake Association*, 141 A.2d 583, 585 (Pa. 1958). Thus, the Plaintiffs ownership rights in the concrete pier can only extend to the low water mark of Lake Erie.

The Defendants are correct that they should not be forced to remove any of the concrete pier below the low water mark of Lake Erie. What the

Defendants overlook is that nothing in the Order of November 14, 2006 compels them to remove any portion of the pier beyond the low water mark. Instead, what the Defendants were ordered to do was to remove the concrete pier from the Plaintiffs property. If the concrete pier goes to the low water mark, the Order of November 14, 2006 only requires the Defendants to remove the pier up to the low water mark.

By law, the low water mark for Lake Erie is 568.6 feet International Great Lakes Datum. See 25 Pa. Code §105.3(b). Hence, the Order of November 14, 2006 requires the Defendants to remove the concrete pier from the lands of the Plaintiffs, meaning all portions of the pier up to 568.6 feet International Great Lakes Datum. There is no error because this Order does not compel the Defendants to remove any of the pier beyond the low water mark.

Since the low water mark is a known point as a matter of law, there is not a factual dispute to be further litigated on this issue.

WHETHER THE DEFENDANTS HAVE PRESERVED ANY RIGHT TO ASSERT A CLAIM ON BEHALF OF THE MILLCREEK TOWNSHIP SEWER AUTHORITY

In the last phrase of the Concise Statement of Matters Complained of on Appeal, the Defendants allege error for failing "to take into account that some of the disputed structures are situated within the Millcreek Township Sewer Authority's easement rights, as shown on the maps submitted by Plaintiffs in support of their Summary Judgment Motion". See Paragraph 5 of the Concise Statement of Matters Complained of on Appeal.

The above reference is the first time the Defendants have ever made this argument. While the municipal easement rights may be referenced on a tax map, at no time have the Defendants ever argued or pointed to these rights in responding to the Plaintiffs Motion. The Defendants cannot argue on appeal a matter that was not raised in the trial court. Hence the Defendants have waived this issue. Pa. R.A.P. 302(a). See also *Buck v. Beard*, 879 A.2d 157, 161 (Pa. 2005)("Our court has made clear that an appellate court will not reverse a judgment on a basis that was not raised and preserved by the parties").

On the merits, it is unclear how the Defendants can argue the existence of the municipal easement rights somehow grant them adverse possession of the three encroachments. The Defendants have failed to establish any relevance between the municipal easement rights and their claim of adverse possession. Also, the Defendants lack standing to assert any claim on behalf of Millcreek Township Sewer Authority, who is not a party to this litigation. Therefore, this assertion is not a basis for any appellate relief.

CONCLUSION

The Defendants have not owned the disputed property for twenty-one years. It is uncontroverted the deed into the Defendants did not contain

the disputed areas. There is no privity of estate with the Campbells. Thus the Defendants cannot tack on to the Campbells. Therefore the Defendants cannot establish all of the elements of an adverse possession claim as a matter of law.

As a matter of the record, after four years of discovery, the Defendants have failed to adduce sufficient evidence to create a genuine issue of fact regarding their claim of adverse possession.

The repudiation of their sworn Affidavits does not entitle Defendants to argue the existence of a material issue of fact.

The Order of November, 2006 only required the Defendants to remove the concrete pier from the Plaintiffs property. As a matter of law, the Defendants are required to remove the concrete pier to the low water mark, a known point fixed by law.

The Defendants have waived any argument regarding municipal easement rights. Further, the Defendants have failed to establish any relevance of these rights to their claim of adverse possession. Also, the Defendants lack standing to assert a claim on behalf of a municipality which is not a party to this lawsuit.

Based on the foregoing analysis, this appeal should be dismissed. The Defendants have had ample time to support their claim for adverse possession and have failed to do so.

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

COMMONWEALTH OF PENNSYLVANIA

v.

OSCAR VARGAS

CRIMINAL PROCEDURE / PRETRIAL PROCEDURE / EXAMINATION OF VICTIM

In a case of first impression, the court concludes that the burden is on a defendant to establish a compelling reason to justify an independent, invasive physical examination of a child who is allegedly the victim of a sexual assault. The determination of whether a compelling reason exists requires a balance of the defendant's interest in due process and the victim's interest in maintaining his or her physical integrity. Factors to be considered include the likelihood of significant probative findings, intimidation of the victim, the nature of the evidence at issue, availability of less intrusive means to acquire evidence, emotional or physical impact on the victim, qualifications of the physician examining the victim, and other factors depending upon the circumstances of each case.

CRIMINAL PROCEDURE / PRETRIAL PROCEDURE / EXAMINATION OF VICTIM

The burden is upon the defendant to make a preliminary showing that a physical examination will yield evidence of significant probative value. A general averment of necessity is insufficient. The defendant must carry the heavy burden to demonstrate scientific justification for invasive physical examinations, ordinarily through expert opinion or an expert report. Further, the evidence must establish that the examination is necessary to respond to testimony to be offered by the Commonwealth.

CRIMINAL PROCEDURE / PRETRIAL PROCEDURE / EXAMINATION OF VICTIM

Where the proffered testimony of the Commonwealth's medical expert is that upon her examination of the victim seven years subsequent to the alleged incidents, scar tissue consistent with an allegation of abuse was observed, where the alleged victim is the only witness and therefore the testimony is of great corroborative value, there are no photographs of the examination and no alternative means of obtaining the information, and there is no indication that a brief examination for the limited purpose of identifying scar tissue would cause harm to the victim, the court finds that the defendant has established a compelling reason for examination and that the request is made in good faith. Cross examination is inadequate where the issue is the correctness of the Commonwealth's witnesses' observations.

CRIMINAL PROCEDURE / PRETRIAL PROCEDURE / EXAMINATION OF VICTIM

The need for a physical examination is eliminated if the Commonwealth chooses not to introduce expert testimony.

CRIMINAL PROCEDURE / PRETRIAL PROCEDURE / EXAMINATION OF VICTIM

The defendant's request to quash the results of the examination by the Commonwealth's expert on the basis of a lapse of time between the alleged acts of abuse and the examination is refused. The issue is a scientific matter upon which the Commonwealth will have the burden to present sufficient testimony at trial to establish the foundation for admissibility of the results of the expert's examination.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY PENNSYLVANIA CRIMINAL DIVISION NO. 2558 of 2006

Appearances: Raquel Taylor, Esquire for the Commonwealth
Keith Clelland, Esquire for the Defendant

OPINION

Bozza, John A, J.

The defendant is charged by Criminal Information filed on October 19, 2006 with two counts of Involuntary Deviate Sexual Intercourse, one count of Rape, one count of Indecent Assault, one count of Endangering the Welfare of a Child and one count of Corruption of Minors. Each count is supported by factual averments relating to incidents that occurred on or about 1998 through 1999, when the alleged victim, M. L., was age five or six. A preliminary hearing was conducted on September 18, 2006 before the Honorable Suzanne Mack at which time M. L., who was then 13 years old, testified that on more than one occasion the defendant put his "private part" in her "behind".

The defendant filed an Omnibus Pre-Trial Motion for Relief on November 21, 2006 and a hearing was held on January 4, 2007. Included in the Omnibus Pre-Trial Motion for Relief was a request to compel the Commonwealth to make M. L. available for a physical examination to be conducted by an expert retained by the defendant. On January 12, 2007, an order was issued disposing of the matters raised in the Omnibus Pre-Trial Motion for Relief, but with regard to the request for a medical examination, the Court noted that it would require additional consideration following review of the medical records of the defendant's expert physician ". . .along the lines set forth on the record at the time of the hearing". At the conclusion of the hearing, the Court had advised counsel that, in order for the Court to grant a request for a physical examination, it would be necessary for the defendant to make a preliminary showing of its necessity in light of circumstances of the case.

On February 1, 2007, the defendant filed a Motion to Quash Commonwealth Medical Report, or, Alternatively, Motion to Compel Medical Examination. A hearing on defendant's Motion was held on

March 15, 2007, at which time the defendant introduced a copy of the expert report of Stephen R. Guertin, M.D., Director of Pediatric Intensive Care Unit and Medical Director of Sparrow Regional Children's Center, and a copy of Dr. Guertin's Curriculum Vitae. The Commonwealth placed in the record the results of Dr. Justine Marut Schober's examination of the child as related in a letter to the Office of Children and Youth and her medical records. Doctor Schober is a board certified pediatric urologist who conducts child abuse examinations at the request of the Office of Children and Youth and frequently testifies as an expert on physical manifestations of child abuse in the Court of Common Pleas of Erie County.

At the time of the hearing, the Commonwealth indicated that Dr. Schober would testify that she conducted an examination of M. L., at the request of the Office of Children and Youth, and that the child reported her stepfather put his "private" inside her "behind" when she was five years old. She would testify that the examination revealed scarring of both the "posterior fourchette" and the anus. It would be her opinion that these findings would be consistent with anal penetration.

Doctor Guertin, who is an associate professor of pediatrics at Michigan State University College of Medicine and a member of the Child Abuse Team at Sparrow Hospital, teaches medical students about child abuse diagnosis and treatment. Annually, he sees 250 children who are suspected victims of child abuse. He has testified in at least ten states on many occasions as an expert in child abuse. In his letter report, Dr. Guertin related his opinion that it is not uncommon for a normal finding relating to the anus and posterior fourchette to be mistaken for scars. He further stated "Given the fact that no photographs were taken in this particular case, an independent judgment of the findings cannot be made without an independent examination of the child." Further, he maintained that, if what Dr. Schober observed was truly a scar, then it should still be present.

The Commonwealth is opposed to the defendant's request, arguing that there is no compelling reason to require an independent medical examination. The Commonwealth argues the results of a physical examination "would be at best equivocal in regard to the defendant's innocence" because the Commonwealth need only prove the slightest degree of penetration and because M. L.'s uncorroborated testimony is sufficient without the need for any evidence of physical injury. Moreover, the Commonwealth notes that such an examination raises serious concerns about emotional trauma, embarrassment and intimidation for the child victim.

From a legal perspective, the Commonwealth relies on *Commonwealth v. Davis*, 437 Pa. Super 471, 650 A.2d 452 (1994). In *Davis*, the defendant asserted that his attorney was ineffective for the failure to request that the victim be compelled to submit to a physical examination. The court

rejected the defendant's position observing that the defendant was not able to point to any legal authority to support such a request. Moreover, the court reasoned that, because five years had elapsed between the occurrence of the alleged abuse and the disclosure, it was likely that results of a physical examination would have only minimal probative value. The Commonwealth's evidence at trial had only included testimony of the victim and the defendant maintained that a physical examination would allow him to demonstrate that there was no physical evidence that the anus was penetrated. In rejecting the defendant's position, the court noted that a similar ineffectiveness theory had been rejected by the Superior Court in *Commonwealth v. Perry,* 403 Pa. Super 212, 588 A.2d 917 (1991). In *Perry*, the defendant argued that compelling a physical examination was necessary to find support for his position that, because of the relative sizes of the victim's and defendant's sex organs, it would be likely that there would be physical evidence of penetration. The court rejected the defendant's claim because the rape statute only required evidence of slight penetration such that the size of the defendant's and the victim's sex organs was irrelevant.

The Commonwealth has also directed the Court's attention to the decision of the Supreme Court of Kansas in *State v. McIntosh,* 274 Kan. 939, 58 P.3d 716 (2002). In *McIntosh*, the defendant was convicted of rape, aggravated indecent liberties and aggravated criminal sodomy and the trial court had denied his request to order an independent physical examination of the victim. The defendant argued that, because the government's physician found evidence that the child victim had been abused but took no photographs, an examination was necessary to preserve his right to due process of law. *See State v. McIntosh,* 30 Kan. App. 2d 504, 43 P.3d 837 (Kansas App. 2002).[1] The exact nature of the physical evidence to be introduced by the government was not apparent. The Kansas Court of Appeals had affirmed the trial judge's decision on the basis that the applicable criminal discovery statute did not authorize the court to grant such a request and that denying it was not otherwise unfair. *Id.* at 509-51. The Supreme Court of Kansas, although rejecting the intermediate appellate court's rationale, affirmed the trial court's decision because the defendant had not shown a compelling reason to support its request. In reaching its conclusion, the court took note of the decisions of a number of other state courts and identified a number of alternative approaches used to address the issue. Ultimately, the Kansas Supreme Court adopted a factor-based balancing test requiring a defendant to show a compelling reason for the request. *McIntosh,* 274 Kan. at 951-955. Moreover, the court drawing on decisions from other jurisdictions and in particular the Rhode Island Supreme Court in *State*

[1] See the opinion of the Court of Appeals for a more complete factual recitation.

v. Ramos, 553 A.2d 1059 (R.I. 1989), identified a number of factors to consider in evaluating the compelling nature of a defendant's request for a physical examination. These included the age of the victim, the time between the alleged criminal acts and the proposed examination, the degree of intrusiveness and humiliation that may be incurred by the victim, the physical and emotional effects of the examination on the victim, the probative value of the results of an examination and present availability of the evidence to the defendant.

The defendant's position is based on the anticipated need to respond to the testimony of Dr. Schober and, more precisely, to her findings that the victim has scar tissue on certain portions of her anatomy consistent with penetration. Although not precisely delineated, it would appear that the defendant's legal position is rooted in due process concerns arising from the inability to obtain evidence essential to his defense. While it does not rest directly upon a violation of the provisions of Pa. R.Crim.P. 573 controlling discovery in criminal cases, it implicates the due process concerns underlying disclosure requirements long ago established in *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Specifically, the defendant having received Dr. Schober's expert report pursuant to Rule 573(B)(I)e, wants to have the results of the Commonwealth's medical expert scrutinized by his own expert. To accomplish that, Mr. Vargas maintains it is necessary to have his expert view the anatomical areas of the victim where scaring is alleged to have occurred.

The conceptual approach adopted by the Kansas Supreme Court provides a useful framework for analyzing the defendant's request. Although Pennsylvania has not squarely addressed the issue, a close reading of *Davis* and *Perry* supports the conclusion that, when requesting a form of invasive physical examination, the burden is on the defendant to establish a compelling reason and that the balancing of respective interests tips in his favor. While there is no Pennsylvania authority as to what might constitute a compelling reason, some guidance may be found in cases involving prosecutorial discovery violations. *See Commonwealth v. Burke,* 566 Pa. 402, 781 A.2d 1136 (2001) (trial court must determine an appropriate remedy for the Commonwealth's discovery violation by considering the "competing values weighed in the *Brady* analysis"). In such instances, the trial court must consider a number of factors to determine whether fundamental due process values have been compromised. *Id.*

In the circumstances presented in this case, several factors necessarily come into play in order to sufficiently balance the due process interest of the defendant and the victim's interest of maintaining his or her physical integrity. These include:

1. Whether there is a reasonable likelihood that an examination would yield findings of significant probative value;

2. Whether the request is made in good faith and not for the purpose of intimidating the victim;

3. The nature of the physiological or anatomical evidence at issue;

4. Whether the evidence may be available through less intrusive means;

5. Whether an examination is likely to cause significant emotional or physical harm to the victim;

6. Whether an examination is to be conducted by a physician with sufficient training and experience in sexual abuse; and

7. Other factors related to the individual circumstances of each case, including relevant lapses of time, age of the victim and relative significance of evidence in the case.

Demonstrating the reasonable likelihood that a physical examination will yield evidence of significant probative value is of particular importance and requires a preliminary showing beyond a general averment of necessity. Indeed, it is likely that it will require the presentation of medical or scientific evidence, either in the form of expert testimony or the furnishing of an expert report. Such evidence must establish that an examination is necessary to respond to the testimony to be offered by the Commonwealth's medical expert and that in the circumstances of the case, it is reasonably likely to lead to evidence of significant probative value. In the absence of a *prima facie* showing, a request to require physical examination must be viewed with great skepticism

In addition, it is necessary that a defendant demonstrate in some preliminary manner the scientific justification for an invasive physical examination. This would ordinarily require expert opinion elicited in the manner dictated by the circumstances of the case.

Turning to the facts presented here, it is apparent that the proffered testimony of Dr. Schober is an important component of the Commonwealth's anticipated case-in-chief. She will tell the jury that she examined the victim, found scar tissue in the posterior fourchette and in the anus and that the presence of scar tissue is consistent with anal penetration. It is also likely, although not explicitly addressed in her report, that Dr. Schober will testify that the scarring may have been caused by penetration that occurred seven years prior to her examination. While the Commonwealth is correct that corroboration of a sexual assault victim's testimony is not required to meet its burden of proof, physical evidence supporting the prosecution's theory may very well play a significant role in convincing the jury of the defendant's guilt. The facts of this case present such a situation. M. L. is the only witness to the events that transpired. The incidents occurred approximately seven or eight years before the abuse was disclosed. Corroboration through physical findings and medical testimony is of great significance when the credibility of the victim is predictably susceptible to challenge.

The defendant has made a preliminary showing that there is a reasonable

prospect that Dr. Schober was incorrect in her conclusion about the existence of scar tissue on the anus and the posterior fourchette and that, in the absence of photographs, a physical examination is the only way to find out. Applying the factors set forth above, the Court is convinced that the defendant has established a compelling reason for his request. It appears to be made in good faith. There is no alternative means to determine the existence of scar tissue. The presence of scar tissue will be introduced by the prosecution and the only effective way for the defendant to refute its existence is through examination. There is nothing in the record to indicate that a brief examination conducted for the limited purpose of identifying scar tissue would cause the victim inordinate emotional or physical harm. The record does not contain any evidence concerning the medical significance of the seven-year period between the time of the abuse and the time of the discovery of the scar tissue. Importantly, the examination will be carried out by a physician with special training, skill and experience in examining children alleged to have suffered sexual abuse and therefore, it is reasonably assured that the examination will be conducted in a manner that will facilitate the emotional and physical well-being of the victim.

Finally, while the facts of this case support the defendant's request, it must be emphasized that in cases such as this the burden on the defendant to demonstrate the legal necessity of an examination is a heavy one. This is not a case where the defendant is embarking on a generalized search for exculpatory evidence. Nor is he attempting to bolster some novel or unwarranted theory of defense. Rather, it is the Commonwealth who is seeking to introduce medical evidence that only its witness has had the opportunity to observe. This is quite a different situation from more common instances of medical expert testimony in criminal cases where the witness is relating the results of empirical tests on tissue or blood and little, if any, interpretation is required. Here, it is observation and subjective judgment rather than objective testing that is at the heart of the testimony of the Commonwealth's expert. In this instance, cross-examination is an inadequate vehicle to test the expert's opinion because it is not simply a question of whether she followed proper medical protocol or that she is being untruthful. The issue is whether her judgment about what she observed is correct. Of course, should the Commonwealth choose not to introduce Dr. Schober's testimony, the need for a physical examination is eliminated as the reasoning of the Superior Court in *Perry* is directly applicable. *Commonwealth v. Perry*, 403 Pa. Super. 212, 588 A.2d 917 (1991).

The defendant has also asked that the results of Dr. Schober's examination be "quashed", arguing that because of the long lapse in time between the alleged acts of abuse and the examination the probative value would be minimal. While the defendant's view may seem to the lay

observer to be reasonable, this is an issue that requires medical or related testimony. The issue is whether the scar tissue observed by Dr. Schober could have been caused by acts of penetration that occurred seven to eight years prior. This is entirely a matter of science that would be beyond the common knowledge of the average member of the community. At the time of trial, it will be the Commonwealth's burden to present testimony sufficient to establish a foundation for the admissibility of the results of Dr. Schober's examination.

ORDER

AND NOW, this 5 day of April, 2007, upon consideration of the Motion to Quash Commonwealth Medical Report, or, Alternatively, Motion to Compel Medical Examination and argument thereon, and for the reasons set forth in this Court's Opinion, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that the Motion to Quash Commonwealth Medical Report is **DENIED** and the Motion to Compel Medical Examination is **GRANTED**.

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

FRATERNAL ORDER OF POLICE LODGE NUMBER 7, Plaintiff,

v.

CITY OF ERIE; JOSEPH E. SINNOTT, in his capacity as Mayor of the City of Erie; RUBYE JENKINS HUSBAND, in her capacity as President of City Council; JAMES N. THOMPSON, in his capacity as City Council member; PATRICK CAPPABIANCA, in his capacity as City Council member; JESSICA HORAN-KUNCO, in her capacity as City Council member; CURTIS JONES, JR., in his capacity as City Council member; DAVID GONZALES, in his capacity as City Council member; and, JOSEPH SCHEMBER, in his capacity as City Council member, Defendants

CIVIL PROCEDURES / STANDING

Since all members of the union have a substantial interest in the recission of an ordinance which impacts their retirement options, the collective bargaining representative has standing to bring an action on behalf of the members seeking injunctive relief.

CIVIL PROCEDURES / PENDENCY OF PRIOR ACTIONS

Where prior actions are pending before administrative agencies with the expertise to adjudicate the fundamental issues in the case, it is sound policy for the Court of Common Pleas to defer judicial decision until the administrative proceedings are decided.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 15240 of 2006

Appearances: Eric C. Stoltenberg, Esq. and Christopher J. Cimballa, Esq. for the Plaintiff
Gregory A. Karle, Esquire for the Defendants

OPINION AND ORDER

DiSantis, Ernest J., Jr., J.

This case comes before the Court on the City of Erie's Preliminary Objections which were filed on January 9, 2007.

I. BACKGROUND OF THE CASE

The plaintiff in this case is the exclusive collective bargaining representative for the City of Erie police officers. The defendants are the City of Erie, its Mayor and members of Erie City Council (City). A collective bargaining agreement (CBA) exists between the plaintiff and the City which covers the wages, hours and other terms and conditions of employment for City of Erie police officers. The term of that agreement is January 1, 2006 through December 31, 2008.

On December 2, 2003, Erie City Council (Council) enacted Ordinance # 54-2003. On February 25, 2004, the City passed Ordinance # 18-2004 incorporating Ordinance # 54-2003. It included a retirement provision known as a partial lump sum distribution option (PLSDO). Section 147.10

of Ordinance #18-2004 provides that "every full-time police officer" will have the opportunity to take advantage of the PLSDO effective December 1, 2003. As a result twenty-seven police officers availed themselves of the PLSDO in calendar year 2004. Other officers took advantage of the program in 2005 and 2006. Due to some state and funding issues.[sic] On December 13, 2006, City Council unilaterally voted to rescind that portion of the police pension ordinance, which included the PLSDO. On or about December 20, 2006, at the second reading before City Council, the City rescinded the ordinance. Subsequently, the FOP filed a grievance under Article XV of the CBA and an unfair labor practice complaint with the Pennsylvania Labor Relations Board (PLRB).[1]

On December 18, 2006, the FOP filed a Petition For Special and Injunctive Relief seeking a preliminary injunction restraining City Council from repealing the PLSDO ordinance until a final judicial hearing. On December 20, 2006, this Court conducted a hearing and denied FOP's request. (As noted above, City Council rescinded the ordinance later that day.) On December 20th, the FOP filed a complaint in equity seeking a permanent injunction. The City filed Preliminary Objections and the FOP has filed a Response.

II. LEGAL DISCUSSION

Preliminary objections are governed by Pa. R. Civ. P. 1028. The rule provides that:

> (a) Preliminary objections may be filed by any party to any pleading and are limited to the following grounds:
>
> (1) lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a complaint;
>
> (2) failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;
>
> (3) insufficient specificity in a pleading;
>
> (4) legal insufficiency of a pleading (demurrer); and
>
> (5) lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action; and
>
> (6) pendency of a prior action or agreement for alternative dispute resolution.

[1] The City agreed to allow those officers that chose the option before the ordinance was rescinded to take advantage of it.

The City's Preliminary Objections

A. Whether the FOP Has Standing To Bring This Action

The defendants first argue that the FOP does not have standing to seek equitable relief. In order to have standing, a collective bargaining representative must allege that virtually all of its members are suffering immediate or threatened injury as a result of the challenged action. *Higher Education Assistance Agency v. State Employees' Retirement Board*, 617 A.2d 93, 95 (Pa.Cmwlth. 1992), aff'd., 636 A.2d 629 (1994). The representative may not substitute itself for specific members. Furthermore, the interest must be substantial, direct and immediate. *William Penn Parking Garage Inc. v. Pittsburgh*, 346 A.2d 269, 280 (Pa. 1975). A substantial interest is one where there is a discernable interest in the outcome of the litigation that surpasses an abstract interest of all citizens in procuring obedience to the law. *Id.* at 282.

In this case, virtually all members of the union have a substantial interest as a result of the rescission of the ordinance because of its impact upon retirement options. Therefore, this Court finds that the FOP has standing in this matter.

B. Pendency of a Prior Action or Agreement for Alternative Dispute Resolution

The City also argues that its preliminary objections should be sustained because there was a prior action or agreement for alternative dispute resolution.

As reflected above, the FOP filed a grievance under the CBA on or about December 18, 2006. That grievance remains pending. In addition, the FOP has filed an action with the PLRB alleging an unfair labor practice. That matter is also pending.

In *Council 13, American Federation of State, County and Municipal Employees, AFLCIO v. Commonwealth of Pennsylvania*, 405 A.2d 592 (Pa. Cmwlth. 1979), the Commonwealth Court adjudicated a controversy involving the union and the Commonwealth. There the union had brought a petition for review and motion for preliminary injunction to enjoin the Commonwealth from laying off certain public employees pending disposition of a grievance filed by the union on behalf of the employees and disposition of charges of unfair labor practices. *Id.* at 593. In denying the request for an injunction the Court noted:

> To enjoin the administrative action in every case of a dismissal, demotion or disciplinary action would not only contravene this policy but, by granting an injunction in a case such as this, we would be reading into the Collective Bargaining Agreement a provision requiring the maintenance of the status quo pending the resolution of the dispute. We are not prepared to impose such a burden on a party who has not contracted for it.

Id. (internal citation omitted.)

In this case, one of the fundamental issues to be decided is whether the City's action rescinding the ordinance violated the CBA. The grievance process is a necessary step in addressing this issue. See generally, *Chester Upland School District v. McLaughlin* 655 A.2d 621 (Pa. Cmwlth)[2]. In addition, the PLRB is not only empowered to adjudicate an unfair labor practice claim, it has the expertise required to do so. See *Pennsylvania Labor Relations Board v. Butz*, 192 A.2d 707, 716 (Pa. 1963). Therefore, it is sound policy and administrative practice to defer a judicial decision until the grievance procedure is completed and the PLRB has had the opportunity to decide the issue before it. To issue a permanent injunction at this point would, in effect, nullify the grievance procedure and usurp the authority of the PLRB. This Court will not do so.

III. CONCLUSION

Based upon the above, this Court will issue an appropriate order overruling the defendants' preliminary objection as to standing, but sustaining its preliminary objection as to a pending action.

ORDER

AND NOW, this 22nd day of March 2007, for the reasons set forth in the accompanying opinion, it is hereby ORDERED that the Defendant's Preliminary Objection to standing is hereby OVERRULED; and the Defendant's Preliminary Objection asserting a pending action is hereby SUSTAINED.

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

[2] The Public Employee Relation Act, 43. P.S. 1101.201 et seq. provides a comprehensive legislative scheme for the resolution of employment disputes in the public sector. *Id.* at 625. The act anticipates arbitration and PLRB review prior to judicial intervention in public employment disputes. Furthermore, the arbitrator generally has sole jurisdiction in the first instance to decide whether an issue is arbitrable. *Id.* at 629.

ASHLEY M. TIRPAK

v.

WILLIAM R. TIRPAK

CHILD CUSTODY / JURISDICTION

Court must resolve dispute of intrastate child custody under Pennsylvania's UCCJEA, 23 Pa. C.S. § 5471 before substantive custody issues can be addressed. Pa. R.C.P. 1915.2

CHILD CUSTODY / JURISDICTION

Where infant under six months of age, and home county jurisdiction not applicable, jurisdiction determined by child's significant connection with county and information available in that county regarding child's best interests and present or future care.

CHILD CUSTODY / JURISDICTION

Mother's custody complaint dismissed for lack of jurisdiction where infant was born in Berks County, resided there until mother unilaterally removed infant to Erie County, where infant had not resided in Erie County for the six months immediately prior to filing the custody complaint, infant's father continues to reside in Berks County, maintains full-time employment in Berks County and has family and friends in Berks County available to care for the child.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA FAMILY DIVISION No. 14568-2006

Appearances: Eric Carr, Esq. for Ashley Tirpak
Kathryn Kisak, Esq. for William Tirpack

OPINION

Procedural History

The above-captioned parties are the parents of an infant girl, [V.E.T.], born October 11, 2006, in Berks County, Pennsylvania. The parties moved to Berks County in August 2000 for Father to seek employment and to be closer to his family.

On October 27, 2006, Ashley Tirpak (hereinafter Mother), formerly a resident of Erie County, left Berks County with the child and returned to Erie County, Pennsylvania, where she moved in with her parents. She filed for custody in Erie County on November 6, 2006.

William Tirpak (hereinafter Father) filed for emergency custody in Berks County on November 3, 2006. He contends that Mother did not tell him she was leaving with the child, that she took the child's birth certificate, and did not provide him with a forwarding address.

Both Erie County and Berks County scheduled custody conferences for the same day, December 6, 2006. Those hearings were continued per this Court's December 4, 2006 Order, which also scheduled a Rule to Show

Cause Hearing for January 10, 2007 to determine the proper venue child custody.

On February 28, 2007, Father's counsel filed a Motion for Resolution of Jurisdiction Issue, alleging that Mother has refused to provide him partial custody or visitation with the child since moving back to Erie County. Until resolution of the jurisdictional matter, no custody order can be properly entered.

Findings of Fact

A hearing was held before this Court on January 10, 2007, wherein both parties made allegations against the other about his or her fitness to parent the minor child. At the conclusion of the hearing, the Court requested Mother's medical records and Father's pay stubs and employee drug tests.

Mother claims there was domestic violence in the marital home. She alleged that Father would not transport her to the hospital in Berks County when she became ill with an infected uterus. Her medial records confirm that she had an infected uterus. They do not indicate whether or not Father was present at the hospital. The Court finds this to be irrelevant to the determination of venue. The Court also notes that Mother has not filed for a Protection From Abuse order individually or on behalf of the minor child in Erie County.[1]

Mother also claimed that she and Father left Erie County to escape drug dealers demanding payment from Father. Upon review of the Erie County dockets, the Court found no past or pending criminal charges of any kind against Father. Further, Father submitted three negative drug tests and pay stubs showing he is clean and employed full time.

Father claimed that Mother is overly dramatic and takes medication for mental health problems. Mother admitted to taking medication, which is supported by her medical records. Father also testified that Mother did not cooperate with doctors at the hospital, several examples of which are indicated by her medical records.

Father testified that Mother would call him repeatedly at work about problems with the child and that his friends and family often heard Mother refer to the child as "bitch" or "wench" when Father was not home. Mother denied this and Father did not provide corroborating evidence or testimony. This Court will leave that issue to the determination of the custody court.

Conclusions of Law

Pennsylvania's Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), 23 Pa.C.S. §5471 governs issues of child custody involving parents living in different counties within the Commonwealth. Upon the separation of the parents, custody is in the parent with physical possession of the child, yet primary jurisdiction for custody issue remains in the community child recognizes as "home". *Warman v. Warman*, 294

Pa.Super. 285, 439 A.2d 1203, (1982). *See also Com.* ex *rel. Octaviano v. Dombrowski*, 290 Pa.Super. 322, 434 A.2d 774, (1981) where Pennsylvania remained the child's "home state" within the Uniform Child Custody Jurisdiction Act [now UCCJEA] even after mother removed the child to New York following commencement of custody proceeding but before service of custody petition. Section 5402 of the UCCJEA defines "home state" as:

> The state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child six months of age or younger the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

Once the initial six-month period has run, the "home state" becomes the place in which the child has lived before commencement of the custodial proceeding. *Warman, supra.*

The UCCJEA is applied intrastate by determining the proper venue of a custody action. See Pa.R.C.P. 1915.2, Venue. The physical presence of the child, while desireable, is not a prerequisite to venue. Pa.R.C.P. 1915.2 (4)(c). Rather, the court must determine if the child has a significant connection to the county, if it is in his/her best interests to remain in that county, and consider substantial evidence concerning the child's present or future care, protection, training and personal relationships. *See* Pa.R.C.P. 1915.2(2).

In the case at bar, the child was born in Berks County where her parents have resided since the summer of 2006. The parents both agreed to move to Berks County. Mother received prenatal treatment while Father obtained employment there. Father also has family and friends available to care for the child in Berks County. Mother did not present any evidence of her intent to remain in Erie County or who might help her care for the child there. She also did not present evidence of employment or a permanent address at the time of the hearing.

Mother only had physical possession of the child because she removed the child to Erie County before the commencement of custody proceedings in either county. The six-month period has not yet tolled because Mother did not relocate to Erie County with the child until October 27, 2006 and did not file her custody action until November 6, 2006. By the Court's calculation, the six-month period will toll on April 6, 2007.

Further, under Section 5429(d) of the UCCJEA, each party has a duty to disclose to the Court any other proceeding in other courts within and outside the Commnnwealth of Pennsylvania. Mother did not disclose to Erie County that a custody action had been filed in Berks County. Compare *Childers v. Childers*, 34 Pa. D. & C. 4th 511 (Berks County

Court of Common Pleas, 1996) where jurisdiction over a custody dispute was declined because Father consented to Mother's move and Mother was not trying to deprive Father of contact with the child. Here, Father clearly did not consent to Mother's relocation.

Furthermore, Mother's secretive actions in removing the child, including taking the child's birth certificate with her, and her apparent refusal to allow Father any visitation with the child indicate to this Court her intention to deprive Father contact with his child. Her actions betray her stated concerns for the child. Other than Mother's allegations, coupled with undisputed testimony that she is sometimes overly dramatic, the Court finds no substantial evidence against transferring jurisdiction to Berks County where Father resides.

ORDER

AND NOW, to-wit this 16th day of March, 2007, after review of the arguments and exhibits submitted by counsel, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that Defendant's Preliminary Objections and Motion to Dismiss are **GRANTED**.

Plaintiff's Complaint for Perental [sic] Custody is hereby **DISMISSED**. Jurisdiction over this matter is **TRANSFERRED** to the Berks County Common Pleas Court for custody proceedings.

FURTHER, based upon troubling allegations raised by both parties at the hearing, i.e. Father's concerns with Mother's mental health and Mother's concerns with Father's alleged drug use, this Court strongly suggests that the proper Berks County authorities and/or agencies conduct an investigation into the suitability of each party's home for the best interests and welfare of the child.

BY THE COURT:
/s/ **MICHAEL E. DUNLAVEY, JUDGE**

[1] The Court is unable to determine if Mother filed a PFA against Father in Berks County. However, no such order was alleged at the December 4, 2006 motion court hearing or at the January 10, 2007 jurisdictional hearing.

PAUL J. NEIMEIC, JR.

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF TRANSPORTATION

DRIVING UNDER THE INFLUENCE / LICENSE SUSPENSION

A Defendant's Operating privileges may be suspended by PennDOT pursuant to 75 Pa.C.S. Section 3804 (e)(2)(iii) when the Defendant pleads guilty to two (2) 75 Pa.C.S. Section 3802(a) violations on the same date even though the Commonwealth charged the Defendant with a first offense Driving Under the Influence on both occasions.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 14021-2006

Appearances: Chad Vilushis, Esq., on behalf of Defendant
Chester Karas, Esq., on behalf of the Department of Transportation

MEMORANDUM OPINION

Domitrovich, J., January 18, 2007

The instant matter arises from Defendant's appeal from PennDOT's September 8, 2006 one-year suspension of his driving privileges due to a violation of 75 Pa.C.S. §3802(a), Driving Under the Influence of Alcohol (DUI). The facts of this case are undisputed and only one issue, which is purely legal in nature, is presented in this case: whether PennDOT was authorized to suspend Defendant's operating privileges where Defendant was previously convicted and sentenced for Driving Under the Influence of Alcohol at the time of Defendant's sentencing for a subsequent conviction for Driving Under the Influence of Alcohol.

Briefly, the undisputed facts of this case are as follows: On July 10, 2005, Defendant was arrested for Driving Under the Influence of Alcohol, in violation of 75 Pa.C.S. §3802(a)(2), at Docket Number 3545-2005. This was Defendant's first violation of 75 Pa.C.S. §3802(a), and the Commonwealth charged Defendant with Driving Under the Influence-First Offense. Subsequently, on April 16, 2006, Defendant was arrested again for Driving Under the Influence of Alcohol, in violation of 75 Pa.C.S. §3802(a)(1), at Docket Number 1390-2006. Although this was Defendant's **second** violation of 75 Pa.C.S. §3802(a), the Commonwealth charged Defendant with Driving Under the Influence-**First** Offense.

On August 1, 2006, Defendant appeared in Court before the Honorable William R. Cunningham and pled guilty to both DUI offenses in both cases, pursuant to a plea agreement with the Commonwealth. *See Defendant's Exhibit 1*. Subsequently, Judge Cunningham imposed the following sentence: at Docket Number 3545-2005 (offense date July

10, 2005), a $300.00 fine, $10.00 EMSA, $50.00 CLTF, $678.00 costs, and six months of intermediate punishment to begin with 30 days of electronic monitoring; and at Docket Number 1390-2006 (offense date April 16, 2006), $10.00 EMSA, $50.00 CLTF, $880.00 costs, and six months of intermediate punishment to begin with 30 days of electronic monitoring, and 30 hours of community service, to be served consecutive to the sentence imposed at Docket Number 3545-2005. *See Defendant's Exhibits 3 and 6*.

On September 8, 2006, PennDOT suspended Defendant's operating privileges for a period of one year, since Defendant had a prior Driving Under the Influence conviction at the time of his sentencing for a second Driving Under the Influence conviction. Defendant then appealed this suspension to this Court.

The only issue presented in the instant appeal is whether PennDOT was authorized to suspend Defendant's operating privileges where Defendant was previously convicted and sentenced for Driving Under the Influence of Alcohol at the time of Defendant's sentencing for a subsequent conviction for Driving Under the Influence of Alcohol. 75 Pa.C.C. §3804(e) states:

> (e) SUSPENSION OF OPERATING PRIVILEGES UPON CONVICTION.—
>
> > (1) The department shall suspend the operating privilege of an individual under paragraph (2) upon receiving a certified record of the individual's conviction of or an adjudication of delinquency for:
> >
> > > (i) an offense under section 3802...
> >
> > (2) Suspension under paragraph (1) shall be in accordance with the following:. . .
> >
> > > (iii) **There shall be no suspension for an ungraded misdemeanor under section 3802(a) where** the person is subject to the penalties provided in subsection (a) and **the person has no prior offense.** (emphasis supplied).

Additionally, the Vehicle Code defines a prior offense, at 75 Pa.C.S. §3806, as follows:

> (a) **A conviction**. . .or other form of preliminary disposition **before the sentencing on the present violation** for any of the following:
>
> > (1) an offense under section 3802 (relating to driving under influence of alcohol or controlled substance)... (emphasis supplied)

75 Pa.C.S. §3804(e)(2)(ii) establishes that PennDOT is permitted to suspend the operating privileges of a driver convicted of Driving Under

the Influence, an ungraded misdemeanor, pursuant to 75 Pa.C.S. §3802(a), only where the driver has a prior offense. In the instant case, Defendant violated 75 Pa.C.S. §3802(a) on two occasions: July 10, 2005 and April 16, 2006. Furthermore, Defendant pled guilty to both of these DUI offenses on August 1, 2006 before Judge Cunningham. Judge Cunningham then imposed a sentence for the first of Defendant's cases, Docket Number 3545-2005/Offense date July 10, 2005. Subsequently, Judge Cunningham imposed a second sentence for the second of Defendant's cases, Docket Number 1390-2006/Offense date April 16, 2006. At the time Judge Cunningham imposed Defendant's second sentence for Defendant's second DUI offense, Defendant had previously been convicted and sentenced for his prior DUI offense. Defendant's convictions and sentences for his two DUIs did occur very closely in time; nevertheless, Defendant was convicted and sentenced for his first DUI case prior to being sentenced for his second DUI case. As aptly identified by PennDOT's counsel in his Brief:

> The sentencing court itself decreed that the sentencing for the April, 2006 violation was 'consecutive' to the September, 2005 violation's sentencing. *(See* Appellant Exhibit 4). A sentence can hardly be consecutive if it is not following a prior conviction and sentence for a separate offense. *PennDOT Brief, p.* 5.

Although the Commonwealth characterized both Defendant's July 10, 2005 DUI offense and Defendant's April 16, 2006 DUI offense as first offenses, pursuant to 75 Pa.C.S. §3804, PennDOT was not bound by these qualifications for purposes of license suspension proceedings. PennDOT's suspension of a driver's license upon a DUI is a collateral civil penalty that is imposed pursuant to the Vehicle Code, and not pursuant to the Crimes Code. *Commonwealth v. Wolf*, 632 A.2d 864, 867-868 (Pa. 1993). It is well established that PennDOT suspension proceedings "are independent civil proceedings separate and apart from the criminal DUI matters." *Id.; Stair v. Commonwealth, Department of Transportation*, 2006 Pa. Commw. LEXIS 674, p.10 (Commw. 2006), holding that where the Commonwealth negotiated a plea agreement with the defendant, whereby the defendant pled guilty to Driving Under the Influence-First Offense, PennDOT was not bound by this plea agreement and was permitted to order the defendant to install an injection interlock system on his vehicle since that was, in fact, Defendant's third 75 Pa.C.S. §3802 violation. Furthermore, in Pennsylvania the following is well established:

> The **statutory suspensions** following a . . . conviction for driving under the influence are not bargaining chips to be traded in exchange for criminal convictions; rather, they **are mandatory civil penalties**, imposed not for penal purposes, but 'to protect the public by providing an effective means of denying an intoxicated motorist the privilege

of using our roads.' *Commonwealth, Dept. of Transp. v. Lefever,* 533 A.2d 501, 503 (Pa. Commw. 1987) (quoting *Commonwealth v. Ebert,* 375 A.2d 837, 839 (Pa. Commw. 1977)). (emphasis supplied).

In the instant matter, Defendant had two separate criminal cases involving two separate DUI charges. At the time of Defendant's sentencing for his second DUI, Defendant had a prior conviction for his first DUI. Defendant is not immune from the imposition of civil penalties from PennDOT simply because of the manner in which the Commonwealth qualified Defendant's charges, pursuant to an unrelated criminal plea agreement. PennDOT was not obligated to follow the Commonwealth's decision to qualify both Defendant's first and second DUI offenses as first offenses, for purposes of Defendant's civil license suspension proceedings. *See, Stair v. Commonwealth, Department of Transportation,* 2006 Pa. Commw. LEXIS 674. Therefore, based on the foregoing analysis, PennDOT was authorized to suspend Defendant's operating privileges where Defendant had a prior DUI offense at the time of his sentencing for a subsequent DUI, and this Court enters the following Order:

ORDER

AND NOW, to wit, this 18th day of January, 2007, after a hearing, upon review of the Memoranda of Law submitted by both counsel, and after a thorough and independent review of the relevant statutory and case law, it is hereby **ORDERED, ADJUDGED, AND DECREED** that Defendant's license suspension appeal in the above-captioned matter is hereby **DENIED**.

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

DONALD B. THOMAS, Plaintiff

v.

OVERNITE TRANSPORTATION COMPANY; CENTRA, INC.; CENTRA OF MICHIGAN, INC.; CENTRAL TRANSPORT INTERNATIONAL, INC.; CENTRAL TRANSPORT, INC.; CC EASTERN, INC.; and PAUL THOMAS, individually and t/d/b/a PAUL THOMAS TRUCKING, Defendants

INSURANCE / WORKERS COMPENSATION / INDEMNIFICATION AND IMMUNITY

The Workers Compensation Act at 77 Pa. C.S.A. §481(b), provides that an employer is immune from any claims of indemnification unless such immunity is explicitly waived in a written contract.

INSURANCE / WORKERS COMPENSATION / INDEMNIFICATION AND IMMUNITY

The employer, his insurance carrier, their servants and agents, employees, representatives acting on their behalf or at their request shall not be liable to a third party in any action at law or otherwise, unless liability for such damages, contributions or indemnity shall be expressly provided for in a written contract.

INSURANCE / WORKERS COMPENSATION / INDEMNIFICATION AND IMMUNITY

The immunity provision in the Workers Compensation Act must be strictly construed and general indemnity language in a lease agreement is not sufficient to waive immunity.

INSURANCE / WORKERS COMPENSATION / INDEMNIFICATION AND IMMUNITY

In this case, the Court found that the language of the indemnity agreement was not sufficient to rise to the level of an explicit waiver of immunity provided by the Workers Compensation Act.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 14785 - 2003

Appearances: Wayne Reid, Esquire for the Plaintiff
Melissa A. Walls, Esquire for the defendant, Overnite Transportation Co.
John T. Pion, Esquire for all other defendants

OPINION

Bozza, John A., J.

This action arises from an incident that occurred in January 2002 on premises owned by Overnite Transportation Company ("Overnite"). A portion of the property in question had been leased to CC Eastern, Inc. ("CC Eastern"). While traversing the premises, plaintiff, Donald B. Thomas ("Thomas"), fell from a loading dock area when a dock plate

separated from the structure. In November 2003, Thomas filed a complaint asserting that the defendants were negligent. In November 2005, this Court entered an Order granting CC Eastern's Motion for Summary Judgment concerning all of Thomas' claims, finding that the facts were insufficient to support his claims of negligence against CC Eastern. However, there remained a claim against CC Eastern for indemnification asserted by Overnite in its new matter. It is that claim that is now the subject of CC Eastern and its affiliated defendants' Motion for Summary Judgment. It is CC Eastern's position that the indemnification provision of its lease with Overnite is not sufficient to have caused it to waive its immunity from suit, pursuant to the Pennsylvania Workmen's Compensation Act. Overnite has a contrary point of view.

As a result of the decision of the worker's compensation judge, CC Eastern has been determined to be the employer of Thomas. The judge's decision in that regard has been affirmed by the Worker's Compensation Appeals Board and the Pennsylvania Commonwealth Court and is pending for review before the Pennsylvania Supreme Court. Although Thomas' status as an employee of CC Eastern continues to be challenged in the appellate courts, for purposes of this proceeding it is necessary to proceed as though the matter has been resolved. See *Yonker v. Donora Borough*, 702 A.2d 618 (Pa. Commw. 1997).

The Pennsylvania Workmen's Compensation Act provides that an employer is immune from any claims of indemnification unless such immunity is explicitly waived in a written contract. 77 P .S. §481(b). The relevant part of the Act states as follows: " . . .the employer, his insurance carrier, their servants and agents, employees, representatives acting on their behalf or at their request, shall not be liable to a third party in any action at law or otherwise, unless liability for such damages, contributions or indemnity shall be expressly provided for in a written contract. . ." (emphasis added) *Id.* Although there is no disagreement between the parties about the applicability of this section to the circumstances presented here, they do disagree as to whether the language of indemnification included in the parties' lease agreement is sufficient to constitute an express waiver as the Act requires.

In support of its position, CC Eastern relies on *Bester v. Essex Crane Rental Corp.*, 422 Pa. Super. 78, 619 A.2d 304 (1993), appeal denied, 539 Pa. 641, 651 A.2d 530 (1994). In *Bester*, the defendant, Essex Crane, leased equipment to an entity referred to as Russell Construction. Russell Construction was the employer of an individual who was injured by an employee of Essex Crane. The lease between Essex Crane and Russell Construction provided as follows:

> The Lessee [Russell] shall defend, indemnify and hold forever harmless Lessor [Essex] against all loss, negligence, damage, expense, penalty, legal fees and costs, arising from any action on account of

> personal injury or damage to property occasioned by the operation, maintenance, handling, storage, erection dismantling or transportation of any Equipment while in your possession. Lessor shall not be liable in any event for any loss, delay or damage of any kind of character resulting from defects in or inefficiency of the Equipment hereby leased or accidental breakage thereof. . .

The court in *Bester* noted that the immunity provision in the Workmen's Compensation Act must be construed strictly and concluded that the general indemnity language in the lease agreement was not sufficient to waive immunity. In reaching its decision, the court relied on *Pittsburgh Steel Co. v. Patterson-Emerson-Comstock, Inc.*, 404 Pa. 53, 171 A.2d 185 (1961), wherein the Supreme Court held that similarly broad language in an indemnification clause was insufficient to constitute a waiver of immunity from suit for injuries suffered by one of its employees. *Id.* The language at issue was as follows:

> INSURANCE CLAUSE: Contractor [Patterson] will indemnify, save harmless and defend buyer [the present plaintiff-appellant] from all liability for loss, damage or injury to person or property in any manner arising out of or incident to performance of this order and will furnish buyer with proper evidence that contractor is insured against such liability. Contractor will indemnify, save harmless and defend buyer from any and all claims, demands or suits made or brought against buyer on account of any of the terms or provision of any applicable workmen's compensation law and will furnish buyer with the proper evidence that contractor is insured against all liability made under such law.

Id. at 55, 171 A.2d 186.

Overnite, in opposing CC Eastern's position, points to the decision in *Bethlehem Steel Corp. v. Matx, Inc.*, 703 A.2d 39 (Pa. Super. 1997). In *Bethlehem*, the court was asked to interpret indemnity language in a construction contract in light of the Workmen's Compensation Act's immunity provision. The court went on to find that the indemnity provision was sufficient, such that the employer waived immunity. It was the court's conclusion that the indemnity provision when read in conjunction with the entire document showed the clear intent of the employer to indemnify Bethlehem Steel for any liability arising from injuries to its own employees related to the use of certain equipment. The indemnity provision in relevant part provided as follows:

> If the Contractor or its. . .employees. . .shall make use of any other tools, equipment or materials, with or without the consent of the Company, such tools, equipment or materials shall be accepted in "as is" condition, without any warranty whatsoever, expressed or implied,

> **and the Contractor shall indemnify and save harmless each of the Bethlehem Companies from and against all loss or liability in respect of any damage, destruction, injury or death arising from the use of such tools, equipment or materials**. . .

Id. (emphasis added).

In the present case, the indemnity language contained in the agreement of the parties provides, in relevant part, as follows:

> The tenant [CC Eastern] shall indemnify, defend and hold landlord [Overnite] harmless from and against any and all civil penalties, criminal penalties, losses, claims, causes of action, damages, suits, judgments and costs, including without limitation reasonable attorney's fees and expenses, asserted against or incurred by landlord [Overnite] in any way arising out of or in connection with (i) any injury or death to persons or damage or destruction of property on or about the Premises. . . (iii) any acts or omissions of [CC Eastern] or of [CC Eastern's] employees, agents, licensees, invitees, or guests on or about the premises. . .Anything to the contrary notwithstanding, [CC Eastern's] covenant to indemnify [Overnite] and save it harmless shall not include [Overnite's] negligence or misconduct.

Overnite argues that this language is like that found in the indemnity provision in *Bethlehem* and therefore sufficient to constitute a waiver of the Workmen's Compensation Act immunity. CC Eastern on the other hand asserts that this language is more like that found in the indemnity provision in *Bester*. After a close review of the relevant portions of the indemnity provision of the parties' lease agreement, this Court finds CC Eastern's position persuasive.

In *Bethlehem*, the Superior Court's conclusion is predicated on language that was narrowly drawn to focus on specific conduct of employees. There, the parties had narrowly agreed that the contractor would indemnify Bethlehem Steel against loss or liability arising from the use of "tools, equipment or materials". The injured party was operating a crane when he was injured. There was other language in the indemnification agreement, which provided that the contractor would indemnify Bethlehem Steel for loss or liability for injuries received or sustained by "any employee of the contractor". As the Superior Court concluded, such language manifests a clear intent of the statutory employer to waive protection afforded by the Workmen's Compensation Act. Here, CC Eastern agreed generally to indemnify Overnite with regard to claims, causes of action or damages arising out of or in connection with any acts or omissions of CC Eastern or its employees. This broad language is similar to that found in *Bester* and *Pittsburgh Steel Co.*

The circumstances of this case are also similar to those found in *Remas*

v. Duquesne Light Co., 371 Pa. Super. 183, 537 A.2d 881 (1988). In *Remas*, an employee of Gregg Security Services, Inc. ("Gregg") was injured while acting within the scope of his duties. Duquesne Light Co. ("Duquesne") wanted to join Gregg as a defendant, asserting that Gregg had agreed to indemnify it in these circumstances. The indemnity provision was as follows:

> INDEMNIFICATION - To hold harmless and indemnify the Company from and against any liability, loss, damages, cost and expense which the Company may suffer from any claim, demand, action, suit or cause of action which may be made or had against the Company by reason of any act committed by the Contractor, its agents, servants or employees other than an act performed by the Contractor, its agents, servants or employees at the specific instruction of the Company.

The lower court found that there was no express waiver of Workmen's Compensation Act indemnity and the Superior Court agreed ". . .that the indemnity clause in the Duquesne-Gregg Agreement did not constitute an agreement by Gregg to indemnify and hold Duquesne harmless in the event Duquesne's negligence caused injury to a Gregg employee. . ." *Id.* at 187, 537 A.2d 882. Applying the strict construction required by the court in *Remas*, the same conclusion must be reached in the case at bar.

An appropriate order shall follow.

ORDER

AND NOW, this 2 day of May, 2007, upon consideration of the Motion for Summary Judgment 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 Summary Judgment filed on behalf of defendants Centra, Inc., Centra of Michigan, Inc., Central Transport International, Inc., Central Transport, Inc., CC Eastern, Inc. and Paul Thomas, individually and t/d/b/a Paul Thomas Trucking is **GRANTED**.

BY THE COURT,

/s/ **John A. Bozza, Judge**

CHRISTOPHER GERALD JACKSON

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION

CRIMINAL PROCEDURE / DRIVING UNDER THE INFLUENCE

The current DL-26 form provides sufficient warning of the consequences of refusing an alcohol test. Section 1547 of the Motor Vehicle Code requires only that the officer inform the arrestee that if convicted of DUI, refusal will result in additional penalties. The officer is not required to enumerate all possible penalties.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 14214-2006

Appearancec: Patricia Ambrose, Esq., on behalf of Defendant
Chester Karas, Esq., on behalf of the Department of Transportation

MEMORANDUM OPINION

Domitrovich, J., January 16, 2007

The instant matter arises from Defendant's appeal from PennDOT's September 15, 2006 one-year suspension of his driving privileges due to a violation of 75 Pa.C.S. §1547, chemical test refusal. Only one issue, which is purely legal in nature, is presented in this case: whether the current DL-26 form provided the Defendant with a clear and concise warning of the consequences of refusing an alcohol test, as required by law.

75 Pa.C.S. §1547 of the Vehicle Code provides:

> Any person who drives, operates or is in actual physical control of the movement of a vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath, blood or urine for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a vehicle . . . in violation of section...3802 (relating to driving under influence of alcohol or controlled substance)... *See also, Commonwealth, Department of Transportation v. Weaver*, 2006 LEXIS 2534, pp.4-5 (Pa. 2006).

Additionally, the Vehicle Code establishes the requirements that must be met before PennDOT may suspend an individual's operating privilege for refusing to submit to chemical testing:

(b) Suspension for refusal —

(1) If any person placed under arrest for a violation of section 3802 is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person...

* * *

(2) It shall be the duty of the police officer to inform the person that:

(i) The person's operating privilege will be suspended upon refusal to submit to chemical testing; and

(ii) Upon conviction, plea or adjudication of delinquency for violating section 3802(a), the person will be subject to the penalties provided in section 3804(c) (relating to penalties).

75 Pa.C.S. §1547(b)(1), (2).

Recently, in *Commonwealth, Department of Transportation v. Weaver*, 2006 LEXIS 2534 (Pa. 2006), the Supreme Court of Pennsylvania addressed the matter of whether the December of 2003 version of the DL-26 Implied Consent Form satisfied the requirements of the Vehicle Code. In *Weaver*, on May 1, 2004, police arrested the appellant for driving under the influence of alcohol (DUI), and took the appellant to a hospital where the police read the December of 2003 Implied Consent Form, DL-26, which was in effect at that time, to the appellant. *Id.* at p.1. Specifically, the December of 2003 Implied Consent form stated, in pertinent part, the following:

> It is my duty as a police officer to inform you that if you refuse to submit to the chemical test, your operating privilege will be suspended for at least one year. In addition, if you refuse to submit to the chemical test, and you are convicted of, plead to, or adjudicated delinquent with respect to violating Section 3802(a) of the Vehicle Code, because of your refusal, you will be subject to the more severe penalties set forth in Section 3804(c) of the Vehicle Code, which include a minimum of 72 hours in jail and a minimum fine of $1000.00. *Id.* at p.2.

After the police read this Implied Consent Form to the appellant, the appellant refused to submit to chemical testing. *Id.* at 1. On appeal, the appellant argued that §1547(b)(2)(ii) requires the arresting officer to inform him of the specific penalties applicable for second, third, and subsequent offenses, as set forth in §3804(c). *Id.* at 6. Moreover, appellant argued that §1547(b)(2)(ii) required warnings beyond those provided in the December

of 2003 version of form DL-26. *Id.* at 12.

In dismissing the appellant's claim, the Supreme Court of Pennsylvania stated:

> The plain language [of §1547(b)(2)(ii)] requires only that the officer inform the arrestee that if he is convicted of DUI, refusal will result in additional penalties; it does not require the officer to enumerate all of the possible penalties, as appellant claims.

The Supreme Court of Pennsylvania also stated that the December 2003 version of Form DL-26 provides an arrestee with "an easily understandable warning that if he refuses a chemical test and is convicted of DUI, he will be subject to severe penalties because of his refusal." The Supreme Court of Pennsylvania stated that Form DL-26 "is clear, and does not include the impractical complexity of explaining each of the three sections and eleven sub-subsections set forth in §3804(c)." Moreover, the Supreme Court of Pennsylvania found that the December of 2003 version of DL-26 Satisfied the requirements of §1547(b)(2)(ii).

In the instant matter, the DL-26 Form that the police officer read to the Defendant was more detailed than the DL-26 Form that was at issue in *Weaver*. Specifically, the current version of the DL-26 Form, which was read to the Defendant, provides, in pertinent part:

> It is my duty as a police officer to inform you that if you refuse to submit to the chemical test, your operating privileges will be suspended for at least 12 months, *and up to 18 months, if you have prior refusals or have been previously sentenced for driving under the influence*. In addition, if you refuse to submit to the chemical test, and you are convicted of or plead to violating Section 3802(a)(1) (relating to impaired driving) of the Vehicle Code, because of your refusal, you will be subject to the more severe penalties set forth in Section 3804(c) (relating to penalties) of the Vehicle Code, which include a minimum of 72 hours in jail and a minimum fine of $1,000.00, *up to a maximum of five years in jail and a maximum fine of $10,000.00.* (emphasis supplied).

Since the Supreme Court of Pennsylvania determined that the less detailed, December of 2003 version of Form DL-26 satisfies the requirement of the Implied Consent Law, it logically follows that the more detailed Form DL-26, at issue in the instant case, satisfies the requirements of the Implied Consent Law as well.

This Court notes that Defendant has cited *Commonwealth v. Jaggers*, 903 A.2d 33, 35 (Pa Super. 2006) in support of his contentoin that the current DL-26 form does not meet the requirements of the Implied Consent Law of providing clear and concise warnings of the consequences of refusing chemical testing. However, the validity of the Superior Court of

Pennsylvania's holding in *Jaggers* is outweighed by the Supreme Court of Pennsylvania's more recent decision in *Weaver*. Furthermore, *Jaggers* is distinguishable from the instant case because it involved the use of a DL-26 Form in the context of criminal trial proceedings as opposed to the context of a PennDOT license suspension case. Moreover, *Commonwealth, Department of Transportation v. Weaver*, 2006 LEXIS 2534 (Pa. 2006), which is factually and procedurally on point, directs the outcome of the instant case.

Accordingly, pursuant to *Commonwealth, Department of Transportation v. Weaver*, 2006 LEXIS 2534 (Pa. 2006), in the instant matter, the refusal warnings that were utilized by the police sufficiently described the penalties faced by the Defendant for declining chemical testing. Therefore, the current DL-26 form did provide the Defendant with a clear and concise valid warning of the consequences of refusing an alcohol test, pursuant to the precedential *Weaver* decision, and this Court, therefore, enters the following Order:

ORDER

AND NOW, to wit, this 16th day of January, 2007, after a hearing, upon review of the Memoranda of Law submitted by both counsel, and after a thorough and independent review of the relevant statutory and case law, it is hereby **ORDERED**, **ADJUDGED**, **AND DECREED** that the Defendant's license suspension appeal in the above-captioned matter is hereby **DENIED**.

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

COMMONWEALTH OF PENNSYLVANIA

v,

DANIEL PAUL ROVNAK, JR.

CRIMINAL PROCEDURE / INEFFECTIVE ASSISTANCE OF COUNSEL

The Pennsylvania Supreme Court has established that the constitutional ineffectiveness standard requires the Defendant to rebut the presumption of professional competence by demonstrating that:

(1) the underlying claim is of arguable merit;

(2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his client's interests; and

(3) counsel's ineffectiveness prejudiced appellant; but for counsel's act or omission, there is a reasonable probability that the outcome of the proceeding would have been different.

SENTENCING / MERGER

The preliminary consideration [in merger analysis] is whether the facts on which both offenses are charged constitute one solitary criminal act. If the offenses stem from two different criminal acts, merger analysis is not required.

POST-CONVICTION RELIEF ACT / FILING REQUIREMENTS

A PCRA petition must be filed within one year of the date judgment becomes final unless the petition alleges and the petitioner proves one of the following exceptions applies:

(i) The failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) The facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) The right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

POST-CONVICTION RELIEF ACT / WAIVER OF ISSUES

An allegation is deemed waived "if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state post-conviction proceedings."

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 3572 of 2000

Appearances: Erin Connelly, Esq. for the Commonwealth
William Hathaway, Esq.
Bernard T. Hessley, Esq.

ORDER

Domitrovich, J.

AND NOW, this 18th day of April, 2007, after a thorough review of Defendant's *pro se* Motion to Correct Error in Sentencing, which this Court is treating as a Motion for Post Conviction Collateral Relief (hereinafter referred to as "PCRA "), Attorney Hathaway's no merit letter, the testimony presented at the PCRA evidentiary hearing, as well as a thorough and independent review of the entire record, it is hereby **ORDERED**, **ADJUDGED**, **AND DECREED** that Defendant's PCRA petition is **DENIED**, as it lacks substantive merit, and Attorney Hathaway's Petition for Leave to Withdraw as Appointed Counsel is **GRANTED**. Defendant will have the option of proceeding *pro se*, by privately retained counsel, or not at all.

With regard to the procedural history of the instant case, on June 20, 2006, this Court revoked Defendant's probation and imposed the following sentence: at Count 6, Resisting Arrest, one (1) to two (2) years of incarceration; at Count 7, Resisting Arrest, six (6) months to two (2) years of incarceration, consecutive to the sentence imposed at Count 6; and at Count 5, Disorderly Conduct, six (6) months to one (1) year of incarceration consecutive to the sentence imposed at Count 7. Defendant did not file a direct appeal.

Subsequently, on November 6, 2006, Defendant filed the instant *pro se* Motion to Correct Error in Sentencing, which this Court is treating as a timely PCRA Petition since Defendant raises PCRA allegations in said Motion. Since this is Defendant's first PCRA Petition, on November 17, 2006, this Court appointed William Hathaway, Esq. to represent Defendant in his PCRA proceedings. Subsequently, on December 18, 2006, Attorney Hathaway submitted a "no merit" letter to this Court, in which he indicated that after a thorough review of Defendant's PCRA petition, the case record, the applicable case law and statutory law, he had concluded that Defendant's PCRA petition lacked arguable merit. See *Attached Exhibit A, "no merit" letter from Attorney Hathaway.* Specifically, Attorney Hathaway stated:

> The Petitioner has styled his petition in the form of a motion to correct error in sentencing and he essentially is seeking modification of sentence to concurrent sentences. The Petitioner has couched his claim in the nature of ineffective assistance of counsel assertions against his defense counsel, Bernie Hessley, Esquire, who the Petitioner identifies as his stand-by counsel. The Petitioner avers that counsel only spent minutes with him and was not knowledgeable about the circumstances of the case. The Petitioner further avers that counsel failed to object to the manner in which the sentence [was] imposed in that the Petitioner alleges he was sentenced on multiple counts all stemming from the same incident and therefore said counts should

have merged for purposes of sentencing. The Petitioner further avers that counsel failed to request a financial compensation hearing in regard to his ability to satisfy the costs, fines and restitution imposed by the Court. In a separate letter, the Petitioner further seeks to supplement his claims as stated [in his] Petition by addressing the circumstances of his parole violation which involved his absconding from the jurisdiction to Florida after being denied permission to make that move several times by his probation officer. The Petitioner outlines various mitigating circumstances in an effort to explain and justify this conduct and offset the patent parole violation. I have attached hereto a copy of the Petitioner's statement in regard to the parole claim.

Upon reviewing the several averments of the Petitioner in regard to the challenge to his sentence, the Petitioner is confronted with the limited parameters for relief under the PCRA as to sentencing challenges. Under the PCRA, the sole basis to challenge a sentence is to plead and prove the imposition of an illegal sentence, that is a sentence greater than the lawful maximum. There is no basis to make that assertion in this case as the sentence does not exceed the statutory parameters as mandated to state a colorable PCRA claim nor is there any evident merit to the allegations that the criminal counts should have merged for sentencing purposes. Further, the Petitioner's efforts to justify and mitigate the parole violation fail to articulate any claim for relief under the PCRA given the patent nature of the violation notwithstanding the Petitioner's statement in regard to his rationale for leaving the jurisdiction without authorization.

Attorney Hathaway also submitted a Petition for Leave to Withdraw as Appointed Counsel. This Court has thoroughly reviewed Attorney Hathaway's "no merit" letter, which not only details the nature and extent of his review, but also lists the issues Defendant wanted to raise, and explains why these issues are meritless. *Commonwealth v. Merritt* 827 A.2d 485, 487 (Pa. Super. Ct. 2003). Furthermore, this Court conducted a PCRA evidentiary hearing on March 2, 2007, relative to the following two issues: Defendant's allegation that Attorney Hessley was ineffective at the time of the June 20, 2006 probation revocation hearing because Attorney Hessley only spent a brief period of time with Defendant and did not know the circumstances of Defendant's case; and (2) Defendant's allegation that Attorney Hessley was ineffective for failing to file a post-sentencing motion or direct appeal from Defendant's June 20, 2006 probationary sentence. On March 21, 2007, this Court notified Defendant of its intention to deny his PCRA Petition and its intention to grant Attorney Hathaway's request to withdraw, and informed Defendant of his right to file objections to this proposed denial within twenty days. Defendant did

not file objections. Moreover, after review of the testimony presented at the PCRA evidentiary hearing and of the relevant statutory and case law, this Court agrees with counsel that Defendant's PCRA Petition lacks merit, and, therefore, this Court sets forth below its own independent review of the record, detailing the reasoning behind its intention to dismiss Defendant's instant PCRA petition. *Id.*

Accordingly, a PCRA evidentiary hearing was conducted on February 27, 2007. At this hearing, Defendant provided the following testimony: Defendant testified that he met with Attorney Hessley, who was a Public Defender, for only two minutes prior to the start of his second probation revocation hearing on June 20, 2006, and Defendant alleged that Attorney Hessley was ill-prepared to represent Defendant because of the brief period of time they spent together discussing Defendant's case. Nevertheless, Defendant acknowledged that an investigator with the Public Defender's Office had met with him at the Erie County Prison regarding his revocation proceedings well in advance of the June 20, 2006 hearing.

At the time of the PCRA hearing, Defendant acknowledged that he did, in fact, violate all three criteria that formed the basis for revoking his probation/parole. However, Defendant stated that although he recognized that this was his second revocation, Defendant had hoped for a light sentence. Defendant testified that during his brief meeting with Attorney Hessley prior to the revocation hearing, Defendant explained to Attorney Hessley all the reasons why he moved without permission, accomplishments Defendant had made, and, moreover, excuses for violating his probation/parole that might assist in sentencing. Defendant also provided Attorney Hessley with a list of everything Defendant wanted Attorney Hessley to tell this Court. Defendant acknowledged that Attorney Hessley spoke on Defendant's behalf at his revocation hearing and Attorney Hessley did, in fact, inform the Court of everything on Defendant's list, and of everything Defendant wanted stated at his hearing. Nevertheless, Defendant made the blanket allegation, however, that he believed his sentence would have been lower if he had had more time to speak with Attorney Hessley prior to his revocation hearing.

Defendant also testified that he wrote a letter to Attorney Hessley on June 20, 2006, following the revocation hearing, in which Defendant asked Attorney Hessley to seek reconsideration of his sentence. Defendant testified that subsequently he received a letter from Attorney Hessley, dated June 20, 2006, in which Attorney Hessley informed Defendant that Defendant needed to notify Attorney Hessley as to his basis for objecting to his sentence, before Attorney Hessley could file a post-sentencing motion. Defendant acknowledged that he never responded to Attorney Hessley's June 20, 2006 letter, and Defendant never informed Attorney Hessley as to his basis for filing a Post Sentencing Motion. Defendant

also acknowledged that he signed a Statement of Understanding of Post Sentencing Rights at the time of his June 20, 2006 hearing, and Defendant was on notice of the ten-day time frame in which he could file a post-sentencing motion, as well as the thirty-day time frame in which he could file an appeal. (N.T. 6/20/06 pp.2-3).

Subsequently, Attorney Hessley provided credible testimony to this Court, and this Court makes the following findings of fact. When Attorney Hessley received notice of the PCRA evidentiary hearing in this matter, he immediately contacted the Erie County Office of the Public Defender, and asked the Office to fax all information concerning this case to him. Accordingly, prior to the PCRA hearing, Attorney Hessley reviewed Defendant's case file to refresh his recollection, and Attorney Hessley did, in fact, recall the circumstances of Defendant's revocation and sentencing hearing,

Although Attorney Hessley was not originally the attorney assigned to Defendant's case, on the morning of Defendant's revocation hearing, the Office of the Public Defender assigned Attorney Hessley to Defendant's revocation proceeding. It is not unusual for a public defender to prepare to fill in for a colleague on short notice, and Attorney Hessley was very familiar with this practice. Attorney Hessley had represented many criminal defendants in probation revocation proceedings prior to Defendant's case. Accordingly, Attorney Hessley thoroughly reviewed Defendant's case file, which consisted of Defendant's revocation summary, intake form from the investigator's interview with Defendant at the Erie County Prison, and the docket sheet, prior to speaking with Defendant.

Subsequently, Attorney Hessley met the Defendant in Court, in advance of the start of Defendant's hearing. It is Attorney Hessley's general practice and procedure to review the case file with the client, show the client the revocation summary, and ask whether the client admits or denies the allegations. In this case, Attorney Hessley recalls that Defendant informed Attorney Hessley he intended to admit to all of the violations. Defendant then provided Attorney Hessley with a list of mitigating factors that he wanted Attorney Hessley to present to the Court prior to Defendant's sentencing. Attorney Hessley informed Defendant that he would inform the Court of these mitigating factors, but Attorney Hessley told Defendant that the Court considers absconding to be very serious, and it was likely that Defendant would receive state time, particularly since this was Defendant's second revocation. Attorney Hessley also reviewed the sentencing parameters with Defendant. Attorney Hessley credibly stated that he had adequate time to speak with Defendant prior to the hearing, and Attorney Hessley noted that if he had needed additional time to speak with the Defendant, he would have requested additional time from the Court, which this Court would have accommodated as a matter of practice. Moreover, Attorney Hessley credibly stated he had ample time to review

Defendant's case file, speak with Defendant, and prepare the care for the revocation hearing.

At the time of the hearing, Attorney Hessley did, in fact, tell the Court everything Defendant wanted him to say. Specifically, Attorney Hessley made the following statement to the Court, on Defendant's behalf:

> I spoke with Mr. Rovnak prior to Your Honor taking the bench and he informed me he gets very nervous in front of the court and asked me to say a few things. He's written a number of reasons - things that he was going through at the time that caused him to fall short on his responsibilities for probation. First, he was not - he couldn't find work. His girlfriend, who was pregnant, he discovered was using heroin and eventually she got an abortion, which he was opposed to, and caused him a great deal of stress, anxiety and sadness. The people in his life that he lived with and who he was looking to for support, they were all into using and didn't seem like he could get away from it. He attempted several times to get his probation transferred so he could get out of this situation in Erie. He had, I guess, letters from jobs that he had lined up and other places, and unfortunately, he was
> - that never materialized as far as transfer went, I guess, for whatever reason. His family at this time was - probably due to their drug use, was turning their back on him, or that's the way he felt, and so he did the only thing he knew how to do and that was remove himself from the situation. Obviously, that's not good advice and I told him that he is not, you know permitted to make those decisions on his own. In the meantime, he did go down to Florida. He started his own detailing business. He was working quite steady, earning significant amounts of money, more than he had in the past, or in Erie here. He picked up no new charges in Florida and even the charges that he faces revocation for here today are of a technical variety, and we ask the court to take that into consideration. I think a lot of this, for whatever reason - his probation officer was Officer Szabo, and I know him and he is an excellent probation officer. Not everybody gets along with everybody else and this is a case where I think that Mr. Rovnak maybe didn't understand what Tony was looking for, and maybe Tony - or excuse me, Officer Szabo didn't see eye-to-eye with Mr. Rovnak, and I think that might have created some difficulty here. Mr. Rovnak is aware of his revocation at this docket and that he faces a very real possibility of state incarceration. I indicated to him that I would ask for another shot at the county level. I think he does have rehabilitative potential still. He was motivated enough to start his own business in Florida and take care of himself, and we ask the court to consider that. He is - he knows what he's facing here. He's willing to take responsibility. He has admitted to the violations and we ask the court to consider no new offenses were committed in

> re-sentencing, and perhaps consider another county level sentence. (N.T. 6/20/06 pp.6-8).

Subsequently, Attorney Hessley stated, "Mr. Rovnak, is there anything that I left out that you wanted. . . to tell the judge about your case before she imposes sentence?" (N.T. 6/20/06 p.8). Mr. Rovnak responded, "No." (N.T. 6/20/06 p.8). Furthermore, at the conclusion of the hearing, Attorney Hessley requested that the Court find Defendant to be boot camp eligible, and this Court did so, to Defendant's benefit.

Following Defendant's revocation hearing, on June 20, 2006, Attorney Hessley received a letter from Defendant, in which Defendant stated the following:

> To Whom It May Concern: I would like to put in for a sentence modification. I was sentenced in front of Judge Domitrovich today 6-20-06 at 9[:]15 Docket # 3572 of 00. *See Commonwealth's Exhibit A.*

Attorney Hessley noted that it was common for the Erie County Public Defender's Office to receive mail from the Erie County Prison on the same day that it was mailed. Accordingly, on June 20, 2006, Attorney Hessley responded in writing to Defendant, stating the following:

> Dear Mr. Rovnak: Please be advised that I have received and read your letter dated June 20, 2006. Before I can file a post sentencing motion, you must inform me in writing what your basis is to request a modification of your sentence. If you have any further questions, please do not hesitate to contact our office. *See Petitioner's Exhibit 1.*

Subsequently, Defendant never responded to Attorney Hessley's letter, Defendant never provided Attorney Hessley with any reasons for filing a post-sentencing motion, and Attorney Hessley never heard from Defendant again. Since Defendant never responded to Attorney Hessley's June 20, 2006 letter with reasons for filing a post-sentencing motion, Attorney Hessley did not file one. Furthermore, Defendant never asked Attorney Hessley to file an appeal.

Initially, in Pennsylvania the following is well established with regard to collateral review of issues arising out of probation revocation proceedings:

> The Legislature did. . .by its enactment of 41 Pa.C.S.A. §9543(a)(2)(vii), intend to provide collateral review to probation revocation issues. As such, we find that probation revocation presents a special situation insofar as determining timeliness under §9545. We hold that where a new sentence is imposed at a probation revocation hearing,

> the revocation hearing date must be employed when assessing finality under §9545(b)(3) to any issues directly appealable from that hearing. To hold otherwise would frustrate the purpose behind the PCRA. *Commonwealth v. Anderson*, 788 A.2d 1019, 1021 (Pa. Super. 2001).

In order "to be eligible for relief under the Post Conviction Relief Act, a petitioner *must not only* establish ineffective assistance of counsel, petitioner *must also* establish that the ineffectiveness was of a type 'which in the circumstances of the particular case, so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.'" *Commonwealth v. Korb*, 617 A.2d 715, 716 (Pa. Super. Ct. 1992) (emphasis in original). Therefore, "it is not enough for appellant to show that he suffered some prejudice as a result of counsel's action or inaction, but rather [he must demonstrate] that counsel's action or inaction so affected the trial itself ('the truth-determining process') that the result of the trial is inherently unreliable." *Id.* Additionally, "counsel is presumed to have acted in his client's best interest; thus it is appellant's burden to prove otherwise." *Commonwealth v. Miller*, 664 A.2d 1310,1323 (Pa. 1995). Furthermore, the Pennsylvania Superior Court has established that the language contained in 42 Pa.C.S. §9543(a)(2)(ii), that "counsel...so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place," means that "an ineffectiveness claim brought under the PCRA must raise a question of whether an 'innocent individual' has been convicted." *Korb, supra,* at 717.

The test for counsel ineffectiveness is based in the performance and prejudice paradigm which the US Supreme Court set forth in *Strickland v. Washington* 466 US 688 (1984). The Pennsylvania Supreme Court has established that the constitutional ineffectiveness standard requires the Defendant to rebut the presumption of professional competence by demonstrating that:

> (1) the underlying claim is of arguable merit;
> (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his client's interests; and
> (3) counsel's ineffectiveness prejudiced appellant; but for counsel's act or omission, there is a reasonable probability that the outcome of the proceeding would have been different.

Commonwealth v. Bryant, 2004 Pa. LEXIS 1899, p. 13-15. Defendant's failure to satisfy any prong of the ineffectiveness test will result in rejection of Defendant's claim. *Id.* at 15. Finally, "attention to the reliability of the trial's results, and the fairness thereof, is essential to evaluating an ineffective assistance of counsel claim." *Commonwealth v. Kimball.* 724 A.2d 326, 331 (Pa. 1999).

The Pennsylvania Supreme Court established that "[i]f it is clear that [Defendant] has not demonstrated that counsel's act or omission adversely affected the outcome of the proceedings, the claim may be dismissed on that basis alone and the court need not first determine whether the first and second prongs have been met." *Commonwealth v. Albrecht*, 720 A.2d 693, 701 (Pa. 1998). In the instant case, Defendant clearly has not established that he was prejudiced by the alleged errors of his trial counsel and that but for these alleged errors there is a reasonable probability that the outcome of the proceeding would have been different. Therefore, this Trial Court will limit its analysis of trial counsel's effectiveness to the third prong of the aforementioned test.

This Court will evaluate Defendant's first PCRA issue as follows: whether Attorney Hessley was effective at the time of Defendant's probation revocation hearing, where Attorney Hessley spent ample time preparing Defendant's case for the hearing, and where Attorney Hessley was very familiar with the circumstances of Defendant's case. As set forth above, Attorney Hessley credibly stated he had ample time to prepare Defendant's case for the probation revocation proceeding. Attorney Hessley was experienced in representing defendants in probation revocation proceedings, and Attorney Hessley had plenty of time to review Defendant's case file, which consisted of Defendant's revocation summary, intake form from the investigator's interview with Defendant at the Erie County Prison, and the docket sheet, and Attorney Hessley had plenty of time to speak with Defendant prior to the start of Defendant's hearing. During this meeting with Defendant, Defendant asked Attorney Hessley to speak on his behalf at the time of sentence, and Defendant provided Attorney Hessley with a list of mitigating factors that he wanted Attorney Hessley to present to the Court prior to Defendant's sentencing. At the time of the hearing, Attorney Hessley did, in fact, tell the Court everything Defendant wanted him to say, as evidenced by the transcript of the revocation proceedings, and Defendant's explicit statement that Attorney Hessley had informed the Court of everything Defendant had wanted to say. Moreover, Attorney Hessley had ample time to review Defendant's case file, speak with Defendant, and prepare the care for the revocation hearing, and Attorney Hessley provided competent representation to Defendant during the revocation hearing. Defendant was not prejudiced by Attorney Hessley's effective representation. Accordingly, Defendant's first PCRA issue lacks merit.

This Court will evaluate Defendant's second PCRA issue as follows: whether Attorney Hessley was ineffective for not objecting to the imposition of separate sentences at each of Defendant's counts, where they were separate offenses that were not subject to merger legally. On June 20, 2006, this Court imposed the following revocation sentence: at Count 6, Resisting Arrest, one (1) to two (2) years of incarceration; at

Count 7, Resisting Arrest, six (6) months to two (2) years of incarceration, consecutive to the sentence imposed at Count 6; and at Count 5, Disorderly Conduct, six (6) months to one (1) year of incarceration consecutive to the sentence imposed at Count 7. In Pennsylvania, the following standard for determining when convictions should merge for the purposes of sentencing is well established:

> The preliminary consideration [in merger analysis] is whether the facts on which both offenses are charged constitute one solitary criminal act. If the offenses stem from two different criminal acts, merger analysis is not required. If, however, the event constitutes a single criminal act, a court must then determine whether or not the two convictions should merge. In order for two convictions to merge: (1) the crimes must be greater and lesser-included offenses; and (2) the crimes charged must be based on the same facts. If the crimes are greater and lesser-included offenses and are based on the same facts, the court should merge the convictions for sentencing; if either prong is not met, however, merger is inappropriate.
>
> One crime is a lesser-included offense of another crime if, while considering the underlying factual circumstances, the elements constituting the lesser crime as charged are all included within the elements of the greater crime, and the greater offense includes at least one additional element that is not a requisite for committing the lesser crime. Thus, in a situation where the crimes, as statutorily defined, each have an element not included in the other but the same narrow fact satisfies both of the different elements, the lesser crime merges into the greater-inclusive offense for sentencing. *Commonwealth v. Gatling*, 807 A.2d 890, 899 (Pa. 2002).

In the instant matter, Defendant pled guilty to two separate counts of Resisting Arrest, at Counts 6 and 7, involving separate instances of Resisting Arrest. The Criminal Information in Defendant's case draws a distinction between Count 6 and Count 7. Specifically, the facts in support of Count 6 involve Defendant resisting arrest by spitting on two Police Officers at the booking counter of the Erie Police Department, prior to being placed in a cell. In contrast, the facts in support of Count 7 involve Defendant resisting arrest by fighting with and spitting on two Police Officers at the Burger King restaurant at the 1100 block of French Street, where the police initially stopped the Defendant. Furthermore, Defendant's Pre-Sentence Investigation Report, which provides a narrative of the facts supporting Defendant's charges, describes at least two instances of resisting arrest:

> On 12-09-00 at approximately 1:45 a.m., police officers noticed the defendant operating a motor vehicle which slid into the intersection

> of 12th and French Streets without lights. The police activated their lights and sirens in order to pull the defendant over. The defendant then turned in to the Burger King (which was closed) and entered the drive-thru. He then circled all the way through the drive thru and stopped his vehicle in the parking lot. The defendant was found to be highly intoxicated and placed under arrest. The defendant immediately became very violent and began to scream obscenities at the officers. He told them that he was going to fight with them every chance he got, and he did. He was taken to the hospital for a blood test and when his cuffs were removed, he turned around and began to fight with the officers. He was cuffed again and refused to give blood. At the booking counter, he began fighting with the officers and spitting on them. He had spit several times at the officers before he was placed into his cell. *See Exhibit B, attached hereto, Page 3 of Pre-Sentence Investigation Report.*

Therefore, Counts 6 and 7 legally did not merge for sentencing purposes, since these charges were based upon separate fact patterns and involved two separate criminal acts. Accordingly, merger analysis was not required, and Defendant was not prejudiced by counsel's decision not to request merger of Counts 6 and 7.

Additionally, contrary to Defendant's claim in his PCRA Petition, Defendant's conviction at Count 5 for Disorderly Conduct also does not merge with Defendant's Resisting Arrest convictions. Defendant's offenses of Disorderly Conduct and Resisting Arrest stemmed from the same criminal acts. However, the crimes of Disorderly Conduct and Resisting Arrest are not greater and lesser-included offenses, and, therefore, are not subject to merger for sentencing purposes. Not all of the elements of Disorderly Conduct are included within the elements of Resisting Arrest. The Pennsylvania Crimes Code defines the crime of Disorderly Conduct as follows:

> (a) A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
>
> (1) Engages in fighting or threatening, or in violent or tumultuous behavior;
> (2) Makes unreasonable noise;
> (3) Uses obscene language, or makes an obscene gesture; or
> (4) Creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor. 18 Pa.C.S. §5503

In contrast, The Pennsylvania Crimes Code defines the crime of resisting arrest as follows:

> A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance. 18 Pa.C.S. §5104

Unlike the crime of Disorderly Conduct, the crime of Resisting Arrest does not include any of the following elements: (1) that the defendant act with the intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof; (2) that the defendant engages in fighting or threatening, or in violent or tumultuous behavior; (3) that the defendant makes unreasonable noise; (4) that the defendant uses obscene language, or makes an obscene gesture; or (5) that the defendant creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor. The crimes of Disorderly Conduct and Resisting Arrest are separate and distinct crimes involving different elements. Therefore, Count 5 is not subject to merger with Count 6 or 7, and Defendant was not prejudiced by counsel's decision not to request merger of Count 5 with Counts 6 or 7. Accordingly, Defendant's second PCRA issue also lacks merit.

This Court will evaluate Defendant's third PCRA issue as follows: whether Attorney Hessley was ineffective for not filing a post-sentencing motion, where Defendant never responded to Attorney Hessley's letter, requesting a list of reasons for filing such a motion; and whether Attorney Hessley was ineffective for not filing an appeal, where Defendant never asked Attorney Hessley to file an appeal. With regard to filing a post-sentencing motion, as set forth above, Attorney Hessley received Defendant's letter, and subsequently responded, stating that Defendant needed to provide reasons for filing a post-sentencing motion before Attorney Hessley would do so. Defendant, however, failed to ever respond to Attorney Hessley's letter and never provided Attorney Hessley with any reasons for requesting modification of sentence. Therefore, Defendant was not prejudiced where Attorney Hessley did not file a post-sentencing motion, since Defendant never responded to Attorney Hessley's request for additional information. Furthermore, with regard to filing an appeal, although Defendant was informed of his appeal rights at the time of his revocation hearing, Defendant never requested that Attorney Hessley file an appeal. Attorney Hessley cannot be faulted for not filing an appeal where Defendant never informed Attorney Hessley that he wanted an appeal filed. Therefore, Defendant was not prejudiced where Attorney Hessley did not file an appeal. Accordingly, Defendant's third PCRA issue also lacks merit.

This Court will evaluate Defendant's fourth PCRA issue as follows: whether Attorney Hessley was ineffective for not requesting a hearing

regarding Defendant's ability to pay his fines and costs, which were imposed at the time of Defendant's original sentencing hearing on May 9, 2001, where this issue is patently untimely and where Defendant waived this issue by failing to raise it in a prior direct appeal or a timely PCRA Petition. Specifically, Defendant alleges that Attorney Hessley was ineffective for "fail[ing] to request a Financial Compensation Hearing, prior to, at, or after-the-fact of sentencing...[to establish] Petitioners [sic] ability to pay any/all costs, fines and/or restitution[1] owed this Court." *See Defendant's PCRA Petition, p.5.* Initially, a thorough review of Pennsylvania statutory and case law reveals no instance where the Legislature or Courts discuss a "financial compensation hearing." Nevertheless, 42 Pa.C.S. §9726(c)(l) provides generally, "The court shall not sentence a defendant to pay a fine unless it appears of record that the defendant is or will be able to pay the fine." In the instant matter, however, this Court imposed fines and costs at the time of Defendant's original sentencing on May 9, 2001, and, therefore, this issue is barred by PCRA timeliness requirements. Specifically, pursuant to 42 Pa.C.S. §9545 (b)(l)(i)-(iii), a PCRA petition must be filed within one year of the date judgment becomes final unless the petition alleges and the petitioner proves one of the following exceptions applies:

> (i) The failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) The facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) The right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

Furthermore, pursuant to 42 Pa.C.S. §9545 (b)(2), any petition invoking any of the above exceptions to the timeliness requirement must be filed within sixty (60) days of the date the claim could have been presented.

In the instant case, pursuant to 42 Pa.C.S. §9545(b)(3), Defendant's judgment, for purposes of issues pertaining to his original sentencing, became final for PCRA purposes, on June 8, 2001, the date on which the time for seeking review with the Superior Court of Pennsylvania expired. As Defendant filed the instant PCRA petition on November 17, 2006,

[1] Defendant was not ordered to pay any restitution.

Defendant failed to file the instant PCRA within one year of the date on which judgment in his case became final, pursuant to 42 Pa.C.S. §9545 (b)(1). The Pennsylvania Supreme Court has stated, "[T]he statute makes clear that where, as here, the petition is untimely, it is the petitioner's burden to plead in the petition and prove that one of the exceptions applies. 42 Pa.C.S. §9545 (b)(1). That burden necessarily entails an acknowledgment by the petitioner that the PCRA petition under review is untimely but that one or more of the exceptions apply." *Commonwealth v. Beasley,* 741 A.2d 1258, 1261 (Pa. 1999), *See also, Commonwealth v. Fahy,* 737 A2d 214, 218 (Pa. 1999)(stating, "it is for the petitioner to allege in his petition and to prove that he falls within one of the exceptions found in §9545 (b)(1)(i)-(iii))." Therefore, Defendant has an obligation to plead and prove the application of one of the exceptions to 42 Pa.C.S. §9545 (b)(1). In the instant case, however, Defendant has failed to plead and prove any of the enumerated exceptions to the PCRA timeliness requirements, which would permit review of his final PCRA issue at this late time. Therefore, Defendant's final PCRA issue is patently untimely, and this Court is precluded from reviewing it.

Furthermore, Defendant also waived his final PCRA issue by failing to raise it prior to this time. It is well established that to be eligible for relief under the Post Conviction Collateral Relief Act, a PCRA petitioner must establish that the issues he raises have not been waived. 42 Pa.C.S. §9543(a)(3). An allegation is deemed waived "if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding." 42 Pa.C.S. §9544(b). In the instant matter, Defendant has waived this issue because he could have raised it previously on direct review or in a prior, timely PCRA petition. Accordingly, Defendant has waived his final PCRA issue.

This Court also notes that at the time of Defendant's sentencing, Defendant was employed as an operator with West Telemarketing. *See Exhibit C, attached hereto, Page 5 of Pre-Sentence Investigation Report.* Furthermore, all of the fines imposed by this Court were legislatively mandated fines, pursuant to the relevant criminal sections with which Defendant was charged. Contrary to Defendant's allegation in his PCRA Petition, Attorney Hessley cannot be found to be ineffective for not requesting a "financial compensation hearing," which is not a proceeding that even exists under Commonwealth law, and where Defendant's fines and costs were imposed at the time of his original sentencing when Attorney Hessley did not represent Defendant, and where the record of Defendant's probation revocation hearing demonstrates that Defendant never requested that Attorney Hessley take any actions with regard to Defendant's fines and costs. Accordingly, Defendant's final issue on appeal fails as it is untimely, pursuant to the Post Conviction Collateral Relief Act, and as Defendant waived this issue by failing to raise it in a

direct appeal from his original judgment of sentence or in a timely PCRA Petition.

For all of the foregoing reasons, Defendant's PCRA petition is denied, and Attorney Hathaway's Petition for Leave to Withdraw as Counsel is granted. Defendant has the option of proceeding *pro se*, by privately retained counsel, or not at all, pursuant to *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988). Defendant may appeal from this Order within thirty (30) days of the date of this Order.

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

COMMONWEALTH OF PENNSYLVANIA

v.

KEVIN E. GRUCZA

CRIMINAL LAW / DOUBLE JEOPARDY / CRIMINAL PROSECUTION AFTER CONTEMPT

In determining whether prosecution is barred under double jeopardy principles after prior criminal contempt conviction, court must look to the specific violated conditions in the contempt order and compare them to the elements of the subsequently charged criminal offense; if they are the same, or if one is a lesser included offense of the other, double jeopardy attaches and subsequent prosecution is barred. U.S.C.A. Const. Amend. 5, *Commonwealth v. Yerby*, 679 A.2d 217 (1996).

CRIMINAL LAW / DOUBLE JEOPARDY / CRIMINAL PROSECUTION FOR SIMPLE ASSAULT AFTER CONTEMPT

Prosecution for simple assault was not barred under double jeopardy principles by prior criminal contempt conviction arising from a PFA Order because the ICC conviction was not predicated on the same conduct that provided the basis for the charge of simple assault. Instead, the ICC conviction was based on Defendant's contact with the victim prior to the alleged assault.

CRIMINAL LAW / DOUBLE JEOPARDY / CRIMINAL PROSECUTION FOR DISORDERLY CONDUCT AFTER CONTEMPT

Prosecution for disorderly conduct was not barred under double jeopardy principles by prior criminal contempt conviction arising from a PFA Order. The ICC conviction was based on "contact" with the victim with no obligation to prove that the defendant engaged in conduct that constituted disorderly conduct. Significantly, "contact" is not an element of disorderly conduct and the finding of contempt required no proof of any element of disorderly conduct. Therefore, prosecution for disorderly conduct was not barred by double jeopardy.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 185 of 2007

Appearances: Office of Erie County District Attorney
Anthony R. Himes, Esq.

OPINION

Bozza, John A., J.

The defendant, Kevin E. Grucza ("Grucza"), is currently charged with simple assault, a misdemeanor of the second degree, a violation of 18 Pa. C.S.A. §2701(1)(a); disorderly conduct, a misdemeanor of the third degree, a violation of 18 Pa. C.S.A. §5503(1-4) and public drunkenness,

a summary offense, a violation of 18 Pa. C.S.A. §5505. With regard to simple assault, the Commonwealth has charged in the Information that Grucza intentionally, knowingly or recklessly caused bodily injury to Sharon LeTrent on or about October 14, 2006, when he pushed her to the ground causing her to strike her head on a curb in the 700 block of Cascade Street, Erie, Pennsylvania. With regard to the charge of disorderly conduct, the Commonwealth has alleged that Grucza:

> . . . with the intent to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof, did engage in fighting or threatening, or in violent or tumultuous behavior and/or makes unreasonable noise and/or uses obscene language or makes an obscene gesture and/or creates a hazardous or physically offensive condition by any act which served no legitimate purpose of the actor and/or did cause substantial harm or serious inconvenience, or if he persists in disorderly conduct after reasonable warning or request to desist. . .

With the more precise factual allegations underlying the charge of disorderly conduct, the Commonwealth accuses Grucza of engaging in a physical altercation with Sharon LeTrent and/or being in a public place while under the influence of alcohol and/or made so much noise the neighbors called the police, and that the events occurred in the 700 block of Cascade Street, Erie, Pennsylvania.

The defendant has filed an Omnibus Pre-Trial Motion, which included a Motion to Dismiss Prosecution Based Upon Double Jeopardy, asserting that his conviction for indirect criminal contempt on November 17, 2006 for violating a Protection From Abuse Order bars a subsequent conviction for either the simple assault or the disorderly conduct charges. The defendant has relied on now well-established principles of double jeopardy jurisprudence as first established in *Blockburger v. United States*, 284 U.S. 299, 76 L.Ed. 306, 52 S. Ct. 180 (1932), and as most recently set forth and clarified in *U. S. v. Alvin J. Dixon and Michael Foster*, 509 U.S. 688, 113 S. Ct. 2849, 125 L.Ed. 2d 556 (1993). In *Dixon and Foster*, the United States Supreme Court applied the "same elements" test as first enunciated in *Blockburger*, to two cases where defendants had been tried for criminal contempt for violating a court order that prohibited them from engaging in conduct that ultimately formed the basis of another criminal prosecution.

Dixon had been found in contempt for violating a court order that prohibited him from committing "any criminal offense" while released on bond. Thereafter, he was arrested for possession of cocaine with intent to distribute and he was found in contempt for committing that offense. He was subsequently directly prosecuted for the possession of cocaine offense. Foster was found to be in contempt for violation of a civil protection order which prohibited him from molesting, assaulting, threatening or

physically abusing his wife. Following his contempt conviction, he was indicted for simple assault, threatening to injure another, and assault with the intent to kill, based on the same factual setting as the contempt conviction. Finding that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution ("Double Jeopardy Clause") attaches to criminal contempt prosecutions the same way it does to any other criminal prosecution, the court concluded that neither Dixon nor Foster could be prosecuted for the offenses that served as the basis for their respective contempt convictions. Although there were five separate opinions in *Dixon and Foster*, each expressing a different view of the application of the "same elements" test, the net result of the court's analysis was to make the test applicable to cases where the original conviction was for contempt. *Id.* at 509 U.S. 696, 113 S.Ct. 2856,125 L.Ed.2d 568.

In further support of his position, the defendant here relies on *Commonwealth v. Yerby,* 544 Pa. 578, 679 A.2d 217 (1996). In *Yerby*, the defendant was subject to a Protection from Abuse Act order ("PFA order") prohibiting him from "striking, threatening, abusing or harassing" his former girlfriend. *Id.* at 580. Thereafter, the defendant approached his former girlfriend, aimed a gun at her and discharged it. Although she was not struck by the bullet, he pursued her into an alley where he held a gun to her head and threatened to kill her. He eventually forced her into a vehicle, where once again he threatened to kill her. Fortunately, she was able to escape. Thereafter, he was convicted of indirect criminal contempt for violation of the PFA order and sentenced to three months imprisonment. *Id.* at 583. Yerby was then prosecuted on a number of other offenses including aggravated assault and terroristic threats, and was ultimately convicted on some of them including terroristic threats and sentenced to state prison. He challenged those convictions on the basis of double jeopardy and ultimately the Supreme Court rejected his appeal finding the subsequent conviction for terroristic threats was not barred by his initial contempt conviction.

In reaching its decision, the Pennsylvania Supreme Court relied on *U. S. v. Alvin J. Dixon and Michael Foster* and overruled its prior decision in *Commonwealth v. Allen,* 506 Pa. 500, 486 A.2d 363 (1984) (further citations omitted). The court concluded that the "same elements" test requires that the reviewing court examine the elements of the offense underlying the contempt violation rather than the contempt statute *per se* and compare those elements with the elements of the offense for which the defendant is subsequently being prosecuted. *Id.* at 587. In that regard, the court stated:

> We think the more sound approach, and the one that adheres most to the concerns behind the protection against successive prosecutions, is one that looks to the specific contempt order and the elements of the

> violated condition(s) of that order. In other words, we must look to the specific offenses at issue in the contempt proceeding and compare the elements of those offenses with the elements of the subsequently charged criminal offenses. If they are the same, or if one is a lesser included offense of the other, double jeopardy attaches and the subsequent prosecution is barred. The focus, then, is on the offense(s) for which the defendant was actually held in contempt.

Id. at 587.

Applying that standard to the facts before it, the Pennsylvania Supreme Court determined that Yerby's conviction for both contempt and terroristic threats did not violate the prohibition against successive prosecutions pursuant to the Double Jeopardy Clause. In reaching its decision, the court concluded that the defendant had not been convicted of indirect criminal contempt as a result of violating the terroristic threat statute. In that regard, the court stated as follows:

> However, based on the record presented to our court, there is no indication that the trial court, at the contempt hearing, ever found Appellant guilty of terroristic threats. Even if the finding of contempt was based on the fact that Appellant threatened to kill Ms. Fisher, the trial court need not have found that the elements of the crime of terroristic threats were established since the PFA order prohibited Appellant not from committing the crime of terroristic threats, but only from "threatening" Ms. Fisher. In other words, the PFA order at issue here did not include the elements of terroristic threats.

The case now before this Court presents a factual setting similar to that found in *Yerby*. According to the Protection From Abuse Order at issue, the defendant was prohibited from having any contact with Sharon LeTrent at any location. Although Grucza was originally charged by criminal complaint with pushing LeTrent to the ground causing her to hit her head on the curb, he was also charged with starting an argument with her outside Wagner's Bar.[1] At the time of the indirect criminal contempt ("ICC") hearing, the Commonwealth proceeded only on the basis that Grucza was prohibited from having contact with Ms. LeTrent. Assistant District Attorney Elizabeth Hirz stated at the time of the hearing:

> "Your Honor, for the record, we are proceeding with just the contact only with respect - and we would delete any reference to any sort of assault from the complaint."

(ICC Hearing Transcript, November 17, 2006, p. 6). Thereafter, it is

[1] Although the defendant was also prohibited by the Court's Order from engaging in other behavior including "abuse, stalk, harass, threaten or attempt to use physical force", he was prosecuted for the no contact provision.

apparent from the hearing transcript that the Commonwealth tailored its presentation to the narrow issue of the defendant's contact with LeTrent outside Wagner's Bar. At the close of the testimony, the Honorable Stephanie Domitrovich indicated, "The Court finds the defendant guilty as charged". (ICC Hearing Transcript, November 17, 2006, p. 40).

On the record before this Court, it must be concluded that Grucza's ICC conviction was not predicated on the basis of a commission of a simple assault, but rather on the fact that he engaged in contact with Ms. LeTrent prior to any assaultive behavior occurring. Since the crime of simple assault was not the basis for the finding of ICC, each offense contained an element not contained in the other and a successive prosecution for simple assault does not violate the Double Jeopardy Clause.[2]

Because the charge of disorderly conduct as set forth in the Information is so broadly stated, further analysis is necessary to determine if a prosecution for disorderly conduct would violate the Double Jeopardy Clause. The Supreme Court's decision in *Yerby* requires a court to look at the specific contempt order and the elements of the condition or prohibition that was violated. *Commonwealth v. Yerby,* 544 Pa. 578, 587-588, 679 A.2d 221 (1996). Since the contempt court did not make a finding that Grucza violated the disorderly conduct statute, it is necessary to determine whether the elements of the offense of indirect criminal contempt nonetheless are the same as the elements of the disorderly conduct statute under which the defendant is currently charged. A review of the final order of court appears to have two provisions that may be applicable to the circumstances of this case. In that regard, the order states as follows:

> 1. Defendant shall not abuse, stalk, harass, threaten or attempt to use physical force that would reasonably be expected to cause bodily injury to the plaintiff or any other protected person in any place where they might be found.
>
> 3. Defendant is prohibited from having ANY CONTACT with the Plaintiff, or any other person protected under this Order, at any location, including but not limited to any contact at plaintiff's school, business or place of employment.

[2] The elements of indirect criminal contempt as applied in this case includes: (1) an order of court entered pursuant to the Protection From Abuse Act; (2) prohibition of contact with the PFA petitioner; (3) contact with the petitioner; and (4) wrongful intent. See, *Commonwealth v. Baker,* 564 Pa. 192, 766 A.2d 328 (2001) (setting forth the four general elements of indirect criminal contempt). The elements of simple assault, as apply in this case, include: (1) attempting to cause or intentionally, knowingly or recklessly causing; (2) bodily injury; (3) to Sharon LeTrent. 18 Pa. C.S.A. §2701.

Although, as noted above, the facts presented to the contempt court encompassed a range of conduct on the part of the defendant, it is apparent that the Commonwealth sought a conviction only on the basis of contact with the victim, so the elements of indirect criminal contempt are the same as applied in the simple assault analysis. Therefore, the Commonwealth was not obligated to prove nor did it in fact prove that the defendant engaged in any conduct that constituted any element of disorderly conduct as defined in 18 Pa. C.S.A. §5503 and as set forth in the criminal Information. Indeed, the Commonwealth sought to establish only that the defendant had contact with the victim outside the bar when the defendant got out of his car and approached Ms. LeTrent. "Contact" *per se* is not an element of disorderly conduct and no element of disorderly conduct was required to be proven to establish the defendant's culpability for contempt. In this circumstance, it is apparent that the elements of indirect criminal contempt and disorderly conduct each have an element not contained in the other and like simple assault, there is no bar to the defendant's current prosecution.

For the reasons set forth above, the defendant's Motion must be respectfully **DENIED**.

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

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN FROESS

APPEAL / SERVICE OF NOTICE OF APPEAL

Counsel's failure to serve the trial court with a copy of the Notice of Appeal is not a defect fatal to the perfection of an appeal, under Pa.R.A.P. 902.

SUFFICIENCY OF EVIDENCE / UNREGISTERED VEHICLE

Where Defendant admitted that his vehicle was not registered in any state, and where Defendant failed to establish that 75 Pa.C.S. §1302(6) exempted his vehicle from registration in Pennsylvania, sufficient evidence existed to convict Defendant of Driving an Unregistered Vehicle.

SUFFICIENCY OF EVIDENCE / UNREGISTERED VEHICLE

Defendant was guilty of driving an unregistered vehicle when he admitted that his vehicle was not lawfully registered in any state.

SUFFICIENCY OF EVIDENCE / UNREGISTERED VEHICLE

Defendant failed to prove that his vehicle was based and principally used in Ohio when he testified that the business for which he drove the vehicle was located in Ohio and that the business paid the taxes and registration for the vehicle, but did not provide evidence of whether the vehicle is generally stored in Pennsylvania or Ohio, how often the vehicle is used in Ohio, whether it was used to transport him to and from work in Ohio, in what capacity he uses his vehicle in connection with his employment in Ohio, or where he keeps his records regarding the business use of the vehicle.

SUFFICIENCY OF EVIDENCE / UNREGISTERED VEHICLE

A critical component to the application of 75 Pa.C.S. §1302(6) is whether a statute exists in another state which requires a person to register the vehicle in that state.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. SA 162-2006

Appearances: Kari A. Froess, Esq., on behalf of Appellant
Bradley H. Foulk, District Attorney of Erie County, Appellee

OPINION

Domitrovich, J., May 7, 2007

This matter is currently before the Superior Court of Pennsylvania on the appeal of John Froess (Defendant) from the Order entered by this Lower Court on February 27, 2007, after a *de novo* bench trial, finding Defendant guilty of Driving an Unregistered Vehicle, codified at 75 Pa.C.S.

§1301(a). Initially, this Lower Court notes that Defendant and Defendant's counsel failed to serve the undersigned judge with a copy of the Notice of Appeal, pursuant to Pa. R.A.P. 906(a)(2), and this Lower Court received notice that the instant appeal had been filed from the Prothonotary of the Superior Court of Pennsylvania. Nevertheless, counsel's failure to serve the trial court with a copy of the Notice of Appeal is not a defect fatal to the perfection of an appeal. *See*, Pa. R.A.P. 902; *see also*, *In Re: Campaign Expense Reports of Corignani*, 873 A.2d 790 (Pa. Commw. 2005). On April 16, 2007, Defendant timely filed his Pa. R.A.P. 1925(b) Statement, raising one issue,[1] and on April 18, 2007, Defendant's counsel served the undersigned judge with a copy of said Statement. This Lower Court will address Defendant's sole appellate issue as follows: whether the evidence is sufficient to support Defendant's conviction for Driving an Unregistered Vehicle, pursuant to 75 Pa.C.S. §1301, where Defendant admitted his vehicle was not registered in any state, and where Defendant failed to establish that 75 Pa.C.S. §1302(6) exempted his vehicle from registration in Pennsylvania.

With regard to the factual and procedural history of this case, on October 18, 2006, Officer Wierbinski initiated a traffic stop of Defendant on West Bayfront Highway in Erie, Pennsylvania. (N.T. 2/26/07 p.3). Affixed to Defendant's vehicle was an Ohio license plate with a vehicle registration sticker that expired on October 31, 2005. (N.T. 2/26/07 pp.3-4). Accordingly, Officer Wierbinski cited Defendant with violating 75 Pa.C.S. §1301, Driving an Unregistered Vehicle.

On November 16, 2006, Magisterial District Judge Robie found Defendant guilty of Driving an Unregistered vehicle. Subsequently, Defendant filed an appeal from this summary conviction. On February 26, 2007, after a *de novo* hearing, during which this Lower Court heard the credible testimony of Officer Wierbinski as well as oral argument, and upon examination of the relevant statutory and case law, the undersigned judge found Defendant guilty and imposed the following sentence: a $75.00 fine, $10.00 EMSA, $30.00 CLTF, $10.00 Judicial Computer, and all court costs.

Defendant's only issue on appeal is whether the evidence is sufficient to support Defendant's conviction for Driving an Unregistered Vehicle, pursuant to 75 Pa.C.S. §1301, where Defendant admitted his vehicle was not

[1] Specifically, the only issue Defendant raises in his Pa. R.A.P. 1925(b) Statement is: "The February 26, 2007 decree finging [sic] John Froess guilty was in error when the Trial Court found that the vehicle John Froess was driving was required to be registered in the state of Pennsylvania. Specifically, the finding of the trial court that John Froess was guilty of driving an unregistered vehicle was contrary to the evidence presented at the time of trial. More specifically, John Froess' vehicle is exempt from registration under § 1902(6)."

registered in any state, and where Defendant failed to demonstrate that 75 Pa.C.S. §1302(6) exempted his vehicle from registration in Pennsylvania. In Pennsylvania, the test for evidence sufficiency is well established, as follows:

> Where a defendant challenges his conviction on appeal the test of the sufficiency of the evidence is whether, viewing all the evidence admitted at trial, together with all reasonable inferences therefrom, in the light most favorable to the Commonwealth, the trier of fact could have found that each element of the offenses charged was supported by evidence and inferences sufficient in law to prove guilt beyond a reasonable doubt. *Commonwealth v. Goetz,* 525 A.2d 181, 183 (Pa. Super. 1987).

75 Pa.C.S. §1301 states, in relevant part,

> (a) DRIVING UNREGISTERED VEHICLE PROHIBITED.-- No person shall drive or move and no owner or motor carrier shall knowingly permit to be driven or moved upon any highway any vehicle which is not registered in this Commonwealth unless the vehicle is exempt from registration.

An exception to the registration requirement, promulgated at 75 Pa.C.S. §1301, is found at 75 Pa.C.S. §1302(6), which states,

> The following types of vehicles are exempt from registration:
>
> (6) Any vehicle owned by a resident legally required to be registered in another state based and used principally outside of this Commonwealth.

At the time of the summary appeal hearing Defendant admitted that his vehicle was not registered in the Commonwealth of Pennsylvania, in violation of 75 Pa.C.S. §1301, and stipulated to the testimony of Officer Wierbinski. (N.T. 2/26/07 p.4). Defendant also admitted that his vehicle was not lawfully registered in any state. (N.T. 2/26/07 pp.4-5). Nevertheless, Defendant claimed that his vehicle was exempt from registration, pursuant to 75 Pa.C.S. § 1302(6), due to "a flaw in the statute" that allegedly exempts certain vehicles from a requirement to register. *See,* (N.T. 2/26/07 p.10).

This Lower Court disagrees with Defendant's claim that 75 Pa.C.S. §1302(6) is "flawed" or that 75 Pa.C.S. §1302(6) exempts Defendant's vehicle from any registration requirement. The Pennsylvania Superior Court explained the purpose of 75 Pa.C.S. §1302(6) as follows:

> Section 1302(6) allows Pennsylvania residents to avoid multiple state registration of their vehicles when another state *requires* that the vehicle be registered in that state *because those vehicles are based*

and used principally in that state. Commonwealth v. Goetz, 525 A.2d 181,183 (Pa. Super. 1987). (emphasis in original).

Accordingly, the Pennsylvania legislature enacted 75 Pa.C.S. §1302(6) for the purpose of providing a defense to the summary offense of Driving an Unregistered Vehicle, where the vehicle is required to be registered in another state because the vehicle is used principally in another state. In the instant matter, however, at the time of the summary appeal hearing, Defendant failed to establish that his vehicle is based and used principally in Ohio. Defendant's counsel, Attorney Brabender, stated that Defendant's place of business, Total Car Care, is located somewhere in Ohio. (N.T. 2/26/07 pp.5-6). Defendant testified, "It is required to be registered in Ohio because the business paid for the vehicle, pays the taxes on the vehicle, pays for the registration." (N.T. 2/26/07 p.8). This is the only factual testimony that was presented to this Court in support of Defendant's claim that Defendant's vehicle is used principally in another state.

Defendant did not provide this Lower Court with information concerning whether the vehicle is generally stored in Pennsylvania or Ohio. *See Goetz,* supra at 183-84. Defendant did not provide this Lower Court with information concerning how often the vehicle is used in Ohio. Defendant did not explain whether the vehicle was used to transport him to and from work in Ohio. Defendant did not explain in what capacity he uses his vehicle in connection with his employment in Ohio. Defendant failed to provide this Lower Court with information concerning where he keeps his records regarding the business and regarding this vehicle. Defendant did not even provide this Lower Court with an Ohio statute, establishing that Defendant was required to register his vehicle in Ohio, which is a critical component to the application of 75 Pa.C.S. § 1302(6). In fact, Defendant's vehicle was not lawfully registered in any state, including Ohio. Moreover, Defendant failed to provide this Court with evidence, tending to establish that 75 Pa.C.S. §1302(6) provides a defense to his admitted failure to register his vehicle in Pennsylvania.

Additionally, this Lower Court did not find credible Defendant's testimony relative to his claim that his vehicle was exempt from Pennsylvania registration. This Lower Court found it is illogical to believe that Defendant regularly had been driving an unregistered vehicle with an Ohio license plate that had been expired for well over one year **in Ohio**. It is illogical to believe that Defendant's vehicle was used principally in Ohio, but was never stopped by Ohio law enforcement officials despite its obvious defects. Furthermore, from a policy perspective, it is important to the people of the Commonwealth that vehicles operated on Commonwealth highways are in compliance with the registration requirements of **some** state. Defendant's vehicle was not in compliance

with the registration requirements of **any** state, and it is illogical to conclude that it was the intention of the Legislature to allow noncompliant vehicles to operate on Commonwealth highways. All of the case law that this Lower Court has examined pertaining to the application of 75 Pa.C.S. §1302(6) involve vehicles that were improperly registered in a state outside of Pennsylvania - not vehicles that were not registered at all. *See, Commonwealth v. Goetz,* 525 A.2d 181, 183 (Pa. Super. 1987), where the Pennsylvania Superior Court held that a vehicle that was registered in Maryland was not exempt from Pennsylvania registration where the vehicle was regularly operated in Pennsylvania in connection with the business of the defendant, who resided in Maryland; *see also, Commonwealth v. Wagner,* 3 Pa. D. & C. 4th 274 (Chester Cty. 1989), where the Chester County Court of Common Pleas held that a vehicle that was registered in Ohio was not exempt from Pennsylvania registration where it was illogical to conclude that the vehicle was used principally in Ohio due to the distance from defendant's home to Ohio.

Moreover, in the instant case, the Commonwealth proved by clear and convincing evidence that Defendant violated 75 Pa.C.S. §130l, and Defendant failed to present any evidence establishing that 75 Pa.C.S. §1302(6) exempts his vehicle from the Pennsylvania vehicle registration requirement. Accordingly, the evidence was sufficient to support Defendant's conviction for violating 27 Pa.C.S. §1301, and the instant appeal lacks substantive merit.

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

IN RE: ERIE GOLF COURSE
CITY OF ERIE, PENNSYLVANIA

STATUTES / CONSTRUCTION

In construing the language of the statute, words and phrases shall be construed according to rules of grammar and according to their common and approved usage; and general words shall be construed to take their meanings and be restricted by preceding particular words. 1 Pa. C.S. § 1903(a).

STATUTES / CONSTRUCTION

Where a statue is unambiguous, the judiciary may not ignore the plain language under the pretext of pursuing its spirit, for the language of a statute is the best indication of legislative intent. Words and phrases should be construed in accordance with their common and approved usage. When the words of a statute are clear, there is no need to look beyond the plain meaning of the statute.

REAL ESTATE / DEDICATED LAND

The express language of the Donated or Dedicated Property Act indicates that the statute is applicable only when there is no record that the political entity accepted the donated or dedicated property as a public facility. 53 P.S. § 3382.

REAL ESTATE / DEDICATED LAND

Where there was a clear formal record that the city accepted the property and agreed to keep and maintain the property as a golf course, a public park, or both, the Donated or Dedicated Property Act is inapplicable; and common-law principles regarding land held as a public trust are applicable. 53 P.S. § 3382.

REAL ESTATE / DEDICATED LAND

Under common law principles applicable to donated or dedicated land, a nation or state which becomes the proprietor of a town site, plats it and dedicates its streets and parks to public use has no greater or better right to revoke or avoid its grant or covenant than a private proprietor would have.

REAL ESTATE / DEDICATION OF LAND

After parks have been cared for and improved according to the plat – in other words after rights have vested in reliance upon the dedication – there is no right of a governmental entity or an individual to revoke it or to release or destroy the right of the public to the exclusive use of the parks and streets for the purposes for which they were granted.

REAL ESTATE / DEDICATION OF LAND

A nation, state, or municipality which dedicates land which it owns to public use for the purpose of a park is conclusively estopped as private proprietor from revoking that dedication, from selling the park, from appropriating the land which it occupies to other purposes after lots have been sold, after the town has been settled, and after the park has been

improved with monies raised by the taxation of its residents and taxpayers in reliance upon the grant and covenant which the dedication evidences.

REAL ESTATE / DEDICATION OF LAND

A municipality cannot revoke or destroy after dedication and acceptance the right of the public to the exclusive use of the property for the purpose designated.

REAL ESTATE / DEDICATION OF LAND

Where the dedication of a golf course is evidenced by the express language of the recorded deed, the city's ordinance accepting the dedication, the city's continuance and exclusive use of the property as a golf course over 80 years, the city's contribution of funds to the maintenance and improvements to the property of the golf course, and the public's use of the property over the past 80 years as a golf course and for public park purposes, the city holds the golf course as fiduciary for the benefit of the public.

WORDS AND PHRASES / TRUST

A "fiduciary" is an entity that has a duty created by its own undertaking to exercise scrupulous good faith and candor.

WORDS AND PHRASES / TRUST

A "fiduciary duty" is the duty to act for someone else's benefit while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law.

TRUSTS / WRONGFUL ACTS

By defunding and quickly attempting to sell a golf course on the basis that the debt service, which the city accepted, was too expensive, the city neglected its fiduciary duty to the public. A much higher standard of care is anticipated.

TRUSTS / FIDUCIARY DUTIES

Pursuant to the public trust doctrine, a city as trustee must continue to keep and maintain a golf course as such or for public park services or both consistent with the express terms of the deed restriction.

TRUSTS / FIDUCIARY DUTIES

Pursuant to the express terms of the deed restriction, a city is not prohibited from selling or otherwise conveying real property to another entity or individual willing to assume the public use restrictions set forth in the deed and willing to keep and maintain the property as a golf course, a public park, or both. However, until the city finds a purchaser who is willing to accept and comply with these restrictions, the city is bound to abide by the terms of the deed restriction to which it consented over 80 years ago.

MUNICIPALITIES / TRUSTS / FIDUCIARY DUTIES

When land is dedicated to a city for use as a golf course, park, or both, and the city accepts the dedication by ordinance, there is no requirement that golf must generate sufficient funds to cover the cost of operation,

this being similar to other municipal functions and spending which do not generate funds over expenses.

MUNICIPALITIES / TRUSTS / FIDUCIARY DUTIES

Where the city accepted the debt service to make substantial improvements to a golf course and was solely responsible for creating any alleged financial burden with regard to the golf course, the city would not be permitted to overturn a deed restriction that was expressly accepted by ordinance.

MUNICIPALITIES / CONSTITUTIONAL LAW / SEPARATION OF POWERS

The Court of Common Pleas lacks the authority to direct the executive branch and legislative branch of a city to adjust the budget for the purpose of funding and opening a golf course.

MUNICIPALITIES

By not restricting a golf course's current usage or the public's access to same, the city of Erie is meeting its fiduciary duty to keep and maintain the premises for the benefit of the public in a manner consistent with the covenants in the deed conveying same to the city, as said deed allowed use as a public park as well as a golf course.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION NO. 58-2007

Appearances: Gregory A. Karle, Esq., Solicitor for the City of Erie
Richard E. Filippi, Esq., on behalf of the Intervenors

MEMORANDUM OPINION

Domitrovich, J., June 27, 2007

This matter is before the Court on the Petition of the City of Erie, requesting that this Court permit the City of Erie to abandon the use of the Erie Golf Course as dedicated public property. This Court makes the following findings of fact: on August 13, 1926, the Erie Golf Club resolved to convey to the City of Erie a parcel of property, which is now commonly known as the Erie Golf Course. In consideration for this conveyance, the City of Erie paid to the Erie Golf Club $1.00, and the City of Erie also assumed a mortgage on the property totaling $15,000.00. On August 31, 1926, the deed transferring the Erie Golf Course property from the Erie Golf Club to the City of Erie was duly recorded in the Erie County Office of the Recorder of Deeds, at Deed Book 301, Page 719. The recorded deed specifically sets forth the terms of conveyance, including the following express land use restrictions, which the City of Erie sanctioned and accepted:

To have and to hold the premises hereby conveyed or intended so

to be, with the appurtenances, unto the said party of the second part [the City of Erie], its successors and assigns, forever, subject to the following covenants and agreements, which are hereby entered into by said party of the second part [the City of Erie], for itself, its successors and assigns, with the said Erie Golf Club, as part of the consideration of this conveyance:

1. And the said party of the second part [the City of Erie], in part consideration for this conveyance, does for itself, its successors and assigns, by the acceptance of this conveyance, covenant and agree to end with the party of the first part, its successors and assigns, that **the said party of the second part [the City of Erie] its successors and assigns, shall and will at all times hereafter and forever, keep and maintain the premises hereby conveyed, as a golf course or for public park purposes, or both...**

It is distinctly covenanted and agreed between the parties hereto that all the covenants and agreements above expressed shall be held to run with and bind the land hereby conveyed, and all subsequent owners and occupants thereof, and the acceptance of this deed shall have the same effect and binding force upon the party of the second part [the City of Erie], its successors and assigns, as if the same were signed and sealed by the party of the second part. *See,* Deed, Petitioner's Exhibit 3. (emphasis supplied).

On August 24, 1926, Erie City Council enacted an Ordinance, Bill Number 5901, authorizing the purchase of the Erie Golf Course, and expressly stating that the City of Erie covenanted to keep and maintain the property forever as a golf course, as a public park, or both. Specifically, Section 3 of the Ordinance provides:

That in addition to the consideration set forth in Section 2 hereof, and as a part of the consideration for this conveyance, the City of Erie in the deed of conveyance shall by the acceptance thereof covenant and agree to any with the party of the first part [the Erie Golf Club] its successors and assigns, that **the said party of the second part [the City of Erie], its successors and assigns, shall and will at all times hereafter and forever, keep and maintain the premises hereby conveyed, as a golf course or for public park purposes, or both.** *See*, Ordinance, Section 3, Intervenors' Exhibit A. (emphasis supplied).

This Ordinance was recorded in Ordinance Book S at Page 130-1.

Since the date of acquisition, the City of Erie consistently has maintained and utilized the dedicated property as a municipal golf course and for public park purposes. For eighty years, from 1926 until 2006, City of

Erie residents and residents of neighboring municipalities have enjoyed the Erie Golf Course. Thousands of individuals have enjoyed golfing the eighteen-hole course during Warmer months. Furthermore, in the wintertime, individuals utilize the property for cross county skiing, sledding, and tobogganing. Year round, individuals enjoy walking the course, bird watching, and berry picking, among other activities, on Erie Golf Course's beautiful, sprawling grounds.

Beginning in 2002, under Mayor Richard Filippi's administration, the City of Erie undertook an analysis of its municipal golf courses, consisting of the Erie Golf Course, Downing Golf Course, and J.C. Martin Golf Course, which the City operates as an enterprise fund. Ultimately, the City decided to make capital improvements to the Erie Golf Course in order to make it a more attractive course. In 2004, Erie City Council, by a vote of six (6) in favor and one (1) opposed, approved a bond issue in the amount of $2,250,000.00 for the purpose of making improvements to the municipal golf courses.[1] Approximately ninety percent of the bond issue was expended on improvements to the Erie Golf Course. (N.T. 4/3/07 p.136).

In 2005, the City of Erie began a significant renovation effort of the Erie Golf Course, which vastly improved the quality and viability of the Erie Golf Course. The renovation effort involved redesigning several of the holes; lengthening the course; installing an irrigation system; building cart paths; gutting and refurbishing the clubhouse; and building a banquet hall, among other renovations. *See*, Petitioner's Exhibit 12. Although most of these renovations were completed prior to the start of the 2006 golf season, not all of the renovations were completed until sometime during the summer of 2006. (N.T. 5/21/07 p.40).

On October 31, 2006, the City of Erie, under Mayor Joseph Sinnott's administration, permanently closed the Erie Golf Course.[2] On December 20, 2006, Erie City Council passed the City's 2007 budget, which did not provide any funding for the operation of the Erie Golf Course. Furthermore, on December 20, 2006, Erie City Council passed a Resolution, authorizing city officials to advertise for bids for the sale of the Erie Golf Course property. Mayor Joseph Sinnott acknowledged that when these decisions were made, he and his staff were unaware of the deed restriction on the Erie Golf Course property, requiring that the City of Erie keep and maintain it forever as a golf course, a public park, or both. (N.T. 4/24/07 p.116)

[1] Pursuant to the terms of this general obligation note, to which the City of Erie consented, the City of Erie is obligated to pay approximately $160,000.00 per year until the year 2024. Furthermore, in 2024 the City of Erie is obligated to make a balloon payment of approximately $1,200,000.00. (N.T. 4/3/07 p.4).

[2] This Court notes that the City of Erie's other two municipal golf courses, Downing Golf Course and J.C. Martin remain open.

On February 26, 2007, the City of Erie filed the instant Petition to Abandon the Use of Dedicated Public Property, and, therefore, the City of Erie bears the burden of proof in this matter. On March 19, 2007, this Court granted leave to the Lake Erie Region Conservancy, the Committee to Keep Erie Golf Course Open, Tom Fuhrman, and Jim Casella to intervene in this case. Hearings were conducted in this matter on March 26, 2007, April 3, 2007, April 16, 2007, April 24, 2007, May 11, 2007, May 21, 2007, May 23, 2007, and May 31, 2007, during which this Court heard extensive expert witness and lay testimony, as well as oral argument, and this Court examined several exhibits submitted by counsel, relative to the Orphans' Court issue of abandonment of a dedicated public use. This Court has conducted a thorough review of the testimony and evidence presented, the relevant statutory and case law, as well as the Proposed Findings of Fact, Conclusions of Law and Legal Memoranda submitted by both counsel.

The first issue before the Court is whether the Donated or Dedicated Property Act, codified at 53 P.S. §3381 *et. seq.* applies to the instant case. Specifically, 53 P.S. §3381 *et. seq.* states, in relevant part, as follows:

§ 3382. Property held in trust

> All lands or buildings heretofore or hereafter donated to a political subdivision for use as a public facility, or dedicated to the public use or offered for dedication to such use, **where no formal record appears as to acceptance by the political division, as a public facility** and situate within the bounds of a political subdivision, regardless of whether such dedication occurred before or after the creation or incorporation of the political subdivision, shall be deemed to be held by such political subdivision, as trustee, for the benefit of the public with full legal title in the said trustee. (emphasis supplied).

§ 3383. Use of property

> All such lands and buildings held by a political subdivision, as trustee, shall be used for the purpose or purposes for which they were originally dedicated or donated, except insofar as modified by court order pursuant to this act.

§ 3384. Orphans' court relief

> When, in the opinion of the political subdivision which is the trustee, the continuation of the original use of the particular property held in trust as a public facility is no longer practicable or possible and has ceased to serve the public interest, or where the political subdivision, as trustee for the benefit of the public, is in doubt as to the effectiveness or the validity of an apparent dedication because of the lack of a record of the acceptance of the dedicated land or buildings, the trustee may

apply to the orphans' court of the county in which it is located for appropriate relief. The court may permit the trustee to-

(1) Substitute other lands or property of at least equal size and value held or to be acquired by the political subdivision in exchange for the trust property in order to carry out the trust purposes.

(2) If other property is not available, sell the property and apply the proceeds to carry out the trust purposes.

(3) In the event the original trust purpose is no longer practicable or possible or in the public interest, apply the property or the proceeds therefrom in the case of a sale to a different public purpose.

(4) Relinquish, waive or otherwise quitclaim all right and title of the public in and to such land and buildings as have been apparently dedicated but for which no formal acceptance appears of record: Provided, only, that the court is satisfied upon hearing the evidence that there is no acceptance by implication arising out of public user or otherwise, the court shall also determine the consideration, if any, to be paid to the political subdivision.

In the instant matter, the Intervenors argued that common law trust principles, established in *Trustees of the Philadelphia Museums v. Trustees of the University of Pennsylvania,* 96 A 123 (1915) and its progeny, which includes *In Re: Conveyance of 1.2 Acres of Bangor Memorial Park to the Bangor Area School District,* 4 Pa. D. & C. 4th 343 (Northampton 1988), affirmed by *In Re: Conveyance of 1.2 Acres of Bangor Memorial Park to the Bangor Area School District,* 567 A.2d 750 (Cmwlth. Ct. 1989), were applicable to the instant case. In contrast, the City of Erie argued in favor of the application of the Donated or Dedicated Property Act, and cited *White v. Township of Upper St. Clair,* 799 A.2d 188 (Cmwlth. Ct. 2002) and *In the Matter of the Petition of the Borough of Westmont,* 570 A.2d 1382 (Cmwlth. Ct. 1990), in support thereof.

In order to determine whether the Donated or Dedicated Property Act applies, the Court must examine the language of the statute. *Bangor Memorial Park, supra* at 349. The Pennsylvania Legislature has established the rules governing statutory construction as follows:

(a) Words and phrases shall be construed according to rules of grammar and according to their common and approved usage...;
(b) General words shall be construed to take their meanings and be restricted by preceding particular words. 1 Pa.C.S. § 1903(a)

In addition, in Pennsylvania, the following rule regarding statutory construction is well established:

> The touchstone of statutory interpretation is that where a statute is unambiguous, the judiciary may not ignore the plain language 'under the pretext of pursuing its spirit,' for the language of a statute is the best indication of legislative intent. Words and phrases should be construed in accordance with their common and approved usage. When the words of a statute are clear, there is no need to look beyond the plain meaning of a statute. *Colville v. Allegheny County Retirement Board*, 2007 Pa. LEXIS 718 (Pa. 2007). (internal citations omitted).

In the instant matter, the critical language relative to the issue of application of the Donated or Dedicated Property Act to this case is found at 53 P.S. §3382, which states, in relevant part: "... where no formal record appears as to acceptance by the political division, as a public facility..." The express language of the Donated or Dedicated Property Act indicates the statute's applicability only when there is no record that the political entity accepted the donated or dedicated property as a public facility.

This Court notes that the cases cited by the City of Erie in support of its position that the Donated or Dedicated Property Act applies to the case at hand fail to provide this Trial Court with guidance relative to the application of the Donation or Dedicated Property Act. In *White v. Township of Upper St. Clair* and in *In the Matter of the Petition of the Borough of Westmont*, the Commonwealth Court does not address the issue of whether public use doctrine or the Donated or Dedicated Property Act applies under the facts of those specific cases. The *White* case primarily involved the issue of standing, and the key issue relative to the Donated or Dedicated Property Act that the Commonwealth Court of Pennsylvania examined was whether private individuals had standing to proceed in equity to compel a political entity to comply with the requirements of a deed restriction, pursuant to the Donated or Dedicated Property Act. *White, supra* at 200. Moreover, in *White*, the Commonwealth Court did not engage in any discussion relative to public use doctrine or its application in that case. Similarly, in *Borough of Westmont*, the Commonwealth Court of Pennsylvania simply applied the Donated or Dedicated Property Act without engaging in any specific analysis of whether public use doctrine was applicable. *Borough of Westmont, supra*.

In contrast, the lower court's "comprehensive opinion" in *Bangor Memorial Park*, which was the basis for the Commonwealth's Court's decision to affirm the lower court, specifically addressed the issue of application of public use doctrine versus application of the Donated or

Dedicated Property Act. *Bangor Memorial Park, supra* at 752; *Bangor Memorial Park, supra*, 4 Pa. D. & C. 4th 343. Furthermore, there exist significant factual similarities between the *Bangor Memorial Park* case and the instant case, relative to evidence of the political entity's clear acceptance of the deed restriction. Therefore, this Court found guidance in *Trustees of the Philadelphia Museums* and its progeny, including *Bangor Memorial Park*, in determining that public use doctrine applies to the instant case, and not the Donated or Dedicated Property Act.

Moreover, in the instant matter there exists a clear formal record that the City of Erie accepted the property and agreed to keep and maintain the property as a golf course, a public park, or both, consistent with the express terms of the deed restriction, recorded on August 31, 1926, to which the City of Erie consented. Furthermore, it is undisputed that on August 24, 1926, the City of Erie entered an Ordinance authorizing the purchase of the property, now commonly known as the Erie Golf Course, "as a golf course or for public park purposes, or both." Furthermore, this parcel of property was specifically dedicated to a public purpose and is subject to a recorded deed covenant, which states that the City of Erie, "shall and will at all times hereafter and forever, keep and maintain the premises hereby conveyed, as a golf course or for public park purposes, or both." Accordingly, the Intervenors are correct that the Donated or Dedicated Property Act is inapplicable to the case at hand, and, therefore, common law principles regarding land held as a public trust are applicable.

The second and final issue before this Court is whether the City of Erie is permitted to sell, convey, or otherwise abandon the use of the Erie Golf Course, which the City dedicated and accepted for public use as a golf course or for public park purposes, or both. In Pennsylvania, the leading case relative to the public trust doctrine is *Trustees of the Philadelphia Museums.* In *Trustees of the Philadelphia Museums,* the City of Philadelphia, through a series of Ordinances, set aside property to be used as a public park for the benefit of the citizens of Philadelphia. *Trustees of the Philadelphia Museums, supra* at 123-124. The City of Philadelphia subsequently provided funding for the care and improvement of this property. *Id.* at 124. Several years after these original Ordinances were entered, the City of Philadelphia entered a series of five additional Ordinances, attempting to repeal the original Ordinance(s), dedicating the land to a public use, in order to convey the property to the University of Pennsylvania. *Id.* The Board of Trustees of the Philadelphia Museum petitioned the court to set aside the conveyance from the City of Philadelphia to the University of Pennsylvania. *Id.*

In holding that the City of Philadelphia had "neither the power nor authority to sell and convey [the dedicated property] for private purposes," the Supreme Court of Pennsylvania quoted the following language of the Eighth Circuit Court:

> We are unwilling to concede that a nation or a state which becomes the proprietor of a town site, plats it, and dedicates its streets and parks to public use has any greater or better right to revoke or avoid its grant or covenant than a private proprietor would have. It may be that either, before any rights have accrued, can revoke the dedication, but, after lots have been sold, after streets have been graded, **after parks have been cared for and improved, according to the plat, — in other words, after rights have vested in reliance upon the dedication, — we deny the right of a nation or an individual to revoke it, or to release or destroy the right of the public to the exclusive use of the parks and streets for the purposes for which they were granted**...A nation, state, or municipality which dedicates land that it owns in the site of a town to public use for the purpose of a park is as conclusively estopped as a private proprietor from revoking that dedication, from selling the park, from appropriating the land which it occupies to other purposes after lots have been sold, after the town has been settled, and after the park has been improved with moneys raised by the taxation of its residents and taxpayers in reliance upon the grant and covenant, which the dedication evidences. *Trustees of the Philadelphia Museums, supra* at 125, quoting *Davenport v. Buffington*, 97 F. 234, 238 (8th Cir. 1899). (emphasis supplied).

Furthermore, the common law trust principles that were established in *Trustees of the Philadelphia Museums* have been adopted in subsequent Pennsylvania case law. In *Easton v. Koch*, the Superior Court of Pennsylvania cited *Trustees of the Philadelphia Museums* in holding, "a municipality cannot revoke or destroy, after dedication and acceptance, the right of the public to the exclusive use of the property for the purpose designated." *Easton v. Koch*, 31 A.2d 747, 752 (Pa. Super. Ct. 1943).

Similarly, in *Borough of Ridgway v. Grant*, 425 A.2d 1168 (Cmwlth. Ct. 1981),[3] the Commonwealth Court of Pennsylvania addressed the issue of a trustee's authority to engage in a construction project on dedicated property, pursuant to the principles established in *Trustees of the Philadelphia Museums.* In *Borough of Ridgway,* a deed limited the use of property to public park purposes, and for a period of sixty years, the Borough of Ridgway kept and maintained the property as such. *Id.* at 1169. Subsequently, the Borough of Ridgway petitioned the court to permit construction of a firehouse on a portion of the park property. *Id.* The Commonwealth Court stated that the Borough had manifested a "clear and

[3] This Court notes that *Borough of Ridgway v. Grant* was decided subsequent to the enactment of the Donated or Dedicated Property Act. Nevertheless, the Commonwealth Court of Pennsylvania analyzed the case pursuant to common law public trust doctrine.

unequivocal" intent to devote the property to public park purposes. *Id.* at 1170. For a period of sixty years the Borough had equipped, maintained, and improved the land as a park, and the public had enjoyed the land as a park. *Id.* Moreover, the Commonwealth Court held that construction of a firehouse was not compatible with use of dedicated land as a public park, and, therefore, denied the Borough's request. *Id.* at 1172.

Finally, in *Bangor Memorial Park*, the Commonwealth Court adopted the lower court's opinion, which utilized the principles established in *Trustees of the Philadelphia Museums* in addressing the Borough of Bangor's petition to convey a portion of dedicated park land to the Bangor School District.[4] In *Bangor Memorial Park*, in the 1930s, the parcel of land, now known as Bangor Memorial Park, was deeded to the Borough of Bangor. *Bangor, supra* at 344. On June 5, 1950, the Borough of Bangor entered an Ordinance, formally dedicating the property as a park for public use. *Id.* Subsequently, the Borough of Bangor petitioned to convey a portion of the dedicated property to the Bangor School District. *Id.* at 345. The Court in *Bangor Memorial Park* determined that there existed clear evidence that Bangor Memorial Park was dedicated and accepted for use solely as a public park. *Id.* at 355. The property continuously had been utilized as a park since the 1930s; the Borough formalized the dedication through an Ordinance enacted in 1950; the park had been used for recreational purposes since the 1930s; and the Borough had invested funds into maintaining and improving the park. *Id.* Accordingly, the Court prohibited the Borough of Bangor from making a conveyance of a portion of Bangor Memorial Park, a park dedicated to a public purpose. *Bangor Memorial Park, supra* at 350.

Moreover, the common law principles that were established in *Trustees of the Philadelphia Museums* and its progeny, relative to dedicated properties, are applicable to the City of Erie's Petition. In the instant matter, the Erie Golf Course was formally dedicated and accepted for use as a golf course, a public park, or both. The dedication of the Erie Golf Course is evidenced by the express language of the recorded deed; the City's of Erie's Ordinance accepting the dedication; the City of Erie's continuous and exclusive use of the property as a golf course over the past eighty years; the City of Erie's contribution of funds toward the maintenance and improvement of the property as a golf course; and the public's use of the property over the past eighty years as a golf course and for public park purposes. Furthermore, in seeking to remove the deed restriction on the

[4] This Court notes that *Bangor Memorial Park* was also decided subsequent to the enactment of the Donated or Dedicated Property Act. Nevertheless, the trial court and the Commonwealth Court of Pennsylvania analyzed the case pursuant to common law public trust doctrine.

property, the City of Erie implicitly acknowledges the restriction's clear existence. In this case, it is clear that the City of Erie holds the Erie Golf Course as fiduciary for the benefit of the public.

This Court notes that Black's Law Dictionary describes a "fiduciary" as an entity that has a duty, created by its own undertaking, to exercise "scrupulous good faith and candor." *Black's Law Dictionary* 625 (6th ed. 1990). Black's further defines "fiduciary duty" as "a duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. **"It is the highest standard of duty implied by law."** *Id.* This Court finds that by defunding and quickly attempting to sell the Erie Golf Course on the basis that the debt service, which the City accepted, was too expensive, the City of Erie neglected its fiduciary duty to the public. A much higher standard of care is anticipated of the City of Erie as fiduciary of the Erie Golf Course.

Moreover, the public trust doctrine, not 53 P.S. §3381 *et seq.* is applicable to the instant case. Pursuant to the public trust doctrine, as established by the Supreme Court of Pennsylvania in *Philadelphia Museums,* **the City of Erie, as trustee, must continue to keep and maintain the Erie Golf Course as a golf course or for public park purposes, or both, consistent with the express terms of the deed restriction.** This Court notes that pursuant to the express terms of the deed restriction, the City of Erie is not prohibited from selling or otherwise conveying the property to another entity or individual willing to assume the public use restriction set forth in the deed, and willing to keep and maintain the property as a golf course, a public park, or both. In fact, the recorded deed and the Ordinance both specifically provide that all "...**successors and assigns**, shall and will at all times hereafter and forever, keep and maintain the premises hereby conveyed, as a golf course or for public park purposes, or both..." However, until the City of Erie finds a purchaser who is willing to accept and comply with these restrictions, the City of Erie is bound to abide by the terms of the deed restriction to which it consented over eighty years ago.

Although it is the opinion of this Court that the Donated or Dedicated Property Act is inapplicable to the case at hand, assuming *arguendo* that the Donated or Dedicated Property Act did apply, the City of Erie's case would still fail. The only reason cited by the City of Erie in support of its contention that the Erie Golf Course is no longer practicable and has ceased to serve the public interest is that the debt service, which the City accepted, has rendered the golf course too expensive for the City to keep. (N.T. 4/24/07 pp.98-99). In fact, Mayor Joseph Sinnott indicated that if this financial problem were removed, nothing else makes the Erie Golf Course impracticable to keep and maintain. (N.T. 4/24/07 p.99); (N.T. 5/11/07 p.36). This Court has thoroughly reviewed the financial figures presented by the City of Erie, as well as the extensive testimony of James Powers,

Joseph Paparone, Ronald Komorek, David Mulvihill, and Mayor Joseph Sinnott, in support of the City's contention that the Erie Golf Course is not feasible from a financial perspective. This Court notes that the origin and accuracy of the City's financial data, which was presented to the Court, was contested throughout the course of the proceedings. Moreover, this Court finds that the City's financial data alone does not clearly demonstrate that the use of the Erie Golf Course is no longer practicable and has ceased to serve the public interest.

Initially, the City suggested that the use of the Erie Golf Course is no longer practicable and has ceased to serve the public interest because the Erie Golf Course and the golf enterprise fund do not generate enough money to pay for the debt service. Nevertheless, Ronald Komorek, a City witness, acknowledged that there is no requirement that golf must generate sufficient funds to cover the cost of operation. (N.T. 4/3/07 p.19-20). Contrary to the City's representations, the Erie Golf Course does not need to generate any specific amount of income to be a viable asset to the community. This Court notes that the City of Erie provides funding to many valuable community resources in Erie that generate insignificant or no revenues, including, but not limited, to the following: $300,000.00 in funding per year to the Erie Zoo; $200,000.00 in funding per year to the Metropolitan Transit Authority; and $30,000.00 in funding per year to the Council of the Arts. (N.T. 5/11/07 pp.68-71).

Furthermore, the debt service, which the City of Erie uses as its sole justification for abandoning the use of the Erie Golf Course, is not secured by the Erie Golf Course. Although the debt service was used in large part to make improvements to the Erie Golf Course, the Erie Golf Course itself was never pledged as collateral for the loan. (N.T. 5/11/07 p.74). Rather, the loan was provided on the faith and credit of the City of Erie, and all of the assets of the City of Erie were pledged as collateral. (N.T. 5/11/07 pp. 74- 77).

Additionally, this Court finds it significant that the only circumstance that the City of Erie cites in support of its position is a circumstance that the City of Erie took upon itself. Just three years ago, the City of Erie evidenced its belief that the Erie Golf Course was such a valuable public asset that the City accepted the debt service in order to make substantial improvements to the Erie Golf Course, in addition to improvements to Downing Golf Course. The City of Erie consented to the terms of the debt service, and it is logical to deduce that the City believed it would be feasible to repay the debt service over time.

Just three years ago, the City of Erie hired Richard Mandell, a noted golf course architect, who redesigned and restored the Erie Golf Course consistent with the design style of the golf course's original designer, A. W. Tillinghast. (N.T. 5/21/07 p.120). Not only is A. W. Tillinghast widely considered to be one of the greatest golf course designers to have

ever lived, A. W. Tillinghast designed some of the country's most exclusive private golf courses, which have hosted the United States Open, the United States Amateur, and the PGA Championship, including Winged Foot, Baltusrol, Bethpage State Park, the Black Forest, and the San Francisco Golf Club. (N.T. 5/21/07 pp.102, 118, 130, 160). Most golfers will never have the privilege of playing any of these exclusive, Tillinghast courses, and the Erie Golf Course is unique in that it provides golfers with a uncommon opportunity to play a course designed by a preeminent golf course designer. (N.T. 5/21/07 p.160).

The City of Erie fully completed the Erie Golf Course remodeling effort sometime in the summer of 2006, but then unexpectedly closed the course permanently only a few months later, completely ignorant of the fact that the golf course was subject to a deed restriction. (N.T. 5/21/07 p.40); (N.T. 4/24/07 p.120). The City proceeded to defund the course, and created and disseminated a Request for Proposals (RFP) to solicit potential buyers or lessors for the property, again, oblivious to the express deed restriction and to its fiduciary duty to protect this asset for the benefit of the public. *See,* Intervenors' Exhibit J. Moreover, the City of Erie, the fiduciary of the Erie Golf Course, deemed this newly renovated and greatly improved, classic A. W. Tillinghast golf course, an unwanted burden. In the instant case, the City of Erie **solely** was responsible for creating any alleged burden with regard to the Erie Golf Course.

As a policy matter, a municipal-fiduciary should not be permitted to create the problem that serves as its only justification for overturning a deed restriction. If this were the case, then any municipal-fiduciary that wanted to sell property that generously had been donated to it could simply accept a loan with unreasonable terms and then petition a court claiming the property was too expensive for the municipal-fiduciary to keep and maintain. The effect of such a policy would be to discourage individuals from donating valuable land to public entities, as indicated by Thomas Fuhrman, president of the Lake Erie Region Conservancy. (N.T. 5/23/07 pp.48-49)

Finally, this Court finds that the Erie Golf Course has no inherent flaws that make it impracticable as a golf course and/or park, which would justify the removal of the deed restriction at this time. This Court conducted a physical view of the property, and found that the Erie Golf Course is a beautiful, sprawling course with a natural landscape that has a secluded feel, but is located near a populous and rapidly developing residential and commercial area. (N.T. 5/31/07 p.45). This Court observed that the Erie Golf Course is surrounded by mature trees and natural habitat, and is home to many different wildlife species. (N.T. 5/31/07 p.45). The Erie Golf Course was recently renovated, and has several redesigned, improved holes; a lengthened course; a new irrigation system; new cart paths; and a fully redesigned clubhouse and banquet hall, among several

other renovations. *See*, Petitioner's Exhibit 12. The golf course itself has done nothing to justify the removal of the deed restriction.

By recently investing approximately $2,000,000.00 into an extensive renovation effort of the Erie Golf Course, the City of Erie has made the Erie Golf Course a much more practicable, feasible, and viable golf course that better serves the public interest. Since the completion of the renovations, the Erie Golf Course has become extremely conducive to being operated as a golf course, a public park, or both, consistent with the express terms of the deed restriction, which the City ratified in the 1926 Ordinance. Furthermore, the credible testimony of Joyce Olszewski and Calvin Neithamer, local golfers who have played the Erie Golf Course for many years, demonstrates that the Erie Golf Course does, in fact, serve the public interest. *See*, (N.T. 5/11/07 pp.120-158); (N.T. 5/23/07 pp.72-109). It is notable that although the City of Erie closed the Erie Golf Course on October 31, 2006, individuals continue to visit the closed Erie Golf Course grounds to play golf, walk the course, and enjoy the surroundings. (N.T. 5/11/07 pp.155-156). The Erie Golf Course is clearly practicable as a golf course, a public park or both, and the Erie Golf Course continues to serve the public interest despite its untimely closing. Accordingly, the City of Erie failed to establish that the original use of the Erie Golf Course is no longer practicable and has ceased to serve the public interest.

In conclusion, this Court notes that on April 9, 2007, a hearing was conducted before this Court at civil court Docket Number 11348-2007 for the purpose of addressing the Intervenors' Motion for Preliminary Injunction, requesting that this Court order the City of Erie to fund, open, and maintain the operation of the Erie Golf Course. On April 9, 2007, after the hearing, this Court entered an Order, dismissing the Intervenors' Petition. The Court specifically found that this Court lacks the authority to direct the executive branch and the legislative branch to adjust the budget for the purpose of funding and opening the Erie Golf Course. This Court reiterates this position at this time. Pursuant to the express language of the deed, the City of Erie is free to keep and maintain the property "as a golf course or for public park purposes, or both," and, therefore, the City is under no obligation to fund and open the Erie Golf Course as a golf course, per se, because the deed restriction also permits the City of Erie to keep and maintain the property as a public park, should the City so choose. Separation of powers doctrine precludes this Court, the judiciary, from ordering the executive and legislative branches to budget funds for purposes of opening the Erie Golf Course for the 2007 golf season, or at any time in the future. Therefore, the City of Erie, as fiduciary of the Erie Golf Course, is bound only by the express language of the deed, to keep and maintain the Erie Golf Course as a golf course or for public park purposes, or both. This Court notes that on May 31, 2007, when the physical view of the Erie Golf Course property was conducted, the Court

noted the absence of any "no trespassing" signs posted on the property. By not restricting the Erie Golf Course's current usage and by not restricting the public's access to the same, the City of Erie is meeting its fiduciary duty to keep and maintain the Erie Golf Course property for the benefit of the public. Accordingly, this Court enters the following Order:

ORDER

AND NOW, to wit, this 27th day of June, 2007, after hearing extensive testimony and oral argument, after examining the evidence presented, including numerous exhibits, and after a thorough independent review of the relevant statutory and case law, as well as the transcribed record of the proceedings, it is hereby **ORDERED, ADJUDGED, AND DECREED** that the City of Erie's Petition to Abandon the Use of Dedicated Public Property is **DENIED** for the reasons set forth in the above Memorandum Opinion. The Erie Golf Course property shall continue to be held by the City of Erie in the public trust consistent with the purpose of the original property dedication, as a golf course or for public park purposes, or both.

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

IN RE:
THE ESTATE OF CHARLES H. MORRILL, Deceased

WILLS / VALIDITY / EXECUTION

Pursuant to 20 Pa. C.S. §2502, "every will shall be in writing and shall be signed by the testator at the end thereof." The requirement that a will be signed at the end was enacted in order to prevent the probate of unfinished papers and mere inchoate expressions of intent. By signing at the end of a document, the scrivener has expressed that he has decided on a testamentary scheme and that the writing is not half-formed thoughts never intended to be operative.

WILLS / ACTIONS / PROBATE

When a party appeals from a decree of the Register of Wills, admitting a will to probate, the Orphans' Court must consider the facts presented and either dismiss the petition, grant an issue in case of a substantial dispute, or set aside the probate.

WILLS / ACTIONS / PROBATE

The Superior Court of Pennsylvania will not reverse a decision of the Orphans' Court unless there has been an abuse of discretion or a fundamental error in applying the correct principles of law. Provided the record supports the Orphans' Court's findings of fact, the Superior Court of Pennsylvania will defer to those findings, and will not reverse absent an abuse of discretion.

WILLS / VALIDITY / CAPACITY

A testator possesses testamentary capacity if he or she knows those who are the natural objects of his or her bounty, of what his or her estate consists, and what he or she desires done with it, even though his or her memory may have been impaired by age or disease.

WILLS / VALIDITY / CAPACITY

Testamentary capacity is to be determined by the condition of the testator at the very time he or she executes the will. However, evidence of incapacity for a reasonable time before and after the making of a will is admissible as an indication of lack of capacity on the day the will is executed.

WILLS / VALIDITY / CAPACITY

Pennsylvania case law establishes that when a contestant to a will challenges capacity on the basis of the testator's alcohol use, the burden is on the contestant to show that the testator was under the influence of intoxicants at the time of the execution of such will, and to such a degree that it affected his or her testamentary capacity.

WILLS / VALIDITY / CAPACITY

Where a will is drawn by a decedent's attorney and proved by subscribing witnesses, the burden of proving lack of testamentary capacity is sustained only if the contestant can produce clear and compelling evidence of lack of testamentary capacity.

WILLS /VALIDITY / CAPACITY

Once a will has been probated, the contestant who claims that the will was procured by undue influence has the burden of proof. A *prima facie* case of undue influence is established and the burden of proof is shifted to the will's proponent when three elements are established: 1) there was a confidential relationship between the proponent and testator; 2) the proponent receives a substantial benefit under the will; 3) the testator had a weakened intellect.

WILLS / VALIDITY / CAPACITY

Although Pennsylvania cases have not established a bright-line test by which weakened intellect can be identified to a legal certainty, they have recognized that it is typically accompanied by persistent confusion, forgetfulness, and disorientation.

WILLS / VALIDITY / INTENT

It has always been the law of Pennsylvania that a parent does not have to leave any of his property to any of his children, irrespective of whether he likes them or dislikes them, or hates them, and he does not have to disclose his reasons for disinheriting them.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION NO. 382-2005

Appearances: George M. Schroeck, Esq., on behalf of
Gary R. Morrill, Appellant
Marcia H. Haller, Esq., on behalf of
James R. Kikta, Appellee

OPINION

Domitrovich, J., May 15, 2006

This matter is currently before the Superior Court of Pennsylvania on the appeal of Gary R. Morrill (hereinafter referred to as Appellant), the estranged son of Charles Morrill, filed by and through his counsel, George Schroeck, Esq., from the Order entered by this Lower Court on March 10, 2006, denying Appellant's "Petition for Citation to Show Cause Why Register's Probate Decree Should Not Be Set Aside." On March 31, 2006, this Lower Court directed Appellant to file of record a concise statement of matters complained of on appeal, pursuant to Pa. R.A.P. 1925(b). In response, Appellant filed a five-page narrative comprised of virtually indistinguishable facts and issues. Despite the voluminous, indistinct nature of the issues raised Appellant's Pa. R.A.P. 1925(b) Statement, this Lower Court will conduct an analysis of the issues raised by Appellant that are identifiable. Accordingly, this Lower Court will combine and address Appellant's issues as the following three issues: (1) whether this Lower Court erred in determining that Charles

Morrill had only one will, signed and properly executed on November 9, 2000; (2) whether this Lower Court abused its discretion in determining that Appellant failed to establish by clear and convincing evidence that Charles Morrill lacked the testamentary capacity to execute his will; and (3) whether this Lower Court abused its discretion in determining that Appellant failed to establish a prima facie case of undue influence, sufficient to prevent probate of Appellant's will.

With regard to the factual and procedural history of the instant case, Charles Morrill executed his Last Will and Testament on November 9, 2000, leaving the entirety of his estate to James Kikta, his very close friend, and naming James Kikta as the Executor of his will. Subsequently, Charles Morrill died testate on August 11, 2005 at the age of eighty-one. Charles Morrill's wife, Audrey Morrill, died on January 13, 1994, predeceasing Charles Morrill. During their marriage, Charles and Audrey Morrill had one son, Gary Morrill, the Appellant in the instant action. Gary Morrill was married to Debbie Morrill until December of 1997, when they divorced. (N.T. 3/9/06 p.49). Charles Morrill's relationship with Gary Morrill became strained following Audrey Morrill's death, and at some point Charles Morrill and Gary Morrill became completely estranged from one another, as detailed below.

During his lifetime, Charles Morrill's closest friend was Richard Kikta. (N.T. 3/9/06 p.89). Richard Kikta and Charles Morrill remained very close friends throughout their lives. (N.T. 3/9/06 p.89). In fact, Richard Kikta and Charles Morrill served in the Merchant Marines together, went to war together, and owned property near each other in East Springfield, Pennsylvania. (N.T. 3/9/06 p.89). Richard Kikta died on August 3,1998. (N.T. 3/9/06 p.105). James Kikta, the sole beneficiary of Charles Morrill's will, is the son of Richard Kikta, and Charles Morrill has known James Kikta since the time of James Kikta's birth. (N.T. 3/9/06 p.89). Charles Morrill and James Kikta developed and have maintained a very close friendship throughout their lives. (N.T. 3/9/06 p.89). Although Charles Morrill lives in Pennsylvania and James Kikta lives in California, Charles Morrill and James Kikta consistently communicated with one another three to four times per week via telephone, and went on annual hunting trips together. (N.T. 3/9/06 p.90).

Following Charles Morrill's death, on August 30, 2005, James Kikta, the Executor named in Charles Morrill's November 9, 2000 Last Will and Testament, filed a Petition for Probate and Grant of Letters in the Erie County Office of the Register of Wills. Accordingly, on August 30, 2005, Patrick Fetzner, the Clerk of Records of Erie County, entered a Decree of Probate and a Grant of Letters Testamentary to James Kikta.

On November 17, 2005, George Schroeck, Esq., on behalf of Gary Morrill, filed an appeal to the Orphans' Court Division of the Erie County Court of Common Pleas, from the decision of the Register of Wills to

admit Charles Morrill's November 9, 2000 Last Will and Testament to probate, and to Grant Letters Testamentary to James Kikta. Furthermore, on November 17, 2005, Attorney Schroeck filed a Petition for Citation to Show Cause Why Register's Probate Decree Should Not Be Set Aside. Accordingly, on March 9, 2006, a hearing was conducted before the undersigned judge concerning this Petition.

At the time of this hearing, this Lower Court found credible the testimony of Shaun Adrian, Esq., a partner with MacDonald, lllig, Jones & Britton in the estate planning department. (N.T. 3/9/06 p.63). Shaun Adrian was the scrivener of Charles Morrill's November 9, 2000 Last Will and Testament. (N.T. 3/9/06 p.63). In March of 2000, when Charles Morrill was seventy-six years old, James Kikta contacted Attorney Adrian, on behalf of Charles Morrill, and requested that Attorney Adrian assist Charles Morrill in preparing a will. (N.T. 3/9/06 pp.63-64, 65, 74). James Kikta informed Attorney Adrian that Charles Morrill had asked Mr. Kikta to contact an Erie attorney for this purpose. (N.T. 3/9/06 p.65). Attorney Adrian stated that James Kikta identified himself as a long time friend of Charles Morrill. (N.T. 3/9/06 p.64). Charles Morrill and James Kikta enjoyed a very close relationship, and James Kikta referred to Charles Morrill as his uncle, and Charles Morrill referred to James Kikta as his nephew.[1] (N.T. 3/9/06 p.64).

Subsequently, in August of 2000, James Kikta telephoned Attorney Adrian, on behalf of Charles Morrill, and informed Attorney Adrian that Charles Morrill was still interested in preparing a Last Will and Testament and other estate documents. Therefore, Attorney Adrian requested that James Kikta provide details concerning what provisions Charles Morrill wanted to include in his will and his other estate planning documents, and Attorney Adrian stated that he would then prepare these documents and forward them to Charles Morrill for his review. (N.T. 3/9/06 pp.65-66).

Subsequently, Attorney Adrian drafted a Last Will and Testament, a General Durable Power of Attorney, and a Health Care Power of Attorney and Advance Health Care Directive for Charles Morrill. (N.T. 3/9/06 p.66). On September 12, 2000, Attorney Adrian forwarded these documents to Charles Morrill. (N.T. 3/9/06 p.66, 69). In the will, prepared by Attorney Adrian, Charles Morrill left his entire estate to James Kikta. *See Respondent's Exhibit 1*. In the General Durable Power of Attorney, prepared by Attorney Adrian, Charles Morrill named James Kikta as his agent. *See Respondent's Exhibits 1 and 2*. Finally, in the Health Care Power of Attorney and Advance Health Care Directive, prepared by Attorney Adrian, Charles Morrill authorized James Kikta to make medical and health care decisions on his behalf in the event Charles

[1] In fact, Charles Morrill and James Kikta were not related biologically to one another.

Morrill was unable to communicate with his doctors. *See Respondent's Exhibits 1 and 3*.

After Charles Morrill had received and reviewed these documents, James Kikta contacted Attorney Adrian to inform him that he had spoken with Charles Morrill over the telephone, and Charles Morrill found all of these documents to be acceptable. (N.T. 3/9/06 pp.67, 79). Furthermore, Charles Morrill wanted James Kikta to arrange a date for Charles Morrill to meet with Attorney Adrian to sign and execute these documents. (N.T. 3/9/06 pp.67, 79). Therefore, an appointment was scheduled for November 9, 2000 for the purpose of reviewing the provisions of these estate planning documents, and executing these documents. (N.T. 3/9/06 p.67).

Accordingly, on November 9, 2000, a meeting was held at Attorney Adrian's office, at which only Attorney Adrian and Charles Morrill were present. (N.T. 3/9/06 p.67). James Kikta was not present for this appointment. (N.T. 3/9/06 p.67). Since this was the first time Attorney Adrian had met with Charles Morrill, Attorney Adrian engaged Charles Morrill in a discussion concerning his assets, his natural heirs, and his intentions with regard to estate planning. (N.T. 3/9/06 p.67). Attorney Adrian asked Charles Morrill what his assets consisted of, and Charles Morrill advised that he owned thirty-six and a half acres of property in East Springfield, he owned two bank accounts with PNC Bank, he owned two vehicles, and he owned a trailer home in which he resided. (N.T. 3/9/06 p.68). Attorney Adrian then asked Charles Morrill who his immediate family members were, and Charles Morrill advised that his wife passed away several years earlier, he had a thirty-seven year old adult son, Gary Morrill, and he had also a six-year old daughter, Lori Ferraro.[2] (N.T. 3/9/06 p.68).

Attorney Adrian asked Charles Morrill why he had decided not to make a provision in his will for his son, Gary Morrill. (N.T. 3/9/06 p.68). Charles Morrill stated that two years earlier he had suffered a heart attack, and he had attempted to contact his son, Gary Morrill, while he was in the hospital; however, Gary Morrill did not respond to these calls. (N.T. 3/9/06 p.68). Charles Morrill stated that there had been "a general falling out" between himself and his son, and, therefore, he did not desire to leave anything to his son, Gary Morrill. (N.T. 3/9/06 p.68).

Based on Attorney Adrian's discussions with Charles Morrill, Attorney Adrian had no reason to believe that Charles Morrill did not understand his assets or the natural objects of his bounty. (N.T. 3/9/06 pp.68-69). Attorney Adrian stated that Charles Morrill knew who his immediate

[2] This Lower Court notes that Lori Ferraro c/o Ted Ferraro was properly served with Notice of Estate Administration, pursuant to Pa. Orph. Ct. R. 5.6(a). However, Ted Ferraro, on behalf of the minor, Lori Ferraro, never filed a Petition to set aside the Probate Decree.

family members were, and Charles Morrill did not intend to leave anything to them. (N.T. 3/9/06 p.69). Rather, Charles Morrill intended to leave his entire estate to James Kikta. (N.T. 3/9/06 p.69). Charles Morrill, moreover, was aware of what he owned, knew who his next of kin were, and had personal reasons for not leaving anything to his son, Gary Morrill. (N.T. 3/9/06 p.83).

Attorney Adrian then explained the estate planning documents to Charles Morrill. (N.T. 3/9/06 p.70). Charles Morrill understood precisely the purposes of these documents. (N.T. 3/9/06 p.70). Furthermore, the provisions that James Kikta had previously told Attorney Adrian to include in Charles Morrill's estate planning documents, accurately described Charles Morrill's intentions. (N.T. 3/9/06 p.80). Attorney Adrian did not believe that Charles Morrill was intoxicated during their November 9, 2000 meeting. (N.T. 3/9/06 p.69). Charles Morrill was well dressed, clean-shaven, and articulate during this meeting. (N.T. 3/9/06 p.69). Attorney Adrian stated that Charles Morrill was of sound mind when he executed his Last Will and Testament, as well as his other estate planning documents. (N.T. 3/9/06 p.69). Moreover, Attorney Adrian did not have any reason to doubt Charles Morrill's capacity to sign his will. (N.T. 3/9/06 p.69).

Furthermore, Attorney Adrian noted that each year he witnesses hundreds of clients signing wills and other estate planning documents, and nothing about this meeting with Charles Morrill led Attorney Adrian to believe that Charles Morrill had been unduly influenced by anyone, including James Kikta. (N.T. 3/9/06 p.72). James Kikta was not physically present for this meeting, and Charles Morrill's decision to execute his will and other estate documents was entirely his own. (N.T. 3/9/06 p.72).

Accordingly, on November 9, 2000, Charles Morrill signed and properly executed his Last Will and Testament, his General Durable Power of Attorney, and his Health Care Power of Attorney and Advance Health Care Directive, in the presence of two witnesses, Attorney Adrian and Attorney Adrian's administrative assistant, Kalene Hedderick. (N.T. 3/9/06 pp.70, 80); *See also, Charles Morrill's Last Will and Testament.* Attorney Adrian retained Charles Morrill's original will at his office, until the time of his death, when it was admitted for probate. (N.T. 3/9/06 p.84).

This Lower Court also found credible the testimony of James Kikta. James Kikta currently lives in Lake Forrest, California, and has lived there intermittently for the past eighteen years. (N.T. 3/9/06 p.88). James Kikta served in the United States Marine Corps for thirty years, and, therefore, he has lived away from his home in California at various times. (N.T. 3/9/06 p.88). As previously stated, Richard Kikta, James Kikta's father, grew up with Charles Morrill in the same neighborhood in Cleveland, Ohio. (N.T. 3/9/06 p.89). Richard Kikta and Charles Morrill remained very close friends throughout their lives. (N.T. 3/9/06 p.89). As previously

stated, Richard Kikta and Charles Morrill served in the Merchant Marines together, went to war together, and owned property near each other in East Springfield, Pennsylvania. (N.T. 3/9/06 p.89). Charles Morrill has known James Kikta from the time of James Kikta's birth, and Charles Morrill and James Kikta developed and maintained a very close relationship. (N.T. 3/9/06 p.89).

Although Charles Morrill and James Kikta were not able to see one another very often since they lived very far apart, Charles Morrill and James Kikta talked over the telephone three to four times per week. N.T. 3/9/06 p.90). Furthermore, once per year, Charles Morrill and James Kikta went hunting together in Pennsylvania. (N.T. 3/9/06 pp.90, 106). James Kikta noted that when he and Charles Morrill were together hunting each year, neither one of them drank alcohol. (N.T. 3/9/06 p.108).

James Kikta never had any concern about Charles Morrill's mental capacity. (N.T. 3/9/06 pp.90-91). Prior to 2000, James Kikta never provided any assistance to Charles Morrill. (N.T. 3/9/06 p.91). During the December 1999 hunting season, Charles Morrill informed James Kikta that he wanted to take steps to ensure that his estate was in order. (N.T. 3/9/06 pp.92, 106). Accordingly, on July 31, 2000, Charles Morrill asked James Kikta to meet with him at Jean Evans Thompson Funeral Home to make arrangements for his own funeral, and Charles Morrill signed a Statement of Funeral Goods and Services Selected. *See Respondent's Exhibit 4*. Furthermore, on August 1, 2000, Charles Morrill signed a contract with Springfield Monument Company to purchase a headstone for his cemetery plot. *See Respondent's Exhibit 5*.

After Charles Morrill had finished making his funeral arrangements, Charles Morrill once again informed James Kikta that he was interested in executing other estate planning documents. (N.T. 3/9/06 p.91). Therefore, James Kikta contacted Attorney Adrian, on behalf of Charles Morrill, informed Attorney Adrian that Charles Morrill was interested in executing estate planning documents, and informed Attorney Adrian, per the directives of Charles Morrill, concerning details of what those documents, including the Last Will and Testament, should contain. (N.T. 3/9/06 p.94).

Attorney Adrian sent drafts of these documents to Charles Morrill, and Charles Morrill reviewed these documents. (N.T. 3/9/06 p.95). Charles Morrill and James Kikta had subsequent conversations concerning these documents, and Charles Morrill stated that he was satisfied with the drafts of all of the documents, including the Last Will and Testament, and Charles Morrill understood their contents. (N.T. 3/9/06 p.95). Accordingly, Charles Morrill requested that James Kikta arrange an appointment with Attorney Adrian in order to execute these documents, and James Kikta did so. (N.T. 3/9/06 p.96). Nevertheless, James Kikta did not appear for the appointment between Attorney Adrian and Charles Morrill when Charles

Morrill executed his Last Will and Testament and other estate planning documents. (N.T. 3/9/06 p.96).

Although Charles Morrill appointed James Kikta as his Power of Attorney, James Kikta never exercised this Power of Attorney. (N.T. 3/9/06 pp.96-97). James Kikta never had to exercise care of Charles Morrill's personal finances and never had to write out or sign any checks for Charles Morrill. (N.T. 3/9/06 pp.97, 98). Furthermore, James Kikta credibly stated that as far as he was aware, no one else assisted Charles Morrill in taking care of his financial affairs. (N.T. 3/9/06 p.97). Charles Morrill was capable of handling his financial affairs entirely on his own. (N.T. 3/9/06 p.98). Moreover, until the time of Charles Morrill's death, Charles Morrill was solely responsible for managing his own financial affairs. (N.T. 3/9/06 p.99).

Additionally, in November of 2000, when Charles Morrill executed his Last Will and Testament, and thereafter, Charles Morrill, on his own, paid his rent for the land where his trailer home was located. (N.T. 3/9/06 p.98). Charles Morrill also paid all of his utilities on his own. (N.T. 3/9/06 p.98). Charles Morrill also owned two vehicles, which Charles Morrill maintained and paid for on his own. (N.T. 3/9/06 p.98). Charles Morrill kept his registration, insurance, and Pennsylvania inspection requirements current on his vehicles. (N.T. 3/9/06 p.102); *See also Respondent's Exhibit 8*. Charles Morrill also kept his driver's license and AAA membership current, until the time of his death. (N.T. 3/9/06 p.104); *See Respondent's Exhibit 9*.

In 2003, a fire destroyed Charles Morrill's trailer home, while Charles Morrill was not present. (N.T. 3/9/06 p.99). Therefore, Charles Morrill was compelled to make alternate living arrangements. (N.T. 3/9/06 p.100). For a short period of time following the fire, Charles Morrill lived in a hotel, and subsequently, on July 7, 2003, Charles Morrill entered into a contract and purchased a trailer home, on his own, from Strong Mobile Homes for the purchase price of $3,710.00. (N.T. 3/9/06 p.101); *See Respondent's Exhibit 6*. Charles Morrill also provided Strong Mobile Homes with payment in the form of a Cashier's Check on July 10, 2003, in the amount of $3,710.00. (N.T. 3/9/06 p.101); *See Respondent's Exhibit 7*.

None of Charles Morrill's family members ever contacted James Kikta, expressing concern about Charles Morrill or suggesting the need for a guardian. (N.T. 3/9/06 p.105). James Kikta was never concerned about Charles Morrill's capacity. (N.T. 3/9/06 p.105). To the contrary, James Kikta believed Charles Morrill was fully capable of handling his own affairs. (N.T. 3/9/06 p.105).

James Kikta also credibly testified concerning the "falling out" between Charles Morrill and Gary Morrill. Following the death of Audrey Morrill, Charles Morrill felt that Gary Morrill was not supportive of him, and

Charles Morrill felt that he could not trust Gary Morrill. (N.T. 3/9/06 pp.95-06). The dissension that existed between Charles and Gary Morrill continued until the time of the time of Charles Morrill's death, and James Kikta credibly stated that Charles Morrill never expressed a desire to change his decision not to leave anything to Gary Morrill in his will. (N.T. 3/9/06 p.99).

Edward P. Wittmann, Esq. also provided testimony to this Lower Court. Attorney Wittmann testified that in 1986, he drafted a will for Charles Morrill. (N.T. 3/9/06 pp.7-8). Attorney Wittmann, however, did not witness Charles Morrill sign his will, and Attorney Wittmann did not know whether this 1986 will was ever signed and properly executed by Charles Morrill. (N.T. 3/9/06 p.10). Attorney Wittmann merely prepared a will for Charles Morrill, and Attorney Wittmann then forwarded this document to Charles Morrill to sign and execute it, if he so desired. (N.T. 3/9/06 p.10). Attorney Wittmann did not maintain a copy of this will, and Attorney Wittmann stated that he believed Charles Morrill had possession of this will. (N.T. 3/9/06 p.9). In fact, subsequently, Attorney Wittmann never had any contact with Charles Morrill, relative to his 1986 will. (N.T. 3/9/06 p.10). The only contact Attorney Wittmann had with Charles Morrill, subsequent to 1986, was in 1994, following the death of Audrey Morrill. (N.T. 3/9/06 p.10). At that time, Charles Morrill and Gary Morrill discussed with Attorney Wittmann the possibility of transferring the Morrill's family home to Gary Morrill. (N.T. 3/9/06 p.10). However, no such transfer ever occurred. (N.T. 3/9/06 pp.10-11). Attorney Wittmann has had no contact whatsoever with Charles Morrill since 1994. (N.T. 3/9/06 p.10).

Nevertheless, Attorney Wittmann testified concerning the provisions contained in the draft of the unsigned, unexecuted, copy of a 1986 will. Attorney Wittmann testified that in Charles Morrill's 1986 draft will, he left his entire estate to his wife. (N.T. 3/9/06 p.8). Attorney Wittmann testified that Charles Morrill's 1986 draft will stated that if his wife predeceased him, then his entire estate would pass to his son, Gary Morrill. (N.T. 3/9/06 p.8). Furthermore, in the event that Gary Morrill predeceased him, Charles Morrill's entire estate would pass to Debbie Morrill, Gary Morrill's wife, whom Gary Morrill subsequently divorced in 1997. (N.T. 3/9/06 pp.9, 49).

Gary Morrill, Charles Morrill's estranged son, also provided testimony to this Lower Court. Initially, this Lower Court notes that it did not find Gary Morrill's testimony to be credible. Throughout his testimony, Gary Morrill made emphatic, confident, statements regarding events that occurred, and subsequently Gary Morrill completely contradicted these statements. Gary Morrill also made emphatic, confident, statements regarding specific dates on which events occurred, which did not make any sense in terms of developing a reasonable timeline. Gary Morrill's

testimony, moreover, is filled with factual and timeline contradictions and misstatements, and, therefore, this Lower Court did not find credible the testimony of Gary Morrill, who is an interested party in the outcome of the instant case.

Gary Morrill testified that after the death of his mother, Audrey Morrill, Gary Morrill lived in the Morrill family's home, which had passed solely to Charles Morrill upon Audrey's death. (N.T. 3/9/06 p.14). Gary Morrill indicated, unreasonably, that he "knew" he would receive the Morrill family's home upon the death of Charles Morrill, because he spoke with Attorney Wittmann in 1994 concerning transferring this property. (N.T. 3/9/06 p.14). As previously stated, no such transfer of this property ever occurred. (N.T. 3/9/06 p.11).

Gary Morrill testified that following his mother's death on January 13, 1994, Charles Morrill "began drinking heavily [and] his mental capacity seemed to be deteriorating rapidly." (N.T. 3/9/06 p.15). Gary Morrill also testified that Charles Morrill received "several" criminal convictions for Driving Under the Influence of Alcohol (DUI). (N.T. 3/9/06 p.16). This Lower Court notes that, in fact, Charles Morrill received one DUI on November 19, 1993, prior to Audrey Morrill's death, and Charles Morrill received a second DUI on August 6, 1994, following Audrey Morrill's death. *See Petitioner's Exhibit B.* After 1994, Charles Morrill did not receive any subsequent DUIs at any point, or any other alcohol-related offenses or charges. However, Gary Morrill alleged that Charles Morrill's alcohol dependency increased after 1994. (N.T. 3/9/06 p.18).

Gary Morrill testified that in 1996, Charles Morrill experienced delirium tremors and chest pains, and Charles Morrill was taken to St. Vincent's hospital. (N.T. 3/9/06 p.19). Gary Morrill also testified that while Charles Morrill was ill in the hospital over a two-week period, he sometimes did not remember who Gary Morrill was. (N.T. 3/9/06 pp.19, 20). Gary Morrill testified that the medical staff at St. Vincent's was concerned about Charles Morrill's drinking, and Gary Morrill arranged for Charles Morrill to go to Pleasant Ridge Manor, a residential nursing facility. (N.T. 3/9/06 pp.20-21). Gary Morrill testified that in March of 1997, Charles Morrill voluntarily decided to leave Pleasant Ridge Manor after spending approximately two months there. (N.T. 3/9/06 pp.21, 37). Interestingly, despite Gary Morrill's purported concerns regarding Charles Morrill's drinking and mental capacity, Gary Morrill was not concerned enough to pursue involuntary alcohol treatment for Charles Morrill or to pursue guardianship proceedings. (N.T. 3/9/06 p.36).

Gary Morrill then testified that *after* Charles Morrill left Pleasant Ridge Manor in March of 1997, Gary Morrill made arrangements for Charles Morrill to live with Mary Ferraro. Gary Morrill then testified that Charles Morrill lived with Mary Ferraro for a year and a half, and moved out of her home in 1996. Therefore, according to Gary Morrill's testimony

Charles Morrill moved in with Mary Ferraro sometime in 1994 or 1995, *before* he ever went to St. Vincent's or lived at Pleasant Ridge Manor, and, furthermore, Charles Morrill moved out in 1996, again, *before* he ever went to St. Vincent's or lived at Pleasant Ridge Manor. Gary Morrill stated that Mary Ferraro cooked for Charles Morrill and helped Charles Morrill with laundry and finances. (N.T. 3/9/06 pp.22, 23). This Lower Court notes, however, that Charles Morrill never executed a Power of Attorney, allowing and authorizing Mary Ferraro to take care of his finances, and Charles Morrill maintained exclusive control over his finances during this time. (N.T. 3/9/06 p.37).

Gary Morrill testified that in 1996, after Charles Morrill left Mary Ferraro's home, Charles Morrill went to live with Gary and Debbie Morrill. (N.T. 3/9/06 p.23). Gary Morrill testified that Charles Morrill came to live with him *after* he was hospitalized, which is confusing and nonsensical in light of Gary Morrill's testimony concerning Charles Morrill living with Mary Ferraro. Although Gary Morrill previously testified that Charles Morrill did not always recognize him when he was ill at St. Vincent's Hospital in 1996, Charles Morrill always knew who Gary Morrill was when he was healthy and they were living together beginning in 1996. (N.T. 3/9/06 p.36). Gary Morrill testified that he and Debbie cooked for Charles Morrill, took him grocery shopping, did his laundry, drove him to the bank, and made certain his bills were paid. (N.T. 3/9/06 pp.24, 48). This Lower Court notes that Charles Morrill never executed a Power of Attorney in favor of Gary or Debbie Morrill, and, therefore, Gary and Debbie Morrill were not authorized to manage Charles Morrill's financial affairs. (N.T. 3/9/06 p.37). This Lower Court also notes that later in Gary Morrill's testimony, Gary Morrill indicated that Charles Morrill handled all of his own financial affairs until February of 2003. (N.T. 3/9/06 p.41). Gary Morrill testified that Charles Morrill did not bathe himself regularly while he was living with Gary and Debbie. (N.T. 3/9/06 p.24). Gary Morrill testified that Charles Morrill became combative and angry with people who visited their home. (N.T. 3/9/06 p.31). Gary Morrill also testified that Charles Morrill sometimes did not remember people that Gary Morrill believed Charles Morrill knew. (N.T. 3/9/06 p.33).

Gary Morrill testified that Charles Morrill enjoyed drinking, and successfully convinced people to take him to bars. (N.T. 3/9/06 p.24). Despite Gary and Debbie Morrill's alleged concerns regarding Charles Morrill's drinking, they both facilitated his drinking by driving him to bars. (N.T. 3/9/06 pp.24, 55). Gary Morrill testified that at some point he stopped taking Charles Morrill out to bars because he "did not want to contribute any further to [Charles Morrill's] alcoholism." (N.T. 3/9/06 p.25). Gary Morrill testified that Charles Morrill traded personal property for alcohol and spent most of his money on alcohol. (N.T. 3/9/06 pp.25-26). Nevertheless, this Lower Court notes that the record establishes that

Charles Morrill always paid for his own expenses, and Charles Morrill never relied on financial assistance from anyone else. Gary Morrill testified that by 1999, Charles Morrill had become completely addicted to alcohol. (N.T. 3/9/06 p.26).

Gary Morrill testified that at some point Charles Morrill returned to Pleasant Ridge Manor. (N.T. 3/9/06 pp.24, 37-38). Gary Morrill testified that shortly thereafter, Charles Morrill decided to leave the nursing home, and asked Gary to help him locate housing. (N.T. 3/9/06 p.26). Despite Gary Morrill's purported concerns regarding Charles Morrill's alleged alcohol dependency and mental capacity. Gary Morrill testified that he helped Charles Morrill locate independent housing. (N.T. 3/9/06 p.27). Charles Morrill moved into a trailer home, where he lived by himself. (N.T. 3/9/06 p.27). Gary Morrill testified that when Charles Morrill initially moved into his trailer home, he had the services of Meals on Wheels and visiting nurses; however, Charles Morrill subsequently decided to discontinue these services, and live more independently. (N.T. 3/9/06 p.27). Gary Morrill stated that he and other family members took Charles Morrill grocery shopping. (N.T. 3/9/06 p.28).

Gary Morrill then made an incredible, blanket allegation that by November 9, 2000, the date on which Charles Morrill executed his will, Charles Morrill's memory was becoming worse, and Charles Morrill could not handle his affairs, and other people were handling Charles Morrill's affairs for him. (N.T. 3/9/06 pp.31, 33). Gary Morrill provided no credible evidence in support of this claim. On cross-examination, Gary Morrill provided directly contradictory testimony. Gary Morrill acknowledged that Charles Morrill utilized his own money to purchase a trailer home, around 1999, and Charles Morrill solely signed all of the paperwork necessary to execute the sale. (N.T. 3/9/06 p.38). Gary Morrill also acknowledged that in 2000, the year Charles Morrill executed his Last Will and Testament, Charles Morrill lived alone, and no one had Power of Attorney over him. (N.T. 3/9/06 p.38). Gary Morrill also acknowledged that Charles Morrill handled all of his own financial affairs in 2000, including banking, paying rent for the land where his trailer home was located, and paying his utilities. (N.T. 3/9/06 pp.38-39). Gary Morrill also acknowledged that in 2000, Charles Morrill owned a car, and responsibly maintained the car, paid for his own car insurance, and kept everything required of a car owner up to date. (N.T. 3/9/06 p.39). Therefore, this Lower Court did not find credible Gary Morrill's unsupported allegations that Charles Morrill's memory was waning and that other people were handling his financial affairs.

Gary Morrill also testified that in February of 2003, Charles Morrill's trailer home caught on fire and all of Charles Morrill's personal belongings were destroyed. (N.T. 3/9/06 p.28). Charles Morrill, however, was not at home during this fire. (N.T. 3/9/06 pp.27 -28). Gary Morrill alleged that

the 1986 will was destroyed at this time; however, Gary Morrill provided absolutely no evidence to support his claim that the will was destroyed or to support his inference that Charles Morrill had ever even executed the 1986 will. (N.T. 3/9/06 p.28). In fact, no one has ever been able to find any will executed by Charles Morrill in 1986. (N.T. 3/9/06 p.30). Gary Morrill testified that a homeless person was killed in this fire, and Gary Morrill testified that he believed Charles Morrill had allowed homeless people to live in his trailer home with him. (N.T. 3/9/06 p.29). However, Gary Morrill did not provide this Lower Court with any proof that this was true. Again, despite that Gary Morrill alleged concern for Charles Morrill, Gary Morrill never filed for guardianship over Charles Morrill. (N.T. 3/9/06 p.33).

Gary Morrill then indicated that Charles Morrill had handled all of his financial affairs on his own until "after the trailer burnt," in February of 2003. (N.T. 3/9/06 p.41). Therefore, all of Gary Morrill's prior allegations that he, Debbie Morrill, and Mary Ferraro, had managed his financial affairs in prior years were contradicted by his own testimony.

Gary Morrill testified that his relationship with Charles Morrill became estranged permanently in 2003; however, the evidence suggests that their relationship was not healthy prior to 2003. (N.T. 3/9/06 p.39). Gary Morrill acknowledged that his relationship with Charles Morrill was not consistently positive even preceding 2003. (N.T. 3/9/06 p.39). Gary Morrill acknowledged that prior to 2003, there were periods of time when Charles and Gary Morrill did not speak to each other, and there were periods of time when Gary refused to visit Charles at his trailer home. (N.T. 3/9/06 p.40). Gary Morrill acknowledged that he and Charles Morrill were not on good terms in 2000, the year Charles Morrill executed his Last Will and Testament, disinheriting Gary Morrill. (N.T. 3/9/06 pp.40, 47).

Finally, Gary Morrill admitted that Charles Morrill had grown up with Richard Kikta, James Kikta's father, and Charles and Richard were lifelong friends. (N.T. 3/9/06 p.42). James Kikta and Richard Kikta often came to visit Charles Morrill. (N.T. 3/9/06 pp.42-43). Gary Morrill acknowledged that Charles Morrill had a very good friendship with James Kikta, the sole beneficiary of Charles Morrill's will. (N.T. 3/9/06 pp.43, 44).

This Lower Court briefly notes that Debbie Morrill stated that she affirmed the testimony of Gary Morrill, and Debbie Morrill's testimony echoed that of Gary Morrill. (N.T. 3/9/06 pp.51-58). This Lower Court further notes that although Gary and Debbie Morrill are presently divorced, Debbie Morrill does have an interest in the outcome of this case. At the time of the March 9, 2006 hearing, Debbie Morrill was living in the home, owned by Charles and Audrey Morrill during their marriage, which will pass to James Kikta through Charles Morrill's November 9, 2000 will. (N.T. 3/9/06 p.51). Therefore, upholding Charles Morrill's executed will has the effect of displacing Debbie Morrill from the home she lives in.

Accordingly, after hearing all of the testimony and after reviewing the arguments of counsel, and after making specific finding of fact and determinations of credibility, on the record, on March 10, 2006, this Lower Court entered an Order, denying Appellant's Petition. Subsequently, on March 31, 2006, Appellant filed his Notice of Appeal to the Superior Court of Pennsylvania.

This opinion will continue in next week's issue of the Erie County Legal Journal - Vol. 90 #30 - July 27, 2007

IN RE:
THE ESTATE OF CHARLES H. MORRILL, Deceased

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION NO. 382-2005

Appearances: George M. Schroeck, Esq., on behalf of
Gary R. Morrill, Appellant
Marcia H. Haller, Esq., on behalf of
James R. Kikta, Appellee

OPINION

Domitrovich, J., May 15, 2006

This opinion is continued from last week's issue of the Erie County Legal Journal - Vol. 90, No. 29 - July 20, 2007

Appellant's first issue on appeal is whether this Lower Court erred in determining that Charles Morrill had only one will, signed and properly executed on November 9, 2000. Pursuant to 20 Pa.C.S. §2502, "every will shall be in writing and shall be signed by the testator at the end thereof." Furthermore, pursuant to 20 Pa.C.S. §2504.l, a will is validly executed only if it is executed in compliance with 20 Pa.C.S. §2502. *See also, In Re: Estate of Hopkins*, 570 A.2d 1058, 1061 (Pa. Super. Ct. 1990) stating that in order to validly execute a will, the testator must sign the will at the end of the document. In addition, "The requirement that a will be signed at the end was enacted in order to prevent the probate of unfinished papers and mere inchoate expressions of intent. By signing at the end of a document, the scrivener has expressed that he has decided on a testamentary scheme and that the writing is not half-formed thoughts never intended to be operative." *Id.*

In the instant matter, Gary Morrill offered the testimony of Attorney Wittmann, who drafted a will for Charles Morrill in 1986. Attorney Wittmann acknowledged, however, that he did not witness Charles Morrill sign this will, and he does not know whether Charles Morrill ever signed and properly executed this will. Furthermore, Gary Morrill failed to present any evidence that Charles Morrill ever signed the will drafted by Attorney Wittmann in 1986. Gary Morrill stated that he had diligently searched for this will, but he had never been able to locate it. Moreover, the copy of the 1986 will, which Gary Morrill presented to this Lower Court at the time of the March 9, 2006 hearing, was merely an unsigned, draft of a will, and was not a valid, properly executed will. *See Petitioner's Exhibit A.* The lack of a signature at the end of the 1986 will suggests that the contents of this document constituted mere inchoate expressions of intent, and not language Charles Morrill desired to give effect. In contrast, on

November 9, 2000, Charles Morrill validly executed his only will, by signing at the end of this document, in the presence of two witnesses, Attorney Adrian and Attorney Adrian's assistant. Charles Morrill clearly intended to give effect to the language of his November 9, 2000 will. This properly executed will was, therefore, admitted to probate. Accordingly, as this Lower Court did not err by acknowledging the existence of only one valid will, executed by Charles Morrill on November 9, 2000, Defendant's first issue on appeal fails.

Appellant's second issue on appeal is whether this Lower Court abused its discretion in determining that Appellant failed to establish by clear and convincing evidence that Charles Morrill lacked the testamentary capacity to execute his will. When a party appeals from a decree of the Register of Wills, admitting a will to probate, the Orphans' Court must "consider the facts presented and either dismiss the petition, grant an issue in case of a substantial dispute, or set aside the probate." *In Re: Luongo,* 823 A.2d 942, 951 (Pa. Super. Ct. 2003). The Superior Court of Pennsylvania will not reverse a decision of the Orphans' Court unless there has been an abuse of discretion or a fundamental error in applying the correct principles of law. *Id.* Provided the record supports the Orphans' Court's findings of fact, the Superior Court of Pennsylvania will defer to those findings, and will not reverse absent an abuse of discretion. *Id.*

With regard to testamentary capacity to execute a will, in Pennsylvania the following is well established:

> A testat[or] possesses testamentary capacity if [he] knows those who are the natural objects of [his] bounty, of what [his] estate consists, and what [he] desires done with it, even though [his] memory may have been impaired by age or disease. The burden of proof as to testamentary capacity initially rests with the proponent of a will. However, a presumption of testamentary capacity arises upon proof of execution by two subscribing witnesses. Thereafter, the burden of proof as to incapacity shifts to the contestant to overcome that presumption. Moreover, where a will is drawn by decedent's attorney and proved by subscribing witnesses. . . the burden of proving lack of testamentary capacity is sustained only if the contestant can produce clear and compelling evidence of lack of testamentary capacity. In addition, it is well recognized that testamentary capacity is to be determined by the condition of the testatrix at the very time [he] executes the will. However, evidence of incapacity for a reasonable time before and after the making of a will is admissible as an indication of lack of capacity on the day the will is executed. *Estate of Vanoni.* 798 A.2d 203, 207 (Pa. Super. Ct. 2002). (internal citations omitted).

In the instant matter, the proponent of Charles Morrill's will, James Kikta, provided evidence that when Attorney Adrian met with Charles

Morrill on November 9, 2000, the day Charles Morrill executed his will, Charles Morrill knew precisely what his assets consisted of and knew who his immediate family members were. Charles Morrill was adamant that he wanted to leave his entire estate to his close friend, James Kikta, and Charles Morrill had personal reasons for disinheriting his estranged son, Gary Morrill. Furthermore, James Kikta provided evidence that two subscribing witnesses, Attorney Adrian and his assistant, Kalene Hedderick, provided proof that Charles Morrill had properly executed his will. *See Charles Morrill's Last Will and Testament, executed November 9, 2000.* Accordingly, James Kikta established the presumption that Charles Morrill had testamentary capacity to execute his Last Will and Testament on November 9, 2000.

Therefore, the burden then shifted to Gary Morrill, the contestant of Charles Morrill's only executed will, to overcome this presumption by clear and convincing evidence. Gary Morrill failed to provide any credible evidence to rebut the presumption that Charles Morrill knew what his estate consisted of. Gary Morrill never provided any evidence or testimony whatsoever, establishing that Charles Morrill ever forgot what he owned. The evidence of record establishes that Charles Morrill knew that he owned property in Springfield Township, he owned the trailer home he lived in, he owned two vehicles, and he owned one bank account. Gary Morrill never offered evidence to the contrary.

Similarly, Gary Morrill failed to provide any credible evidence that around November 9, 2000, Charles Morrill did not know who his next of kin were. In 2000, Charles Morrill clearly knew that his natural heir was his son, Gary Morrill. Gary Morrill provided testimony that in 1999, Charles contacted Gary Morrill to help him find independent housing. Gary Morrill also testified that he occasionally visited Charles Morrill at his trailer home in approximately 1999 and 2000. Gary Morrill claimed that Charles Morrill contacted him for assistance and they spent time together during the relevant time frame. Gary Morrill, moreover, provided no indication that Charles Morrill did not know who he was at any time around 2000. The only evidence that Gary Morrill ever presented, suggesting that Charles Morrill did not know who the natural objects of his bounty were, was testimony that in 1996 when Charles Morrill was ill in the hospital for weeks, he did not always recognize Gary Morrill. Initially, 1996 is very far removed from the relevant time period of November 9, 2000. Furthermore, Charles Morrill was sick and medicated during his stay in the hospital in 1996, which obviously accounts for his inability to recognize his son at this time. Moreover, after 1996, the record establishes that Charles Morrill did know that Gary Morrill was the natural object of his bounty.

Additionally, Gary Morrill failed to provide any credible evidence to rebut the presumption that Charles Morrill knew how he wanted to dispose

of his estate. In fact, Gary Morrill provided absolutely no testimony or evidence that Charles Morrill was ever confused about who he wanted to leave his property to. Gary Morrill provided testimony that he believed Charles Morrill was going to leave his estate to him. However, this was clearly an irrational belief, since Gary Morrill acknowledged that by 2000, the relationship between Charles and Gary Morrill could be described as strained, at best. Gary Morrill also acknowledged that he and Charles Morrill became completely estranged by 2003 and were not on good terms at the time of Charles Morrill's death. Moreover, Gary Morrill failed to provide any testimony or evidence that Charles Morrill was uncertain as to how he wanted to dispose of his estate. Gary Morrill's belief that Charles Morrill's estate would go to him was not reasonable.

This Lower Court also notes that Gary Morrill failed to provide sufficient evidence that Charles Morrill's alleged alcohol use in some way impeded his testamentary capacity. During the relevant time frame surrounding 2000, Charles Morrill's alleged alcohol use did not impede him from entering into a contract to purchase a trailer home, from paying for a trailer home, from arranging his own funeral, from entering into a contract to purchase a headstone, from paying all of his own bills, and from managing his own money, among other things. Despite Charles Morrill's alleged alcohol use, the record demonstrates that Charles Morrill was capable of caring for himself appropriately, entering into contracts, and managing his affairs. Furthermore, Pennsylvania case law establishes that when a contestant to a will challenges capacity on the basis of the testator's alcohol use, "the burden [is] on the contestant to show that the testat[or] was under the influence of intoxicants *at the time of the execution of such will*, and to such a degree as affected [his] testamentary capacity." *In Re: Fay*, 60 A.2d 356, 358 (Pa. Super. Ct. 1948) (emphasis in original). Gary Morrill presented absolutely no evidence suggesting that Charles Morrill was intoxicated on November 9, 2000. Therefore, with regard to Charles Morrill's capacity on November 9, 2000, this Lower Court found credible the testimony of Attorney Adrian, a neutral witness to the execution of Charles Morrill's will, who found Appellant to be well-dressed, clean-shaven, articulate, and sober on the date of execution. (N.T. 3/9/06 p.69).

Moreover, Gary Morrill failed to provide any evidence whatsoever, much less clear and convincing evidence, to overcome the presumption that on November 9, 2000, Charles Morrill knew exactly what his estate consisted of, knew who the natural objects of his bounty were, and knew precisely how he desired to dispose of his estate. Gary Morrill failed to provide clear and convincing evidence to rebut the presumption that Charles Morrill was lucid, competent, sober, and was not suffering from a weakened intellect when he executed his will on November 9, 2000. None of the allegations made by Gary Morrill concerning Charles Morrill were

sufficient to rebut the presumption of testamentary capacity. Accordingly, Gary Morrill's second issue on appeal also lacks merit.

Appellant's third and final issue on appeal is whether this Lower Court abused its discretion in determining that Appellant failed to establish a prima facie case of undue influence, sufficient to prevent probate of Appellant's will. With regard to the matter of whether a will was procured by undue influence, in Pennsylvania, the following is well established:

> Once a will has been probated, the contestant who claims that the will was procured by undue influence has the burden of proof. A *prima facie* case of undue influence is established and the burden of proof is shifted to the will's proponent when three elements are established: 1) there was a confidential relationship between the proponent and testator; 2) the proponent receives a substantial benefit under the will; 3) the testator had a weakened intellect. For purposes of the undue-influence test, a weakened intellect does not rise to the level of testamentary incapacity. A confidential relationship for purposes of undue influence exists whenever circumstances make it certain that the parties did not deal on equal terms but that on one side there was an over-mastering influence, and on the other, dependence or trust, justifiably reposed. The term 'influence' does not encompass every line of conduct capable of convincing a self-directing person to dispose of property in one's favor. The law requires that the influence be control acquired over another that virtually destroys [that person's] free agency. Conduct constituting influence must consist of imprisonment of the body or mind, fraud, or threats, or misrepresentations, or circumvention, or inordinate flattery or physical or moral coercion, to such a degree as to prejudice the mind of the testator, to destroy his free agency and to operate as a present restraint upon him in the making of a will. A parent-child relationship does not establish the existence of a confidential relationship nor does the fact that the proponent has a power of attorney where the decedent wanted the proponent to act as attorney-in-fact. Once the contestants establish a *prima facie* case with the three elements of undue influence, including the existence of a confidential relationship, the burden of proof shifts to the proponents of the will to establish that it was not obtained through undue influence. *In Re: Angle*, 777
> A.2d 114, 123 (Pa. Super. Ct. 2001). (internal citations and quotations omitted).

The will contestant must establish a *prima facie* case of undue influence by clear and convincing evidence. *In Re: Estate of Stout*, 746 A.2d 645, 648 (Pa. Super. Ct. 2000).

In the instant matter, Appellant failed to prove by clear and convincing evidence two of the three elements required to establish a *prima facie*

case of undue influence.[3] Initially, Appellant failed to provide clear and convincing evidence that a confidential relationship existed between James Kikta and Charles Morrill. At the time Charles Morrill executed his will on November 9, 2000, the relationship between Charles Morrill and James Kikta was not such that circumstances made it certain that they did not deal on equal terms with one another. James Kikta was not an "over-mastering influence" on Charles Morrill, and James Kikta was not capable of convincing Charles Morrill to dispose of his property in James Kikta's favor. James Kikta never imprisoned Charles Morrill's body or mind, never made threats or misrepresentations, and never physically or morally coerced Charles Morrill in any way, much less to such a decree as to prejudice Charles Morrill's mind and destroy his free agency. To the contrary, on November 9, 2000, and during the time frame immediately preceding Charles Morrill's will execution, James Kikta was simply Charles Morrill's long-time friend. James Kikta lived hundreds of miles away from Charles Morrill, and only saw Charles Morrill a maximum of one time per year. This physical distance certainly prevented James Kikta from having any serious influence over Charles Morrill.

Furthermore, Charles Morrill clearly trusted James Kikta, and relied upon James Kikta to assist him in preparing estate documents. James Kikta, in turn, helped Charles Morrill by finding an attorney for Charles Morrill, relaying information, and arranging an appointment. James Kikta, however, did not act independently in assisting Charles Morrill; rather, James Kikta acted only upon the request of his close friend, Charles Morrill. James Kikta did not coerce, persuade, or otherwise influence Charles Morrill in any way to execute estate planning documents. Rather, Charles Morrill independently decided to do so, and merely requested James Kikta's assistance in facilitating this process.

Finally, this Lower Court notes that in Pennsylvania it is well established that "the existence of a power of attorney given by one person to another is a clear indication that a confidential relationship exists between the parties." *In Re: Lakatosh*, 656 A.2d 1378, 1383 (Pa. Super. Ct. 1995). The instant case, however, is distinguishable from other cases in which a testator executed a will when a power of attorney was already in place. In the instant matter, on November 9, 2000, when Charles Morrill executed his Last Will and Testament, no Power of Attorney was in place. Rather, Charles Morrill executed Powers of Attorney, in favor of James Kikta, on the same date on which he executed his will. Therefore, since James Kikta did not exercise Power of Attorney over Charles Morrill prior to the time Charles Morrill executed his will, there exists no clear indication of a confidential relationship in this case.

[3] The second element of the aforementioned test for *prima facie* undue influence, "the proponent receives a substantial benefit under the will" is clearly established in the instant case, as James Kikta received the entirety of Charles Morrill estate, under his will.

Gary Morrill, moreover, failed to present clear and convincing evidence to this Lower Court, establishing the existence of a confidential relationship between Charles Morrill and James Kikta, as indicated earlier. In fact, at the time of the March 9, 2006 hearing, Gary Morrill did not present any testimony from any witness indicating that James Kikta exercised any sort of control or influence over Charles Morrill. The only testimony from any of the Appellant's witnesses concerning the nature of the relationship between Charles Morrill and James Kikta was that Charles Morrill and James Kikta had a good relationship. (N.T. 3/9/06 p.43). Charles Morrill and James Kikta shared a very close friendship in which Charles referred to James as his nephew and James referred to Charles as his uncle. Charles Morrill and James Kikta dealt on equal terms and James Kikta never exerted an "over-mastering influence" on Charles Morrill. Therefore, Gary Morrill failed to establish the existence of a confidential relationship between Charles Morrill and James Kikta.

Additionally, Gary Morrill failed to establish by clear and convincing evidence that Charles Morrill suffered from a weakened intellect at any time. Although Pennsylvania "cases have not established a bright-line test by which weakened intellect can be identified to a legal certainty, they have recognized that it is typically accompanied by persistent confusion, forgetfulness and disorientation." *Owens v. Mazzei*, 847 A.2d 700, 707 (Pa. Super. Ct. 2004). In the instant matter, Gary Morrill alleged that at times years before Charles Morrill executed his will, Charles Morrill experienced brief periods when he did not recognize Gary Morrill or other people. Notably, Charles Morrill was ill in the hospital when he had difficulty recognizing Gary Morrill. Gary Morrill also alleged that years before Charles Morrill executed his will, people helped Charles Morrill with cooking, laundry, driving, and writing checks. Gary Morrill, however, did not present any evidence that Charles Morrill was persistently confused, forgetful, or disoriented. To the contrary, Gary Morrill presented evidence that in 1999, one year before Charles Morrill executed his will, Charles Morrill decided to purchase and move into his own home. From 1999 until his death, Charles Morrill lived alone and took care of himself independently. Charles Morrill remembered to pay his rent and utilities, remembered to keep his driver's license and AAA membership up to date, remembered to keep his vehicle registration and inspection up to date, and managed his own finances adequately. Although Charles Morrill may have requested assistance, from time to time, with driving or check preparation or estate planning, the record demonstrates that Charles Morrill essentially lived alone as an independent person from 1999 until the time of his death. Clearly, Charles Morrill was not persistently confused, forgetful, or disoriented. Therefore, Gary Morrill failed to provide clear and convincing evidence that Charles Morrill suffered from a weakened intellect.

Assuming *arguendo* that Gary Morrill had established a *prima facie* case of undue influence, the proponent of the will, James Kikta established that Charles Morrill's will was not obtained through undue influence. In the instant matter, the credible evidence establishes that during the December of 1999 hunting season, Charles Morrill mentioned to James Kikta that he was considering pursuing some estate planning. Subsequently, in 2000, Charles Morrill requested that James Kikta accompany him while he pre-planned his funeral, and James Kikta did so. Furthermore, in 2000, Charles Morrill requested that James Kikta assist him by finding an attorney for him in Erie, Pennsylvania, and by relaying information concerning what provisions Charles Morrill wanted his will and other documents to contain. James Kikta complied with Charles Morrill's request, and James Kikta arranged an appointment for Charles Morrill to meet with Attorney Adrian. James Kikta did not appear for the meeting between Charles Morrill and Attorney Adrian, and Attorney Adrian determined that Charles Morrill independently decided to execute his Last Will and Testament and other estate planning documents.

Although James Kikta facilitated the estate planning process by acting as an intermediary between Charles Morrill and Attorney Adrian, James Kikta did not persuade Charles Morrill to execute a will, James Kikta did not persuade Charles Morrill to leave his estate to him, James Kikta did not appear for the meeting when Charles Morrill executed his will, and James Kikta, at no point, exerted influence upon Charles Morrill with regard to his estate plans. The record demonstrates that Charles Morrill was a very strong-willed person. Debbie Morrill even acknowledged that Charles Morrill was very strong-willed. (N.T. 3/9/06 p.57). Charles Morrill lived independently and cared for himself until the time of his death. Charles Morrill made his own decisions and handled all of his own affairs. The record suggests that Charles Morrill was not easily manipulated by anyone.

Furthermore, Charles Morrill's will clearly reflects his desires. Even after Charles Morrill executed his will, he remained adamant that he intended to disinherit Gary Morrill and he intended to leave the entirety of his estate to James Kikta. Subsequent to the execution of his will, Charles Morrill continued to maintain a relationship with James Kikta, involving several telephone conversations each week and one hunting trip each year. Furthermore, Gary Morrill acknowledged that his relationship with Charles Morrill had been in the process of deteriorating at the time that Charles Morrill executed his will, and Gary Morrill acknowledged that he and Charles Morrill were not consistently on good terms in 2000. In 2003, the relationship between Gary Morrill and Charles Morrill became completely estranged, and the record demonstrates that very little, if any contact existed between Gary and Charles Morrill from 2003 until

the time of Charles Morrill's death. It is reasonable that Charles Morrill would leave his entire estate to his closest friend, where, at the time of the execution of his will, his relationship with his son was strained, and later, this relationship was non-existent. This Lower Court also briefly notes that with regard to Gary Morrill's allegation in his Pa.R.A.P. 1925(b) Statement, that "an heir is not to be disinherited except by plain words or necessary implication," in Pennsylvania, it is well established that a testator may leave his property to whomever he so desires. *In Re: Angle*, 777 A.2d 114, 125 (Pa. Super Ct. 2001). Furthermore, "it has always been the law of Pennsylvania that a parent does not have to leave any of his property to any of his children, irrespective of whether he likes them or dislikes them, or hates them, and he does not have to disclose his reasons for disinheriting them." *In Re: Estate of Sommerville*, 177 A.2d 496, 499 (Pa. 1962). Charles Morrill's November 9, 2000 will clearly is not invalid because he did not state he was disinheriting Gary Morrill. This fact is clear from the instrument itself, and Charles Morrill is permitted, under Pennsylvania law, to disinherit his son, through his act of leaving his assets to someone he considered as a nephew, James Kikta. Therefore, assuming *arguendo* that Gary Morrill has made out a *prima facie* case of undue influence, Gary Morrill's third and final issue on appeal also still fails.

Accordingly, all of the issues raised in the instant appeal lack merit.

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

COLDWELL BANKER SELECT REALTORS, INC.,
Plaintiff
v.
ERIC V. WALTERS and LINDA K. WALTERS,
Defendants

CONTRACTS / REAL ESTATE LISTING AGREEMENT / REQUIREMENT OF A WRITING / TERMINATION DATE / INTENT OF PARTIES

Where a real estate contract does not contain a defined termination date, a court interpreting the contract must ascertain the intent of the parties.

INTERPRETATION OF CONTRACT / AMBIGUITY / PAROLE EVIDENCE

Where the court determines an ambiguity in the terms of a real estate listing contract, parole evidence is admissible to explain, clarify or resolve the ambiguity.

CONTRACT / AGREEMENT FOR SALE / ORAL MODIFICATIONS / CONDUCT OF PARTIES

Although written real estate listing agreement states that all changes to a contract must be in writing and signed by the Broker and Seller, a written agreement may be modified by subsequent oral agreement or a contract requirement may be waived by conduct of the parties.

LISTING AGREEMENT / EFFECTIVENESS OF ORAL MODIFICATION

In order for an oral modification to be effective, the oral modification must be established by clear, precise and convincing proof and must be based on valid consideration.

CONTRACTS / REAL ESTATE LISTING AGREEMENT / ABILITY OF ONE SPOUSE TO OBLIGATE BOTH SPOUSES

A presumption exists that during the course of the marriage, so long as both parties to the marriage stand to benefit, either party to the marriage has the power to act on behalf of the other.

UNJUST ENRICHMENT

Recovery under a theory of unjust enrichment where a determination that a contract is void on the basis of public policy circumvents the consequence of a determination of void based on public policy and therefore cannot be allowed.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION AT LAW & EQUITY
NO. 10625 - 2005

Appearances: Neal R. Devlin, Esquire for the Plaintiff
William R. Brown, Esquire for the Defendants

OPINION

Bozza, John A., J.

Before this Court is the defendants', Eric V. Walters and Linda K. Walters ("Walters"), Motion for Summary Judgment. This action arose out of plaintiff's, Coldwell Banker Select Realtors, Inc. ("Coldwell Banker"), Complaint in which it sought damages in the amount of $45,000, as the result of the Walters alleged breach of an exclusive real estate listing agreement. In its Complaint, Coldwell Banker also sought recovery on the basis of an unjust enrichment claim. The Walters have denied liability asserting *inter alia* that the listing agreement was void as against public policy because it violated various provisions of the Real Estate Licensing and Registration Act ("RELRA ") and related regulations.

While there are certain factual issues that remain to be resolved, the essential facts necessary to decide the Walters' motion are not in controversy. The parties entered into a Listing Contract Exclusive Right to Sell Real Property ("Listing Agreement") in 2002. The Listing Agreement was signed by the Walters on November 24, 2002 and by agent Kathé Rafferty on behalf of Coldwell Banker on December 2, 2002. The Listing Agreement concerned the sale of property identified as 8040 Marietta Drive, Fairview, Pennsylvania and provided for a listing price of $1,175,000.[1] Paragraph 6 of the Listing Agreement provided that the Walters would pay a broker's fee after the ending date of the contract if:

(1) A sale occurs within 90 days of the Ending Date, AND
(2) The buyer was shown or negotiated to buy the Property during the term of this contract.

Paragraph 2.C. of the Listing Agreement, which allowed the parties to specify an ending date, was left blank. On March 5, 2004, the Walters entered into a contract with Frank Lasky and Que Lasky ("Laskys") for the sale of the property for $900,000.

Although the ending date is not specified in the Listing Agreement both of the parties believe that the duration of the Listing Agreement was one year. According to paragraph 2, the agreement started when it was signed by the seller and broker. Therefore, the contractual arrangement between the parties commenced on December 2, 2002 and continued for a period of one year, until December 2, 2003. On December 2, 2003, a written notation of a telephone conference was recorded by someone from Coldwell Banker indicating that the Listing Agreement was extended to December 16, 2003. On December 15, 2003, Coldwell Banker recorded another written memorandum of a telephone call with Linda Walters. That memorandum indicated that the Walters wanted to terminate the

[1] An agreement was included in a form recommended and approved by members of the Pennsylvania Association of Realtors.

Listing Agreement. According to Coldwell Banker agent Kathé Rafferty, she spoke with Linda Walters some time in November, prior to the 24th, and she agreed to extend the Listing Agreement for perhaps two or three weeks.

It is apparent that the sale of the property to the Laskys did not occur within 90 days of the ending date contemplated by, although not explicitly stated in, the Listing Agreement of December 2, 2003. However, it did occur within 90 days of December 15, 2003, the date to which Coldwell Banker asserts the Listing Agreement was orally extended.

It is the Walters' position that the Listing Agreement, whether extended or not, is void because of the failure to comply with the requirements of RELRA. Specifically, they assert that the Listing Agreement failed to set forth a "definitive termination date that is not subject to prior notice in any listing agreement" in violation of 63 P.S. §455.604 or otherwise specify its duration in violation of 49 Pa. Code §35.331

RELRA provides that certain agreements between a consumer and a licensed real estate agent be in writing:

> A licensee may not perform a service for a consumer of real estate services for a fee, commission or other valuable consideration paid by or on behalf of the consumer unless the nature of the service and the fee to be charged are set forth in a written agreement between the broker and the consumer that is signed by the consumer.

63 P.S. §455.606a(b)(1). The Act goes on to delineate a series of "prohibited acts" which, if engaged in, could result in the suspension, revocation of a license or the imposition of fines against the offending licensee. 63 P.S. §455.604(a). These prohibitions include: . . .

> (10) Failing to specify a definite termination date that is not subject to prior notice, in any listing contract.
>
> (15) Violating any rule or regulation promulgated by the commission in the interest of the public and consistent with the provisions of this act.

In furtherance of its statutory obligation, the Real Estate Commission has proceeded to promulgate a number of regulations including the following:

> §35.281. Putting contracts, commitments and agreements in writing
>
> (a) All contracts, commitments and agreements between a broker, or a licensee employed by the broker, and a principal or consumer who is required to pay a fee, commission or other valuable consideration shall be in writing and contain the information specified in §35.331 (relating to written agreements generally).

§35.331. Written agreements generally

(a) A written agreement between a broker and a principal or between a broker and a consumer whereby the consumer is or may be committed to pay a fee, commission or other valuable consideration shall contain the following: ...

(3) Notification that the broker's commission and the duration of the agreement have been determined as a result of negotiations between the broker, or a licensee employed by the broker, and the seller/ landlord or buyer/tenant.

§35.332. Exclusive listing agreements

(a) An exclusive listing agreement shall contain, in addition to the requirements in §35.331 (relating to written agreements generally), the following:

(3) The duration of the agreement.

(c) An exclusive listing agreement may not contain:

(1) A listing period exceeding 1 year.

It is apparent that the Listing Agreement is in writing and that it includes the fees to be charged and the nature of the services to be performed and that it is signed by the Walters, thus meeting the threshold requirements of 63 P.S §455.606(a)(b)(1). The question remains, however, whether it fails to specify a definite termination date that is not subject to prior notice and provides for its duration as required by 49 Pa. Code §35.332. While it is true that paragraph 2 does not include a precise ending date, it does recite that: "Seller and broker have discussed and agreed upon the length or term of this contract." It also states that: "By law the length or term of a listing agreement may not exceed one year." In interpreting a contract it is the objective of the court to ascertain the intent of the parties. *Ins. Adjustment Bureau, Inc. v. Allstate Ins. Co.*, 588 Pa. 470, 905 A.2d 462 (2006). Where an ambiguity in the terms of the contract exists, parol evidence is admissible to explain, clarify or resolve the ambiguity. *Id.* The provisions of Paragraphs 2, while suggestive of a one-year duration, are susceptible to more than one meaning and therefore are ambiguous. However, the record evidence plainly indicates that the parties intended that the Listing Agreement terminate one year following the start date. The start date, the date on which both parties signed the agreement, was December 2, 2002. Indeed, the moving parties admit that the duration of the Listing Agreement was one year. *See* Answers and Responses to Plaintiff's Interrogatories and Request for Production of Documents, No. 6. Therefore, the Walters' position that the Listing Agreement is void

because it failed to comply with statutory requirements concerning the duration of the agreement is without merit.

The Walters next argue that the Listing Agreement was not extended beyond the one-year period through an oral agreement. In that regard, the Walters have reasoned that, because of the mandatory requirement that a listing agreement be in writing, any modification of the agreement must also be in writing. Neither RELRA nor the regulations address the issue of modification of a written listing agreement. However, the Listing Agreement explicitly provides in paragraph 28 that: "All changes to this contract must be in writing and signed by Broker and Seller." In spite of this language, it is apparent that the parties, on or about September 2, 2003, without benefit of a signed writing, intended to change the listing price to $1,090,000 and they behaved accordingly. It is apparent that both parties ignored the requirement of Paragraph 28 and there has been no suggestion that the change in the listing price was ineffective because it was not in writing.

The law in Pennsylvania is well established that a written agreement may, in certain circumstances, be modified by a subsequent oral agreement and a contract requirement may be waived by the conduct of the parties. *Bonczek v. Pascoe Equipment Co.*, 304 Pa. Super. 11, 450 A.2d 75 (Pa. Super. 1982). In order for an oral modification to be effective, it must be established by clear, precise and convincing proof and must be based on valid consideration. *Id.*

With regard to the extension of the Listing Agreement, the Walters have not argued that the extension was ineffective because of the application of paragraph 28 and there is no express prohibition against oral modification of an otherwise valid written agreement in RELRA and the Walters have not pointed to any regulation promulgated to address the issue. Therefore, an oral agreement of the parties to extend a listing period may be permissible, if it otherwise meets the requirements of the Pennsylvania common law.

Although not fully developed in their brief, the Walters also seem to argue that an oral agreement entered into by one spouse is insufficient to bind both spouses in the circumstances here presented. In support of this proposition, they provide no authority. Indeed, the law of the Commonwealth is quite the opposite. The law with respect to entireties property is that there is a presumption that, during the course of the marriage, so long as both stand to benefit, either spouse has the power to act on behalf of the other. *J.R. Christ Construction Co. v. Olevsky,* 426 Pa. 343, 232 A.2d 196 (1967). While the evidence in the record concerning the extension suggests that Mrs. Walters agreed to extend their contract with Coldwell Banker, material issues of fact in the summary judgment record preclude a final determination of this issue.

The Walters have also sought a determination of Coldwell Banker's

claim for restitution on the basis of an unjust enrichment theory. The Walters maintain that Coldwell Banker cannot recover under an unjust enrichment theory where to do so would circumvent the consequences of a contract that is void on the basis of public policy. In that regard, this Court accepts the reasoning of the Walters as set forth in their brief. See, Restatement (Second) Contracts §197. Moreover, should there be a determination that there was a valid extension of the contract until December 16, 2003, no cause of action for unjust enrichment would lie. A party is entitled to restitution for unjust enrichment only where there is otherwise no contract between the parties. *Mitchell v. Moore*, 729 A.2d 1200 (Pa. Super. 1999)

For the reasons set forth above, the Walters' Motion for Summary Judgment must be denied in part and granted in part and an appropriate order will be entered accordingly.

ORDER

AND NOW, this 11 day of June, 2007, upon consideration of the defendants' Motion for Summary Judgment, and for the reasons set forth in this Court's Opinion, it is hereby **ORDERED, ADJUDGED and DECREED** that the Motion for Summary Judgment with regard to the contractual obligation of the defendants is **DENIED,** and with regard to the issue of unjust enrichment, the Motion is **GRANTED,** subject to determination as to whether or not there was an extension of the Listing Agreement.

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

PHILIP S. ASKINS and JOYCE L. ASKINS, his wife, Plaintiffs
v.
SUZANNE KINNEAR ADAMS, D.D.S., PLAZA DENTAL ASSOCIATES, MATTHEW E. SIMMONS, D.D.S., STEVENS & KING ORAL SURGERY a/k/a SIMMONS & KING ORAL SURGERY, Defendants

STATUTES / CONSTRUCTION

When interpreting statutes, courts must adhere to the principles of statutory construction set forth in Pennsylvania's Statutory Construction Act. 1 Pa. C.S.A. § 1501 et seq.

When the words of a statute are clear and free from ambiguity, the letter of a statute is not to be disregarded in pursuit of the spirit of the statute. 1 Pa. C.S.A. § 1921(b).

The object of statutory construction is to determine the intent of the General Assembly and the plain language of the statute is the best indication of the General Assembly's intent. 1 Pa. C.S.A. § 1921(a).

Words and phrases in a statute must be construed according to the rules of grammar and given their common and approved usage.

STATUTES / PARTICULAR STATUTES

The language of the MCARE Act is unambiguous and indicates that the General Assembly did not intend that a dentist specializing in maxillofacial surgery would be treated as a "physician" within the meaning of the Act.

The General Assembly's intent not to treat dentists as "physicians" for purposes of the MCARE Act is evidenced by both the plain meaning of "physician" which implicates a doctor of medicine and the MCARE Act's definition of "medical professional liability claims" as claims against "healthcare providers" where the various definitions of "healthcare providers" in the MCARE Act do not include dentists. 40 P.S. §§ 1303.103, 1303.503 & 1303.1101.

CIVIL PROCEDURE / TRIAL

The Certificate of Merit Rule contained in Pa. R.C.P. § 1042.3 does not require that a reviewing expert dentist be board certified.

EVIDENCE / OPINIONS AND EXPERT TESTIMONY / QUALIFICATIONS

A dentist specializing in oral and maxillofacial surgery was qualified to testify in a dental malpractice case where he graduated from dental school, was licensed to practice in Pennsylvania, had been practicing oral and maxillofacial surgery for 28 years, taught as a part-time clinical instructor for 22 years and employed the procedure at issue in the dental malpractice case on multiple occasions. Pa. R.E. 702.

CIVIL PROCEDURE / TRIAL / POST-TRIAL MOTIONS

A defendant must have been dismissed through voluntary dismissal, verdict or order of court before the court will order disclosure of an expert's

written statement underlying a certificate of merit. Pa. R.C.P. 1042.7.

CIVIL PROCEDURE / TRIAL / POINTS FOR CHARGE

Jury instructions must be viewed in their entirety and only when they are prejudicial when taken as a whole will a new trial be ordered.

EVIDENCE / OPINIONS / EXPERT TESTIMONY / SCOPE OF REPORT

Defendant's surgical expert's testimony regarding the plaintiff's developmental condition was not beyond the scope of the expert report and the court did not err in permitting the testimony where plaintiff's counsel "opened the door" to the topic through cross examination and plaintiff's counsel failed to object during the expert's direct examination wherein he discussed the condition.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 10727 - 2005

Appearances: Eric J. Purchase, Esq. and Mark O. Prenatt, Esq. for the Plaintiffs
Deborah D. Olszewski, Esq. for defendants Simmons/ Steven & King Oral Surgery
Frances Gargar, Esq. for defendants Adams/Plaza Dental Associates

OPINION

Bozza, John A., Judge

This dental malpractice case was tried before a jury in February 2007. Following their deliberations, the jury concluded that the defendant, Matthew E. Simmons, D.D.S., was negligent and that his negligence was the factual cause of the plaintiffs' harm. It awarded the plaintiffs a total of $200,000 in damages. The jury concluded that Suzanne Kinnear Adams, D.D.S. was not negligent. Post-verdict motions were filed by both the plaintiffs and Dr. Simmons and are now before this Court for resolution.

The jury found Dr. Simmons negligent for failing to correctly treat Philip S. Askins' fractured jaw. He now requests that the jury's verdict be overturned because the plaintiffs' testifying expert was not a board certified oral and maxillofacial surgeon. His position is based on his view that the Medical Care Availability and Reduction of Error Act's ("MCARE Act") provision governing the qualifications of an expert to testify against a physician with regard to the standard of care applies in this case. While Dr. Simmons acknowledges that dentists are not explicitly included in the MCARE Act, he argues that an oral surgeon is more like a physician and so the Act's limitations on expert testimony apply in an action based on professional negligence. For this proposition the defendant cites to no

legal authority.

In essence, the issue presented is a question of statutory interpretation. When interpreting the provisions of a statute, the court is required to adhere to the principles of statutory construction set forth in 1 Pa. C.S.A. §1501 *et seq.* These rules provide that "when the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under pretext of pursuing its spirit." *Id.* at §1921(b). Moreover, the object of statutory interpretation is to "ascertain and effectuate the intention of the general assembly." *Id.* at §1921(a). The Pennsylvania Supreme Court has noted that the plain language of the statute is the best indication of the legislature's intent. *Commonwealth v. Gilmore Mfg. Co.*, 573 Pa. 143, 822 A.2d 676 (2003). The Statutory Construction Act further provides that "words and phrases shall be construed according to rules of grammar and according to their common and approved usage." *Id.* at §1903(a).

Here the plain language of the statute is free from ambiguity and the legislature's intent is clear. The MCARE Act explicitly states, "This chapter relates to medical professional liability." 40 Pa. C.S.A. §1303.501. This case involves a dental professional liability issue. Moreover, the MCARE section directly at issue relating to the qualifications of expert witness in medical liability cases states that, "No person shall be competent to offer an expert medical opinion in a medical professional liability action against a physician unless. . ." 40 Pa. C.S.A. §1303.512 (2006) (emphasis added). It makes no reference to an action against a dentist or dental surgeon. Indeed, throughout the applicable section, the limitation of an expert testimony relates to "an expert testifying as to a physician's standard of care. . ." *Id.* 1303.512(c). Therefore, the question is whether Dr. Simmons, a dentist specializing in maxillofacial surgery, is a "physician" within the meaning of the MCARE Act. While the MCARE Act does not provide a definition of physician the plain and ordinary meaning of the word directly implicates one as a doctor of medicine. Random House's college dictionary defines a physician as "a person who is legally qualified to practice medicine; doctor of medicine." *Random House 1979 Ed.* Dr. Simmons is not a doctor of medicine.

Further indication of the inapplicability of the MCARE Act is found in the Act's definition of "Medical Professional Liability Act" as "a proceeding in which a medical professional liability claim is asserted, including any action in a court of law or an arbitration proceeding." 40 P.S. §1303.103. In turn, the Act defines a medical professional liability claim as "any claim seeking a recovery of damages or loss from a health care provider. . ." *Id.* And, although "health care provider" is defined in more than one place in the MCARE Act, none of the definitions include dentists. *See* 40 P.S. §1303.103, 503, 1101. In sum, there is nothing in the MCARE Act that makes any reference to the inclusion of dentists or dental surgeons.

The defendant would have this Court conclude that Dr. Simmons was more like a physician than a dentist and therefore the limitations on expert testimony provided in the MCARE Act should apply. In that regard, Dr. Simmons has pointed to the provisions of Pa. R.C.P. §1042.3 relating to filing a certificate of merit, and in particular, to an explanatory note of the civil rules committee. Attempting to clarify its position with regard to who would constitute an "appropriate licensed professional" for purposes of providing a certificate of merit, the civil rules committee stated:

> For example, in a medical professional liability action against a physician, the expert who provides the statement in support of the certificate of merit should meet the qualifications set forth in §512 of the MCARE Act.

This, the defendant argues, means that a dentist who reviews the conduct of an oral and maxillofacial surgeon must, like a physician, be appropriately board certified. For this proposition, the defendant also does not point to any legal authority. It is apparent that there is no provision of the certificate of merit rule that requires a reviewing expert dentist to be board certified.

In the absence of any explicit statutory limitation regarding the qualification of an expert witness, the Pennsylvania Rules of Evidence apply. Pa. R.E. 101(a). In that regard, Pa. R.E. 702 provides that a witness testifying on a scientific matter must be "qualified as an expert by knowledge, skill, experience, training or education." Here, Dr. Robert Wohor, a dentist who specializes in oral and maxillofacial surgery, testified concerning the breach of the standard of care by Dr. Simmons. He testified that he received his dental training from the University of Pennsylvania and that he was licensed to practice in Pennsylvania and that he had been practicing oral and maxillofacial surgery for approximately 28 years. He also testified that he had taught on a part-time basis at the Thomas Jefferson University Hospital between 1980 and 2002 as a clinical instructor. He further testified that he treated mandibular fractures with rigid fixation, the same procedure that was at issue in this case on multiple occasions. On the record before this Court, Dr. Wohor met the threshold requirements of Pa. R.E. 702 and he was properly allowed to testify.

Finally, in a separate pleading entitled "Motion Pursuant to Pa.R.C.P. 1042.7," defendant, Dr. Simmons, requested that this Court order the plaintiffs to disclose the written statement obtained by the licensed professional upon which the certificate of merit was based. In its motion, Dr. Simmons argues that his practice was more akin to that of a health care provider as defined in 40 P.S. §1303.503 than that of a dentist and that an appropriate licensed professional who would certify the merits of the plaintiffs' claims must have the same qualifications as that required

by a physician. In essence, Dr. Simmons made the same claim as his contention for post-trial relief regarding Dr. Wohar's competence to testify as an expert.

Here, however, Dr. Simmons requests that this Court order the production of the letter underlying the certificate of merit and impose sanctions for violation of the certificate of merit role, if warranted. In part, for similar reasons supporting this Court's rejection of Dr. Simmons' claim regarding the competence of Dr. Wohar to testify, this Court also finds no merit to his contention in his motion. However, it is also of serious concern that counsel for the defendant has ignored the clear requirements of Pa. R.C.P. 1042.7 which only require the disclosure of a written statement underlying a certificate of merit in circumstances where a "defendant is dismissed through voluntary dismissal, verdict or order of court." Pa. R.C.P. 1042.7(a). It is obvious that Dr. Simmons has not been dismissed through voluntary dismissal, verdict or order of court and there is no justification for ignoring this plainly stated condition precedent to disclosure.

In their Motion for Post-Trial Relief, the plaintiffs' assert that it was error for this Court to have failed to instruct the jury that "informed consent is not a defense to a negligence cause of action." A review of the record indicates this Court adequately instructed the jury with regard to the law of informal consent and negligence. Moreover, after a thorough explanation of the applicable law with regard to both informed consent and negligence, this Court further stated as follows:

> Now also, ladies and gentlemen, I want you to keep in mind that these causes of action are separate and distinct. They're not dependent on each other. In other words, you could have one cause of action without the other one. Because you don't have informed consent doesn't mean that you also have negligence. Because you have negligence doesn't also mean that you have informed consent. They're separate and distinct and you need to evaluate them on their independent merits.

(Notes of Jury Instruction, Jury Trial - Day 5, pp. 13-14). And at the time of its explanation to the jury regarding the completion of the verdict slip, this Court stated as follows:

> And so you will see that there is a series of questions. And I need to explain this to you because it can be a little confusing. Right at the top it says: "Did Defendant, Doctor Adams, properly advise Mr. Askins of the facts, risks, complications, alternatives of surgery?" That's the informed consent issue. Okay? Yes or no.
>
> A Juror: Yes.
>
> The Court: That's the idea. When you have reached your decision, that's it. You complete that form.

> Now regardless of what your answer is in that, you go to Question 2. You must answer Question 2. And that has to do with whether or not you would find that Doctor Adams was negligent. Okay? And you answer that yes or no. . .

(Notes of Jury Instruction, Jury Trial - Day 5, pp. 20 and 21). At the conclusion of the Court's instructions, there was no request by plaintiffs' counsel to clarify the distinction between informed consent and negligence. In addition, the notion that informed consent was a defense to negligence was never raised before the jury and not argued by counsel for Dr. Adams. Instructions must be viewed in their entirety. *Jistarri v. Nappi*, 378 Pa. Super. 583, 549 A.2d 210 (Pa. Super. 1988); s*ee also Commonwealth v. Carson*, 913 A.2d 220 (Pa. 2006). Only when instructions are inaccurate, and when taken as a whole prejudicial, is a party entitled to a new trial. The record reflects that the jury was clearly, thoroughly and accurately advised as to the applicable law to be considered in their deliberations.

It is also the plaintiffs' position that this Court erred by allowing Dr. Bernard J. Costello, Dr. Simmons' surgical expert witness, to testify concerning the "developmental condition" underlying Mr. Askins' dental problems because such testimony as asserted was beyond the scope of his expert report. This assertion of error is entirely without any foundation in the record. Actually, it must be pointed out that the topic of the condition of Mr. Askins' jaw prior to his surgery was first broached by the attorney for Dr. Adams in his examination of Dr. Delvecchio. (Notes of Testimony, Jury Trial - Day 4, p. 29). Plaintiffs' counsel objected, and after discussion, the objection was sustained thereafter, plaintiffs' counsel brought up the issue through further questioning of Dr. Delvecchio and cross-examination, thus opening the door to a more involved discussion of developmental problems with Mr. Askins' jaw.

With regard to Dr. Costello's testimony, there was extensive commentary concerning the developmental condition of Mr. Askins' jaw without any objection from plaintiffs' counsel. (Notes of Testimony, *Jury* Trial - Day 4, pp. 110, 111, 117, 118, 126, 127 and 153). Indeed, there was no objection made along these lines stated in plaintiffs' post-trial motion. The only objection in any way related to Dr. Costell's testimony regarding developmental problems occurred during counsel for Dr. Adams' examination of the witness. After the objection, there was no further testimony on the subject. (Notes of Testimony, Jury Trial - Day 4, p. 1160). In short, plaintiffs' allegations are not supported by the record.

For all the reasons set forth above, both the plaintiffs' and defendants' Motion for Post-Trial Relief and defendant's, Dr. Simmons, Motion Pursuant to Pa.R.C.P. 1042.7 will be denied, and plaintiffs' Motion to Mold Verdict and Motion for Delay Damages Pursuant to 42 Pa.R.C.P. 238 shall be granted and an appropriate order shall follow.

ORDER

AND NOW, this 24 day of May, 2007, upon consideration of the Motion Pursuant to Pa.R.C.P. 1042.7 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**

ORDER

AND NOW, this 24 day of May, 2007, upon consideration of the Motion to Mold Verdict and the Motion for Delay Damages Pursuant to 42 Pa.R.C.P. 238 and argument thereon, and for the reasons set forth in this Court's Opinion, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that both Motions are **GRANTED** and delay damages in the amount of $16,073.94 are awarded against defendants, Matthew E. Simmons, D.D.S. and Simmons & King Oral Surgery, for a total award against both defendants in the amount of $216,073.94.

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

ORDER

AND NOW, this 24 day of May, 2007, upon consideration of the Motion for Post- Trial Relief filed on behalf of defendants, Matthew E. Simmons, DDS, Stevens & King Oral Surgery n/k/a Simmons & King Oral Surgery, as well as the Motion for Post-Trial Relief filed on behalf of the plaintiffs, and argument thereon, and for the reasons set forth in this Court's Opinion, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that both Motions for Post-Trial Relief are **DENIED**.

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

DAVID MARTIN and MARY GARVEY, Plaintiffs
v.
ALLEGHENY VALVE COMPANY and ALLEGHENY COUPLING COMPANY, Defendants

PLEADINGS / PRELIMINARY OBJECTIONS

When ruling on a demurrer, the court must look solely at the complaint, accept as true all material facts pled in the complaint and all reasonable inferences deducible therefrom, and determine whether the complaint permits relief under any theory of law

CIVIL PROCEDURE /DISCONTINUANCE

A voluntary discontinuance is the sole method of discontinuing an action before trial and may be stricken if necessary to protect the rights of the parties

CIVIL PROCEDURE / DISCONTINUANCE

A voluntary discontinuance resolves all pending claims and has the effect of a final judgment

CORPORATIONS / INDEMNIFICATION

When a corporation voluntarily discontinued an action against a corporate officer or director, the corporate officer or director was "successful on the merits or otherwise" in that action within the meaning of 15 Pa.C.S. §1743, and the corporate officer or director states a claim for indemnification for legal fees, costs and interest against the corporation under 15 Pa.C.S. §1743

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 15140 OF 2006

Appearances: W. Patrick Delaney, Esq. for the Plaintiffs
John W. McCandless, Esq., Co-Counsel for Defendants
Marjorie M. Obod, Esq., Co-Counsel for Defendants

OPINION AND ORDER

DiSantis, Ernest J., Jr., J.

This case comes before the Court on Defendants' preliminary objections to Plaintiffs' civil complaint.

I. HISTORY OF THE CASE

Plaintiffs, David Martin and Mary Garvey, were directors and/or officers for Defendants, Allegheny Valve Company and Allegheny Coupling Company. On December 31, 2002, the Defendants initiated a civil action against the Plaintiffs alleging breach of fiduciary duty, conversion, negligence and/or willful, wanton and reckless conduct (Erie Co. Civil Docket No. 14756 of 2002). The civil complaint was filed March 13, 2003, and amended complaints were filed April 17, 2003 and February 28, 2005.

The case progressed though the pre-trial process to summary judgment stage until November 22, 2006 when Defendants filed a Praecipe to Discontinue as to the Plaintiffs. On November 29, 2006, Plaintiffs filed a Petition to Strike off Discontinuance. On December 18, 2006, Defendants filed a response to Plaintiffs' Petition to Strike off Discontinuance. On December 20, 2006, Plaintiffs filed an Answer to New Matter. On December 21, 2006, this Court issued the following order:

> After review of petition to strike off discontinuance filed by defendants David Martin and Mary Garvey and the plaintiffs' response, it is hereby ordered that defendants' petition is denied. The Court finds that there is no interest of justice that would require revival of this lawsuit, which has been discontinued.

On December 13, 2006, the Plaintiffs instituted this action against the Defendants asserting breach of contract and seeking indemnification.[1] On December 20, 2006, Defendants filed preliminary objections to the civil complaint. On January 25, 2007, Defendants filed a brief in support of the their preliminary objections. On February 1, 2007, Plaintiffs filed a brief in opposition to Defendants preliminary objections. On February 27, 2007, the parties entered into a stipulation that rendered moot paragraphs 3 to 11 of the preliminary objections.

The Defendants' preliminary objections boil down to the following assertion: the Defendants' act of unilaterally discontinuing the previous case does not correspond to "success on the merits or otherwise" that would entitle Plaintiffs to indemnification under 15 Pa.C.S.A. §1743.

II. LEGAL DISCUSSION

Preliminary objections are governed by Pa.R.C.P. 1028. The rule provides that:

> (a) Preliminary objections may be filed by any party to any pleading and are limited to the following grounds:
>
> (1) lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form 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.

[1] Plaintiffs seek $70,254.10 in attorney's fees, costs, and interest.

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." *Belser v. Rockwood Casualty Ins. Co.*, 791 A.2d 1216, 1219 (Pa. Super. 2002) (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.*" *Regal Industrial Corp., v. Crum and Forster, Inc.*, 890 A.2d 395, 398 (Pa.Super. 2005); *Sutton v. Miller*, 592 A.2d 83, 87 (Pa. Super. 1991).

The Plaintiffs seek indemnification for legal fees, costs, and interest. To establish a claim or defense based upon indemnification under the statute, the party asserting the claim or defense must allege facts that would establish the following elements: (1) the party was director and/or officer of the corporate entity; (2) the corporate entity sued the director and/or officer under theories relative to party's connection to the corporate entity; and (3) the party should be "successful on the merits or otherwise." See 15 Pa.C.S.A. §1743.

The resolution of this issue turns on the interpretation of 15 Pa.C.S.A. §1743. That section of the Pennsylvania Business Corporation Law provides for indemnification of directors and/or officers under the following circumstances:

> To the extent that a representative of a business corporation has been **successful on the merits or otherwise** in defense of any action or proceeding referred to in Section 1741 (relation to third party actions) or 1742 (relating to derivative and corporate actions) or in defense of any claim, issue or matter therein, he shall be indemnified against expenses (including attorney's fees) actually and reasonably incurred by him in connection therewith.

See 15 Pa.C.S.A. §1743 (emphasis added).

This Court must determine whether the discontinuance entered in the previous case falls within the definition of "successful on the merits or

otherwise." There are no Pennsylvania cases directly on point. However, in interpreting a statute, this Court is guided by the principles set forth in 1 Pa.C.S.A. §1921. That statute provides in part:

> (a) The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give the effect to all its provisions.
>
> (b) When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

When the words of a statute are not explicit, the Court is called upon to look at various other factors that are itemized in subsection (c)(1)-(8) of the act.

Turning to the critical phrase of §1743, "has been successful on the merits or otherwise," this Court first notes that the word "or" is a conjunction denoting an alternate choice. Second, the word "otherwise" means in a different manner, in another way, or in other ways. See Henry Campbell Black, *Black's Law Dictionary* 992 (Joseph R. Nolan & M.J. Connolly eds. 5th ed. 1979).

A discontinuance is the exclusive method of voluntary termination of an action by a plaintiff before the beginning of trial. See Pa. R. Civ. P. 229(a). Discontinuances are granted by leave of court only, but standard practice in this Commonwealth has been to assume such leave in the first instance. See *Fancsali v. University Health Ctr.*, 761 A.2d 1159, 1161 (Pa. 2000). A trial court may strike off a discontinuance where it is necessary to protect the rights of any party from unreasonable inconvenience, vexation, harassment, expense, or prejudice. See Pa. R. Civ. P. 229(c); *Gray v. Magee*, 864 A.2d 560, 565 (Pa.Super. 2004).

The Pennsylvania courts have determined that a praecipe to discontinue a case constitutes a final resolution of all issues. *Sustrik v. Jones & Laughlin Steel Corp.*, 197 A.2d 44, 46 (Pa. 1964). Further, a praecipe for discontinuance has the same effect as a judgment entered in favor of the defendant. *Triffin v. Janssen*, 688 A.2d 1212, 1214 (Pa. Super. 1997). Thus, since a praecipe for discontinuance constitutes a final resolution of the case and has the effect of a final judgment, a trial court may consider a petition for fees filed within a period of 30 days after the filing of the praecipe. *Miller Electric Co. v. DeWeese*, 907 A.2d 1051, 1054 & 1056 (Pa. 2006) (court defines a discontinuance with prejudice as a final order); see also *Ferrato v. Castro*, 888 F.Supp. 33, 34 (S.D.N.Y. 1995) ("...a dismissal with prejudice has the effect of a final adjudication on the merits favorable to defendant.").

In *Salovaara v. SSP Advisers*, 2003 Del.Ch. Lexis 142, at 13, 23 (Del. Ch. December 22, 2003), the court was called upon to determine whether

a plaintiff could receive indemnification of legal fees after it granted a defendant's motion to dismiss his case against the plaintiff pursuant to 8 Del. Code §145(c). This statute is virtually identical to 15 Pa.C.S.A. § 1743 and provides that:

> (c) To the extent that a present or former director or officer of a corporation has been **successful on the merits or otherwise** in defense of any action, suit or proceeding referred to in subsections (a) [third party actions] and (b) [derivative and corporate actions] of this section, or in defense of any claim, issue or matter therein such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith.

See 8 Del. Code §145(c) (emphasis added).

The *Salovaara* court determined that its granting of the defendant's motion to dismiss fell within the definition of "successful on the merits or otherwise," which allowed the plaintiff to recoup attorney's fees. See *Salovaara v. SSP Advisers,* 2003 Del.Ch. Lexis 142, at 13, 23 (Del.Ch. December 22, 2003)**.**

In *Merritt-Chapman & Scott Corp. v. Wolfson,* 321 A.2d 138, 141 (Del. Sup. 1974), the issue before the court was whether a criminal defendant-director was entitled to partial indemnification related to dismissal of criminal charges. Again the court applied §145(c) and determined that he was eligible for partial indemnification because any charge to which the defendant was not found guilty and/or did not plead 'no contest' is the equivalent of "successful on its merits or otherwise," *Id.,* at 141.

Generally, courts have liberally construed this and similar indemnification statutes to provide corporate directors and officers with the broadest protection possible when they have successfully defended against a claim or action. See *Witco Corp. v. Beekhuis,* 38 F.3d 682, 692 (3rd Cir. 1994) (Delaware law provides for broad statutory indemnification protection in situations where a corporate officer or director successfully defends against claims); *Wisner v. Air Express Int'l Corp.,* 583 F.2d 579, 583 (2nd Cir. 1978) (the Second Circuit interpreted an Illinois statute identical to 145(c) and concluded that the term "successful on the merits or otherwise...surely is broad enough to cover a termination of claims by agreement without any payment or assumption of liability."); *Waltuch v. Conticommodity Servs., Inc.,* 881 F.3d 87, 97 (2nd Cir. 1996) (the court determined that plaintiff's dismissal with prejudice without any payment on his part as a result of defendant's settlement was sufficient to entitle him to mandatory indemnification under 145(c)); and *B & B Inv. Club v. Klenert's, Inc.*, 472 F.Supp 787, 791 (ED. Pa. 1979) (interpreting language of Pennsylvania statute similar to 145(c) and holding that a negotiated "dismissal with prejudice without making any payment. . .

[he or she]...was 'successful on the merits or otherwise.'").

One commentator's observation of the Delaware statute appears to be equally applicable to Pennsylvania's version. As he stated:

> Two characteristics have defined the parameters of success under subsection (c). First, a termination of the legal proceedings will be deemed successful under the statute only if it is final. ... Although there is no Delaware precedent directly on point, most commentators agree that a settlement and dismissal with prejudice of an action will also satisfy the finality requirement of success under the statute. ...
>
> Second, the successful conclusion of the underlying suit for which indemnification is sought must have been achieved without any payment or assumption of liability by the defendant director or officer who is now a claimant seeking indemnification. ... it is clear that in order for a settlement to qualify as a "success" under 145(c) [the Delaware statute], it must result in a dismissal, with prejudice without any payment or assumption of liability by the defendant director or officer.

See Kurt A. Mayr, II, *Note: Indemnification of Directors and Officers: The "Double Whammy" of Mandatory Indemnification under Delaware Law in Waltuch v. Conticommodity Services, Inc., 42* Vill. L. Rev. 223, 256-59 (1997).

Courts interpreting the Delaware statute have not been concerned with the motive of the party who discontinued the action. Accordingly, the only question for a court considering a claim under §145(c) is what was the result of the underlying litigation. See *Wolfson*, 321 A.2d at 138; *Waltuch*, 88 F.3d at 96.

In the instant case: (1) the Plaintiffs were directors and/or officers in the Defendants' corporations; (2) the Defendants sued the Plaintiffs in their capacity as directors and/or officers; and (3) the Defendants' voluntary discontinuance of Civil Docket No. 14756 OF 2002 against the Plaintiffs, as well as this Court's December 21, 2006 order refusing to strike off the discontinuance constituted a resolution of the case such that Plaintiffs were "successful on the merits or otherwise." Therefore, the Plaintiffs' complaint is sufficient to state a cause of action for indemnification.

III. CONCLUSION

Based on the above analysis, Defendants' preliminary objections will be OVERRULED.[2]

[2] The Court need not decide at this time whether §1743 is mandatory. Such a determination is more appropriate at the summary judgment phase of the case. However, the committee comment to the rule states in part:

ORDER

AND NOW, this 22nd day of March, 2007, for the reasons set forth in the accompanying opinion, Defendants' preliminary objections are OVERRULED.

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

[2] continued

> Unlike indemnification pursuant to 15 Pa.C.S.A. §1741 and §1742, which may be restricted in the bylaws, this revision creates an absolute right to indemnification.

See also *Alphin v. Cotter, et al.*, 35 Phila 533, 537 (Phila.Co. 1998) (although the court did not rule in favor of the party seeking legal fees under §1782(c) and §1743, it noted that: 15 Pa.C.S.A. §1741, §1742, and §1782(c) were discretionary, and §1743 was mandatory).

JAMES ALLEN, Plaintiff

v.

PATRICIA GOODWIN, Defendant

CIVIL PROCEDURE / POST TRIAL MOTIONS

A new trial will be granted on the grounds that a verdict is against the weight of the evidence only where the verdict is so contrary to the evidence that it shocks one's sense of justice; a jury's verdict shocks one's sense of justice when it disregards the uncontroverted evidence of causation.

TRIAL / VERDICT

A jury is entitled to reject any and all evidence up until the point at which the verdict is so disproportionate to the uncontested evidence as to defy common sense and logic.

TRIAL / VERDICT

Pennsylvania law is clear that it is within the province of the jury to determine whether or not it believes the plaintiff suffered a compensable pain as the result of an accident; the issue of the existence of compensable pain is an issue of credibility.

TRIAL / VERDICT

A jury is not obliged to believe every injury causes pain or the pain specifically alleged; the jury could also conclude any discomfort is a "transient rub of life" for which compensation is not warranted.

TRIAL / VERDICT

Where there is uncontradicted evidence elicited from the plaintiff, his experts and the defense expert that a plaintiff has sustained injuries, the jury must award some compensable damage.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANlA CIVIL DIVISION NO. 13102 - 2005

Appearances: Craig A. Markham, Esquire for the Plaintiff
Sharon L. Bliss, Esquire for the Defendant

OPINION

DiSantis, Ernest J., Jr., J.

I. BACKGROUND OF THE CASE

This case comes before this Court on Plaintiff's Motion For New Trial And/Or For Judgement Notwithstanding The Verdict. The case arises out of an automobile collision which occurred on September 23, 2003 on South Lake Street (State Route 89) in Erie County, Pennsylvania. It is undisputed that at that time the defendant struck the rear of the plaintiff's truck with her smaller vehicle causing the plaintiff's vehicle to be pushed into the on-coming lane of traffic.

The case proceeded to trial and on April 18, 2007 the jury returned a verdict in favor of the defendant. (A copy of the verdict slip is attached.)

At trial, there was no dispute that the defendant caused the collision. What was at issue was the extent, if any, to which the collision caused the injuries alleged by the plaintiff. He alleged left shoulder pain, neck pain, headaches and aggravated right shoulder pain.

Both parties presented expert testimony. The plaintiff's experts supported his claim that the pain he experienced was related to the collision.

The defense presented the testimony of one witness, Doctor David Babbins. As his testimony indicated, he disputed the plaintiff's claim that the collision caused an aggravation of the right shoulder injury. However he conceded that there was symptomology with respect to the left shoulder, but no anatomic changes. He did not disagree with the diagnosis of plaintiff's experts concerning the left shoulder pain, nor did he dispute that the neck pain and headaches were related to the collision. As he stated:

> Question: Okay. Um, the pain in the left shoulder we see here in this hospital record, are you saying that that's not caused by the accident?
>
> Answer: No. I wouldn't disagree that the diagnosis that provided based on the doctor that saw him at the time would, would be related.

Dr. Babbins' deposition transcript at 36.

> Question: Okay. And so you agree that at least to the extent he suffered a neck injury in this auto accident? Answer: I believe as a result of this accident he sustained a soft-tissue injury to the regions around his neck and that he continues to have symptoms.
>
> Question: Okay. And those symptoms include headaches?
>
> Answer: Yes.

Id. at 55.

II. LEGAL DISCUSSION

Our Supreme Court has stated: "A new trial will be granted on the grounds that a verdict is against the weight of the evidence only where the verdict is so contrary to the evidence that it shocks one's sense of justice." *Neison v. Hines*, 653 A.2d 634, 636 (Pa. 1995) (citations omitted). A jury's verdict shocks one's sense of justice when it disregards the uncontroverted evidence of causation. *Kraner v. Kraner*, 841 A.2d 141, 146 (Pa. Super. 2004). As the Superior Court has noted: "A jury is entitled to reject any and all evidence up until the point at which the verdict is so disproportionate to the uncontested evidence as to defy common sense and logic." *Andrews v. Jackson*, 800 A.2d 959, 962 (Pa. Super. 2002), quoting *Neison v. Hines, supra* at 637.

Soft tissue injury cases, like the one at bar, are often problematic.

Nevertheless, a jury "must find the accident was a substantial cause of at least some injury, where both parties' medical experts agree the accident caused some injury". *Elliott v. Ionta,* 869 A.2d 502, 509 (Pa. Super. 2005).

In this case there was no dispute by any medical expert that the plaintiff suffered injury as a result of the collision, specifically injury to his left shoulder, neck and headaches. The defendant argues, however, that this is not dispositive because of the specific verdict slip that was utilized in this case. She asserts that because the jury was asked to determine whether or not the defendant's negligence caused the plaintiff's pain (rather than injury), the jury was free to reject the plaintiff's evidence.

As defendant points out, and as this Court agrees, Pennsylvania law is clear that it is within the province of the jury to determine whether or not it believes the plaintiff suffered a compensable pain as the result of an accident. See *Boggavarapu v. Ponist,* 542 A.2d 516 (Pa. 1988). The issue of the existence of compensable pain is an issue of credibility. See *Davis v. Mullen,* 773 A.2d 764 (Pa. 2001); *Majczyk v. Oesch,* 789 A.2d 717 (Pa. Super. 2001).

As the Superior Court noted in its interpretation of some of the Pennsylvania Supreme Court's decisions:

> A review of our supreme court's in decisions in *Neison, supra,* and *Boggavarapu, supra,* further delineates the supreme court's interpretation of the meaning of compensable pain. In *Boggavarapu,* for example, our supreme court instructed that while "there are injuries to which human experience teaches there is accompanying pain," including, ***inter alia***, the stretched muscle, which a jury may not disregard, *"**they are not obliged to believe that every injury causes pain or the pain alleged**." Boggavarapu,* 581 Pa. at 167, 542 A.2d at 518 (emphasis added). The *Boggavarapu* court then considered the pain of a dog bite followed by a tetanus shot to be transient rubs of life for which the jury could award damages of $42, the cost of emergency room treatment. *Id.*

Majczyk v. *Oesch,* 789 A.2d at 723 - 724

In its analysis of *Neison,* the Superior Court noted that:

> *Neison* presented uncontradicted evidence of a violent automobile accident for which Hines conceded negligence. *Neison, supra* at 520, 653 A.2d at 637. Hines' medical expert also conceded that Neison "'exhibited a diagnosis of a healed neck sprain and a healed scapular or shoulder blade sprain.'" *Id.,* quoting the record. Hines' medical expert also opined that recovery from an injury such as Neison's usually takes three to five months. *Id.*

Id. at 724.

The proof at trial established that the collision caused by the defendant's somewhat smaller vehicle forced the plaintiff's truck into the oncoming lane of traffic. This was more than a mere "bump". It is true that a jury may conclude that a plaintiff suffered some painful inconvenience for a few days or even a few weeks after an accident, and decide that the plaintiff's discomfort was the "sort of transient rub of life for which compensation is not warranted". *Boggavarapu*, 542 A.2d at 518. However, in the case at bar the uncontradicted evidence elicited from the plaintiff, his experts and the defense expert indicated that the injuries sustained to the plaintiff's left shoulder, neck and the resulting headaches were more than "a transient rub of life". That uncontradicted evidence served as a basis for an award of some amount of compensable damages for the plaintiff's pain associated with his left shoulder, neck and the headaches. Therefore, the jury's decision to award nothing for these injuries shocks one's sense of justice and entitles the plaintiff to a new trial.

Based upon the above, this Court finds that a new trial is warranted and the issues at trial shall be limited to liability and damages related to the plaintiff's claims associated with his left shoulder, neck and alleged headaches.

Finally, because the plaintiff has failed to demonstrate that he is entitled to a judgment *non obstante veredicto*, that motion shall be denied.

ORDER

AND NOW, this day 6th of June 2007, for the reasons set forth in the accompanying opinion, it is hereby ORDERED that the plaintiff's Request For A New Trial is GRANTED. Absent any appeal of this order, the trial shall be conducted during the October 2007 term of court. Plaintiff's Motion For Judgment Notwithstanding The Verdict is DENIED.

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

VERDICT SLIP

Based upon the agreement of the parties, as a matter of law I instruct you that Ms. Goodwin negligently caused the collision with Mr. Allen's vehicle. You are asked to answer the following questions:

1. Was Ms. Goodwin's negligence a factual cause of Mr. Allen's alleged injuries? The injuries alleged are:

	YES	NO
left shoulder pain		X
neck pain		X
headaches		X
aggravated right shoulder pain		X

If your answer to this question is "NO" to all of the above, Mr. Allen may not recover monetary damages. The Foreperson should sign and date the verdict slip and notify the tipstaff.

If your answer is "YES" to any of the above, go to Question 2.

2. State the amount of loss, if any, sustained by Mr. Allen, as a result of Ms. Goodwin's negligence. The following are the items for which Mr. Allen requests monetary compensation.

a. past pain and suffering
b. future pain and suffering
c. past, present and future embarrassment and humiliation
d. past, present and future enjoyment of life
e. unreimbursed medical expenses (amount claimed - $12,293.14)

Amount $_____

4-18-07 /S/
Date FOREPERSON

RICHARD K. WEBER, Executor of the Estate of EDWARD P. MASCHARKA, SR., deceased, Plaintiff,

v.

HAMOT MEDICAL CENTER, Defendant

CIVIL PROCEDURE / POST-TRIAL MOTIONS

The entry of judgment N.O.V. is appropriate when the movant is entitled to judgment as a matter of law and/or the evidence is such that reasonable minds could not disagree that the outcome should have been rendered in favor of the movant.

CIVIL PROCEDURE / POST-TRIAL MOTIONS

When addressing a motion for judgment N.O.V., the court must consider the evidence in the light most favorable to the verdict winner and must give the verdict winner the benefit of every reasonable inference therefrom.

CIVIL PROCEDURE / POST-TRIAL MOTIONS

A motion for judgment N.O.V. must be denied where conflicting evidence has been presented to the jury.

CIVIL PROCEDURE / POST-TRIAL MOTIONS

When addressing a motion for a new trial, the court must determine (1) whether a factual, legal or discretionary mistake was made at trial and if so (2) whether such mistake caused sufficient prejudice to the movant to warrant a new trial. A mistake causes sufficient prejudice to the movant to warrant a new trial if, but for the mistake, the outcome would have been different.

CIVIL PROCEDURE / POST-TRIAL MOTIONS

Where the introduction of evidence is objected to at trial for a specific reason, other reasons are waived and may not be raised for the first time via post-trial motion.

EVIDENCE

Medical expenses incurred by the plaintiff's decedent were admissible where the physician for the plaintiff's decedent offered reasonable testimony as to which expenses were related to the accident that was the subject of the lawsuit.

DAMAGES

A damage award is excessive and subject to remittitur if it deviates substantially from what could be considered reasonable compensation.

DAMAGES

An award of non-economic damages in favor of the plaintiff's decedent in the amount of $360,000 was not excessive, despite the fact that the plaintiff's decedent was eighty-two years old and suffered from health complications secondary to a stoke at the time of the fall giving rise to the litigation.

DAMAGES

The Pennsylvania Property and Casualty Insurance Guarantee Association ("PPCIGA") cannot be held liable for delay damages under Pa.R.C.P. 238 when it has paid the statutorily mandated amount of the insolvent insurance policy.

DAMAGES

The ninety-day stay set forth in 40 P.S. § 991.1819 for proceedings in which an insolvent insurer is a party or is obligated to defend a party is not excluded when calculating delay damages under Pa.R.C.P. 238.

DAMAGES

The medical expense portion of an award in a civil action seeking monetary relief for bodily injury, death or property damage is to be included in the calculation of delay damages under Pa.R.C.P. 238.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 12613-1996

Appearances: Steven E. Riley, Esq. for the Plaintiff
John Giunta, Esq. for the Defendant

OPINION

Connelly, J., July 18, 2007

Before the Court is Hamot Medical Center's (hereinafter "Defendant") Motion to Mold Verdict and Motion for Post-Trial Relief. Also before the Court is Richard K. Weber's, Executor of the Estate of Edward P. Mascharka, Sr., (hereinafter "Plaintiff") Motion to Mold Verdict and Assess Delay Damages.

Procedural History

Plaintiff commenced this action against Defendant in 1996, with the actual complaint filed on November 15, 1996. Protracted discovery continued for the next several years until the case was certified for trial on December 30, 2005. During the October 2006 civil trial term, a jury was impaneled to hear the case. On October 19, 2006, following a four-day trial, the jury returned a verdict finding that Defendant was negligent in the care of Plaintiff's decedent. Furthermore, the jury attributed 10% of the causal negligence to Plaintiff's decedent. The jury awarded $121,000.00 as the amount of damages sustained by the plaintiff as a result of the negligence of the hospital and nursing home expenses. It also awarded $360,000.00 as pain and suffering, embarrassment and humiliation, loss of ability to enjoy the pleasures of life, and disfigurement. The total damages were $481,000.

Statement of Facts

Edward P. Mascharka was admitted to Hamot Medical Center on August 9, 1994 by Dr. James DeMatteis, his treating neurologist. Mr. Mascharka

had suffered a stroke three months prior to this hospitalization and Dr. DeMatteis suspected that he had developed aspiration pneumonia because of Mr. Mascharka's difficulty in swallowing, a lingering side effect of the stroke. Mr. Mascharka was admitted to the fourth floor of Hamot Hospital, which is specifically a neurological unit. Dr. DeMatteis noted in Mr. Mascharka's chart that he was known to fall at night because he gets out of bed unassisted. During the night hours between August 9th and 10th, a nurse's aide heard a thump in Mr. Mascharka's room and a nurse, Kathy D'Urso, found Mr. Mascharka on the floor near his bed. The medical resident consulted with the on-call neurologist, who ordered hourly checks of Mr. Mascharka's neurological status and a CT scan to be performed the morning of August 10th. No record exists to determine whether the hourly checks were performed. The first shift nurse, Kathy Bari, evaluated Mr. Mascharka shortly after she came on duty. She found Mr. Mascharka to be difficult to arouse, incontinent, and unable to open his eyes or follow commands. A CT scan indicated that Mr. Mascharka had a subdural hematoma. Later that morning he underwent a surgical procedure in which Dr. Brian Dalton removed the hematoma and coagulated the bleeding arteries.

Following his surgery, Mr. Mascharka was admitted to Hamot's intensive care unit. He was later transferred to Health South LEIR for rehabilitation and on September 14, 1994 he was readmitted to Hamot following a respiratory arrest. After being transferred to Hamot's skilled nursing unit, he was ultimately discharged on October 12, 1994 to St. Mary's Home of Erie. He resided there until his death on May 1, 1996. The plaintiff alleged that Mr. Mascharka received substandard care during his August 1994 stay at Hamot Hospital and, as a result, his quality of life was greatly diminished. As discussed *supra*, the jury agreed with the plaintiff and found Hamot to be 90% negligent, with the damages totaling $481,000.

Findings of Law

Both Plaintiff and Defendant have raised several issues in their post-trial motions. First the Court will address the several issues raised by Defendant in its Motion for Post-Trial Relief. Next, the Court will address both parties' Motions to Mold Verdict, followed by the Plaintiff's Motion for Delay Damages.

I. Defendant's Motion for Post-Trial Relief

A. Motion for Judgment Notwithstanding the Verdict

Defendant contends that it is entitled to judgment notwithstanding the verdict because the verdict was against the law, against the weight of the evidence produced at trial, the verdict was excessive, and there was insufficient evidence presented at trial for the jury to conclude that Defendant was liable to Plaintiff. Specifically, Defendant asserts that Plaintiff's nursing expert was unable to state a claim that the nurses were

negligent and that her testimony on the physician's progress notes was improper. Plaintiff rebuts these assertions by relying on the standards set forth by this Court *infra.*

> There are two bases upon which a judgment N.O.V. can be entered; one, the movant is entitled to judgment as a matter of law and/or two, the evidence is such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant. With the first, the court reviews the record and concludes that, even with all factual inferences decided adverse to the movant, the law nonetheless requires a verdict in his favor. Whereas with the second, the court reviews the evidentiary record and concludes that the evidence was such that a verdict for the movant was beyond peradventure.

Janis v. AMP, Inc., 856 A.2d 140, 143-144 (Pa.Super. 2004).

> The 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.

Burton-Lister v. Siegel, Sivitz and Lebed Associates, 798 A.2d 231, 236 (Pa.Super. 2002).

Dr. Talerico, Plaintiff's nursing expert, rendered her expert opinion that Mr. Mascharka's toileting plan was inadequate. Plaintiff cites several portions of Dr. Talerico's testimonial record that support her conclusion. From the point when Mr. Mascharka was admitted until the fall, Dr. Talerico notes several instances which, she believes, should have indicated to the Defendant that the toileting plan was inadequate. This testimony was all presented to the jury. Defendant's counsel argues that Dr. Talerico's testimony was improperly admitted, but that even if it were proper, Dr. Talerico failed to make a cause and effect relationship between the inadequacies of the toileting plan and Mr. Mascharka's fall. Defense counsel cross-examined Dr. Talerico and presented his own expert witness to the jury. A JNOV must be denied where conflicting evidence has been presented to the jury. *Id.* The jury was permitted to weigh all of the evidence. This court does not find any legal reason to ignore the findings of the jury. Defendant's Motion for Judgment Notwithstanding the Verdict is denied.

B. Motion for a New Trial

Defendant next sets forth its Motion for New Trial. Defendant believes the verdict was against the weight of the evidence and that this Court made

prejudicial trial errors as to the issues of liability and damages.

The trial court must follow a two-step process in responding to a request for a new trial. The trial court must determine whether a factual, legal or discretionary mistake was made at trial. Second, if the trial court determines that one or more mistakes were made, it must then evaluate whether the mistake provided a sufficient basis for granting a new trial. A new trial is not justified simply because an irregularity occurred at trial or a different judge would have ruled differently. The moving party must prove that he or she has suffered some prejudice by the error. *See Bey v. Sacks*, 789 A.2d 232 (Pa.Super. 2001). Prejudice in this context requires that, but for the mistake, the outcome would have been different. *Spino v. John S. Tilley Ladder Co.*, 696 A.2d 1169 (Pa. 1997).

i. Motion in Limine: Post-fall Treatment

Specifically, Defendant avers that the trial court improperly ruled upon Part II of Defendant's Motion in Limine, which sought to bar evidence of post-fall treatment, and Part III of Defendant's Motion in Limine, which sought to exclude evidence of medical bills incurred after the fall. Defendant avers that there were multiple errors during the trial regarding what witnesses were or were not permitted to testify about that warrant a new trial. Defendant argues that the Court erred in the jury charges. Defendant argues that the trial Court erred in failing to grant Defendant's Motion for Compulsory Non-Suit and Motion for Directed Verdict.

The Court will first address Defendant's issues as they relate to the pre-trial rulings. The admission or exclusion of evidence is within the sound discretion of the trial court. A reversal is warranted where the trial court has clearly abused its discretion or committed an error of law. To constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party. *Hawkey v. Peirsel*, 869 A.2d 983, 989 (Pa.Super., 2005)

Defendant sought to exclude testimony regarding post-fall treatment on two bases: that it would not be unequivocal and that it would not be medical testimony. This Court addressed both of Defendant's concerns in its October 2006 Order. Furthermore, this Court recognizes that Plaintiff is correct in citing the appropriate case law regarding the specificity of objections. It has long been the rule in this Commonwealth that in instances where the introduction of evidence is objected to at trial for a specific reason, other reasons are waived and may not be asserted post-trial for the first time. *See Siter v. Maryland Peat & Humus Co.*, 363 A.2d 1221 (Pa.Super. 1976). This rule also applies to pre-trial objections. Therefore, Defendant's new contentions as to the inadmissibility of Nurse Talerico's testimony are untimely and have been waived.

Even if this were not the case, Defendant's objections are without merit. Defendant now asserts that the testimony of post-fall restraints was irrelevant and unduly prejudicial. The Court first notes that evidence of

post-fall restraints was excluded by the Court in response to Defendant's Motion in Limine. Order of Court, October 13, 2006. However, Defense counsel elicited the testimony during the trial regarding post-fall restraints.

Q. [by Mr. Giunta] Ma'am, you would agree with me that that note at 11 a.m. at the beginning of shift - 11 p.m., was the first note of disorientation in this chart, that's what you said?
A. [by Dr. Talerico] First nurses' note of disorientation.
Q. Exactly, first evidence of that. And that it's a change. And was he combative. Any note he was combative at any time during the shift?
A. Yes, there was.
Q. What's combative?
A. When they put the restraint on him after he fell.
Q. No. No. No. No.
A. That was the same shift, wasn't it?
[The Court] Wait. Counsel, ask a question. She should be given an opportunity to answer.
[Mr. Giunta] I meant the shift.
[The Court] Then you should-
[Mr. Giunta] I know, that's fine, that's fine, Your Honor. Go ahead.
Q. [by Mr. Giunta] Go ahead, you answer.
A. [by Dr. Talerico] You said if he was combative.
Q. My question should have been-
[Mr. Riley]: May she answer it?
[Mr. Giunta]: She can answer it, sure.
A. [by Dr. Talerico] I read from the nurses' notes that Mr. Mascharka became combative after the fall, when they put a vest restraint on him, that he was very upset with that and wanted it taken off. And I believe he was described as combative or agitated.
Q. At this point he was not going anywhere, he was in the bed and he was being - he was angry about hat [sic]. Before he fell, that was my more proper question, I thought I phrased it that way and I'm sorry if I didn't. Before he unfortunately was found on the floor, was he combative at any time during this shift?
A. I did not see any evidence of that.

Trial 10/17/06 p. 321 II. 9-25; p. 322 II. 1-22.

Evidence of post-fall restraints was excluded by this Court in its October 13, 2006 Order. However, because Defendant opened the door, he cannot now object to this evidence.

ii. Motion in Limine: Medical Expenses

Defendant also argues that the Court erred in its ruling regarding the Plaintiff's introduction of the related medical expenses. Specifically, Defendant argues that the introduction of the medical expense testimony was improper as there was no reference to specificity of the bills and

that Plaintiff did not produce any expert testimony to establish which bills were related to or enhanced by the fall. Regarding the ability of Dr. DeMatteis to testify in general to the medical bills, the Court reiterates that position taken in the October 13, 2006 Order. Medical expense testimony may be introduced through the plaintiff, or the treating or non-treating doctor. *Kravinsky v. Glover,* 396 A.2d 1349 (Pa. Super. 1979). Regarding Defendant's claim that the bills were not specific enough, this Court previously recognized the *Poltorak* standard. *See Poltorak v. Sandy,* 345 A.2d 201 (Pa. Super. 1975).

> The plaintiff or her physician must make a reasonable showing of which bills were for accident related treatments and which were for unrelated treatments...the plaintiff must individuate the injuries and damages...not with absolute exactitude, but at least with reasonable approximation, and...damages may not be based on a mere guess or speculation; the proof must be of a character to enable an intelligent separation of the damages caused by the negligence complained of from those otherwise sustained.

Id.

Dr. DeMatteis testified to the expenses on the first day of trial. Plaintiff's counsel had a line-by-line exhibit drawn up, but during a sidebar conference initiated by defense counsel, the Court ruled that, due to collateral source issues, the chart should not be published to the jury and that Dr. DeMatteis could testify as to the total sum of related expenses. Dr. DeMatteis then testified to the damages:

> Q. [by Mr. Mizner] If you can, we'll go back to the summary sheet. Last week we met and I brought you an entire list of all the various charges and expenses that have been incurred and what had been paid by a number of people; is that correct?
> A. [by Dr. DeMatteis] That's correct.
> Q. And is it a fair statement that you went through that line by line and told me what you believed was directly related to the fall and subsequent surgery and what was not, things that you believed that would have been incurred regardless of the fall and the surgery?
> A. Yes.
> Q. And, in fact, you spent a fair amount of time going through it line by line; is that correct?
> A. Yes.
> Q. I'm not going to take you through it line by line today.
> A. Thank you.
> Q. I will refer you to the summary and the total paid medical expenses, and that would be on the bottom page.
> A. Yes.
> Q. Can you tell the jury what was the total paid medical expenses that

you believe was related to the fall and subsequent brain surgery?
A. I believe it's this last line here, I believe $182,728.72.
Q. And those were expenses that were paid directly as a result of the fall and subsequent brain surgery, correct?
A. Yes.
Q. Doctor, is it your professional opinion that the total amount of paid expenses related to Mr. Mascharka's care and treatment then was $182,728.72?
A. Yes, sir.

Trial 10/16/06 p. 90 I. 24 - p. 92 I. 7.

This was followed by cross-examination by Mr. Giunta:

Q. [Mr. Giunta] Doctor, I hesitate to bring this up. I'll talk a little bit, just a little bit, but I do owe a duty to do this, about the bills. Okay. The jury hasn't seen the chart and I've seen the chart but there's a-one of the bills, let's start at the end and make it as quick as we can.
...
Q. Whatever that bill was, you will agree that it was your expectation that would need to be paid anyway because it was your expectation he would be in a nursing home?
A. [Dr. DeMatteis] That's not a fair statement and let me explain.
Q. Sure.
A. Sure. Had he not fallen, he would have not had-say he went-let's say for argument he was sent to the nursing home after August 9... The level of care and level of intensity of burden of care offered by those nurses would have been far less had he left without the fall, so that's -but with the fall, as a result of the fall and the complications and neurologic burden as a result of that fall, additional neurologic burden increased the level of intensity of care.

Trial 10/16/06 p. 128 II. 18-23; p. 131 II. 9-25.

And on re-direct by Plaintiff's counsel:

Q. [Mr. Mizner] And if I'm correct, if I understand your testimony correctly, while he did come to the E.R. on August 9 with aspiration pneumonia, that could have been treated and there was no doubt in your mind with this family and what you knew about the care that they're willing to provide, that there was no reason that he could not have been able to return home; is that correct? Without the fall.
A. [Dr. DeMatteis] That was my hope. That was my hope, he would go home. But, again, it's also-I'm not trying to-but you know sometimes families just say maybe that they may not be able to. But there certainly is also a possibility they can. I always put in all possibility contingencies.
Q. And that's what you were trying to address at this time; is that correct? If he did not improve, it would look to you like he was going

to a nursing home, correct?
A. Yes.
Q. All that hope went out the window when he fell and had the subdural hematoma and went through the three and a half hours of brain surgery, correct?
A. Yes
Q. And at that point there was no doubt in your mind that that would not be a life that he would be able to live; is that correct?
A. He would not be able to go home, yes.

Trial 10/16/06 p. 137 II. 7-25; p. 138 II. 1-5.

Dr. DeMatteis' trial testimony satisfies the *Poltorak* standard. Dr. DeMatteis was Mr. Mascharka's physician. The bills were separated on the basis of their being related to the injury. The trial testimony established that these bills were not based on any "guess or speculation" made by Dr. DeMatteis. The introduction of the medical expenses was proper. Therefore, Defendant's Motion for a New Trial on the basis of the medical bills is denied.

iii. Jury Charges

The Court will next examine the Defendant's position that the Court erred in the jury charges. Defendant argues that the Court erred in charging the jury at plaintiff's request on "increased risk of harm," that the Court erred in barring Defendant's specific Points regarding quoted testimony from the *Lomax, Ragan, Navarro, Melley, Flanagan, Isaac, and Calhoun cases* and 63 P.S. §212(I), the Court erred in failing to elaborate on the *Poltorak* standard, cited supra, for the jury, and the Court erred in failing to charge the jury in light of Plaintiff's alleged failure to establish the necessary causation of harm after the fall.

A jury instruction will be upheld if it accurately reflects the law and is sufficient to guide the jury in its deliberations. *Angelo v. Diamontoni,* 87 A.2d 1276 1279 (Pa.Super. 2005). Reversible error occurs when, upon consideration of all the evidence of record, the jury was "probably misled" by the court's instructions or that an omission from the charge amounted to "fundamental error." In accordance with this prescription, "all issues which are relevant to pleadings and proof may become the subject of jury instructions." *Carpinet v. Mitchell,* 853 A.2d 366, 371 (Pa.Super. 2004). Although the court's instructions "should not exclude any theory or defense that has support in the evidence," *McClintock v. Works,* 716 A.2d 1262, 1266 (Pa.Super.1998), the court may charge "only on the law applicable to the factual parameters of a particular case and it may not instruct the jury on inapplicable legal issues." *Cruz v. Northeastern Hospital,* 801 A.2d 602, 611 (Pa.Super. 2002). Consequently, where the record includes no evidence to satisfy the elements of a particular legal doctrine, the court may not discuss that doctrine in its charge.

In reviewing this standard in light of the testimony given throughout the four-day trial, as well as the charge to the jury on the fourth day of trial, this Court finds no error that amounts to "fundamental error." There is no evidence to support a theory that the jury was "probably misled." Therefore, Defendant's Motion for a New Trial due to court error in the jury charge is denied.

iv. Motions for Compulsory Non-Suit and Directed Verdict

The Defendant also brings before this Court allegations of error in the Court's treatment of Defendant's Motions for Compulsory Non-Suit and Directed Verdict. Defendant made a Motion for Compulsory Non-Suit at the close of Plaintiff's case on the grounds that Plaintiff's expert failed to establish a basis for a finding that the nursing staff fell below the standard of care before Mr. Mascharka's fall, and that said failure was a factual cause of said fall, justifying a grant of a compulsory non-suit. Plaintiff's expert established that, in her opinion, the toileting plan of Mr. Mascharka was inadequate. Further, Plaintiff's expert opined on the relationship between the allegedly inadequate toileting plan and Mr. Mascharka's fall.

> Q. [Mr. Riley] Let me ask you, in what respects did Mr. Mascharka, Sr. not receive the appropriate care in your professional opinion?
> A. [Dr. Talerico] The primary areas that I felt Mr. Mascharka did not receive professional level of care surrounded the prevention of injuries secondary to falls, as well as his need for toileting and assistance with toileting which is closely related to the fall issue. Because most - most time when older adults fall in health care facilities, most frequently cite areas they were trying to get to the bathroom and weren't able to make it there safely. So those two areas really go together.
> Q. Okay. Let me ask you about close observation or monitoring of Mr. Mascharka, Sr. Do you have an opinion with respect to whether the extent of observation was close enough?
> A. I do. I did not see evidence in the medical record that the extent of the observation was anything beyond what their usual, customary practice was. And this was a man who had special needs and I did not see any evidence that anything was provided that would have been appropriate to his special needs and conditions that he presented to the hospital with.

Trial 10/17/06 p. 287 II. 3-25.

This specific testimony, as well as the testimony elicited from Dr. DeMatteis and the Plaintiff's several other witnesses, proved a *prima facie* case on behalf of the Plaintiff. The Court did not err in denying Defendant's Motions for Compulsory Non-Suit and Directed Verdict, as the Defendant alleges.

C. Motion for Remittitur

Finally, the Defendant sets forth a Motion for Remittitur. Defendant

asserts that the $360,000 portion of the jury verdict is excessive and speculative. Plaintiff rebuts this argument stating that $360,000 is just compensation for Mr. Mascharka's pain, suffering, mental anguish, discomfort, inconvenience, duress, embarrassment, humiliation, disfigurement and loss of enjoyment of life's pleasures from the time of the fall to his death. In Pennsylvania, the Rules of Civil Procedure govern the requirements for a trial court in analyzing whether a motion for remittitur of non-economic damages in a medical malpractice case is appropriate.

> A damage award is excessive if it deviates substantially from what could be reasonable compensation. In deciding whether the award deviates substantially from what could be considered reasonable compensation, the court shall consider (1) the evidence supporting the plaintiff's claim; (2) factors that should have been taken into account in making the award; and (3) whether the damage award, when assessed against the evidentiary record, strongly suggests that the trier of fact was influenced by passion or prejudice.

Pa.R.C.P.1042.72(b).

In consideration of all three factors, this Court notes that the evidence set forth *supra* has supported Plaintiff's claims (this factor is interrelated to the factors cited by the Court in Defendant's Motion for a New Trial. There clearly was enough evidence set forth to support a jury verdict for Plaintiff. As to the amount Plaintiff was entitled to recover, the jury is to make that determination. This Court notes that prior to Mr. Mascharka's fall, he was beginning to age, based on the testimony of nearly every trial witness with personal knowledge of Mr. Mascharka. He had suffered a stroke, and had paid for an assistant to stay in his home with him at night. However, Mr. Mascharka was lucid, able to mobilize himself, could accompany his family on outings, and converse with his friends and family. Following the fall, the testimony showed that Mr. Mascharka was confined to a wheelchair or a bed. He could not speak. His ability to respirate worsened. He was no longer as coherent as he had been prior to the fall. Trial 10/16/06 p. 86 II. 15-25; p. 87 II. 1-10. Testimony was introduced that prior to the fall, Mr. Mascharka had enjoyed picnics and boat outings on Lake Erie. Dr. Frankovich was one witness who testified to the extent of Mr. Mascharka's debilitation following the fall:

> Q. [Mr. Riley] When you speak to him, would he respond at all?
> A. [Dr. Frankovich] No. He would kind of - sort of I got into the same thing that families get into, and that is you - actions the he would do, you would think that he was responding to you, and you didn't know whether he was or not. And we - he didn't - he couldn't speak anymore.
> Q. Could he make noises?
> A. Oh, yeah. He - if I remember right, he would do certain things

-particularly if he was getting contractures in the feet, and if I would try to move them about, stretch them out - and I remember his one hand. And he would tell you-he wouldn't tell you. He would react that it was painful. And he - he tried - well, he couldn't speak, and then we tried to get him to - to write. And I remember the therapist would come, and over and over and over and over again, and finally he - I think he wrote something. And-
Q. Do you remember what he wrote?
A. I think he wrote his name.
Q. and specifically what - Ed?
A. Ed. I think I was Ed, yeah. [sic]
Q. E-D is what he wrote.
A. And I remember it was a great thing for Carly too, because she had worked - Carly Williams, his friend.
Q. Sure.
A. She had worked so hard, and it was great to have him partially back with us.
Q. Okay. How about walking? Was he ever able to walk after he had the brain injury at Hamot?
A. No. No, I - no, that's when he was in the wheelchair, getting - having some problems with the chair.
Q. All right. Did he seem to be as sharp as he had been before?
A. Oh, no. No, he - he didn't have any quality of life after that. That was just - you know, we tried. We - everything that he did, we - we construed it as hope that is [sic] was some - some gain, but it wasn't really. Didn't - didn't do much.

Deposition of Karl F. Frankovitch, MD taken October 12, 2006 p. 24, II. 9-25; p. 25, II. 1-15.

Mr. Mascharka was 82 years old when he fell at Hamot. After the fall, he spent approximately 3 hours in brain surgery. Following the surgery, he was monitored in the Intensive Care Unit, was then transferred to Health South Rehabilitation facility, transferred back to Hamot, and ultimately transferred to St. Mary's Home. Mr. Mascharka died approximately twenty (20) months after the fall.

A damage award is excessive if it deviates substantially from what could be reasonable compensation. This Court recognizes that this standard is less than one which would be required to "shock the conscience of the court." However, considering the totality of the evidence, this Court cannot find that $360,000 is a substantial deviation from reasonable compensation. Furthermore, there is no evidence of record that suggests the jury was motivated by passion or prejudice. Therefore, considering Defendant's Motion for Remittitur in light of Pa.R.C.P. 1042.72, this Court finds that remittitur is not appropriate.

II. Motions to Mold Verdict

It is undisputed that the jury award of $481,000 should be reduced by the 10% causal negligence of Plaintiff's decedent, which reduces the award to $432,900.

At the time of Mr. Mascharka's fall, Defendant carried a $200,000 policy issued by PHICO Insurance Company, PHICO was declared insolvent on February 1, 2002. As a result, Pennsylvania Property and Casualty Insurance Guaranty Association (hereinafter "PPCIGA") assumed PHICO's obligations. Pennsylvania law requires that any liability assumed by PPCIGA shall be reduced by the amount of any recovery under other insurance. 40 P.S. §991.1817. Two payments made by Mr. Mascharka's other insurance coverage were introduced at trial. First, Blue Cross/Blue Shield paid $17,292.20 for medical expenses. Mr. Mascharka's private insurance carrier, AARP, paid a total of $757.38. These total payments of $18,049.58 will therefore be deducted from PPCIGA's liability. Noting that PPCIGA's liability is limited to the $200,000 policy previously issued by PHICO, and reducing that amount by the $18,049.58 covered by other insurance carriers, PPCIGA's liability is $181,950.42.

The balance of the verdict, $232,900, will be covered by the Medical Care Availability and Reduction of Error Fund (hereinafter "MCARE"). MCARE is a Pennsylvania Treasury Fund established to cover medical negligence verdicts in excess of a provider's basic insurance policy limits.

Therefore, the Court will enter the appropriate order that the jury award of $481,000 be reduced by 10% to $432,900. PPCIGA will be responsible for the $200,000 PHICO policy, but $18,049.58 of that limit was covered by private insurance reducing PPCIGA's liability to $181,950.42. The remaining balance of $232,900 shall be paid by MCARE.

III. Plaintiff's Motion for Delay Damages

The Pennsylvania Rules of Civil Procedure provide the appropriate framework for analyzing a motion for delay damages.

> At the request of the plaintiff in a civil action seeking monetary relief for bodily injury, death or property damage, damages for delay shall be added to the amount of compensatory damages awarded against each defendant or additional defendant found to be liable to the plaintiff in the verdict of a jury . . . and shall become part of the verdict...

Pa.R.C.P. 238(a)(1).

Rule 238 was designed to encourage defendants to make reasonable settlement offers in certain types of cases, thereby alleviating delays in the judicial system and compensating plaintiffs for delays in receiving damage awards. *Anchorstar v. Mack Trucks, Inc.*, 620 A.2d 1120, 1121 (Pa., 1993), *Schrock v. Albert Einstein Medical Center*, 589 A.2d 1103,

1106-07 (Pa., 1991). A literal and non-expansive interpretation has been accorded to Rule 238, allowing delay damages to be awarded only in cases falling clearly within the purview of the "bodily injury, death or property damage" requirement. *Anchorstar* at 1121. Delay damages are not permitted in what are essentially loss of consortium claims filed by parties other than the directly injured plaintiff. *See Anchorstar*, 620 A.2d 1120 (Pa., 1993) and *Goldberg v. Isdaner,* 780 A.2d 654 (Pa. Super. 2001). However, delay damages are permitted in wrongful death actions, which are undeniably a civil action seeking monetary relief for the death of the decedent. *See Machado v. Kunkel,* 804 A.2d 1238 (Pa. Super., 2002).

The case at bar is clearly a civil case stemming from injuries Mr. Mascharka suffered as a result of his fall at Hamot. Because Mr. Mascharka is deceased, the Executor of his estate stands in the shoes of Mr. Mascharka. Therefore, this is the proper type of case in which delay damages may be awarded.

The next issue is the proper amount of delay damages. Plaintiff argues that delay damages are appropriate from the time beginning one year after Hamot was served with a Writ of Summons on September 3, 1996. *Plaintiff's Motion to Mold Verdict and Assess Delay Damages,* ¶ 6. Plaintiff excludes from its calculation the period of time between April 17, 2006 and the time of trial because Plaintiff sought a continuance in the case. Furthermore, Plaintiff calculates its delay damages on a sum of $414,850.42, reflecting the PPCIGA liability offset by private insurance and the remaining MCARE portion of the verdict.

Defendant argues that in addition to the period of the Plaintiff's request for a continuance, delay damages are not recoverable for the ninety days following the Order of Liquidation when PPCIGA assumed PHICO's liabilities. Furthermore, Defendant argues that PPCIGA cannot be liable for delay damages. Finally, Defendant argues that delay damages are not to be calculated on awards for medical expenses. Defendant asserts that 25.15592% of the jury's award was for medical expenses and that the MCARE portion of the verdict, upon which Defendant concedes delay damages are appropriate, should only have delay damages calculated upon approximately 75% of the total MCARE award.

In calculating delay damages, the Court is again guided by the Pennsylvania Rules of Civil Procedure. Rule 238 provides the following considerations:

> (a)(2) Damages for delay shall be awarded for the period of time from a date one year after the date original process was first served in the action up to the date of the award, verdict or decision.
>
> (a)(3) Damages for delay shall be calculated at the rate equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus one percent, not compounded.

(b)(1) The period of time for which damages for delay shall be calculated under subdivision (a)(2) shall exclude the period of time, if any,

(i) after the defendant made a written offer which complied with the requirements of subdivision (b)(2), provided that the plaintiff obtained a recovery which did not exceed the amount described in subdivision (b)(3), or

(ii) during which the plaintiff caused delay of the trial.

Pa.R.C.P.238.

Pursuant to the MCARE Act, delay damages can be assessed on the MCARE portion of the award.

> Delay damages and post judgment interest.--Delay damages and post judgment interest applicable to the fund's liability on a medical professional liability claim shall be paid by the fund and shall not be charged against the participating health care provider's annual aggregate limits. The basic coverage insurer or self-insured participating health care provider shall be responsible for its proportionate share of delay damages and post judgment interest.

40 P.S. §1303.714(h).

In this case, the basic coverage insurer was PHICO, who is now insolvent. PPCIGA has assumed PHICO's liabilities. However, PPCIGA's liability is statutorily construed. Specifically, PPCIGA's purpose is to "provide a means for the payment of covered claims under certain property and casualty insurance policies, to avoid excessive delay in the payment of such claims and to avoid financial loss to claimants or policyholders as a result of the insolvency of an insurer." 40 P.S. §991.1801. One object of the Insurance Guaranty Association Act is to ensure that insureds receive, as nearly as possible under the Act, the same level of insurance protection that they would have received if their insurer had not become insolvent. *Keystone Aerial Surveys, Inc. v. Pennsylvania Property & Cas. Ins. Guar. Ass'n*, 777 A.2d 84 (Pa.Super. 2001), reargument denied, appeal granted 796 A.2d 983, affirmed 829 A.2d 297. It is clear, pursuant to 40 P.S. §1303.714(h) that if PHICO were still solvent, PHICO would be responsible for delay damages on the portion of the verdict attributable PHICO. However, prior caselaw from the Pennsylvania Commonwealth Court has held that regardless of what PHICO's responsibilities were, PPCIGA is not responsible for delay damages. *See Chajkowsky v. Pennsylvania Property and Cas. Ins. Guar. Ass'n*, 895 A.2d 528 (Pa. 2006); *Elliott-Reese v. Medical Professional Liability Catastrophe Loss Fund*, 833 A.2d 138 (Pa. 2003). While this Court is not mandated to follow these Commonwealth Court cases that were affirmed in per curiam opinions, the Court will look at these cases as providing guidance in the issue at bar.

In *Chajkowsky,* the Plaintiff/Appellant instituted a medical malpractice action against a defendant-doctor who was insured by PIC Insurance Group (PIC) for $200,000. PIC was subsequently placed into liquidation, thus obliging PPCIGA to pay PIC's covered claims. The statutory amount PPCIGA was obligated to pay was the lesser of the covered claim obligation, PIC's policy limit of $200,000, or the statutory maximum of $300,000. The jury returned a verdict for Appellant, which the trial court molded to $3,500,263. PPCIGA paid Appellant $200,000, which represented the defendant-doctor's policy limits with PIC but was $100,000 less than the Guaranty Association's $300,000 cap. Appellant filed a declaratory judgment action against the Guaranty Association seeking the additional $100,000 to compensate Appellant for delay damages and post-judgment interest. On appeal to the Supreme Court, Appellant argued that, because delay damages and post-judgment interest become part of the verdict against an insurer, the Guaranty Association should likewise be required to pay them, over and above the policy limits but subject to the statutory cap of $300,000. PPCIGA argued that it paid policy limits, which is all it is statutorily obligated to pay. The Supreme Court seems to have accepted this argument through its *per curiam* affirmance. Again, while this Court recognizes that a per curiam opinion carries no precedential weight, in the absence of any precedential caselaw, this Court finds that PPCIGA cannot be held responsible for delay damages when it has paid the statutorily mandated amount of the insolvent insurance policy.

Next, the Court will consider whether delay damages are applicable during the 90 day stay following the Order of Liquidation as to PHICO. As Hamot points out:

> (a) All proceedings in which the insolvent insurer is party or is obligated to defend a party in any court in this Commonwealth shall be stayed for ninety (90) days from the date the insolvency is determined to permit proper defense by the association of all pending causes of action.

40 P.S. § 991.1819.

Plaintiff counters that this statutory language is contrary to Rule 238, *supra,* and has been specifically rejected by the Pennsylvania Superior Court. In *Tindal v. Southeastern Pennsylvania Transportation Authority,* the case was stayed for approximately three and one-half months when Tindal's insurer was suspended from conducting business in Pennsylvania. Defendant wished to exclude this period of time from the calculation of delay damages. The Superior Court disagreed:

> It is clear from the above that the newly enacted Rule does not permit the exclusion from the calculation of delay damages periods of delay for which no party is responsible due to extraneous administrative concerns.

Tindal v. Southeastern Pennsylvania Transp. Authority, 560 A.2d 183, 187 (Pa.Super. 1989).

Analyzing the facts of this case with the conflicting statutory and caselaw, this Court recognizes that PPCIGA is not liable for delay damages on its portion of the verdict. Therefore, looking to PPCIGA's statutory authority is not particularly useful in determining whether the ninety (90) day stay is applicable to the remainder of the verdict. Rule 238 does specifically exclude certain periods of time from the calculation of delay damages. A stay imposed from an Order of Liquidation is not one of the enumerated reasons. Therefore, in accordance with the Rules of Civil Procedure and prior caselaw, this Court finds that the period of time following PHICO's order of liquidation is not excluded from the calculation of delay damages.

Finally, the Court must determine whether the molded medical expense award of $108,900 should be excluded from the calculation of delay damages. Defendant argues in his brief that caselaw from the Pennsylvania Superior Court supports the exclusion of such an award. *Goldberg v. Isdaner,* 780 A.2d 654 (Pa. Super. 2001). In *Goldberg*, the parents of prematurely born twins brought suit against the medical doctor who delivered the twins. One twin died shortly after birth and the other twin was severely disabled. The trial court refused to assess delay damages on the amount the parent-plaintiffs received for medical expenses spent on behalf of their sons. In upholding the trial court's ruling, the Superior Court stated:

> The Goldbergs have suffered a financial loss due to money they have expended to pay for medical expenses for their son Heath's injuries and Blake's death. As with the loss of consortium claim in *Anchorstar,* the Goldberg's claim stems from bodily injuries of other persons. Like the situation in *Anchorstar,* their claim is separate and distinct. We find no abuse of discretion on the part of the trial court in holding that, under the clear and express language of Rule 238, delay damages are not applicable to the Goldberg's claim for monetary damages for their sons' medical expenses.

Id. at 659.

In analyzing the reasoning of the Goldberg court, it is clear to this Court that delay damages were not awarded in Goldberg because the parents were suing to receive money damages spent on behalf of their sons. The Goldberg court did not reach the conclusion the Defendant is asserting; namely, that delay damages are not to be calculated on medical expense awards. The Court is again drawn to the language of Rule 238:

> At the request of the plaintiff in a civil action seeking monetary relief for bodily injury, death or property damage, damages for delay shall be added to the amount of compensatory damages awarded against each defendant...

Pa.R.C.P. 238.

The Court can find no authority, whether statutory or case law, that would not allow delay damages on the medical expense award. There is no question that delay damages are appropriate in this case. Furthermore, the medical expense award is part of the compensation that the jury determined was appropriate. Therefore, the $108,900 is to be included in the calculation of the delay damages.

The calculation of the delay damages will be as follows:

a. From September 3, 1997 to December 31, 1997	
$232,900 x 9.25% = $21,543.25	
120 days at $59.02 per day	$7,802.40
b. 1998	
$232,900 x 9.5%	$22,125.50
c. 1999	
$232,900 x 8.75%	$20,378.75
d. 2000	
$232,900 x 9.5%	$22,125.50
e. 2001	
$232,900 x 10.5%	$24,454.40
f. 2002	
$232,900 x 5.75%	$13,391.75
g. 2003	
$232,900 x 5.25%	$12,227.25
h. 2004	
$232,900 x 5%	$11,645.00
i. 2005	
$232,900 x 5.25%	$12,227.25
j. January 1 , 2006 to April 17, 2006	
$232,900 x 8.25% = $19,214.25	
107 days at $52.64 per day	$5,632.48
TOTAL DELAY DAMAGES	$152,010.38

ORDER

AND NOW, to-wit, this 18th day of July, 2007, for the reasons set forth in the foregoing **OPINION**, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that Defendant's Motion for Post-Trial Relief is **DENIED**. Defendant's and Plaintiff's Motions to Mold Verdicts are **GRANTED** in part and **DENIED** in part. Plaintiff's Motion to Assess Delay Damages is **GRANTED** in part and **DENIED** in part.

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

STEPHANIE FRANKIEWICZ and KAREN FRANKIEWICZ, Plaintiffs

v.

MOTORISTS MUTUAL INSURANCE COMPANY, Defendant.

CIVIL PROCEDURE / SUMMARY JUDGMENT

A party can move for summary judgment when there is no issue of material fact that is a necessary element of the cause of action or defense that could be established through additional discovery or expert report. *Pa. R. Civ. P. 1035.2(1).*

CIVIL PROCEDURE / SUMMARY JUDGMENT

A motion for summary judgment may be filed if, after the close of discovery including the production of expert reports, an adverse party has failed to produce evidence of fact essential to the cause of action or defense in which a jury would need to decide the issues. *Pa. R. Civ. P. 1035.2(2).*

INSURANCE / AUTOMOBILE INSURANCE

Section 1738 of the Motor Vehicle Financial Responsibility Law, 75 Pa.C.S.A. § 1738, which provides that when more than one vehicle is insured under one or more policies providing uninsured or underinsured motorist coverage, the stated limit shall apply separately to each insured vehicle and the limits of the coverage shall be the sum of the limits for each vehicle as to which the insured person is an insured; the named insured may waive coverage providing a stacking of the above coverages in which case the limits available under the policy for insured to the stated limits for the motor vehicle as to which the injured person is an insured; and each named insured purchasing uninsured or underinsured motorist coverage for more than one vehicle under a policy shall be provided the opportunity to waive the stacked limits of coverage.

STATUTES / CONSTRUCTION

The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible to give effect to all its provisions. *1 Pa.C.S.A. § 1921*. The Motor Vehicle Financial Responsibility Law is to be construed liberally to afford the greatest possible coverage to injured claimants. In close or doubtful insurance cases, a court should resolve the meaning of the insurance policy provisions or the legislative intent in favor of the coverage for the insured. *Danko v. Erie Insurance Exchange* 630 A.2d 1219 (Pa. Super. 1993). The law is to be construed liberally to afford the greatest possible coverage to injured claimants. *Sturkie v. Erie Insurance Group* 595 A.2d 152 (Pa. Super. 1991).

INSURANCE / AUTOMOBILE INSURANCE

The court held that because the language of 75 Pa.C.S.A. § 1738 is specific in that it must be the "first named insured" to whom shall be provided with the opportunity to waive the stacked limits of the coverage,

when the first named insured ceases to exist, the waiver should also cease to exist. Essentially, it would be against the legislative intent behind the Motor Vehicle Financial Responsibility Law to uphold the validity of a stacking waiver signed by a person who is no longer on the policy. The Court found that the language of the statute clearly mandates that in order for such a waiver to be valid and enforceable, it must be signed by the first named insured.

INSURANCE / AUTOMOBILE INSURANCE

40. P.S. § 991.2001 requires that in order for an insurance policy to be an automobile insurance "renewal" policy, a renewal policy must be at least equal to the original policy.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - EQUITY NO. 60071-2006

Appearances: Elliot J. Segel, Esq., Attorney for Plaintiff
William C. Wagner, Esq., Attorney for Defendant

OPINION

Connelly, J., January 9, 2007

PROCEDURAL HISTORY

The instant action was initiated by Stephanie Frankiewicz and Karen Frankiewicz (hereinafter "Plaintiffs") by filing a Complaint for Declaratory Judgment against Motorists Mutual Insurance Company (hereinafter "Defendant") on December 1, 2003. On March 24, 2004, Defendant filed an Answer and New Matter. Plaintiffs filed a Reply to New Matter on April 13, 2004. Defendant filed a Motion for Summary Judgment and a Brief in Support thereof on October 20, 2006. Defendant submitted a Reply Brief in Support of Summary Judgment Motion on November 10, 2006.

Defendant's Motion for Summary Judgment and Plaintiffs' Cross Motion for Summary Judgment are now before the Court.

FACTUAL BACKGROUND

Plaintiffs are mother and daughter and throughout all time relevant to this action, they lived together at 612 Crotty Drive, Erie, Pennsylvania 16511. *Complaint for Declaratory Judgment*, p. 1, ¶ 3. On October 31, 1997, Daniel Frankiewicz, father to Plaintiff Stephanie Frankiewicz and husband to Plaintiff Karen Frankiewicz, purchased an automobile insurance policy (hereinafter "DF Policy") from Defendant. *Id.* at p. 2, ¶ 6. The DF Policy provided the following:

A. That Daniel Frankiewicz was the only "named insured" on the policy;

B. That three drivers were covered by the policy, namely, Daniel, Karen and Stephanie Frankiewicz;

C. Underinsured motorist coverage (UIM) with a limit of $300,000.00 per accident; and

D. The policy covered two vehicles.

Id. at p. 2, ¶ 7. Daniel Frankiewicz died on April 30, 2002. *Id.* at p. 2, ¶ 9.

Approximately one (1) month after Daniel Frankiewicz's death, Plaintiff Karen Frankiewicz telephoned her family's insurance agent, the LoCastro-Bonini Insurance Agency of Erie, Pennsylvania and made the following requests:

A. To substitute herself as the newly "named insured" on the family's auto insurance policy in place of her late husband;

B. To delete her late husband's vehicle as a covered auto under the policy, since it was being sold; and

C. To remove, or delete from the policy, coverage for collision, towing and rental on one of the vehicles, a 1995 Ford Taurus.

Id. at p. 3, ¶ 14. During the telephone conversation Plaintiff Karen Frankiewicz was never given an opportunity to accept or reject stacked insurance coverage. *Id.* at p. 4, ¶ 16. Shortly after visiting and speaking with an insurance agent at LoCastro-Bonini, Defendant sent Plaintiff Karen Frankiewicz a declaration page which displayed an effective date of June 4, 2002, which retained the same policy number, but a new policy issue "06". *Id.* at p. 4, ¶ 17. The policy period was from 05/01/02 to 11/01/2002. *Id.* at p. 4 ¶ 18. A declarations page policy issue "07" was issued with an effective date of June 20, 2002 (hereinafter "KF Policy"), and it carried over the same policy period and policy terms as issue "06". *Id*. at p. 5, ¶ 21.

On August 23, 2002, Defendant Stephanie Frankiewicz was a passenger on a motorcycle driven by Alester Jimerson when Mr. Jimerson lost control of the motorcycle and crashed. Id. at p. 5, ¶ 22. Liability for this crash rest completely and solely upon Mr. Jimerson. *Id.* at p. 5, ¶ 23. As a result of the crash Plaintiff Stephanie Frankiewicz has suffered multiple serious, disabling and permanent injuries, for which she has undergone more than 15 surgical procedures, with treatment continuing into the future. *Id.* at p. 5, ¶ 24. On May 16, 2003, Plaintiff Stephanie Frankiewicz made a claim with Defendant for UIM provided by the KF Policy. *Id.* at p. 6, ¶ 27.

Effective June 4, 2002, Plaintiff Karen Frankiewicz became the first and only named insured under the KF Policy, but Defendant failed to inform her that she could exercise a waiver of the stacked limits of UIM coverage and further, failed to have her execute a waiver of stacking coverage, as required by § 1738 of the Motor Vehicle Financial Responsibility Law

(MVFRL). *Id.* at p. 6, ¶ 32. On July 2, 2003, Defendant paid Plaintiff Stephanie Frankiewicz $300,000.00 of UIM benefits coverage, claiming that said payment exhausts the available coverage under the KF Policy. *Id.* at p. 7, ¶ 33. Defendant has taken the position that the rejection of the stacking coverage form signed when the late Daniel Frankiewicz first obtained automobile insurance coverage from Defendant on October 31, 1997 was still valid at the time of the August 23, 2002 motorcycle crash; effectively binding indefinitely all future named insureds under the KF Policy. *Id.* at p. 7, ¶ 34.

Plaintiffs assert that the KF Policy was a new insurance policy, not a renewal of the DF Policy as Defendant claims. *Id.* at p. 8, ¶ 40. Since the KF Policy was a new policy, Defendant had the duty to provide notice and opportunity regarding rejecting or accepting stacked UIM coverage to Plaintiff Karen Frankiewicz, and failed to acquire the waiver. *Id.* at p. 9, ¶ 42. Since no such waiver was obtained, the KF Policy had stacked coverage of $300,000.00 per vehicle, per accident, making the total UIM coverage available to Plaintiff Stephanie Frankiewicz on August 23, 2002 equal to $600,000.00. *Id.* at p. 9, ¶ 43.

Defendant asserts that Plaintiffs are specifically denied any further UIM coverage under the KF Policy. *Defendant's Answer and New Matter,* p. 4, ¶ 35. Defendant specifically denies Plaintiff Karen Frankiewicz was entitled to any notice or opportunity to waive stacked UIM coverage as her late husband, Daniel, waived stacked coverage on October 31, 1997 when he filled out the applicable and waiver form at the DF Policy inception date. *Id.* at p. 5, ¶ 42. Defendant asserts that they are entitled to summary judgment because the waiver of stacking Daniel Frankiewicz endorsed at the DF Policy inception date resulted in the premiums for the non-stacked UIM coverage to be lower than the stacked coverage and said benefit remained effective until Plaintiff Stephanie Frankiewicz's August 23, 2002 accident. *Defendant's Motion for Summary Judgment.* p. 2, ¶ 8. Therefore, Defendant requests that this Court enter summary judgment in their favor because they paid Plaintiffs $300,000.00 in UIM coverage and no additional benefits are available. *Id.* at p. 2, ¶ 9.

Plaintiffs assert that Defendant is not entitled to summary judgment because there is a fact issue that is in dispute that involves a matter of credibility that should be determined at trial. *Plaintiffs' Cross Motion for Summary Judgment,* p. 1, ¶ 4. It is alleged that the contested issue is whether or not Defendant provided clear disclosure and Plaintiffs received actual, understandable notice that the automobile insurance policy covering their vehicles provided non-stacked insured coverage. *Id.*

LEGAL ANALYSIS

A party can move for summary judgment when there is no genuine issue of material fact that is a necessary element of the cause of action or defense that could be established through additional discovery or expert

report. *Pa.R.Civ.P. 1035.2(1).* Further, a motion for summary judgment may be filed if, after the close of discovery including the production of expert reports, an adverse party has failed to produce evidence of fact essential to the cause of action or defense in which a jury would need to decide the issues. *Pa. R.Civ.P. 1035.2(2).*

The standard that the Court must apply when considering a motion for summary judgment is set forth in *McCarthy v. Dan Lepore & Sons Co., Inc.,* 724 A.2d 938 (Pa. Super. 1998), *alloc. den.,* 743 A.2d 921 (Pa. 1999). *McCarthy* states:

> A grant for summary judgment is proper when the evidentiary record either shows that the material facts are undisputed or there is insufficient evidence to establish a prima facia cause of action or defense. Furthermore, it is incumbent upon the adverse party to provide essential evidence to preserve the cause of action. If the non-moving party fails to provide sufficient evidence to establish or contest a material issue the moving party is entitled to judgment as a matter of law. It is the non-moving party that bears the burden of providing sufficient evidence on issues that are essential to the case such that a jury could return a verdict favorable to the non-moving party. The court must examine the record in the light most favorable to the non-moving party and resolve all doubts against the moving party as to the existence of a triable issue in all motions for summary judgment.

Id. At 940 (citations omitted).

Defendant's Motion for Summary Judgment presents the question: Does 75 Pa.C.S.A. § 1738 require insurers to secure a new stacking waiver beyond that secured from the first named insured at the policy inception? *Defendant's Brief in Support of Summary Judgment Motion,* p. 2. Defendant argues that the waiver signed at the inception of the DF Policy, was binding and effective on Plaintiffs at the time of Plaintiff Stephanie Frankiewicz's Accident. Plaintiffs disagree and assert that when Plaintiff Karen Frankiewicz replaced her late husband as the first named insured it revoked the waiver her late husband had signed, and that Defendant failed to properly inform her that she could stack or reject the limits and therefore denied her that said ability to do so.

Plaintiffs ask this Court to find that the principles of statutory construction mandate a valid stacking waiver must be signed by the first named insurer, meaning the "current first named insurer, or said purported rejection of stacking is void and the coverage should be automatically stacked under 75 Pa.C.S.A. § 1738. *Plaintiffs' Cross Motion for Summary Judgment,* p. 30. Plaintiffs also assert that the KF Policy was in fact a new policy and not a renewal policy as Defendant concedes, and therefore the new policy required a new waiver to be signed in order to effectively deny said coverages.

75 Pa.C.S.A. § 1738 sets forth the following:

§ 1738. Stacking of uninsured and underinsured benefits and option to waive

(a) When more than one vehicle is insured under one or more policies providing uninsured or underinsured motorist coverage, the stated limit for uninsured or underinsured coverage shall apply separately to each vehicle so insured. The limits of coverages available under this subchapter for an insured shall be the sum of the limits for each motor vehicle as to which the injured person is an insured.

(b) Notwithstanding the provisions of subsection (a), a named insured may waive coverage providing stacking of uninsured or underinsured coverages in which case the limits of coverage available under the policy for an insured shall be the stated limits for the motor vehicle as to which the injured person is an insured.

(c) Each named insured purchasing uninsured or underinsured motorist coverage for more than one vehicle under a policy shall be provided the opportunity to waive the stacked limits of coverage and instead purchase coverage as described in subsection (b). The premiums for an insured who exercises such waiver shall be reduced to reflect the different cost of such coverage.

(d) FORMS.

(1) The named insured shall be informed that he may exercise the waiver of the stacked limits of uninsured motorist coverage by signing the following written rejection form:[1]

(2) The named insured shall be informed that he may exercise the waiver of the stacked limits of underinsured motorist coverage by signing the following written rejection form:[2]

(e) The forms described in subsection (d) must be signed by the first named insured and dated to be valid. Any rejection form that does not comply with this section is void.

75 Pa. C.S.A. § 1738.

The instant case is one that involves statutory interpretation of the language encompassed by 75 Pa.C.S.A. § 1738. The parties are asking this Court to interpret the language of said statute in order to determine whether the statue itself either denies Plaintiffs' claim or whether it creates

[1] Form omitted.
[2] Form omitted.

a statutory remedy for a violation thereof. Initially, the Court would note that the instant action is a case of first impression. The issue presented herein is an unsettled question of law that the Pennsylvania Supreme Court has addressed in the past but failed to set precedent.

The Court will first address Defendant's Motion for Summary Judgment. Defendant asserts that they are entitled to Summary Judgment because Plaintiff Karen Frankiewicz is bound by the stacking waiver that was signed by her late husband at the inception of the DF Policy. Defendants take the position that the changes Plaintiff Karen Frankiewicz made to her insurance coverage after her husband passed away constituted a renewal policy not a new policy.

Defendant relies heavily on the case of *Rupert v. Liberty Mutual Insurance Company,* 291 F.3d 243 (3d. Cir. 2002). The facts in *Rupert* mirror the facts of the instant action. Essentially, Cynthia Winters purchased an auto insurance policy before she married her husband, Timothy Rupert. *Id.* Winters was the only named insured on the policy, but Rupert was also insured under the policy. *Id.* Winters signed a rejection of stacked uninsured coverage limits form, three (3) years after she married Rupert in 1991. *Id.* In 1997, Winters added Rupert to the policy as a named insured. *Id.* Winters passed away in 1997 and Rupert became the sole name insured under the policy. *Id.* Shortly thereafter, Rupert was injured in an automobile accident. *Id.* Rupert claimed that he was entitled to stacked uninsured motorists (UM) coverage because the waiver signed by his late wife was inapplicable to him. *Id.* In *Rupert* the Federal Court of Appeals for the Third Circuit held the following:

> Under 75 Pa. Cons. Stat. § 1738 of the Motor Vehicle Financial Responsibility Law, 75 Pa. Cons. Stat. §§ 1701-99, the first named insured's signature on a valid waiver form "at the inception of the policy" is sufficient to show that each named insured under the policy received notice of the policy's stacking options. The Motor Vehicle Financial Responsibility Law, 75 Pa. Cons. Stat. §§ 1701-99, specifically 75 Pa. Cons. Stat. § 1738, does not impose a continuing obligation on insurers to acquire a new stacking waiver whenever the first named insured on a policy changes. A valid stacking waiver will remain valid as long as it was signed by the person who was designated as the first named insured at the time the waiver was signed.

Id. at 248 & 249.

However, there was a clear lack of certainty as to any precedent expressed by the federal court in the *Rupert* opinion.

> The uncertainty over the state of Pennsylvania law on this issue that prompted us to certify this question in the first place is compounded

> by this result. We are therefore left with no choice but to predict what the Pennsylvania Supreme Court will ultimately decide by analyzing Pennsylvania law ourselves. We find that Justice Zappala's view best reflects Pennsylvania law and will render judgment accordingly, affirming the judgment of the District Court. We will state our rationale succinctly. After all, we write on quicksand; once the Pennsylvania Supreme Court faces this question in another case -- we hope soon -- it will presumably resolve it once and for all, and anything we write will disappear.

Rupert, at 244.

Defendant also relies on the case of *Nationwide Mutual Insurance Co. v. Buffetta,* 230 F.3d 634 (3d. Cir. 2000). In *Buffetta,* Saverio Buffetta took out an auto insurance policy in 1981, at which time he was married to Rosetta Buffetta. *Id.* Saverio was the sole named insured on the policy because Rosetta was not a licensed driver. *Id.* In 1995, the Buffettas divorced and Saverio was removed from the policy, and Rosetta requested to be the sole insured on the policy. *Id.* No new selection forms were executed by Rosetta, and as a result all of the coverage selections by Saverio remained in effect. *Id.* Rosetta's father was killed in a car accident while he was residing with her in 1997. *Id.* The representative for her father's estate made a claim for UIM benefits from Nationwide. *Id.*

The federal court opined the following on appeal:

> We predict that the Pennsylvania Supreme Court would hold that where the new named insured was covered by the existing policy when the written reduction was effected, and became a named insured with ample opportunity to alter the coverage under the policy, having received ongoing notice of the amount of coverage under her policy, and having paid premiums that took such coverage limits into account, she was bound by the coverage choices made by the previous named insured under the policy.

Buffetta at 642. *See also, Smith v. The Hartford Insurance Company,* 849 A.2d 277 (Pa. Super. 2004) *appeal denied at* 867 A.2d 524 (2005) (held insurer is not required to provide the insured with a new rejection of UM/UIM coverage selection form when an insured changes his or her policy liability coverage limits); and *Kimball v. CIGNA Insurance Co.,* 660 A.2d 1368 (Pa. Super. 1995)(held insurer had no obligation to obtain new or additional "sign down" selection forms when sole named insured's daughter was added to the existing policy).

While Defendant makes a good argument for summary judgment on this topic in the federal court system, this is the Pennsylvania state court system and Defendant's leading cases of *Rupert* and *Buffetta* do not apply here. In regard to *Rupert,* the Court would note that it was a 2-1 split decision with a strong dissent, which is apparent from the remarks the

Court made noting that the decision rested on "quicksand,"[3] and that the federal court hoped that once this issue comes before the Pennsylvania Supreme Court again, it can finally be resolved. *Rupert* had been originally certified to the Pennsylvania Supreme Court, however the Court split 3-3 on the decision and the case went back to the federal court. Not only does *Rupert* display a somewhat flawed historical background, the facts in the case are distinguishable from the instant action. In *Rupert*, Timothy Rupert became a named insured four (4) years before his accident, while Plaintiff Karen Frankiewicz became a named insured approximately two (2) months before her daughter's accident. Timothy Rupert renewed his policy prior to his accident, while Plaintiff Karen Frankiewicz alleges she did not. In fact, a substantial question in this case is whether the changes Plaintiff Karen Frankiewicz made to the KF Policy constituted a renewal, modification or new policy itself, and this issue was not present in *Rupert*.

In *Buffetta*, the Federal Court also split 2-1. Further, the case involved issues that dealt with a different section of the MVFRL than the section this Court is concerned with in the instant action. *Buffetta* dealt with sign down forms while here the Court is concerned with stacking waivers. Even though both cases involve the MVFRL, they deal with completely different sections of the law and therefore have little relevance to the instant action. Also, in coming to the decision the federal court made in that case, it reasoned that Rosetta Buffetta was not entitled to UIM benefits because of her long term ongoing notice of the terms of the policy and her continuing payment of the premiums for said policy. However, the instant case is distinguishable because Plaintiff Karen Frankiewicz was only the named insured for two (2) months prior to the her daughters accident and did not have the opportunity to receive ongoing notice of the policy or make continuing payments of the policy premiums.

The Court cannot grant summary judgment in Defendant's favor because there are material facts in dispute and sufficient evidence to establish a *prima facia* cause of action. These material facts in dispute relate to whether or not under the circumstances Plaintiff Karen Frankiewicz is bound by her late husband's rejection of stacked limits and whether or not the KF Policy is a new policy or a renewal policy. Therefore, the Court cannot grant Defendant's request, and Defendant's Motion for Summary Judgment is denied.

Next, the Court will address Plaintiffs' Motion for Cross Summary Judgment. Plaintiffs are asking this Court to determine whether the language in 75 Pa.C.S.A. § 1738 pertaining to the first named insured, specifically section (e) which deals with the execution of stacked waivers, was intended to mean the first insured at the inception of the policy or

[3] *Rupert* at 244.

rather the current first insured on a policy. Plaintiff argues that the clear language of the MVFRL, § 1738 in particular, provides that the first named insured on an auto insurance policy must sign a waiver of stacking for a waiver to be valid and provides a statutory remedy which is that all policies must provide stacking absent a valid waiver. Brief in Support of Plaintiff's Cross Motion for Summary Judgment, p. 22. Plaintiff brings three (3) Pennsylvania Supreme Court cases to the Court's attention that have dealt with the requirements and interpretations of the MVFRL. These cases are *Winslow-Quattlebaum v. Maryland Insurance Group,* 752 A.2d 878 (Pa. 2000); *Donnelly v. Bauer*, 720 A.2d 447 (Pa. 1998); and *Salazar v. Allstate Insurance Company*, 702 A.2d 1038 (Pa. 1997).

In *Winslow-Quattlebaum* the Pennsylvania Supreme Court addressed issues surrounding the form and substance of a valid stacking waiver. The Court interpreted the language of 75 Pa.C.S.A. § 1738 and held the following:

> There is nothing in the language of the Motor Vehicle Financial Responsibility Law, to suggest that the required rejection statement for uninsured motorist or underinsured motorist coverage must stand alone on a page without any other writing. Rather, the plain language of this section merely requires that the rejection statement for subsection § 1731 (b) uninsured motorist coverage appear on a page separate from the rejection statement for § 1731 (c) underinsured motorist coverage.

Winslow - Quattlebaum at 881. The *Winslow - Quattlebaum* Court further held that in order to be valid, uninsured (UM) or underinsured (UIM) rejection forms must comply with the requirements of 75 Pa. Cons. Stat. § 1731(C.1) as follows: the UIM rejection must appear on a sheet separate from the UM rejection; the first name insured must sign the rejection; and the rejection must be dated. *Id.* at 882. The Court based all of its conclusions solely on the language of the statute and an interpretation thereof.

In *Donnelly*, the Court had to interpret the MVFRL in order to determine whether the MVFRL created a statutory remedy for a violation of the provision[4] requiring auto insurers to provide insureds with a limited tort and full tort differential. The Court performed a statutory interpretation of the language of the MVFRL and concluded that a remedy for a violation of the aforementioned provision did not exist. *Id.*

In *Salazar,* the Court once again had to interpret the language of the MVFRL in order to determine whether the legislature intended to create a statutory remedy for a violation of the provision[5] requiring insurers to provide an insured with notice of available coverages at the time of

[4] 75 Pa.C.S.A. § 1705

[5] 75 Pa.C.SA. § 1791.1

policy renewal. The Court held, "While we recognize that section 1791.1 requires that an insurer must provide specific information to the insured at the time of renewal, the legislature has not provided in the MVFRL any enforcement mechanism regarding this requirement." *Id.* at 1044. In coming to the aforementioned conclusion, the Court looked to the strict language of the statute and found that no statutory remedy could be inferred from said language.

In each of the foregoing cases, the Pennsylvania Supreme Court had to look to the language and structure of the MVFRL in order to determine whether the requisite legislative intent could be inferred to either grant or deny each party's own interpretation of the MVFRL. Since there is no Pennsylvania case law directly on point as to the specific issue before this Court, the Court must make its own statutory interpretation of 75 Pa.C.S.A. § 1738. The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. *1 Pa.C.S.A. § 1921*. Every statute shall be construed, if possible, to give effect to all its provisions. *Id.* The MVFRL is to be construed liberally to afford the greatest possible coverage to injured claimants. *Danko v. Erie Insurance Exchange*, 630 A.2d 1219 (Pa. Super. 1993), *affirmed* at 649 A.2d 935 (1994). In close or doubtful insurance cases, a court should resolve the meaning of insurance policy provisions or the legislative intent in favor of coverage for the insured. *Id*. The law is to be construed liberally to afford the greatest possible coverage to injured claimants. *Sturkie v. Erie Insurance Group*, 595 A.2d 152 (Pa. Super. 1991).

Under 75 Pa.C.S.A. § 1738 subsection (e), it clearly states that the "first named insured" on the policy must sign the rejection of stacked limits of UIM coverage in order for said waiver to be valid. In the instant action, at the time of Plaintiff Stephanie Frankiewicz's accident, Plaintiff Karen Frankiewicz was the first named insured on the KF Policy issued by Defendant. It is undisputed that Plaintiff Karen Frankiewicz did not sign a waiver of stacked limits of UIM coverage for the KF Policy. The language of section 1738(e) of the MVFRL is clear and specifically states who the waiver must be signed by in order to be effective and in this case the waiver was not signed by the first insured, but rather her late husband who was no longer the first insured on the Policy.

Defendant's central argument is that the waiver of Plaintiff's late husband signed at the inception of the DF Policy, when he was the "first named insured", binds Plaintiff Karen Frankiewicz. The Court finds no merit in this argument. The intent of the legislature in enacting §1738(e) of the MVFRL was to provide the first named insured with notice of the types of coverage available under the policy. Specifically, the legislature reasonably intended to give potential insureds the opportunity to design their policy to their own specific needs, which includes the decision

whether to either accept or reject stacked insurance coverage. Defendant did not offer Plaintiff Karen Frankiewicz an opportunity to accept or reject the stacked coverage. Therefore, she did not have the ability to make a reasoned decision to either reject or accept said coverage. The Court believes that under the circumstances in the case at bar the Defendant should have had Plaintiff Karen Frankiewicz sign a new rejection form when she became the "first named insured" on the policy. When Plaintiff Karen Frankiewicz became the first named insured on the policy, her late husband ceased to be the first named insured. The waiver signed by Daniel Frankiewicz became void at that time. Therefore, said waiver could not bind Plaintiff Karen Frankiewicz because at the time of Plaintiff Stephanie Frankiewicz's accident the prior rejection form was void.

Plaintiff makes a good argument that since policies often continue beyond the life of the original first named insured, insurers have an obligation to inform new first named insureds of the right to stacking and to obtain new stacking waivers, especially where the previous first named insured is deceased. This is especially true because the statutory language is specific in that it declares that it must be the "first named insured"; therefore if the first named insured ceases to exist, the waiver should also cease to exist. The Court concludes that it would be contrary to the legislative intent behind the MVFRL to uphold the validity of a stacking waiver signed by a person who is no longer on the policy. Therefore, the Court finds that the language of the statute clearly mandates that in order for such a waiver to be valid and enforceable, it must be signed by the first named insured.

Defendant argues that they did not have an obligation nor duty to have Plaintiff Karen Frankiewicz sign a waiver because when she became the first named insured, she essentially renewed her existing policy instead of obtaining a "new" policy. Defendant claims that because it was a renewal policy the original waiver controls. Once again there is no Pennsylvania case law specific to this legal topic. However, as Plaintiff points out, 40 P.S. §991.2001 defines an auto insurance "renewal" policy.

> Renewal or to renew. To issue and deliver at the end of an insurance policy period a policy which supersedes a policy previously issued and delivered by the same insurer and which provides types and limits of coverage at least equal to those contained in the policy being superseded, or to issue and deliver a certificate or notice extending the term of a policy beyond its policy period or term with types and limits of coverage at least equal to those contained in the policy being extended: provided, however, that any policy with a policy period or term of less than twelve (12) months or any period with no fixed expiration date shall for the purpose of this article be considered as if written for successive policy periods or terms of twelve (12) months.

40 P.S. § 991.2001.

The requirement that a renewal policy be at least equal to the original policy has not been satisfied in the instant action, Plaintiff Karen Frankiewicz made the following changes to her insurance coverage when she went to Defendant's place of business for coverage:

1. Coverage for her husband's Mercury was deleted;
2. Coverage on her daughter's Chevrolet Cavalier was deleted;
3. Coverage was added for a 1996 Honda Accord, her daughter's new car;
4. Insurance for the Ford Taurus, Karen's car and the only one left from the prior policy issue, was kept, but coverages were decreased. Specifically, the coverage for collision, comprehensive, towing and labor, and rental and transportation were all dropped; and
5. Karen was made the only named insured for this policy, and the covered drivers were only herself and her daughter.

Brief in Support of *Plaintiffs' Cross Motion for Summary Judgment,* p. 14.

Plaintiff Karen Frankiewicz made significant changes to her auto insurance coverage when she became the first named insured on June 4, 2002. The Court finds that the nature and number of these charges is so significant that one could not reasonably assume they would constitute renewal. When comparing the coverage under the policy prior to Daniel Frankiewicz's death to the coverage gained thereafter on June 4, 2002, it is unreasonable to conclude that the coverages on each policy are "at least equal to one another". Therefore in accordance with the statutory language of 40 P.S. § 991.2001, the Court finds that the policy that Plaintiff Karen Frankiewicz obtained on June 4, 2002 constituted a "new" policy of insurance under the law.

Defendant attempts to argue that Plaintiff's contention that a new policy was created on June 4, 2002 as opposed to a renewal would violate the public policy behind the MVFRL. The Court finds no merit in this argument. While it is true that one of the primary purposes of the MVFRL is to curb the rising costs of auto insurance, it is also true that the underlying objective of the MVFRL is to provide broad coverage to assure the financial integrity of the policyholder. *Danko v. Erie Insurance Exchange,* 630 A.2d 1219, 1222 (Pa. Super. 1993), *affirmed* at 649 A.2d 935 (1994). Therefore, the Court believes that its finding that the KF Policy is a "new" policy does not violate public policy, but rather complies with it in protecting Plaintiffs in accordance with the underlying objective of the MVFRL.

Therefore, Defendant's Motion for Summary Judgment is denied, and Plaintiffs' Cross Motion for Summary Judgment is granted.[6]

[6] The cases cited and submitted by the parties at oral argument, none of which are directly on point, for the most part lend credence to the Court's substantive and legal findings and conclusions in this matter.

ORDER

AND NOW, TO-WIT, this 9th day of January, 2007, for the reasons set forth in the foregoing Opinion, it is hereby **ORDERED, ADJUDGED and DECREED** as follows:

1. Defendant's Motion for Summary Judgment is **DENIED**.
2. Plaintiff's Cross Motion for Summary Judgment is **GRANTED.**

BY THE COURT:
/s/ Shad Connelly, Judge

MICHELLE L. BOND, Administrator of the Estate of MATTHEW R. BOND, Deceased, Plaintiff

v.

PBL LEASING, INC., B & W CARTAGE COMPANY, INC., a/k/a B & W CARTAGE, INC., JERRY W. SCRUGGS and ALBERT EUGENE OSMENT, JR., Defendants

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF GENERAL SERVICES AND PRO-GARD INDUSTRIES, Additional Defendant

WILLIAM F. STUCKEY, Plaintiff

v.

PBL LEASING, INC., B & W CARTAGE COMPANY, INC., a/k/a B & W CARTAGE, INC., JERRY W. SCRUGGS and ALBERT EUGENE OSMENT, JR., Defendants

JOINT TORTFEASOR / CONTRIBUTION

The concept of contribution among joint tortfeasors arose in equity and is enforced on equitable principles.

JOINT TORTFEASOR / CONTRIBUTION

A joint tortfeasor is entitled to seek contribution under the Pennsylvania Uniform Contribution Among Tortfeasors Act (42 PA CSA §8324 *et seq.*) regardless of the legal theory upon which each joint tortfeasor is liable to the plaintiff.

JOINT TORTFEASOR / CONTRIBUTION

The Pennsylvania Uniform Contribution Among Tortfeasors Act provides no distinction between the forms of liability in determining whether a joint tortfeasor has a right to seek contribution.

JOINT TORTFEASOR / CONTRIBUTION

Under the Pennsylvania Uniform Contribution Among Tortfeasors Act, the jury has the discretion to award contribution amongst the defendants after weighing each defendant's liability to the plaintiff.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NOS. 12316-2000 AND 10095-2002

Appearances: Harry J. Zimmer, Esq. for PBL Leasing, Inc.
T. Warren Jones, Esq. for Pro-Gard Industries
E. Max Weiss, Esq. for Michelle L. Bond

OPINION

Cunningham, William R., J.

In this case, Plaintiff brought a wrongful death and survival action against

the Defendants based on the tragic death of Matthew Bond on January 13, 2000. Joined as Additional Defendants were the Commonwealth of Pennsylvania and Pro-Gard Industries ("Pro-Gard"). A comprehensive settlement was reached between the Plaintiff and Defendants on February 19, 2003 which also extinguished any claims of Plaintiff against Pro-Gard.

The Defendants now seek to recover contribution from Pro-Gard. In response, Pro-Gard filed a Motion for Summary Judgment alleging that a joint tortfeasor whose tortious conduct was willful and wanton is precluded from seeking contribution. The Defendants disagree for a host of reasons. After oral argument, the Motion for Summary Judgment filed by Pro-Gard is DENIED.

At issue is whether the original Defendants have a right to seek contribution from Pro-Gard. As a general rule, there exists a right of contribution among joint tortfeasors pursuant to the Pennsylvania Uniform Contribution Among Tortfeasors Act. *See* 42 Pa. C.S.A. §8324 *et seq.* (hereinafter UCATA). Pro-Gard asserts there is an exception to this general rule because there is no right of contribution for a joint tortfeasor who has intentionally, willfully and/or wantonly caused harm to the Plaintiff. Pro-Gard argues "the law does not permit such morally culpable tortfeasors... from seeking contribution." See Brief in Support of Motion for Summary Judgment at p. 26.

According to Pro-Gard, the conduct of Defendant Albert Eugene Osment, Jr. was willful and wanton and within his agency for all of the Defendants. Therefore the Defendants are precluded from seeking contribution from Pro-Gard, who was not engaged in any willful and wanton misconduct at the time of decedent's accidental death.

The Defendants have a layered response. The Defendants deny that Osment is an agent for each of the Defendants on all of Plaintiff's claims. The Defendants contend the Plaintiff asserted claims against the Defendants involving direct liability separate from any vicarious liability. The Defendants maintain the UCATA permits contribution among all joint tortfeasors regardless of the basis for liability. Finally, the Defendants argue it is a jury question of whether any party acted in a willful and wanton manner. Because of the disposition of Pro-Gard's Motion, not all of these contentions need to be addressed.

PENNSYLVANIA LAW

There is not a Pennsylvania appellate decision on the issue of whether a joint tortfeasor who was found to have engaged in willful and wanton misconduct can recover contribution from a joint tortfeasor who has not acted in such a manner. Instead, Pro-Gard relies on a series of federal decisions predicting the Pennsylvania appellate courts, if called upon to decide this issue, would preclude such a claim for contribution. *See*

v. New York Central Railroad Co., 276 F. Supp. 778 (W.D. Pa. 1967); *Walters v. Hiab Hydraulics, Inc.*, 356 F. Supp. 1000 (M.D. PA. 1973), and *In re: One Meridian Plaza Fire Litigation*, 820 F. Supp. 1492 (E.D. Pa. 1993).

Although the federal decisions are not binding on a state trial court, the rationale in predicting the direction of Pennsylvania law is inviting. The concept of contribution among joint tortfeasors arose in equity and is enforced on equitable principles. *Anstine v. Pennsylvania Railroad Co.*, 43 A.2d 109, 352 Pa. 547 (1945); *Brown v. Dickey*, 155 A.2d 836, 397 Pa 454 (1959). As a matter of fundamental fairness, it does not seem equitable to allow a joint tortfeasor who has engaged in willful and wanton misconduct to seek relief from a joint tortfeasor who has not engaged in such behavior. There is little reason to subsidize the morally culpable tortfeasor.

However, to create the exception Pro-Gard proffers would be an act of legislating by this Court. If the legislature intended to disallow such a right of contribution, it would have stated so in the UCATA. The legislature did not identify any type of tortfeasor who cannot seek contribution. Instead, the legislature simply provided a "right of contribution exists among joint tort-feasors". 42 Pa. C.S.A. §8324(a).

The Pennsylvania appellate courts have held the right to seek contribution is available regardless of the legal theory upon which each joint tortfeasor is liable to the plaintiff. *Moran for and on Behalf of Moran v. G. and W. H. Corson, Inc.*, 402 Pa. Super. 101, 586 A.2d 416 (1991). There is no distinction drawn between the forms of liability in determining whether a joint tortfeasor has a right to seek contribution. *Svetz for Svetz v. Land Tool Company*, 355 Pa. Super. 230, 513 A.2d 403 (1986).

Notably, most of the federal cases relied upon by Pro-Gard in predicting Pennsylvania law precede the UCATA, which became law effective June 27, 1978. Also, because the legislature has enacted legislation determining the right of contribution, the federal predictions are moot and/or inaccurate.

Importantly, the equitable concerns expressed by Pro-Gard can still be considered under the UCATA. The joint tortfeasor who has acted with willful and wanton misconduct is not exonerated. Instead, all of the egregious conduct can be considered in determining whether any relief should be afforded such a tortfeasor. While the UCATA allows any joint tortfeasor to seek relief, it does not entitle the joint tortfeasor to actually recover any contribution.

In this case, all of the conduct ascribed to Albert Osment Jr. can be considered in determining whether the Defendants should recover any amount of contribution from Pro-Gard. It is very possible the jury may not award any sum after considering Osment's conduct vis-a-vis the alleged

conduct of Pro-Gard. The UCATA purposely allows such a weighing process to be determined by a jury.

ORDER

For the reasons set forth in the accompanying opinion, the Motion for Summary Judgment as filed by Pro-Gard is **DENIED**.

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

MARC KUNTZ, Plaintiff

v.

EUGENIA MAE KUNTZ, Defendant

FAMILY LAW / CHILD CUSTODY

A divorced parent is entitled to a hearing before a trial judge, not a master, regarding modification of child custody.

FAMILY LAW / CUSTODY

There are not many cases addressing the issue whether to homeschool or not to homeschool. For some guidance on this particular issue, the Court looks to Pennsylvania's Compulsory School Law, 24 P.S. §13-1327.1 and the Pennsylvania Homeschooling Act, 169 of 1988, P.L. 1321, No. 169 (hereinafter Act 169).

FAMILY LAW / CUSTODY

The Pennsylvania legislature permits four options for education that may satisfy the Compulsory School Law: (1) public schools, with certain trade school options; (2) non-public, licensed private academic schools; (3) schools operated by bona fide churches or other religious bodies; and (4) "home education programs."

FAMILY LAW / CUSTODY

Act 169 provides that instruction to children of compulsory school age in a "home education program" satisfies the Compulsory School Law.

FAMILY LAW / CUSTODY

While religion merits consideration in child custody cases, it has little weight in making a custody decision unless it can be shown to have harmful effects on the child.

FAMILY LAW / CUSTODY

A court may prohibit a parent from advocating religious beliefs, which, if acted upon, would constitute a crime; however, the court may not infringe on a parent's constitutional right to speak to a child about religion as he/she sees fit.

FAMILY LAW / CUSTODY

Further, a court may not bar a parent from taking a child to religious activities simply because the other parent disagrees with them.

FAMILY LAW / CUSTODY

A custodial parent may direct the children's religious training.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION - CUSTODY
No. 14461-2003

Appearances: David A. Schroeder, Esq., Attorney for Plaintiff
Bradley K. Enterline, Esq., Attorney for Defendant

OPINION

Dunlavey, Michael E., J.

Procedural History

Marc Kuntz (hereinafter Plaintiff) filed for divorce on October 29, 2003. Eugenia Mae Kuntz (hereinafter Defendant) was granted primary custody of the parties' three children, Rebekah, Nathan, and Autumn, by an order dated February 14, 2002. Pursuant that order, Plaintiff has visitation twice a week and every other weekend. Based on the testimony of the parties, Plaintiff's visitation has been expanded to periods of partial custody. Since 2002, Plaintiff has paid $2,035 per month for child support and spousal support. The support orders were not substantially changed after a support *de novo* hearing held on September 14, 2005 before the Honorable Elizabeth K. Kelly.

Defendant currently homeschools Nathan and Autumn. Rebekah graduated from the homeschool program in May 2007. The parties disagree whether to continue homeschooling the two youngest children since 2005.

A Divorce Master was appointed on October 28, 2005 and a Master's Hearing was scheduled for December 8, 2006. However, at that hearing, the Master and counsel for both parties decided that the issue of homeschooling should be determined by a trial court.

Plaintiff filed a Motion for Special Relief on February 19, 2007, requesting a hearing on the issue. He contends that it is not in the younger children's best interests to be homeschooled and that Defendant's entitlement to alimony should conclude since Rebekah has graduated. The Master's Hearing was postponed pending resolution of the homeschooling matter. *See also* February 22, 2007 Order (J. Garhart).

Hearings were held before this Court on May 30, 2007 and June 6, 2007. Defendant's counsel presented a "Memorandum on Whether Custodial Parent May Direct the Religious Education and Training of her Children Through Homeschooling Where Father Objects" at the first hearing. At the conclusion of the second hearing, the Court heard oral arguments and directed counsel to submit briefs. The Court turns to the matter now.

Findings of Facts

Given the relevance and the similarity between the evidence and witnesses offered at the hearings held before this Court and at the support *de novo* hearing before Judge Kelly, the Court will consider testimony from both proceedings. *See also* Defendant's Exhibit 1 Support De Novo Hearing Transcript.

Plaintiff and Defendant attended Northwestern High School, a public high school, where they started dating. Plaintiff testified that he was involved in sports and clubs and went to school dances. After high school, Plaintiff attended Penn State University and obtained an

engineering degree. Defendant attended Erie Vo-Tech where she studied electronics. She also served in the Army reserves as a communications specialist. She later worked for WTC Technologies and as a cashier at Phar-Mor.

The parties were married on August 5, 1989. At that time, both belonged to the Berean Baptist Church (hereinafter the Church), located in Girard, Pennsylvania. Both were raised in the Baptist faith. Defendant still belongs to the Church, but Plaintiff does not. Plaintiff testified to his belief that the Church is "very far right" and "extreme" as reasons for leaving.

John Bates, pastor of the Berean Baptist Church for 23 years, testified that Plaintiff was actively involved in the Church, participating in the choir, teaching Sunday School, and even serving as Church Treasurer for a time.

Upon agreement of the parties, Defendant stopped working shortly after they were married. Both testified that their religion dictated that women should not work outside the home. Plaintiff worked at Perry Nuclear Power Plant in Perry, Ohio, where he remains employed.

The parties' oldest child, Rebekah, was born on June 26, 1990. The parties decided that she would be homeschooled in accordance with teachings of their faith. Around the same time, several of their friends had started homeschooling their children. Robert Brown, the Plaintiff's best man at his wedding, testified that Plaintiff supported homeschooling and was opposed to public schools because he believed they were secular, taught evolution and other beliefs he did not share, and had problems with drugs and violence. Mr. Brown homeschools his own children and is a member of the Church.

Rebekah began homeschooling in the fall of 1994 when she was four years old. Defendant taught her during the day while Plaintiff was at work. Plaintiff testified that he sometimes helped Rebekah with her math and science homework because of his engineering background. Defendant testified that Rebekah also played youth soccer, volunteered at the local branch of the Erie County library, and actively participated in the Church. Rebekah graduated with honors in May 2007 at the age of sixteen (Defendant's Exhibit 4). Defendant testified that Rebekah is considering taking college courses at home through Whitfield College in Florida, or enrolling in a religious college or university. She has expressed an interest in learning how to become a homeschool teacher.

There is a ten-year age gap between Rebekah and her younger siblings. Plaintiff testified that there were "martial difficulties" between himself and Defendant during that time, but did not specify what those problems were. Defendant did not offer any testimony about those circumstances either. Nathan was born on June 30, 2000 and Autumn was born on September 28, 2001. Shortly afterward, the parties separated in October 2001.

Plaintiff contends that Defendant never told him that she planned to homeschool Nathan and Autumn. He testified that he learned from Nathan in 2005 that Defendant was homeschooling the younger children. According to Defendant, Nathan and Autumn began kindergarten at the age of four, the same age Rebekah was when she started homeschooling. Defendant testified that she presumed that Plaintiff knew about the children's schooling because they would show him their schoolwork. Plaintiff contends that he only saw coloring book pages done by the children.

Defendant presented the testimony of Janet Preston, a homeschool evaluator. Ms. Preston has an Associate's degree in early childhood education, a Bachelor's degree in education, and a Pennsylvania teacher's certification. She testified that she has been a homeschool evaluator for eleven years and currently evaluates 130 students. Like Defendant, Ms. Preston also homeschools her five children.

Ms. Preston explained the homeschool evaluation process required by Pennsylvania law.[1] She testified that only a certified psychologist or person with a Pennsylvania teacher's certification may become a homeschool evaluator. Every year, the evaluator must interview the child, review their portfolio, and write a report to be submitted to the local school district.

An evaluation is mandatory once a child turns eight years old, but parents may request the evaluation of younger children. The evaluation is strictly academic, even if the homeschooling program includes religious instruction. The standard is whether the child is making progress at his/her grade level.

The child's portfolio contains samples of his/her work as a student throughout the year. The evaluator may ask questions about the portfolio as well as review other materials such as standardized testing results, extracurricular activities and projects, etc. For example, Ms. Preston testified that she reviewed Rebekah's PSAT, SAT, and CLEP scores along with her portfolio (Defendant's Exhibits 3, 5, 6, 7). Ms. Preston also testified that an evaluation typically lasts about one hour, but the evaluator may take longer to review a portfolio. Ms. Preston kept Rebekah's final portfolio for longer than the standard hour to review several of her essays and research papers.

At the hearing, Ms. Preston reviewed recent homeschool evaluations for all three Kuntz children (Defendant's Exhibits 8, 9, 10). She testified that Rebekah is progressing at college levels and received a state-approved diploma with honors in four subjects (Defendant's Exhibit 4).

Ms. Preston described Nathan as "very outgoing" and a "bubbly boy"

[1] *See also* "Homeschooling in Pennsylvania: A Brief Fact Sheet" and "Frequently Asked Questions" http://www.elc-pa.org/pubs/downloads/english/homeschooling-11-02.pdf

during his interview and was eager to show all the things he learned during the school year. She asked Defendant if she could borrow Nathan's portfolio to use as an example for other homeschooling families.

Ms. Preston indicated that Autumn can read very well, but has some trouble with reading comprehension. She noted, however, that Autumn is also participating in an advanced program called Abeka.

Overall, Ms. Preston considered the Kuntz homeschool to be "exceptional" and a "model" for other homeschooling programs. She testified that Defendant uses eclectic teaching approaches and adapts to each child's learning style. Ms. Preston expressed no concerns about Defendant's lack of a teaching certification or an education-related background. She pointed out that Defendant has been homeschooling for thirteen consecutive years, has a good homeschooling support group, and is willing to ask for advice from others.

Ms. Preston also testified about extracurricular programs the Kuntz children participate in outside of homeschooling. They belong to Erie County Homeschool Opportunities (ECHO), which organizes activities for homeschooled students. The children are also involved in their church, programs at Erie Junior Philharmonic, the Erie County library, and Ashbury Woods, and in youth sports. All three children play soccer. Ms. Preston also mentioned that homeschooled children are now permitted to play on sports teams in their local school district.[2]

Plaintiff does not dispute the fact that Rebekah did exceptionally well in her homeschooling program. He described her as very intelligent and always learned things quickly from a young age. Instead, Plaintiff raised concerns over Rebekah's emotional and social development, that she might be socially behind peers of the same age, and that she is "isolated" because she often chooses to stay home and sew or do crafts. Plaintiff described the younger two children as having "normal" intelligence as compared to their older sister.

Plaintiff also worries that all three children will have difficulty interacting beyond their homeschool environment and trouble handling confrontations because they are homeschooled. Plaintiff believes that his own public school education prepared him for "socializing and team building" he engages in employment. Plaintiff also testified that he feels public schools offer more routine, interaction with others, and regular communication with parents. Both Plaintiff and Defendant acknowledged at the hearing that they do not communicate very well, if at all, about the children's education.

Plaintiff stated several times that he does not believe homeschooling is in the younger children's best interests because the "family unit" is no

[2] See also http://home.comcast.net/~askpauline/hsex/hsexc.html for discussion of Pennsylvania's Equal Access Law, effective January 1, 2006, allowing homeschoolers to participate in extracurricular activities at local schools.

longer intact. He sees a distinction between the time when the parties were married, belonged to the Church and decided to homeschool Rebekah, and the present time where the parties are separated and Plaintiff voluntarily left the Church. Plaintiff believes that homeschooling requires the support of both parents in an environment where the family lives "under one household." He feels that the "family unit" could better handle problems with the children's schooling as they arose.

Conclusions of Law

The Divorce Master and counsel for the parties agreed that the issue of homeschooling the younger children should be determined by a trial court. Plaintiff's counsel cites 23 Pa. C.S.A. §3321 where the court may appoint a master to hear testimony on all or some issues, except issues of custody and paternity, and make recommendations to the court. However, this section was suspended by order of the Supreme Court effective January 1, 1995 (now Pa.R.C.P. No. 1920.51).

According to *Littman v. Van Hoek*, 789 A.2d 280, (2001), a divorced parent is entitled to a hearing before a trial judge, not a master, regarding modification of child custody. *See also Van Dine v. Gyuriska*, 552 Pa. 122, 713 A.2d 1104 (1998) where the master lacked authority to hear custodial matter and parent was granted *de novo* hearing per the rules of civil procedure. Thus, the Court, not the Master, has the authority to determine whether or not the children shall continue to be homeschooled. It should be noted that the Court will not be deciding which type of education or religion training is better overall. *See Epperson*, *infra*, concurring opinion of Justice Rice, at 153,1276-1277.

Pennsylvania Homeschooling Law

Based upon the Court's own research, there are not many cases addressing the issue whether to homeschool or not to homeschool. For some guidance on this particular issue, the Court first looks to Pennsylvania's Compulsory School Law, 24 P.S, §13-1327.1 and the Pennsylvania Homeschooling Act, 169 of 1988, P.L. 1321, No. 169 (hereinafter Act 169).[3]

The Pennsylvania legislature permits four options for education that may satisfy the Compulsory School Law: (1) public schools, with certain trade school options; (2) non-public, licensed private academic schools; (3) schools operated by bona fide churches or other religious bodies; and (4) "home education programs." 24 P.S. §§13-1327(a), 13-1327(b), 13-1327.1 *See also Combs v. Homer Center School District* 468 F.Supp.2d

[3] The Pennsylvania Department of Education's website contains the text of Act 169, a list of frequently asked questions about home schooling and compliance with Act 169, sample forms and affidavits, acceptable tests, academic standards, and links to various resources available to assist home schooling parents, guardians and supervisors. http://www.pde.state.pa.us/home_education/site/default.asp

738, 743 (W.D.Pa., 2006). While the parties were still married, they chose option number four, a home education program.

Act 169 provides that instruction to children of compulsory school age in a "home education program" satisfies the Compulsory School Law. *Combs, supra* at 746-748. The compulsory school age in Pennsylvania is between eight (8) and seventeen (17) years. Act 169 requires the same number of days and hours of instruction, and the same subject matters of instruction as traditional public or parochial schools. School instruction is required for 180 days per year or 900 hours for elementary education and 990 hours for secondary education. For elementary education, the required subjects to be taught are: English, including spelling, reading, and writing; arithmetic; history of Pennsylvania and United States; civics; health and physiology; physical education; music; art; geography; science; and safety education, including fire safety/prevention. For secondary education, the required subjects to be taught are: English, including language, literature, speech and composition; science, geography; social studies, to include civics, world history, history of the United States and Pennsylvania; mathematics, to include general mathematics, algebra and geometry; art; music; physical education; health; and safety education, including fire safety/prevention.[4]

Upon review of the aforementioned law and the testimony of Ms. Preston, a qualified homeschool evaluator for eleven years, the Court concludes that the Kuntz homeschooling program complies with the Compulsory School Law and Act 169.

Homeschooling and Child Custody

Plaintiff cites two cases in support of his arguments against homeschooling. He cites *In re Wesley J.K.*, 299 Pa.Super. 504, 445 A.2d 1243 (1982) for its premise that shared legal custody includes joint input for all major decisions affecting the child, including education, and *Ferguson-Berman v. Berman*, Montgomery County, Civil Division No. 84-11801 (1988) where the trial court held that Mother could not unilaterally decide matters of schooling and religious training (enrolling the child in parochial school without consulting the father) despite the fact that the child was in her custody in Ohio. However, both cases pre-date the passage of Act 169 and neither specifically address homeschooling. For these reasons, the Court finds they are not particularly persuasive to the issue *sub judice*.

Since there appears to be a dearth of homeschooling/child custody cases in Pennsylvania, the Court must consider cases from Pennsylvania's sister states, where there are also relatively few cases specifically related to the issues of divorce, child custody, and homeschooling.

[4] "Home Schooling in the United States: Pennsylvania- A Legal Analysis" http://www. hslda.ora/laws/analysis/Pennsylvania.pdf

In a Montana case, *In re Marriage of Epperson*, 326 Mont. 142, 107 P. 3d 1268 (2005), the parents had agreed to homeschool their seven children in accordance to their Tridentine Catholic faith. They lived a self-contained life, with limited technological access and contact with others outside their faith. The district court determined that a public school education was in the best interests of three remaining minor children based on Mother's inflexibility and intolerant manner toward others, and the children's limited access to the outside world.

In *Morgan v. Morgan*, _ So.2d _, 2007 WL 778557, the Alabama Civil Appeals Court held that the trial court had subject matter jurisdiction to resolve dispute between parents over their child's education (homeschooling or public school). The court decided that the child should attend public school because parents' work schedule did not permit enough time for homeschooling and the child had failed seventh grade placement tests after a trial period of homeschooling. The Appeals Court also noted that parents have a fundamental right to determine child's education without governmental interference, except in custodial situations where a trial court has the authority to decide what is in the child's best interests.

Here, the parties are not as inflexible and rigid as the parents in *Epperson*, nor are the children isolated or prohibited from contact with others outside their faith. Defendant presented undisputed testimony that the children are involved in sports and other activities not affiliated with the Church, that they are outgoing, enthusiastic, and sociable. Neither their faith nor their homeschooling appears to have limited their progression. While the parties' infrequent communication greatly dismays the Court, it is somewhat understandable as a consequence of their divorce. However, the Court cannot emphasize enough the importance of regular communication for the best interests of the children. The parties must put their differences of opinion aside in order to co-parent the children together.

Because a custodial situation has arisen from the filing of divorce, this Court has the authority to decide what kind of education is in the children's best interests over either parent's preferences. Unlike in *Morgan*, the parties' work schedules permit homeschooling, because historically Defendant has stayed home and Plaintiff has worked while the children were taught by Defendant. No evidence was presented that the children were failing or not making progress in their studies.

Further, the Court cannot simply ignore the fact that Rebekah excelled in her homeschooling program, that the program is considered a model for others by Janet Preston, a qualified homeschool evaluator, and that Defendant accomplished all of this with little outside training. Based on Ms. Preston's testimony, it appears that Nathan and Autumn are also excelling in their schooling beyond their traditional grade/age levels. The Court is unwilling to disturb that kind of progress by placing Nathan

and Autumn into an unfamiliar public school.

The Court also cannot overlook the fact that Plaintiff has not stridently objected to the children's homeschooling. Plaintiff first objected at a support hearing in 2005, not when he filed for custody in 2002. At the May 30, 2007 hearing before this Court, Plaintiff admitted there is still "a financial flavor" to his objections to homeschooling based on his belief that Defendant should work.

During the time between the 2005 support hearing and the hearings held before this Court in 2007, Plaintiff failed to actively research alternative schooling for the children. His testimony indicated that he had only driven by a public school. He did not call, tour, or otherwise attempt to obtain further information from any other school. He did not present any other witnesses to support his claim that homeschooling is not in the best interests of the children. In two years, his arguments have not substantially changed or become any more convincing.

In contrast, Defendant presented supporting witnesses familiar with how homeschooling works. Even taking into account the fact that all of Defendant's witnesses were also Church members who homeschool their children, Defendant's arguments are still more persuasive than Plaintiff's.

Religious Training

It cannot be denied that religion and the parties' difference of opinion regarding their faith lie at the center of their dispute. But, this Court refuses to penalize Plaintiff for leaving the Church and changing his mind about homeschooling or Defendant for staying with the Church and homeschooling as she believes is to God's will. Those are their rights as individuals and as parents.

While religion merits consideration in child custody cases, it has little weight in making a custody decision unless it can be shown to have harmful effects on the child. *Luminella v. Marcocci*, 2002 Pa.Super. 410, at 411-412; 814 A.2d 711, at 718, citing *Boylan v. Boylan*, 395 Pa.Super. 280, 577 A.2d 218 (1990) and *Commonwealth ex rel. Pierce v. Pierce*, 493 Pa. 292, 426 A.2d 555, 558 (1981). The *Luminella* Court found Mother's strong dislike of Father's neo-pagan religion not enough to change his periods of partial custody.

A court may prohibit a parent from advocating religious beliefs, which, if acted upon, would constitute a crime; however, the court may not infringe on a parent's constitutional right to speak to a child about religion as he/she sees fit. *Shepp v. Shepp*, 588 Pa. 691, 906 A.2d 1165 (2006) (Mormon fundamentalist father was allowed to teach child about polygamy during his partial custody time over mother's objections, despite the fact that polygamy is a crime.

Further, a court may not bar a parent from taking a child to religious activities simply because the other parent disagrees with them. *See*

Zummo v. Zummo, 394 Pa.Super. 30, 574 A.2d 1130 (1990) where trial court improperly barred Catholic father from taking children to church because parties previously agreed to raise them in Mother's Jewish faith. The Superior Court held that father's church presented no substantial threat or harm to the children, but let stand the trial court order that Father bring children to Mother's synagogue for religious training during her custodial time.

In *Tripathi v. Tripathi*, 787 A.2d 436 (2001), which relied on the *Zummo* decision, the Superior Court held that a custodial parent may direct the children's religious training. The Court did not fault the Mother for straying from the Hindu religion she and Father belonged to prior to divorce because Mother's extended family was Hindu, the children had regular contact with them, and were exposed to Hindu beliefs, to which Mother did not object.

In her Memorandum and Brief, Defendant relies on *Zummo* and *Tripathi* to justify teaching Christian principles within her homeschooling program. She claims that her involvement in her church is intertwined with homeschooling. She argues that Plaintiff has no right to interfere with her decision because she is entitled to practice her religion and teach her children as she believes. However, Defendant forgets that Plaintiff also has fundamental rights as a parent to practice or teach any religion to his children as he sees fit.

Plaintiff has not demonstrated any harmful effects on the children from their homeschooling and/or participation in Church activities. While he may disagree with the specific principles of the Church based on his own experiences, he has not shown how those same principles might endanger the children. In addition, nothing prohibits Plaintiff from bringing the children to other kinds of religious services or activities during his custody time. Defendant may object because she is the primary custodial parent and desires to primarily direct the children's religious teachings, but her objections cannot impede Plaintiff's constitutional rights to free speech and association. *See Combs, supra*, where District Court held that the Pennsylvania's statute specifying home education programs did not violate Pennsylvania Religious Freedom Protection Act and did not violate Free Exercise Clause of the First Amendment to the U.S. Constitution, and *Jeffery v. O'Donnell*, 702 F.Supp. 516 (M.D.Pa.,1988) where school district superintendent's approval of home schooling by qualified tutor did not violate free exercise or establishment clauses of the First Amendment.

Hence, the Court is not persuaded that Defendant's religion presents any harm to the children, nor that Plaintiff's disputes with the Church and homeschooling have interfered with Defendant's fundamental rights.

Alleged Violations of the Custody Order

As for Plaintiff's argument that Defendant violated the custody

order by not consulting with Plaintiff about educational decisions for the children, the Court finds that under the parties' current custody order, dated February 14, 2002, the parties do not share legal custody. Defendant has primary custody and Plaintiff has visitation, not partial custody. Plaintiff's reference to a March 6, 2002 order that the parties shall share custody does not exist on the custody or the divorce dockets. While the parties have mutually agreed to allow Plaintiff partial custody time with the children, the Court is bound by the only custody order of record, dated February 14, 2002.

Further, as to Plaintiff's allegations that Defendant violated Paragraphs 7 and 8 of the custody order, the Court finds that Plaintiff took no decisive action to remedy the situation. He did not file for a modification of the custody order nor did he file a petition for contempt. Even at the 2005 support *de novo* hearing, Plaintiff conceded that Defendant chose to stay home and chose to homeschool the children, stating "that's her choice." The Court will not award Plaintiff's lack of effort with a finding of contempt against Defendant.

It should be noted that Defendant is not entirely without fault either. Her refusal to clearly communicate with Plaintiff about the children and their progress in the homeschooling program is unreasonable. Her excuse that she "assumed" the children told their father that they were being homeschooled is wholly inadequate. The children should not be used as messengers between their parents.

The parties' differences in opinion about the Church, homeschooling, etc. are irrelevant when it comes to the wellbeing of their children. The Court directs the parties to Paragraph 9 of the custody order for their contemplation. Like it or not, the parties must communicate with each other about their children. Since both parties indicated that they have Internet access and e-mail, the Court would encourage them to use those methods for communication if speaking directly to each other is too intolerable.

ORDER

AND NOW to-wit, this 24th day of August, 2007, based upon the testimony presented, briefs submitted by counsel, and the foregoing Opinion, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that the Defendant, Eugenia Mae Kuntz, may continue homeschooling the parties' minor children. The objections raised by the Plaintiff, Marc Kuntz, to homeschooling are hereby **DENIED** as contrary to the best interests of the children. The Court encourages Plaintiff to become involved with his children's education despite his reservations about it.[5]

[5] See "What Dads Can Do in Homeschooling" by Marsha Ransom, attached as an Appendix to this Opinion and Order. Also available at http://www.homeeducator.com/FamilyTimes/articles/9-3article7.htm

FURTHER, the parties are hereby **DIRECTED** to schedule a custody conciliation conference to update their custody order and address their co-parenting difficulties. The parties are hereby **ORDERED** to communicate weekly about all three children and their progress until further order of court.

The Master's Hearing that was postponed pending resolution of the homeschooling issue shall be rescheduled forthwith.

BY THE COURT:
/s/ **MICHAEL E. DUNLAVEY, JUDGE**

GLENN L. MacDONALD and MAUREEN L. MacDONALD, his wife, Plaintiffs,

v.

PETER J. BELOTT, JR., Esquire And THE BELOTT LAW FIRM, Defendants

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Motions for summary judgement are governed by Pa. R.C.P. 1035.2: after the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law.

INSURANCE / INTERPRETATION OF POLICIES

The interpretation of an insurance contract is a question of law for the Court.

INSURANCE / EXCLUSIONS / DUTY TO DEFEND

Where an insurer relies on a policy exclusion as the basis for its denial of coverage and refusal to defend, the insurer has asserted an affirmative defense and, accordingly, bears the burden of proving such a defense.

INSURANCE / WAIVER AND ESTOPPEL

Waiver is the voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver a party would have enjoyed.

INSURANCE / WAIVER AND ESTOPPEL

Where a claim may potentially become one which is within the scope of the policy, the insurance company's refusal to defend at the outset of the controversy is a decision it makes at its own peril.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 14570 OF 1998

Appearances: Andrew J. Conner, Esq. for the Plaintiffs
Peter J. Belott, Jr., Pro Se
James R. Schadel, Esq. and Scott R. Eberle, Esq. for Garnishee Westport
George J. Manos, Esq. and Beth Ann Berger Zerman, Esq. for Garnishee Westport

OPINION AND ORDER

This case comes before the Court because of the following motions: (1) Garnishee Westport's Motion for Summary Judgment; (2) Plaintiffs' Motion for Partial Summary Judgment (later Amended and Enlarged Motion for Summary Judgment); (3-4) two Motions for Protection from Subpoenas and Notice of Depositions of Plaintiffs' Legal Counsel; (5) Garnishee Westport's Motion to Strike Plaintiffs' Reply to New Matter;

(6) Garnishee Westport's Motion to Compel Production of Plaintiffs' Documents and Answers to Interrogatories; and (7) Plaintiffs' Motion to Compel Production of Garnishee Westport's Documents.

I. Factual and Procedural History of the Case

On December 6, 1988, Plaintiff, Glenn L. MacDonald, was injured in an automobile accident caused by David A. Stevens. Defendants, Peter J. Belott, Jr., Esq. and the Belott Law Firm, agreed to represent the Plaintiff. On November 27, 1990, Plaintiff filed a personal injury lawsuit against Mr. Stevens and a worker's compensation claim against Plaintiff's employer. On January 29, 1993, Defendants settled his claims against Mr. Stevens.[1] However, Defendants never filed an uninsured motorist (UIM) claim against the insurance company before the statute of limitations expired on January 29, 1997. Subsequently, Plaintiffs retained Michael Cauley, Esq. and later the law firm of Conner & Riley (now Conner, Riley, Friedman & Weichler) to review the feasibility of a UIM claim.

On December 15, 1998, Plaintiffs filed a praecipe for a writ of summons against the Defendants, ostensibly to retrieve Defendants' files for discovery purposes. On January 11, 1999, Defendants received the praecipe for a writ of summons and on February 18, 1999, a Pa.R.C.P. 4009 Request for Production of Documents.[2] The Request for Production of Documents focused on the Plaintiffs' UIM claim. It demanded:

> (a) All memorandums, documents, correspondence and notes regarding any written and/or oral communications by and between Peter Belott, the Belott Law Firm and Erie Insurance Exchange regarding any **uninsured and/or underinsured motorist claim of Glenn MacDonald** arising out of the personal injuries incurred by Glenn MacDonald on December 6, 1988;
>
> (b) Any written statement and/or oral statement reduced to writing of any person, party or witness with respect to any third party and/or **uninsured and/or underinsured claim(s) of Glenn MacDonald** arising out of the motor vehicle collision made reference above;
>
> (c) Office diary system or documents maintained by Peter Belott and for the Belott Law Firm recording, listing or otherwise identifying the dates for the running of the **statute of limitations for any of the Glenn MacDonald claims**, made reference to the previous Requests;

[1] Belott settled the worker's compensation claim soon thereafter.

[2] As part of the discovery process (related to UIM claim) Defendants received the following: (1) on April 27, 1999, a notice of deposition for Peter Belott, Esq.; (2) on May 13, 1999, a second notice of deposition for Peter Belott, Esq.; and (3) on May 27, 1999, an order issued by Judge Fred P. Anthony granting Plaintiffs' Motion to Compel Request for Production of Documents.

(d) The primary, umbrella and/or excess professional liability policy or policies providing any possible **insurance coverages for the claim being asserted by Glenn MacDonald** against Peter Belott and the Belott Law Firm in the within action;

(e) The declaration pages showing and identifying the limits of insurance coverages for the policies, made reference to in the previous request;

(f) If not already provided, any documents and/or memorandums prepared by Peter Belott and the Belott Law Firm setting forth and/or summarizing, either in whole or in part, any of the facts with respect to **Glenn MacDonald's uninsured and/or underinsured motorist claims** arising out of the December 6, 1988 collision, made reference to in the previous Requests; and

(g) If not already provided, correspondence, memorandums and documents referring and/or summarizing any written and/or oral communications by and between Peter Belott, the Belott Law Firm and the Plaintiffs, Glenn MacDonald and Maureen MacDonald, regarding the **uninsured and/or underinsured motorist claims which Glenn MacDonald** had arising out of the December 6, 1988 collision, made reference to in the previous requests.

See *Pa.R.C.P. 4009 Request for Production of Documents*, 02/18/99 (emphasis added).

On April 15, 1999, Defendants renewed their legal malpractice insurance (effective May 6, 1999).[3] The renewal application contained the following interrogatory (Question 11):

Is the Applicant, its predecessor firms, or any individual proposed for this insurance aware of any circumstance, act, error, omission or personal injury which might be expected to be the basis of a legal malpractice claim or suit that has not previously been reported to the firm's insurance carrier? If yes, please complete a Claim Information Supplement.

Defendants answered "no" to question 11. See *Affidavit of Janice Neems Carman*, ¶4, Exhibit A (Westport's Appendix of Documents, Exhibit E).

The applicable policy provided:

[3] From May 6, 1998 to May 6, 1999, Defendants maintained a professional liability policy for legal malpractice with Coregis Insurance Company [Policy No. PLP-223430-4]. In February of 1999, Westport acquired Coregis' assets and liabilities. From May 6, 1999 to May 6, 2000, Defendants maintained a policy with Westport [Policy No. PLP-225418-5].

XIV. EXCLUSIONS

This POLICY shall not apply to any CLAIM based upon, arising out of, attributable to, or directly or indirectly resulting from:

B. any act, error, omission, circumstance or PERSONAL INJURY occurring prior to the effective date of this POLICY if any INSURED at the effective date knew or could have reasonably foreseen that such act, error, omission, circumstance or PERSONAL INJURY might be the basis of a CLAIM [Exclusion B];

See Westport Policy (1999-2000).

On July 16, 1999, Plaintiffs filed a civil complaint against the Defendants alleging legal malpractice. On July 19, 1999, Defendants reported the claim to Westport and asserted that Plaintiffs did not possess a viable UIM claim.

On August 31, 1999, Defendants complied with Plaintiffs' February 18, 1999 document request after Judge Fred P. Anthony issued a second order (August 18, 1999) granting the Plaintiffs' second motion to compel (August 11, 1999).

On September 13, 1999, Janice Neems Carman, an employee of Westport, recorded a telephone conversation with Defendant Belott in which he asserted that Plaintiffs did not possess a viable UIM claim.[4]

[4] Ms. Carman summarized the telephone call as follows:

> Insured acknowledges that he was not aware that the service of a Writ constitutes a claim, and that he should put us on notice of his. He did not realize that a writ constitutes a claim, since he did not interpret a summons to be a suit. He contends that the Pltf's atty advised him that the purpose of the Summons was to secure precomplaint document production. Pltf's atty wanted Insured's file, and wanted to determine if there were any other documents regarding the u/I claim, so that the Pltf's atty could evaluate the underlying claim. Insured explained that months before the writ was filed, that another atty, Michael Cowley (sic), had asked Insured to send his file, which Insured did, but another atty, the current Pltf's atty, apparently took over the matter and called Insured.
>
> Insured further advised that he was out of the office from the end of 4/99 to the end of 6/99 for cancer surgery. He was not in the office when served with the pre-complaint discovery. This is why he had not responded right away to the pre-complaint discovery.

See *Affidavit of Janice Neems Carman*, 174, Exhibit A (Westport's Appendix of Documents, Exhibit E); see also, *Deposition of Janice Neems Carma*n, 05/22/06, at 110, 111, 113, 128, 139-40, 213-14.

In its tender of defense letter, Defendants stated the following:

> A summons in this matter was filed on December 18, 1998, although, (sic) I was advised that the purpose of the Summons was to secure pre-complaint document production.

See *Plaintiffs' Appendix*, at 321. In Defendant Belott's two depositions [April 25, 2000 (I) and September 12, 2000 (II)], his answers and/or explanations remained consistent: Belott believed that the litigants could not receive both worker's compensation and UIM benefits, therefore, he believed Plaintiffs did not have a UIM claim under Pennsylvania law. See *Deposition of Peter Belott, Esq. (I)*, at 32, 41, 43, 45, 48; *Deposition of Peter Belott, Esq. (II)*, at 40, 42.

Further, Defendant Belott advised Plaintiffs to seek other counsel to review the UIM claim. See *Belott I*, at 45. In contrast, Plaintiff Glenn MacDonald testified that Defendant Belott told him that he was planning on settling the UIM claim. See *Deposition of Glenn L. MacDonald*, 07/02/07, at 49-50.

On October 12, 2001, Plaintiffs filed a motion for summary judgment requesting that Judge Anthony award Plaintiffs damages in the amount of $750,000.00. On September 21, 2001 Defendants consented and Judge Anthony granted the motion the same day. On January 22, 2002, Plaintiffs filed a judgment against the Defendants in the amount of $750,000.00.

On October 17, 2002, Plaintiffs filed a praecipe for writ of execution against Defendants' property. On October 3, 2003, Judge Anthony sustained Garnishee Westport's (Westport) preliminary objections thereby striking the writ of execution. On October 9, 2003, Plaintiffs filed an appeal. On February 17, 2005, the Superior Court reversed Judge Anthony's October 2, 2003 order and remanded the case.

On November 11, 2005, Westport filed a motion for summary judgment. Westport argued that Defendants did not timely report the December 15, 1998 praecipe for a writ of summons as a claim during the 1998-99 policy year (Defendants reported the resulting July 16, 1999 civil complaint during the 1999-2000 policy year). On October 18, 2006, this Court denied Westport's motion for summary judgment. It determined that the civil complaint, not the praecipe for a writ of summons, was a claim and that Defendants timely reported it.

On December 12, 2006, Plaintiffs filed a Partial Motion for Summary Judgment with a supporting brief. On February 1, 2007, Westport filed a Notice of Intent to Subpoena to Produce Documents and Things for Trial on Plaintiffs' legal counsel under Pa.R.C.P. 4009.21 (i.e. Andrew J. Conner, Esq. and Michael R. Cauley, Esq.). On February 14, 2007, Attorney Conner filed an Answer, Response and Objection to the February 1, 2007 Notice. On February 20, 2007, Attorney Cauley filed an Answer, Response and Objection to the February 1, 2007 Notice. On March 7, 2007, Westport filed a response brief (in opposition) to Plaintiffs' Partial Motion for Summary Judgment.

On April 9, 2007, Plaintiffs filed an Amended and Enlarged Motion for Summary Judgment in which they assert that a genuine issue of material fact does not exist as to liability because this Court determined that Defendants' claim was properly made under the Westport policy. On April 9, 2007, Plaintiffs filed a brief in opposition. On May 21, 2007, Westport filed a response brief in opposition to Plaintiffs' Amended and Enlarged Motion for Summary Judgment. On June 5, 2007, Plaintiffs' filed a Motion for Protection from Subpoenas and Notices to Plaintiffs' legal counsel under Pa.R.C.P. 4001, 4011(a) and 4011(c). On June 22, 2007, Plaintiffs filed a response brief in opposition to Westport's response to Plaintiffs' Amended and Enlarged Motion for Summary Judgment.

On May 21, 2007, Westport filed a Motion for Summary Judgment with a supporting brief arguing that it is entitled to summary judgment based upon the Exclusion B provision of the 1999-2000 policy. On June 22, 2007, Plaintiffs filed a response in opposition to Westport's

Motion for Summary Judgment and on July 19, 2007, Westport filed a Reply Brief.

On July 9, 2007, Plaintiffs filed a Reply to New Matter. On July 17, 2007, Westport filed a Motion to Strike Plaintiffs' Reply to New Matter under Pa.R.C.P. 1028 and a Motion to Compel Production of Plaintiffs' Documents and Answers to Interrogatories.

On July 23, 2007, the Court held oral argument on the above motions.

II. Legal Discussion

Motions for summary judgment are governed by Pa.R.C.P. 1035.2. The rule provides that:

> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law:
>
> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> (2) if, after the completion of discovery relevant to the motion including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Ultimately, the court must decide "whether the moving party has established by virtue of a developed pre-trial record, the cause of action or defense pleaded, or whether there is a genuine issue of fact for decision." *Bensalem Township School District v. Commonwealth*, 544 A.2d 1318, 1321-22 (Pa. 1988). A fact is material "if it directly affects the disposition of the case." *Windber Area Authority v. Rullo*, 387 A.2d 967, 970 (Pa.Cmwlth. 1978) (citing *Ryan v. Furey*, 262 A.2d 305, 308-09 (Pa. 1970)). The inquiry in deciding a motion for summary judgment "is whether the admissible evidence in the record, in whatever form, from whatever source, considered in the light most favorable to the respondent to the motion, fails to establish a prima facie case or defense." *Liles v. Balmer*, 567 A.2d 691, 692 (Pa.Super. 1989) (citing *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3rd Circ. 1983)).

Summary judgment may only be granted if the record shows clearly that no genuine issues of material fact exist after review of pleadings, depositions, answers to interrogatories, and admissions, together with supporting affidavits, *Davis v. Res. for Human Dev.*, 770 A.2d 353, 357 (Pa. Super. 2001), and that the moving party is entitled to judgment as a matter of law. *Id.*; see also *Nanty-Glo Boro. v. American Surety Co.*, 163 A. 523 (Pa. 1932); *PennCenter House, Inc. v. Hoffman*, 553 A.2d 900,

902-03 (Pa. 1989); *Harleysville Ins. Co. v. Aetna Cas. & Sur. Ins. Co.*, 795 A.2d 383, 385 (Pa. 2002).

Summary Judgment is proper in cases that are clear and free from doubt, *Washington v. Baxter*, 719 A.2d 733, 737 (Pa. 1998); where the facts are undisputed, and only one conclusion may reasonably be drawn. *Askew v. Zeller*, 521 A.2d 459, 463 (Pa.Super. 1987).

A defendant's motion for summary judgment is properly granted where the plaintiff fails to establish one of the elements of his or her cause of action, such as where the defendant owes no duty to the plaintiff, provided that there are no controverted issues of material fact. *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 474 (Pa. 1979).

Continuing:

> 'Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which it bears the burden of proof ... establishes the entitlement of the moving party to judgment as a matter of law.' Lastly, we will 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. (citations omitted).

Murphy v. Duquesne University of the Holy Ghost, 777 A.2d 418, 429 (Pa. 2001); *Manzetti v. Mercy Hospital of Pittsburgh*, 776 A.2d 938, 944 (Pa. 2001); see also Pa.R.C.P. 1035.3.

WESTPORT'S MOTION FOR SUMMARY JUDGMENT.

Westport argues that the Exclusion B provision is a contractual defense that allows it to avoid coverage under the policy for Plaintiffs' action because the December 16, 1998 praecipe for a writ of summons and subsequent discovery requests was a "potential" claim that Defendants were obligated to report on the renewal application for the 1999-2000 policy (i.e. Question 11). Because Defendants failed to report the potential claim, Westport argues it did not have an obligation to provide coverage under the policy. Furthermore, it argues that Belott's conduct (whether he should have recognized the praecipe for a writ of summons and subsequent discovery requests as a potential claim) is measured by an objective standard.

In response, Plaintiffs assert that Westport's Motion for Summary Judgment must be denied because Exclusion B does not apply for the following reasons: (1) in this Court's October 16, 2006 opinion and order, it found that the praecipe for a writ of summons was not a claim; and (2) in this Court's order of March 8, 2006, it granted Westport's March 6, 2006 oral motion to strike any rescission defenses, which includes the Exclusion B defense.

The interpretation of an insurance contract is a question of law for the court. *Baldwin v. Magen*, 123 A.2d 815 (Pa. 1924). Courts cannot rewrite the terms of the policy or give them a construction in conflict

with the accepted and plain meaning of the language used. *Pennsylvania Manufacturers Association Insurance Co. v. Aetna Casualty & Surety Insurance Co.*, 233 A.2d 548 (Pa. 1967). When a word used in the exclusion under scrutiny is specifically defined in the definitions section of the policy, it is that definition which must control in determining the applicability of the exclusion. *Great American Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, 194 A.2d 903 (Pa. 1963). Any ambiguous terms must be given a construction most favorable to the insured. *Patton v. Patton*, 198 A.2d 578 (Pa. 1964); but "[a] provision of an insurance policy is ambiguous [only] if reasonably intelligent men on considering it in the context of the entire policy would honestly differ as to its meaning." *Celley v. Mutual Benefit Health & Accident Association*, 324 A.2d 430, 434 (Pa.Super. 1974); *Adelman v. State Farm Mut. Auto. Ins. Co.*, 386 A.2d 535, 538 (Pa.Super. 1978).

The insurance contract at issue is a "claims made" policy and as such:

> Protects against claims made during the life of a policy irrespective of when the act giving rise to the claim occurred. It differs from the other major type of insurance policy, an 'occurrence' policy, which protects an insured against occurrences during a policy period, regardless of when the resulting claims are made.

See *Pizzini v. American Int'l Specialty Lines Ins., Co.*, 210 F.Supp.2d 658, 668 (E.D. Pa 2002); contra *Brakeman v. Potomac Insurance Co.*, 371 A.2d 193, 198 (Pa. 1977).[5]

A "claims made" policy offers lower premiums while imposing strict conditions for coverage:

> Failure to comply with the reporting provision of a "claims made" policy precludes coverage. Although a harsh consequence, "claims made" policies, and their reporting provisions are enforceable. As courts have recognized, a "claims made" insurance policy represents a distinct bargained-for exchange between insurer and insured. An insurer obtains the benefit of a clear and certain cut-off date for coverage. In return, the insured typically pays a lower premium.

See *Pizzini*, 210 F.Supp.2d 668. Therefore, a claimant must report the occurrence during the policy period. See *Consulting Engineers, Inc. v.*

[5] *Brakeman* involved an 'occurrence' not a 'claims made' policy. In a plurality decision, the Pennsylvania Supreme Court concluded that the insurer had the burden of showing that (1) the insured failed to provide timely notice, and (2) it suffered prejudice. However, several courts have stated that the insurer does not have to demonstrate prejudice with regard to 'claims made' polices. See *Ace American Ins. Co. v. Underwriters at Lloyd's*, 2005 Phila.Ct.Com.PI. Lexis 397, 5-7 (Phila.C.C.P. 2005) (citing *Pizzini v. American Int'l. Specialty Lines Ins. Co.*, 210 F. Supp. 2d 658, 669-70 (E.D. Pa. 2002); *Borish v. Britamco Underwriters, Inc.*, 869 F. Supp. 316, 319 (E.D. Pa. 1994); *Clemente v. The Home Ins. Co.*, 791 F. Supp. 118, 121-22 (E.D. Pa. 1992); *Employers Reinsurance Corp. v. Sarris*, 746 F. Supp. 560, 565 (E.D. Pa. 1990)). Therefore, the law appears unsettled on this issue.

Insurance Co. of N. Am., 710 A.2d 82, 85 n.5 (Pa.Super. 1998); *National Union Fire Ins. Co. v. Sharon Regional Health Sys.*, 69 Pa.D.&C. 4th 374, 381 (C.P. Alleg. 2004).

Furthermore:

> "Claims made" policies permit the reporting of acts not yet in litigation. This provides additional protection for the insured, because coverage could extend to a suit not brought until long after the policy has expired, as long as the insured provides notice to the insured of potential claims. Yet this highlights the reciprocal responsibility of the insured to report all acts and occurrences that could become future claims.

See *F.D.I.C. v. St. Paul Fire and Marine Ins. Co.*, 993 F.2d 155, 158 (8th cir. 1993).

As stated above, Westport not only asserts an Exclusion B defense, but argues that under an objective standard Defendant Belott should reasonably have foreseen that the praecipe for a writ of summons and subsequent discovery requests might be the basis of a claim. (Plaintiffs argue that his conduct should be judged by a subjective standard.)

Exclusion B must be construed against the drafter (Westport) and in favor of Defendant Belott. Generally, this type of provision is meant to protect the insured, not the insurer. *Id*. However, this particular provision allows the insurer (Westport) to avoid coverage if the insured (Belott) knew or could have reasonably foreseen that some "act, error, omission, circumstance or PERSONAL INJURY might be the basis of a claim." See Westport Policy, Exclusion B. Moreover, the question of whether he should have reported the praecipe for the writ of summons and subsequent discovery requests in response to Question 11 of the renewal application is generally a question for a jury and/or factfinder.[6] However, this does not end the inquiry.

PLAINTIFFS' ARGUMENT THAT WESTPORT WAIVED THE EXCLUSION B DEFENSE.

The Exclusion B defense was raised in Westport's New Matter at ¶¶ 4 and 5. Relying upon this Court's order of March 8, 2006 (and the

[6] See *Evans v. Penn Mutual Life Insurance Company*, 186 A. 133, 137-38 (Pa. 1936) (Insured's estate sued for proceeds of life insurance policy; Insurer attempted to void insurance policy because of Insured's alleged false statements on the application. The Court ruled that whether the insured's representations true or false was a matter for a jury.); *Baldwin v. Prudential Insurance Co.*, 258 A.2d 660, 662 (Pa.Super. 1969); *Orr v. Union Fidelity Life Ins. Co.*, 198 A.2d 431, 433 (Pa.Super. 1964); *Tudor Insurance Co. v. Township of Stowe*, 697 A.2d 1010 (Pa.Super. 1997). The burden of establishing the veracity of the insured's answers on the insurance policy is on the insurer. See *Evans*, supra at 138; *Rohm & Haas Co. v. Cont'l Cas. Co.*, 781 A.2d 1172, 1179 (Pa. 2001); *Franklin Life Insurance Co. v. Francock*, 195 A.2d 874, 875 (Pa.Super. 1963). The controlling factor is the good faith of the insured. See *Evans*, supra at 139; *Baldwin*, supra at 662; *Orr*, supra at 433.

motion serving as its predicate), Plaintiffs argue that Westport cannot raise the Exclusion B defense as a summary judgment ground because prior counsel abandoned and/or waived it and any rescission remedy. See *Affidavit of James R. Fryling, Esq.*, 04/05/07.

Westport argues that it did not abandon and/or waive the Exclusion B defense but, only waived the rescission request. Instead of seeking rescission and/or cancellation of the contract, Westport now seeks to avoid defending and/or paying this particular claim. See *Mutual of Omaha Ins. Co. v. Bosses*, 237 A.2d 218 (Pa. 1968); *Affidavit of David L. Haber, Esq.*, 05/18/07.

Certain affirmative defenses must be pled as a New Matter. See Pa.R.C.P. 1030; *American Ass'n of Meat Processors v. Casualty Reciprocal Exchange*, 588 A.2d 491, 495 (Pa. 1991). Defenses not properly pleaded are waived.

> A party waives all defenses and objections which he does not present either by preliminary objection, answer or reply, except:
>
> (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits . . . .

See Pa.R.C.P. 1032(1); *American Ass'n of Meat Processors v. Casualty Reciprocal Exchange*, 588 A.2d 491, 495 (Pa. 1991).[7] Where an insurer relies on a policy exclusion as the basis for its denial of coverage and refusal to defend, the insurer has asserted an affirmative defense and, accordingly, bears the burden of proving such a defense. *Madison Construction Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 106 (Pa. 1999) (citing *Erie Ins. Exch. v. Transamerica Ins. Co.*, 533 A.2d 1363, 1366 (Pa. 1987)); see also *Miller v. Boston Ins. Co.*, 218 A.2d 275, 277 (Pa. 1966)).

In Westport's Answer and New Matter dated March 16, 2005, it stated:

> 4. Assuming, *arguendo*, coverage of the MacDonald [Plaintiffs] claim met the Insuring Agreements of Westport Policy No. PLP-225418-5, coverage for the MacDonald claim is nonetheless excluded under said Policy pursuant to Exclusion B. of the General Terms and Conditions, form COR.CPC.1691 (2/98) PA, of that Policy, which states as follows:

---

[7] Affirmative defenses include: accord and satisfaction, arbitration and award, consent, discharge in bankruptcy, duress, estoppel, failure of consideration, fair comment, fraud, illegality, immunity from suit, impossibility of performance, justification, laches, license, payment, privilege, release, res judicata, statute of frauds, statute of limitations, truth and waiver. See Pa.R.C.P. 1030.

> XIV. EXCLUSIONS
>
> This POLICY shall not apply to any CLAIM based upon, arising out of, attributable to, or directly or indirectly resulting from:
>
> B. any act, error, omission, circumstance or PERSONAL INJURY occurring prior to the effective date of this POLICY if any INSURED at the effective date knew or could have reasonably foreseen that such act, error, omission, circumstance or PERSONAL INJURY might be the basis of a CLAIM [Exclusion B];
>
> 5. Westport Policy No. PLP-225418-5 [1999-2000 policy] was procured by way of material misrepresentations made by the insured in the application for that policy, and is therefore subject to rescission.

Therefore, in its New Matter Westport requested rescission based upon two possible defenses: (1) that the praecipe for writ of summons and discovery request constituted a claim; and in the alternative, (2) that these were potential claims that Defendant Belott misrepresented and/or failed to disclose on the policy renewal application. (The Exclusion B defense).

Rescission is:

> . . . the unmaking of a contract and is not merely a termination of the rights and obligations of the parties towards each other, but is an abrogation of all rights and responsibilities of the parties towards each other from the inception of the contract.

See *Klopp v. Keystone Ins. Cos.*, 595 A.2d 1, 4 n.6 (Pa. 1991) (quoting *Metropolitan Property and Liab. Ins. Co. v. Commonwealth of Pennsylvania, Ins. Comm'r*, 509 A.2d 1346, 1348 (Pa.Cmwlth. 1986). Rescission is an equitable remedy, not a defense. See *Georgia Toy v. Metropolitan Life Ins. Co.*, 928 A.2d 186 (Pa. 2007) (J. Saylor's dissent opinion); *Lackner v. Glosser*, 892 A.2d 21, 31 fn.7 (Pa.Super. 2006).

On March 6, 2006, during oral argument, Westport's counsel orally submitted a motion to strike any "defense of rescission", as he termed it. As reflected in Attorney Haber's affidavit:

> 5. In an effort to narrow the scope of Ms. Carman's deposition, I was authorized by Westport and its counsel, Bollinger, Ruberry & Garvey, to withdraw only Westport's rescission defense pleaded in its New Matter at New Matter No. 4.
>
> 6. I did not represent to James R. Fryling, Esquire, the Court, or anyone else that Westport was withdrawing any defense other than its rescission defense.
>
> 7. I was not authorized, nor did I intend, to withdraw any defense pleaded in Westport's New Matter other than the rescission defense

at New Matter No. 4.

In effect, Westport agreed to withdraw what it called its "rescission defense", found in ¶¶ 4 and 5 of its new matter to accomplish the following: (1) limit and/or narrow discovery on depositions of Westport employees (i.e. Janice Neems Carman); and (2) expedite and/or speed the discovery process.

Based upon Westport's request, this Court issued an order on March 8, 2006 which stated:

> AND NOW, this 8th day of January [sic March], 2006, after having conducted argument on the Plaintiffs' Motion to Strike Garnishee's [Westport] Objections to Plaintiffs' Request for Production of Documents and Motion for Continuance to Complete Discovery, it is hereby ORDERED as follows:
>
> 1. The Court GRANTS Westport's motion to strike any defense of rescission in this case; and
>
> 2. Discovery shall be extended for a period of sixty (60) days in order for the parties to conduct the deposition of Janice Carmen (Neems).[1] Upon completion of the deposition, plaintiffs shall have thirty (30) days in which to file their response to Westport's Motion for Summary Judgment.
>
> BY THE COURT:
> /s/ E. DiSantis
> ERNEST J. DISANTIS, JR., JUDGE
>
> [1] The scope of the deposition will be confined to the issue of notice to Westport by Mr. Belott or any representative.

See Order, dated 03/08/06.

Waiver is the "voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed." See generally *Den-Tal-Ez, Inc. v. Siemens Capital Corp*., 566 A.2d 1214, 1223 (Pa.Super. 1989) (citing *Davison v. Klaess*, 280 N.Y. 252, 20 N.E.2d 744 (1939); *Lord Construction Co. v. Edison Portland Cement Co.*, 234 N.Y. 411, 138 N.E. 39 (1923)).

A waiver may be expressed or implied. An implied waiver exists when there is either an unexpressed intention to waive, which may be clearly inferred from the circumstances, or no such intention in fact to waive, but conduct which misleads one of the parties into a reasonable belief that a provision of the contract has been waived. See *Id*. (citing *Kiernan v. Dutchess County Mutual Ins. Co.*, 150 N.Y. 190, 44 N.E. 698 (1896); *Lord*, supra)).

Because rescission is a remedy, there must be a substantive legal theory that serves as its predicate. In this case, rescission and the Exclusion B defense are inextricably intertwined. As the Pennsylvania appellate courts have noted:

> A material misrepresentation of an existing fact confers on the party who relies on it the right to rescind whether the defendants here actually knew the truth or not, especially where, as here, they had means of knowledge from which they are bound to ascertain the truth before making the misrepresentation. Misrepresentations made under such circumstances *are* fraudulent and have been variously called implied, constructive or legal fraud or fraud in Equity . . . but even where innocently made, if material, are nevertheless grounds for rescissions . . .

See *Gilmore v. Northeast Dodge*, 420 A.2d 504, 506 (Pa-Super. 1980) (quoting *LaCourse v. Kiesel*, 77 A.2d 877 (Pa. 1951)).

At the July 23, 2007 oral argument, this Court did not believe that Plaintiffs' waiver argument was viable. However, in preparing this opinion, this Court has re-read the relevant pleadings, in particular Westport's New Matter and the affidavits of Attorneys Fryling and Haber. After so doing, it concludes that ¶¶4-5 (of the New Matter) must be read in conjunction with one another. For a discovery concession, Westport expressly waived not only its request for a rescission remedy, but its Exclusion B defense, which serves as its predicate. Westport made a tactical decision to proceed solely upon the theory that Defendant Belott failed to report his claim in a timely manner (i.e. the praecipe for writ of summons and the discovery requests). To find otherwise would be to conclude that Westport gave up nothing in order to gain the discovery concession.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND AMENDED AND ENLARGED MOTION FOR SUMMARY JUDGMENT.

Plaintiffs also argue, *inter alia*, that they should be granted summary judgment because a genuine issue of material fact does not exist as to liability (see this Court's October 18, 2006 opinion and order) and/or to damages (see Judge Anthony's September 21, 2001 order).

A genuine issue of material fact does not exist as to liability because Westport abandoned and/or waived its remaining arguments (rescission and/or Exclusion B). Furthermore, this Court previously granted summary judgment in plaintiffs' favor on the claim issue. The next question is whether Westport can challenge the damage award of $750,000.00 reflected in Judge Anthony's 9/21/01 order.

At the time of oral argument, this Court believed that the doctrine of collateral *estoppel* probably barred Westport's challenge to the amount of the judgment entered. However, upon further research and reflection,

this Court now concludes that collateral *estoppel* does not apply.

Judge Anthony's order amounted to a consent judgment between plaintiffs and defendants. Westport did not enter a consent. In *Matternas v. Stehman*, 642 A.2d 1120 (Pa. Super 1994), the Pennsylvania Superior Court stated:

> Where there has previously been rendered a final judgment on the merits by a court of competent jurisdiction, the doctrine of *res judicata* will bar any future suit on the same cause of action between the same parties. (Citation omitted.) Invocation of the doctrine of *res judicata* (claim preclusion) requires that both the former and latter suits possess the following common elements:
>
> 1. identity in the thing sued upon;
> 2. identity in the cause of action;
> 3. identity of persons and parties to the action; and,
> 4. identity of the capacity of the parties suing or being sued.
>
> (Citations omitted.)

Id. at 1123.

In the instant case *res judicata* does not apply because elements 2 - 4 are absent.

Collateral *estoppel* does not require identity of causes of actions or parties. *Id*. at 1125. While *res judicata* will bar subsequent claims that could have been litigated in the prior action, but actually were not, collateral *estoppel* will bar only those issues that actually were litigated in the prior proceeding. *Id.*; see also *Martin v. Poole*, 336 A.2d 363 (Pa. Super. 1975). As the *Matternas* Court stated: "our case law has determined that in a situation involving a consent judgment, there has been no actual litigation of issues." Id. See also Restatement (Second) Judgments, §27, cmt. (e) 1982. Because the damage amount was not actually litigated and Westport did not consent to the entry of the judgment, the doctrine of collateral *estoppel* does not apply. However, the doctrine of waiver does.

Our Courts have consistently held that: "where a claim may potentially become one which is within the scope of the policy, the insurance company's refusal to defend at the outset of the controversy is a decision it makes at its own peril." See *Gene & Harvey Builders v. Pa. Manufacturers' Assoc. Inc. Co.*, 517 A.2d 910, 918-919 (Pa. 1986); *Cadwaller v. New Amsterdam Casualty Co.*, 152 A.2d 484, 486-88 (Pa. 1959); *Pittsburgh Plate Glass Co. v. Fidelity & Casualty Co. of New York*, 281 F.2d 538, 540 (3rd Cir. 1960); *W.T. Grant Co. v. U.S.F.&G. Ins. Co.*, 421 A.2d 337, 360 (Pa. Super. 1980); *Vakasman v. Zurich Gen. Acc. & Liability Insurance Co.*, 94 A.2d 186, 188 (Pa. Super. 1953). In spite of ample opportunity to do so, Westport elected not to object to the amount of the judgment until now. Unfortunately, it did so "at its own peril". *Id*.

III. Conclusion.

Based upon the above, Westport's summary judgment motion will be denied. Plaintiffs' motion for partial summary judgment and amended and enlarged motion for summary judgment will be granted. Finally, all outstanding motions will be denied as moot.

ORDER

AND NOW, this 20th day of September 2007, for the reasons set forth in the accompanying opinion, it is hereby ORDERED that Westport's Motion for Summary Judgment is DENIED and Plaintiffs' Partial Motion for Summary Motion and Amended and Enlarged Motion for Summary Judgment are GRANTED. All other motions pending before this Court are DENIED AS MOOT.

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

TRUST OF HENRY ORTH HIRT, Settlor Trust Under Agreement Restated December 22, 1980 With Respect to Susan Hirt Hagen
No. 79 - 2006
AND
TRUST OF HENRY ORTH HIRT, Settlor
Trust Under Agreement Restated December 22, 1980
With Respect to F. W. Hirt
No. 80 - 2006

APPELLATE PROCEDURE / FINAL ORDER

An order denying Appellant's Objections to the Audit Statement and Account is not a final order as defined by statute and when Appellant did not request to certify it as a final order for appeal purposes, the criteria for PA.R.A.P. 341(b)(2) and (3) are not satisfied.

APPELLATE PROCEDURE / FINAL ORDER

An order which does not dispose of all claims of all parties is not a final order appealable under PA.R.A.P. 341(b)(1)

APPELLATE PROCEDURE / APPEALABLE ORDER

An order directed Appellant to file the appropriate action in the proper forum against all of the parties involved for discovery and/or surcharge was not a determination on the merits of Appellant's claims.

APPELLATE PROCEDURE / WAIVER

Where Appellant failed to preserve an Objection to the Audit Statement and Account, Appellant has waived appellate review.

APPELLATE PROCEDURE / WAIVER

When an appellant fails to adequately identify in a concise manner the issues sought to be pursued on appeal, the trial court is impeded in his presentation of his legal analysis which is pertinent to those issues.

CIVIL PROCEDURE

Appellant is not entitled to an evidentiary hearing and/or a trial for Objections raised to an Audit Statement and Account where Appellant was afforded an opportunity to file written pleadings and present oral argument and the Court has before it eight years worth of litigation record.

TRUSTS / RIGHTS OF BENEFICIARIES

Appellant's present attempt to seek further discovery solely on the basis of her status as a contingent beneficiary without establishing any relevance to the Audit Statement and Account is frivolous.

TRUSTS

Appellant may not draw a Trustee into litigation and then complain when said Trustee incurs legal fees to defend that litigation, especially when the Trustee's actions were affirmed.

APPELLATE PROCEDURE

Where Appellant has never filed a substantive objection to expenses incurred by Trustee, there is nothing to review on appeal.

TRUSTS / TRUSTEE POWERS

Where the corporate trustee is not involved in the direct or daily management of Erie Indemnity Company or Erie Insurance Exchange, it is unacceptable for Appellant to seek surcharge solely against the corporate trustee of the Trust for alleged mismanagement of the Company.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHAN'S COURT DIVISION Nos. 79 - 2006 and 80 - 2006

Appearances: Nicholas M. Centrella, Esq.,
Alfred W. Putnam, Jr., Esq.,

OPINION

Cunningham, William R., J.

The present appeal has its genesis in litigation which erupted in the spring of 1998 between Appellant's father and Appellant's aunt. There followed a protracted series of legal and familial disputes at Docket Numbers 100 and 101 of 1998. This Court has presided over all of the litigation and has written extensively about these matters. Incorporated herein and attached hereto are the salient Opinions authored during the course of the Hirt family differences. Only a brief historical update is necessary.

As the key founder of Erie Insurance Exchange, H.O. Hirt was a majority stockholder of the Erie Indemnity Company, a corporation which serves as the attorney-in-fact for the Erie Insurance Exchange. At the time of his death, H. O. Hirt owned 76.22 percent of the voting stock (Class B) of Erie Indemnity Company. Mr. Hirt placed all of the Class B stock into trusts created for the benefit of his two children, F. W. Hirt and Susan Hirt Hagen.

These two trusts are similar in terms and are administered by the same three trustees (hereinafter the trusts are collectively referred to as the Hirt Trust). Any decision on behalf of the Hirt Trust requires the consent of two of the three trustees.[1] The primary responsibility of the Hirt Trustees is to vote the shares of Class B stock in the election of members to the Board of Directors of Erie Indemnity Company.

H.O. Hirt appointed Mellon Bank as the corporate trustee. He also appointed his two children, F. W. Hirt and Susan Hirt Hagen as individual trustees.[2] These three trustees served from the time of H. O. Hirt's death

[1] There are a number of situations requiring the assent of the corporate trustee. See e.g., Article 4.04 and Article 5.01 of the Hirt Trust.

[2] F. W. Hirt passed away on July 13,2007. He was replaced as an individual trustee by Elizabeth Vorsheck.

in 1982 until the spring of 1998 when Susan Hirt Hagen instituted legal action challenging Mellon Bank's ability to continue as a corporate trustee based on an alleged conflict of interest since Mellon Bank had entered the insurance marketplace.

Shortly thereafter, Mellon Bank resigned as corporate trustee and was replaced by Bankers Trust Company of New York. Within months, Bankers Trust became Deutsche Bank Trust Company of New York (hereinafter Deutsche Bank). Because of its insurance activities in Europe, Deutsche Bank tendered its resignation as corporate trustee in 1999. This resignation was accepted effective upon the appointment of a successor.

The road to the appointment of a successor corporate trustee was longer than expected. For reasons explained in the accompanying Opinions, Sentinel Trust Company was not appointed as a corporate trustee until December, 2005.

On April 21, 2006, Deutsche Bank filed its Audit Statement and Account. After receiving an extension of time, in June, 2006, Appellant filed Objections to the Audit Statement and Account of Deutsche Bank. On August 8, 2006, Deutsche Bank filed an Answer and New Matter to Appellant's Objections. Appellant filed a Reply to New Matter on August 23, 2006. The parties presented oral argument about these Objections on October 27, 2006.

Appellant's only Objection arguably related to the Audit Statement and Account was a concern about the legal fees and professional services. Appellant asked for the documents explaining these two expenditures. By Order dated November 14, 2006, Deutsche Bank was ordered to provide Appellant with detailed copies of the legal bills and professional services listed in the Audit Statement and Account. All other Objections were dismissed without prejudice to seek relief in the proper forum against the appropriate parties.

Thereafter, Appellant filed a Notice of Appeal and a Concise Statement of Matters Complained of on Appeal. Appellant alleges it was error to deny her "Request for Information and Discovery regarding Deutsche Bank Trust Company's administration of the Trust" and her "Petition for Surcharge without discovery or an evidentiary hearing." Concise Statement of Matters Complained of on Appeal, Paragraphs 2(a) and (b).

Appellant's contentions are without a basis for appellate relief for at least the following reasons.

THE ORDER OF NOVEMBER 14, 2006 WAS NOT A FINAL, APPEALABLE ORDER

A party can take an appeal as of right from any final order of a lower court. See Pa.R.A.P. 341(a). A final order is defined as "any order that: (1) disposes of all claims and of all parties; or (2) is expressly defined as a final order by statute; or (3) is entered as a

final order pursuant to Subdivision C of this Rule." Pa.R.A.P. 341(b).

In the case *sub judice*, the Order of November 14, 2006 is not a final, appealable order. This Order simply denied Appellant's Objections to the Audit Statement and Account filed by Deutsche Bank. Such an order is not a final order as defined by statute nor was there a request by Appellant to certify it as a final order for appeal purposes. Hence, the criteria in Pa.R.A.P. 341(b)(2)(3) are not satisfied.

Likewise, the criteria for a final order is not met under subsection (1) because the Order did not dispose off all claims and of all parties. The denial of Appellant's Objections merely meant that Appellant had not presented any meritorious objection(s) to the listed expenditures of Deutsche Bank.

As will be more fully discussed, the only Objection by Appellant relating to the expenses of Deutsche Bank was a request for an explanation of the attorneys fees and professional services to determine whether any further objection was warranted. Despite its reservations, Deutsche Bank provided Appellant with documents supporting the listed expenditures for attorneys fees and professional services. At no time thereafter has Appellant filed a substantive challenge to the attorneys fees and professional services listed in the Audit Statement and Account.

Hence, there was nothing before this Court or on appeal in the form of a substantive challenge to the expenses listed in the Audit Statement and Account. As a result, the November 14, 2006 Order could not finally dispose of a claim that either does not exist or was not asserted.

On appeal, Appellant has not presented any argument that the Order of November 14, 2006 dismissed any of her substantive Objections to the Audit Statement and Account. Instead, Appellant alleges it was error to deny her request for discovery and her Petition for Surcharge without an evidentiary hearing or a trial. These procedural claims widely miss the mark and do not render the November 14, 2006 Order a final, appealable order.

Appellant's request for discovery and the Petition for Surcharge are completely disconnected to any objection to the expenditures listed in the Audit Statement and Account. By her own admission, Appellant's discovery request focuses on the communications between the Hirt Trustees and the Board of Directors and management of Erie Indemnity Company. These communications have nothing to do with the expenditures listed in the Audit Statement and Account of Deutsche Bank. Appellant's concerns are with the management of Erie Indemnity Company and not the Hirt Trust.

Similarly, Appellant's allegations of mismanagement by Erie Indemnity Company and the damages she seeks in the form of a surcharge are wholly unrelated to the expenditures listed in the Audit Statement and Account. Indeed, Appellant could be granted the relief she sought in the

form of discovery and the surcharge damages and such a result would still not affect the Audit Statement and Account as filed by Deutsche Bank on April 21, 2006.

Importantly, the Order of November 14, 2006 did not dismiss any claim Appellant may have for discovery and/or a surcharge. Instead, Appellant was simply directed to file the appropriate action in the proper forum against all of the parties involved. Nothing in the Order of November 14, 2006 was a determination on the merits of Appellant's claims.

In addition, there are indispensable parties missing from this proceeding. Glaringly absent are the two individual trustees. As Appellant knows, any action on behalf of the Hirt Trust requires the agreement of at least two of the trustees. The corporate trustee action alone cannot take any action adverse to the Hirt Trust. All of the mismanagement conduct Appellant alleges required the participation and consent of at least one individual trustee. Therefore, Appellant's claims about the improper administration of the Hirt Trust would require joinder of the individual trustees and indispensable parties.

Other parties affected by Appellant's surcharge request are the Board of Directors and management of Erie Indemnity Company. Any claims by or against these entities were not disposed of by the November 14, 2006 Order. Hence, not all of the players are at the table nor are all of the claims against all of the relevant parties disposed of by the Order under appeal.

In sum, this is a hollow appeal. There are no substantive issues before the Court. Appellant has not filed any Objection relating to the expenditures listed in the Audit Statement and Account. The Order under appeal did not dismiss or address the merits of any claim Appellant has for surcharge damages. Appellant remains free to file an action seeking the surcharge damages, which action would allow the pleading and discovery process to fully occur prior to a trial.

APPELLANT HAS WAIVED APPELLATE REVIEW BY FAILING TO PRESERVE A SUBSTANTIVE CHALLENGE TO THE AUDIT STATEMENT AND ACCOUNT

Assuming arguendo the November 14, 2006 Order is a final, appealable order, Appellant has waived appellate review by failing to preserve an Objection to the Audit Statement and Account of Deutsche Bank. Appellant has yet to raise any substantive challenge to the expenditures listed in the Audit Statement and Account. Appellant's only claims on appeal are procedural and relate to the alleged mismanagement of Erie Indemnity Company. Appellant has remedies for her procedural claims readily available at the trial court level.

Therefore, Appellant has waived any substantive challenge to the Audit Statement and Account of Deutsche Bank.

APPELLATE REVIEW IS WAIVED BY FAILING TO

ARTICULATE AN ARGUMENT

The allegations contained within Appellant's Concise Statement of Matters Complained of on Appeal are largely boilerplate and do not identify any error which needs to be addressed on appeal. As the Superior Court has held, "when an appellant fails to adequately identify in a concise manner the issues sought to be pursued on appeal, the trial court is impeded in his presentation of his legal analysis which is pertinent to those issues." *In Re Estate of Daubert*, 757 A.2d 962 (Pa. Super. 2000).

Other than generally alleging error, Appellant has failed to specify how there was error or otherwise elucidated an argument entitling her to appellate relief. Because Appellant's Concise Statement of Matters is deficient, appellate review has been waived.

APPELLANT LACKS STANDING TO OBJECT

At the time the Audit Statement and Account was filed. Appellant was not entitled to receive any current income from the Hirt Trust. During the time that Deutsche Bank served as corporate trustee the income beneficiaries were Appellant's father and her aunt. As required by Article 3.01(a)(1) of the Hirt Trust, all of the net income from the Hirt Trust was distributed annually to the income beneficiaries,

Hence, to the extent any relief would be afforded by virtue of Appellant's Objections, such relief would go to the income beneficiaries and not to Appellant. Therefore, Appellant lacks standing to object to the Audit Statement and Account filed by Deutsche Bank.

APPELLANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING

Appellant cannot cite any legal authority for the proposition that she is entitled to an evidentiary hearing and/or a trial for Objections raised to an Audit Statement and Account. Appellant was afforded an opportunity to file written pleadings and present oral argument. There was also before this Court eight years worth of a litigation record. As a result, the record was more than sufficient to address Appellant's Objections.

APPELLANT'S OBJECTIONS

Appellant's pleading as filed on June 19, 2006 was titled "Objections to the Audit Statement and Account filed by Deutsche Bank and Petition to Surcharge." This title is misleading since almost all of the Objections are unrelated to the Audit Statement and Account. Each of Appellant's four Objections as titled will now be reviewed seriatim.

OBJECTION 1
"REQUEST FOR INFORMATION AND DOCUMENTS"

By its very title, it is clear this is not an objection. Instead, Appellant was attempting to relitigate discovery matters from Docket Numbers 100 and 101 of 1998 which had been resolved in 2000 through 2002.

By way of this purported Objection, Appellant was seeking

"full disclosure by Deutsche Bank of all documents relating to the administration of the Trust and concerning her rights in the Trust." *See* Paragraph 4. Appellant overlooks the fact that by Order dated August 20, 2001 Appellant was given complete access to all non-privileged documents in the possession of Deutsche Bank. In fact, Appellant had six years to review these documents.

In addition, Appellant had six years to engage in discovery as part of the ongoing litigation between the parties. Hence, Appellant had an extended, open-ended opportunity to access all relevant information needed from the files of Deutsche Bank.

Also, Appellant was given an extension of time to file Objections to the Audit Statement and Account. Appellant's present attempt to seek further discovery solely on the basis of her status as a contingent beneficiary without establishing any relevancy to the Audit Statement and Account is frivolous.

On appeal, Appellant ignores the fact the Order of November 14, 2006 required Deutsche Bank to provide the documents substantiating the payment of the legal fees and professional services. Thus, Appellant was given access to all of the information relevant to any of her expressed concerns about the Audit Statement and Account.

Appellant's Objection was not made in good faith. The object was not to question the expenses set forth in the Audit Statement and Account of Deutsche Bank. Instead, the purpose was to perpetuate disputes which have been decided as a matter of law or in the corporate offices of Erie Indemnity Company. There is no information to be discovered that could change past legal decisions or the results of the elections of the Board of Directors. Nor is there any further discovery necessary relating to the Audit Statement and Account of Deutsche Bank.

OBJECTION II

"OBJECTIONS TO REIMBURSEMENTS FOR CERTAIN ATTORNEYS FEES PAID"

Appellant's initial objection was that the legal bills were not itemized so she could not determine whether the fees were reimbursable from the Hirt Trust. This was a fair request and Appellant's relief was granted by the Order of November 14, 2006.

Appellant went on to argue Deutsche Bank should not be reimbursed for "attorneys fees incurred for its own self interest, or which were against the interest of the trust or their beneficiaries". This argument is not supported by the facts.

Deutsche Bank served as corporate trustee during a turbulent time because of the heated disputes among the descendants of H. O. Hirt. There were also differences of opinions between the Hirt Trustees and the management/Board of Erie Indemnity Company.

There were a host of public disagreements within Appellant's family.

Appellant's mother filed documents in which she publicly disagreed with her husband's position. Appellant filed documents in which she publicly disagreed with her father's position. Meanwhile, Appellant's sibling filed documents disagreeing with their mother and with Appellant.

As this Court has previously written, "the first generation brother disagrees with the first generation sister. The second generation of siblings disagree. The 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." *See* Opinion of December 21, 2005, at page 13.

During its years of service as corporate trustee, Deutsche Bank was frequently placed in a position adversarial to each of the individual trustees, the Board of Directors and/or management of Erie Indemnity Company and several of the beneficiaries of the Hirt Trust. Most of the time Deutsche Bank was drawn into the fray based on legal action initiated by the individual trustees and/or Appellant.

Having presided over the entirety of these matters, this Court finds that Deutsche Bank did not incur attorneys fees "for its own self interest, or which were against the interest of the Trust or their beneficiaries." To the contrary, particularly as it related to the ability of the Hirt Trust to nominate members of the Board of Directors, Deutsche Bank at all times was acting in the best interest of the Hirt Trust.

There was no need for an evidentiary hearing to make this determination since the litigation record speaks for itself. Further, it is vexatious for Appellant to draw Deutsche Bank into litigation and then complain when Deutsche Bank incurs legal fees to defend that litigation, especially when the bank's actions were affirmed.

Notably, neither of the individual trustees, who as income beneficiaries of the Hirt Trust are the ones financially affected, objected to these attorney fees.

OBJECTION III
"OBJECTIONS TO REIMBURSEMENTS FOR OTHER PROFESSIONAL EXPENSES"

Appellant "objects to these disbursements because she has no basis to evaluate whether the services rendered were necessary for the administration of the Trust". *See* Paragraph 24. Appellant made a valid point, which is why the Order of November 14, 2006, provided Appellant with an explanation for the payment of the professional expenses incurred by Deutsche Bank. Appellant has since made no substantive objection to the professional expenses.

In fact, Appellant has never filed a substantive objection to these expenses. As such, there is nothing to review on appeal.

Additionally, because of the years of strained litigation, it is not unreasonable to expect a corporate trustee to incur professional expenses in the listed amount. Also considered was the fact neither of the income

beneficiaries challenged the payment of these expenses.

OBJECTION IV
"OBJECTION IN THE NATURE OF A PETITION FOR A SURCHARGE"

In this Objection, Appellant sets forth a litany of complaints about the Erie Indemnity Company. Appellant argues Deutsche Bank "...elected directors who were incompetent and who permitted the mismanagement by the officers of the company." *See* Paragraph 54. Appellant argues that Erie Indemnity Company suffered a loss of policyholder surplus during the time Deutsche Bank served as corporate trustee which loss "was caused by: (a) the mismanagement of the investment portfolio of the Surplus of the Exchange; (b) the failure of management to implement proper computer software to efficiently write and manage the policies for the Exchange; and (c) lack of oversight of claims resulting in a punitive damage award against the Company and loss of confidence in the Company." *See* Paragraph 56.

As damages, Appellant sought a surcharge against Deutsche Bank for:

> ". . . the loss of surplus in the amount of at least 2.64 Billion; the loss of income to the H.O. Hirt Trust as a result of the reduced earning capacity of the Erie Indemnity Company and its dividend-paying capacity due to the loss in Policyholder Surplus; and the cost of the In formation Technology System that was abandoned in 2006 because it failed to perform as expected. The cost of the failed system exceeds several hundreds of millions of dollars, most of which was charged to the Erie Insurance Exchange in violation of the Subscribers Agreement. In addition, Deutsche Bank should be surcharged for the devaluation of the H. O. Hirt Trust as a result of the Funding Plan that essentially eliminates the "control premium value" of each share of Class B stock that is sold or converted to Class A shares for the payment of Trustees fees."

See Paragraph 63.

There was no need to hold an evidentiary hearing to deny this Objection. None of this Objection relates to the items listed in the Audit Statement and Account. Rather, the entire focus is on matters unrelated to the Audit Statement and Account. Indeed, the relief sought is not related to the Audit Statement and Account.

Appellant argues that a surcharge is warranted in part because Deutsche Bank has eliminated the "control premium value" of a share of Class B stock. However, the need for the Funding Plan that put in place the possible sale of Class B stock was the result of the litigation brought by members of the Hirt family. During the height of the family war, when there was no

end in sight, it became apparent the fees incurred by the corporate trustee could exceed the annual income of the Hirt Trust. Accordingly, a funding plan had to be developed to provide a mechanism to pay the corporate trustee in the event the fees exceeded the income of the Hirt Trust.

Appellant objected to the Funding Plan as developed and agreed upon by the individual trustees. The Funding Plan was ultimately approved by this Court and affirmed by the Superior Court in response to Appellant's appeal.[3]

Appellant's present attempt to blame the corporate trustee for the Funding Plan is unfortunate. Had the Hirt family been able to amicably resolve their differences, there would have been no need for a funding plan.

As the present record also reflects, during the time Deutsche Bank served as corporate trustee, none of the Class B shares of stock had to be sold pursuant to the Funding Plan. Further, the Funding Plan as approved did not permit the sale of any Class B stock that would leave the Hirt Trust with less than 51% of the voting stock. *See* Paragraph 28 of the May 17, 2002 Opinion. Thus, Appellant's argument is built on several premises Appellant knows to be false. Appellant's attempt to perpetuate this dispute under the guise of an Objection to an Audit Statement and Account is not done in good faith.

The surcharge request is also based on the faulty premise that Deutsche Bank is solely responsible for the damages Appellant claims. Deutsche Bank alone cannot cause the damages alleged. Deutsche Bank did not elect the Board members of Erie Indemnity Company. Instead, two or three of the Hirt Trustees cast the votes.

Another fundamental problem with Appellant's surcharge demand is the limited role of the trustees vis-à-vis the damages claimed by Appellant. It is the Board of Directors of Erie Indemnity Company who is broadly responsible for the governance of the company. The corporate trustee of the Hirt Trust is not involved in the direct or daily management of the Erie Indemnity Company or Erie Insurance Exchange. Therefore it was unacceptable for Appellant to file what purports to be an Objection to an Audit Statement and Account seeking a surcharge solely against the corporate trustee of the Hirt Trust for the alleged mismanagement of the Erie Indemnity Company.

Appellant’s claims have nothing to do with the expenses reported in the Audit Statement and Account. Further, the denial of the Petition for Surcharge was without prejudice to Appellant to file the appropriate action against all of the involved parties in the correct forum. There was no need to hold an evidentiary hearing to reach this legal conclusion.

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[3] See this Court's Opinion dated May 17, 2002 and the Superior Court Opinion dated August 7, 2003.

CONCLUSION

The present appeal is not about any objection to the Audit Statement and Account of Deutsche Bank. Appellant has yet to tender a substantive objection to any of the listed expenses. Instead, this appeal is a misguided attempt to keep the fires fanned in disputes that have been resolved in a judicial setting or in the cooperate offices of Erie Indemnity Company.

This appeal is not from a final, appealable order. If it is, Appellant has not preserved any substantive claim for appellate review. Appellant has also failed to preserve appellate review by filing a vague Concise Statement of Matters Complained of on Appeal.

Appellant lacks standing to pursue her Objections since she is not entitled to any income from the Hirt Trust during the time Deutsche Bank served as corporate trustee. Further, Appellant has failed to cite any legal authority entitling her to an evidentiary hearing or trial on her Objections. Appellant was afforded an opportunity to plead and argue her Objections, which could be addressed based on the long history of the case without the need for further evidentiary hearings.

At all times Deutsche Bank was acting in the best interest of the Hirt Trust. The legal fees and professional expenses listed in the Audit Statement and Account were consistent with the proper discharge of Deutsche Bank's fiduciary duties.

Appellant's Objections are without merit and were not presented in good faith. Appellant remains free to pursue her claims about the mismanagement of Erie Indemnity Company in the appropriate forum with full discovery and a trial.

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

REBA SYKES, Plaintiff

v.

STATE FARM INSURANCE, Defendant

PARTIES / DEFECTS, OBJECTIONS AND AMENDMENT / AMENDMENT OF DEFECTS/IN GENERAL

Generally, a party "may at any time change the form of action, correct the name of a party or amend his pleading" either with the written consent of the adverse party or leave of Court.

PARTIES / DEFECTS, OBJECTIONS AND AMENDMENT / AMENDMENT OF DEFECTS

Amendments can occur after the expiration of the statute of limitations provided it is simply changing the designation or identity of a party timely sued…a party cannot amend a pleading to add a new party after the statute of limitations has run.

LIMITATION OF ACTIONS / DEFECTS AS TO PARTIES

A substitution of a party after the statute of limitations can occur when the "same assets" are exposed to judgment before and after the amendment.

LIMITATION OF ACTIONS / DEFECTS AS TO PARTIES

An amendment can occur after the statute of limitations to change the caption to…clarify a technical defect in the identity of a named defendant which was not denied or disputed by the opposing party.

PARTIES / DEFECTS, OBJECTIONS, AND AMENDMENT / AMENDMENT OF DEFECTS / IN GENERAL

It is the caption of the case which controls and not the body of the complaint. A reference to an entity in the body of a complaint is not sufficient to make that entity a party to the lawsuit.

PARTIES / DEFECTS, OBJECTIONS, AND AMENDMENT / AMENDMENT OF DEFECTS / MISNOMER OR MISDESCRIPTION IN GENERAL

The proper inquiry is whether the Defendant was sued under a wrong designation or whether the wrong party was sued.

LIMITATION OF ACTIONS / OPERATION AND EFFECT OF BAR BY LIMITATION / OPERATION AS TO RIGHTS OR REMEDIES IN GENERAL

Prejudice is not an issue in determining whether a complaint is barred by the statute of limitations.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA No. 11824 - 2007

Appearances: Marcia H. Haller, Esq., for State Farm Insurance
Richard T. Ruth, Esq., for Reba Sykes

OPINION

Cunningham, William R., J.

The present matter is the Plaintiff's Motion to Amend the Caption After Expiration of Statute of Limitations. Because the Plaintiff's request would require the addition of a new party after the expiration of the statute of limitations, the Motion must be denied.

On May 30, 2005, the Plaintiff was in a motor vehicle accident. With the statute of limitations about to expire, on May 2, 2007 the Plaintiff on a pro se basis filed a document in letterform with the Prothonotary of Erie County. This handwritten document is treated as a pleading which contained the above caption.

Consistent with the caption, the Plaintiff had a Writ of Summons issued against State Farm Insurance and instructed the Sheriff of Erie County to serve it. On May 14, 2007, the Sheriff of Delaware County served State Farm Insurance with the Summons.

An appearance was entered on behalf of State Farm Insurance on June 1, 2007 by Attorney Marcia Haller. A Rule to File Complaint was served on the Plaintiff on June 5, 2007. In response, the Plaintiff, through Attorney Richard T. Ruth, filed the present Motion to Amend Caption After Expiration of Statute of Limitations. The parties have now briefed and argued this Motion.

Generally, a party "may at any time change the form of action, correct the name of a party or amend his pleading" either with the written consent of the adverse party or leave of Court. *See* Pa.R.C.P. No. 1033. Amendments can occur after the expiration of the statute of the limitations provided it is simply changing the designation or identity of a party timely sued. However, a party cannot amend a pleading to add a new party after the statute of limitations has run. *Claudio v. Dean Machine Company*, 831 A.2d 140 (Pa. 2003).

In the present case, the Plaintiff seeks leave to add as a defendant an individual identified as Paul Montag. The Plaintiff asserts that Montag was not originally named as a defendant because she did not know his address. The Plaintiff claims she contacted State Farm Insurance Company but was informed Montag's address would not be provided to her. In its written response, State Farm states it has no record of receiving a telephone inquiry from Plaintiff regarding the address of Paul Montag. Giving the Plaintiff the benefit of assuming she called State Farm Insurance and was not provided with the address of Paul Montag, these facts do not excuse her failure to name Montag as a defendant within the statute of limitations.

The Plaintiff was aware of the existence of Paul Montag as evidenced by her inquiry to State Farm Insurance. Further, in her document filed with the Prothonotary on May 2, 2007 she identified the person insured by State Farm as Paul Montag. Plaintiff had two years to ascertain the address of Paul Montag through a plethora of accessible resources,

including the accident report, the Internet and public records.

Plaintiff utilizes the recent case of *Piehl v. City of Philadelphia*, 2007 W.L. 214 1554 (Pa. Commw. 2007) to argue that a substitution of a party after the statute of limitations can occur when the "same assets" are exposed to judgment before and after the amendment. Plaintiff contends the naming of State Farm as a Defendant is sufficient to bring in its insured Paul Montag as a party. These contentions are unavailing.

The "same assets" argument was rejected by the Pennsylvania Supreme Court in *Tork-Hiis v. Commonwealth of Pennsylvania*, 735 A.2d 1256 (Pa. 1999). This argument is also inapplicable to this case. While State Farm as the insurer may provide assets to cover Plaintiff's claims, these assets are different from those of Paul Montag. If there is not sufficient coverage under Montag's policy with State Farm, then Montag's separate assets would be required. In short, State Farm and Paul Montag do not possess the same assets to respond to Plaintiff's claims.

Plaintiff's reliance on *Piehl* is misplaced for another reason. In *Piehl*, the issue was whether an amendment could occur after the statute of limitations to change the caption to identify the correct agency within the Commonwealth of Pennsylvania. Originally, the Plaintiff in *Piehl* captioned as a Defendant the City of Philadelphia and the Commonwealth of Pennsylvania. In the body of the Complaint, the Commonwealth was further identified as the "Commonwealth of Pennsylvania Department of Transportation". In the Answer filed by the Attorney General's office, there was no denial of the allegations identifying the Defendant as the Department of Transportation. Based on these facts, the Commonwealth Court allowed the amendment since it was a clarification of a technical defect in the identity of a named defendant which was not denied or disputed by the Defendant.

By contrast in the instant case, the Plaintiff is not correcting a technical defect in the identification of a defendant. Paul Montag is not an entity within the umbrella of State Farm as PennDot is to the Commonwealth of Pennsylvania. Obviously Paul Montag is an individual separate and apart from State Farm Insurance.

A case more on point is *Glover v. SEPTA*, 794 A.2d 410 (Pa. Cmwlth. 2002). The plaintiff in Glover named as defendants in a civil complaint the "Commonwealth of Pennsylvania Attorney General's Office, SEPTA and the City of Philadelphia". In the body of the complaint, the plaintiff at one point described the Commonwealth as "Commonwealth, Department of Transportation ("PennDot")". In responding to a Motion for Judgment on the Pleadings filed by PennDot, the Plaintiff argued PennDot was identified in the body of the complaint and therefore was a party to the lawsuit.

This argument was rejected by the Commonwealth Court because it is the caption of the case which controls and not the body of the complaint.

Glover, 794 A.2d at 415. Further, a reference to an entity in the body of a complaint is not sufficient to make that entity a party to the lawsuit. *Id*.

In the case *sub judice,* Paul Montag is not identified in the caption of the case even though Plaintiff knew of his existence prior to seeking a Writ of Summons. The Plaintiff's reference to Paul Montag in the body of her pleading is not sufficient to make him a party to the lawsuit. This is particularly true when the Plaintiff never sought service of the Summons on Paul Montag.

According to the Pennsylvania Supreme Court, the proper inquiry is whether the Defendant was sued under a wrong designation or whether the wrong party was sued. *Tork-Hiis, supra*. Here, the wrong party was sued. This is not a situation where the Plaintiff is seeking to correct the spelling of a defendant's name or properly identify the defendant.

The Plaintiff's final argument is the Motion to Amend should be granted because the Defendants have not suffered any prejudice. However, in the case of Paul Montag, being served with a lawsuit after the expiration of the statute of limitations is prejudicial. Further, the Commonwealth Court has held that prejudice is not an issue in determining whether a complaint is barred by the statute of limitations. *Glover,* 794 A.2d at 414 n.6 *citing Vetenshtein ex rel. Verenshein v. City of Philadelphia*, 755 A.2d 62 (Pa. Cmwlth. 2000).

CONCLUSION

While this Court is empathic with the Plaintiff's plight as a pro se litigant, she has nonetheless failed to sue a party whose identity she knew well within the applicable statute of limitation.

This is not a case where the right party was sued under the wrong name or designation. Instead, Plaintiff is seeking the addition of a new party to the lawsuit after the expiration of the statute of limitations. As such, the Motion to Amend Caption must be denied.

ORDER

For the reasons set forth in the accompanying Opinion, the Motion to Amend Complaint After Expiration of Statute of Limitations is hereby **DENIED.**

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

GLENN L. MacDONALD and MAUREEN L. MacDONALD, his wife, Plaintiffs

v.

PETER J. BELOTT, JR., ESQUIRE and THE BELOTT LAW FIRM, Defendants

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Garnishment is a Civil action governed by Pa. R.C.P. 3101 et. seq., and there is no reason why it is not subject to a motion for summary judgment.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

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

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

In this case the summary judgement issue involves a matter of law, i.e. an interpretation of the insurance contracts.

INSURANCE / NOTICE/NOTICE OF CLAIM

A writ of summons did not meet the definition of a claim under the specific language of the insurance contract which defined a claim as a demand for loss and further defined loss as not including any form of non-monetary relief.

Editor's Note: This 2006 opinion is being printed by request to provide readers with a better understanding of the opinion that was published in the Oct. 12, 2007 issue of the Erie County Legal Journal.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 14570-1998

Appearances: Andrew J. Conner, Esq. for the Plaintiffs
James R. Schadel, Esq., for Westport
Beth Ann Berger Zerman, Esq. for Westport

OPINION AND ORDER

DiSantis, Ernest J., Jr., J.

This case comes before the Court on Garnishee's, Westport Insurance Corporation ("Westport") motion for summary judgment. Plaintiffs, (also Garnishors) Glenn L. and Maureen L. MacDonald, have filed a brief in opposition. Both parties filed supplemental responses.

I. <u>BACKGROUND OF THE CASE</u>

In a Complaint filed July 16, 1999, Plaintiff brought this action against their former legal counsel, Peter J. Belott, Jr. and the Belott Law Firm. Between November 1, 1990 and March 6, 1998, Belott represented Plaintiffs in a personal injury claim arising out of a December 6, 1988, two vehicle automobile collision that occurred at 12th & Sassafras Streets in Erie, Pennsylvania. Belott also agreed to represent Plaintiff regarding any workers compensation and underinsured motorist (UlM) claims.

In January 1993 Plaintiffs recovered the policy limits ($50,000) from the other driver's (an employee of Hallman Brothers Chevrolet) insurance carrier. After their recovery, Belott had numerous written and oral communications with Erie Insurance Exchange ("Erie"). (Erie provided Hallman with $ 1 million of UIM coverage). After his review Belott did not make a UIM claim against Erie Insurance because he concluded Plaintiffs were limited to a workers compensation claim. It appears that the statute of limitations expired on Plaintiff's UIM claim four years after the January 1993 settlement of the initial claim.

On March 16, 1998, Belott's representation of Plaintiffs terminated. Subsequently, Plaintiffs wanted to obtain the case file. At some point they concluded that the most expeditious procedure for them to do so was to file a praecipe for writ of summons naming Belott as a defendant. Once they did so, they could employ a subpoena or use a Pa.R.Civ.P. 4009.1 request to obtain all files including Erie's.[1]

On December 15, 1998, a praecipe for the issuance of a writ of summons on behalf of Plaintiffs was filed at this docket number. The Praecipe read "TO THE PROTHONOTARY: Please issue a Writ of Summons-Civil Action in the above-captioned matter and forward it to the Sheriff's Office for service upon the Defendants." The writ of summons issued by the Prothonotary Office in response to that Praecipe stated that: "You are hereby notified that the above-named Plaintiffs have commenced an action against you". No claim for monetary relief was made in either the praecipe or the summons.

It is undisputed that Belott interpreted the January 11, 1999 summons as a request by Plaintiffs' new counsel to obtain a copy of his file. Belott did not treat the writ as a "claim" that he was required to report to his professional liability insurance carrier.[2] Therefore, he did not report it.

On February 18, 1999, Plaintiffs filed a Pa.R.Civ.P. 4009 request for Belott's documents. Belott did not file a response.

On May 27, 1999, Plaintiff's counsel filed a motion under Pa.R.Civ.P. 4009.1 requesting a court order to compel Belott to produce the requested documents. On May 27, 1999 Honorable Fred P. Anthony, formerly of this Court, issued an order directing Belott to produce the documents in response to that motion. On July 16, 1999 a claim containing a demand for loss against Belott was made. Belott promptly reported this event to the carrier.

[1] Plaintiffs requested that Michael Cauley, Esquire, review this matter. Attorney Cauley requested that Belott produce a copy of his file. Belott did so. Thereafter, Plaintiffs retained the law firm of Conner, Riley & Fryling to evaluate what claims, if any, Plaintiffs might have. No legal action was filed as a result of these actions.

[2] From May 6, 1998 through May 6, 1999, Belott's professional liability carrier was a GE Subsidiary, Coregis Insurance Company ("Coregis"). From May 6, 1999 through May 6, 2000, Belott's professional liability insurance carrier was the garnishee, Westport. In February 1999, Westport acquired Coregis assets and liabilities.

On August 31, 1999, Belott filed and served responses to plaintiffs' request for documents in response to Judge Anthony's May 27th Order. On September 1, 1999 Plaintiffs' counsel sent a letter to Mr. Al McLaughlin, Westport's claim manager, enclosing copies of all the relevant documents.[3] On September 8, 1999 Westport assigned the claim to Ms. Janice Carman. During her investigation, she had two telephone conversations with Belott. He reportedly told her that he perceived the purpose of the December 15, 1998 writ as a procedural step to obtain Belott's MacDonald file. (Carman, p. 110, line 16 through p. 111, line 9; p. 128 lines 2-7; p. 163, lines 7-11).

On September 16, 1999, she sent a letter to Belott denying $500,000 of liability coverage under the Westport policy (Carman Depo., 57, lines 23-24) because he did not report service of the writ.

THE INSURANCE POLICIES

Westport provided professional liability coverage under policy PLP-223430-4 to Belott for the period May 6, 1998 to May 6, 1999. The relevant form (COR.CPC1692 (3/97) PA, stated:

I. INSURING AGREEMENTS

A. The Company shall pay on behalf of the INSURED all LOSS in excess of the deductible which any INSURED becomes legally obligated to pay as a result of CLAIMS first made against any INSURED during the POLICY PERIOD and reported to the Company in writing during the POLICY PERIOD or within sixty (60) days thereafter, by reason of any WRONGFUL ACT occurring on or after the RETROACTIVE DATE, if any:....

Westport also provided Belott customized practice coverage under policy number PLP 225418-5 for the period May 6, 1999 to May 6, 2000. The relevant Coregis and Westport professional liability policies have the same definition for the term "claim". They provide:

"XV. DEFINITIONS

A. 'CLAIM MEANS a demand made upon any INSURED for LOSS, as defined in each of the attached COVERAGE UNITS, including, but not limited to, service of suit or institution of arbitration proceedings or administrative proceedings against any INSURED;..."

(See page 6 of Coregis and Westport policies.)

[3] Those documents included the December 15, 1998 Praecipe for Writ of Summons, the May 27, 1999 Order to produce documents, the July 16, 1999 Complaint, the August 18, 1999 Order to produce documents by August 31, 1999, the August 26, 1999 Notice scheduling the deposition of T. Tobin of Erie Insurance for September 7, 1999, and Belott's August 31, 1999 Response to the Request Documents.

The policies define those claims for which there is not coverage and no requirement to report in the policy definitions of "loss". They state:

> "D. 'LOSS' WHENEVER USED IN THIS COVERAGE UNIT MEANS the monetary and compensatory portion of any judgment, award or settlement, provided always that LOSS shall not include:
>
> 1. civil or criminal fines, penalties, fees or sanctions;
> 2. punitive or exemplary damages, including the multiplied portion of any multiple damages;
> 3. the return by any INSURED of any feed or remuneration paid to any INSURED;
> 4. **any form of non-monetary relief.**" (emphasis added)

(See page 4 of the customized practice policies)

Westport asserts that relevant to its policy number PLP-223430-4 (effective May 6, 1998 to May 6, 1999) no obligation for coverage arose because a claim was not both first made against Belott and reported to Westport within the sixty (60) day period. (Westport's position is that the date of the claim was January 11, 1999). It argues that a claim was not made until September 1, 1999, which was outside of the reporting period under Policy No. PLP-223430-4. It further argues that the January 11, 1999 event fell outside the scope of the coverage provided under Policy No. PLP-225418-5 (effective May 6, 1999 to May 6, 2000) because it occurred prior to the inception of that policy. (Belott reported the July 16, 1999 claim within the coverage period.)

Although not dispositive, it is worth noting Belott's belief from the time he was served with the writ of summons on January 1, 1999 through September 16, 1999 (when Westport declined coverage available under either policy) was essentially as summarized below.

First, the writ of summons did not represent a "demand" upon him for a monetary loss. Second, the purpose of the writ of summons was to allow Plaintiffs' counsel to secure a copy of Belott's MacDonald file regarding the UIM claim against Erie Insurance.[4] Third, there was no

[4] See Ms. Carman's (a Westport senior claims analyst) September 13, 1999 inter-office memo (Exhibit #14 of her May 22, 2006 deposition) summarizing the substance of the September 13, 1999 telephone call she had with Belott. She reports:

> Insured took issue with this position. Insured acknowledges that he was not aware that the service of a Writ constitutes a claim, and that he should put us on notice of this. He did not realize that the [sic] constitutes a claim, since he did not interpret a summons to be a suit. He contends Pltf's atty advised him that the purpose of the Summons was to secure pre-Complaint document production. Pltf's atty wanted insured's file, and wanted to determine if there were any other documents regarding the u/I claim, so that the Pltf's atty could evaluate the underlying claim. Insured explained that months before the Writ was filed, that another atty, Michael Cauley, had asked the insured to send his file, which insured did, but another atty, the current Pltf's atty, apparently took over the matter and called insured.

factual and/or legal basis asserted to support a claim by Plaintiffs against him for monetary loss regarding his legal work regarding the UIM claim against Erie Insurance (Carman Depo. p. 113, lines 15-19; p. 128, lines 7-11).[5]

II. THE SUMMARY JUDGMENT ISSUES

A. Is Summary Judgment Available In A Garnishment Action?

Garnishment is governed by a Pa. R.Civ. P. 3101 et. seq. It is a civil action. After this Court's review, it finds no reason why it is not subject to a motion for summary judgment, which is simply a procedural mechanism by which one of the parties asserts that no genuine issue of material fact exists. Therefore, the court will consider the motion.

B. Standard of Review.

Summary judgment should only be granted in a case that is clear and free from doubt. *Ducjai v. Dennis*, 656 A.2d 102, 107 (Pa.1995). Additionally, summary judgment can be granted at the close of the pleadings:

> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which would be established by additional discovery or expert report, or
>
> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.Civ.P. 1035.2

Furthermore, the Pennsylvania Supreme Court has stated that:

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

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

Pa.R.Civ.P. 1035.3 provides, in part:

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[5] On July 16, 1999, Belott claims he sent a letter to Westport reporting this action. The letter stated:

> Enclosed please find a copy of a Complaint filed against the undersigned on July 16, 1999. This complaint was served today, July 19, 1999.
> A summons in this matter was filed on December 18, 1998, although, I was advised that the purpose of the Summons was to secure pre-complaint document production.
> When counsel is assigned, I will be happy to meet and discuss this matter.

Westport claims it never received that letter

(a) the adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty (30) days after service of the motion identifying

(1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or

(2) evidence in the record establishing the facts essential to the cause of action or defense which the motions cite as not having been produced.

As a general proposition, a party may not obtain summary judgment if its proof is based on oral testimony, even if the oral testimony is uncontradicted. *Nanty Glo Borough the American Surety Co.*, 163 A. 523 (Pa. 1932) *See also Penn Center House, Inc. v. Hoffman*, 533 A.2d 900, 903 (Pa. 1989).

The reason for the role is that credibility determinations are not proper considerations at the summary judgment stage. A non-party may rely on oral testimony or affidavit in the record to defeat a motion for summary judgment. *Gruenwald v. Advanced Computer Applications, Inc.*, 730 A.2d 1004, 1009 (Pa. Super. 1999).

In this case, there is no need to make any credibility determinations because the summary judgment issue involves a matter of law, i.e., an interpretation of the insurance contracts.

III. CONCLUSION

Based upon the above, Westport's Motion for Summary Judgment will be denied.

ORDER

AND NOW, this 18th day of October 2006, for the reasons set forth in the accompanying opinion, it is hereby ORDERED that Westport Insurance Corporation's Motion for Summary Judgement is DENIED.

BY THE COURT:

/s/ **Ernest J. DiSantis, Jr., Judge**