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Reports of Cases Decided in the Several Courts of
Erie County for the Year
2008

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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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RICHARD FILIPPI, Plaintiff

v.

THE CITY OF ERIE PENNSYLVANIA, UNITED NATIONAL GROUP, DIAMOND STATE INSURANCE COMPANY, INSURANCE MANAGEMENT COMPANY and SWETT & CRAWFORD, Defendants

PLEADINGS / PRELIMINARY OBJECTIONS

Preliminary objections should be sustained only in cases that are clear and free from doubt. In deciding preliminary objections, the Court must consider as true all of the well-pleaded material facts set forth in the complaint and all reasonable inferences that may be drawn from those facts.

PRINCIPLES OF EQUITY / UNJUST ENRICHMENT

Unjust enrichment is an equitable doctrine whereby benefits are conferred on the defendant by the plaintiff, there is appreciation of such benefits by the defendant, and there is acceptance and retention of such benefits under such circumstances that it would be inequitable for the defendant to retain the benefit without payment of value.

PRINCIPLES OF EQUITY / UNJUST ENRICHMENT

The most important factor to be considered in applying the doctrine of unjust enrichment is whether the enrichment of the defendant is unjust. Where unjust enrichment is found, the law implies a contract implied in law that requires that the defendant pay to the plaintiff the value of the benefit conferred.

PRINCIPLES OF EQUITY / UNJUST ENRICHMENT

A publicly elected mayor's indictment and subsequent acquittal of eight separate felony counts did not confer any financial benefit upon the municipality for whom he served.

PRINCIPLES OF EQUITY / UNJUST ENRICHMENT

A publicly elected mayor's involvement with a private company, done as a private citizen and not as a public servant, did not serve to confer any financial benefit upon the municipality where any profit reaped would benefit the company and not the municipality.

DISCOVERY

Pre-complaint discovery is permissible if it is shown the plaintiff has set forth a prima facie case and the plaintiff cannot prepare and file a complaint otherwise.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 15072 – 2006

Appearances: Eric S. Yonkin, Esq., for Plaintiff
Gregory A. Karle, Esq., for the City of Erie
G. Jay Habas, Esq., for Insurance Management Co.
Craig Markham, Esq., for Swett & Crawford

Eric B. Snyder, Esq., for United National Group
David E. Edwards, Esq., for Diamond State Insurance
Renee F. Bergman, Esq., for Swett & Crawford

OPINION

Cunningham, William R., J.

The Plaintiff has filed an appeal from an order granting the Preliminary Objections of the City of Erie to the Plaintiff's Amended Complaint and dismissing the case against the City of Erie.

PROCEDURAL HISTORY

This action commenced on December 7, 2006 with the issuance of a Writ of Summons filed by the Plaintiff ("Appellant") against all of the above defendants. A Complaint was filed March 19, 2007 and an Amended Complaint on April 26, 2007. All of the Defendants filed Preliminary Objections to the original and Amended Complaints. After oral argument, all of the Preliminary Objections to the Amended Complaint were granted resulting in the dismissal of the case against each Defendant.

Appellant filed a Notice of Appeal on September 5, 2007 and a timely Statement of Matters Complained of on Appeal under Pa.R.A.P.1925(b). This appeal involves only the City of Erie ("Appellee"). Appellant has not preserved a claim against any of the other Defendants.

FACTUAL HISTORY

In a three-count Amended Complaint, Appellant sought to recover the costs of defending himself in a criminal case brought by the Attorney General. The material facts are not in dispute.

Appellant served as the Mayor of the City of Erie from January 5, 2002 until January 2, 2006. The City of Erie is a Third Class City within the Commonwealth of Pennsylvania and operates under the optional Third Class City Charter Law, 53 P.S. §41101, *et seq*.

During his campaign for Mayor, Appellant promised to promote the economic development of an industrial site where the International Paper Company plant ("IP site") was located. The International Paper Company had been a major employer in the Erie area for decades. The closing of this plant was a significant setback to the area economy.

To his credit, after assuming office, Appellant sought to make the best economic use of the IP site. Unfortunately for Appellant, a question arose whether he engaged in conduct for his private financial gain utilizing inside information known to him as Mayor. In November, 2004, a statewide investigating Grand Jury returned an eight-count indictment against Appellant and two of his business associates, Attorneys Eric Purchase and Rolf Patberg.

The Grand Jury indictment alleged that from February 7, 2002, through March 4, 2004, Appellant either directly or by virtue of a conspiracy

used confidential information he received in his capacity as Mayor for the private financial benefit of a corporation formed with Attorneys Purchase and Patberg. The corporation was a real estate development company known as AIKO Acquisition, LLC ("AIKO"). One of the business aims of AIKO was to buy residential properties surrounding the IP site on speculation the values would increase with the development of the IP site. Appellant conceded his role was limited to a non-recourse loan of eight thousand dollars ($8,000.00) to AIKO.

At all times, Appellant denied any criminal wrongdoing. In March, 2006, a jury agreed and acquitted Appellant of all criminal charges. In the summer of 2006, Appellant sent a letter to the insurer for the City of Erie requesting reimbursement for his legal fees in defending the criminal action. After Appellant's claim was denied, this action was instituted to recover the legal fees of the criminal case.

In Count I of Appellant's Amended Complaint, a common law claim of unjust enrichment was advanced against the City of Erie. In Count II, Appellant sought a declaration against Diamond State Insurance Company that its insurance policy issued to the City of Erie provided coverage for the legal fees incurred in defending Appellant's criminal case.

In Count III, Appellant asserted negligence claims against Diamond State Insurance Company, United National Group, Insurance Management Company and Swett and Crawford Company. Appellant alleged each of these Defendants had a duty to obtain proper insurance coverage for the City of Erie and its employees. Appellant contended these Defendants breached that duty by not securing an insurance policy which provided coverage for Appellant's legal fees in his criminal case.

All three counts of Appellant's Amended Complaint were dismissed by Order dated August 6, 2007. Presently, the issues raised on appeal concern only the unjust enrichment claim against the Appellee at Count I. Appellant has not preserved any issue(s) regarding any other Defendant.

LEGAL STANDARD

In deciding the Preliminary Objections, the legal standard as proffered by the Appellant was utilized:

> Preliminary Objections, the end result of which would be dismissal of a cause of action, should be sustained only in cases that are clear and free from doubt. The test on preliminary objections is whether it is clear and free from doubt from all of the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish his right to relief. To determine whether the preliminary objections have been properly sustained, this Court must consider as true all of the well-pleaded material facts set forth in appellant's complaint and all reasonable inferences that may be drawn from those facts.

Bower v. Bower, 531 Pa. 54, 57, 611 A.2d 181 (Pa. 1992).

In reviewing this matter, all factual averments and inferences in Appellant's Amended Complaint were accepted as true. Nonetheless, the dismissal of this claim against Appellee was warranted.

Appellant seeks equitable relief in the form of reimbursement for his legal fees under an "unjust enrichment" theory. Appellant cited this legal explanation of his theory:

> "Unjust enrichment" is essentially an equitable doctrine. We have described the elements of unjust enrichment as "benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value." The application of the doctrine depends on the particular factual circumstances of the case at issue. In determining if the doctrine applies, our focus is not on the intention of the parties, but rather on whether the defendant has been unjustly enriched. The most important factor to be considered in applying the doctrine is whether the enrichment of the defendant is *unjust*. Where unjust enrichment is found, the law implies a contract, referred to as either a *quasi contract* or a contract implied in law, which requires that the defendant pay to plaintiff the value of the benefit conferred. In short, the defendant makes restitution to the plaintiff in *quantum meruit*.

Schenck v. K.E. David, 446 Pa.Super. 94, 666 A.2d 327, 328-29 (1995) (internal citations and line breaks omitted).

Appellant contends the benefit to the Appellee is obvious: Appellant spent $370,000 of his own money defending actions he undertook in furtherance of important City goals with the consent of the City Council.

However, glaringly absent from Appellant's Amended Complaint is any benefit Appellee received because its Mayor was indicted and acquitted on eight separate felony counts. There was no benefit conferred by Appellant to Appellee by virtue of the AIKO venture or the criminal charges against Appellant. Further, any benefit, if such does exist, is not being unjustly retained by Appellee. AIKO remains free to do business.

Appellant's position is misguided as a matter of logic and law. Assuming Appellant's innocence of the criminal charges, there is still no benefit conferred upon Appellee simply because Appellant was exonerated of the criminal allegations. When the dust settled, what was left was the fact the jury found there was insufficient proof that Appellant committed any crimes. These facts do not confer a benefit upon Appellee. Appellee is not unjustly enriched in any financial sense by Appellant's acquittal.

Appellant's involvement with AIKO was a perfectly legal capitalistic

venture. Importantly, any profit reaped by AIKO was private and did not belong to the City of Erie. Appellant's activities relating to AIKO did not confer any financial benefit to the City of Erie. Appellant's involvement with AIKO was not at the behest of City Council or in his capacity as Mayor. Appellant's involvement was undertaken as a private person, not as a public servant.

There is no legal authority compelling Appellee to reimburse Appellant for expenses related to the risks Appellant undertook to seek private pecuniary gain. Appellant acknowledges, as he must, the criminal charges against him were for the alleged misuse of his office for his private pecuniary gain. *See* Amended Complaint, Paragraphs 45-48. The criminal allegations were not based on conduct within the scope of his duties as Mayor. Appellant's subsequent acquittal from the criminal charges did not bring Appellant's conduct within the scope of his mayoral duties.

In sum, there is no benefit conferred upon Appellee by virtue of Appellant's acquittal which is being retained unjustly by the Appellee. If Appellant had never been indicted, Appellee's sole financial obligation to him remained the payment of his mayoral salary. Appellant has not pled facts in his Amended Complaint legally sufficient to establish a claim for unjust enrichment.

THE DISCOVERY ISSUE

Appellant alleges the dismissal of his case was premature since discovery would have substantiated his case. Appellant's position is untenable for several reasons.

If Appellant felt he had insufficient information to formulate an unjust enrichment claim after the Writ of Summons was issued, he could have engaged in pre-complaint discovery. Pre-complaint discovery is permissible if it is shown the plaintiff has set forth a prima facie case and the plaintiff cannot prepare and file a complaint otherwise. Pa.R.C.P. 4001(c) 4007.1 4007.2; *McNeil v. Jordan*, 586 Pa. 413, 894 A.2d 1260 (2006). Discovery is available to enable a party to prepare pleadings, assuming the action has been commenced and that the party can show the requested information is relevant. *Lombardo v. DeMarco*, 350 Pa.Super. 490, 504 A.2d 1256 (l985). A plaintiff who needs discovery in the initial stages of an action and who has issued a summons may seek discovery to enable the drafting of the complaint. *Cole v. Wells*, 406 Pa. 81, 177 A.2d 77 (l962).

Pa.R.C.P. 1019(a) states: "The material facts on which a cause of action is based shall be stated in a concise and summary form." Thus, Appellant had a duty to ascertain the facts in support of his claim of unjust enrichment prior to filing his Complaint. The Appellant chose not to engage in any discovery in support of his unjust enrichment claim either before or after the Writ of Summons issued and prior to drafting the

Complaint or the Amended Complaint. Appellant had the benefit of the Defendants' Preliminary Objections to the original Complaint and could have engaged in discovery prior to filing the Amended Complaint.

Appellant's argument that he can better formulate a claim of unjust enrichment after discovery is unpersuasive. Our civil system does not encourage a party to file a lawsuit and then force a defendant to incur the costs of the discovery process to determine whether the plaintiff has stated a claim. Pa.R.C.P. 1019; 2 Goodrich-Amram 2d §§1019:2, 1019:3, 1019:4. Appellant should know whether he has a claim and the facts to support it before a lawsuit is filed.

The facts of this case are not complicated. All of the material facts are not in dispute. These facts are uncontroverted: Appellant's status as Mayor; Appellant's indictment on allegations he used inside information as Mayor for his private financial gain through AIKO; Appellant's acquittal of all criminal charges; Appellant's legal fees of $370,000. There are few, if any, significant facts left to be discovered. No additional amount of discovery will change the pleading requirements for an unjust enrichment claim or enable Appellant to shoehorn in such a claim.

CONCLUSION

Appellant has failed to plead a legally cognizable claim of unjust enrichment at Count I of the Amended Complaint against the City of Erie. Appellant's claim cannot be made legally cognizable by additional discovery. This appeal is without merit.

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

JAMES FLYNN, Plaintiff,

v.

DANIELLE BIMBER, Defendant

FAMILY LAW / CHILD SUPPORT

There is no question that vacating a support order destroys it. The destruction, however, can only be applied retroactively.

FAMILY LAW / CHILD SUPPORT

When a support order is vacated, the order cannot have any future impact on the parties' rights.

FAMILY LAW / CHILD SUPPORT

A Court cannot retroactively take away a child's right to receive support from their parent during the time the child spent outside of the parent's custodial care.

FAMILY LAW / CHILD SUPPORT

A person that is in fact "caring for" minor children has standing to commence and continue a support action on behalf of minor children, even though the minor children were in person's custody contrary to parent's wishes.

FAMILY LAW / CHILD SUPPORT

Parent's have an obligation to support minor children in order to promote the best interest of their children.

FAMILY LAW / CHILD SUPPORT

Children outside the primary custodial care of a parent are entitled to support from that parent.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA PACSES NO. 114108307
DOCKET NO. NS200601089

Appearances: Melissa Hayes Shirey, Attorney for James Flynn
Joseph P. Martone, Attorney for Danielle Bimber

OPINION

Kelly, Elizabeth K., J.

March 27, 2007: This support matter is before the Court on James Flynn's (hereinafter "Father") Complaint for Support. Father petitions for reimbursement of child support paid to Danielle Bimber (hereinafter "Gestational Carrier") at PACSES # 260106041 for the support of his three minor children.

PROCEDURAL AND FACTUAL HISTORY[1]

In August of 2002, Father and his paramour entered into a surrogacy contract with Gestational Carrier and an egg donor. *J.F. v. D.B.*, 897 A.2d

[1] This Court will provide only a brief summary of the facts relevant to these proceedings as they are set forth by the Superior Court at *J.F. v. D.B.*, 897 A.2d 1261 (Pa. Super. 2006).

1261, 1265-66 (Pa. Super. 2006). Pursuant to the surrogacy contract, Gestational Carrier underwent in vitro fertilization, whereby three of the egg donor's eggs, fertilized by Father's sperm, were implanted into Gestational Carrier. *Id.* at 1266. The in vitro fertilization was successful and, on November 19, 2003, Gestational Carrier gave birth to triplets. *Id.* at 1267. Thereafter, Gestational Carrier made a unilateral decision that Father and his paramour would not be "fit parents" and, on November 27th, 2003, Hamot Hospital discharged the triplets to Gestational Carrier. *Id.* at 1269, 1276. Gestational Carrier took the triplets to her home, without Father's consent and against his wishes. *Id.* at 1276.

On December 4, 2003, Father filed a Complaint for Custody against Gestational Carrier. The Court promptly entered a consent order granting Gestational Carrier temporary legal and physical custody of the children, with father receiving visitation.[2]

Gestational Carrier, on February 2, 2004, filed for child support. Upon stipulation of the parties, the Honorable Shad Connelly entered a September 17, 2004 Order requiring Father to pay $1750.00 a month for child support.

On January 7, 2005, Judge Connelly granted Gestational Carrier primary physical custody of the triplets, with Father having partial custody. At the same time, Judge Connelly ordered that the issues of standing, child support and custody may be taken up on appeal together. Father filed a timely appeal.

The Superior Court listed the issues for its consideration as:

1) Whether the trial court erred in determining that gestational carrier had standing to challenge the natural father's custody of the triplets based on
   a) her *in loco parentis* status, and/or
   b) her status as the legal mother of the babies; and
2) Whether the trial court erred in granting primary physical custody to gestational carrier.

J.F. v. D.B., 897 A.2d at 1273. Upon determining that Gestational Carrier lacked standing to pursue custody, the Superior Court, on Apri1 21, 2006, vacated Judge Connelly's custody and support orders.[3] Despite vacating the child support order, the Superior Court did not address the support issue in its Opinion.

Father, on May 24, 2006, filed a Complaint for Support seeking recovery of all child support paid. The parties agree that Father paid $48,309.53 in

[2] The Order preserved Father's right to challenge Gestational Carrier's standing to pursue custody of the triplets. On April 2, 2004, Judge Connelly entered an Order finding that Gestational Carrier had standing to pursue custody and child support.

[3] Because of its decision regarding standing, the Superior Court did not reach the issue of whether the trial court erred in granting Gestational Carrier primary physical custody of the triplets. *Id.*

support during the course of the legal proceedings.

DISCUSSION

A. Impact of Vacating the Support Order

First, Father relies upon *Fitzpatrick v. Fitzpatrick*, 811 A.2d 1043 (Pa. Super. 2002) for the proposition that the Superior Court, by *vacating* the trial court's orders, negated Gestational Carrier's support rights and left Father paying support pursuant to an order that was void for lack of jurisdiction.

Fitzpatrick provides: "where a judgment is vacated or set aside (or stricken from the record) by valid order or judgment, it is entirely destroyed and the rights of the parties are left as though no such judgment had ever been entered." *Fitzpatrick*, 811 A.2d at I04S *quoting Rufo v. Bastian-Blessing Co.*, 420 Pa. 416, 218 A.2d 333, 334 (Pa. 1966) (*quoting In re Higbee Estate*, 372 Pa. 233, 93 A.2d 467, 469 (Pa. 1953)). Similarly, the Pennsylvania Rules of Civil Procedure governing Actions for Support define "vacate" as declaring a support order "null and void, as if it were never entered." P.R.C.P. 1910.1(c).

There is no question that vacating an order destroys it. The destruction, however, can only be applied prospectively. As the case law upon which *Fitzpatrick* finds its support explains, a vacated judgment has "no more ***future*** effect than if [it][] had never existed." *In re Higbee Estate*, 93 A.2d 467, 469 (Pa. 1953) (emphasis added). Accordingly, when the Superior Court vacated Judge Connelly's orders, the order of support could not have any *future* impact on the parties' rights. In that respect, the support order was destroyed and, as of April 21, 2006, the rights of the parties were left as though no such judgment had ever been entered.

In re Higbee Estate acknowledges the reality that certain aspects of an order simply cannot be undone. No court can take away the fact that Gestational Carrier had custody of the children from November 27, 2003 until April 21, 2006, a two and one-half year time period which neither Father nor Gestational Carrier is likely to forget. In that respect, this Court is also incapable of taking away the children's right to receive support from their Father during the time that they spent outside of his custodial care. Accordingly, the Superior Court's order must be applied prospectively.

As a result, when the Superior Court vacated the support order it could not, beyond Apri1 21, 2006, have any impact on the parties' rights.

B. Standing to Pursue Support

Similarly, father asserts that by vacating the orders, the Superior Court negated Gestational Carrier's right to receive support and, therefore, Gestational Carrier never had standing to receive child support.[4]

With regard to standing in a child support action, the Domestic Relations Code provides:

[4] The Superior Court did not make a specific finding that Bimber lacked standing to pursue the support action. Instead, upon directing that Father be awarded full physical and legal custody of the children, it vacated the support order.

> STANDING.-- Any person caring for a child shall have standing to commence or continue an action for support of that child regardless of whether a court order has been issued granting that person custody of the child.

23 Pa.C.S.A. §4341. Moreover, an action for support shall be brought "on behalf of a minor child by a person caring for the child regardless of whether a court order has been issued granting that person custody of the child." Pa.R.C.P. 1910.3(c).

Regardless of the validity of the custody order granting Gestational Carrier a legal right to the children, she was in fact a "person caring for" the children. In this regard, Gestational Carrier had standing to commence and continue the support action on behalf of the children. 23 Pa.C.S.A. §4341; Pa.R.C.P. 1910.3(c). It is irrelevant that the children were in Gestational Carrier's custody contrary to Father's wishes. *See generally Luzerne County C.Y.S. v. Cottam*, 603 A.2d 212 (Pa.Super. 1992) (father was not relieved of duty to support his child even though father objected to CYS' custody of the child).

In seeking reimbursement of the money paid for his children's support, father relies upon *Elkin v. Williams*, 755 A.2d 695 (Pa. Super. 2000). In *Elkin*, the Superior Court directed that a biological mother be reimbursed for child support paid to an individual who lacked standing to file a complaint for support. *Id*. At 699. Specifically, the Court found that when an eighteen-year-old adult decided on his own accord to live with a family friend, the family friend lacked standing to file a complaint for support on behalf of the eighteen-year-old, who was neither a "child" nor a minor for purposes of support. *Id.* In other words, because the eighteen-year-old was not entitled to receive support the family friend was precluded from filing for support on his behalf.

Unlike in *Elkin*, there is no potential argument that the triplets were not entitled to their Father's support. Specifically, parents have an obligation to support minor children in order to promote the best interest of their children. 23 Pa.C.S.A. 4321; *Elkin*, 755 A.2d at 697.

It was not Gestational Carrier's benefit for whom the support order was entered. This was a child support order issued for the benefit of three young boys, who were entitled to the support of their father. It is unimaginable that any parent would ever wish to take away a benefit that parent is fully capable of conferring to his child. Yet, that is precisely the conclusion to which Father's argument leads this Court.

Regardless of the validity of the custody order, the children were outside the primary custodial care of their father and they were entitled to his support.

For the foregoing reasons Father's Complaint for Support, is denied.

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

In Re: ERIE COUNTY TAX SALES.
ESTATE OF DOUGLAS F. FERGUSON, SR.,
TRACY L. FERGUSON, Administrator, Objector,
v.
FIZEL ENTERPRISES, INC., Purchaser.

TAXATION / TAX SALES

When real property has been sold at a tax sale due to delinquent taxes and the tax sale has been challenged, the tax claim bureau has the burden of proving compliance with the statutory requirements of the Pennsylvania Real Estate Tax Sale Law. *In Re Tax Sale of Real Property Situated in Jefferson Township*, 828 A.2d 475 (Pa. Cmwlth. 2003).

TAXATION / TAX SALES

Notice provisions of the Real Estate Tax Sale Law are to be strictly construed, and there must be strict compliance with such provisions to guard against deprivation of property without due process of law. *Murphy v. Monroe County Tax Claim Bureau*, 784 A.2d 878 (Pa. Cmwlth. 2001).

TAXATION / TAX SALES

With regard to notice of a tax sale to the owner of the property, the Real Estate Tax Sale Law requires that the tax claim bureau: (1), publish notice of a tax sale in the designated county legal journal and in two newspapers of general circulation in the county, if available, at least 30 days prior to the tax sale; (2) provide notice by certified mail, restricted delivery, return receipt requested, at least 30 days prior to the tax sale, and (3) post a notice of the tax sale on the property which is subject to the tax sale, at least 10 days prior to the sale. 72 P.S. §5860.602 (a); (e)(1),(3).

TAXATION / TAX SALES

Compliance with all three notice requirements is necessary in order for the sale of real estate at a tax sale to be valid.

TAXATION / TAX SALES

The Tax Claim Bureau is required to conduct a reasonable investigation to ascertain the identity and whereabouts of the latest owner of a property subject to an upset sale for the purpose of providing notice to that party. 72 P.S. § 5860.607a(a).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 13911 of 2007

Appearances: Tracy L. Ferguson, Objectors to Tax Sale, Pro Se
David Holland, Esq., Counsel for Fizel Enterprises, Inc.
George Joseph, Esq., Counsel for County of Erie
Norman A. Stark, Esq., Counsel for County of Erie

OPINION AND ORDER

DiSantis, Earnest J., J.

This case comes before the Court on the Tax Sale Objections for a piece of real property located at 937-939 West Tenth Street, Erie, Pennsylvania (Erie County Index No. 16-030-046.0-217.00).

I. HISTORY OF THE CASE

On August 19, 2004, Douglas C. Ferguson, Sr. died at age 88. His daughter (Objector), Ms. Tracy L. Ferguson,[1] was appointed the administratrix of his estate. *See Exhibit O-1* (packet of documents). The property located at 937-939 West Tenth Street (hereinafter Ferguson property)[2] was part of the estate. The 2005 taxes for the Ferguson property were never paid.

On July 11, 2007, the Erie County Tax Claim Bureau sent a Notice of Upset Tax Sale via certified mail to the Ferguson property (one addressed to Wm. Ferguson and one addressed to Edna Ferguson).[3] After three attempts the Post Office returned the mail as unclaimed. *See Exhibit Respondent C-2* (unclaimed mail to Wm. and Edna Ferguson).

From August 7, 2007 to September 4, 2007, the Tax Claim Bureau searched the following for additional addresses: (1) current telephone directory; (2) assessment office records; (3) recorder of deeds; (4) prothonotary's office; (5) tax claim bureau files; (6) local tax collector records; (7) polk directory; and (8) register of wills. *See Exhibit Respondent C-4* (log of searched offices).

On August 21, 2007, the Tax Claim Bureau posted a Notice of Upset Tax Sale between the two front doors located on the front of the Ferguson property (i.e. the Ferguson property is a duplex). *See Exhibit Respondent C-1* (affidavit of Eileen Gallenstein); *Exhibit Respondent F-1* (picture of notice posted between the two front doors). Melissa Roche's children (a tenant) removed the posted notice "almost immediately."

On August 24, 2007, the Tax Claim Bureau published the Notice of Upset Tax Sale in the Erie Times News and Erie County Legal Journal.

In late August 2007, Timothy Sabolsky (a tenant) had a telephone conversation with Ms. Ferguson. Ms. Ferguson and Mr. Sabolsky negotiated a September rent for three weeks instead of four weeks because

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[1] Ms. Ferguson is the daughter of Douglas G. Ferguson, Sr. from Mr. Ferguson, Sr.'s first marriage to Mabel K. Ferguson, also surviving Mr. Ferguson, Sr. were a son Douglas G. Ferguson, Jr., two additional daughters and his current spouse, Marjorie B. Ferguson. *See Exhibit O-1* (packet of documents).

[2] The Ferguson property is indexed as Erie County Index No. 16-030-046.0-217.00. It was jointly owned by William R. Ferguson; his wife Edna I. Ferguson; Douglas G. Ferguson, Sr.; and his wife Mabel K. Ferguson since March 15, 1945, *See Erie County Recorder of Deeds Book No. 453, Page No. 136.*

[3] The Post Office attempted delivery to Wm. Ferguson on July 14th, July 19th and July 29th and to Edna Ferguson on July 13th, July 18th and July 29th. Wm. and Edna Ferguson are both deceased.

of the upcoming tax sale for the Ferguson property and a potential lien from the Department of Public Welfare (DPW).

On September 7, 2007, Ms. Ferguson collected the rent for the month of September. During that exchange, Ms. Roche personally handed Ms. Ferguson the tax sale notice her children removed as well as the rest of the mail.[4]

On September 10, 2007, the Tax Claim Bureau sent a final notice to William and Edna Ferguson (one to each) regarding the forthcoming tax sale of the Ferguson property. *See Exhibit Respondent C-3* (Ten-day notice to Wm. and Edna Ferguson).

On September 24, 2007, the Ferguson property was sold at an unset tax sale. It was purchased by Respondent Fizel Entelprises, Inc. (hereinafter Fizel).

On September 26, 2007, the Tax Claim Bureau sent a warning notice to William and Edna Ferguson (one to each) regarding the sale of the Ferguson property. On October 24, 2007, Ms. Ferguson filed Objections and Exceptions to Confirmation of Sale.

On October 29, 2007, George Joseph, Esq. (counsel for County of Erie) received a phone call from Ms. Ferguson's half-brother, Douglas G. Ferguson, Jr.[5] They discussed matters related to the tax sale, specifically the potential DPW lien, which exceeded the value of the property.[6]

On November 14, 2007, Respondent County of Erie filed an answer to Ms. Ferguson's objections and exceptions. On November 16, 2007, Respondent Fizel filed an answer to Ms. Ferguson's objections and exceptions.

On November 29, 2007, this Court held an evidentiary hearing and oral argument. Tracy L. Ferguson asserted that her half-brother (i.e. Douglas G. Ferguson, Jr.) and she did not receive notice of the tax sale until a conversation with Ms. Roche.[7] She also asserts that the County failed to contact all owners of the property.

Respondents Fizel and County of Erie countered that the County met all notice and publication requirements. Furthermore, Fizel argued that Ms. Ferguson knew of the tax sale and the potential DPW lien.

On November 30, 2007, this Court granted Respondent Fizel's Motion

[4] Ms. Roche testified that she had given Ms. Ferguson the prior tax sale notices addressed to Wm. and Edna Ferguson and that Ms. Ferguson had discussed a potential DPW lien estimated at $57,000. Ms. Ferguson admitted collecting the rent on that date, but denied receiving the notices.

[5] His secretary stated the person identified himself as Douglas G. Ferguson, Jr.

[6] Douglas G. Ferguson, Jr. denied the conversation. He stated that the person Mr. Joseph talked to was actually Ms. Ferguson's boyfriend, Michael Clath.

[7] Ms. Ferguson admitted the following: (1) the taxes for the Ferguson property were never paid; and (2) it was her responsibility to pay the taxes. She stated she did not pay the taxes because of a potential DPW lien.

to Stay the eviction proceedings pending against the tenants until the issue of Ms. Ferguson's objections and exceptions could be resolved.[8]

II. LEGAL DISCUSSION

The Tax Sale Law, 72 P.S. §5860.602, dictates the process for the sale of real estate regarding delinquent taxes:

> § 5860.602. Notice of sale
>
> (a) At least thirty (30) days prior to any scheduled sale the bureau shall give notice thereof, not less than once in two (2) newspapers of general circulation in the county, if so many are published therein, and once in the legal journal, if any, designated by the court for the publication of legal notices. Such notice shall set forth (1) the purposes of such sale, (2) the time of such sale, (3) the place of such sale, (4) the terms of the sale including the approximate upset price, (5) the descriptions of the properties to be sold as stated in the claims entered and the name of the owner.
>
> (b) Where the owner is unknown and has been unknown for a period of not less than five years, the name of the owner need not be included in such description.
>
> (c) The description may be given intelligible abbreviations.
>
> (d) Such published notice shall be addressed to the "owners of properties described in this notice and to all persons having liens, judgments or municipal or other claims against such properties."
>
> (e) In addition to such publications, similar notice of the sale shall also be given by the bureau as follows:
>
> (1) At least thirty (30) days before the date of the sale, by United States certified mail, restricted delivery, return receipt requested, postage prepaid, to each owner as defined by this act.
>
> (2) If return receipt is not received from each owner pursuant to the provisions of clause (1), then, at least ten (10) days before the date of the sale, similar notice of the sale shall be given to each owner who failed to acknowledge the first notice by United States first class mail, proof of mailing, at his last known post office address by virtue of the knowledge and information possessed by the bureau, by the tax collector for the taxing district making the return and by the county office responsible for assessments and revisions of taxes. It shall be the duty of the bureau to determine the last post office address known to said collector and county assessment office.

[8] Ms. Ferguson and Mr. Ferguson, Jr. initiated eviction proceedings to remove Timothy Sabolsky, Melissa Roche and their minor children (i.e. the tenants) from 937-939 West Tenth Street (i.e. the Ferguson Property). On November 20, 2007, MDJ DiPaolo granted a default judgment against the tenants. See DJ No. LT 0000569 of 2007 (MDJ DiPaolo); Erie County Civil Docket No. 15272 of 2007 (Appeal).

(3) Each property scheduled for sale shall be posted at least ten (10) days prior to the sale.

(f) The published notice, the mail notice and the posted notice shall each state that the sale of any property may, at the option of the bureau, be stayed if the owner thereof or any lien creditor of the owner on or before the actual sale enters into an agreement with the bureau to pay the taxes in installments, in the manner provided by this act.

(g) All notices required by this section other than the newspaper notice and notice in the legal journal shall contain the following provision, which shall be conspicuously placed upon said notices and set in at least 10-point type in a box as follows:

WARNING

"YOUR PROPERTY IS ABOUT TO BE SOLD WITHOUT YOUR CONSENT FOR DELINQUENT TAXES. YOUR PROPERTY MAY BE SOLD FOR A SMALL FRACTION OF ITS FAIR MARKET VALUE. IF YOU HAVE ANY QUESTIONS AS TO WHAT YOU MUST DO IN ORDER TO SAVE YOUR PROPERTY. PLEASE CALL YOUR ATTORNEY, THE TAX CLAIM BUREAU AT THE FOLLOWING TELEPHONE NUMBER, OR THE COUNTY LAWYER REFERRAL SERVICE."

The Tax Sale Law outlines the procedure for notification of owners when their real estate is sold at an upset tax sale:

§ 5860.607. Bureau's consolidated return to court; notice; confirmation; appeal

(a.l) (1) Notice shall be given by the bureau within thirty (30) days of the actual sale to each owner by United States certified mail, restricted delivery, return receipt requested, postage prepaid, to each owner at his last known post office address as determined in section 602(e)(2) that the property was sold and that the owner may file objections or exceptions with the court relating to the regularity and procedures followed during the sale no later than thirty (30) days after the court has made a confirmation nisi of the consolidated return.

(2) All notices required by this subsection shall contain the following provisions and be in the following form set in at least 10-point type in a box as follows:

WARNING

"YOUR PROPERTY HAS BEEN SOLD AT A TAX SALE ON FOR

> THE COLLECTION FOR DELINQUENT TAXES INCURRED IN _____.
>
> YOU MAY FILE OBJECTIONS OR EXCEPTIONS TO THE SALE IMMEDIATELY BUT NO LATER THAN THIRTY (30) DAYS FOLLOWING THE CONFIRMATION NISI OF THE RETURN BY THE COURT.
>
> IF YOU HAVE ANY QUESTIONS PLEASE CALL YOUR ATTORNEY, THIS TAX CLAIM BUREAU AT THE FOLLOWING TELEPHONE NUMBER _____, OR THE COUNTY LAWYER REFERRAL SERVICE."
>
> ...
>
> (d) Any objections or exceptions to such a sale may question the regularity or legality of the proceedings of the bureau in respect to such sale, but may not raise the legality of the taxes on which the sale was held, of the return by the tax collector to the bureau or of the claim entered. In case any objections or exceptions are filed they shall be disposed of according to the practice of the court. If the same are overruled or set aside, a decree of absolute confirmation shall be entered by the court.

See 72 P.S. §5860.607; *Tracy v. County of Chester Tax Claim Bureau,* 489 A.2d 1334 (Pa. 1985).

Strict compliance with the Tax Sale Law's notice provisions is essential. See *Smith v. Tax Claim Bureau of Pike County,* 834 A.2d 1247 (Pa.Cmwlth. 2003); *Murphy v. Monroe County Tax Claim Bureau,* 784 A.2d 878 (Pa.Cmwlth. 2001). "The purpose of a tax sale is not to strip an owner of his property but rather to insure the tax on the property is collected." *Murphy,* 784 A.2d at 883. If reasonably possible, due process requires that the government notify an owner before his property is sold at an upset tax sale. *Id.*

Ms. Ferguson cites *In re 2005 Sale of Real Estate v. Clinton County Tax Claim Bureau,* 915 A.2d 719 (Pa.Cmwlth. 2007), as controlling. In that case the court vacated an upset tax sale when evidence showed that the local tax claim bureau failed to search for additional addresses within the various public offices (i.e. Recorder of Deeds). However, the facts in the instant case are dissimilar because here the County specifically checked the following public records: (1) current telephone directory; (2) assessment office records; (3) recorder of deeds; (4) prothonotary's office; (5) tax claim bureau files; (6) local tax collector records; (7) polk directory; and (8) register of wills. *See Exhibit Respondent C-4.* Therefore, it exercised reasonable efforts to locate the identity and addresses of record owners of the property.

CONCLUSION

Based upon the direct and circumstantial evidence presented, this Court concludes the following: (1) Ms. Ferguson (Objector to Tax Sale) had notice of the impending upset tax sale of the Ferguson property; and (2) the County followed the notice and publication requirements of the Tax Sale Law.

ORDER

AND NOW, this 21st day of December, 2007, for the reasons set forth in the accompanying opinion, Tracy L. Ferguson's objections and exceptions to confirmation to tax sale are DENIED.

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

LILIANE G. O'BRIEN, Plaintiff,

v.

GUY C. O'BRIEN, Defendant

FAMILY LAW / PRENUPTIAL AGREEMENT

The validity of prenuptial agreements is governed by contract law.

FAMILY LAW / PRENUPTIAL AGREEMENT

A valid prenuptial agreement requires full and fair disclosure of the financial circumstances of the parties to be married.

FAMILY LAW / PRENUPTIAL AGREEMENT

A statement in prenuptial agreement that each party has made full and fair disclosure is generally sufficient to satisfy the disclosure requirement.

FAMILY LAW / PRENUPTIAL AGREEMENT

The presumption of full and fair disclosure may be rebutted by ascertation of fraud, misrepresentation or duress, and must be proven by clear and convincing evidence.

FAMILY LAW / PRENUPTIAL AGREEMENT

The reasonableness of a prenuptial agreement is not a factor for the court to consider in determining the validity of a prenuptial agreement.

FAMILY LAW / PRENUPTIAL AGREEMENT

The court may find adequate consideration to support the validity of a prenuptial agreement where the agreement contains mutual releases against each spouse's estate, even if no provision for payment of money or other valuable consideration is contained in the agreement.

FAMILY LAW / PRENUPTIAL AGREEMENT

Where the parties entered into a valid premarital agreement immediately prior to their marriage, then reaffirmed the exact same terms of the premarital agreement seven years later by a separate document, no additional financial disclosure was necessary at the reaffirmation.

FAMILY LAW / PRENUPTIAL AGREEMENT

Wife's voluntary choice to not read the prenuptial agreement, and later reaffirmation of the prenuptial agreement, does not provide legal basis for challenge to the validity of the agreements.

FAMILY LAW / PRENUPTIAL AGREEMENT

The spouse challenging the validity of a prenuptial agreement cannot allege that she was defrauded by her failing to include her own list of assets as an exhibit to the prenuptial agreement.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY PENNSYLVANIA CIVIL DIVISION - DIVORCE
NO. 11656-2006

Appearances: Edward Niebauer, Esq., Attorney for Plaintiff
James H. Richardson, Jr., Esq., Attorney for Defendant
Mary Alfieri Richmond, Esq., Divorce Master

OPINION

Dunlavey, Michael E., J.

Procedural History

The parties were married on November 8, 1996. Liliane O'Brien (hereinafter Wife) filed a Complaint in Divorce on April 26, 2006. On January 10, 2007, Wife filed a Petition for Declaratory Judgment as to the Validity of an Anti-Nupital [sic] Agreement. Guy O'Brien (hereinafter Husband) filed an Answer to Wife's Petition with a supporting Trial Memorandum on May 8, 2007, asserting the validity of the Antenuptial Agreement and the Reaffirmation and Ratification Agreement.

After several continuances, hearings were held before this Court on August 15 and 31, 2007. Counsel was directed to submit briefs to the Court ten days after the completion of hearing transcripts.[1]

Findings of Fact

The Court makes the following findings of fact based on the briefs submitted and transcripts of the hearings:

1) The parties met in Brazil in 1993. Day 1A, pp. 1, 4; Day 2, p. 72.

2) Husband has been a licensed chiropractor for 27 years. Day 2, p. 72.

3) Wife is originally from Brazil. Husband was an exchange student there and lived with a host family when he was in high school. Day 1B, p. 4; Day 2, pp. 96-97.

4) Both parties are fluent and literate in English and Portuguese. Day 2, p. 5.

5) In Brazil, Wife earned a college degree in Business Administration, and taught advanced English classes. Day 1A, pp. 5, 8; Day 2, pp. 6-7, 10-11.

6) Wife was also a founder and manager of the Premier Language Association in Brazil, and Assistant Manager of Kontak Tours and Travel in Miami, arranging tours for Brazilian tourists. Day 2, pp. 6-8, 11; Husband's Exhibit C.

7) Wife moved to Miami, Florida in 1994. Day 1A, p. 4.

8) The parties maintained their relationship via telephone during 1994-1996. Day 2, p. 5.

[1] For brevity, the Court shall refer to the three different transcripts in this matter as Day 1A (August 15, 2007, Examination of Thomas A. Testi, Esq.), Day 1B (August 15, 2007, Direct Examination of Liliane O'Brien), and Day 2 (August 31, 2007 hearing).

9) Husband visited Wife in Florida in February 1996. Day 1A, p. 61.

10) Husband proposed to Wife in May 1996. Day 1A, p. 7; Day 2, p. 72.

11) Wife moved to Erie in August 1996 at Husband's request. Day 1A, pp. 10-12.

12) Husband and Wife resided in Husband's mother's home in McKean, Pennsylvania. Day 1A, p. 13.

13) Husband testified that the parties discussed the idea of a prenuptial agreement to protect their assets and any assets they would receive from their families. Day 2, pp. 107-108, 111.

14) The parties went to Attorney Mary Ann McConnell's office in Mercer, Pennsylvania, on or about November 1, 1996 to discuss a prenuptial agreement. Day 1A, p. 18; Day 2, pp. 19-20.

15) Mary Ann McConnell has been licensed to practice law in Pennsylvania since 1976. Day 2, p. 36.

16) Attorney McConnell testified that she was a family friend of Husband's mother. Day 2, p. 37.

17) Attorney McConnell testified that she did not know Wife prior to the meeting. Day 2, p. 37.

18) Attorney McConnell stated that Husband and Wife attended the meeting together. Day 2, p. 38.

19) Attorney McConnell admitted that she had no distinct recollection of the specifics of her meeting with the parties. Day 2, pp. 39, 48.

20) Attorney McConnell could not find any files or notes regarding the meeting. Day 2, pp. 40, 45.

21) Attorney McConnell testified that she usually showed clients interested in a prenuptial agreement a sample document during her meeting with them. Day 2, pp, 39-40.

22) Attorney McConnell testified that according to her standard practice, she would not insert any clauses or terms without discussing them with the parties first. Day 2, pp. 44-45, 56.

23) Attorney McConnell testified that both parties were concerned with keeping their assets separate. Day 2, p. 69.

24) Both Husband and Wife appeared to understand and agree to the terms that were discussed at the meeting with Attorney McConnell. Day 2, pp. 40-41, 67.

25) Attorney McConnell also discussed the ramifications of the Pennsylvania Divorce Code with both parties. Day 2, p. 63.

26) Attorney McConnell's practice was to represent only one party in the preparation of a prenuptial agreement and advise the other that he/she could select an attorney if he/she chose. Day 2, pp. 58-59.

27) Attorney McConnell testified that she represented Husband. Day 2, p. 58.

28) Husband testified that he believed that Attorney McConnell represented him and Wife at the meeting. Day 2, pp. 47-48.

29) In the text of the Antenuptial Agreement, the parties acknowledged that they had been represented by counsel or advised to seek independent counsel. (Wife's Exhibit 1, p. 1)

30) Wife testified that she asked no questions during the meeting. Day 2, pp. 20-21.

31) Wife testified that she was "a very good listener" at the meeting. Day 2, p. 20.

32) Attorney McConnell prepared a document titled, Antenuptial Agreement, for the parties on November 1, 1996. (Wife's Exhibit 1, p. 1)

33) The Antenuptial Agreement contains eight (8) separate provisions binding both Husband and Wife. (Wife's Exhibit 1, pp. 1-3)

34) The Antenuptial Agreement states that each party attached exhibits identifying and valuing their assets and disclosing their respective incomes. (Wife's Exhibit 1, p. 1)

35) Attorney McConnell advised the parties to attach their disclosures to the agreement, but did not personally review the disclosures. Day 2, pp. 59, 57.

36) Husband attached the first page of his 1995 income tax return and a net worth statement. Day 1A, p. 16; Day 2, pp. 85-86, 90-92.

37) Wife testified that Husband asked her to prepare a list of her assets and her parents' assets for disclosure. Day 1A, p. 17.

38) Wife's father helped her prepare the list and provided it to Husband. Day 2, pp. 23-24, 84-85.

39) No copy of Wife's list was included with the Antenuptial Agreement at issue before the Court.

40) Neither party located a copy of the list prior to the hearings held before this Court. Day 2, p. 85.

41) The Court must conclude that the list of Wife's assets was inadvertently lost.

42) Husband testified that he had a general understanding of Wife's assets and income and was comfortable with the disclosures she made.

43) Wife testified that she did not review Husband's net worth statement or income tax return. Day 2, p. 18.

44) Husband testified that he paid Attorney McConnell $75.00 for the conference and the preparation of the Antenuptial Agreement. Day 2, p. 76.

45) Attorney McConnell sent the Antenuptial Agreement to the parties for signature. She did not receive a return copy. Day 2, pp. 42, 61, 64.

46) Husband testified that the agreement was mailed to his mother's house where the parties were residing, and that both parties had time and access to review the document. Day 2, p. 73.

47) Husband testified that the parties reviewed the Antenuptial Agreement together on or about November 3-5, 1996 and agreed with its terms. Day 2, pp. 82-88, 112.

48) Husband testified that the Antenuptial Agreement was signed on the afternoon of November 6, 1996. Day 2, p. 87.

49) Wife testified that Husband presented the Antenuptial Agreement to her for signature only a few hours before the wedding rehearsal dinner on November 7, 1996. Day 2, pp. 18-19, 22.

50) Husband explained to Wife that the agreement had to be signed "premarriage" [sic]. Day 1A, pp. 14.

51) Husband explained to Wife that the agreement would protect assets received from their respective families, and, in the event of a divorce, those assets would not pass on to future spouses or their children. Day 1A, pp. 16-17; Day 2, pp. 77-79.

52) Both Husband and Wife signed the Antenuptial Agreement on November 7, 1996. (Wife's Exhibit 1, p. 4)

53) Wife's sister, Claudia Siscar, a first year law student, and Wife's brother-in-law, Roberto Siscar, Jr., witnessed the signing of the agreement. Day 1A, pp. 15, 20-21; Day 2, pp. 22-23.

54) Husband testified that he, Wife, and the Siscars sat down together and read the agreement aloud prior to it being signed. Day 2, pp. 87-88.

55) Neither Wife's sister nor her brother-in-law testified at the hearings held before this Court.

56) Wife testified that she did not read the agreement prior to signing it. Day 1A, pp. 16, 21; Day 2, pp. 11, 29; Wife's Brief, p. 2, No. 13.

57) Wife stated she did not read the parties' prenuptial agreement until April 2006 when she filed for divorce. Day 2, pp. 16-17.

58) Wife claims that she was not given a copy of the agreement after signing it. Day 2, p. 26, 29.

59) Husband claims he gave Wife a copy of the agreement. Day 2, p. 83.

60) The parties were married on November 8, 1996.

61) On March 9, 2000, the parties filed a Certidao de Registro de Casamento (hereinafter Certidao) at the Brazilian Consulate in Miami, Florida. (Wife's Exhibit 2).

62) Both parties testified that they wanted to register their marriage in Brazil, Wife's native country, and allow Wife to change her surname on her travel documents. Day 1A, p. 23.

63) At the time the parties filed the Certidao, they believed they were filing their marriage license with the General Consulate of Brazil in

Miami. Day 1A, pp. 23-24.

64) Husband testified that his Brazilian host family had some concerns with the Certidao when he discussed it with them. Day 2, pp. 96-97, 99, 119.

65) Husband expressed these concerns with Wife and later to Thomas A. Testi, Esq., an attorney and friend of the parties. Day 2, pp. 94, 98, 100.

66) On July 9, 2003, Wife planned to travel to Brazil for a vacation with the parties' son, Liam. The trip would have been Liam's first trip out of the United States. Day 1, pp. 29, 35.

67) Prior to the trip, Husband asked Attorney Testi to review the Certidao and make sure Wife's travel documents were in order. Day 1B, p. 9; Day 2, p. 23.

68) Attorney Testi and Husband were friends for approximately ten (10) years prior to Husband's marriage to Wife. Day 1B, pp 6-7.

69) Attorney Testi testified that he was friends with both parties after their marriage and considers himself to still be their friend despite the initiation of divorce proceedings between them. Day 1B, p. 7.

70) Attorney Testi admitted that he was a "reluctant witness" at the August 15, 2007 hearing held before this Court. Day 1B, pp. 8-9.

71) Attorney Testi provided legal advice and counsel to Husband and Wife for minor legal matters. Day 1B, p. 8.

72) Attorney Testi represented Husband when he purchased the marital residence on Wilson Road and an apartment building on West Eighth Street. Day 1B, pp. 24, 29-30, 37-38.

73) Husband is also Attorney Testi's chiropractor. Day 1B, p. 6.

74) Husband was sometimes "doctor of record" for Attorney Testi's worker's compensation and Social Security cases. Day 1B, p. 23.

75) Attorney Testi was aware that the parties had signed a prenuptial agreement in 1996. Day 1B, p. 9.

76) Attorney Testi testified that he knew Spanish and could understand most of the Certidao, written in Portuguese. Day 1B, p. 9.

77) Husband and Wife assisted Attorney Testi in translating the Certidao. Day 2, p. 119.

78) Wife provided a translation of the Certidao for the Court. Day 1A, p. 22; Wife's Exhibit 3.

79) Attorney Testi believed the Certidao contained language that the parties' assets were community property, in direct conflict with the terms of the Antenuptial Agreement. Day 1B, pp. 10-11.

80) Attorney Testi was concerned that the Certidao might invalidate the Antenuptial Agreement and informed Husband of his concerns. Day 1B, pp. 10-11.

81) Attorney Testi drafted a document titled "Reaffirmation and Ratification of Antenuptial Agreement Dated November 7, 1996" (hereinafter Reaffirmation) to clarify the parties' intention in filing the Certidao. Day 1B, p. 13.

82) Husband and Wife agreed to void the Certidao by signing the Reaffirmation. Day 2, pp. 98, 100; Wife's Exhibit 4.

83) Attorney Testi met with Husband and Wife at his office on July 9, 2003 to discuss and sign the Reaffirmation. Day 1B, pp. 11-14.

84) Attorney Testi did not review the Antenuptial Agreement with the parties, but attached a copy of it to the Reaffirmation. He also attached a copy of the Certidao. Day 1B, pp. 13, 30-31.

85) Attorney Testi did not advise either party of their rights under the Pennsylvania Divorce Code or inform them to consult with independent counsel prior to signing the Reaffirmation. Day 1B, pp. 44-45.

86) Attorney Testi testified that the parties were holding hands during the meeting and Wife was excited about her impending trip to Brazil. Day 1B, p. 14.

87) Attorney Testi testified that the entire meeting lasted less than ten minutes. Day 1B, p. 14.

88) Wife testified that the parties argued that morning and that Husband stated she could not travel to Brazil with Liam unless she signed the Reaffirmation. Day 1B, p. 30.

89) Attorney Testi testified that neither party showed any hesitation or doubt about signing the Reaffirmation. Day 1B, pp. 15-16.

90) Attorney Testi did not charge the parties for drafting the Reaffirmation. Day 1B, pp. 103-104.

91) Wife did not ask any questions during the meeting with Attorney Testi. Day 1B, pp. 28, 48.

92) Wife did not read the Antenuptial Agreement or the Reaffirmation at the meeting. Day 2, p. 13.

93) The Reaffirmation states that the parties executed the document "of their own free will and choice" and as a "current manifestation of their deep and abiding love" and was "not based on any financial inducements and consequences." Day 1B, p. 21; Wife's Exhibit 4.

94) Wife traveled to Brazil with Liam without further incident.

95) Wife testified that the parties participated in marital counseling for four years. Day 2, pp. 30-31.

96) Wife filed for divorce in April 2006.

Conclusions of Law

A) Marital Contracts

Prenuptial agreement and post-nuptial agreements are governed by contract law. *Stackhouse v. Zaretsky*, 2006 Pa. Super. 108, 900 A.2d 383. "The determination of marital property rights through prenuptial agreement, postnuptial and settlement agreements has long been permitted, and even encouraged." *Holz v. Holz*, 2004 Pa. Super. 181, 850 A.2d 751, citations omitted.

In the case at bar, there are two marital contracts at issue- the Antenuptial Agreement and the Reaffirmation. Based on the testimony presented, the intentions of the parties seem very clear. They signed the first agreement to keep their assets, and any assets they might inherit from their respective families, separate. They signed the second agreement to reaffirm the Antenuptial Agreement and correct any negative impact from the Certidao. The terms of the agreements were unambiguous, and the parties were fluent in both English and Portuguese. Further, in their testimony, Husband and Wife repeatedly mentioned a desire to keep certain assets separate, as well as concern about what might happen to those assets in the event of divorce, death, or remarriage. Their testimony demonstrates to the Court that they both intended to enter into the agreements to resolve those concerns and protect their assets.

B) Full and Fair Disclosure

Under Pennsylvania law, a prenuptial agreement requires the full and fair disclosure of the financial circumstances of the parties to be married. *Stoner v. Stoner,* 572 Pa. 665, 819 A.2d 529 (2003). "If an agreement provides that full disclosure has been made, a presumption of full disclosure arises." *Simeone v. Simeone*, 525 Pa. 392, at 403, 581 A.2d 162, at 167 (1990), citing *Hillegass Estate,* 431 Pa. at 152-53, 244 A.2d at 676-77. Full and fair disclosure should not be obscure, but also does not require exact values. *Mormello v. Mormello,* 452 Pa. Super. 590, 682 A.2d 824 (1996) and *Gula v. Gula,* 551 A.2d 324 (1988). The contracting parties should have a general idea of the assets and wealth of each party. *Busch v. Busch*, 732 A.2d 1274 (1999). A mere statement in a prenuptial agreement that full and fair disclosure was made is sufficient. *Paroly v. Paroly,* 876 A.2d 1061 (2005).

Page one, paragraph two of the Antenuptial Agreement states that each party gave a "full and complete disclosure of the income, assets, and obligations" to the other. The paragraph also mentions that both parties provided lists of their incomes and assets, attached to the document, and notes that those figures and valuations may not be exact. With these statements, the Antenuptial Agreement meets the requirements of *Paroly, Simeone,* and *Gula, supra.*

Upon review of the Reaffirmation, the Court finds that no full and fair disclosure was necessary. The Reaffirmation was merely reiterating the terms of the Antenuptial Agreement free from interference from the Certidao. In 2003, after seven years of marriage, Wife should have had a reasonable idea of Husband's income and assets, as well as her own. Completing another set of financial disclosures for the signing of a document that was only reaffirming the prenuptial agreement would have been redundant.

C) Rebutting Presumption of Full and Fair Disclosure

The presumption of full and fair disclosure may be rebutted by an assertion of fraud, misrepresentation, or duress, and must be proved by clear and convincing evidence. *Simeone, supra. See also Sabad v. Fessenden,* 2003 Pa.Super. 202, 825 A.2d 682.

Wife does not allege duress, despite her claim that she was told by Husband to sign the prenuptial agreement only hours before the wedding rehearsal dinner. *See also Hamilton v. Hamilton,* 404 Pa.Super. 533, 591 A.2d 720 (1991) (Court found no duress where wife was pregnant and unemployed on the eve of the wedding, but represented by counsel when she signed prenuptial agreement.)

Wife alleges fraud by Husband, that she relied on his inaccurate disclosures and was fraudulently induced to sign the Antenuptial Agreement. Given Wife's own admissions that she did not read the agreement nor Husband's disclosures, the Court must find that Wife

could not be defrauded by something she did not read. The failure to read a contract is not a defense against its execution or validity. As the Court in *Cooper v. Oakes*, 427 Pa.Super. 430, 629 A.2d 944 (1993) held:

> Contracting parties are normally bound by their agreements, without regard to whether the terms thereof were read and fully understood and irrespective of whether the agreements embodied reasonable or good bargains. *See Standard Venetian Blind Co. v. American Empire Insurance Co.*, 503 Pa. 300, 305, 469 A.2d 563, 566 (1983) (failure to read a contract does not warrant avoidance or nullification of its provisions); *Estate of Brant*, 463 Pa. 230, 235, 344 A.2d 806, 809 (1975); *Bollinger v. Central Pennsylvania Quarry Stripping & Construction Co.*, 425 Pa. 430, 432, 229 A.2d 741, 742 (1967) ("Once a person enters into a written agreement he builds around himself a stone wall, from which he cannot escape by merely asserting he had not understood what he was signing."); *Montgomery v. Levy*, 406 Pa. 547, 550, 177 A.2d 448, 450 (1962) (one is legally bound to know the terms of the contract entered). Based upon these principles, the terms of the present prenuptial agreement must be regarded as binding, without regard to whether the terms were fully understood by appellant. *IGNORANTIA NON EXCUSAT.*

Cooper at 434-435, 946, quoting *Simeone*, 525 Pa. at 399-400, 581 A.2d at 165-66, emphasis added.

Further, copies of Husband's disclosures were provided for the Court's review, and Husband testified as to his financial circumstances at the time of the execution of the parties' prenuptial agreement. The Court found nothing to be amiss with Husband's financial disclosures.

While Wife does not allege misrepresentation by Husband, she makes the novel argument that the unavailability of her list of assets renders her disclosure incomplete, therefore invalidating the prenuptial agreement. It is unclear if, as Husband's brief argues, Wife is alleging that she misled herself into signing an invalid agreement by failing to disclose her own assets (See Husband's Brief, pp. 11, 14, Nos. 37, 51). Such a conclusion is hard to believe since Wife appeared to testify coherently at both hearings. Nevertheless, the Court finds that Wife's argument strains credibility and dismisses it entirely.

D) Procedural Fairness

While contract principles may govern prenuptial agreement and antenuptial agreements, procedural fairness is also required under Pennsylvania public policy. *Karkaria v. Karkaria*, 405 Pa. Super. 176, 592 A.2d 64 (1991). In this matter, the parties met with a licensed attorney prior to signing each agreement. Attorney McConnell and Attorney Testi were acquaintances of the parties, and neither appeared to have any biases against Husband or Wife. Attorney Testi in fact admitted

to being a reluctant witness, a friend subpoenaed to testify in his friends' divorce case. For the work done, Attorney McConnell charged a minimal fee and Attorney Testi charged no fee. Both attorneys advised the parties that they could each obtain separate counsel. As drafter of the Antenuptial Agreement, Attorney McConnell discussed the possible implications of the Pennsylvania Divorce Code with the parties. As drafter of the Reaffirmation, Attorney Testi reviewed his concerns with the Certidao with the parties. Based upon their testimony, the Court finds both attorneys to be credible witnesses. The Court also finds that they acted professionally in assisting Husband and Wife in executing the two agreements.

Wife's argument that Attorney Testi "knew" about Husband's real estate transactions when he drafted the Reaffirmation is irrelevant here. His only concern was the possible invalidation of the prenuptial agreement by the Certidao, not the specific details of prenuptial agreement itself. He did not appear to be motivated against Wife based on his business dealings with Husband. On the contrary, Attorney Testi's discomfort in testifying was easily apparent to the Court. The Court finds that Wife was not deprived of due process by meeting with two attorneys who were first acquainted with Husband for the execution of the Antenuptial Agreement and the Reaffirmation.

E) Consideration

Wife further argues that the Reaffirmation was entered into without consideration. However, Wife's entire brief fails to cite any case law in support of her argument. After conducting its own research, this Court found the validity of a prenuptial agreement may be sustained where the agreement contains mutual releases against each spouse's estate, even if no provision for payment of money or other valuable consideration is contained in the agreement. *See In re Gelb's Estate*, 425 Pa. 117, at 127, 228 A.2d 367, at 373 (1967) *citing Zeigler Estate*, 381 Pa. 436, 113 A.2d 271 (1955). In the present case, the Antenuptial Agreement contains such releases and is therefore valid.

F) Reasonableness and Fairness

"Contracting parties are normally bound by their agreements without regard to whether the terms thereof were read and fully understood and irrespective of whether the agreements embodied reasonable or good bargains… If parties viewed an agreement as reasonable at the time of its inception, as evidenced by their having signed the agreement, they should be foreclosed from later trying to evade its terms by asserting that it was not in fact reasonable." *Simeone, supra*, at 401, 165-166. The reasonableness of a prenuptial agreement is presumed to be reasonable at its inception and is not a factor for the courts to consider in determining the validity of such as agreement. *Hamilton v. Hamilton*, 404 Pa.Super. 533, 591 A.2d 720 (1991).

Wife argues that the terms of the Antenuptial Agreement are unfair because Husband holds title to the majority of property acquired during the marriage, including the marital residence. However, based on the testimony of Attorney McConnell, the parties agreed to separately title such property. Attorney McConnell noted that clause of the Antenuptial Agreement was unusual, but both parties agreed to include it. By her own testimony, Wife did not ask any questions or raise any objections at the meeting with Attorney McConnell. Rather, she testified that she was a "good listener" during the meeting. Thus, the Court must conclude that Wife listened to the discussion of the separate property clause and agreed to its inclusion. The Court must also conclude the same for the meeting with Attorney Testi and the signing of the Reaffirmation.

Wife asks this Court to suppose that she, a college-educated business woman fluent in two languages, unknowingly signed two contracts at two different times without reading either or asking any questions about what she was signing. However, the Court does not believe that Wife is, or was, that naïve or ignorant. Wife had ability to read and understand both documents, but chose not to. The Court is inclined to agree with Husband's argument that, "[i]t is apparent that Wife… now, in the wake of a pending divorce, has decided that it would be to her financial advantage to attempt to invalidate the contract." (Husband's Brief, p. 17)

Conclusion

Based on the foregoing findings of fact and conclusions of law, this Court concludes that the parties' Antenuptial Agreement and Reffirmation are valid under the law.

ORDER

AND NOW to-wit, this 4th day of December 2007, upon consideration of Plaintiff's Petition for Declaratory Judgment as to the Validity of an Anti-Nuptial [sic] Agreement, and based on the foregoing Opinion and case law, it is hereby **ORDERED, ADJUDGED,** and **DECREED** that the Petition is **DENIED.**

BY THE COURT
/s/ **Michael E. Dunlavey, Judge**

COMMONWEALTH OF PENNSYLVANIA,

v.

JEREMY RANDALL MULLIGAN

CRIMINAL PROCEDURES / ADMISSIBILITY OF EVIDENCE

Competency of a witness is a factual question to be resolved by the Court. Pa.R.E. 601 (b)

CRIMINAL PROCEDURE / PRE-TRIAL MOTIONS

Denial of Defendant's Motion to Continue did not result in prejudice or abuse of discretion given the history of two continuances and previous delay of trial for five months.

CRIMINAL PROCEDURES / ADMISSIBILITY OF EVIDENCE

Evidence of Defendant's drug activity is admissible where such evidence was part of the chain or sequence of events which explained the events leading to the shooting of the victim.

CRIMINAL PROCEDURES / ADMISSIBILITY OF EVIDENCE

Defendant has no privacy interest in the phone calls made from Erie County Prison and recording of these calls do not constitute Constitutional violations of Defendant's rights.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 3020 OF 2006

Appearances: Raquel L. Taylor, Attorney for Commonwealth
George Schroeck, Esq., Attorney for Defendant
Timothy J. Lucas, Esq., Attorney for Defendant

OPINION

Cunningham, William R., J.

This Opinion is in response to the appeal from Appellant's convictions after a jury trial. Because this appeal is without merit, it must be dismissed.

FACTUAL HISTORY

In the early morning hours of August 7, 2006, Appellant shot his girlfriend Kristi Corder at point-blank range in the neck with a .38 caliber handgun. The gunshot shattered Corder's spine and exited through her cheek. Corder has been rendered a quadriplegic and will never breathe on her own again without the use of a ventilator. For a long time, it appeared Kristi Corder would die from this gunshot wound. Although she has survived, Corder will never be able to function independently nor care for herself or her two minor children.

Appellant is a native of Detroit, Michigan. Appellant came to Erie, Pennsylvania to traffic in illegal drugs. By his own admission, Appellant did not have any significant legal employment while living in Erie.

Appellant was romantically involved with Kristi Corder and was often

at her residence at 619 East 28th Street in the City of Erie. Appellant frequently stored his drugs and drug proceeds at Corder's downstairs apartment.

In the apartment above Corder lived David Ollie. About 1:07 a.m. on August 7, 2006, Ollie was awakened by Kristi Corder pounding on his door. Corder was accompanied by her two children and was crying when she told Ollie she had just been robbed. Although Corder did not want to call the police, she asked to borrow Ollie's cell phone. She then called Appellant. Afterward, Corder returned to her apartment leaving her two children with Ollie.

Concerned about his neighbor, Ollie went downstairs to check on Corder and saw the apartment was ransacked consistent with her description of being robbed. Appellant arrived while Ollie was in Corder's apartment. Appellant was upset and profane. Ollie decided to give them privacy and left.

During this time, Ollie observed outside of his apartment building an older model gray vehicle which he had seen earlier in the day. At some point, Corder brought blankets to Ollie's apartment for her two children who were going to stay there for the night. About twenty minutes after Corder left, Ollie heard a single gunshot. Ollie looked outside and observed the same gray vehicle he had seen earlier only this time it was pulling out of the driveway without headlights on.

Ollie ran downstairs and found Kristi Corder lying in a pool of blood. He called 911. While attending to Corder, Ollie asked if her boyfriend (meaning Appellant) did this to her. In what Ollie thought to be a dying declaration, Corder gave Ollie non-verbal confirmation that she had been shot by Appellant.

In addition to Ollie, the Commonwealth adduced the testimony of Appellant's employee in the drug trade, Gregory Austin. In the early morning hours of August 7, 2006, Austin received a phone call from Appellant telling him to come right away to Corder's residence.

Austin was met outside of Corder's apartment by Appellant. The two then drove to Austin's apartment in Appellant's 1998 gray Delta 88 Oldsmobile. During the ride, Appellant told Austin that Corder had set him up to get robbed of eleven thousand dollars and eleven ounces of cocaine. Because he never dealt drugs out of Corder's residence, Appellant believed Corder was the only person who knew he kept his drugs and money there. To Appellant it meant Corder was directly involved in the theft of his money and drugs. Appellant told Austin that if Corder does not give him his money and drugs back, he is going to kill her. Appellant dropped Austin off at his apartment.

A short time later, Appellant returned to Austin's apartment and told him they needed to leave immediately because he had just "killed the bitch". Trial Transcript, Day 2, May 15, 2007, p. 89. Austin and Appellant

then fled from Erie, Pennsylvania to Detroit, Michigan in the same 1998 Delta 88 Oldsmobile. En route Appellant told Austin he shot Corder. Austin saw a gun on Appellant's lap.

The Commonwealth also produced taped telephone calls in which Appellant was asking his mother to get rid of the gun that he brought to Detroit.

Officer Pat Chandley of the Identification Unit of the Erie Police Department testified that he lifted a fingerprint from a ceramic type coffee mug sitting on a coffee table in the front room of Kristi Corder's apartment. A subsequent lab report confirmed the fingerprint on this coffee mug came from Appellant.

Terry Amacher testified that he frequently drove Appellant around Erie to pick up or drop off drugs. Amacher took Appellant to Kristi Corder's apartment approximately six to ten times and described Appellant as having a sexual relationship with Kristi Corder. At Appellant's request, Amacher found a person willing to title Appellant's Delta 88 in his own name. Joseph Fosburg testified that he registered Appellant's Delta 88 Oldsmobile in his name in exchange for drugs and money from Appellant.

PROCEDURAL HISTORY

Appellant was arrested in September, 2006 in Detroit, Michigan. After a three day jury trial, on May 16, 2007, Appellant was convicted of Criminal Attempt/Homicide, Aggravated Assault, Recklessly Endangering Another Person, Firearms Not to be Carried Without a License and Possessing Instruments of a Crime.

On July 2, 2007 Appellant was sentenced. A timely Notice of Appeal was filed on July 31, 2007 followed by a Concise Statement of Matters Complained of on Appeal on August 23, 2007. This Opinion is in response to the issues raised therein.

THE COMPETENCY OF KRISTI CORDER

Appellant alleges it was error to deny his pre-trial motion challenging the ability of Kristi Corder to make an in-court identification of her assailant. Appellant maintains Corder was incompetent to testify because her memory was impaired. Appellant argues Corder should not have testified because the Commonwealth never provided to Appellant any of Corder's neurological or psychological records.

Without establishing any evidentiary basis, Appellant's counsel postulates that Corder's memory was the product of a concept known as "confabulation."[1] As the record reflects, there was neither expert nor any other testimony about "confabulation." Trial counsel's discussion of the

[1] "Confabulation" is not a psychiatric diagnosis or syndrome in the DSM-IV-TR. According to the 27th Edition of Dorland's Illustrated Medical Dictionary, "confabulation" is defined as the "unconscious filling in of gaps in memory with fabricated facts and experiences, commonly seen in organic amnestic syndromes. It differs from lying in that the patient has no intention to deceive and believes the fabricated memories to be real."

topic does not constitute evidence. Accordingly, any appellate argument about "confabulation" is unsupported by the evidentiary record.

Appellant's challenge to the competency of Kristi Corder is likewise unsupported by the record. Generally, "every person is competent to be a witness except as otherwise provided by statute or in these Rules." Pa.R.E. 601(a). Appellant argues an exception to this general rule by claiming Corder was an incompetent witness because of her impaired memory. *See* Pa.R.E. 601(b)(3).

The Comment to Pa.R.E. 601 states, in part: "The application of the standards in Pa.R.E. 601(b) is a factual question to be resolved by the Court." Consistent therewith, a hearing was held outside the presence of the jury in open court before all parties to determine Corder's competency as a witness.

Kristi Corder was seated in a wheelchair and connected to a ventilator. A nurse and a respiratory therapist were present to assist Corder with the ventilator. Also, a detective was present to hold the microphone into which Kristi Corder spoke. Other than what has just been described, none of these attendants assisted Kristi Corder in any other manner or in presenting her testimony. (T. T. Day Two, May 15, 2007 pp. 15, 16).

During her direct examination, Kristi Corder was able to state her name as well as her mother's name. *Id.* p. 12. Corder was able to identify the fact she has two children, each of whom are girls. *Id.* p. 13. Further, she could provide their names (Alicia and Marshia). *Id.* p. 13. On cross-examination, Corder gave the ages of her children (9 years old and 3 years old). *Id.* p. 15. She stated she was born in 1979 and would be 26 years old in a month. *Id.* p. 15. When asked by Appellant, Corder testified she did not do any drugs just prior to being shot. *Id.* p. 15.

In addition to these background questions, Corder was able to convey that she was injured by a gunshot wound from "Remi" (Appellant's nickname). Corder described her relationship with Remi as "we used to date. We used to be friends." *Id.* p. 13. According to Corder, she was dating Appellant when he shot her. *Id.* p. 14. Corder was sure that "Remi" shot her. *Id.* p. 14.

Finally, she represented that she knew the difference between the truth and a lie. *Id.* p. 14. The only fact Kristi Corder could not provide was the date on which she was shot. *Id.* pp. 14, 15.

In making a determination that Kristi Corder was competent, this Court had the opportunity to observe her entire testimony. Other than her physical limitations caused by a being a quadriplegic, Kristi Corder was alert and lucid. She knew her own name. She knew her mother's name. She knew how many children she had, their ages and names. She knew the gender of her children. She knew what year she was born and her present age.

Kristi Corder was able to describe how she was injured and who shot

her. She was able to identify Appellant by his nickname, "Remi." She described her relationship with Appellant as a friendship that blossomed into a dating relationship before Appellant shot her. She was able to state that she was not using drugs prior to being shot. Corder also recognized the difference between the truth and a lie.

Kristi Corder was asked to repeat much of this information during her trial testimony. Corder was able to provide the jury with her name, her age, her number of children and the gender of her children. *Id.* p. 17. She identified "Remi" as the person who shot her. *Id.* p. 18. She was also able to describe their relationship by stating, "we were friends, and then we dated" *Id.* p. 18.

On cross-examination at trial, Appellant threw Kristi Corder a curve ball in the following exchange:

"Q. Kristi did you know a fellow named Cash Lavelle Johnson?
A. Cash?
Q. Yeah, Lavelle, Lavelle Johnson?
A. Yes.
Q. He was your boyfriend about the time of the shooting, wasn't he? Was he your boyfriend at the time of the shooting?
A. No.
Q. Was he ever your boyfriend?
A. Yes"

Id. p.19.

Appellant's attempt to discredit Corder's memory by asking about a past boyfriend was creative but unsuccessful. This exchange reflects Corder's cognitive ability and the fact her memory was not impaired. Further, this is not the type of information which someone could have suggested by way of the "confabulation" that Appellant theorizes.

In other trial cross-examination, Appellant went on to test Kristi Corder's memory by asking the age of her youngest daughter. Corder replied correctly. When pressed further, Corder was able to provide her youngest daughter's birthday as February 5th, although she needed time to think about what year the child was born. *Id.* pp. 19, 20.

Corder's trial testimony is recounted to corroborate her ability to consistently recall and recite factual information establishing her cognitive ability and memory. Had Kristi Corder given any testimony at trial inconsistent with her testimony at the competency proceeding, Appellant would be arguing any discrepancy on appeal. There is no such argument available to Appellant.

To this Court's observation during the competency hearing, Kristi Corder was at all times coherent. Corder was able to comprehend the questions posed to her and immediately formulate an appropriate answer. There were no delays in her verbal responses. Corder was able to speak in a voice audible for all to hear. There was no apparent adverse affect

caused by medications on Corder's ability to recall information and respond to the questions asked of her.

The background facts Corder testified to regarding herself and her family were all accurate. Likewise, Corder's testimony about her relationship with Appellant and his nickname were true. These were not "fabricated facts" produced by any "confabulation." These true facts establish the ability of Corder to recall information.

Any attempt by Appellant to argue Corder's identification of him as the shooter is the product of "confabulation" is misplaced. Immediately after being shot, Corder communicated to David Ollie that she had been shot by Appellant. There was no time for anyone to suggest any fabricated fact to Corder before this identification. In fact, this form of dying declaration is admissible evidence because of its inherent reliability.

In determining competency this Court was aware of the significant physical injuries Corder suffered and their possible impact on her memory. There was no impairment of Kristi Corder's memory which rendered her incompetent as a witness. This observation is corroborated by Appellant. At no time has Appellant suggested that Kristi Corder was incompetent based on the record adduced at the competency hearing. On appeal, Appellant is not contending the record does not support a finding of competency.

Instead, Appellant focuses his challenge on the failure of the Commonwealth to provide any neurological or psychological records for Kristi Corder. This argument is unpersuasive for a number of reasons.

First, it has never been the law that a witness has to undergo a battery of medical, psychological and neurological tests before testifying. There is no requirement in Pa.R.E. 601 that a party tendering a witness present expert testimony to establish the competency of the witness.

Nonetheless, Appellant alleges error because the Commonwealth did not turn over any neurological or psychological records of Kristi Corder. However, the Commonwealth turned over all medical information in its possession. The Commonwealth is not required to conduct a neurological examination of a witness upon the demand of a defendant. The Commonwealth was under no legal obligation to procure a neurological examination and/or psychological records of Corder. In not securing such an examination or the supporting records, the Commonwealth ran the risk its witness may not be deemed competent. However, as it turned out in this case, there was no need for the neurological or psychological records.

Appellant must accept the victim as he finds her. It was Appellant who created the circumstances surrounding Kristi Corder's physical and mental conditions. At trial, Appellant stipulated to the injuries suffered by Kristi Corder. Specifically, the parties agreed as follows:

> The gun shot wound inflicted into Ms. Corder's cervical spine caused a C-2 fracture that resulted in respiratory failure and quadriplegia. Ms. Corder will remain dependent on a ventilator in order to breathe the rest of her life, and in addition will remain paralyzed from the neck down.

Trial Transcript, Day One, May 14, 2007 at pp. 188-189.

The jury was aware of the nature of Corder's injuries. The jurors observed Ms. Corder testify and made their own determinations whether Corder's physical injuries impacted her memory and ability to testify.

The bottom line is that Kristi Corder was able to appear in the presence of Appellant and identify him as the person who shot her. Her identification was unequivocal and immediate. Kristi Corder was a coherent witness. Her memory was not so impaired as to render her incompetent to testify.

MOTION FOR TRIAL CONTINUANCE

Appellant alleges error in the denial of his Motion for Continuance as presented on the eve of trial. This argument is unsupportable.

Appellant was represented from the outset by Attorney Timothy Lucas. All of the pre-trial matters, including discovery motions and pre-trial hearings, were handled by Attorney Lucas.

Appellant's trial was scheduled to start on Monday, May 14, 2007. On Thursday, May 10, 2007 Attorney Lucas filed a written Motion to Withdraw which he presented orally at a hearing on Friday, May 11, 2007. *See* Hearing Transcript, May 11, 2007 at p. 23. This request was on the last business day before the start of trial.

Attorney Lucas indicated his client wanted to hire Attorney George Schroeck and have Attorney Lucas withdraw. Meanwhile, on May 11, 2007, Attorney Schroeck entered an appearance and filed a Motion for Continuance. The Motion for Continuance by Attorney Schroeck and the Motion to Withdraw by Attorney Lucas were each denied.

While Attorney Lucas represented he had irreconcilable differences with his client, neither he nor Appellant could articulate the nature of these differences. At first, Appellant complained that Mr. Lucas was on vacation from April 15 to April 30, 2007. *Id.* p. 24. Assuming Attorney Lucas was on vacation during this time period, this fact did not warrant a continuance. Appellant fails to state how his defense was adversely impacted by his lawyer's vacation. Attorney Lucas represented Appellant for a lengthy period beginning in September, 2006. Attorney Lucas was present at all pre-trial proceedings and was familiar with Appellant's case.

Appellant also expressed concerns about financial problems. Yet, as pointed out to him, in addition to paying Attorney Lucas Appellant would now have to pay Attorney Schroeck. *Id.* pp. 24, 25.

Attorney Lucas then indicated there were problems with his client

stipulating to the Commonwealth's evidence. *Id.* p. 25. However, the record does not support this representation.

During a colloquy on May 9, 2007 Attorney Lucas, consistent with Appellant's expressed desires, would not stipulate to the authentication and admission of taped telephone conversations from the Erie County Prison or stipulate to evidence indicating Appellant was a drug dealer from Detroit. *See* Hearing Transcript May 9, 2007, pp. 11 - 15. There were no differences, let alone any irreconcilable differences, on any of these issues between Appellant and Attorney Lucas. In sum, neither Attorney Lucas nor Appellant could articulate any substantive basis to grant the Motion to Withdraw by Attorney Lucas.

Appellant's Motion to Continue on the eve of trial as filed by Attorney Schroeck was denied in large part because of the history of continuances in this case.

On January 3, 2007, Attorney Lucas filed a Motion to Continue Appellant's jury trial from the January term of criminal court. This Motion was granted and the trial was rescheduled for the next term of criminal court, which was March, 2007.[2]

On February 28, 2007, Attorney Lucas filed another Motion to Continue the trial. Appellant's request was granted; his trial was continued to the May, 2007 term of criminal court. By virtue of these two continuances, Appellant's trial was delayed for five months.

To be blunt, Appellant's third request for a trial continuance on the last day before trial was an orchestrated sham. Appellant knew that Kristi Corder's medical condition was precarious with a strong possibility her death was imminent. Appellant also knew that Kristi Corder had not given a videotaped statement and her testimony had not otherwise been preserved for use at trial. Further, there were no eyewitnesses to the shooting other than Kristi Corder. Appellant knew that if he kept delaying the trial as long as possible, there was the real possibility Kristi Corder would die and he may not be convicted of shooting her.

Appellant was not prejudiced by the denial of Attorney Schroeck's Motion to Continue as filed on May 11, 2007. In fact, the combined denial of the Motion to Withdraw by Attorney Lucas and the Motion to Continue by Attorney Schroeck gave Appellant the best of both worlds. Appellant had the benefit of the pre-trial knowledge and preparation of the case by Attorney Lucas coupled with his choice of counsel, Attorney Schroeck, to represent him at trial.

On May 11, 2007, Attorney Lucas hand delivered to this office a letter which read:

[2] Criminal trial terms are held in Erie County on alternating months, beginning with a criminal term in January.

Judge,

After the hearing at 10:00 a.m. on May 11, 2007 attorney Schroeck, Mr. Mulligan and I met at length and a decision made whereby attorney Schroeck will assume full responsibility for trial in this matter and perform all trial functions as Mr. Mulligan's attorney.

Pursuant to the Court's order denying my motion to withdraw as counsel I will function as standby counsel to Mr. Schroeck to assist him as he deems necessary but not actively engage in any trial matters.

I will be present at 9:00 a.m. on May 14, 2007 for the commencement of trial.

Respectfully,

Timothy Lucas, Esquire

Consistent with this letter, Attorney Lucas was present throughout the trial and actively assisted Attorney Schroeck on all matters. The record also reflects Attorney Schroeck was prepared for trial.

Attorney Schroeck's preparation was manifested in part by the additional pre-trial motions he filed. Before the trial started on May 14, 2007, Attorney Schroeck filed a written Motion in Limine seeking to exclude the fingerprint evidence and setting forth a detailed basis for this relief. At the same time, Attorney Schroeck filed another written motion titled "Motion to Suppress Victim's In Court Identification of Defendant Jeremy R. Mulligan as her Assailant". In this Motion, Attorney Schroeck demonstrated his working knowledge of the case in challenging the testimony of the victim. Attorney Schroeck was prepared for trial and had the benefit of all of the pre-trial preparation of Attorney Lucas. As such, Appellant did not suffer and cannot articulate any prejudice by the denial of his third continuance request.

By contrast, the Commonwealth would have been significantly prejudiced by a third defense continuance. The Commonwealth had the continued risk that its victim, who was the only eyewitness to the shooting, could die before she could testify about the shooter. This prejudice clearly outweighed Appellant's last minute request for a third continuance.

The interest of justice required the denial of Appellant's third continuance request. Appellant succeeded in delaying his trial for five months. Appellant had ample time to prepare for trial. Appellant's attorneys were prepared and Appellant cannot demonstrate any prejudice.

EVIDENCE OF DRUGS TO PROVE MOTIVE

Appellant alleges error by the introduction "into evidence the defendant's averred non-violent crime(s) involving drugs, by the use of corrupt witnesses at trial...." Concise Statement of Matters on Appeal, Paragraph 9. Appellant argues the probative value of the evidence was outweighed by the prejudice to him. This argument is unavailing.

Prior to trial, the Commonwealth filed a Motion in Limine seeking to introduce evidence:

> "a) The defendant and Ms. Corder were dating at the time of the shooting.
>
> b) The defendant, who is from Detroit, was involved in the illegal sale of narcotics, and stored his product and money at the residence of Ms. Corder.
>
> c) Shortly before the shooting, the defendant's drugs and a quantity of money had been taken from the Corder residence.
>
> d) After being told about the missing drugs and money, the defendant accused Ms. Corder of setting him up.
>
> e) In response, the defendant shot the victim."

Commonwealth's "Motion in Limine Introducing Evidence of Other Crimes, Wrongs, or Acts Pursuant to Pennsylvania Rules of Evidence 404(B)", Paragraph 3(a)-(e).

This evidence was admissible pursuant to Pa.R.E.404(b)(2) as proof of a motive.[3] Appellant's statements before and after shooting Kristi Corder as testified to by Gregory Austin establish Appellant's motive to shoot Corder. This evidence was of enormous probative value for the factfinders.

This evidence was prejudicial to Appellant. However, a trial is a search for the truth. In determining what actually occurred and why Kristi Corder was shot, the jury could consider Appellant's statements and conduct establishing his motive. The credibility of the witnesses providing this evidence was left solely to the jury. The probative value of this evidence outweighed any prejudice to the Appellant.

There was a second basis rendering this evidence admissible. Specifically, this evidence was necessary to explain the sequence of events which lead to the shooting of Kristi Corder. This type of evidence is admissible according to the Pennsylvania Supreme Court:

> Another special circumstance for evidence of other crimes may be relevant and admissible is where such evidence was part of the chain or sequence of events which became part of the history of the case

[3] Pa.R.E. 404(b)(2) provides: "Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

and formed part of the natural development of the facts.

Commonwealth v. Lark, 543 A.2d 497 (Pa. 1988).

The testimony about Appellant's drug activities was relevant to explain the sequence of events prior to the shooting of Kristi Corder. Further, this evidence was inextricably woven into the facts of this case. It would be nearly impossible to bleach these facts out of the fabric of the story the jury needed to hear.[4]

APPELLANT'S TELEPHONE CALLS WERE PROPERLY ADMITTED

Appellant alleges error in the admission of telephone calls by Appellant from the Erie County Prison. Appellant alleges these calls were admitted "in violation of the Fourth, Sixth and Fourteenth Amendments of the United States Constitution and laws, statutes and constitution of the Commonwealth of Pennsylvania." Concise Statement of Matters, Paragraph 10.

Appellant has waived this argument for several reasons. First, Appellant never raised any of these constitutional violations as an objection at trial. Instead, the sole objection tendered by Appellant was the lack of Miranda warnings given to Appellant prior to any of these phone calls. Appellant never presented this objection as a violation of the Fourth, Sixth or Fourteenth Amendments. Because of his failure to raise these objections at trial. Appellant has not preserved any argument regarding the Fourth, Sixth or Fourteenth Amendments.

Second, Appellant has waived these constitutional issues by failing to articulate an argument. Appellant does not identify how the Fourth, Sixth or Fourteenth Amendments are implicated or violated. Appellant's Concise Statement is deficient to the point of waiver. *See Commonwealth v. Flores,* 909 A.2d 387 (Pa. Super. 2006). As the Superior Court has stated: "(w)hen the trial court has to guess what issues an appellant is appealing, that is not enough for a meaningful review." *Commonwealth v. Lemmon,* 804 A.2d 34, 37 (Pa. Super. 2002); see also, *In Re Estate of Daubert,* 757 A.2d 962 (Pa. Super. 2000)("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 its preparation of its legal analysis which is pertinent to those issues...").

In this case, Appellant's bald assertions are devoid of any argument which must be addressed on appeal. This Court cannot prepare an analytical response to Appellant's boilerplate allegations. As such, Appellant has waived appellate review.

Assuming arguendo there is no waiver, there are nonetheless no constitutional violations. Appellant had no reasonable expectation of any

[4] For example, this evidence explains why Corder called Appellant and not the police to report the robbery.

privacy in his telephone calls made from the prison. There were at least three ways Appellant was informed that all of his telephone calls were being monitored.

First, as part of the intake process when Appellant was committed to the Erie County Prison, he was given an inmate handbook informing him that all telephone calls from the prison phones are recorded. *See* Commonwealth Exhibit 2. Trial Transcript, Day 1, May 14, 2007, p. 6.

In the event Appellant did not read or recall that portion of the inmate handbook, he was advised by a sign prominently displayed above each telephone in the prison, stating in both English and Spanish: "All calls in the telephone number you are calling will be recorded and monitored." *See* Commonwealth Exhibit "A" *Id.* pp. 6, 7.

Assuming an inmate does not read the inmate handbook or the sign prominently displayed by the telephone, Appellant was informed a third time during the call that it is being recorded. There is an oral message during the call informing the parties that the phone call is being recorded. Hence, all parties to the phone call are told that the contents of the call are being recorded. In fact, the party receiving the phone call has the option to accept or decline the call after being informed it is being recorded. *Id.* p. 8.

Appellant was repeatedly apprised in a variety of ways that everything he was saying on the telephone and everything he was hearing from the party he was calling was being recorded. As a result, Appellant had no reasonable expectation of privacy in any of his conversations and therefore has no constitutional protection. As such, Appellant's constitutional rights were not implicated.

It should be noted the only portions played to the jury were short excerpts between Appellant and his mother. There were no tapes played to the jury involving any discussions between Appellant and his counsel.

Appellant also complains it was error to allow the jury to hear the prejudicial statements by Appellant's mother. However, Appellant knew when he called his mother that everything he said to his mother was recorded. Appellant also knew everything she said was recorded. Appellant's mother was informed every time she received a telephone call that the call was being recorded and she had an option whether to accept the call. It was her decision to accept the calls knowing they were recorded. It was also her decision to make incriminating statements. As such, she has no constitutional protections.

To the extent Appellant is objecting to the substance of any statements made by Appellant's mother, these statements were also admissible under the co-conspirator exception to the Hearsay Rule, particularly as it relates to the conversation about a gun. *See* Pa.R.E. 803(25)(E). Appellant asked his mother if she got rid of the gun. She responded that she had already done so. Kristi Corder was shot with a gun that has never been recovered. There was also evidence that Appellant fled the scene of

the shooting to return to his mother's residence in Detroit. According to Gregory Austin, Appellant had a gun on his lap as he drove from Erie to Detroit after shooting Corder.

Appellant's mother is admitting she helped get rid of a gun. The mother is possibly admitting that she conspired with Appellant to destroy evidence of a crime. While the conversation may not have specifically identified the gun as the same one used to shoot Kristi Corder, given all of the circumstances, a strong inference can be drawn that it was the same gun. There would otherwise be little reason for this conversation to occur. Therefore, this evidence was admissible as a statement of a co-conspirator within the scope of a conspiracy flowing from Corder's shooting to destroy evidence or hinder the apprehension of Appellant. *See Commonwealth v. Mayhue*, 639 A.2d 421 (Pa. 1994).

The statements of Appellant's mother were also admissible under another exception to the Hearsay Rule known as a Statement against Interest. *See* Pa.R.E. 804(b)(3). The mother's admission about getting rid of a gun when she knew her son was accused of shooting Corder with a gun are statements possibly subjecting her to criminal liability. "In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." *Id.* Because there is evidence that Corder was shot with a gun, that Appellant fled to his mother's residence in Detroit while in possession of a gun, there was no recovery of the gun used to shoot Corder and the fact these conversations were captured on tape, the trustworthiness of the mother's statements is established rendering her comments admissible as against her penal interest.

CONCLUSION

Kristi Corder survived to tell the story of her shooting. She was unequivocally able to identify Appellant as her shooter. Appellant had the opportunity to challenge her memory and credibility. Corder's memory was not impaired so as to render her incompetent as a witness. Likewise, the jury had the opportunity to observe Kristi Corder and determine whether she could recall the events of August 7, 2006.

Appellant was granted two prior trial continuances causing a five month delay. Appellant's eleventh hour request for a third continuance of his jury trial was without merit. Appellant cannot establish any prejudice because he was represented by Attorneys Lucas and Schroeck at trial and therefore had the best of both worlds. Attorney Lucas had been preparing a defense for nine months and Attorney Schroeck was Appellant's choice of counsel. The Commonwealth would have been prejudiced by a third continuance and the real possibility the victim could die before testifying to the identity of her shooter.

Appellant's convictions were not the result of any improperly admitted evidence. Appellant's drug trafficking and belief that Kristi Corder set up

the theft of his drugs and money established his motive to shoot Kristi Corder. Further, this evidence was inextricably woven into the sequence of events prior to the shooting. The probative value of this evidence outweighed any prejudice to Appellant.

The telephone calls Appellant made from the Erie County Prison to his mother as played to the jury were not secure in violation of Appellant's constitutional rights. Appellant has waived these arguments by failing to raise these objections at the time of trial or articulate them in a concise manner on appeal. Further, Appellant has no reasonable expectation of privacy in these telephone calls and therefore no constitutional protection.

Likewise, Appellant's mother accepted the phone calls knowing they were being recorded and made incriminating statements possibly establishing herself as a co-conspirator to destroy evidence of Kristi Corder's shooting. The statements were also against the mother's penal interest.

For all of the foregoing reasons, this appeal must be dismissed.

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

UNIFUND CCR PARTNERS, Plaintiff

v.

NANCY L. ANDERSON, Defendant

PLEADING / PRELIMINARY OBJECTIONS

In an action seeking to collect past due payments on a credit card, plaintiff's failure to attach to its complaint a statement of activity demonstrating when and where the card was used rendered the complaint deficient under Pa.R.C.P. 1019(i).

PLEADING / PRELIMINARY OBJECTIONS

In an action seeking to collect past due payments on a credit card, plaintiff's failure to attach to its complaint a copy of the contract or credit agreement that would have been sent to the defendant along with the credit card rendered the complaint deficient under Pa.R.C.P. 1019(i).

PLEADING / PRELIMINARY OBJECTIONS

In an action seeking to collect past due payments on a credit card, plaintiff's failure to attach to its complaint documents demonstrating that the card issuer sold and/or assigned defendant's debt to plaintiff rendered the complaint deficient under Pa.R.C.P. 1019(i).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 12631-2007

Appearances: Michael F. Ratchford, Esq., Attorney for Plaintiff
Lori R. Miller, Esq., Attorney for Defendant

OPINION

Connelly, Shad, J.

This matter is before the Court pursuant to Nancy L. Anderson's (hereinafter "Defendant") Preliminary Objections to Unifund CCR Partners' (hereinafter "Plaintiff") Complaint.

Procedural and Factual Background

Plaintiff filed its Complaint on August 24, 2007 seeking to collect past due payments on a credit card issued to Defendant. Plaintiff is engaged in the business of debt purchase and collection and is the alleged assignee of this debt that was sold by First USA Platinum. *Complaint*, ¶¶ 3, 5. Plaintiff alleges that Defendant applied for and received a credit card issued by First USA Platinum, under the account number 5417126716184311. *Id.* at ¶ 4. Plaintiff alleges the remaining balance due, owing and unpaid on Defendant's account is $17,690.84. *Id.* at ¶ 12. Interest has also accrued in the amount of $2,689.91. *Id.* at ¶ 14. Plaintiff also seeks attorney fees in the amount of 25% of the balance, which Plaintiff calculates to be $5,095.19. *Id.* at ¶ 15. Attached to Plaintiff's Complaint was a document entitled Exhibit A, comprised

of several documents including a two-page printout with a Bank One logo, labeled Page 2 of 3 and Page 3 of 3, showing a statement date of 11/05/04-12/04/04; an "Affidavit of Indebtedness" from Kim Kenney, Media Supervisor of Unifund CCR Partners, attesting that Nancy L. Anderson is indebted and said account had been transferred to counsel of record for collection; a "Unifund Statement" sent to Defendant stating that her account was past due and that she should remit payment to Unifund in the amount of $20,148.10; and a "Bill of Sale" from Chase Bank USA, N.A. (as successor through merger with Bank One, Delaware, N.A.) to Unifund Portfolio A, transferring "those certain receivables, judgments or evidences of debt described in **Exhibit 1** attached hereto..." (emphasis in original). The Court would note that Exhibit 1, which allegedly lists the accounts transferred, is not attached to the pleadings. Plaintiff alleges that it has attached the cardmember agreement as Exhibit A to the pleadings. *Plaintiff's Response to Defendant's Preliminary Objections*, ¶ 4. The Court would note that no such document is attached as Exhibit A, however Exhibit B to the Complaint contains a four page internet printout from "Card Member Services" which appears to detail the Terms of Use of the Online Banking Services offered by FirstUSA. *Complaint*, Exhibit B.

Defendant filed Preliminary Objections and a Brief in Support of the Preliminary Objections. Defendant alleges that Plaintiff's Complaint is defective as it fails to conform to law or rule of court. *Preliminary Objections to Plaintiff's Complaint*, ¶¶ I. Defendant alleges that the Bank One Statement is not a sufficient statement of the account as it does not lists the dates nor the merchants where the credit card was used. *Brief in Support of Preliminary Objections to Plaintiff's Complaint*, ¶ II. Defendant argues that the alleged defect in Plaintiff's Complaint violates Pa.R.C.P. 1019(i), and Defendant moves to strike or dismiss Plaintiff's Complaint. *Id.*

Plaintiff denies that its Complaint is defective. *Plaintiff's Response to Defendant's Preliminary Objections*, ¶¶ 2-5. Plaintiff alleges that the purported Exhibit A, the Cardmember Agreement[1], was properly attached as the document upon which this case is based. *Id.* at ¶¶ 3-4. Finally, Plaintiff denies that it is required to attach the monthly statements of activity to the Complaint. *Id.*

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

[1] Actually Exhibit B to Plaintiff's Complaint.

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 partial statement, titled Exhibit "A", which lists only the balance due, not the specific dates or merchants where the charges were acquired. As this Court has held in prior cases, "A sufficient statement of activity will contain a record of where the card was used.` *LVNV Funding, LLC, Assignee of Sherman Acquisition, Assignee of Bank of America v. Tina L. Lindsey,* Erie County Court of Common Pleas, No. 14119-2006 (January 19, 2007).

Plaintiff has not attached any contract or credit agreement that would have been sent to Defendant along with the disputed credit card. Plaintiff has merely attached an Internet printout describing the online banking of FirstUSA, as listed on a website entitled Card Member Services. This falls short of the requirements set forth in *Rule 1019(i), Atlantic Credit and Finance*, and *LVNV Funding.*

Finally, Plaintiff has not attached proper documentation of the assignment of Defendant's alleged debt. The assignment included in Exhibit A of Plaintiff's Complaint is only a partial document and makes no reference to the disputed account. Again, Plaintiff's documentation falls short of the requirements set forth in *Rule 1019(i), Atlantic Credit and Finance*, and *LVNV Funding.*

Therefore, in accordance with the foregoing opinion, Defendant's preliminary objections are sustained. 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 23rd day of January, 2008, 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 30 days to file an amended complaint with the appropriate documentation.

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

MYCHAELANN GASS, Plaintiff

v.

JULIE MORGAN and DAVID MORGAN, Defendants

CIVIL PROCEEDINGS / PLEADING / PRELIMINARY OBJECTIONS

Preliminary objections in the nature of a demurrer require the court to resolve the issue solely on the basis of the pleadings; no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer.

CIVIL PROCEEDINGS / PLEADING / PRELIMINARY OBJECTIONS

A complaint containing mostly general averments consisting of 32 paragraphs with no separate accounts and no specific requests for relief does not conform with Rule 1019 (general and specific averments) and Rule 1021 (claim for relief), Pa. R. Civ. P.

CIVIL PROCEEDINGS / PLEADINGS / COMPLAINT

In a breach of contract action, the plaintiff must plead with specificity the existence of a contract, breach of that contract, and resulting damages to the plaintiff.

CIVIL PROCEEDINGS / PLEADINGS / COMPLAINT

Where the complaint did not indicate the alleged circumstances of the contract, whether it was oral or written, how it was allegedly breached, and how plaintiff was damaged, the defendants' demurrer must be granted.

CIVIL PROCEEDINGS / PLEADING / PRELIMINARY OBJECTIONS

Where the complaint alleged that plaintiff suffered "severe emotional distress" and sought the return of an invisible fence and two dog collars, which are both possible separate causes of action but not necessarily damages, the complaint does not conform to Rule 1020, Pa. R. Civ. P., regarding pleading more than one cause of action.

CONTRACTS / OFFER AND ACCEPTANCE

In order to form an enforceable contract, there must be an offer, acceptance, consideration or mutual meeting of the minds. There must be a "meeting of the minds" whereby both parties mutually assent to the same thing as evidenced by an offer and its acceptance. Further, there must be a meeting of the minds on all terms in a contract.

CONTRACTS / OFFER AND ACCEPTANCE

Where the first newspaper advertisement stated that two dogs were "pure blooded, free to a good home" and a second advertisement stated that the dogs would be "free, good home, must stay together," the parties were not relying on the same offer or even had the same understanding of that offer, and the existence of a contract could not be found.

CONTRACTS / MISTAKE

A "mutual mistake" is (1) a mistake in which each party misunderstood the other's intent and/or (2) a mistake that is shared and relied on by both parties to a contract. Mutual mistake exists where both parties to a

contract are mistaken as to existing facts at the time of execution.

CONTRACTS / MISTAKE

Clear, precise, and convincing evidence of mutual mistake of contracting parties will be found if (1) the witnesses are found to be credible, (2) the facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order, and (3) their testimony is so clear, direct, weighty, and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.

CONTRACT / MISTAKE

Where the parties' testimony was credible and clearly indicated that there was no agreement between them and that both were mutually mistaken about material facts regarding the transfer of dogs, namely, whether one or both dogs should be returned to plaintiff in the event of a problem, a mutual mistake will be found.

REPLEVIN / WRIT OF SEIZURE

Seizure of assets is disfavored and may be unnecessary where the record lacks evidence of any harm if seizure was not granted.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 14998-2007

Appearances: Richard Filippi, Esquire, Attorney for Plaintiff
Tina Fryling, Esquire, Attorney for Defendants

OPINION

Dunlavey, Michael E., J.

"If dogs could talk, perhaps we would find it as hard to get along with them as we do with people." - Karel Capek

"No matter how little money and how few possessions you own, having a dog makes you rich." - Louis Sabin

Procedural History

Before the Court is a dispute over the ownership of a female Golden Retriever named Brandy. On November 13, 2007, Plaintiff filed a Complaint in Replevin, for the return of Brandy, plus an invisible dog fence and two invisible fence collars. On November 29, 2007, Plaintiff flied a Motion for a Writ of Seizure. Defendants filed Preliminary Objections on December 7 and 12, 2007 with a supporting brief. Plaintiff filed a Reply on January 4, 2008. A hearing on the Writ of Seizure was held before this Court on January 8, 2008.

Findings of Fact

Plaintiff placed an advertisement in the local newspaper seeking a new home for her two pet Golden Retrievers, Brandy, a female, and Blue, an older male dog. Plaintiff was admittedly very close to the dogs, and had

recently lost a third pet Golden Retriever. She was also moving to an apartment that did not allow pets. Defendants, seeking two dogs for their family, responded to the advertisement.

Testimony revealed that two advertisements were placed in the Erie Times-News (hereinafter the News) The first advertisement (hereinafter Ad #1) ran on April 18, 2007, and read:

> **GOLDEN RETRIEVERS** (2) full blooded, free to good home. [Plaintiff's phone number]

Prior to Ad #1's appearance in the News, Plaintiff telephoned the News to verify her phone number and to add language that the dogs must stay together. She testified that she was informed that the advertisement would take an additional line and could not be changed before the April 18, 2007 edition was issued. Plaintiff testified that she changed the advertisement to avoid using an additional line. The second advertisement (hereinafter Ad #2) ran on April 19, 2007, and read:

> **GOLDEN RETRIEVERS** (2) free, good home, must stay together. [Plaintiff's phone number]

Defendant Julie Morgan testified that she was unaware of the existence of Ad #2. She testified that she responded to Ad #1, explaining that her family had recently moved and her husband, David Morgan, would bring yesterday's newspaper from his workplace to read at home.

Subsequently, Plaintiff checked Defendants' references and agreed to transfer the dogs to Defendants, with the understanding that she could call and check in on them. Defendants testified that Plaintiff called them every day, sometimes more than once.

Approximately a week or two later, in May 2007, Defendants contacted Plaintiff and informed her that they wished to return the male dog, Blue, because he damaged a door in their home and growled at their young children.

Plaintiff informed Defendants that she would retrieve both dogs and obtained a ride from a friend to Defendants' home to do so. Plaintiff's friend, Margaret (Meg) McCray, testified that she could not transport the dogs because she had a small car with leather seats that could be damaged by the dogs. Defendant Julie Morgan testified that she negotiated with Plaintiff to keep Brandy and offered to transport Blue in her vehicle back to Plaintiff's home.

Ultimately only Blue was returned to Plaintiff. Plaintiff claims that Defendants refused to return Brandy, despite repeated requests. Plaintiff filed the aforementioned Complaint in Replevin approximately six months later.

Conclusions of Law

I. Preliminary Objections - Demurrer

Defendants first argue that Plaintiff failed to state a cause of action in her Complaint for Replevin (hereinafter Complaint). Upon review of

the Complaint, the Court is inclined to agree. "[P]reliminary objections in the nature of a demurrer require the court to resolve the issues solely on the basis of the pleadings; no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer." *Mellon Bank, N.A. v. Fabinyi*, 437 Pa.Super. 559, 650 A.2d 895, 899 (1994).

The Complaint contains mostly general averments, consisting of 32 paragraphs with no separate counts and no specific requests for relief. Thus, the Complaint does not conform with the Pennsylvania Rules of Civil Procedure, specifically, Rule 1019 (general and specific averments) and Rule 1021 (claim for relief).

Further, Plaintiff's Complaint mentions the word "contract" only once in the entire Complaint, but Plaintiff's counsel argued in his Reply, and at the hearing, that this is a breach of contract matter. *See* Plaintiff's Complaint for Replevin, No. 19. In a breach of contract action, the plaintiff must plead with specificity the existence of a contract, breach of that contact, and resulting damages to the plaintiff. *See Williams v. Nationwide Mut. Ins. Co.*, 750 A.2d 881 (Pa.Super., 2000). Attaching pertinent information is also helpful when pleading the case. *Williams, supra*, citing Pa.R.C.P. 1019(h).

Plaintiff, in her Complaint, did not indicate the alleged circumstances of the contract, whether it was oral or written, how it was allegedly breached, and how Plaintiff was damaged. The Complaint mentioned that Plaintiff suffered "severe emotional distress" and sought the return of an invisible fence and two dog collars, which are both possible separate causes of action, but not necessarily damages. *See* Plaintiff's Complaint for Replevin, Nos. 27 and 28. Thus, the Court must grant Defendants' demurrer. The Court also finds Plaintiff's Complaint does not conform to Pa.R.C.P. 1020 regarding pleading more than one cause of action.

Upon review of Plaintiff's Writ of Seizure, the Court notes that it more closely resembles a typical civil complaint, but that does not cure the flawed Complaint in Replevin.

II. Existence of a Contract

Plaintiff also failed to attach copies of the newspaper advertisements to her pleadings as the basis of the alleged contract. Only at the time of hearing did the Court learn that there were two different newspaper advertisements. No mention of this was made in either Plaintiff's Complaint or Writ.

Plaintiff argues that a contract between the parties has been breached. However, the revelation of the two different advertisements presents an interesting problem. Ad #1 states that the dogs are pureblooded and free to a good home. Ad #2 states the dogs are free to a good home but must stay together. Based on these differences, it appears to the Court that the parties were not relying on the same offer or even had the same understanding of that offer. Plaintiff's counsel argues that the ads were

simply offers to negotiate.

It is black letter law that in order to form an enforceable contract, there must be an offer, acceptance, consideration or mutual meeting of the minds. *Schreiber v. Olan Mills,* 426 Pa.Super. 537, 541-42, 627 A.2d 806, 808 (1993).

"[T]here must be a 'meeting of the minds,' whereby both parties mutually assent to the same thing, as evidenced by an offer and its acceptance." *Mountain Props. v. Tyler Hill Realty Corp.,* 767 A.2d 1096, 1100 (Pa.Super. 2001). Further, there must be a meeting of the minds on *all terms* in a contract. *Onyx Oils Resins Inc. v. Moss,* 367 Pa. 416, 420, 80 A.2d 815, 817 (1951), emphasis added.

Here, Defendants relied on Ad #1 and believed they could keep Brandy and return Blue. Plaintiff relied on Ad #2 and believed that the dogs must remain together or be returned to her. It is apparent that both parties did not mutually assent to the same thing. Rather, it appears that both parties were mistaken in their understanding of the transfer of the dogs. Legally, the term for such a misunderstanding is "mutual mistake."

Black's Law Dictionary defines a "mutual mistake" as 1) A mistake in which each party misunderstands the other's intent, and/or 2) A mistake that is shared and relied on by both parties to a contract. Black's Law Dictionary, p. 1023 (8th ed. 2004). Mutual mistake exists where both parties to a contract are mistaken as to existing facts at the time of execution. *Vonada v. Long,* 2004 Pa.Super. 212, 852 A.2d 331, 337.

Clear, precise and convincing evidence of mutual mistake of contracting parties will be found if the following factors are satisfied: witnesses must be found to be credible, that the facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct, weighty, and convincing as to enable the [fact finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. *Mellish v. Hurlock Neck Duck Club, Inc.,* 886 A.2d 1151 (Pa. Commw. Ct., 2005).

In the case at bar, both Plaintiff and Defendant Julie Morgan were very clear in their testimony, no matter how disparate their positions were. The Court found both to be credible. Each was able to recall particular details in a straightforward, convincing manner, although each was colored by her own particular point of view. The Court concludes that while the parties' testimony was credible, it is clear that there was no agreement between them and that both were mutually mistaken about material facts regarding the transfer of the dogs, to-wit, whether one or both dogs should be returned to Plaintiff in the event of a problem. *See also Fink v. Smith,* 170 Pa. 124, 32 A. 566 (1895) where contract to sell horse was void due to mutual mistake. Defendant bought the horse at sheriff's sale, but kindly allowed plaintiff to keep it until the conclusion of plaintiff's husband's larceny trial. The Court found the parties erroneously believed that husband's criminal trial could affect his title to the horse. Aside

from this Court granting demurrer, without a contract, Plaintiff has no cause of action here.

III. Preliminary Objections - Motion to Strike

Since the Court is granting Defendants' Preliminary Objections and dismissing the Complaint, the Motion to Strike based on Pa.R.C.P. 1028(a)(2) does not need to be addressed. However, the Court recognizes that Plaintiff initially made allegations of possible "abuse" of Brandy, but at the hearing, apparently retreated from those allegations and claimed only possible "anxiety" by Brandy. Plaintiff, and her counsel, should understand the great disparity between alleging abuse of an animal and an animal being anxious. In this Commonwealth, the first may be considered criminal, while the latter is merely emotional. In other circumstances, the Court would consider striking Paragraphs 30 and 31 as "scandalous" *and* "impertinent." *See Jubelirer v. Rendell*, 904 A.2d 1030, Pa.Cmwlth. (2006).

IV. Writ of Seizure

As to the Writ of Seizure, the Court will not decide its merit since demurrer has been granted. However, the Court notes the case of *Watson v. Trustees of Conneaut Lake Park, Inc.,* 795 A.2d 1068, Pa.Cmwlth. (2002), where the court weighed continued operation of the Park against allowing its assets (rides, etc.) to be seized, finally determining that seizure of assets would cause the Park to fail, which was the very thing the Court was trying to prevent. The *Watson* Court noted that the record lacked evidence of any harm if seizure was not granted.

In the case at bar, if Brandy is safe and in a good home, has become the family pet and had good veterinary care including being spayed, seizure may not be necessary. Plaintiff renounced her concerns about abuse of the dog at the hearing. Thus, the Court sees no reason to remove Brandy from Defendants' care. *Compare Morgan v. Kroupa*, 702 A.2d 630 (1997) where the Vermont Supreme Court awarded lost dog to finder over original owner, holding that finder made efforts to locate owner, took good care of dog, and that the dog had become family pet.

ORDER

AND NOW to-wit, this 11th day of January 2008, based upon the foregoing Opinion and case law, and the testimony presented by the parties, it is hereby **ORDERED, ADJUDGED**, and **DECREED** that Defendants' Preliminary Objections are **GRANTED**. Plaintiff failed to state a cause of action in either contract or tort. The Court finds that no contract existed between the parties due to mutual mistake. Plaintiff's Complaint in Replevin also fails to comply with Pennsylvania Rules of Civil Procedure. **FURTHER,** Plaintiff's Motion for Writ of Seizure is hereby **DENIED.**

BY THE COURT:
/s/ **Michael E. Dunlavey, Judge**

HEATHER EDMOND, Plaintiff

v.

WALDAMEER PARK, INC., Defenant

PLEADINGS / PRELIMINARY OBJECTIONS

A preliminary objection may be filed by any party to any pleading. An appropriate preliminary objection includes objecting on the basis of improper service.

CIVIL PROCEDURE / SERVICE

Jurisdiction of the defendant cannot be obtained unless proper service is made; procedural requirements relating to service of process must be strictly adhered to.

CIVIL PROCEDURE / SERVICE

Pa.R.C.P. Rule 401 provides that process must be served within the Commonwealth within thirty days after the issuance of a writ or the filing of a complaint. If service is not made within the 30-day window, the prothonotary may reissue the writ or reinstate the complaint.

CIVIL PROCEDURE / SERVICE

Service of process completes the progression of events by which an action is commenced. Once an action is commenced, the statute of limitations is tolled only if the plaintiff makes a good faith effort to effectuate service.

CIVIL PROCEDURE / SERVICE

After the statute of limitations has expired, and where the plaintiff has not made a good faith effort at notice such that (1) the defendant had no notice of the litigation and, as a result, (2) the defendant was prejudiced, the Plaintiff's claim is barred by the statute of limitations.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 12880-2007

Appearances: Charles V. Longo, Esquire for Plaintiff
Patrick M. Carey, Esquire for Defendant

OPINION AND ORDER

DiSantis, Ernest J., Jr., J.

This case comes before the Court on the Defendant's, Waldameer Park, Inc., preliminary objections to the Plaintiff's, Heather Edmonds, Civil Complaint.

I. BACKGROUND OF THE CASE.

On July 10, 2007, the Plaintiff filed a Complaint against Defendant for injuries sustained on Defendant's property on July 19, 2005.[1] According

[1] In Pennsylvania, "an action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another" must me commenced within two years. 42 Pa.C.S.A. § 5524 (2). "[L]imitations periods are computed from the time that the cause of action accrued." *Fine v. Checcio*, 582 Pa. 253, 870 A.2d 850, 857 (Pa. 2005) (citation omitted). Accordingly, the Plaintiff was required to file her negligence action against the Defendant no later than July 19, 2007.

to the docket entries and filings, the Plaintiff did not take any affirmative steps to serve the Complaint within thirty days of the filing date. As a result, the Plaintiff reinstated the Complaint on October 22, 2007. On October 26, 2007, the Erie County Sheriff's Department filed a Return of Service, indicating that the reinstated Complaint was served on October 24, 2007.

On November 16, 2007, the Defendant filed preliminary objections and a supporting brief, asserting improper service of Complaint, legal insufficiency of a pleading (demurrer) and insufficient specificity in a pleading. On December 10, 2007, the Plaintiff filed a Brief in Opposition to Defendant's Preliminary Objections. On January 2, 2008, one day before the scheduled argument, the Plaintiff filed a Motion to Continue Hearing, which this Court denied on the same day given the late filing of the motion. On January 3, 2008, the Court heard oral argument on the Defendant's preliminary objections. Plaintiff's counsel did not attend.

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.

A. Improper Service.

In its first objection, the Defendant requests this Court dismiss the Plaintiff's Complaint with prejudice. In support, the Defendant alleges that the Plaintiff failed "to make any attempt at service between the date the Complaint was filed and the date the Complaint was reinstated (104) days" and, therefore, the Plaintiff intentionally stalled the judicial machinery. Defendant's Preliminary Objections, 11/16/07, at ¶ 10. The Defendant further contends "[t]he Plaintiff's inaction also resulted in a failure to provide actual notice to the Defendants within the statute of limitations." *Id.*

In her Brief in Opposition to Defendant's Preliminary Objections, the Plaintiff asserts that she made a "good faith effort" to perfect service on the Defendant, and never intended to "stall the judicial machinery." Brief in Opposition, 12/10/07, at 3-4.[2] In support, the Plaintiff attached a sworn Affidavit of Jana A. Gendrich, paralegal to Plaintiff's counsel. *See* Exhibit A. In the Affidavit, Ms. Gendrich recites her attempts to serve the Complaint. In essence, Ms. Gendrich implies that the Prothonotary's office never instructed her to complete the necessary Sheriff's instructions and provide them to the Erie County Sheriff's Department. According to Ms. Gendrich, she did not become aware that Plaintiff was required to supply Sheriff's instructions until she contacted the Erie County Sheriff's Department sometime in late September/early October of 2007. After obtaining this information, Ms. Gendrich forwarded a Praecipe to Reinstate the Complaint to the Prothonotary's office, and supplied the Sheriff's Department with the required documentation and payment. *Id.* at ¶ 9-10.

"Procedural rules relating to service of process must be strictly followed because jurisdiction of the person of the defendant cannot be obtained unless proper service is made." *Miller v. Klink,* 871 A.2d 331, 334 (Pa. Cmwlth. 2005), *citing Beglin v. Stratton,* 816 A.2d 370, 373 (Pa. Cmwlth. 2003).

> Service of process is the mechanism by which a court obtains jurisdiction over a defendant. The rules relating to service of process must be strictly followed. Proper service is not presumed; rather, the return of service itself must demonstrate that the service was made in conformity with the Pennsylvania Rules of Civil Procedure. In the absence of valid service, a court lacks personal jurisdiction over the party and is powerless to enter judgment against that party. Where service of process is defective, the remedy is to set aside the service. In such a case, the action remains open, however, and the court must allow the plaintiff to attempt to make proper service of process on the defendant which would properly vest jurisdiction in the court.

City of Philadelphia v. Berman, 863 A.2d 156, 160 (Pa. Cmwlth. 2004) (internal citations and footnote omitted). Furthermore, Rule 401 of the Pennsylvania Rules of Civil Procedure provides:

> **Rule 401. Time for Service. Reissuance, Reinstatement and Substitution of Original Process. Copies for Service**
>
> (a) Original process shall be served within the Commonwealth within thirty days after the issuance of the writ or the filing of the complaint.
>
> ****

[2] Furthermore, the Plaintiff claims that Defendant suffered no prejudice since the Defendant had actual notice of the lawsuit "years before the filing of the Complaint". *Id.* at 5.

(b)(1) If service within the Commonwealth is not made within the time prescribed by subdivision (a) of this rule or outside the Commonwealth within the time prescribed by Rule 404, the prothonotary upon praecipe and upon presentation of the original process, shall continue its validity by reissuing the writ or reinstating the complaint, by writing thereon "reissued" in the case of a writ or "reinstated" in the case of a complaint.

(2) A writ may be reissued or a complaint reinstated at any time and any number of times. A new party defendant may be named in a reissued writ or a reinstated complaint.

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(4) A reissued, reinstated or substituted writ or complaint shall be served within the applicable time prescribed by subdivision (a) of this rule or by Rule 404 after reissuance, reinstatement or substitution.

(5) If an action is commenced by writ of summons and a complaint is thereafter filed, the plaintiff instead of reissuing the writ may treat the complaint as alternative original process and as the equivalent for all purposes of a reissued writ, reissued as of the date of the filing of the complaint. Thereafter the writ may be reissued, or the complaint may be reinstated as the equivalent of a reissuance of the writ, and the plaintiff may use either the reissued writ or the reinstated complaint as alternative original process.

Note: If the applicable time has passed after the issuance of the writ or the filing of the complaint, the writ must be reissued or the complaint reinstated to be effective as process. Filing or reinstatement or substitution of a complaint which is used as alternative process under this subdivision, has been held effective in tolling the statute of limitations as the reissuance or substitution of a writ.

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Pa.R.C.P. 401

Instantly, the Plaintiff filed her Complaint on July 10, 2007 and according to the docket entries, she failed to serve the Complaint within thirty-days after the filing date. The Plaintiff thereafter reinstated the Complaint on October 22, 2007 and effectuated service, via Erie County Sheriff's Department, on October 24, 2007. Although the reinstated Complaint was served within the applicable time prescribed by Pa.R.C.P. 401 (a), the Defendant contends that the Plaintiff's failure to attempt service between July 10, 2007 and October 22, 2007 evidences "an intent to stall the judiciary machinery" and, therefore resulted in a failure to provide actual notice within the applicable statute of limitations. Defendant's Preliminary Objections, 11/16/07, at ¶ 10. As a result, the Defendant alleges that the reinstated complaint did not toll the statute of limitations.

Our law is clear that "[t]he existence of a statute of limitation which cuts off a remedy does not constitute a defect in the 'form of service'." *Devine v. Hutt*, 863 A.2d 1160, 1167 (Pa. Super. 2004), *quoting Farinacci v. Beaver County Industrial Development Authority*, 510 Pa. 589, 511 A.2d 757 (1986). Moreover, an affirmative defense of a statute of limitations is properly raised in new matter and not through preliminary objections. *See* Pa.R.C.P. 1028; 1030.

Here, the Plaintiff has not objected to consideration of the Defendant's statute of limitations claim through preliminary objections. In fact, she addresses the issue her brief in opposition. Given the posture of the case, particularly the fact that the issues of statute of limitations and service are inextricably intertwined, this Court shall address the issue now.

"It is well settled in this Commonwealth pursuant to *Lamp v. Heyman*, 469 Pa. 465, 366 A.2d 882 (1976), and *Farinacci* [, *supra*], that service of original process completes the progression of events by which an action is commenced." *Englert v. Fazio Mechanical Services, Inc.*, 932 A.2d 122, 124 (Pa. Super. 2007), *appeal denied*, 2007 Pa. LEXIS 2805 (Pa. December 18, 2007). Once an action is commenced by either a writ of summons or complaint, the statute of limitations is tolled "only if the plaintiff then makes a good faith effort to effectuate service. *Id*. (citations omitted). "Where a plaintiff does not make a good faith effort at service of original process, an action which was otherwise timely commenced by filing a praecipe for a writ of summons within the statutory period will be deemed untimely and barred by the statute of limitations. *Miller*, 871 A.2d at 336 (citations omitted). Importantly, "a writ of summons shall remain effective to commence an action only if the plaintiff then refrains from a course of conduct which serves to stall in its tracks the legal machinery he has just set in motion." *Lamp* at 478, 366 A.2d at 889.

In determining whether a good faith effort to effectuate notice was made, the following is relevant to a court's determination:

> It is not necessary [that] the plaintiff's conduct be such that it constitutes some bad faith act or overt attempt to delay before the rule of *Lamp* will apply. Simple neglect and mistake to fulfill the responsibility to see that requirements for service are carried out may be sufficient to bring the rule in *Lamp* to bear. Thus, conduct that is unintentional that works to delay the defendant's notice of the action may constitute a lack of good faith on the part of the plaintiff.

Englert, 932 A.2d at 124-25 (citations omitted).

In *McCreesh v. City of Philadelphia*, 585 Pa. 211, 888 A.2d 664 (2005), our Supreme Court adopted a more flexible approach in regards to service of process. There, the plaintiff attempted service by mailing a writ of summons via certified mail. After the statute of limitations had expired, the plaintiff properly served the defendant by hand delivery. The

McCreesh Court determined that the initial defective service constituted a good faith effort at notice where the defendant had notice of the litigation and was not prejudiced. The *McCreesh* Court concluded that dismissal is appropriate only if a plaintiff demonstrates an intent to stall the judicial machinery or where failure to comply with the Rules of Civil Procedure has prejudiced the defendant. *Id.* at 227, 888 A.2d at 674. In particular, the *McCreesh* Court concluded that:

> Neither our cases nor our rules contemplate punishing a plaintiff for technical missteps where he has satisfied the purpose of the statute of limitations by supplying a defendant with actual notice. Therefore, we embrace the logic of the *Leidich* line of cases, which, applying *Lamp*, would dismiss only those claims where plaintiffs have demonstrated an intent to stall the judicial machinery or where plaintiffs' failure to comply with the Rules of Civil Procedure has prejudiced defendant.

Id.

After its review of the applicable law, this Court is compelled to conclude that the Plaintiff failed to make a good faith effort to effectuate service and, therefore, her claim is barred by the statute of limitations. In arriving at this conclusion, this Court considered the Gendrich Affidavit and docket entries. These documents clearly show that between July 10, 2007 and October 22, 2007, Plaintiff's counsel failed to complete the required Sheriff's instructions or pay the necessary fees in order to effectuate service of the Complaint. In fact, the Plaintiff's first attempt at service did not occur until October 24, 2007. Although the Plaintiff's paralegal, Ms. Gendrich, states that she called the Prothonotary's office several times to check if the Complaint was served, she never took the affirmative steps to ensure that the necessary Sheriff's instructions were completed, or supply the Sheriff's Department with the necessary forms and fees associated in serving original process. Accordingly, this Court finds that the Plaintiff's action is time-barred.

Continuing, although the Plaintiff contends that the Defendant had notice that there was a potential for litigation, it is clear that the Defendant did not have "actual notice" of the lawsuit prior to the expiration of the statute of limitations. *See Englert*, 932 A.2d at 127, *citing McCreesh*, at 224 n. 17, 888 A.2d at 672 n. 17 ("observing that, in *Farinacci*, the defendant 'had notice of the potential for litigation, [but] it did not have actual notice of the commencement of the litigation within the statute of limitations period.'").

Continuing, this Court finds that an evidentiary hearing was unnecessary. In light of the parties' respective pleadings, docket entries, and the Gendrich Affidavit, the Court was provided with ample evidence in order to make its determination. *Miller, supra.* Moreover, Plaintiff's counsel did not attend the January 3rd proceeding, nor did he send

substitute counsel in order to supplement the record.

Finally, based upon this Court's determination of this issue, it is unnecessary to address the remaining preliminary objections.

IV. CONCLUSION.

Based upon the above, this Court will issue an order in accordance with the above opinion.

ORDER

AND NOW, this 6th day of February, 2008, for the reasons set forth in the accompanying opinion, Defendant's preliminary objections are **SUSTAINED** and Plaintiff's Complaint is **DISMISSED** with prejudice.

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

JOHN REVAK and EUGENIA REVAK, his wife, Plaintiffs

v.

MICHAEL SUTTON and CAROL SUTTON, his wife, individually and d/b/a SUTTON BUILDING & CONTRACTING, a de facto Pennsylvania Partnership, Defendants

CIVIL PROCEDURE / PLEADING / PRELIMINARY OBJECTIONS

An agreement to submit disputes to binding arbitration may be raised by preliminary objection.

CONTRACTS / CONSUMER CONTRACT

A contract to remodel consumers' home, barn and garage, where the contractor visited the consumers' home before the contract was entered, is subject to Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 P.S. §201-1 *et seq*.

STATUS / UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW

Contractor who visits consumers' home before entering into remodeling contract is required to provide a 3 day right to cancel the contract and notice of that right. Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§201-7(a) and (e).

CONTRACTS / RESCISSION / ARBITRATION

If a consumer contract is rescinded pursuant to a statutory right to cancel, the provisions of the consumer contract that require binding arbitration of disputes are not enforceable.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 11978-2007

Appearances: Tibor R. Solymosi, Esquire for Plaintiffs
Thomas A. Pendleton, Esquire for Defendants

OPINION AND ORDER

Disantis, Ernest J. Jr., J.

This case comes before this Court on the defendants' Preliminary Objections.

I. BACKGROUND OF THE CASE

Plaintiffs and defendant entered into a contract on September 3, 2005 which called for defendants to remodel the plaintiffs' home, garage and pole barn located at 597 Benson Road, Waterford, Pennsylvania. The contract provided that disputes were to be resolved by arbitration. (See page 2 of the agreement.) It is undisputed that prior to entering into the contracts, Michael Sutton (who was originally contracted by plaintiffs) visited the Revaks' residence for the purpose of preparing an estimate of costs for the work purposed. After the project began, a dispute

arose over the quality of the work. Unable to resolve their differences, plaintiffs rescinded the contract on July 31, 2006. On May 10, 2007 plaintiffs filed a complaint alleging breach of contract and violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 P.S. 201-1 *et seq.*

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.

Defendants argue that the parties agreed to binding arbitration and, therefore, this Court does not have jurisdiction. Plaintiffs counter that this matter is controlled by Pennsylvania's Consumer Protection Law found at 73 P.S. § 201-7(a) which provides that a contract that includes a contact with or a call on the buyer at his/her residence requires that the contractor afford the consumer three full business days following the day on which the contractor's sale is made to cancel the contract. The statute also requires that a notice of right of cancellation be given pursuant to 73 P.S. § 201-7(e). There is no dispute that the notice of right of cancellation was not given by the defendants to the plaintiffs.

Plaintiffs cite two cases for the proposition that the arbitration clause should not be enforced. See *Chapman v. Mortgage One Corp.*, 359 F. Supp. 2d 831, 833-34 (E.D. Mo. 2005). (When the contract was rescinded, its terms became void.) In *Wilson v. Power Builders II, Inc.*, 879 F. Supp. 1187, 1190 (M.D. Fla. 1995), plaintiffs argued that because they had exercised their right to rescind the contract pursuant to the Truth in Lending Act, the arbitration clause of the contract was also rescinded and could not be enforced. These cases are persuasive, but not precedental.

After its review, this Court concludes that this situation is covered by the door-to-door sales provision of the Unfair Trade Practices and Consumer Protection Law and that the plaintiffs were required to provide the defendants with a notice of right of cancellation. (Pursuant

to § 201-7(e) of the statute, the three-day period did not begin to run until the plaintiffs' renewal notice.) Having failed to do so, the defendants had a right to rescind the contract, which they did. Therefore defendants' failure to comply with Pennsylvania's Consumer Protection Law and plaintiffs' rescission defeats defendants' argument that the matter must be subjected to binding arbitration.[1]

ORDER

AND NOW, this 13th day of December 2007, based upon the reasons set forth in the accompanying opinion, it is hereby **ORDERED** that the defendants' Preliminary Objections are **OVERRULED**.

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

[1] To hold otherwise would be to defeat the purpose of the statute.

SEISMIC INVESTMENT PARTNERS, a joint enterprise, Plaintiff,

v.

KASTLE RESOURCES ENTERPRISES, INC., Defendant

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

A party is entitled to move for summary judgment as a matter of law: (1) whenever there is no genuine issue of any material facts 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.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

In determining whether summary judgment should be granted, the record is to be viewed in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Failure of a non-moving party to adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law.

AGENCY / GENERALLY

Whether an agency relationship exists is a question of fact.

AGENCY / VICARIOUS LIABILITY

The party asserting an agency relationship has the burden of proving it by a fair preponderance of the evidence. Agency is created when there exists a manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking.

AGENCY / VICARIOUS LIABILITY

Before a factfinder can conclude that an agency relationship exists and that the principal is bound by a particular act of the agent, the factfinder must determine that one of the following exists: (1) express authority directly granted by the principal to bind the principal as to certain matters; or (2) implied authority to bind the principal to those acts of the agent that are necessary, proper and usual in the exercise of the agent's express authority; or (3) apparent authority, i.e. authority that the principal has by words or conduct held the alleged agent out as having; or (4) authority that the principal is estopped to deny.

AGENCY / VICARIOUS LIABILITY

An authorized agent who executes a contract for an undisclosed principal becomes a party thereto and stands in the place of his principal and is subject to the obligations of his principal.

CONTRACT / PAROL EVIDENCE

When the terms of a contract are clear and unambiguous, the intent of the parties is to be ascertained from the document itself. When, however, an ambiguity exists, parol evidence is admissible to explain and clarify or resolve the ambiguity, irrespective of whether the ambiguity is patent, created by the language of the instrument, or latent, created by extrinsic or collateral circumstances.

CONTRACT / PAROL EVIDENCE

A contract will be found to be ambiguous if, and only if, it is reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning though indefiniteness of expression or has a double meaning. A contract is not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends; and a contract is not rendered ambiguous by the mere fact that the parties do not agree upon the proper construction.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 11222-2006

OPINION

Connelly, J., January 24, 2008

This matter is before the Court pursuant to Kastle Resources Enterprises, Inc.'s (hereinafter "Defendant") Motion for Summary Judgment and/or Partial Summary Judgment. Since Defendant's filing of this Motion for Summary Judgment, Seismic Investment Partners (hereinafter "Plaintiff') has filed a third amended complaint that renders portions of Defendant's arguments moot. However, several issues remain for the Court's consideration:

1.) Whether the Agreement became "null and void" by Plaintiff's failure to deposit the $100,000 by the deadline set forth in the Agreement;
2.) Whether the Agreement is valid, since it was only signed by Defendant, and Defendant did not own any of the interests being conveyed in the Agreement;
3.) Assuming arguendo that the Agreement is valid, whether Plaintiff is entitled to wells delineated by 3-D seismic;
4.) Whether Plaintiff is entitled to wells delineated by seismic shot beyond the 15-month period as specified in the Agreement; and
5.) Whether Plaintiff is entitled to a carried working interest in wells that were drilled on leases that were not listed on Exhibit A to the Agreement, including the North Coast Farmout and the Shearer Tract.

Statement of Facts

Plaintiff is a joint venture organized and existing under the laws of Texas and is made up of the following participants: Jim Sam Camp; Farrile (Sonny) Young; Warren A. Wilbur; Estate of John Greer, deceased; Dean Greenwood; and Hufo-Price Partnership. *Amended Complaint*, ¶¶ 1-2. Defendant is a Pennsylvania corporation that was established to pursue oil and gas exploration at various locations in western Pennsylvania, western New York, and eastern Ohio. *Id.* at ¶¶ 4, 12.

Prior to 2001, Defendant, through its principal officers, had solicited Jim Sam Camp, Sonny Young, and Warren Wilbur, among others, to invest in various exploration and drilling efforts. *Id.* at ¶ 15. In the summer of 2001, David Sheldon, president of Defendant, approached Jim Sam Camp, Sonny Young, and Warren Wilbur to request their investment in the ongoing efforts to further the development of oil and gas production in two fields, the Trahan Field and the Kastle Field. *Id.* at ¶ 19. On or about September 19, 2001, Plaintiff entered into an agreement (hereinafter "2001 Agreement") with Defendant to provide $100,000 to Defendant in return for a five percent (5%) carried working interest in any oil or gas wells developed on the Trahan or Kastle Fields. *Id.* at ¶ 22. The 2001 Agreement additionally provided that Plaintiff would also have a five percent (5%) carried working interest in any subsequently acquired leases on land that was identified as potentially having oil and gas reserves as a result of the seismic exploration conducted after the investment by Plaintiff. *Id.* at ¶ 23. In or about mid-2004 Defendant, via an agent, expressed to Plaintiff that Plaintiff would only participate in wells whose sites were identified in seismic lines that were acquired between September 19, 2001 and December 19, 2002. *Id.* at ¶ 33. Plaintiff filed this action alleging breach of contract by Defendant. Plaintiff has since amended its complaint to include civil conspiracy and breach of fiduciary duty claims against Defendant and to add Penn West Development and Northern Natural Resources as defendants in the breach of contract action, and to add civil conspiracy claims against Penn West Development (hereinafter "PWD"), Northern Natural Resources (hereinafter "NNR"), Steve Fleischer, and Jack Miller (hereinafter collectively "Additional Defendants"). Plaintiff's *Third Amended Complaint*, 10/16/07.

While Defendant's primary arguments have been set forth *supra*, a brief summary of Defendant's arguments is necessary. Defendant's first argument is that the Agreement should be "null and void", as Plaintiff did not deposit the $100,000 payment by the date set forth in the Agreement. *Brief in Support of Motion for Summary Judgment and/or Partial Summary Judgment*, p.17. Defendant avers that the date in the contract was September 30, 2001. *Id*. Plaintiff paid Defendant $100,000 on October 9, 2001. *Id.* at 18. Plaintiff responds that multiple copies of the contract were in existence and the copy it attached to its Complaint

contained a "scrivener's error." *Plaintiff Seismic Investment Partners, LLC's Brief in Support of Its Opposition to Defendant Kastle's Motion for Summary Judgment and/or Partial Summary Judgment,* p. 6. Plaintiff avers that the actual deadline for the deposit was October 31, 2001 and that Plaintiff, therefore, made a timely deposit. *Id.*

Defendant's next argument is that the agreement is not valid because only Defendant signed the agreement, while other parties, specifically, PWD and NNR, owned the disputed resources. *Brief in Support of Motion for Summary Judgment and/or Partial Summary Judgment,* pp. 10-11. Defendant initially argued that Plaintiff erred in not filing suit against these parties, but PWD and NNR are now parties in this action. *Plaintiff's Third Amended Complaint,* 10/16/07. Plaintiff responds that Defendant was acting as an agent for PWD and NNR. *Plaintiff Seismic Investment Partners, LLC's Brief in Support of Its Opposition to Defendant Kastle's Motion for Summary Judgment and/or Partial Summary Judgment,* p. 3.

Defendant's third argument is that Plaintiff is not entitled to assets discovered by 3D seismic work, as the Agreement specifically states, "The seismic work shall consist of Vibroseis and/or Standard 2D seismic lines run across the property." *Brief in Support of Motion for Summary Judgment and/or Partial Summary Judgment,* p. 18. Defendant argues that the more recently drawn 3D seismic lines were not contemplated in the Agreement and that the 3D lines are substantially different from the 2D lines considered in the Agreement. *Id.* at 19. Plaintiff responds that the Agreement is ambiguous as to what type of lines would be drawn in the disputed areas of mutual interest. *Plaintiff Seismic Investment Partners, LLC's Brief in Support of Its Opposition to Defendant Kastle's Motion for Summary Judgment and/or Partial Summary Judgment,* p. 7. Furthermore, Plaintiff asserts that Defendant relied on the 2D lines in drawing the 3D lines and that Defendant unfairly benefited from Plaintiff's interest in the 2D lines. *Id.* at 10.

Defendant's fourth argument is that Plaintiff cannot benefit from wells that were drawn beyond the 15-month period specified in the Agreement. *Brief in Support of Motion for Summary Judgment and/or Partial Summary Judgment,* p. 18. Defendant seeks to limit Plaintiff's benefits to wells derived from the following seismic lines: CPA-05-02, CPA-V6-02, CPA-V7-02, CPA-9-02, CPA-10-02, NY-01-V1, NY-01-V2, NY-01-V3, NY-010V4. *Id.* at 19. Plaintiff responds that Defendant has sought to limit Plaintiff's investment by delineating certain lines, but that these specific lines have changed in various conversations between Plaintiff and Defendant. *Plaintiff Seismic Investment Partners, LLC's Brief in Support of Its Opposition to Defendant Kastle's Motion for Summary Judgment and/or Partial Summary Judgment,* pp. 8-9. Plaintiff also believes that some of the aforementioned lines were shot either prior to Plaintiff's investment or after the purported 15-month limitation on Plaintiff's

investment, which Plaintiff believes undermines Defendant's assertions. *Id.* at 9. Finally, Plaintiff argues that the Agreement is ambiguous as to the timeframe because various clauses in the Agreement conflict with each other. *Id.* at 10.

Defendant's final argument is that Plaintiff should be limited to wells that were specified in an exhibit to the agreement, and that no further expansion of potential wells should be permitted. *Brief in Support of Motion for Summary Judgment and/or Partial Summary Judgment*, p. 21. Plaintiff responds that it should be allowed to participate in additional wells because the Agreement contains an exception that allows Plaintiff to participate in wells on acreage that was necessary to create a "drilling unit." *Plaintiff Seismic Investment Partners, LLC's Brief in Support of Its Opposition to Defendant Kastle's Motion for Summary Judgment and/or Partial Summary Judgment*, p. 11. As to Defendant's assertion regarding the Shearer Tract, Plaintiff responds that several of the specifically mentioned lines that Defendant concedes Plaintiff has an interest in run through the Shearer Tract. *Id.* at 12. Plaintiff also asserts that Defendant acknowledged in a subsequent meeting that Plaintiff would be given an interest in the North Coast Farmout when NNR acquired the property. *Id.*

Findings of Law

A party is entitled to move for summary judgment 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.

Pa. R. Civ. P. 1035.2.

In determining whether summary judgment should be granted, the record is to be viewed in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Manzetti v. Mercy Hosp. of Pittsburgh*, 776 A.2d 938, 945 (Pa. 2001). Furthermore, where the nonmoving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment. We have stated quite plainly that "[f]ailure of a nonmoving party to adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof ... establishes the entitlement of the moving party to judgment as a matter of law." *Id.* citing *Young v. Corn., Dept. of Transp.*, 744 A.2d 1276, 1277 (Pa. 2000). Proceeding under this

standard, the Court must consider each of Defendant's four arguments for summary judgment.

Defendant first asks this Court to grant its Motion because the Agreement is null and void due to Plaintiff's "late" deposit. In order for the Court to grant Defendant's Motion for Summary Judgment, it is necessary for the Court to either determine that there is no genuine issue of material fact or that Plaintiff has failed to produce evidence of facts essential to the cause of action. Obviously, a material fact is in dispute in this case. Defendant asserts that the payment set forth in the contract was not deposited in a timely fashion, while Plaintiff argues that it was. Furthermore, Plaintiff has produced evidence showing that there is a question of fact as to whether the parties agreed to a deadline of September 30, 2001 or October 31, 2001. This is an essential element in Plaintiff's case and it is not a matter of law for this Court to decide.

Assuming *arguendo* that Plaintiff should have made the deposit by September 30, 2001, there is a question as to whether Defendant's acceptance of the October 9, 2001 deposit ratified the contract. Defendant used Plaintiff's money to continue its seismic exploration and has paid Plaintiff proceeds over the past several years as a result of this investment. Therefore, Defendant's Motion for Summary Judgment as to Plaintiff's allegedly late payment is without merit.

Defendant's second argument is that Plaintiff has sued the wrong Defendant. Specifically, Defendant argues that it does not have an ownership interest in the property from which Plaintiff seeks to recover. Plaintiff responds that it can recover from Defendant because Defendant acted as an agent when it entered into the contract with Plaintiff. Defendant responds that it could not have been acting under agency theory because there was no "principal" to which it reported. Because PWD and NNR have been added as defendants to the action, this argument is moot. Additionally, Defendant can be held responsible under an agency theory, as Plaintiff has set forth facts alleging that Defendant acted for an undisclosed principal.

Agency "cannot be assumed from the mere fact that one does an act for another." *Volunteer Fire Co. of New Buffalo v. Hilltop Oil Co.*, 602 A.2d 1348, 1351 (Pa.Super.1992). Whether an agency relationship exists is a question of fact. *Id.* The party asserting an agency relationship has the burden of proving it by a fair preponderance of the evidence. *Id.* Agency is created where there exists a "manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking." *Id.*

> Before a factfinder can conclude that an agency relationship exists and that the principal is bound by a particular act of the agent, the factfinder must determine that one of the following exists:

1) express authority directly granted by the principal to bind the principal as to certain matters; or
2) implied authority to bind the principal to those acts of the agent that are necessary, proper and usual in the exercise of the agent's express authority; or
3) apparent authority, i.e. authority that the principal has by words or conduct held the alleged agent out as having; or
4) authority that the principal is estopped to deny.

Id. at 1351-1352.

An authorized agent who executes a contract for an undisclosed principal becomes a party thereto and stands in the place of his principal and is subject to the obligations of his principal. *Pennsylvania Co. for Insurances on Lives & Granting Annuities v. Clark*, 18 A.2d 807, 814 (Pa. 1941).

Plaintiff has set forth multiple reasons why it believes Defendant can be held responsible for the contract. Notably, Defendant accepted the $100,000 deposit from Plaintiff and allegedly deposited the money into Defendant's own bank account. Defendant has made payments to Plaintiff as a result of Plaintiff's investment. In the Agreement, David Sheldon signed on behalf of Defendant, not on behalf of the Additional Defendants or any other entity or person. Based on these alleged facts, Defendant has been unable to meet its burden that summary judgment should be granted. Defendant is a proper party to this action.

Defendant's third and fourth arguments can be addressed simultaneously. Defendant asks the Court for summary judgment based on Plaintiff only being entitled to 2D seismic work, rather than the 3D seismic work for which Plaintiff seeks to recover. Defendant also seeks to limit Plaintiff's interest to the fifteen-month period specified in the Agreement. Plaintiff responds that the contract is patently ambiguous as to the type of seismic work and the time period that Plaintiff's investment included. Furthermore, Plaintiff offers parol evidence to show that the intent of the parties was to permit participation in the areas of mutual interest covered by the Agreement without regard to time and without regard to the type or nature of the seismic studies relied upon to explore the areas of mutual interest and drill wells.

The provision at issue appears within the Agreement:

2. For and in consideration of the promise to pay said $100,000.00, KASTLE agrees to do the following:
A. Commence and complete the seismic work on the Property within fifteen (15) months after the date of this agreement. The seismic work shall consist of Vibroseis and/or Standard 2D seismic lines run across the Property. The extent and nature of said seismic work on the Property shall be determined by

KASTLE and shall be conducted at KASTLE'S sole direction.

Brief in Support of Motion for Summary Judgment and/or Partial Summary Judgment, Exhibit A, p. 2.

It is also well established that under the law of contracts, in interpreting an agreement, the court must ascertain the intent of the parties. *Kripp v. Kripp*, 849 A.2d 1159, 1163 (Pa. 2004). In cases of a written contract, the intent of the parties is the writing itself. *Id.* If left undefined, the words of a contract are to be given their ordinary meaning. *Id.* When the terms of a contract are clear and unambiguous, the intent of the parties is to be ascertained from the document itself. *Id.* When, however, an ambiguity exists, parol evidence is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is patent, created by the language of the instrument, or latent, created by extrinsic or collateral circumstances. *Id.*

> A contract will be found to be ambiguous if, and only if, it is reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning. A contract is not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends; and a contract is not rendered ambiguous by the mere fact that the parties do not agree upon the proper construction.

Metzger v. Clifford Realty Corp., 475 A.2d 1, 5 (Pa.Super. 1984).

The Court must determine as a matter of law whether the Agreement is ambiguous. The Court may only consider Plaintiffs proffered parol evidence if the Agreement is ambiguous. in *Kripp v Kripp,* the property settlement agreement executed by the Kripps included a provision prohibiting Mrs. Kripp from "cohabitating" if she were to continue to receive alimony payments from Mr. Kripp. *Kripp* at 1160. Mrs. Kripp had a female roommate and Mr. Kripp sought to discontinue payments under the cohabitation clause. *Id.* at 1161. Mrs. Kripp argued that the intent of the parties was to prohibit Mrs. Kripp from living with a paramour, not a roommate. *Id.* The Court considered the definition of cohabitation, as well as what the word is generally interpreted as meaning in divorce contracts, and held that ambiguity did exist in the settlement agreement. *Id.* at 1162. The trial court then considered parol evidence to determine how the contract should be construed. *Id.* The Pennsylvania Supreme Court upheld the trial court's decision. *Id.* at 1165.

The case at bar is easily distinguished from *Kripp.* If a court can determine a contract's meaning from its language, then the mere fact the parties disagree upon its application is not enough to overcome the

contractual language. The contract clearly states that in consideration of Plaintiff's $100,000 deposit, Defendant will commence and complete all work within fifteen months. Plaintiff, therefore, cannot construe that it is entitled to revenue from wells drilled after the fifteen-month period. Unlike *Kripp,* the language used is not ambiguous. The language "commence and complete" is clear. Plaintiff attempts to gain additional consideration by citing parol evidence to show how the clause should be interpreted. However, the guidance provided by *Metzger* prohibits the consideration of such parol evidence when the contractual language is unambiguous. Therefore, Defendant's Motion for Summary Judgment as to Plaintiff's Claim for Working Interests in Wells Drilled Pursuant to Seismic Completed After the 15 Month Period is granted.

Defendant also argues that Plaintiff is not entitled to revenue from wells drilled pursuant to 3D seismic, as the contractual language clearly limits Plaintiff's interest to Vibroseis and 2D seismic work. Plaintiff responds again that the contractual language is ambiguous as to the type of seismic work to be completed. Plaintiff also asserts that, based on discovery interviews, 3D seismic work heavily relies on previously drawn 2D seismic lines. Again, the Court must rely on the precedent set forth by *Kripp* and *Metzger* when determining whether the contract provision is ambiguous. The contract states, "The seismic work shall consist of Vibroseis and/or Standard 2D seismic lines run across the Property." Because the contractual language is clear, Plaintiff cannot offer parol evidence to show that 2D also means 3D. Therefore, Defendant's Motion for Summary Judgment as to Plaintiff's Claim for Additional Working Interests in Wells Drilled Pursuant to 3D Seismic is granted.

Defendant's final argument is that Plaintiff has no claim to revenue from wells drilled on the Northcoast Farmout, the Shearer Tract, or new leases. Plaintiff responds that issues of material fact remain in dispute regarding these properties. Specifically, Plaintiff asserts that lines that Defendant has conceded Plaintiff has an interest in run across the disputed Shearer Tract. As genuine issues of material fact exist as to these properties, Defendant's Motion for Summary Judgment that Plaintiff has no Claim to a Working Interest in Wells Drilled on the Northcoast Farmout Owned by NNR, the Shearer Tract owned by PWR, or New Leases Taken by PWD or NNR Since September, 2001 is denied.

ERIE INSURANCE EXCHANGE, Plaintiff,

v.

MARK D. MAIER and EMILY A. MAIER, Defendants

REAL ESTATE / MORTGAGES

Where a mortgagee released its lien on real property due to an alleged misrepresentation of value of the property by the purchaser, a claim that the purchaser impaired the mortgagee's interest is an allegation of loss of use of the property.

INSURANCE / AMBIGUITY

In the interpretation of an insurance contract, words that are clear and unambiguous must be given their plain and ordinary meaning while ambiguities must be construed in the light most favorable to the insured.

INSURANCE / SUMMARY JUDGMENT

Whether a particular loss falls within the coverage of an insurance policy is a question of law to be decided by a court on a motion for summary judgment in a declaratory judgment action.

INSURANCE / DECLARATORY JUDGMENT ACTION

As there are factual allegations concerning negligence in an insurance contract dispute, it is sufficient in the context of a declaratory judgment action if the underlying civil action includes averments of accidental or negligent conduct that could reasonably be construed as asserting unintentional behavior.

INSURANCE / DAMAGES

Since a mortgagee released its lien on real property and thereby lost its use of the property to sell or recover the mortgagee's debt, the claimed impairment of the mortgagee's interest by the purchaser's conduct implicates the loss of use of tangible property.

INSURANCE / CONTRACTS AND AGREEMENTS

Since the definitions of "occurrence" in multiple insurance policies each include property damage during the relevant policy periods to raise the issue of "loss of use" of the property, the claimed impairment of a mortgagee's interest in the property due to a purchaser's conduct is clearly an allegation within the terms of the policies.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW NO. 15086-2006

Appearances: Scott D. Livingston, Esquire for Defendants
Arthur J. Leonard, Esquire for Plaintiff

MEMORANDUM

Bozza, John A., J.

This case is before the Court on the 1925(b) Statement of Matters

Complained of Upon Appeal filed by the plaintiff, Erie Insurance Exchange (hereinafter "Erie Insurance"), in response to this Court's Memorandum and Order dated October 19, 2007, granting the defendants', Mark D. Maier and Emily A. Maier (hereinafter the "Maiers"), Motion for Summary Judgment.

The incident surrounding this case occurred on or about August 12, 2005, when the Maiers purchased real property located at 4819 Wolf Run Road, Erie, Pennsylvania from Jeffrey Anthony and Carolyn Anthony (hereinafter the "Anthonys") for $650,000. Prior to closing the transaction, the Maiers and Anthonys entered into a letter agreement with regard to the purchase of personal property for $200,000. This arrangement was not noted in the Articles of Agreement for the Sale of Real Estate nor was it included in the HUD-1 Settlement Statement. FNB, who was a creditor of the Anthonys, filed a Complaint against the Maiers alleging that the sale of personal property was not disclosed to them and that the $650,000 purchase price did not accurately reflect the value of the property. Moreover, FNB alleges that the Maiers misrepresented the true value of the property at issue and, had it known of the transaction for the personal property, it would not have surrendered the mortgage interest it had in the real estate.[1]

The Maiers have three policies with Erie Insurance that they argued provide them with coverage for the claims asserted by FNB. Although each policy has its own specific language applicable to the issues presented in this case, Erie Insurance denied coverage under each on the basis that FNB's injuries were not the result of an occurrence under any of the policies and that FNB has not alleged that it suffered property damage as that term is defined in the respective policies.

As a result Erie Insurance filed a declaratory judgment action, seeking a determination from the Court, that the three policies issued to the Maiers provide no coverage for the allegations contained within the FNB Complaint. The Maiers then filed a Motion for Summary Judgment, claiming that the policies did provide coverage and therefore Erie Insurance is obligated to defend and indemnify them in the FNB action. Upon consideration of the Maiers' Motion for Summary Judgment, and argument thereon, the Court granted the Motion.

This appeal, filed by Erie Insurance, followed. In their Rule 1925(b) Statement, Erie Insurance has identified three issues that they intend to address on appeal as to why the Court erred in granting the Maiers' Motion for Summary Judgment.

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[1] FNB is the successor in interest to the National Bank of Northeast, who had released its mortgage lien position on the basis of the Anthonys' representation that the value of their property is $650,000. The Complaint includes three causes of action against the Maiers, including "civil conspiracy," "fraudulent misrepresentation" and "negligent misrepresentation".

1. The "Negligent Misrepresentation" Count asserted in the [FNB] action did not trigger a duty to defend or indemnify the Maiers the [FNB) action because negligent representation — particularly as alleged in that action — does not constitute an "occurrence" as defined under [the] Erie Insurance Policies.
2. In the Complaint filed in the [FNB] action, despite including a count under the veil of negligent misrepresentation, the Maiers' actions were described as intentional; thus, coverage was precluded by the intentional acts exclusions contained in [the] Erie Insurance Policies.
3. In the Complaint filed in the [FNB] action, there was no allegation of covered "property damage," "bodily injury," or "personal injury" as defined under [the] Erie Insurance Policies.

(Pl. 1925(b) Statement ¶¶ 2(c)-(e).) All three assertions of error are identical to those already addressed in the Court's Memorandum and Order dated October 19, 2007. Nonetheless, the Court would like to take this opportunity to add clarity to its position for the purposes of this Rule 1925(a) Memorandum Opinion.

I. Occurrence

The first two assertions of error raised by Erie Insurances are in regards to the count of negligent misrepresentation alleged against the Maiers in the FNB Complaint. Erie Insurance asserts that it was improper to grant the Maiers' Motion for Summary Judgment because the FNB claim of negligent representation against the Maiers does not constitute an "occurrence" as defined under the Erie Insurance Policies and therefore coverage is improper. Furthermore, Erie Insurance claims that the Maiers' actions were described as intentional; thus, coverage is precluded by the intentional acts exclusions contained in the insurance policies at issue.

Whether a particular loss falls within the coverage of an insurance policy is a question of law to be decided by the court on a motion for summary judgment in a declaratory judgment action. *Erie Ins. Exchange v. Transamerica Ins. Co.,* 516 Pa. 574, 533 A.2d 1363 (1987). When the court interprets an insurance contract, words that are clear and unambiguous must be given their plain and ordinary meaning. Where ambiguities are found, they must be construed in the light most favorable to the insured. *Donegal Mut. Ins. Co. v. Raymond*, 2006 Pa. Super. 105, 899 A.2d 357, 2006 Pa. Super. LEXIS 795 (Pa. Super. Ct. 2006) (citations omitted).

All three policies provide, *inter alia*, that "occurrence" is defined as an accident that causes personal injury or property damage during the policy period. It is the Maiers' position that FNB's negligent misrepresentation claim allows for the coverage of all three policies to be triggered. Under

the pleading titled "Negligent Misrepresentation," FNB claimed the following:

127. The foregoing misrepresentation of fact was made under circumstances in which the defendants knew (or ought to have known) its falsity.
128. Defendants failed to make a reasonable investigation as to the truth of the representations made in the Articles of Agreement, Settlement Statement, and other closing documents.
129. Defendants misrepresented the purchase price of the Property with the intent of inducing NBNE to release its liens on the Property.

(FNB Comp. ¶¶123-131.) Although it is apparent in its Complaint that FNB has asserted the Maiers acted with intent of inducing FNB to release its lien, it is also apparent that FNB has asserted that its underlying behavior is the result of their failure to make a reasonable investigation as to the truth of the assertions made in various documents, and further, that the misrepresentation of fact was made under circumstances where they "ought to have known" its falsity. S*ee Mutual Benefit Ins. Co. v. Haver*, 555 Pa. 534 (1999).

There are factual allegations concerning negligence in dispute that are raised against the Maiers in the FNB Complaint. Whether it can ultimately be proven that the Maiers acted negligently can only be the product of conjecture, however, in the context of this declaratory judgment action, it is sufficient if the underlying civil action includes averments of accidental or negligent conduct that could reasonably be construed as asserting unintentional behavior. FNB's claims against the Maiers include such allegations. Therefore it was proper to grant the Motion for Summary Judgment.

II. Loss of Use of Property

Erie Insurance's last assertion of error avers that it was improper to grant the Maiers' Motion for Summary Judgment because there was no allegation of covered "property damage," "bodily injury," or "personal injury" in the FNB Complaint as defined under Erie Insurance Policies, and therefore the policies do not provide coverage. Specifically, Erie believes that the alleged damages in the FNB Complaint do not constitute "loss of use" of property.

It is apparent from the nature of FNB's claim that it believes its interest, as a mortgagee in the real property located at 4819 Wolf Run Road, was impaired as a result of the Maiers' conduct. Such a claim implicates the loss of use of tangible property. Paragraph 34 of the Complaint specifically indicates that the National Bank of North East, of which FNB is the successor, did "release its lien on the property". It no longer has the use of the real estate to sell to recover the debt it is

owed by the Anthonys. This is clearly an allegation of the loss of use of tangible property. *See Westfield Groups v. Campisi*, 2006 U.S. Dist. LEXIS 24731 (W.D. Pa. Feb. 10, 2006). Therefore this assertion of error is also without merit. It is important that Erie Insurance uphold the terms of the policies issued to the Maiers and to defend the Maiers as they are obligated to do.

For the reasons set forth above, and in the prior Memorandum in this matter, the Court's Order, dated October 19, 2007, should be affirmed.

Signed this 7 day of February, 2008.

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

THE UNION CITY AREA SCHOOL DISTRICT, Petitioner

v.

THE UNION CITY AREA EDUCATION ASSOCIATION, PSEA/NEA, Respondent

CIVIL PROCEDURE / ARBITRATION

The well-established standard for judicial review of an arbitrator's decision is the "essence test" under which the decision of the arbitrator is final and binding in the majority of cases.

CIVIL PROCEDURE / ARBITRATION

While as a general proposition, an arbitrator has broad authority to interpret an undefined provision regarding termination for just cause under collective bargaining agreement, to permit an arbitrator to interpret the agreement as to require reinstatement of an employee who was determined to have engaged in egregious misconduct that strikes at the very core function of the public enterprise would be to deprive the employer of its ability to discharge that essential function.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

The State Board of Education Regulations at 22 Pa.Code 351.26(a) states: "Two consecutive unsatisfactory ratings of a professional employee shall be necessary to dismiss on the grounds of incompetency."

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

Incompetency as a cause for dismissal is to be given broad meaning and includes the lack of physical or mental ability to physically perform teaching duties, and also deficiencies in personality, composure, judgment, and attitude.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

Where the dismissal of a professional employee is predicated on incompetency, all school code and regulatory mandates must be fulfilled.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

While courts have insisted on strict compliance with some rating requirements, a school district's failure to meet others has been found inconsequential.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

Tenure affords an employee/grievant the right to procedural and substantive due process.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11393-2007

Appearances: Mark T. Wassell, Esquire for Petitioner
Richard McEwen, Esquire for Respondent

1925(b) OPINION

Cunningham, William R., J.

The Union City Area Education Association, PSEA/NEA has filed a Notice of Appeal from an order vacating an Arbitrator's decision. This Opinion is in response to the Concise Statement of Matters Complained of on Appeal.

PROCEDURAL HISTORY

On August 3, 2005, Carl Howell was notified by the Union City Area School District (the "School District") of his dismissal as a fifth grade teacher. The Union City Area Education Association, PSEA/NEA (the "Association") filed a grievance on Mr. Howell's behalf (hereafter, "Grievant").

The Board of School Directors of the School District denied the grievance which led to arbitration. After several hearings, an Arbitration Opinion and Award was issued on March 2, 2007, modifying the School District's discharge to a reinstatement to Grievant's teaching position with a sixty (60) day unpaid suspension.

The School District filed a Petition to Vacate Arbitration Award on March 30, 2007.

After consideration of the evidentiary record, the parties' Briefs and oral argument, an Opinion/Order was entered August 15, 2007 vacating the Arbitrator's Award. The result was Grievant's dismissal as a teacher. The Association filed a Notice of Appeal on August 29, 2007 and a Statement of Matters Complained of on Appeal on September 18, 2007.

FACTUAL HISTORY

The Grievant is a tenured teacher in the Union City School District. All public schools in Pennsylvania are mandated to evaluate professional employees. *See,* 24 P.S. §11-1123. Tenured teachers are evaluated in four categories: personality, preparation, technique and pupil reaction. *See*, Pennsylvania Department of Education Form, PDE 6501, Transcript of Proceedings before the Arbitrator (hereafter, "Arb.T."), pp. 11,12.

On November 14, 2003, the Grievant received an unsatisfactory rating in the areas of personality and technique for the 2003-2004 school year. In the personality area, Grievant was found lacking in judgment, poise, composure and professional attitude. He was deficient in the technique area due to poor behavior management skills.

A professional improvement plan was devised for Grievant to address these deficiencies. The plan included anger management counseling and a requirement that Grievant devise improvement plans of his own. Grievant was given several opportunities to incorporate his own plans for improvement. Grievant's plans were to be discussed with school administrators. At a follow-up meeting to review Grievant's ideas for improvement, Grievant brought a blank sheet of paper and a pen in lieu of his plan for improvement in deficient areas. (Arb.T., pp. 21-24). On his own, Grievant never created a plan for improvement. Instead, based on input from administrators and with the concurrence of Grievant, an

improvement plan was developed.

Unfortunately, Grievant did not improve. A second unsatisfactory rating was issued on June 7, 2005 for the 2004-2005 school year in the same four categories: personality, preparation, technique and pupil reaction. This rating also included documented deficiencies from November 18, 2003 through June 7, 2005. That is, the second unsatisfactory evaluation included deficiencies noted in the remainder of the 2003-2004 school year after the first unsatisfactory rating was issued. Grievant was advised he continued to exercise poor judgment; was unable to maintain poise and composure; and exhibited a poor professional attitude. Grievant was also informed he failed to implement expected instructional strategies.

The School District documented numerous incidents from August, 2003 through June, 2005 of Grievant's conduct which resulted in the unsatisfactory ratings. These incidents are comprehensively detailed in the transcript of proceedings before the Arbitrator.

The following examples of documented incidents are representative of Grievant's deficiencies:

A. Three students engaged in a fight on their way to the bus. The fight escalated due to Grievant's lack of supervision. (Arb.T., pp. 118, 120, 145-147, 301-303).
B. A student entered Grievant's classroom with a video camera for a pre-announced and approved school project. The student was confronted by Grievant who put his hand over the camera and ordered the student to leave the classroom. The student was traumatized by this event. (Arb.T., pp. 32, 220-224, 344, 345, 351).
C. A student's mother arrived at the school to pick up her son who had been in Grievant's charge for detention purposes. The student was not with Grievant and initially could not be found. The student was eventually located in another teacher's office after wandering the halls unsupervised. (Arb.T., pp.170, 171, 228, 229, 249, 292-294, 357-360).
D. The Grievant lost his temper, grabbed an agenda book out of a student's hands and ripped it in half within arm's length of the student in full view of other students. The student was extremely upset and was afraid to return to Grievant's classroom. The student's parents requested that she be removed from Grievant's classroom. The student, who had behavioral challenges, was transferred to another teacher's classroom. This student's behaviors diminished considerably and she was managed easily in another teacher's classroom. (Arb.T., pp. 16-20, 61, 105, 106, 296-298, 362.)
E. One of Grievant's students was observed outside of the school building prior to dismissal. Grievant had not noticed the student was missing from his classroom. Because the student was not supervised by Grievant, a host of troublesome scenarios existed. (Arb.T., pp. 120, 122, 149-151, 194, 304-306).

F. One of Grievant's students was bitten in the neck, kicked and hit during recess, but Grievant noticed nothing. Grievant was supposed to be supervising recess but never noticed the fight. The student told his mother after school about the fight. The student's parents were not notified by the school the fight occurred. The student's mother called the principal to report the incident and queried why Grievant did not control the situation. This caused the principal to launch an investigation. (Arb.T., pp. 42, 43, 373).

G. Grievant was observed returning from a field trip with his students. The students were near busy roads and a creek. Because of the obvious danger, the School District would not permit the students to be near the creek. The students were engaging in horseplay, pushing and hitting each other and not walking in an orderly line. One student was observed near the creek. Meanwhile, Grievant was walking along indifferently and made no attempt to keep his students safe and organized. Importantly, all of these events were observed by the Director of Pupil Services. (Arb.T., pp. 180-182).

These incidents established Grievant failed to supervise his students, failed to address inappropriate behavior and language by the students, did not control his temper and was persistently negligent.

As part of Grievant's improvement plan, Grievant's classroom was observed. It was noted the noise level was high, children were shouting without correction by Grievant and Grievant failed to implement any disciplinary intervention with the students. Grievant's evaluations contained other unacceptable deficiencies, including: failure to cooperate with improvement plans, failure to implement expected teaching strategies, and failure to improve teaching performance. The record supports the School District's evaluations.

The Public School Code provides, "The board of school directors in every school district...shall arrange a course or, courses of study adapted to the age, development, and needs of the pupils... ." 24 P.S. §15-1512. It is the policy of the State Board of Education "that the local curriculum be designed by school districts... ." 22 Pa.Code §4.4(a),(b).

As part of its curriculum, the School District implemented two integral programs which modified past teaching models: Balanced Literacy Framework and Responsive Classroom Framework. The Balanced Literacy Framework was designed to improve reading comprehension. The Responsive Classroom Framework was intended to improve student behavior and reaction to teaching methods. Grievant was afforded training in the substance of both programs and the methods of implementation. Grievant was directed to modify his teaching methods to comply with these programs. Despite comprehensive training in these models, Grievant failed to appropriately institute these methods. Some specific examples of deficiencies are:

A. The School District had been involved in transitioning to a Comprehensive Literacy program over a period of three years. Grievant was present at many of the staff development training meetings. Nonetheless, Grievant was observed continuing to use the round-robin method of teaching reading. Round-robin reading occurs when each student takes a turn reading a passage while the other students sit passively. Grievant's-fifth graders were observed in this activity for a fifty-minute period. Round-robin previously was abandoned by the School District as research has shown this method and time expended do not develop reading comprehension. Grievant directly violated this instructional directive. (Arb.T., pp. 48, 49, 133, 332).

(a) Grievant's classroom was observed and it was noted that reading time was poorly utilized and the learning goal and assessment tool were inappropriately matched in contravention of the Balanced Literacy Framework. (Arb.T., pp. 27, 28, 44, 79, 81, 132-137, 157-162, 164).

(b) Grievant was observed on at least one occasion erroneously teaching rudimentary information. For example, Grievant told his students that "eggs" and "mice" were two syllables words which caused his students to snicker and laugh. (Arb.T., p. 178).

(c) Grievant was observed allowing the students to self-correct their papers and call their scores aloud to Grievant which he recorded. Four students were randomly monitored and had not correctly reported accurate scores but inflated scores. Grievant failed to move from his place in the front of the classroom to monitor the students for accurate self-correction. These errors were not caught by Grievant and would have resulted in false information for grading purposes. The School District determined this is an inappropriate teaching method. (Arb.T., pp 178, 179).

B. Grievant failed to comply with administrative directives and violated the protocol for chain of authority. An example was his failure to impose strict disciplinary days for classroom misbehavior. Contrary to specific administrative directive, Grievant chose to take his students to the computer lab which is considered an earned privilege instead of a disciplinary response. (Arb.T., pp. 176-179, 192).

C. The School District implemented the Responsive Classroom Framework approach to student management. The Grievant failed to work with the School District on positive, structured classroom management strategies in order to better control what was observed to be a chaotic classroom environment. In response to administrative feedback regarding his lack of improvement, Grievant behaved in a condescending and disengaged manner toward personnel who were attempting to aid him with an improvement plan. Grievant failed to demonstrate a willingness to accept improvement suggestions that were repeatedly given. (Arb.T., pp. 27, 44-50, 79-98, 127-130, 155-157, 170-176, 182-188).

As a result of Grievant's failure to improve in any area, the School District terminated the Grievant from employment. The specific grounds for Grievant's termination were unsatisfactory work performance, incompetence and persistent negligence in the performance of duties, all of which are independent grounds for terminating a professional employee under the Pennsylvania Public School Code. *See*, 24 P.S. §11-1122.

DISCUSSION

On appeal the Association alleges these five errors: 1) the Court incorrectly concluded the second prong of the essence test has not been met; 2) the Court substituted its judgment for that of the Arbitrator regarding the severity of Grievant's conduct; 3) the Court erroneously interpreted the School District's failure to issue two consecutive unsatisfactory ratings as "procedural defects"; 4) the Court wrongly concluded Grievant's conduct adversely affected the core function of the School District; and 5) the Court erroneously applied the core functions doctrine in violation of Grievant's property rights and constitutional protections. Each of these issues will now be addressed although not in Appellant's same order.

THE ESSENCE TEST

The well-established standard for judicial review of an arbitrator's decision is the "essence test" under which the decision of the arbitrator is final and binding in the majority of cases. *State System of Higher Education (Cheney University) v. State College University Professional Assn. (hereafter "SCUPA")*, 560 Pa. 135, 743 A.2d 405 (1999).

The *SCUPA* Court clarified the application of the "essence test" by instituting the following two-prong analysis:

> First, the court shall determine whether the issue as properly defined is within the terms of the collective bargaining agreement. Second, if the issue is embraced by the agreement and thus, appropriately before the arbitrator, the arbitrator's award will be upheld if the arbitrator's interpretation can be rationally derived from the collective bargaining agreement. That is to say, a court will only vacate an arbitrator's award where the award indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement.

SCUPA, 560 Pa. At 150, 743 A.2d at 413.

Applying the "essence test" in this case, it is uncontroverted the issue before the arbitrator was within the terms of the collective bargaining agreement thus satisfying the first prong of the "essence test."

The second prong of the "essence test" has not been met. The arbitrator's award is not rationally derived from the collective bargaining agreement because a public employer such as a school district cannot bargain away its right to terminate a teacher whose conduct deprives the employer

of its ability to perform its core function. *City of Easton v. American Federation of the State, County and Municipal Employees, AFL-CIO, Local 447*, 562 Pa. 438, 756 A.2d 1107 (2000); *Green County v. Dist. 2, United Mine Workers of America*, 578 Pa. 347, 852 A.2d 299 (2004).

THE CORE FUNCTIONS DOCTRINE

The Association's fourth and fifth objections concern the applicability of the core functions doctrine and whether Grievant's conduct adversely affected the core function of the School District. Because these objections are interrelated, they will be addressed together.

The core functions doctrine has been explained by the Supreme Court of Pennsylvania as follows:

> Unlike private sector employers, public employers are ultimately responsible for the health, safety and welfare of our communities. Due to their unique nature and role, public employers must be able to perform the functions they are charged to carry out by our citizenry. Consistent with this status, our court has recognized that public employers cannot be compelled in arbitration to relinquish powers that are essential to the discharge of their functions. Id. Thus, while as a general proposition, an arbitrator has broad authority to interpret an undefined provision regarding termination for just cause under collective bargaining agreement, *Office of Attorney General*, to permit an arbitrator to interpret the agreement as to require reinstatement of an employee who was determined to have engaged in egregious misconduct that strikes at the very core function of the public enterprise would be to deprive the employer of its ability to discharge that essential function. *City of Easton*, 756 A.2d at 1111-12. An Arbitrator's award granting reinstatement in such a situation would not be rational and therefore fails the essence test.

Green County, supra, at 308.

Among the core functions of the Union City School District are the education of students and the health, safety and welfare of the students entrusted to its care. The development and implementation of the school's curriculum are within the educational core function of the School District.

In *Forest Hills School District v. Forest Hills Education Association*, 859 A.2d 896 (Pa.Cmwlth. 2004), *appeal denied*, 582 Pa. 689, 870 A.2d 324 (2005)[1], the Court applied the core function analysis of *Green, Id.* In *Forest Hills*, a teacher with fourteen years of experience was charged with misconduct under the Public School Code, 24 P.S. §11-1122. The school district pursued dismissal of the teacher for incidents which amounted to incompetence, unsatisfactory work performance, willful neglect of duties, persistent and willful violation or failure to comply

[1] It is acknowledged *Forest Hills, supra,* is an unpublished opinion and, therefore, not precedential. It is, however, persuasive.

with the school laws of the Commonwealth and persistent negligence in the performance of duties. Unlike the present case, in *Forest Hills*, the teacher received only one unsatisfactory rating.

The teacher filed grievances which were taken to arbitration. The arbitrator modified the penalty from dismissal to a thirty day suspension after finding the teacher did commit the alleged conduct. The *Forest Hills* arbitrator, however, found the alleged conduct did not rise to misconduct under Section 1122 of the School Code.

The Trial Court and the Commonwealth Court disagreed and found the teacher's conduct affected the core functions of a public school employer. The Commonwealth Court determined public employers must have unfettered managerial prerogative to discipline conduct that strikes at the very core of a public enterprise.

Both *Green County, supra* and *Forest Hills* are cases in which the Court overruled the arbitrator despite the deference to be accorded arbitrator's awards. The key word is "deference." Deference does not mean a total abdication of judicial review. A trial court is not a rubber-stamp for the arbitrator's award, particularly when the safety, well-being and education of fifth graders is concerned.

Contrary to the Association's position that the core functions doctrine does not apply, this Court would have been remiss in not applying the doctrine.

THE UNSATISFACTORY RATINGS

The Arbitrator's Award did not set forth a separate Findings of Fact. The Arbitrator described as a "procedural defect" the failure of the School District to have evaluations for consecutive time periods for Grievant. Arbitrator's Award, p.3. The Grievant received two unsatisfactory ratings, one on November 14, 2003, and the other on June 7, 2005. No evaluation rating was issued between those dates. The Association argues because two consecutive ratings were not issued by the School District, a finding of incompetency cannot be upheld. This argument is misplaced.

The State Board of Education Regulations at 22 Pa.Code 351.24 (b) states: "Professional employees shall be rated a minimum of once each year." 22 Pa.Code 351.26(a) states: "Two consecutive unsatisfactory ratings of a professional employee shall be necessary to dismiss on the grounds of incompetency. This requirement insures that dismissal is not based on the first instance of unsatisfactory performance but that dismissal follows notice and an opportunity for the employee to improve."

Importantly, the November 14, 2003 rating represented Grievant's performance for part of the 2003-2004 school year and the June 7, 2005 rating represented the remainder of the 2003-2004 school year and the 2004-2005 school year. Because the ratings were more than twelve months apart, the arbitrator found this to be a fatal procedural flaw. Arbitrator's Award, p.3. However, the ratings covered consecutive school years. In fact, consistent with regulatory requirements, Grievant was rated at least

once for each school year. The unsatisfactory evaluations were issued to Grievant based on his performance during two consecutive school years. The fact the ratings were more than twelve months apart does not mean the deficiencies found in the ratings are to be disregarded.

The Arbitrator's conclusion is form over substance. The content of the ratings is more important than the actual dates of the ratings. At various times during these two school years, the School District attempted to help Grievant improve by having other teachers or administrative personnel model better teaching methods. Grievant's performance was observed and assessed at different times with the deficiencies duly noted. The reality is Grievant's performance was unsatisfactory for a host of reasons for two consecutive school years. Simply because the dates of the ratings exceed twelve months does not mean Grievant's conduct did not occur and should be ignored.

THE SEVERITY OF GRIEVANT'S CONDUCT

The Association contends the Court inappropriately substituted its judgment for that of the Arbitrator regarding the severity of Grievant's conduct. However, the Arbitrator found the "litany of alleged offenses is present." Arbitrator Award, p.5. Further, the Arbitrator stated:

> While the record is clear that grievant was not a stellar teacher, there's nothing separately or collectively that would justify termination. Discharge in the labor relations arena is the most serious action possible; it is at par with capital punishment in the criminal sector and should be utilized for only the most egregious offenses. The foregoing is not to imply that grievant should be held harmless, grievant's problems with teaching techniques and classroom framework are vexing and the infractions to which he conceded are problematic and need to be addressed. Without the procedural flaws in the evaluations, a very different award would be written.

Id., p.5.

The Arbitrator's concern with Grievant's performance was such that he imposed a sixty day unpaid suspension, a sanction which the parties acknowledge is harsh and unusual. Given the nature of the sanction, it must be based on serious misconduct.

These concerns explain the Arbitrator's statement that "a very different award" would have resulted "without the procedural flaws in the evaluations." Arbitrator's Award, p.4. In other words, but for what the Arbitrator perceived to be a procedural flaw by the School District not issuing two unsatisfactory ratings within one year, the Arbitrator would have found Grievant's conduct warranted termination.

One of the bases relied on by the School District for Grievant's dismissal is incompetency. Incompetency is generally defined as an incapacity to teach arising out of either a lack of substantive knowledge of the subjects to be taught, a lack of ability, a lack of a desire to teach

according to proper methodology, or want of physical ability. *West Mahanoy Twp. School Dist. v. Kelly,* 156 Pa.Super. 601, 41 A.2d 344 (1945). Incompetency, also means an inability, incapacity, or lack of ability, legal qualification, or fitness to discharge the required duties. *Horosko v. School District of Mt. Pleasant Twp.*, 335 Pa. 369, 374-5, 6 A.2d 866, 869-70. Incompetency as a cause for dismissal is to be given broad meaning. *Bd. of Public Ed., School Dist. of Philadelphia v. Soler,* 406 Pa.168, 172, 176 A.2d 653, 655 (1961).

Incompetency is not narrowly defined. It includes the lack of physical or mental ability to physically perform teaching duties, and also deficiencies in personality, composure, judgment and attitude. *Hamburg v. North Penn. School Dist.*, 86 Pa.Cmwlth. 371, 484 A.2d 867 (1984).

Where the dismissal of a professional employee is predicated on incompetency, all school code and regulatory mandates must be fulfilled. *New Castle Area School Dist. v. Bair,* 28 Pa. Cmwlth. 240, 368 A.2d 345 (1977). The School Code requires that professional employees be rated, and the State Board of Education requires two unsatisfactory ratings as a precondition to the dismissal of a professional employee on the basis of incompetency. 24 P.S. 11-1123; 22 Pa.Code 351.26.

Generally, all requirements of the School Code and the applicable regulations must be met in order for a rating to be considered valid and to provide support for dismissal. *Hamburg, Id.* While courts have insisted on strict compliance with some rating requirements, a school district's failure to meet others has been found inconsequential. *See, Bd. of Education of Sch. Dist. of Philadelphia v. Kushner,* 109 Pa.Cmwlth. 120, 530 A.2d 541 (1987) (absence of numerical scoring will not invalidate an unsatisfactory rating); *Travis v. Teter,* 370 Pa. 326, 87 A.2d 177 (1952)(personal knowledge of facts by person signing unsatisfactory rating not required); *Gabriel v. Trinity Area School Dist.*, 22 Pa.Cmwlth. 620, 350 A.2d 203 (1976) (discrepancies in format of rating form will not invalidate an unsatisfactory rating). In this case, that Grievant's ratings are more than twelve months apart is not consequential given the substance of the ratings.

As discussed, *Forest Hills, supra*, involved only one unsatisfactory rating. Despite the absence of two consecutive unsatisfactory ratings, the Commonwealth Court vacated the arbitrator's award and upheld the school district's discharge of the teacher.

The purpose of requiring two unsatisfactory ratings is to give a teacher an opportunity to improve. This purpose fairly balances the interests of a teacher with the core functions of the school district.

Grievant had that opportunity to improve and failed to do so. Grievant was informed in November, 2003 that his rating for the 2003-2004 school year was unsatisfactory. Instead of improving, Grievant proceeded to get an unsatisfactory rating for the remainder of that school year and for the 2004-2005 school year. Hence, for two consecutive school years, Grievant's performance was unsatisfactory. The School District's

documentation of Grievant's failure to perform satisfactorily for two consecutive years is established in the record.

THE TENURE ISSUE

In its (1925)(b) Statement, the Association raises an argument for the first time that Grievant, as a tenured professional, possesses a property right to continued employment. Also raised for the first time in the Association's (1925)(b) statement is the argument application of the core functions doctrine violated Grievant's state and federal constitutional rights. The Association did not raise either of these arguments before the Arbitrator or this Court.

The Association must delineate the scope of claimed constitutional errors on appeal. Pa.R.A.P. 1925(b)(4)(ii),(v). In fact, the Association has never identified what constitutional rights were violated. The Association has failed to preserve these arguments on appeal and, thus, they are waived. Pa.R.C.P. 227.1(b); Pa.R.A.P. (1925)(b)(4).

The main thrust of the Association's argument appears to be the Teacher Tenure Reform Act, 24 P.S. §§11-1122, 1123, requires two consecutive unsatisfactory ratings, done annually, before the Grievant can be dismissed. The Association maintains the School District failed to strictly comply with this requirement in violation of Grievant's constitutional rights and therefore cannot dismiss him.

A meaningful response to this argument is unavailable because the Association never identifies what constitutional rights are violated or the nature of the alleged violations. Further, the Association cannot establish that the Teacher Tenure Reform Act, *Id.* , creates an indefeasible property right in a teacher's job.

By virtue of his tenure, Grievant has a property right in his teaching job. However, this property right does not provide a constitutional shield to discharge. Instead, tenure affords Grievant the right to procedural and substantive due process. If Grievant's job performance is impeding one of the core functions of the School District, Grievant can lose his property right to his teaching position assuming Grievant has received due process.[2]

In this case, Grievant was afforded substantive and procedural due process. Grievant was put on notice of the bases for his dismissal. Grievant had the opportunity to challenge the evidence against him and to present evidence.

Indeed, before the legal proceedings began, Grievant was put on notice of his deficiencies in November, 2003, and failed to improve in the remainder of that school year. On his own, Grievant never developed a plan for improvement. Grievant was given ample assistance in the form of peers and administrators modeling appropriate teaching methods and was directed to anger management counseling. Nonetheless, Grievant

[2] The teacher in *Forest Hills* was tenured and yet discharged.

proceeded to perform in an unsatisfactory manner for the remainder of the 2003-2004 school year and for the 2004-2005 school year.

Under the core functions analysis, the greater interest of the public is served by allowing a public employer such as a school district to discharge a teacher whose performance is adversely affecting the core function(s) of the school district. To hold otherwise would permit the evisceration of a public employer's ability to perform its core function(s).

CONCLUSION

Grievant's conduct must be viewed for what it is: a history of engaging in inappropriate teaching methods, anger outbursts (requiring two separate sessions of anger management counseling) and a demonstrated inability to control his classroom or account for his students' whereabouts. Also, Grievant did not follow the curriculum directives of the School District. These behaviors persisted despite concerted administrative attempts to work with Grievant.

Grievant has consistently endangered the physical and emotional well-being of the students entrusted to his care. Grievant's performance impaired the educational development of his students by not following the curriculum or engaging in effective teaching methods.

When given an unsatisfactory rating for the 2003-2004 school year, Grievant had the opportunity and time to improve for the 2004-2005 school year. Grievant did not comply with the improvement plans and received another unsatisfactory rating. Other teachers and administrators modeled appropriate methods for Grievant, yet he did not improve.

The second prong of the "essence test" has not been met. The Union City School District established just cause to dismiss the Grievant. The appropriate standard of review has been applied to the Arbitrator's Award. The core functions doctrine is applicable to this case. The Association's argument based on the timing of the unsatisfactory ratings is unpersuasive. Grievant's conduct warrants dismissal. Grievant has waived any constitutional argument based on tenure status. Grievant does not have an absolute property right in his teaching position which can never be divested by the School District. This appeal lacks merit.

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

PERRY PLAZA ERIE, PA. LIMITED PARTNERSHIP, successor by assignment from FIRST ALLIED SHOPPING CENTER LIMITED PARTNERSHIP, Plaintiff

v.

CHECK 'N GO OF PENNSYLVANIA, INC., and CNG FINANCIAL CORPORATION, Defendants

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary Judgment is appropriate when there is no issue of material fact that could be established by additional discovery or expert report, after reviewing the record in a light most favorable to the non-moving party.

CONTRACT INTERPRETATION

Though the general issue is whether summary judgment is appropriate, the specific issue is whether the lease was breached. The interpretation of a contract (the lease) is a question of law for the courts.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary Judgment is appropriate if the terms of the lease are clear and unambiguous, but inappropriate if there are substantial disputes as to the facts regarding the interpretation or application of the lease terms.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

There is a substantial dispute as to facts regarding application of the lease terms, when viewed most favorably to the Defendant. Summary Judgment is not proper.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 10234-2007

Appearances: David E. Holland, Esq., Attorney for Plaintiff
Andrew F. Szefi, Esq., Attorney for Defendants

OPINION

Connelly, J., May 2, 2008

The matter before this Court is pursuant to a Motion for Summary Judgment filed by Perry Plaza Erie, Pennsylvania, Limited Partnership (hereinafter "Plaintiff"), successor by assignment from First Allied Shopping Center, Limited Partnership (hereinafter "First Allied"). Check 'N Go of Pennsylvania, Incorporated (hereinafter "Defendant Check 'N Go") and CNG Financial Corporation (hereinafter "Defendant CNG") oppose Plaintiff's motion.

Procedural History

On January 18, 2007, Plaintiff filed a Complaint before this Court containing two counts: Count I, Defendant Check 'N Go's breach of a lease

agreement (hereinafter "the Lease") as between Plaintiff and Defendant Check 'N Go for failure to remain open and conduct business continually in Perry Plaza, located at 2220 Broad Street, Erie, Pennsylvania, 16503 (hereinafter "the Premises"), and for failing to pay rent; and Count II, Defendant CNG's breach of lease guaranty (hereinafter "the Guaranty") as between Plaintiff and Defendant CNG whereby Defendant CNG was to act as surety for the prompt payment of all obligations due to Plaintiff by Defendant Check 'N Go in connection with the Lease of the Premises. *Complaint, ¶¶ 4-15.*

In response, on March 1, 2007, Defendants filed an Answer and New Matter. *Answer and New Matter, ¶¶ 1-26.* In the Answer, Defendants state the following: Defendant Check 'N Go did not violate the Lease in any way as it was "prevented from conducting business by causes beyond its control;" Defendant Check 'N Go owes no amounts under the Lease as it "properly invoked its termination rights under the Lease, attempted to make all necessary payments pursuant to the Lease, and those payments were denied by Plaintiff;" Defendant CNG is not obligated to make payments to Plaintiff under the terms and conditions of the Guaranty as no such amounts are owed under the Lease; and Plaintiff is not entitled to any damages as a result of any alleged breach. *Id. at ¶¶ 1-15*. In the New Matter, Defendants state Plaintiff's claims are barred by the terms and conditions of the Lease, the terms and conditions of the Guaranty, the doctrine of accord and satisfaction, Plaintiff's own breach of the Lease for failure to accept termination payment in accordance with the Lease, and by Plaintiff's failure to mitigate its damages. *Id. at ¶¶ 16-26.*

On August 24, 2007, Plaintiff argued no genuine issue as to any material fact exists, Defendants owe Plaintiff costs specifically provided for and permitted under the Lease itself, and Plaintiff is entitled to judgment as a matter of law with respect to all claims set for in its Complaint. *Motion for Summary Judgment, ¶¶ 1-4; Brief in Support of Plaintiff's Motion for Summary Judgment, pp. 1-11; Complaint, ¶¶ 11, 15.* Following Plaintiff's Motion for Summary Judgment, Defendants averred material issues of fact remain as to the following issues: whether the fact Defendant Check 'N Go was not continuously open for business constitutes a breach of the Lease; whether the termination option is applicable; whether section 28.05 of the Lease is triggered; whether the alleged breach was material; and whether Defendant Check 'N Go was constructively evicted from the Premises. *Brief in Opposition to Plaintiff's Motion for Summary Judgment, pp. 6-12.*

On November 8, 2007, Plaintiff, in turn, argued the following: Defendant Check 'N Go's admission that it was not continuously open for business clearly shows a breach of the Lease; the "Termination Offer" in the Lease is not a defense barring summary judgment; and there are no questions of fact preventing summary judgment regarding section 28.05

of the Lease. *Reply Brief on Behalf of Plaintiff in Support of Motion for Summary Judgment, pp. 2-9.* Further, Plaintiff alleged that given the admission Defendant Check 'N Go breached the express covenant of "Continuous Occupancy" in section 7.01 of the Lease, and in light of Defendants' other breaches, it is for the Court to decide as a matter of law whether the breach was material. *Id.* Finally, Plaintiff contended there are no questions of fact regarding Defendant Check 'N Go's vacation of the Premises which prevents summary judgment in favor of Plaintiff. *Id.*

Statement of Facts

On or about December 16, 2003, First Allied and Defendant Check 'N Go entered into the Lease while First Allied and Defendant CNG entered into the Guaranty. *Complaint, ¶¶ 5, 13, Exhibit A, C; Answer and New Matter, ¶ 5.* On or about October 18, 2004, First Allied assigned all its right, title, and interest in and to the Lease and Guaranty to Plaintiff. *Complaint, ¶ 6, Exhibit B; Answer and New Matter, ¶ 6.*

Defendants allege that at some point in early 2006, the Federal Deposit Insurance Corporation (hereinafter "the FDIC") notified Defendant Check 'N Go's banking institution customers that the FDIC no longer considered the loan servicing arrangement engaged in by Defendant Check 'N Go to be in compliance with the FDIC's existing regulations.[1] *Defendants' Pre-Trial Statements, pp. 2-3.* In early July of 2006, Plaintiff became aware that the Premises "went dark," i.e., Defendant Check 'N Go was no longer continually conducting business on the Premises. *Plaintiff's Pre-Trial Statement, p. 2.* As a result, Plaintiff sent correspondence via certified mail to Defendants on July 6, 2006. *Brief in Support of Plaintiff's Motion for Summary Judgment, pp. 2; Brief in Opposition to Plaintiff's Motion for Summary Judgment, pp. 2-3.* In this July 6, 2006 letter, Plaintiff informed Defendants it believed Defendant Check 'N Go to be in default under the Lease for failing to continually operate a business on the Premises and as a result, Defendant Check 'N Go would be given ten (10) days to cure the default. *Id.*

On November 22, 2006, Plaintiff advised Defendant Check 'N Go, in writing, that it had failed to cure the default specified in the July 6, 2006 correspondence, and that Plaintiff intended to exercise its rights under the Lease. *Brief in Support of Plaintiff's Motion for Summary Judgment, p. 2; Brief in Opposition to Plaintiff's Motion for Summary Judgment, p. 3.* Defendant Check 'N Go received the November 22, 2006 letter. *Id.* On or about December 1, 2006, Plaintiff, in writing, advised Defendants of its intent to re-enter the Premises on December 7, 2006, and to exercise its rights under the Lease. *Brief in Support of Plaintiff's Motion for*

[1] The notification alleged to have been sent by the FDIC to Defendant Check 'N Go's banking institution customers informing them that the FDIC no longer considered Defendant Check 'N Go's loan servicing arrangement to be in compliance with the FDIC's existing regulations is not contained in the record; it is merely alluded to by Defendants.

Summary Judgment, p. 3; Brief in Opposition to Plaintiff's Motion for Summary Judgment, p. 3. Defendants received the December 1, 2006 letter. *Id.*

By e-mail dated December 6, 2006, Defendants informed Plaintiff that Defendant Check 'N Go would vacate the Premises by 5:00 p.m. on December 7, 2006. *Id.* By letter dated December 12, 2006, Defendant Check 'N Go notified Plaintiff of its "termination of Lease Agreement" claiming its contractual arrangements with two banks were terminated as a result of the FDIC's directive, and therefore it had ceased conducting business from July 7, 2006, through November 22, 2006. *Id; Responses to Requests for Admission, No. 2.* Plaintiff was able to re-lease the Premises beginning February 13, 2007, but at a lesser rate than agreed to in the Lease between it and Defendant Check 'N Go. *Motion for Summary Judgment, p. 2.*

Analysis of Law

The general issue before this Court is whether Plaintiff is entitled to summary judgment, that is, whether Plaintiff, as the moving party, has shown the absence of a genuine issue of material fact as to a necessary element of the current cause of action pursuant to *Pennsylvania Rule of Civil Procedure* (hereinafter "PA Civil Rule") *1035.2***.** In determining whether Plaintiff is entitled to summary judgment, this Court, in viewing the record in the light most favorable to Defendants, has weighed applicable law as it relates to the facts of this case as well as the merits of the arguments presented by the parties.

PA Civil Rule 1035.2 provides that summary judgment is appropriate when there is no issue of material fact as to a necessary element of the cause of action or defense that could be established by additional discovery or expert report. *Pa.R.Civ.P. 1035.2***.** Any party may move for summary judgment, in whole or in part, after the relevant pleadings are closed. *Ertel v. The Patriot-News Co.,* 674 A.2d 1038, 1041 (Pa. 1996). It is the burden of the moving party to prove that no genuine issues of material fact exist. *Id.* Therefore, the record is reviewed in the light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact are to be resolved against the moving party. *Id.* The non-moving party, however, may not rest upon the mere allegations or denials of its pleadings, but must set forth, either by affidavit or otherwise, specific facts showing there is a genuine issue for trial. *Id.*

Though the general issue before this Court is whether Plaintiff is entitled to summary judgment, the specific issue before this Court is whether Defendant Check 'N Go breached the Lease pursuant to its terms by failing to remain continuously open for business. The interpretation of a contract, e.g., the Lease in this present case, is a question of law for courts, and while it is in this Court's ability to do so, it is inappropriate

to grant summary judgment if there are substantial disputes as to the facts regarding the interpretation or application of the Lease's terms. *See, Henry v. First Fed. Sav. & Loan Ass'n of Green County,* 459 A.2d 772, 775 (Pa. Super. 1983). However, if the terms of the Lease are clear and unambiguous, summary judgment is appropriate if this Court is able to apply those terms to the facts of this case. *Id.* The clauses in the Lease should not be read independent of one another without this Court considering their combined effects, and the terms in one section of the Lease will not abolish the other terms of the Lease. *See, Trombetta v. Raymond James Fin. Serv., Inc.*, 907 A.2d 550, 561 (Pa. Super. 2006).

Defendants assert that although Defendant Check 'N Go ceased to continuously conduct business as of July 2006, its failure to do so does not constitute a breach pursuant to sections 7.02 and 28.05 of the Lease. *Brief in Opposition to Plaintiff's Motion for Summary Judgment, pp. 2-13.* In pertinent part, sections 7.02 and 28.05 of the Lease read as follows:

> Tenant shall operate all of the leased premises during the entire term of this Lease with due diligence and efficiency so as to produce all of the gross sales which may be produced by such manner of operation, unless prevented from doing so by causes beyond Tenant's control . . . .

Section 7.02, Operation of Business.

> In the event that either party hereto shall be delayed or hindered in or prevented from the performance of any act required hereunder by reason of . . . . restrictive government . . . . regulations . . . . then performance of such act shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay . . . .

Section 28.05, Force Majeure.

Defendants argue that not only was the notification issued by the FDIC a force beyond Defendant Check 'N Go's control that prevented it from operating the Premises during the entire term of the Lease, but as the FDIC notification was a restrictive government regulation, the performance of continually conducting business was excused via the combined terms of sections 7.02 and 28.05 of the Lease, and therefore no breach had occurred. *Brief in Opposition to Plaintiff's Motion for Summary Judgment, p. 7; citing, Section 7.02, Operation of Business; see also, Complaint, Exhibit A.*

Plaintiff asserts that because Defendant Check 'N Go ceased to continuously conduct business as of July 2006, its failure to do so constitutes a breach pursuant to sections 7.01 and 29.03, and Plaintiff

has a right of re-entry pursuant to section 22.01.[2] *Reply Brief on Behalf of Plaintiff in Support of Motion for Summary Judgment, pp. 1-10.* In pertinent part, sections 7.01, 29.03, and 22.01 of the Lease read as follows:

> Tenant shall use the leased premises solely for the purpose of conducting the business of: providing financial services including, but not limited to, refund anticipation loans, insurance products premiums, mortgage lending, small loans, and deferred payment . . . . Tenant shall occupy the leased premises provided for in section 1.01 hereof, and shall conduct continuously in the leased premises the business above stated . . . . Owner, at its option, may re-enter the leased premises and relet the same . . . .

Section 7.01, Use of the Leased Premises.

> In the event Tenant's use, as described in Section 7.01 of the Lease, is prohibited by any federal law . . . . from continuing its regular business operations Tenant shall have the option (the "Termination Option") to terminate the Lease, effective one hundred twenty (120) days after Owner receives notice from Tenant (the "Termination Date") subject to the following terms and conditions: (i) Tenant gives Owner written notice of Tenant's election to exercise the Termination Option, which notice shall be sent via certified registered mail and must be received by Owner not later than one hundred twenty (120) days prior to the Termination Date; and (ii) Tenant is not in default under the Lease; and (iii) Tenant pays to Owner concurrently with Tenant's exercise of the Termination Option, a case lease termination fee (the "Fee") in an amount equal to the sum of three (3) months base monthly rent, additional rent and all brokerage commissions and legal fees paid or incurred by Owner in connection with the Lease; and (iv) Within thirty (30) days after Owner's receipt of a notice from Tenant requesting a determination of the actual amount of the Fee, Owner shall notify Tenant of such amount. The Termination Option shall automatically terminate and become null and void upon the earlier to occur of (i) the termination of Tenant's right to possession of the leased premises; (ii) the assignment by Tenant of the Lease, in whole or in part; (iii) the sublease by Tenant of all or any party of the leased premises; (iv) the recapture by Owner of the leased premises as may be provided for in the Lease; (v) the failure of Tenant to timely or properly exercise the Termination Option.

[2] Although Plaintiff attached portions of the Lease with the Complaint, section 22.01 is not found in the record; it is merely alluded to by Plaintiff in its Reply Brief on Behalf of Plaintiff in Support of Motion for Summary Judgment.

Section 29.03.

> . . . If Tenant shall discontinue doing its business in the leased premises as defined in SECTION 7.01 of this Lease, or if Tenant shall abandon the leased premises . . . . Owner besides other rights or remedies it may have, shall have the immediate right of re-entry ... .

Section 22.01; cited in Reply Brief on Behalf of Plaintiff in Support of Motion for Summary Judgment, p. 2.

Plaintiff argues that section 7.02, as relied on by Defendants, is not applicable, as opposed to section 7.01, because section 7.02 of the Lease relates to Defendant Check 'N Go's covenant to operate its business with due diligence and efficiency so as to produce gross sales, while section 7.01 exclusively deals with Defendant Check 'N Go's obligation to conduct business continuously on the Premises. *Reply Brief on Behalf of Plaintiff in Support of Motion for Summary Judgment, p. 2.* Plaintiff argues that because section 7.01 is the controlling provision, section 29.03 of the Lease is the only provision of the Lease that would excuse Defendant Check 'N Go's non-performance rendering section 28.05 non-applicable, and therefore a breach had occurred. *Id. at 2-6.*

As stated, the interpretation of the Lease is a question of law for the Court unless the Lease's combined terms are neither clear nor unambiguous, or if there are substantial disputes between the parties as to the facts regarding the interpretation or the application of its terms. *See, Henry,* 459 A.2d at 775; *Trombetta*, 907 A.2d at 561. After a thorough review of not only the record but also the arguments presented by Plaintiff and Defendants, this Court finds there to be a substantial dispute between Plaintiff and Defendants as to the facts regarding the application of the terms of the Lease, i.e., whether Defendant Check 'N Go's admitted inability to remain continuously open to conduct business as a result of measures taken by the FDIC constitutes breach under the Lease after applying all its terms taken as a whole. Therefore, because the provided evidence, as viewed in a light most favorable to Defendants, does not clearly reveal that Defendant Check 'N Go's failure to continuously remain open constitutes breach, summary judgment is not proper. Consequently, Plaintiff's Motion for Summary Judgment is denied as genuine issues of material fact remain.

ORDER

AND NOW, TO-WIT, this 2nd day of May, 2008, it is hereby **ORDERED, ADJUDGED, and DECREED** that, for the reasons set forth in the foregoing Opinion, Plaintiff's Motion for Summary Judgment is **DENIED.**

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

C.A. CURTZE COMPANY, INC., Plaintiff

v.

THOMAS R. PHILLIPS, Defendant

LABOR AND EMPLOYMENT / NONCOMPETES

Restrictive covenants and covenants not to compete are valid if: (1) the covenant is ancillary to employment; (2) it is supported by adequate consideration; (3) it is reasonably limited in time and geographic scope; (4) it must be reasonably designed to safeguard a legitimate interest of the former employer.

LABOR AND EMPLOYMENT / NONCOMPETES

As a general proposition, Pennsylvania Courts do not favor restrictive covenants because they are contracts in restraint of trade.

LABOR AND EMPLOYMENT / NONCOMPETES

An employer has a right to protect its customer goodwill acquired through efforts of its employees. So, too, customer relationships and goodwill developed through or shared with a sales representative are protectable interests that support the enforceability of an employment covenant not to compete.

CIVIL PROCEDURE / PRELIMINARY INJUNCTION

The issuance of a preliminary injunction is appropriate where: (1) the relief sought by plaintiff is necessary to prevent immediate and irreparable harm that could not be remedied by damages; (2) greater injury will result by refusing the injunction than by granting it; (3) the injunction will restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; and (4) the injunction is reasonably suited to abate such activity.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW NO. 10047-2008

Appearances: Richard A. Lanzillo, Esquire for the Plaintiff
Gary K. Schonthaler, Esquire for the Defendant

OPINION AND ORDER

DiSantis, Ernest J., Jr., J.

This case is before the Court on the plaintiff's complaint in equity and request for a preliminary injunction filed January 4, 2008. A hearing was held on February 5, 2008 and the Court afforded the parties until February 29, 2008 to submit proposed findings of facts and conclusions of law.

I. BACKGROUND OF THE CASE AND FACTUAL FINDINGS

Plaintiff, C.A. Curtze Company, Inc. ("Curtze") is a Pennsylvania corporation with its principal place of business located at 1717 East 12th

Street, Erie, Pennsylvania. It markets, distributes and sells a wide variety of food, beverage products and supplies to restaurants, hotels, hospitals, nursing homes and other institutional customers. (Hearing Transcript ("Tr."), 5, 42-43).

On May 2, 1991, Curtze and defendant, Thomas R. Phillips ("Phillips"), entered into a written employment agreement ("Agreement") under which Curtze hired Phillips as its Sales Product Specialist. (Tr., 7-8; Exhibit A to Motion for Preliminary Injunction).[1] In brief, pursuant to the Agreement. Phillips agreed, in consideration of his employment by Curtze, that, for a period of twelve (12) months after termination of the Agreement, he would not engage or become interested in any business located in or which sells products in the sales area in which Curtze, or its affiliate, Northern Frozen Foods, conducts its business or sells its products, where such other business is directly or indirectly in competition with the business conducted by Curtze. The geographic restriction is within a one (1) mile radius of any customer contacted by Curtze or its affiliate during the course of Phillip's employment, where that business is directly or indirectly in competition with Curtze, (Tr., 7-8; Exhibit A to Motion for Preliminary Injunction). In addition, Phillips also agreed, that during his employment with Curtze and for twelve (12) months thereafter, Phillips would maintain in strictest confidence and would not reveal to any third person or party other than appropriate representatives of Curtze, sources of product supplies of Curtze, or other confidential information revealed to Phillips or acquired by Phillips in the course of his employment. (Tr., 7-8; Exhibit A to Motion for Preliminary Injunction).

Curtze employed Phillips from May 6, 1991 until December 3, 2007 when he voluntarily resigned. (Tr., 6).

During his employment with Curtze, Phillips held various key managerial and supervisory positions relating to sales, marketing and customer relations. These included District Sales Manager, District Sales Consultant and, ultimately, Senior Sales Consultant. (Tr., 8-11). In each of these capacities, Phillips serviced numerous Curtze customers and accounts within Northwest Pennsylvania and Western New York. (Tr., 80). In reliance upon the Agreement, Curtze permitted and facilitated Phillips' direct extensive contact and business relationships with many of Curtze's customers and prospective customers. (Tr., 8- 12, 80). Eventually, Phillips became Curtze's highest producing sales representative with sales revenue that exceeded any other sales representative in the company. (Tr., 8-10; Plaintiff's Exhibit 2).

At the time of his resignation from Curtze, Phillips was receiving annual compensation of between $110,000 and $120,000. (Tr. 12).

Curtze entrusted Phillips with extensive confidential information

[1] Exhibit A is the Agreement.

about its current and prospective customers, including their product preferences, buying patterns and volumes, and key contact personnel who make purchasing decisions. He was also privy to Curtze's specific strategies for retaining and expanding the business of specific customers. (Tr. 12-26; 42-45; 79-81,91-92). Curtze also entrusted Phillips with extensive confidential information concerning its internal costs, the optimum sales price for the sale of its goods and services, the actual sales price for goods and services it provides to each of its customers, sources of product supplies, marketing techniques and processing techniques. (Tr., 12-26, 42-45).

During his employment, Phillips regularly participated in sales and marketing meetings during which Curtze representatives shared, discussed and developed confidential information concerning its plans and strategies for competing with direct competitors, including Sysco Food Services of Jamestown ("Sysco"). (Tr. 24). In reliance upon the Agreement, Curtze also entrusted Phillips with confidential reports and information that were not shared with other sales personnel, but were made available only to key management personnel and Phillips. These included confidential information concerning Curtze's customers' buying patterns and preferences and its procurement costs for goods. (Tr., 12-26, 42-45). Curtze also gave Phillips special pricing authority for key customers within his sales territories. This allowed Phillips to utilize pricing known only to upper management and Phillips. (Tr., 22-24).

Confidential customer, sales, pricing, cost and marketing information, such as the information that Curtze shared with Phillips, is extremely valuable to a competitor in the food service industry, particularly a competitor like Sysco, which consistently and aggressively competes with Curtze for customers within the heart of Curtze's sales territory. (Tr., 23-24).

Customer good will and customer relationships are two of the most valuable assets of businesses in the food service industry. Both Curtze and Sysco recognize the value of goodwill and customer relationships. (Tr., 11-12). Phillips acknowledged that his relationship with Curtze's established, new and potential customers. In addition, his access to Curtze's confidential business information made his position with Curtze one of "high trust and confidence". (Tr. 83).

Without Curtze's knowledge, Sysco and Phillips negotiated an employment agreement at Sysco prior to his resignation from Curtze. (Tr. 89). In fact, on November 7, 2007, at least three weeks before he tendered his resignation to Curtze, Phillips signed a written employment agreement with Sysco. Phillips did not disclose this arrangement to Curtze. (Tr. 88). Unaware of this agreement between Phillips and Sysco, Curtze allowed Phillips to continue to interact with Curtze's customers and prospective customers. Curtze continued to provide him

with confidential information. (Tr. 88-89). Phillips acknowledged that he joined Sysco with sixteen and one-half years of information that he gained through training, direct customer contact and from working with management at Curtze. (Tr. 91).

Immediately upon leaving Curtze, Phillips began working for Sysco, knowing that Sysco is a direct competitor of Curtze, and knowing he was subject to the Agreement. (Complaint ¶14; Answer ¶14).

Phillips and Sysco describe Phillips' employment as a "training position". However, it is apparent that the result of his employment will target, directly or indirectly, customers that Phillips previously serviced on behalf of Curtze, and customers about which Curtze provided confidential information to Phillips. This will occur within the heart of Curtze's sales territory. (Tr. 55-56). Phillips will train Sysco sales associates who will be calling directly upon Curtze's customers, including customers who Phillips serviced on behalf of Curtze. (Tr. 88-89).

The parties generally agree that restrictive covenants such as the one *sub judice* are recognized throughout the food service industry as reasonable and necessary for the protection of the employer's customer relationships, good will and confidential information. (Tr., 26; 87-88). Sysco also requires its employees to sign restrictive covenants that restrict employees to a similar extent as the restrictive covenants included in the Agreement. (Tr. 86-87).

Sysco is one of Curtze's primary competitors, particularly with respect to customers located within the areas that Phillips serviced for Curtze during his employment. (Complaint ¶¶15- 17; Answer ¶¶15-17). From its Jamestown, New York location, Sysco services customers throughout Curtze's sales territory, including Northwest Pennsylvania and Western New York. (Complaint ¶¶14-16; Answer ¶¶14-16).

Phillips works in that office and acknowledges that the ultimate goal is to recover business from Curtze's customers. (Tr. 81).

Given the circumstances preceding and surrounding Phillips' acceptance of employment with Sysco, it is fair to infer that Sysco and Phillips intend to use the goodwill, relationships and information previously entrusted to Phillips by Curtze to compete with Curtze. (Tr. 81, 91). As evidence of this fact, the Court notes that shortly after Phillips commenced active employment with Sysco, Phillips attended a sales presentation to a customer of Curtze. This occurred within Phillips' former sales territory. (Tr. 100).

Phillips has reasonable alternative employment opportunities within the immediate area that would permit him to make a living for the duration of the restriction without further violating his contractual covenants and obligations under the Agreement. (Tr., 26-27, 92-93). This would not preclude eventual employment with Sysco.

II. LEGAL DISCUSSION

Restrictive covenants and covenants not to compete are valid if: (1) the covenant is ancillary to employment; (2) it is supported by adequate consideration; (3) it is reasonably limited in time and geographic scope; (4) it must be reasonably designed to safeguard a legitimate interest of the former employer. See *Sidco Paper Co. v. Aaron*, 351 A.2d 250, 252 (Pa. 1976); *Insulation Corp. of America v. Brobston*, 667 A.2d 729, 733 (Pa. Super. 1995). As a general proposition, Pennsylvania Courts do not favor restrictive covenants because they are contracts in restraint of trade. *Morgan's Home Equipment Corp. v. Martucci*, 136 A.2d 838, 844 (Pa. 1957).

The Court will examine those elements in the context of the Agreement.

First, the Court finds that the covenant not to compete, and those related to it, were ancillary to the employment relationship. There is no dispute on this issue.

Second, the restrictive covenants were supported by adequate consideration. Here, they were part of the bargain at the outset of the employment relationship between Curtze and Phillips. See *Morgan's Home Equipment Corp. v. Martucci, supra* at 838, 846 n.14; *Modern Laundry and Dry Cleaning v. Farrer*, 536 A.2d 409, 411 (Pa. Super. 1988).

Third, the Court finds that the covenants are reasonably necessary to safeguard a legitimate interest of the employer. Curtze has three interests worthy of protection. They are: (1) its relationships with its customers and customer goodwill; (2) its confidential information and trade secrets, including the pricing and purchasing of services, as well as the buying patterns of its customers; and (3) the specialized training, skills and information provided to Phillips during the course of his employment relationship.[2]

Fourth, the geographic scope is sufficiently narrow and defined. It is limited to the area that corresponds to Curtze's business territory and the location of its customers.

Fifth, the temporal restriction, twelve months, is appropriate and not unduly restrictive.

Continuing, the issuance of a preliminary injunction is appropriate where: (1) the relief sought by plaintiff is necessary to prevent immediate and irreparable harm that could not be remedied by damages; (2) greater

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[2] An employer has a right to protect its customer goodwill acquired through efforts of its employees. See *Sidco Paper Co., supra* at 252 - 253 (citations omitted); *Jacobson & Co. v. International Environment Co.*, 235 A.2d 612 (Pa. 1967). So, too, customer relationships and goodwill developed through or shared with a sales representative are protectable interests that support the enforceability of an employment covenant not to compete. See *Robert Clifton Associates, Inc. v. O'Connor*, 487 A.2d 947, 952 (Pa. Super. 1985).

injury will result by refusing the injunction than by granting it; (3) the injunction will restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; and (4) the injunction is reasonably suited to abate such activity. See *WPNT Inc. v. Secret Communication Inc.*, 661 A.2d 409, 410 (Pa. Super 1995).

Although Phillips and Sysco characterize Phillips' position as a training position, this is not dispositive. As the person responsible for training Sysco's employees, it is virtually impossible to conclude that Phillips will not be relying upon his former experience and knowledge acquired while he was with Curtze. In instructing sales personnel, his frame of reference will include intimate knowledge of Curtze's clients located within the geographic area that he served while an employee of Curtze. Furthermore, even if one were to assume that he could limit his instructional activities so as not to infringe upon the Agreement, it would be virtually impossible to "police" his activities. Moreover, monetary damages will not remedy the situation. The evidence also shows that greater injury will occur by refusing the injunction than by granting it. Finally, an injunction will restore the status quo the parties held before the defendant's wrongful conduct. Therefore, this Court finds that all elements necessary for the issuance of a preliminary injunction have been established by the plaintiff.

III. CONCLUSION

Based upon the above, this Court will grant plaintiff's request for a preliminary injunction.

ORDER

AND NOW, this 6th day of March 2008, for the reasons set forth in the accompanying opinion, it is hereby **ORDERED** that the plaintiff's Request For A Preliminary Injunction is **GRANTED** and the preliminary injunction shall **ISSUE** effective the date of this order.

As a result, it is further **ORDERED** that the defendant shall, within five (5) days from the date of this order, **CEASE EMPLOYMENT** with Sysco Food Services of Jamestown and comply with all relevant terms and conditions of the Agreement between the plaintiff and the defendant entered May 2, 1991 unless and until the Court may order otherwise.

Plaintiff shall post bond in the amount of one hundred fifty thousand dollars ($150,000.00), cash, property or surety within five (5) days of the date of this order.

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

ROBERT WILLIAMS, Plaintiff

v.

RASHADA JOHNSON, Defendant

CIVIL PROCEDURE / PLEADINGS / COMPLAINT

The Commonwealth of Pennsylvania is a fact pleading state whereby the complaint must provide the defendant notice of the basis of the claim as well as a summary of the facts essential to support that claim.

CIVIL PROCEDURE / PLEADINGS / PRELIMINARY OBJECTIONS

Preliminary objections in the form of motions to strike items in a complaint per Pa.R.C.P. 1028(a)(3) can be for lack of specificity of pleading pursuant to Pa.R.C.P. 1019(a).

CIVIL PROCEDURE / PLEADINGS / GENERAL REQUIREMENTS

Pennsylvania's Rules of Civil Procedure require that all the material facts on which a cause of action or defense are based shall be stated in a concise and summary form. To determine if a paragraph contains the appropriate specificity, the court looks not only to the particular paragraph at issue, but also to that paragraph in the content of the other allegations in the complaint. The trial court has broad discretion in determining the amount of detail that must be pleaded since this is not something capable of precise measurement.

CIVIL PROCEDURE / PLEADINGS / GENERAL REQUIREMENTS

It is not necessary to plead evidence which can be developed through discovery.

CIVIL PROCEDURE / PLEADINGS / COMPLAINT

When determining whether the averments of the complaint are sufficient, a court must ensure that the challenged averments present no risk of a future, unexpected amendment to the complaint based upon new facts after the statute of limitations has run.

TORTS / NEGLIGENCE

The violation of a statute may serve as the basis for finding of negligence *per se*.

DAMAGES / PUNITIVE DAMAGES

A request for punitive damages does not constitute a cause of action in and of itself; rather, a request for punitive damages is merely incidental to a cause of action.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 12899-2007

Appearances: Thomas P. Wall, II, Esquire for the Plaintiff
Christopher J. Sinnott, Esquire for the Defendant

OPINION

Connelly, J., February 1, 2008

This matter is before the Court pursuant to Rashada Johnson's (hereinafter "Defendant") Preliminary Objections to Robert Williams' (hereinafter "Plaintiff") Complaint. Defendant raises two issues for the Court's consideration: Whether Plaintiff has failed to plead sufficient facts to state a negligence claim and whether Plaintiff can plead a separate cause of action for punitive damages.

Statement of Facts

The case stems from an August 5, 2006 motor vehicle accident that occurred at the intersection of East 11th and French Streets in the City of Erie. *Civil Complaint*, ¶ 3. Plaintiff was driving a City of Erie police cruiser in a southbound direction on French Street. *Id.* Plaintiff was responding to an emergency call. *Id.* Defendant was operating a 2007 Dodge Durango in a westbound direction on East 11th Street. *Id.* at ¶ 4. Plaintiff's vehicle and Defendant's vehicle collided in the intersection. *Id.* at ¶ 5. Plaintiff alleges that he suffered severe, serious and permanent injuries, including head pain, neck pain, back pain, left shoulder strain, decreased shoulder range of motion, left hip strain, and shock to the nerves and nervous system. *Id.* at ¶ 6. Plaintiff further alleges that he has suffered and will continue to suffer great pain, inconvenience, mental anguish, and loss of enjoyment of life's pleasures. *Id.* at ¶ 7. Plaintiff alleges that he has been and will be required to expend large sums of money for these injuries and that he has and will continue to suffer loss of wages and earning capacity. *Id.* Plaintiff argues that these injuries were the result of Defendant's negligence, recklessness, and carelessness. *Id.* at ¶ 9. Specifically, Plaintiff alleges that Defendant operated his vehicle at an excessive rate of speed under the circumstances, that he failed to have his vehicle under proper and reasonable care, that he collided with Plaintiff's vehicle, that Defendant failed to pay proper and reasonable attention to other vehicles as he proceeded westbound on East 11th Street, that he operated his vehicle without due regard for the rights, safety and position of other vehicles on the road, that he failed to operate his vehicle in a safe and proper manner, and that he failed to comply with the laws, rules, and regulations of the Pennsylvania Motor Code. *Id.* As to the last assertion, Plaintiff alleges that Defendant violated the Pennsylvania Motor Code by failing to drive at a safe speed, driving in a careless manner, failure to yield to an emergency vehicle, and driving under the influence of alcohol or a controlled substance. *Id.* As a separate claim, Plaintiff seeks to recover punitive damages by alleging that Defendant acted in a willful, wanton, and malicious manner when he operated his motor vehicle under the influence of alcohol and/or a controlled substance. *Id.* at ¶ 11.

Defendant requests that the Court require Plaintiff to amend his

complaint to include more specific pleadings. *Defendant's Preliminary Objections*, ¶¶ 5, 7. Defendant argues that Plaintiff's complaint lacks the following information: "There is no indication as to who had the right-of-way; whether the intersection was controlled by a traffic light and, if so, who had the green light; whether the intersection was governed by a stop sign or other traffic sign and, if so, who it effected; whether the plaintiff was approaching the intersection with his emergency lights and siren sounding." *Id.* at ¶ 6. Defendant argues that Plaintiff must plead these facts in order to establish both the duty and breach elements of his negligence claim. *Id.* at ¶ 7. Additionally, Defendant argues that Plaintiff cannot state a separate cause of action for punitive damages. *Id.* at ¶ 9. Defendant asks the Court to dismiss Plaintiff's punitive damage claim at Count II. *Id.* at ¶ 10.

Findings of Law

The Commonwealth of Pennsylvania is a fact pleading state whereby the complaint must provide the defendant notice of the basis of the claim as well as a summary of the facts essential to support that claim. *Alpha Tau Omega Fraternity v. University of Pennsylvania,* 464 A.2d 1349 (Pa. Super. 1983). Preliminary objections in the form of motions to strike items in a complaint per Pa.R.C.P. 1028(a)(3) can be for lack of specificity of pleading pursuant to Pa.R.C.P. 1019(a). These Rules of Civil Procedure require that all the material facts on which a cause of action or defense are based shall be stated in a concise and summary form. See Pa.R.C.P. 1019(a); *Yacoub v. Lehigh Valley Medical Associates P.C.,* 805 A.2d 579 (Pa. Super. 2002). To determine if a paragraph contains the appropriate specificity, the Court looks not only to the particular paragraph at issue, but also to that paragraph in the content of the other allegations in the complaint. *Yacoub*, supra at 588.

The trial court has broad discretion in determining the amount of detail that must be pleaded since this is not something capable of precise measurement. *Pike County Hotels Corp. v. Kiefer,* 396 A.2d 677 (Pa. Super. 1978). It is not necessary to plead evidence which can be developed through discovery. *Local No. 163, International Union U.B.F.C.S.D. & D.W. v. Watkins,* 207 A.2d 776 (Pa. 1965). Yet, when determining whether the averments of the complaint are sufficient, a court must ensure that the challenged averments present no risk of a future, unexpected amendment to the complaint based upon new facts after the statute of limitations has run. *Connor v. Allegheny General Hospital,* 461 A.2d 600 (Pa. 1983); see also, *Clarkson v. Geisinger Medical Center,* 46 Pa. D. & C.4th 431 (2000).

With this standard in mind, the Court must review the facts pled by Plaintiff in his complaint. Plaintiff clearly limits the scope of the Complaint to the motor vehicle accident and lists seven (7) specific bodily injuries that Plaintiff allegedly has suffered. Plaintiff also specifically

lists the four (4) types of damages for which Plaintiff seeks to recover. Defendant raises the issue that Plaintiff failed to specifically state facts to support the duty and breach elements of a negligence claim. However, Plaintiff has alleged that Defendant operated his vehicle in a reckless and negligent manner by violating the Motor Vehicle Code, amongst other allegations. As the Pennsylvania Supreme Court has stated, it is not necessary to plead evidence that can be developed through discovery. See *Local No. 163, supra.* The specific information that Plaintiff seeks can be obtained through discovery. Furthermore, the violation of a statute may serve as the basis for a finding of negligence *per se. Minnich v. Yost,* 817 A.2d 538, 541 (Pa. Super. 2003). Based on these findings, Plaintiff has pled his case with enough specificity to satisfy Rule 1019. Therefore, Defendant's preliminary objection as to the sufficiency of the complaint is overruled.

Defendant also argues that Plaintiff has improperly added a claim for punitive damages as a separate cause of action. Plaintiff's Count 11 alleges no cause of action, it only seeks to recover punitive damages for the allegations in Count 1 of Plaintiff's Complaint. It is well settled law that a request for punitive damages does not constitute a cause of action in and of itself. Rather, a request for punitive damages is merely incidental to a cause of action. See *Nix v. Temple University of Com. System of Higher Educ.,* 596 A.2d 1132, 1138 (Pa. Super. 1991). In *Nix,* the Superior Court found that the trial Court properly dismissed Plaintiff's Count VII as it pled no cause of action, only sought to recover punitive damages. In the case at bar, Plaintiff may not recover punitive damages as to Count II of his complaint. Therefore, Defendant's preliminary objection as to the dismissal of Count II is sustained.

ORDER

AND NOW, to-wit, this 1st day of February, 2008, for the reasons set forth in the foregoing **OPINION**, it is hereby **ORDERED, ADJUDGED and DECREED** that Defendant's Preliminary Objection as to the sufficiency of Plaintiff's Complaint is overruled. Defendant's Preliminary Objection to dismiss Count II of Plaintiff's Complaint is sustained.

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

DOUGLAS L. THOMPSON, Plaintiff,

v.

T.J. WHIPPLE CONSTRUCTION COMPANY, Defendant

CIVIL PROCEDURE / DAMAGES

Under Rule 238 of the Pennsylvania Rules of Civil Procedure, damages for delay shall be added to the amount of compensatory damages awarded against each defendant.

CIVIL PROCEDURE / DAMAGES

Rule 238 of the Pennsylvania Rules of Civil Procedure 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.

CONTRACT / DAMAGES

A high/low agreement is considered a settlement contract.

CONTRACT / DAMAGES

Settlement agreements are regarded as contracts and must be considered pursuant to general rules of contract interpretation.

CONTRACT / INTERPRETATION

The fundamental rule in construing a contract is to ascertain and give effect to the intention of the parties.

CONTRACT / INTERPRETATION

A court may not ignore otherwise clear language merely because one of the parties did not anticipate related complications prior to performance.

CONTRACT / DAMAGES

A plaintiff will not be permitted to recover additional delay damages beyond the high end of a bargained-for limit in a high/low agreement.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 13538-2005

Appearances: Todd Berkey, Esquire for the Plaintiff
Paul T. Grater, Esquire for the Defendant

OPINION

Connelly, J., January 17, 2008

This matter is before the Court pursuant to Douglas L. Thompson's (hereinafter "Plaintiff") Petition for Delay Damages. Plaintiff seeks a total of $84,847.04 in delay damages following a jury award of $1,071,041.67 for a personal injury claim. T.J. Whipple Construction Company (hereinafter "Defendant") opposes Plaintiff's Petition and sets forth a new matter alleging that a high-low agreement entered between the parties prior to trial limits Plaintiff's maximum recovery to $1,000,000.

Statement of Facts

On October 8, 2004, Plaintiff suffered an electrocution injury resulting in personal injury to his left upper extremity. *Plaintiff's Petition for Delay Damages,* ¶ 1. Plaintiff served Defendant with this lawsuit on October 5, 2005. *Id.* at ¶ 2. Defendant is insured by Selective Insurance Company. *Id.* at ¶ 10. Discovery proceeded throughout 2005, 2006, and 2007. *Id.* at ¶ 5. This Court presided over a trial that commenced on August 20, 2007 and concluded with a jury verdict on August 24, 2007. *Id.* at ¶ 8. The jury awarded Plaintiff $1,071,041.67 in damages. *Id.* Prior to trial, Plaintiff's attorney and Defendant's insurance carrier entered into a high/low agreement, which guaranteed Plaintiff a minimum recovery and limited Defendant's maximum liability. *Answer to Plaintiff's Petition for Delay Damages*, ¶ 17. The agreement set forth $250,000 as the low amount and $1,000,000 as the high amount. *Id.* at ¶ 18. Plaintiff seeks to recover delay damages pursuant to Pennsylvania Rules of Civil Procedure 238. *Plaintiff's Petition* at ¶ 10. Plaintiff has calculated that Defendant owes $84,847.04. *Id.* at ¶ 16. Defendant argues that because delay damages become part of the total verdict rendered, and because the verdict was already over the $1,000,000 maximum, Plaintiff cannot recover the delay damages as a separate award. *Answer* at ¶ 23. Plaintiff responds that the high-low agreement was never meant to limit Plaintiff's right to recover delay damages, but to simply place parameters on the jury award. *Plaintiff's Reply to Defendant's Answer to Plaintiff's Petition for Delay Damages*, ¶ 1. The high-low agreement was memorialized with two letters exchanged between Selective Insurance Company and Plaintiff's counsel. The first letter, written by a Selective Insurance Company litigation specialist and dated August 17, 2007, reads, in pertinent part,

> This letter will confirm our telephone conversation from today.
>
> As we discussed, we are willing to enter into a high/low agreement, prior to trial, with the high being $1,000,000 and the low $250,000. You indicated you needed to discuss these parameters with Mr. Thompson and did not think you could get back to me with an answer. Therefore, you were going to discuss this further with Paul Grater on Monday morning.

Answer, Exhibit A.

The second letter, written on August 20, 2007 by Plaintiff's counsel, reads:

> This will confirm that my client has agreed to accept Selective Insurance Company's offer of a high/low agreement. The high will be $1,000,000.00 and the low will be $250,000.00. If the jury should award more than $1,000,000.00 then Mr. Thompson would receive $1,000,000.00. And if the jury should award less

> than $250,000.00, or if it should be a defense verdict, then Mr. Thompson would receive $250,000.00.

Answer, Exhibit B.

Findings of Law

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).

The case at bar is clearly a personal injury case brought by the injured party. Under these circumstances, delay damages may be appropriate. However, this Court must also consider the propriety of delay damages when a high/low agreement exists.[1]

A high/low agreement is considered a settlement contract. *Miller v. Ginsberg*, 874 A.2d 93, 99 (Pa.Super. 2005). Settlement agreements "are regarded as contracts and must be considered pursuant to general rules of contract interpretation." *Id.* citing *Frija v, Frija*, 780 A.2d 664, 668 (Pa.Super. 2001). The fundamental rule in construing a contract "is to ascertain and give effect to the intention of the parties." *Miller* at 99. A court "will adopt an interpretation which, under all circumstances, ascribes the most reasonable, probable, and natural conduct of the parties, bearing in mind the objects manifestly to be accomplished." *Id.*

[1] The Court would note that it was not aware of the high/low agreement until after the trial when Defendant responded to Plaintiff's Petition for Delay Damages. Therefore, the two letters presented are the only evidence of the parties' intent.

Additionally, if "the language appearing in the written agreement is clear and unambiguous, the parties' intent must be discerned solely from the plain meaning of the words used." *Id.* A court "may not ignore otherwise clear language merely because one of the parties did not anticipate related complications prior to performance." *Id.*

Defendant argues that because Rule 238 states that delay damages become a part of the jury award, they are therefore included in the $1,000,000 maximum recovery provided in this case. Plaintiff responds that delay damages were never part of the high/low agreement and that a broad reading of Rule 238 would allow Plaintiff to recover the delay damages. Specifically, Plaintiff asserts:

> The only agreement that was discussed and entered into was that if the jury's award was in excess of $1,000,000.00, the plaintiff would receive $1,000,000.00. There was never any discussion or agreement that this would be plaintiff's "maximum recovery" or that plaintiff was waiving his right to have delay damages added to the jury's award.

Plaintiff's Reply to Defendant's Answer to Plaintiff's Petition for Delay Damages, ¶ 5.

While the Court has found no analogous prior case, it is influenced by another Court of Common Pleas decision where a high/low agreement guaranteed the plaintiff a minimum recovery of $100,000. *Cerino v. Kaduk*, 55 Pa. D. & C.4th 115 (Nov. 13, 2000). After a defense verdict, the defendant sought to recover attorney fees from the plaintiff, which would place the plaintiff's recovery below the $100,000 minimum set forth in the high/low agreement. The Court refused to allow the defendant to recover these costs, stating:

> While the high/low agreement itself did not expressly address the issue of costs, the language of the agreement is clear: the parties were entering into a settlement agreement whereby plaintiffs would receive no less than $100,000 and no more than $450,000, regardless of the jury verdict. Defendants are now attempting to reduce this amount by asserting that plaintiffs are responsible for costs. Allowing defendants to recover costs would defeat the plain meaning of the agreement by reducing plaintiffs' recovery to less than $100,000.

Id. at 120-121.

In the case at bar, Plaintiff is trying to expand the high/low agreement in its favor, just as the *Cerino* defendant attempted to do. It is clear from the letters exchanged that Plaintiff and Defendant attempted to obtain some security for their clients prior to starting the jury trial. Plaintiff cannot enjoy the benefit of the bargained for $250,000 minimum recovery

without maintaining the $1,000,000 high end of the high/low agreement. As Rule 238 provides, "damages for delay shall be added to the amount of compensatory damages awarded against each defendant." Because Plaintiff's recovery has already reached the $1,000,000 bargained-for limit, Plaintiff may not recover additional delay damages.

ORDER

AND NOW, TO-WIT, this 17th day of January, for the reasons set forth in the foregoing Opinion, it is hereby **ORDERED** that Plaintiff's Petition for Delay Damages is **DENIED.** In accordance with the pre-trial agreement entered between the parties, the jury verdict is hereby molded to $1,000,000.

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

DAVID C. OLSEN, Plaintiff,

v.

FRANK BELLUOMINI, Individually and d/b/a, UPDATES UNLIMITED, Defendant

CIVIL PROCEDURE / GENERAL REQUIREMENTS

Failure to attach a copy of a written contract to a Complaint is a basis for granting preliminary objections, but a reasonable interpretation of Pa.R.C.P. 1033 permits the Court to allow the plaintiff 20 days to file an amended complaint with an attached copy of the written contract.

PLEADINGS / GENERAL REQUIREMENTS

Failing to specify averments of time, place and special damages in a Complaint is a basis for granting preliminary objections. However, the Court may grant the plaintiff leave to file an amended complaint in order to specifically provide the missing information necessary to state breach of a verbal contract.

NEGLIGENCE / ACTIONS AND PLEADINGS

The "gist of the action doctrine" forecloses tort claims which meet the following elements: (1) they arise solely from the contractual relationship between the parties; (2) the alleged duties breached were grounded in the contract itself; (3) any liability stems from the contract; and (4) the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim depends on the success of the contract claim.

CONTRACTS / WARRANTY

A breach of warranty claim is not a tortious claim, but is instead contractual in nature.

TRADE REGULATION / STATUTES AND REGULATIONS

A claim under the Uniform Trade Practices and Consumer Protection Law ("UTPCPL") is not tortious in nature, but is rather statutory in nature. Therefore, claims under the UTPCPL are not barred under the "gist of the action doctrine."

TRADE REGULATION / STATUTES AND REGULATIONS

A party must provide a writing when it claims that repairs, improvements or replacements on tangible, real or personal property were made of a nature or quality inferior to or below the standard of that agreed in writing. 73 P.S. § 201-2(4)(xvi).

TRADE REGULATION / STATUTES AND REGULATIONS

In order to file a claim under the "catch-all" provision of the UTPCPL, a plaintiff must plead and prove the elements of common law fraud. 73 P.S. § 201-2(4)(xxi).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 14402-2007

Appearances: James J. Bruno, Esq., for the Plaintiff
Maureen Geary Krowicki, Esq., for the Defendant

OPINION

Connelly, J., March 31, 2008

Procedural History

On October 9, 2007, David C. Olsen (hereinafter, "Plaintiff") filed a Complaint before this Court containing the following counts: Count I, breach of contract; Count II, unjust enrichment; Count III, negligence; Count IV, breach of warranty; and Count V, an Unfair Trade Practices Act and Consumer Protection Law claim (hereinafter, "UTPCPL"). *Complaint, ¶¶ 1-27.* In response, on November 29, 2007, Frank Belluomini, individually and doing business as Updates Unlimited (hereinafter, "Defendant"), filed Preliminary Objections to Plaintiff's Complaint pursuant to *Pennsylvania Rule of Civil Procedure (hereinafter, "PA Civil Rule") 1028(a)(2),*[1] stating Counts I, III, IV, and V be stricken and/or dismissed. *Defendant's Preliminary Objections to Complaint, ¶¶, 1-31*. Then, on December 28, 2007, Defendant also filed a Brief in Support of Preliminary Objections to Complaint. *Defendant's Brief in Support of Preliminary Objections to Complaint, pp. 1-10.* On January 28, 2008, Plaintiff, in turn, filed a Brief in Opposition to Defendant's Preliminary Objections to Complaint. *Plaintiff's Brief in Opposition to Defendant's Preliminary Objections to Complaint, pp. 1-8.*

Statement of Facts

According to the Complaint, on or about October 17, 2002, Plaintiff and Defendant entered into a written contract wherein Defendant was to receive $13,500.00 in consideration for providing specific services and materials needed for the construction and completion of an addition to Plaintiff's primary residence found at 7300 Bear Creek Road, Fairview, Pennsylvania, 16415. *Complaint, ¶¶ 1-11*. Plaintiff alleges that in addition to the written contract, both Plaintiff and Defendant entered into a separate verbal contract. *Id.* at ¶ 6. As a result of this verbal contract, Plaintiff alleges he paid Defendant an additional $1,500.00 to provide the labor necessary to install facia and soffit on Plaintiff's primary residence and garage. *Id.* The case now before this Court stems from Plaintiff's allegation that Defendant failed to perform in "accordance with the primary contract, i.e., the written contract, and the verbal contract." *Id. at ¶ 1-11; Defendant's Preliminary Objections to Complaint, ¶ 6.*

[1] PA Civil Rule 1028 notes that preliminary objections may be filed by any party to any pleading. *Pa.R.Civ.P. 1028.* All preliminary objections shall be raised at one time and shall state specifically the grounds relied upon and may be inconsistent. *Id.* In ruling on preliminary objections, a court must accept as true all well-pled facts which are relevant and material, as well as all inferences reasonably deducible therefore. *Texas Keystone, Inc. v. Pa. Dep't of Conservation and Natural Res.*, 851 A.2d 228 (Pa. Cmwlth. 2004).

Analysis of Law

Presently at issue before this court is whether Counts I, III, IV, and V of the Complaint should be dismissed and/or stricken pursuant to the arguments contained in the Preliminary Objections to Complaint, those arguments being: the aforementioned Counts either fail to conform to law; fail to conform to rule of court; or require dismissal for legal insufficiency. In determining whether Counts I, III, IV, and V be stricken and/or dismissed, the Court has weighed all applicable law as it relates to the facts of this case as well as the merits of the arguments presented by both Plaintiff and Defendant.

Count I: Breach of Contract

Through Preliminary Objections, Defendant argues Count I be stricken and/or dismissed for failure to comply with *PA Civil Rule 1019(i). Defendant's Preliminary Objections to Complaint, ¶¶ 10-12; Defendant's Brief in Support of Preliminary Objections to Complaint, pp. 3-4.* Defendant states Plaintiff failed to attach "copies of the 'written proposal' that Plaintiff alleges was the 'primary contract' between the parties." *Id. PA Civil 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.Civ.P. 1019(i).

While the PA Civil Rules are clear as to the necessity of attaching copies of writings to a complaint when claims are based on such writings, these Rules are also to be liberally construed in a reasonable manner. *Pa.R.Civ.P. 126; see, Hoare v. Bell Tel. Co.,* 500 A.2d 1112, 1114 (Pa. 1985). The PA Civil Rules also provide a remedy for such oversights and omissions:

> A party . . . . by leave of court, may at any time . . . . amend his pleading. The amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense. An amendment may be made to conform the pleading to the evidence offered or admitted.

Pa.R.Civ.P. 1033.

Complaints are considered pleadings under the PA Civil Rules. *Pa.R.Civ.P. 1017(a).* The Complaint filed in this case failed to contain a copy of the written contract drafted between Plaintiff and Defendant on or about October 17, 2002. *Complaint, ¶¶ 1-27.* Pursuant to a reasonable interpretation of *PA Civil Rule 1033*, the Court shall allow Plaintiff twenty (20) days to file an amended complaint with an attached copy of

the written contract provided Plaintiff wishes to state a breach of written contract between he and Defendant.

Defendant argues Count I also be stricken and/or dismissed for failure to comply with *PA Civil Rule 1019(f). Defendant's Preliminary Objections to Complaint, ¶¶ 13-16; Defendant's Brief in Support of Preliminary Objections to Complaint, pp. 3-4.* Defendant states "the Complaint fails to include a date corresponding to the factual averments set forth in Paragraph 6 of the Complaint wherein Plaintiff alleges, 'in a separate verbal contract between the parties, the [P]laintiff paid the [D]efendant an additional $1,500.00.'" *Id. PA Civil Rule 1019(f)* states, "[a]verments of time, place and items of special damage shall be specifically stated." *Pa.R.Civ.P. 1019(f).*

While the PA Civil Rules are clear as to the necessity of specifically stating averments of time, place, and items of special damage, these Rules, again, are to be liberally construed in a reasonable manner. *Pa.R.Civ.P. 126; see, Hoare,* 500 A.2d at 1114. As stated above, the PA Civil Rules provide that a party, by leave of court, may at any time amend his pleading. *Pa.R.Civ.P. 1033*. The Complaint in this case failed to specifically state the time and place of the alleged verbal contract entered into between Plaintiff and Defendant where Defendant was to receive an additional $1,500.00 to provide the labor necessary to install facia and soffit on Plaintiff's primary residence and garage. *Complaint, ¶¶ 1-27*. Pursuant to a reasonable interpretation of *PA Civil Rule 1033*, the Court shall allow Plaintiff twenty (20) days to file an amended complaint with such specific statement provided Plaintiff wishes to state a breach of a verbal contract between he and Defendant.

Count III: Negligence

Through Preliminary Objections, Defendant requests a demurrer[2] as to Count III stating Plaintiff's claims are contractual in nature. *Defendant's Preliminary Objections to Complaint, ¶¶ 17-21; Defendant's Brief in Support of Preliminary Objections to Complaint, pp.5-7*. As Plaintiff's claims are contractual in nature, Defendant avers the tortious nature of Count III is barred under the "gist of the action doctrine." *Id.* Although not explicitly reviewed by the Pennsylvania Supreme Court, dicta of the Pennsylvania Supreme Court suggests the "gist of the action doctrine" to be a practical doctrine preventing plaintiffs from obtaining damages through both contractual and tortious claims when the action is, itself, contractual in nature. *Reardon v. Allegheny College*, 926 A.2d 477,

[2] The question presented by a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. *Eckell v. Wilson,* 597 A.2d 696, 698 (Pa. Super. 1991). A demurrer should be sustained only in cases where the plaintiff has clearly failed to state a claim on which relief may be granted. *Id.* A demurrer should not be sustained if there is any doubt as to whether the complaint adequately states a claim for relief under any theory. *Id.*

485-86 (Pa. Super. 2007), *citing Glazer v. Chandler,* 200 A.2d 416, 418 (Pa. 1964). The "gist of the action doctrine" acts to foreclose tort claims which meet the following elements: (1) they arise solely from the contractual relationship between the parties; (2) the alleged duties breached were grounded in the contract itself; (3) any liability stems from the contract; and (4) the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim. *Reardon,* 926 A.2d at 486, *citing Hart v. Arnold,* 884 A.2d 316, 340 (Pa. Super. 2005).

In order to find the "gist of the action doctrine" applicable, it must first be shown Plaintiff's tort claim of negligence arises solely from the contractual relationship entered by the parties on or about October 17, 2002, the alleged duties breached were grounded in those contracts, and any liability stems from the contracts. *Id.* Under Count III of the Complaint, Plaintiff states:

> The defendant had a *duty owed* to the plaintiff, the specifics of which were established by and between the parties *in the contracts previously specified.* The defendant *breached said duty owed* to the plaintiff as set forth herein previously. Said breach of duty was the *actual and proximate cause of the harm suffered* by the plaintiff. *The plaintiff suffered the damages* as previously specified herein and renews his demand that the defendant be required to pay the plaintiff said enumerated damages.

Complaint, ¶¶ 15-19 (emphasis added).

In the Complaint under Count III, Plaintiff clearly lists each of the prima facie elements of a negligence claim, i.e., duty of care, breach of that duty, actual cause, proximate cause, and injury. *See, Krentz v. Conrail,* 910 A.2d 20, 27 (Pa. 2005)(stating the prima facie elements of negligence), *citing Phillips v. Cricket Lighters,* 841 A.2d 1000, 1008 (Pa. 2003). What's more, Plaintiff explicitly states Defendant's duty (and subsequent breach, cause-in-fact, and injury) stems from, i.e., is grounded in, the contracts specified in the Complaint. *Complaint, ¶ 16.* Plaintiff therefore, according to the above-cited argument, also implicitly states liability resulting from the breach of duty stems from the contract. As a result, this Court finds a reading of the Complaint clearly reveals Plaintiff's tort claim of negligence arises solely from the contractual relationship between the parties, the alleged duties breached were grounded in the contract itself, and any liability resulting from said breach of duty stems from the contract.

To find the "gist of the action doctrine" applicable, it must also be shown the tort claim essentially duplicates the breach of contract claim or the success of the tort claim is dependent on the success of the breach of contract claim. *Reardon,* 926 A.2d at 486, *citing Hart,* 884 A.2d at 340. As stated, Plaintiff argues Defendant breached the contract as Defendant

breached a contractually-owed duty, said breach was the actual and proximate cause of the harm suffered, and Plaintiff was injured as a result of that breach. *Complaint, ¶¶ 10-11, 15-19.* In this manner, Plaintiff's claims of breach of contract and negligence are redundant in nature, and call for the "gist of the action doctrine" to foreclose on the tort claim of negligence. As the above-four "gist of the action doctrine" elements have been established, this Court finds Defendant's argument that Count III be dismissed for legal insufficiency under the "gist of the action doctrine" to be persuasive. Therefore, Plaintiff's Count III shall be dismissed.

Count IV: Breach of Warranty

Through Preliminary Objections, Defendant requests a demurrer as to Count IV stating Plaintiff's claims are contractual in nature. *Defendant's Preliminary Objections to Complaint, ¶¶ 17-21; Defendant's Brief in Support of Preliminary Objections to Complaint, pp.5-7.* Defendant argues breach of warranty to be tortious in nature. *Id.* As such, Defendant avers Count IV is barred under the "gist of the action doctrine." *Id.* The "gist of the action doctrine" applies to claims of tort that are nothing more than re-characterized contract claims. *Reardon,* 926 A.2d at 485-86; *Pennsylvania Mfr. Ass'n Ins. Co. v. L.B. Smith, Inc., Envtl. & Recycling Serv., Inc., CMI Corp.,* 831 A.2d 1178, 1182 (Pa. Super. 2003); *Caudill Seed and Warehouse Co., Inc. v. Prophet 21, Inc.,* 123 F.Supp.2d 826, 833 (E.D. Pa. 2000); *Sunquest Info. Sys., Inc., v. Dean Witter Reynolds, Inc.,* 40 F.Supp.2d 644, 651 (W.D. Pa. 1999); *Bash, D.D.S., v. The Bell Tel. Co. of Pennsylvania,* 601 A.2d 825, 829 (Pa. Super. 1991).

This Court finds it to be well-settled law that breach of warranty is not a tortious claim, but instead is one that is contractual in nature. *Salvador v. Atl. Steel Boiler Co.,* 307 A.2d 398, 401 (Pa. Super. 1973). The Court finds that as the "gist of action doctrine" acts to foreclose only tort claims arising from contractual claims, it does not apply to a contractual breach of warranty claim arising out of the contractual relationship of the parties. Therefore, this Court finds Defendant's argument that Count IV be dismissed for legal insufficiency under the "gist of the action doctrine" to be unpersuasive.

Count V: Unfair Trade Practices Act and Consumer Protection Law

Through Preliminary Objections, Defendant requests a demurrer as to Count V stating Plaintiff's claims are contractual in nature. *Defendant's Preliminary Objections to Complaint, ¶¶ 17-21.* Defendant argues a violation of the UTPCPL to be tortious in nature. *Id.* As such, Defendant avers Count V is barred under the "gist of the action doctrine." *Id. at ¶¶ 19-21.* The "gist of the action doctrine" applies to claims of tort that are nothing more than re-characterized contract claims. *Reardon,* 926 A.2d at 485-86; *Pennsylvania Mfr. Ass'n Ins. Co.,* 831 A.2d at 1182; *Caudill Seed and Warehouse Co., Inc.,* 123 F.Supp.2d at 833; *Sunquest Info. Sys., Inc.,* 40 F.Supp.2d at 651; *Bash, D.D.S.,* 601 A.2d at 829.

As the UTPCPL is found in title seventy-three (73) of the Pennsylvania Statutes, this Court finds a claim arising out of the UTPCPL to be that of a statutory nature, not tortious. *See, 73 P.S. §§ 201-1 through 202-8.* The Court finds that as the "gist of action doctrine" acts to foreclose only tort claims arising from contractual claims, it does not apply to statutory claims arising out of the contractual relationship of the parties. Therefore, this Court finds Defendant's argument that Count V be dismissed for legal insufficiency under the "gist of the action doctrine" to be unpersuasive.

Through Preliminary Objections, Defendant also requests a demurrer as to Count V stating Plaintiff failed to make written representations that Defendant failed to meet the agreed-upon standards of work pursuant to the writing requirement of the UTPCPL as found in *73 P.S. § 201-2(4)(xvi).*[3] *Defendant's Preliminary Objections to Complaint, ¶¶ 22-26.* The UTPCPL lists twenty-one examples of unfair or deceptive acts or practices. *73 P.S. § 201-2(4)(i)-(xxi).* Out of these twenty-one examples, one explicitly states that a writing is required. *73 P.S. § 201-2(4)(xvi)*(stating a writing is required when a party claims that repairs, improvements or replacements on tangible, real, or personal property were made of a nature or quality inferior to or below the standard of that agreed to in writing). Therefore, a writing is not required to state a claim under the UTPCPL unless Plaintiff argues the repairs, improvements or replacements on his tangible, real, or personal property were made of a nature or quality inferior to or below the standard of that agreed to in writing. Here, Plaintiff does state repairs, improvements, or replacements on his tangible, real, or personal property were made of a nature or quality inferior to or below the standard of that agreed to in writing. *Complaint, ¶¶ 24-27.*

Provided Plaintiff wishes to state such a claim which incorporates *73 P.S. § 201- 2(4)(xvi),* the Court shall allow Plaintiff twenty (20) days to file an amended complaint, pursuant to a reasonable interpretation of *PA Civil Rule 1033,* with an attached copy of the written contract revealing such standards.

Through Preliminary Objections, Defendant also requests a demurrer as to Count V stating Plaintiff failed to plead and prove the elements of common law fraud as required when filing a claim under *73 P.S. § 201-2(4)(xxi),* i.e., engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding. *Defendant's Preliminary Objections to Complaint, ¶¶ 27-31, citing Colaizzi v. Beck,* 895 A.2d 36, 39 (Pa. Super 2006)(In order to establish a violation of *73 P.S. § 201-2(4)(xxi)'*s catchall provision, a plaintiff must prove all of the

[3] In its Preliminary Objections to Complaint and Brief in Support of Preliminary Objections to Complaint, the Defendant erroneously cited to *73 P.S. § 201-2(2)(xvi). Defendant's Preliminary Objections to Complaint, ¶ 25; Defendant's Brief in Support of Preliminary Objections to Complaint, p. 7.* 73 P.S. § 201- 2(2)(xvi) does not exist. However, a writing requirement is found in *73 P.S. § 201-2(4)(xvi).*

elements of common-law fraud). In its Brief in Opposition to Defendant's Preliminary Objections to Complaint, Plaintiff argues a plaintiff need not establish the elements of common law fraud to prove a *73 P.S. § 201-2(4)(xxi)* claim. *Plaintiff's Brief in Opposition to Defendant's Preliminary Objections to Complaint, pp. 4-6, citing Mertz v. Donzi Marine, Inc.,* 2007 U.S. Dist. Lexis 15708 (W.D. Pa. 2007)(plaintiffs need not prove elements of common law fraud to prove a 73 P.S. § 201-2(4)(xxi) claim); *Com. ex rel Corbett v. Manson,* 903 A.2d 69, 73-74 (Pa. Cmwlth. 2006).

As both the parties have cited conflicting opinions of the Superior and Commonwealth Courts of Pennsylvania regarding whether a plaintiff need establish the elements of common law fraud to prove a *73 P.S. § 201-2(4)xxi)* claim, an analysis as to proper jurisdiction is advantageous. The Superior Court of Pennsylvania has exclusive appellate jurisdiction of all appeals from final orders of Pennsylvania Courts of Common Pleas, regardless of the nature of the controversy or the amount involved, except such classes of appeals as are by any provision of this chapter within the exclusive jurisdiction of the Supreme Court or the Commonwealth Court. *42 P.S. § 742.* Except as provided in *42 P.S. 762(b),*[4] the Commonwealth Court shall have exclusive jurisdiction of appeals from final orders of the Courts of Common Pleas in the following cases: Commonwealth civil cases;[5] governmental and Commonwealth regulatory criminal cases;[6] secondary review of certain appeals from Commonwealth agencies;[7] local government civil and criminal matters;[8] certain private corporation

[4] The Commonwealth Court shall not have jurisdiction of such classes of appeals from courts of common pleas as are by section 722 (relating to direct appeals from courts of common pleas) within the exclusive jurisdiction of the Supreme Court. *42 P.S. 762(b).*

[5] Commonwealth civil cases include all civil actions or proceedings [which are]: original jurisdiction of which is vested in another tribunal by virtue of any of the exceptions to *42 P.S. § 761(a)(1)* (relating to original jurisdiction), except actions or proceedings in the nature of applications for a writ of habeas corpus or post-conviction relief not ancillary to proceedings within the appellate jurisdiction of the court; and by the Commonwealth government, including any officer thereof acting in his official capacity. *42 P.S. § 762(a)(1)(i), (ii).*

[6] Governmental and Commonwealth regulatory criminal cases include all criminal actions or proceedings for the violation of any: rule, regulation or order of any Commonwealth agency; and regulatory statute administered by any Commonwealth agency subject to Subchapter A of Chapter 5 of Title 2 (relating to practice and procedure of Commonwealth agencies). The term "regulatory statute" as used in this subparagraph does not include any provision of Title 18 (relating to crimes and offenses). *42 P.S. § 762(a)(2)(i), (ii).*

[7] Secondary review of certain appeals from Commonwealth agencies include all appeals from Commonwealth agencies which may be taken initially to the courts of common pleas under section 933 (relating to appeals from government agencies). *42 P.S. § 762(a)(3).*

[8] Local government civil and criminal matters include all actions or proceedings arising under any municipality, institution district, public school, planning or zoning code or under which a municipality or other political subdivision or municipality authority may be formed or incorporated or where is drawn in question the application, interpretation or enforcement of any: statute regulating the affairs of political subdivisions; municipality and other local authorities or other public corporations or of the officers, employees or agents thereof, acting in their official capacity; home rule charter or local ordinance or resolution; or statute relating to elections, campaign financing

matters;[9] eminent domain;[10] and immunity waiver matters.[11] *42 P.S. 762(a)(1)-(7).* Pursuant to *42 P.S. §§ 742, 762(a)(1)-(7),* the case presently before this Court would not fall under the jurisdiction of the Commonwealth Court provided any appeal would be made. For this reason, this Court finds the ruling of the Superior Court in *Colaizzi* to be controlling in this matter.

In this case, Plaintiff wishes to state a claim pursuant to the catchall provision of *73 P.S. § 201-2(4)(xxi)*. *Complaint, ¶ 26(d).* Provided, Plaintiff wishes to state such a claim which incorporates *73 P.S. § 201-2(4)(xxi),* the Court shall allow Plaintiff twenty (20) days to file an amended complaint, pursuant to a reasonable interpretation of *PA Civil Rule 1033,* in which he avers he meets each of the common law elements of fraud.

Pursuant to the above analysis, Defendant's Preliminary Objections as to Counts I, III, IV, and V of Plaintiff's Complaint for failure to conform to law, failure to conform to rule of court, and failure to contain legal sufficiency are granted in part and denied in part.

ORDER

AND NOW, TO-WIT, this 31st day of March, 2008, it is hereby **ORDERED, ADJUDGED, and DECREED** that, for the reasons set forth in the foregoing Opinion, the following order is made. Defendant's Preliminary Objection as to Counts I and V of Plaintiff's Complaint are **GRANTED,** and Plaintiff shall have twenty (20) days in which to file an amended complaint. Defendant's Preliminary Objection as to Count III of Plaintiff's Complaint is **GRANTED,** and Count III is hereby **DISMISSED.** Defendant's Preliminary Objection as to Count IV of Plaintiff's Complaint is **DENIED.**

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

8 continued

or other election procedures. *42 P.S. § 762(a)(4)(i)(A), (B), (C).* Local government and criminal matters also include all appeals from government agencies other than Commonwealth agencies decided under section 933 or otherwise. *42 P.S. § 762(a)(4)(ii).*

[9] Certain private corporation matters include all actions or proceedings relating to corporations not-for-profit arising under Title 15 (relating to corporations and unincorporated associations) or where is drawn in question the application, interpretation or enforcement of any provision of the Constitution, treaties or laws of the United States, or the Constitution of Pennsylvania or any statute, regulating in any such case the corporate affairs of any corporation not-for-profit subject to Title 15 or the affairs of the members, security holders, directors, officers, employees or agents thereof, as such; and all actions or proceedings otherwise involving the corporate affairs of any corporation not-for-profit subject to Title 15 or the affairs of the members, security holders, directors, officers, or employees or agents thereof, as such. *42 P.S. § 762(a)(5)(i), (ii).*

[10] Eminent domain includes all eminent domain proceedings or where is drawn in question the power or right of the acquiring agency to appropriate the condemned property or to use it for the purpose condemned or otherwise. *42 P.S. § 762(a)(5).*

[11] Immunity waiver matters include matters conducted pursuant to Subchapter C of Chapter 85 (relating to actions against local parties). *42 P.S. § 762(a)(6).*

BRENDA A. PUNDT, Plaintiff,

v.

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

JUDGMENTS / SUMMARY

Summary judgment is proper in cases that are clear and free from doubt. Summary judgment should not be granted if there exists no genuine issue of material facts. The record must be reviewed in the light most favorable to the non-moving party and all doubts must be resolved against the moving party.

STATUTES / CONSTRUCTION

Under the rules of statutory construction, words and phrases shall be construed according to rules of grammar and according to their common and approved usage, unless they have acquired a peculiar meaning. 1 Pa. C.S.A. § 1903 (a).

STATUTES / CONSTRUCTION

When interpreting a statute or ordinance, the Court must give effect to legislative intent.

POLITICAL SUBDIVISIONS / MUNICIPAL CORPORATIONS

A municipal employee who works full-time on a temporary basis is not considered a full-time employee entitled to pension benefits under the City of Erie's pension program. Only permanent full-time employees and elected officials may participate.

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

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

OPINION AND ORDER

DiSantis, Ernest J., Jr., Judge

This case is before the Court on remand by the Honorable Commonwealth Court of Pennsylvania.

I. BACKGROUND

This Court will not recount the factual and procedural history of this case which is found in both its Rule 1925(a) Opinion filed September 18, 2006 and the Commonwealth Court's Opinion March 13, 2007.

After the original appellate process had run its course, this Court conducted a status conference. As a result the parties were afforded additional time in which to conduct discovery and file briefs. They have done so.

II. DISCUSSION

This case was remanded by the Commonwealth Court for resolution of a narrow issue, i.e., whether Ms. Pundt was a full-time employee within the meaning of the applicable ordinance. This is purely a matter of statutory construction. To the extent the parties (after remand) have raised additional arguments not related to this issue, those arguments are waived and beyond the scope of the remand. Therefore, this Court shall not consider them.

Summary judgment is proper in cases that are clear and free from doubt. *Washington v. Baxter*, 719 A.2d 733 (Pa. 1998). Summary judgment should not be granted if there exists no genuine issue of material facts. *Jones v. Cheltenham Township*, 543 A.2d 1258 (Pa. Cmwlth. 1988). In addition, the record must be reviewed in the light most favorable to the non-moving party and all doubts must be resolved against the moving party. *Murphy v. Duquesne University of the Holy Ghost*, 777 A.2d 418 (Pa. 2001).

Under the terms of the plaintiff's employment agreement, she was to work from January 9, 2002 until March 29, 2002. See, Employment Agreement, p. 3. However, based upon publicity generated by an investigation by the Erie Times-News, her employment status was terminated effective at 5:00 p.m. on January 18, 2002.

Paragraph IV of the relevant ordinance provides:

> All officers and employees of the City of Erie, other than firemen and policemen, are participants in the Plan from the first day of their employment. Officers and employees of the City of Erie may not participate in the Plan if they were first hired, newly elected or first appointed to the service of the City on or after June 26, 1992 on less than a full-time basis. All elected officers of the City other than members of City Council are considered to be full-time employees. Members of City Council are part-time employees.

Section 145.01 of the ordinance defines the terms "employee" and "officer" as follows:

> (b) "Employee" means a person in the service 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....This definition, however, 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 person 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.

This Court's analysis is guided by the rules of statutory construction. 1 Pa.C.S.A. § 1901 *et seq*. Section 1903 provides that:

> (a) Words and phrases shall be construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a peculiar and appropriate meaning or are defined in this part, shall be construed according to such peculiar and appropriate meaning or definition.
>
> (b) General words shall be construed to take their meanings and be restricted by preceding particular words.

Furthermore, the Court must give effect to the legislative intent of the statute (or ordinance in this case). See, 1 Pa.C.S.A. § 1921. The term "full-time" has been defined as: "the amount of time considered the normal or standard amount for working during a given period". Webster's Collegiate Dictionary, 471 (10th Ed 1996).

The record demonstrates that Ms. Pundt was hired to work a regular workday and workweek for a period of three months. See undated Affidavit of Brenda Pundt, ¶¶ 8-11; January 8, 2002 Employment Agreement, p. 2 ¶ 6; 7/12/07 Affidavit of Richard Filippi, ¶¶ 7-9. She was terminated before the end of her employment due to "political fallout" related to her hiring. She was, in fact, a temporary full-time employee working a full workday and workweek, for a limited duration of time.

A review of the ordinance leads this Court to conclude that it permits only permanent full-time employees to participate in the pension program. See § 145.01(b). The ordinance distinguishes City Council Members from other employees categorizing them as part-time. It also provides that elected officials are full-time. See Ordinance ¶ IV. The ordinance does not anticipate participation of employees hired on a temporary basis.

Therefore, in the absence of any language in the ordinance permitting the participation of temporary full-time employees, this Court concludes that it was not intended to include them. To hold otherwise would be to redraft the ordinance and usurp the power of municipal government.

III. CONCLUSION

This Court concludes that Ms. Pundt was hired as a temporary full-time employee. As such, she was not permitted to participate in the pension plan because her category of employment is not included within the class of those eligible to do so. Only permanent full-time employees and elected officials may participate. Therefore, this Court will grant the defendant's Cross-Motion For Summary Judgment and deny the plaintiff's Motion For Summary Judgment.

ORDER

AND NOW, this 12th day of February 2008, it is hereby **ORDERED** that the defendant's Cross-Motion For Summary Judgment is **GRANTED** and the plaintiff's Motion For Summary Judgment is **DENIED**.

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

SHIRLEY MAYS AND BRUCE MAYS, Plaintiffs,
v.
THE CAFARO COMPANY, MILLCREEK PLAZA, MILLCREEK MALL CORPORATION, CAFARO MANAGEMENT COMPANY, MILLCREEK PAVILION and PA-EASTWAY, INC., Defendants

CIVIL PROCEDURE / POST-TRIAL MOTIONS

A request for remittitur is appropriate when the jury awards damages beyond a level of fair and reasonable compensation.

CIVIL PROCEDURE / POST-TRIAL MOTIONS

The court should look at the evidence in the light most favorable to the verdict winner in a post trial review of damage awards.

DAMAGES / CALCULATION

The proper calculation to determine whether a jury's award for damages is supported by the evidence is the severity of the injury, whether the injury is demonstrated by objective physical evidence, whether the injury is permanent, plaintiff's ability to continue employment, disparity between the amount of out-of-pocket expenses and the amount of the verdict, and damages plaintiff requests in his/her complaint.

DAMAGES / LIMITATION

Reduction of a jury award by the court is proper only in circumstances where the award is plainly excessive and exorbitant.

DAMAGES / LIMITATION

Granting a request for remittitur is appropriate when an award of damages falls outside of the uncertain limits of fair and reasonable compensation or the verdict so shocks the sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake or corruption.

DAMAGES / LIMITATION

The Court granted defendants' request for remittitur and reduced plaintiff-wife's personal injury award from $1,500,000.00 to $300,000.00 and plaintiff-husband's loss of consortium award from $1,000,000.00 to $100,000.00. The Court further ruled that in the event plaintiffs do not accept the remittitur, defendants' motion for a new trial on the issue of damages shall be granted.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION-LAW NO. 12813-2005

Appearances: Jeff Connelly, Esquire for Plaintiff
Patricia Ambrose, Esquire for Plaintiff
John Dodick, Esquire for Defendant

OPINION

Bozza, John A., J.

The plaintiffs, Shirley Mays and Bruce Mays (hereinafter "Mrs. Mays" and "Mr. Mays") sought damages as a result of an injury to Mrs. Mays' shoulder suffered as a result of a fall at the Millcreek Mall on November 24, 2003. The case proceeded to trial by jury resulting in a verdict in favor of Mr. and Mrs. Mays and an award of damages for past medical expenses in the amount of $1,640, pain and suffering for Mrs. Mays in the amount of $1.5 million and loss of consortium for Mr. Mays in the amount of $1 million. The defendants (collectively, the "Cafaro Company") filed a Motion for Post-Trial Relief requesting a new trial, Motion for Judgment N.O.V. or Motion for New Trial with regard to damages as well as a request for a remittitur. Following argument, consideration of briefs and a thorough review of the record, this Court concludes that the Cafaro Company's request for a new trial on the basis that this Court failed to properly instruct the jury is without merit and accordingly will be denied. This Court further finds that the Cafaro Company's request for Judgment N.O.V. or for a new trial on the basis that the evidence was insufficient to establish that the Cafaro Company's negligence was a substantial factor in bringing about Mr. and Mrs. Mays' harm is without merit and shall be denied. The evidence presented at trial was sufficient to support the jury's verdict finding that Mrs. Mays' injury to her shoulder was caused by the negligence of the Cafaro Company in failing to properly care for its parking lot and specifically for failing to correct a dangerous condition, a hole, in the pavement in front of a handicap parking space. From the evidence presented, the jury could have concluded that the Cafaro Company was aware that a handicap signpost had been removed leaving in its place a significant hole immediately in front of the space where a person was likely to walk to reach a store. Moreover, the jury could have properly concluded that repair of the hole was, in effect, ignored for a substantial period of time.

With regard to the Cafaro Company's request for a new trial on the issue of damages and request for remittitur, this Court, for the reasons set forth below concludes that the Cafaro Company's position is correct and an appropriate order will be entered.

Viewing the evidence in a light most favorable to the verdict winner, the facts that the jury could have found in support of Mr. and Mrs. Mays' claim for damages may be summarized as follows. *Haines v. Raven Arms*, 536 Pa. 452, 640 A.2d 367 (1994) (Facts in the record and inferences to be viewed in a light most favorable to the verdict winner). In November 2002, Mrs. Mays fell and injured her right shoulder. At the time she was 66 years old, having been born on December 22, 1935. It turned out she suffered a fracture of her humerus near the shoulder and broke off the portion of the shoulder referred to as the "greater tuberosity"

with accompanying damage to the rotator cuff muscles. The orthopedic surgeon who treated her and testified at the time of trial, Dr. Kastrup, recommended surgery to her at that time to prevent "impingement". She declined and the fracture subsequently healed. As of July 2003 when she saw the doctor, she continued to suffer pain and Dr. Kastrup was concerned that Mrs. Mays may develop what is commonly referred to as a "frozen shoulder". Thereafter, she did not see Dr. Kastrup until after she fell at the Millcreek Mall in November 2003. On January 8, 2004, she returned to see Dr. Kastrup complaining of considerable pain in the humerus, which she noted had been getting worse. Dr. Kastrup believed that her fall had caused her to re-injure her shoulder or as he observed a number of times during his testimony, to aggravate her pre-existing injury. However, the second fall did not result in a new fracture or some other anatomic change but did result in shoulder impingement syndrome or irritation of the rotator cuff muscle.

On January 8, 2004, Dr. Kastrup gave Mrs. Mays a steroid injection in the shoulder that brought relief for only a couple of days. He did not see her again until July 2004 when she reported that the pain was worse, that she was having trouble sleeping and that she was taking high doses of narcotics. Dr. Kastrup recommended arthroscopic surgery involving a small incision and she agreed and the procedure was carried out in October 2004. Thereafter, Mrs. Mays had some physical therapy and did some physical therapy in the form of exercises on her own at home. In December 2004, she reported to Dr. Kastrup that there was no real improvement and he suggested that she undergo an open surgical procedure which necessitated a more substantial incision. The surgery was performed in February 2005, and in May 2005 when the doctor examined her, he found that the degree of motion in her shoulder had significantly improved. However, he noted that the pain she was experiencing would in all likelihood be permanent. Overall, it was Dr. Kastrup's impression that the fall caused a strain to the rotator cuff muscle, that additional swelling had occurred and the impingement syndrome developed.

Because of certain medical conditions unrelated to her fall, Mrs. Mays was not able to testify at the time of trial. However, Mrs. Mays provided testimony through the introduction of her deposition that had been taken in December 2005. On the basis of her testimony as well as the testimony of Mr. Mays, the jury could have reasonably concluded that the first injury to her shoulder in 2002 was a painful one, that the pain did not entirely subside but considerably improved prior to the second fall in November 2003. The jury could also have reasonably concluded that as a result of Mrs. Mays fall at the Millcreek Mall, and the aggravation of the pre-existing injury to her shoulder, she decided to have the surgery. The record supports the conclusion that following the fall in the Millcreek Mall parking lot, Mrs. Mays incurred substantial pain and thereafter was

limited with regard to her ability to engage in certain activities requiring the use of her arm. For example, she could not make the beds, run the sweeper, mop the floors or do the dishes and Mr. Mays had to do those things for her. He also helped her in dressing herself and doing her hair. She also was not able to pick up her dogs and it was difficult for her to take a shower. As a couple, they had to curtail many activities they enjoyed including playing golf, going to local social clubs and to the Rod and Gun Club. Although she had suffered from depression for a considerable period of time, it was aggravated by the circumstances surrounding her second injury.

As of the time of the trial, however, Mr. Mays noted that although she still had pain, it was not as bad as it was before the second surgery, and although there is some improvement, it remains difficult for her to reach up and reach around her back and she cannot comb her hair with her right arm or wash her hair. As a consequence of her injury, Mrs. Mays has had to rely on assistance from her husband and her daughter and has not been able to pick up her grandson, although he can sit beside her on her lap. She is able to dress herself now but has some difficulty putting on her shoes and her husband does help her with her hair.

From the record it is also evident that Mrs. Mays had a number of other medical conditions prior to her fall in the parking lot. In 1986 she had a heart attack, and when she was around 57, she subsequently went on disability and stopped working. She suffered from depression for a long period of time and was diagnosed as bi-polar. She has suffered from knee problems and had both of her knees replaced and she had significant back problems as well. She also had "tremors' for which she was prescribed medication and had suffered two strokes. At the time of the fall in the parking lot, she was taking four prescription pain medications and two medications for depression. According to her husband, some of her other medical problems contributed to her inability to go out and do things around the house as well.

With regard to Mr. Mays, it was evident that he had to provide his wife with substantial assistance during the period of time she was injured as a result of the fall at the Millcreek Mall. Moreover, they were unable to do things together as they had in the past including playing golf, going out to dinner and related social activities. She was dependent on him for driving her places and he was certainly affected by her depression.

A court may grant a new trial on the issues of damages or a remittitur only in circumstances where the court determines that a verdict so shocks the sense of justice as to suggest that the jury was influenced by partiality, prejudice or mistake. *Goldberg v. Isdaner,* 2001 Pa. Super. 180, 780 A.2d 654 (2001). In determining whether a jury's award for damages is supported by the evidence, the court can consider at least the following factors:

1. the severity of the injury;
2. whether the injury is demonstrated by objective physical evidence;
3. whether the injury is permanent;
4. plaintiff's ability to continue employment;
5. disparity between the amount of out-of-pocket expenses and the amount of the verdict; and
6. damages plaintiff requests in his/her complaint.

Smalls v. Pittsburgh-Corning Corp., 2004 Pa. Super. 31, 843 A.2d 410 (2004). Ordinarily, the decision to grant a new trial or remittitur because of excess or inadequacy is a matter within the sound discretion of the trial court that had the benefit of listening to the testimony and observing the witnesses. *Haines v. Raven Arms*, 536 Pa. 452, 640 A.2d 367 (1994); *Botek v. Mine Safety Appliance Corp.*, 531 Pa. 160, 611 A.2d 1174 (1992). Reduction of a jury award by the court is proper only in circumstances where it is plainly excessive and exorbitant. *Haines*, 536 Pa. at 455. Moreover, it is not a matter of the trial court substituting its judgment for that of the jury, but rather, an objective determination of whether the evidence warranted the jury's conclusion. "The question is whether the award of damages falls within the uncertain limits of fair and reasonable compensation or whether the verdict so shocks the sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake or corruption." *Carminati v. Philadelphia Transportation Co.*, 405 Pa. 500, 509, 176 A.2d 440, 445 (1962).

Turning to an analysis of the six factors identified in *Smalls v. Pittsburgh-Corning Corp.*, it is apparent that Mrs. Mays sustained an injury to the rotator cuff muscle in her shoulder and it necessitated two surgeries. Although it has caused her significant distress, it was an aggravation of a prior injury that had also caused her significant pain and was not completely resolved within six (6) months of her fall at the Millcreek Mall. Indeed, at the time of the fall she was prescribed four pain medications. While certainly disruptive of her life, it did not result in what could reasonably be characterized as a "catastrophic loss". She was not generally immobilized or paralyzed in any manner. Her injury was restricted to limitations in the movement of her shoulder in that she cannot raise her arm over her head. In fact, the unequivocal medical evidence from Mrs. Mays' surgeon was that following her second surgery and as of her last visit to him, she had a much-improved range of motion, only lacking a few degrees of motion in either direction.

While there is no question that the nature of her injury *per se* was objectively determinable, the pain she was experiencing was obviously not and required some degree of subjective interpretation. There was sufficient evidence, on the basis of Dr. Kastrup's testimony, for the jury to conclude that the pain she was experiencing at the time of her last office visit was likely to be permanent. However, the record clearly

indicates that her overall functioning improved after the second surgery and that some of the limitations she initially developed after the fall had lessened.

Moreover, Mrs. Mays unfortunately suffered from a myriad of medical conditions prior to the fall including problems with her back, knee replacements, heart condition, stroke, tremors, Meniere's disease and bi-polar illness. While the law has long embraced the notion that a tortfeasor takes their victim as they finds him, here it is evident that Mrs. Mays' prior health conditions contributed to a substantial degree to the overall state of her health at the time of the fall and subsequent thereto. Since she was not working at the time of her fall or at the time of trial as she had been disabled from working for many years, and there was no request for lost wages, her out-of-pocket medical expenses were limited to $1,640, the amount awarded by the jury. There was no request for future medical expenses and no evidence that any would be required. Nor was there any request for damages associated with her need for future care. Mr. and Mrs. Mays' prayer for damages set forth a general request for damages in an amount in excess of the compulsory arbitration limits.

The question for the jury was in fact a very narrow one: How much to award Mrs. Mays for pain and suffering, the loss of enjoyment of life and related non-economic loss associated with a rotator cuff injury?[1] Considering the factors described above, this Court is constrained to conclude that the award of $1.5 million for non-economic loss was excessive and exorbitant and shocks the Court's sense of justice. This case did not involve a catastrophic, life-threatening or profoundly life-altering injury. Mrs. Mays, who at the time of trial was 72 years old, is restricted from raising her arm over her head and this limits her activity, causes her discomfort and inconvenience and has contributed to her depression. While these are certainly unfortunate circumstances for her, they do not, given the overall facts in the case, justify an award of $1.5 million, which can only be seen as the result of prejudice, partiality or mistake. It is a verdict that was plainly beyond what the evidence warrants.

A similar but even more obvious conclusion must be reached with regard to the $1 million awarded to Mr. Mays for loss of consortium, which represents by far the highest loss of consortium award in Erie County since jury verdicts have been tracked starting in 1998. While the evidence certainly demonstrates that he had to provide his wife with substantial assistance, and as a result of her injury he did not enjoy the benefit of her company for engaging in many of the activities they once enjoyed together, he was not required to provide anything akin to twenty-four hour a day care or the kind of care that a catastrophic injury would require. There was no evidence that his fundamental marital relationship with his spouse has been altered. He now has to help her with dressing and

[1] The medical costs were essentially not contested.

caring for her hair and he does many more household chores including cooking but their relationship has remained in tact. Her present condition which apparently involves the onset of dementia and that has precluded her from testifying is not the result of the injury to her shoulder.[2] Certainly to his credit, he has carried on to meet his responsibilities as a dutiful and caring spouse. A loss of consortium claim is intended to compensate an individual only for the loss of services, society and conjugal affection. *Smalls*, 843 A.2d at 417. There was absolutely no evidence that the shoulder injury harmed their marriage and there was no testimony concerning impairment to the couple's conjugal affection. See, *Id*. (Court finds that an award for loss of consortium in the amount of $500,000 was excessive where spouse was obligated to take over household chores.) Notwithstanding that Mr. Mays suffered no injury and endured no pain or discomfort, the jury awarded him a full two-thirds as much as his wife. Such an award is far beyond what the evidence can support and also shocks this Court's sense of justice.

As a result, this Court shall enter an order granting the request for stating a remittitur and if rejected, granting the Cafaro Company's Motion for a New Trial on the issue of damages. See, *Goldberg v. Isdaner,* 780 A.2d. 654 (Pa. Super. 2001). Mr. and Mrs. Mays' Motion to Mold the Verdict for Inclusion of Rule 238 Damages shall be granted but the calculation of the amount shall be deferred until such time as the parties determine whether their remittitur will be accepted and thereafter upon request of Mr. and Mrs. Mays shall be calculated accordingly.

ORDER

AND NOW, this 30th day of June, 2008, upon consideration of the Motion for Post-Trial Relief requesting a new trial, Motion for Judgment N.O.V. or Motion for New Trial, and argument thereon, and for the reasons set forth in this Court's Opinion, it is hereby **ORDERED, ADJUDGED and DECREED** that the defendants' request for remittitur is **GRANTED** and the Court finds that the plaintiff, Shirley Mays, should be awarded the sum of $300,000 for the non-economic damages she sustained and her husband, Bruce Mays, should be awarded the sum of $100,000 on his claim for loss of consortium.

In the event the plaintiffs do not accept the Court's remittitur in these amounts, the defendants' Motion for New Trial on the issue of damages shall be **GRANTED.** The plaintiffs have **Fourteen (14) days** within which to advise the Court and the defendants of their position in that regard.

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

[2] See Plaintiff's Motion in Limine with Exhibit "A", describing Mrs. Mays' current medical condition and inability to testify.

SUMMIT TOWNSHIP INDUSTRIAL AND ECONOMIC DEVELOPMENT AUTHORITY; SUMMIT TOWNSHIP; SUMMIT TOWNSHIP SEWER AUTHORITY; SUMMIT TOWNSHIP WATER AUTHORITY; and PERRY HI-WAY HOSE COMPANY, Plaintiffs,

v.

THE COUNTY OF ERIE, PENNSYLVANIA; ERIE COUNTY GAMING REVENUE AUTHORITY; MILLCREEK TOWNSHIP; MILLCREEK TOWNSHIP SEWER AUTHORITY; MILLCREEK TOWNSHIP WATER AUTHORITY; MCKEAN TOWNSHIP; MCKEAN TOWNSHIP SEWER AUTHORITY; MCKEAN TOWNSHIP WATER AUTHORITY; WATERFORD TOWNSHIP; WATERFORD TOWNSHIP SEWER AUTHORITY; WATERFORD TOWNSHIP WATER AUTHORITY; and GREENE TOWNSHIP, Defendants

STATUTES / CONSTRUCTION

When interpreting a statute, the Court must ascertain and effectuate the intent of the legislature and give full effect to each provision of the statute if at all possible.

Words and phrases shall be construed according to rules of grammar and according to their common and approved usage. 1 Pa. C.S.A. §1893(a). General words shall be construed to take their meaning and be restricted by preceding particular words.

Courts should assume that every word, phrase and clause in a legislative enactment is intended and has some meaning and that none was inserted accidentally.

When a statute is ambiguous, meaning that it is susceptible to more than one interpretation, courts may resort to extrinsic aids to determine intent, such as legislative history.

The Court finds that it is persuasive that the phrase "associated with the licensed facility modifies" human services, infrastructure improvements, facilities, emergency services, health and public safety expenses and thus the legislature intended to have grants awarded to the municipalities affected by the establishment of a licensed gaming facility. *Midboe v. State Farm,* 495 Pa. 348, 433 A.2d 1342 (1981); *Chesler v. Government Employees Insurance Company,* 503 Pa. 292, 469 A.2d 560 (1983).

A prepositional phrase is very seldom a working part of a sentence. A prepositional phrase can be eliminated from the sentence and the basic structure of the sentence is not changed.

If the prepositional phrase of the statutory language is eliminated, the Court finds that the statute is to apply to costs associated with the casino operations.

CIVIL PROCEDURE / MOTION FOR JUDGMENT ON THE PLEADINGS

Under Pa. R.C.P. 1034, a Motion for Judgment on the Pleadings may be filed after the pleadings are closed but within such time as not to unreasonably delay the trial.

A Motion for Judgment on the Pleadings may be granted only when there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law.

Granting a judgment on the pleadings may be appropriate in cases that turn upon the construction of a written agreement.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION No. 15679-2007

Appearances:

Daniel J. Pastore, Esquire, Attorney for STIEDA and Summit Township

Roger H. Taft, Esquire, Attorney for Erie County, ECGRA

Robert C. Ward, Esquire, Attorney for Summit Township Water Authority and Perry Hi-Way Hose Company

David J. Rhodes, Esquire, Attorney for Summit Township Sewer Authority

Evan E. Adair, Esquire, Attorney for Millcreek Township, Millcreek Township Sewer Authority and Water Authority

Ritchie T. Marsh, Esquire, Attorney for McKean Township, McKean Township Sewer Authority and Water Authority, Waterford Township, Waterford Township Water Authority and Sewer Authority, and Greene Township

ORDER AND OPINION

Dunlavey, Michael E., J.

"We're involved with interpretation of one small section of the Gaming Statute, and hopefully we can get that resolved within a short period of time...[But] 1don't think we need to have an evidentiary hearing with regard to any of these things. It's purely a question of statutory interpretation."

-Wallace Knox, Esq., Erie County Solicitor, *N.T., Injunction Hearing*, December 28, 2007, p. 9, lines 1-4, 20-24.

"We would agree that we don't believe there's any — absent some surprise in the County's answer — that there are any disputed issues of fact, and this would be a purely legal argument. And we would certainly appreciate the expedited disposition."

-Daniel Pastore, Esq., Counsel for STIEDA, *N.T., Injunction Hearing*, December 28, 2007, p. 12, lines 1-6.

Facts

According to counsel for the principal parties, the facts of this matter are generally not in dispute. On July 5, 2004, the Pennsylvania Legislature enacted the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S.A. §1101 *et seq.* (hereinafter the Gaming Act). Pursuant to the Act, a "Category 1" license was issued to the Presque Isle Downs & Casino, which is entirely located in Summit Township, Erie County, Pennsylvania, and includes a casino and a thoroughbred racetrack. Presque lsle Downs & Casino (hereinafter Casino) began operations on February 28, 2007, generating "gaming revenue", the disposition of which is now at issue before the Court.

The "gaming revenue" generated by a licensed gaming facility is subject to certain requirements of the Gaming Act. A "licensed facility" is defined as "the physical land-based location at which a licensed gaming entity is authorized to place and operate slot machines." 4 Pa. C.S.A. §1103. The facility is required to pay a daily tax of 34% from the revenue generated plus a "local share assessment" into the State Gaming Fund. 4 Pa. C.S.A. §1403. The local share assessment is determined by the class of the county and the municipality in which the licensed facility is located, the category of the facility (1, 2, or 3), and whether the facility has a horse racetrack.

Here, the Casino is a Category 1 licensed facility with a thoroughbred racetrack. Erie County is a third class county and Summit is designated as a second class township. Therefore, Paragraph (c)(2)(ii) of the Gaming Act applies to these entities. Under Paragraph (c)(2)(ii)(D), the local share assessment shall be distributed as "1% of the gross terminal revenue to the county hosting the licensed facility from each such licensed facility" and "[a]n additional 1% of the gross terminal revenue to the county hosting the licensed facility... for the purpose of municipal grants within the county in which the licensee is located."

The first 1% is paid by the State Gaming Fund to Erie County without restriction. These funds have been referred to in this case as "unrestricted gaming revenue." The second 1% is also paid to Erie County with the express condition that the revenue is to be used for "municipal grants" within the county where the licensed facility is located. These funds have been referred as "restricted gaming revenue." The focus of this litigation is on the distribution of the "restricted gaming revenue", an amount of approximately $5.5 million dollars.

Section1403 (c)(2)(v) of the Gaming Act explains how the "restricted gaming revenue" is to be used. That section reads in its entirety:

> (v) Unless otherwise specified, for the purposes of this paragraph ***money designated for municipal grants within a county***, other than a county of the first class, in which a licensed

> facility is located shall be used ***to fund grants to the municipality in which the licensed facility is located, to the county in which the licensed facility is located and to the municipalities which are contiguous to the municipality in which the licensed facility is located*** and which are located within the county in which the licensed facility is located. Grants shall be administered by the county through its economic development or redevelopment authority in which the licensed facility is located. ***Grants shall be used to fund the costs of human services, infrastructure improvements, facilities, emergency services, health and public safety expenses associated with licensed facility operations***. If at the end of a fiscal year uncommitted funds exist, the county shall pay to the economic development or redevelopment authority of the county in which the licensed facility is located the uncommitted funds.(emphasis added)

"Municipality" is defined by the Gaming Act as "a city, borough, incorporated town or township." 4 Pa. C.S.A. §1103. The municipalities that are contiguous to the Casino and Summit Township are Millcreek, McKean, Waterford, and Greene townships (hereinafter the contiguous townships). Summit Township designated the Summit Township Industrial and Economic Development Authority (hereinafter STIEDA) to act on its behalf in seeking municipal grants from the restricted gaming revenue.

On April 13, 2007, STIEDA wrote to Erie County that it intended to submit grant applications for the restricted funds and requested advice how to do so. The County never responded to this correspondence. Six months later, on September 12, 2007, STIEDA Chairperson, Brian McGowan, wrote to Erie County Executive Mark DiVecchio and County Council Chairman Fiore Leone, again advising them of STIEDA's plans with a list of proposed projects and urging the County to take action before the end of the fiscal year. Again, the County never responded to STIEDA's requests.

On December 18, 2007, Erie County Council passed Ordinance Nos. 165, 166, and 167. They were officially enacted with the signature of the County Executive on December 26, 2007. Ordinance No. 165 established the Erie County Gaming Revenue Authority (ECGRA) "to administer municipal grants through its economic development authority". Ordinance No. 166 adopted the Erie County Gaming Revenue Committee Report (hereinafter Report) and stated that "the recommended funding for capital projects such as the Erie County Runway Project may be found in the "Major Projects" category under the "Restricted Funds Policy" of the Report. Ordinance No. 167 amended the Administrative Code of Erie County to reflect the newly enacted Ordinances 165 and 166.

The Report acknowledges that Erie County, Summit Township, and the

contiguous townships are eligible to receive municipal grants from the restricted funds. The Report also states, "It is clear the Commonwealth of Pennsylvania didn't give any priority to any of the three groups eligible for the municipal grants." Relying on 4 Pa.C.S.A. §1403(c)(2)(ix), the Report notes that Erie County can enter into "intergovernmental cooperative agreements" with any of the other thirty-three (33) Erie County municipalities.

The Report establishes the end of ECGRA's fiscal year as March 31st and quotes the last sentence of Section1403 (c)(2)(v) of the Gaming Act which allows the county to pay uncommitted funds to the economic development authority. Specifically, the Report outlines the county's version of what the municipal grants shall be used for as follows:

According to the Gaming Act, the grants shall be used to fund the costs of:

- Human Services
- Infrastructure Improvements
- Facilities
- Emergency Services
- Health
- Public safety expenses associated with the licensed facility operations

Report, pp. 1-2.

"Public safety expenses associated with the licensed facility operations" is defined by the Report (and the County in its argument) as "eliminating any safety concerns resulting from the addition of the licensed facility in the county." Report, p. 2.

The "Restricted Funds Policy" section of the Report limits using gaming funds for "no more than fifty percent (50%) of the required funds" for grant awards and states that the gaming funds are "intended to supplement, not replace, local municipal contribution" (pp. 6-9).

Procedural History

Litigation commenced on December 28, 2007 when Plaintiff STIEDA filed a Complaint for Declaratory Judgment and a Motion for Preliminary Injunction against Defendant Erie County (hereinafter the County). STIEDA's immediate concern was the unresolved question of the distribution of gaming revenue generated in 2007 before the end of the County's fiscal year. STIEDA argued that the County adopted an incorrect interpretation of the Gaming Act as part of the three county ordinances passed relating to the distribution of restricted gaming revenue. STIEDA also argued that the County placed an arbitrary 50% limit on grant awards and improperly authorized grants to be awarded to local government units that are not contiguous to the host township of the Casino, Summit Township.

After hearing argument, this Court granted the preliminary injunction, with the consent of the County, and enjoined the County from granting, paying, or transferring any of the restricted gaming revenues to any municipal authority or person, including the [then yet to be established] ECGRA. *See* December 28, 2007 Order. The Court also directed the County to file its response to the Complaint by January 18, 2008.

During the past seven months, the Court has been "inundated" with a barrage of pleadings. *N.T. Argument*, February 5, 2007, p. 3. Events in this case have proceeded thus:

January

On January 18, 2008, the County filed Preliminary Objections with a supporting brief of forty (40) pages. On January 22, 2008, the Court issued an order to reconvene the Declaratory Judgment/Preliminary Injunction hearing on February 5, 2008. Leave to file the supporting brief was later granted by the Court on February 1, 2008.

February

STIEDA filed Objections and Answers to the County's Preliminary Objections on February 1, 2008. STIEDA simultaneously filed a Motion to Quash Notice to Attend for Brian McGowan, Summit Township Supervisor. The Court granted the Motion in an Order dated February 4, 2008, and encouraged the parties "to succinctly address the issue of interpretation of the [Gaming] Act...and not digress into other issues."

Petitions to Intervene were filed by the Summit Township Water Authority, the Summit Township Sewer Authority, and the Perry Hi-Way Hose Company on February 4, 2008.

Oral argument was scheduled by the Court for February 5, 2008. In the interest of judicial economy, the Court also chose to hear the Petitions to Intervene on the same day. The Court initially denied the Petitions to Intervene from the bench, but reconsidered that decision on March 6, 2008. The Court also denied most of the County's Preliminary Objections directly from the bench.
N.T. Argument, February 5, 2007, pp. 9, 22, 30.

On February 15, 2008, the Court directed the County to file its Answer by February 20 for the purpose of closing the pleadings. Upon timely filing of the Answer, STIEDA filed a Motion for Summary Judgment and a Reply to New Matter on February 21, 2008.

March

The Court issued an Order dated March 6, 2008, granting Summit Township Water Authority, Summit Township Sewer Authority, and Perry Hi-Way Hose Company's Petitions to Intervene. The Court also gave STIEDA twenty days to join the four contiguous townships and their respective authorities, if applicable.

On March 3, 2008, the County requested a discovery schedule and time to respond to STIEDA's Motion for Summary Judgment. On March 4, 2008, STIEDA moved to withdraw its Motion for Summary Judgment and filed a Motion for Judgment on the Pleadings instead. The County filed a Motion for Leave to File Amended Answer and New Matter on March 17, 2008. STIEDA also filed a Motion for Leave to File Amended Complaint, Join Parties, and Amend Caption on March 26, 2008.

April

After consideration of both parties' motions, the Court issued an Order on April 4, 2008, granting both parties' requests to amend their pleadings, allowing STIEDA to withdraw its Motion for Summary Judgment, giving the County 30 days to respond to STIEDA's Motion for Judgment on the Pleadings, and setting June 1, 2008 as the deadline to complete all discovery.

Fifteen new parties were added to the litigation in April. Summit Township, Summit Township Sewer Authority, Summit Township Water Authority, and the Perry Hi-Way Hose Company were joined as Plaintiffs, for a total of five (5). ECGRA, Millcreek Township, Millcreek Township Sewer Authority, Millcreek Township Water Authority, McKean Township, McKean Township Sewer Authority, McKean Township Water Authority, Waterford Township, Waterford Township Sewer Authority, Waterford Township Water Authority, and Greene Township were joined as Defendants, for a total of twelve (12).

Defendants, Erie County and ECGRA, filed an Answer and New Matter on April 22, 2008 and corrected typographical errors in its pleadings on April 25, 2008. On April 28, 2008, they also filed a Motion to Amend this Court's April 4, 2008 Order, arguing STIEDA's Motion for Judgment on the Pleadings was moot because the original complaint had been amended and several new parties had since been joined. Erie County and ECGRA were not joined by the other ten Defendants in their Answer, New Matter, and Motion.

May

On May 5, 2008, Defendants McKean Township, Waterford Township, and their respective authorities, and Greene Township filed an Answer and New Matter. The County and ECGRA filed a Response in Opposition to STIEDA's Motion for Judgment on the Pleadings on May 5, 2008, again arguing STIEDA's Motion for Judgment on the Pleadings was moot because the original complaint had been amended.

STIEDA, joined by the four new Plaintiffs, filed a Reply to New Matter by Defendant Millcreek Township and its respective authorities on May 6, 2008, and to Defendants McKean Township, Waterford Township, their sewer and water authorities, and Greene Township on May 27, 2008.

June

On June 16, 2008, the County and ECGRA filed a Reply to New Matter by McKean Township, Waterford Township, their sewer and water authorities, and Greene Township. Defendants Millcreek Township and its sewer and water authorities also responded to the New Matter on June 17, 2008.

STIEDA, joined by the four other Plaintiffs, filed a Renewed Motion for Judgment on the Pleadings on June 17, 2008 with a supporting brief of sixty (60) pages. The Court granted leave to file the supporting brief on June 18, 2008.

July

On July 16, 2008 McKean Township, Waterford Township, Greene Township and their respective sewer and water authorities filed a response and brief to the Plaintiff's Motion for Judgment on the pleadings. The gravamen of their response was to question the applicability of the funding to solely funds to be used for Public safety. They adopted the remainder of the Plaintiffs' arguments.

On July 24, 2008 the County and ECGRA filed their response to Plaintiffs' Motion accompanied by a 46 page Brief.

On July 28th, this Court heard argument from the parties on the case.

Now, nearly eight months later, based on the assurances made by counsel in December 2007, the Court finally turns to that one "small" question of statutory interpretation.

Conclusions of Law

I. **Statutory Interpretation**

Particularly in dispute is the statutory interpretation of one sentence of Section 1403 (c)(2)(v), which reads:

> Grants shall be used to fund the costs of human services, infrastructure improvements, facilities, emergency services, health and public safety expenses associated with licensed facility operations.

Plaintiffs argue that the grants are intended to fund the costs of human services, infrastructure improvements, facilities, emergency services, health and public safety expenses related to the Casino (i.e. the licensed facility).[1] Plaintiffs allege that Erie County is, through Ordinances Nos. 165-167 and the Report, attempting to limit the funds that Summit, the host township of the Casino, and the four contiguous townships are eligible to receive from the State Gaming Fund.

[1] Plaintiffs' brief explains the entire §1403(c)(2)(v) accordingly at page 5: "The first sentence explains who can receive funding. The second sentence explains how the monies are to be administered. The third sentence explains the purposes for which the funds may be used. The fourth sentence (and final) sentence explains what happens to the restricted funds which are "uncommitted" at the end of "a fiscal year."

Defendants argue, as Ordinances Nos. 165-167 and the Report reflect, that the grants are intended to fund the costs of public safety expenses associated with the Casino and the costs of human services, infrastructure improvements, facilities, emergency services, health and public safety expenses throughout Erie County. Defendants maintain that the Gaming Act gives the County broad discretion to use the gaming revenue and that there is no priority for the host township or the contiguous townships to receive the funds first. The County also argues that it has the right to enter into "intergovernmental cooperative agreements" pursuant to §1403(c)(2)(ix) and distribute the gaming revenue as it sees fit.

a) Legislative Intent and History

When interpreting a statute, the court must ascertain and effectuate the intent of the [legislature] and give full effect to each provision of the statute if at all possible. *East Lampeter Township. v. Pennsylvania State Horse Racing Commission,* 704 A.2d 703 (Pa.Cmwlth., l997), at 708, citing 1 Pa.C.S. §1921(a) and *MacElree v. Chester County,* 667 A.2d 1188 (Pa.Cmwlth.1995). Words and phrases shall be construed according to rules of grammar and according to their common and approved usage. 1 Pa.C.S.A. §1903(a). General words shall be construed to take their meanings and be restricted by preceding particular words. 1 Pa.C.S.A. §1903(b). Courts should assume that every word, phrase, and clause in a legislative enactment is intended and has some meaning and that none was inserted accidentally.[2] When a statute is ambiguous, meaning it is susceptible to more than one interpretation, courts may resort to extrinsic aids to determine legislative intent, such as legislative history.[3]

Section 1102(3) states the legislative intent of the Gaming Act relevant to this matter. "The authorization of limited gaming is intended to provide a significant source of new revenue to the Commonwealth to support property tax relief, wage tax reduction, economic development opportunities and other similar initiatives." The creation of ECGRA and a program to award municipal grants fulfills this goal.

Unfortunately, there is very little legislative history for the entire Gaming Act. Both parties concede that there is no legislative history of record for the disputed section of the Gaming Act and the Court's own research failed to uncover any pertinent history as well. Thus, the court must turn to the rules of grammar and statutory construction to interpret the disputed section.

b) Grammatical Interpretation

The County argues that the "comma rule" and the "last antecedent

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[2] Sutherland statutes and Statutory Construction, Norman J. Singer, "Part VI. Application of the Rules of Statutory Construction in Selected Areas of Substantive Law", Chapter 73, Legislation for the Public Good, Section 12, Gaming statutes, footnotes omitted.

[3] *Id.*

rule" should be applied to the interpretation of the disputed sentence. The "comma rule" provides where there is a comma before a modifying phrase, the phrase modifies all items in a series and not just the immediately preceding item. If there is no comma, the modifying phrase modifies the preceding item only. According to the comma rule as applied by the County, the modifying phrase "associated with the licensed facility" modifies "public safety expenses" only. The "last antecedent rule" provides that a modifying clause or phrase that follows several expressions applies only to the one expression that precedes it. According to the last antecedent rule as applied by the County, the modifying phrase "associated with the licensed facility" modifies "public safety expenses" only.

STIEDA points out that according to *Commonwealth v. Rosenbloom Finance Corp.*, 457 Pa. 496, 325 A.2d 907 (1974), the "last antecedent rule" may be helpful but is not applicable in all cases. Citing *Midboe v. State Farm*, 495 Pa. 348, 433 A.2d 1342 (1981) and *Chesler v. Government Employees Insurance Co.*, 503 Pa. 292, 469 A.2d 560 (1983), which also mentioned the last antecedent rule, STIEDA maintains that the phrase "associated with the licensed facility" modifies "human services, infrastructure improvements, facilities, emergency services, health and public safety expenses." The issue in *Midboe* was whether the "survivor" under the No-Fault Act had to be dependent on the decedent for support, since the Act's definition of survivor included a "child, brother, sister, or relative dependent on the decedent for support." The *Midboe* Court, in a plurality decision later upheld by *Chesler*, held that the clause "dependent on the decedent for support" modified all of the objects before it. Similarly, STIEDA argues that the clause "associated with the licensed facility" modifies all of the clauses before it.

STIEDA further argues that the clause "Grants shall be used" is mandatory because of the use of the word "shall". *Koken v. Reliance Ins. Co.*, 586 Pa. 269, 893 A.2d 70, at 86 (2006). Substituting "shall" with "must" (a synonym), the sentence reads, "Grants *must* be used to fund the costs... associated with licensed facility operations." In this light, the statutory intent appears to be very clear. Defendants' did not formally address the hierarchal funding distribution scheme in the second sentence of subsection(v) in which the legislature placed first, the township in which the gaming facility is located, then the county followed by the contiguous townships and did not mention the remaining townships in the county.

c) Other Interpretations

The County also points to 1 Pa. C.S.A. §1921 (c)(8) wherein the court can defer to administrative interpretations of a statute. The only administrative interpretation the Court has seen thus far are those that are currently in dispute. Given the fact that the Gaming Act is a relatively

new statute and lacks ample legislative history and case law, the Court declines to defer to any administrative interpretations at this time.

As to the County's argument that it may enter into "intergovernmental cooperative agreements" pursuant to §1403(c)(2)(ix) and distribute the gaming revenue as it sees fit, STIEDA argues that the agreements are related to unrestricted funds only, which is not before this Court. However, the Court does not dispute that the County may enter into such agreements, but finds the issue to be mostly irrelevant to the interpretation of §1403(c)(2)(v). After the issue is settled and the municipal grants are properly awarded as the statute requires, the Court presumes that the County will enter into those agreements it deems necessary.

The Court concludes that STIEDA's argument is more persuasive than the County's argument in many respects. The example used in *Midboe* is more on point to the issue here than either the "comma rule" or the "last antecedent rule". Neither rule is a compulsory rule of grammar and may not necessarily apply in every instance. The specific use of the word "shall" clearly indicates to the Court that the Legislature did not intend the broad discretion the County is actively seeking but instead intended to have grants awarded to the municipalities affected by the establishment of a licensed gaming facility.[4]

d) Prepositional Phrase Explanation

After much consideration, the Court believes there is another possible grammatical interpretation of the statutory sentence at issue. The Court looks to the parts of the sentence and notes that there are three separate clauses. "Grants shall be used" could be a sentence by itself. "To fund the costs" indicates the specific use of the grants. "Of human services, infrastructure improvements, facilities, emergency services, health and public safety expenses" describes the type of costs for which the grants shall be used. "Associated with the licensed facility" would further describe the costs, relating them to the licensed facility.

Primarily at issue is the prepositional phrase, "of human services, infrastructure improvements, facilities, emergency services, health and public safety expenses" and whether those items listed are all "associated with the licensed facility." "[A] prepositional phrase is very seldom a working part of a sentence. In other words, a prepositional phrase can be eliminated from the sentence, and the basic structure of the sentence is not changed. As a matter of fact, it is best to eliminate prepositional phrases when attempting to determine the structure of a sentence."[5]

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[4] The 50% limit on the award amounts of municipal grants proposed by the County also appears to be another limit on distribution of the gaming funds sought by the County. Since the Court can find no language in the Gaming Act setting such a limit, the Court must conclude that it is arbitrary and should be reconsidered by the County.

[5] http://www.collaboratory.nunet.net/goals2000/drake/prep.html. Northwestern University Collaboratory Project © 2003.

If the prepositional phrase "of human services, infrastructure improvements, facilities, emergency services, health and public safety expenses" is eliminated from the sentence, it then reads, "Grants shall be used to fund the costs ... associated with licensed facility operations." The words human services, infrastructure improvements, facilities, emergency services, health and public safety expenses arguably describe the type of costs the licensed facility (i.e. casino) generates in its operation and existence. Without the confusion of the long prepositional phrase, the Court finds that the "costs" are quite clearly associated with casino operations. Therefore, little question remains about the statute's meaning.

The County's novel interpretation, reading every clause of §1403(c)(2)(v) separate from the casino except "public safety expenses" suggests to the Court that County Council deliberately chose certain parts of the Gaming Act to benefit the County's plans (e.g. the phrase "the recommended funding for capital projects such as the Erie County Runway Project may be found in the "Major Projects" category under the "Restricted Funds Policy"). Since this leads to an absurd result that grossly favors the County over Summit and the contiguous townships, the Court refuses to interpret this provision of the Gaming Act in the County's favor.[6] *See also* 1 Pa. C.S.A. §1922.

II. Renewed Motion for Judgment on the Pleadings

The Court now turns to whether Plaintiffs' Motion for Judgment on the Pleadings is appropriate. The Court may not enter judgment on the pleadings on its own motion. *Bueamith Electronics, Inc. v. Guise,* 62 Pa. D. & C.2d 777 (Adams County, 1973) and *School Sec. Services, Inc. v. Duquesne City School Dist.,* 851 A.2d 1007 (Pa. Cmwlth.2004). Once one of parties has moved for judgment on pleadings, the Court may enter a judgment in favor of either plaintiff or defendant. *Shroup v. Shroup,* 469 Pa. 165, 364 A.2d 1319 (1976).

Under Pa.R.C.P 1034, a Motion for Judgment on the Pleadings may be filed: (a) After the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings; and (b) The court shall enter such judgment or order as shall be proper on the pleadings.

A motion for judgment on the pleadings may be granted only when there is no genuine issue of fact and moving party is entitled to judgment as a matter of law. *Wachovia Bank, N.A. v. Ferretti,* 2007 Pa.Super. 155, 875 A.2d 565; *Parish v. Horn,* 768 A.2d 1214, (Cmwlth. 2001), *affirmed* 800 A.2d 294, 569 Pa. 45. Granting such a motion may be appropriate in cases that turn upon the construction of a written agreement. *Gallo v.*

[6] Courts will avoid any construction of the statutory language which leads to an absurd result. Above all else, statutory interpretation must give a fair and reasonable meaning to legislation so the intent of the legislature is honored. *See* Sutherland, *supra.*

J.C. Penney Cas. Ins. Co., 476 A.2d 1322, 328 Pa.Super. 267, (1984).

In the case at bar, the pleadings closed in mid-June 2008 and discovery was to be completed by June 1, 2008. *See* Procedural History, supra, pp. 9-10, and Plaintiffs' Brief, p. 18, n. 17. The issue of statutory interpretation turns upon the County's Ordinances Nos. 165, 166, and 167, and their consistency with Section 1403(c)(2)(v). Since statutory interpretation is a matter of law for a court of law to determine, a Motion for Judgment on the Pleadings may be properly raised at this stage.

The Court considered Defendants' May 2008 request to amend its April 4, 2008 Order to be unnecessary since all parties were allowed additional time to amend their pleadings and file the appropriate Answers and Replies to New Matters. The Court notes that the issues regarding statutory interpretation have not changed since the inception of this litigation, the December 28, 2007, hearing, despite the filing of numerous pleadings and the joinder of fifteen new parties.

Upon review of all of the various pleadings in this matter and the supporting briefs and legal arguments, the Court finds that Plaintiffs' Motion is proper and should be granted based on the arguments presented. In particular, STIEDA's supporting brief is very comprehensive, presenting the clearest discernment of the issues thus far presented to the court.[7] Conversely, the County has attempted to muddy the issues since January, raising all sorts of superfluous arguments, making unsubstantiated accusations against Summit Township, criticizing Summit Township's fiscal responsibility, demanding the joinder of more parties (15 in all), and initially delaying the municipal grant process by ignoring STIEDA's letters asking how to proceed.

Defendants' "County is king" mentality has been to the detriment of the citizens of Erie County, especially those living in Summit Township and the four contiguous townships to the casino.[8] The County's delay in distributing the restricted funds and the limitations placed upon them by the Report is overly defensive, especially when the final determination of how the municipal grants will be awarded rests with the County's economic development board (ECGRA) anyway. Further, any uncommitted funds left at the end of fiscal year also return to the ECGRA. STIEDA is not arguing for the County to turn over all the restricted funds to Plaintiffs. Rather, it is simply arguing for a fair chance to apply for and receive funds that the facility has generated to reimburse the townships for the financial burden incurred by the presence of the Casino.

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[7] While the briefs of the parties are not "pleadings" for the purpose of ruling on a motion for judgment, they may be considered as part of the relevant documents and exhibits attached to the pleadings. *See Del Quadro v. City of Philadelphia,* 437 A.2d 1262, 293 Pa.Super. 173, Super.1981.

[8] "But I would say if you read the statute and what has been set up, and I will call it this way, *the county is king.* The county is being given this money." Roger Taft, Esq., Counsel for Erie County and ECGRA, *N.T., Argument,* February 5, 2007, p. 74, lines 8-11.

Conclusion

Both Erie County and Summit Township will receive (or have already received) monies from the State Gaming Fund because they are the host county and host township, respectively, for the Casino. That is both the burden and privilege of hosting a licensed facility/casino. The Court finds that Summit unquestionably bears more of the burden as the actual physical location of the Casino. The Casino was erected in Summit and is operated in Summit. Every day Summit and the four contiguous townships, bear the burdens (a.k.a. costs associated with the licensed facility) of traffic, water supply, sewerage, fire, rescue, and other emergency services, and other required infrastructure to run such a facility. For the County to ignore those burdens (and their costs) and claim that the monies Summit receives should be adequate, or, worse, assume that the four contiguous townships' taxpayers will foot the bill is extremely insensitive and unbalanced. *See N.T., Argument,* February 5, 2008, p. 49. *See also* pp. 31-38, arguments of counsel for Summit Township Water Authority, Summit Township Sewer Authority, and Perry Hi-Way Hose Company regarding the specific impact of Casino on those entities.

If the County is not careful, it may kill the golden goose (the Casino) with its refusal to award the required restricted funds, causing the costs associated with the Casino to be underfunded and ultimately shut the facility down. It is time for the County and ECGRA to share the golden eggs with Summit and the four contiguous townships or be left with nothing but the axe that killed the goose. *See N.T., Argument,* February 5, 2008, pp. 65-66.

ORDER

AND NOW, to-wit, this 4th day of August 2008, upon consideration of Plaintiff's Motion for Judgment on the Pleadings, it is hereby **ORDERED, ADJUDGED, and DECREED** that the Motion is **GRANTED.** Erie County Ordinances Nos. 165, 166, and 167 are hereby found to be **INVALID** as they are inconsistent with the Gaming Act, particularly §1403(c)(2)(v). Pursuant to the requirements of 4 Pa.C.S.A. §1403:

1) All grants awarded or administered by the Defendant Erie County and/or the Erie County Gaming Revenue Authority (ECGRA) must be used to fund the costs of human services, infrastructure improvements, facilities, emergency services, or health and public safety expenses associated solely with the operation of Presque Isle Downs & Casino, in accordance with §1403(c)(2)(v).
2) All available "restricted" gaming revenue must be used to fund applications for municipal grants which are submitted and

eligible for funding during the fiscal year, without restriction upon the amount requested in the grant applications.

3) Grants from the "restricted" gaming revenue may not be awarded to units of local government or their respective public authorities' other than Erie County, Summit Township, Millcreek Township, McKean Township, Waterford Township, and Greene Township.
4) The County may enter into any "intergovernmental cooperative agreements" it deems necessary pursuant to §1403(c)(2)(ix) and distribute unrestricted gaming revenue after the municipal grants are properly awarded as §1403(c)(2)(v) of the Gaming Act requires.

FURTHER, all "restricted" gaming revenue received by Defendants Erie County and ECGRA during 2007 shall not become uncommitted or unrestricted due the Defendants' failure to implement a grant program in a timely manner. Defendants shall continue to hold all "restricted" funds received in a separate account until Defendants have publicly adopted a grant program that is consistent with the Gaming Act and this Court's Order, Defendants have publicly solicited the first round of grant applications, and Defendants have made a final determination on all pending grant applications.

The Court denies and grants Judgment in favor and against Defendants McKean Township, McKean Township Sewer Authority, McKean Township Water Authority, Waterford Township, Waterford Township Sewer Authority, Waterford Township Water Authority and Greene Township consistent with this Order.

This Order hereby **SUPERCEDES** this Court's December 28, 2007 Order.

BY THE COURT:
/s/ Michael E. Dunlavey, Judge

STEPHANIE A. McCASLIN, Plaintiff,

v.

LOUIS TRACY, IV, Defendant

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary Judgment may be entered when the defendant has shown the absence of a genuine issue of material fact as to a necessary element of the plaintiff's cause of action or that the plaintiff has failed to produce evidence of facts essential to the cause of action.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Any party may move for summary judgment after the relevant pleadings are closed. The moving party bears the burden of proving that no genuine issues of material fact exist. The record is reviewed in the light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact are to be resolved against the moving party. The non-moving party must set forth specific facts by affidavit or otherwise to show that a genuine issue for trial exists and may not rest upon its pleadings. Judgment as a matter of law may be entered if it is clear that no reasonable jury could find in favor of the non-moving party.

NEGLIGENCE / PUNITIVE DAMAGES

In an action arising from a motor vehicle accident, plaintiff must first establish an underlying action in tort to request punitive damages as punitive damages are an element of damages and not a cause of action. Having averred a cause of action for negligence, the plaintiff has established the requisite underlying action in tort to request punitive damages.

DAMAGES / PUNITIVE

Punitive damages may not be awarded unless it is shown that defendant’s alleged outrageous conduct caused plaintiff actual harm. In order to dismiss a claim for punitive damages, the court must determine that no reasonable jury could find that the defendant’s alleged outrageous conduct caused actual harm to the plaintiff.

DAMAGES / PUNITIVE

Pennsylvania has adopted § 908(2) of the Restatement (Second) of Torts, allowing an award of punitive damages for conduct that is outrageous either because of the defendant’s evil motive or reckless indifference. An assessment of punitive damages is based upon the character of the defendant’s act, the nature and extent of the harm and the defendant’s wealth. A party acts with reckless indifference when, after having reason to know of facts creating a high degree of physical harm, the party deliberately proceeds in conscious disregard or indifference to the risk.

DAMAGES / PUNITIVE

A jury may find the defendant acted with reckless indifference where

defendant was aware that people were sitting on the tailgate of the truck he was driving yet suddenly accelerated. Additionally, a jury could find defendant acted with reckless indifference in his refusal, for at least fifteen minutes, to assist plaintiff in efforts to seek care at a hospital.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 10292-2007

Appearances: J. Timothy George, Esq., Attorney for Plaintiff
Bruce L. Decker, Jr., Esq., Attorney for Defendant

OPINION

Connelly, J., August 11, 2008

This matter is before the Erie County Court of Common Pleas (hereinafter "the Court") pursuant to a Motion for Partial Summary Judgment filed by Louis Tracy, IV (hereinafter "Defendant") against Stephanie A. McCaslin (hereinafter "Plaintiff"). Plaintiff opposes Defendant's Motion.

Procedural History

On April 5, 2007, Plaintiff filed a Complaint before the Court, and then on April 13, 2007, filed an Amended Complaint which contained the following counts: Count I, Negligence; and Count II, Punitive Damages. *Complaint, ¶¶ 1-11; Amended Complaint, ¶¶ 1-20*. Defendant then filed an Answer to Plaintiff's Amended Complaint along with a New Matter on April 27, 2007. *Answer to Amended Complaint, ¶¶ 1-12*; *New Matter, ¶¶ 1-3*. On May 1, 2007, Plaintiff filed her Reply. *Reply to New Matter, ¶¶ 1-3*. On March 28, 2008, Defendant filed his Motion for Partial Summary Judgment and Brief in Support stating Plaintiff's claim for Punitive Damages should be dismissed.[1] *Defendant's Motion for Partial Summary Judgment, ¶¶ 1-13*; *Defendant's Brief in Support of Motion*

[1] Defendant, in stating Plaintiff's Count II should be dismissed, argues that Plaintiff avers Defendant's outrageous and/or reckless conduct occurred solely after (and not before) her injury and that in no way did this alleged conduct contribute to or worsen the injury. *Defendant's Brief in Support of Motion for Partial Summary Judgment, pp. 2-3, 6-7.* However, a simple reading of the Amended Complaint clearly reveals Plaintiff incorporated all of Count I's pre-injury averments into Count II's claim for punitive damages. *Amended Complaint, ¶¶ 12-18.* In regard to pleadings, such as Plaintiff's Amended Complaint, "material facts on which a cause of action or defense is based shall be stated in a concise and summary form." *Pa.R.C.P 1019(a).* Allegations comply with *Rule 1019(a)* if (1) they contain averments of all of the facts the plaintiff will eventually have to prove in order to recover, and (2) they are sufficiently specific so as to enable defendant to prepare his defense. *Smith v. Wagner*, 588 A.2d 1308, 1310 (Pa. 1991). The Court finds Plaintiff, by incorporating all of Count I's pre-injury averments into Count II's claim for punitive damages, provided Defendant fair notice of the claim for punitive damages relating to Defendant's pre-injury actions with sufficient specificity so as to enable Defendant to prepare a defense.

for Partial Summary Judgment, pp. 1-8. Plaintiff, on April 25, 2008, filed her Brief in Opposition to Defendant's Motion. *Plaintiff's Brief in Opposition of Motion for Partial Summary Judgment, pp. 1-14.*

Statement of Facts

On April 16, 2005, Defendant was driving his pickup truck near West Line, Pennsylvania. *Amended Complaint, ¶ 3; Answer to Amended Complaint, ¶ 3*. During this trip Defendant slowly drove with Carrie Hammond in the backseat, Erica Henry in the front, Chris Larson in the bed, and Plaintiff, Matthew Sharpe and Kevin Hammond on the tailgate. *Amended Complaint, ¶ 4*; *Answer to Amended Complaint, ¶ 4; C. Hammond Depo., pp. 21-22, 25-26; S. McCaslin Depo., p. 28-29, 36-39; M. Sharpe Depo., pp. 16-18, 20.* Before and/or during the ride in the pickup truck, everyone involved had been drinking alcohol. *C. Hammond Depo., pp. 18-20; S. McCaslin Depo., p. 32; K. Hammond Depo., pp. 9-11*.

At some point during the truck ride, Chris Larson yelled, "gun it" (or something to that effect) and Defendant complied by suddenly accelerating. *Amended Complaint, ¶ 5; C. Hammond Depo., pp. 29-30; K. Hammond Depo., p. 19; M. Sharpe Depo., pp. 16-18, 20.* Plaintiff then fell from the truck's tailgate, hit the ground, and injured her left leg. *Amended Complaint, ¶ 6; C. Hammond Depo., pp. 29-30; S. McCaslin Depo., p. 52; K. Hammond Depo., p. 22*. Attempting to get up, Plaintiff discovered she could not bear weight on her left leg as it caused her to experience pain and discomfort. *Amended Complaint, ¶ 13; C. Hammond Depo., pp. 30-32; K. Hammond Depo., p. 22; M. Sharpe Depo., p. 29.* Defendant suggested Plaintiff's injury was not a fracture (but a dislocation), and insisted Plaintiff or another person at the campsite attempt to put the leg back into place. *Amended Complaint, ¶ 14; C. Hammond Depo., p. 32; S. McCaslin Depo., p. 59-67*. After refusing to do so for approximately fifteen (15) minutes, Defendant provided directions in traveling to the nearest hospital. *Amended Complaint, ¶ 17; C. Hammond Depo., p. 35; S. McCaslin Depo., p. 59-67.*

Plaintiff suffered from an ankle fracture as a result of her fall. *S. McCaslin Depo., p. 72.* While at the hospital, Plaintiff was informed surgery would be required, but she refused because she was not from the area. *Id.* Therefore, Plaintiff was splinted. *Id.* Eleven days later, she received care from a Dr. Robert A. Lupo who concurred with the original diagnosis of an ankle fracture that required surgery. *Id. at 87.*

Analysis of Law

The general issue before the Court is whether Defendant, as the moving party, is entitled to partial summary judgment, that is, whether he has shown the absence of a genuine issue of material fact as to a necessary element of the current cause of action pursuant to *Pennsylvania Rules*

of Civil Procedure (hereinafter "PA Civil Rules") *1035.1 et seq*. The *PA Civil Rules* provide that summary judgment is appropriate when: the record[2] demonstrates there exists "no genuine issue of material fact as to a necessary element of the cause of action or defense that could be established by additional discovery or expert report;" or "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.C.P. 1035.2.*

Any party may move for summary judgment, in whole or in part, after the relevant pleadings are closed. *Ertel v. The Patriot-News Co.*, 674 A.2d 1038, 1041 (Pa. 1996). It is the burden of the moving party to prove that no genuine issues of material fact exist. *Id.* Therefore, the record is reviewed in the light most favorable to the nonmoving party and all doubts as to the existence of a genuine issue of material fact are to be resolved against the moving party. *Id.* The nonmoving party, however, may not rest upon the mere allegations or denials of its pleadings, but must set forth, either by affidavit or otherwise, specific facts showing there is a genuine issue for trial. *Id.* at 1042. Defendant is entitled to judgment as a matter of law if, after assessing the relevant facts, it is clear to the Court that no reasonable jury could find in favor of Plaintiff. *See, Washington v. Baxter,* 719 A.2d 733, 737 (Pa. 1998). In determining whether Defendant is entitled to partial summary judgment, the Court, in viewing the record in the light most favorable to Plaintiff, has weighed applicable law as it relates to the facts of this case as well as the merit of the arguments presented by both parties. The general issue before the Court is whether Defendant is entitled to partial summary judgment. To determine such, the Court shall specifically decide whether Plaintiff's claim for punitive damages should be dismissed pursuant to applicable law regarding such damages.

In order for Plaintiff to request punitive damages, she must first have established an underlying action in tort, as "the right to punitive damages is a mere incident to a cause of action . . . . and not the subject of an action in itself." *Feingold v. Southeastern Pennsylvania Transportation Authority,* 517 A.2d 1270, 1276 (Pa. 1986); *quoting, Hilbert v. Roth*, 149 A.2d 648, 652 (Pa. 1959); *see also, Schecter v. Watkins,* 577 A.2d 585, 595 (Pa. Super. 1990)(holding punitive damages are not a cause of action, but an element of damages flowing from a tortious action). Secondly, punitive damages may not be awarded to Plaintiff unless it

[2] The "record" includes: pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, and reports signed by an expert witness that would, if filed, comply with *PA Civil Rule 4003.5(a)(1),* whether or not the reports have been produced in response to interrogatories. *Pa.R.C.P. 1035.1.*

is shown that Defendant's alleged outrageous conduct caused her actual harm. *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800, 802 (Pa. 1989); *citing, Hilbert*, 149 A.2d at 652. As Plaintiff has filed a negligence cause of action at Count I of her Amended Complaint, the Court finds she has established the requisite underlying action in tort to request punitive damages. Therefore, in order for the Court to dismiss Count II of the Amended Complaint, it must rule no reasonable jury could find Defendant's alleged outrageous conduct caused Plaintiff's actual harm.

The Pennsylvania Supreme Court has adopted Section 908(2) of the Restatement (Second) of Torts which states:

> *Punitive damages may be awarded for conduct that is outrageous*, because of the defendant's evil motive or his *reckless indifference* to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

SHV Coal, Inc. v. Continental Grain Co., 587 A.2d 702, 705 (Pa. 1991)(emphasis added).

The Pennsylvania Supreme Court has also adopted Comment (a) to Section 500 of the Restatement (Second) of Torts which defines "reckless indifference" as occurring when an, "actor knows, or has reason to know of facts which create a high degree of physical harm to another, and deliberately proceeds to act, or fail to act, in conscious disregard of, or indifference to, that risk." *Id.* at 704.

Prior to Plaintiff's injury, Defendant was aware people were on the tailgate, and there was a risk that people sitting on the tailgate may fall off. *L. Tracy Depo., p. 50.* While driving, Defendant heard somebody yell "gun it" (or something to that affect). *Id. at 20.* Once "gun it" was yelled, Defendant complied by suddenly accelerating. *C. Hammond Depo., pp. 29-30; K. Hammond Depo., p. 19; M. Sharpe Depo., pp. 16-18, 20.* Subsequent to Plaintiff's obvious ankle injury, *K. Hammond Depo, p. 22,* Defendant was legally obligated to render aid.[3] *75 Pa.C.S.A. § 3744(a).* Instead, Defendant refused to assist in taking Plaintiff to the hospital for at least fifteen minutes before he ultimately relented. *C. Hammond Depo., pp. 34-35; S. McCaslin Depo., p. 59-67.* Pursuant to these facts, the Court finds it possible that a reasonable jury could find Defendant caused Plaintiff's injury as he acted with reckless indifference both prior

[3] The driver of any vehicle involved in an accident resulting in injury to . . . . any person . . . . shall render to any person injured in the accident reasonable assistance, including the making of arrangements for the carrying of the injured person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that treatment is necessary or if requested by the injured person. *75 Pa.C.S.A. § 3744(a).*

to and after said injury as he knew or had reason to know of facts which created a high degree of physical harm to Plaintiff and deliberately proceeded to act in conscious disregard of, or indifference to, that risk.

Pursuant to the above analysis, partial summary judgment in favor of Defendant is not proper. The provided evidence as viewed in a light most favorable to Plaintiff clearly reveals not only does Plaintiff's claim for punitive damages apply to both pre-accident and post-accident injuries, but also reveals a reasonably jury, in considering the character of Defendant's acts and the nature and extent of Plaintiff's injuries, could find Defendant's pre-accident and post-accident conduct to have been outrageous as well as the cause of Plaintiff's injury. Consequently, Defendant's Motion for Partial Summary Judgment is denied.

ORDER

AND NOW, TO-WIT, this 11th day of August, 2008, it is hereby **ORDERED, ADJUDGED, and DECREED** that, for the reasons set forth in the foregoing Opinion, Defendant's Motion for Partial Summary Judgment is **DENIED.**

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

COMMONWEALTH OF PENNSYLVANIA

v.

JAMIE PROPER

CRIMINAL PROCEDURE / SEARCH & SEIZURE

There are three levels of interaction between citizens and the police: (1) "mere encounter" (or request for information) which need not be supported by any level of suspicion, but carries no official compulsion to stop or respond; (2) "investigative detention" must be supported by reasonable suspicion for it subjects a suspect to a stop and a period of detention, but does not rise to the level of an arrest; (3) an arrest or "custodial detention" that must be supported by probable cause.

CRIMINAL PROCEDURE / MOTOR VEHICLE CODE VIOLATION

75 Pa.C.S.A. § 6308(b) indicates whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number of the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

CRIMINAL PROCEDURE / REASONABLE SUSPICION

Reasonable suspicion exists when an officer is able to "articulate specific observations which, in conjunction with reasonable inferences derived from those observations, led him reasonably to conclude, in light of his experience, that criminal activity was afoot and the person he stopped was involved in that activity." The totality of the circumstances must be considered in making this inquiry.

CRIMINAL PROCEDURE / SEARCH & SEIZURE

Where the purpose of an initial, valid traffic stop has ended and a reasonable person would have believed that he was free to leave, the law characterizes a subsequent round of questioning by the officer as a 'mere encounter'. Since the citizen is free to leave, he is not detained, and the police are free to ask questions appropriate to a mere encounter, including a request for permission to search the vehicle. However, where the purpose of an initial stop has ended and a reasonable person would not have believed that he was free to leave, the law characterizes a subsequent round of questioning by the police as an investigative detention or arrest. In the absence of either reasonable suspicion or probable cause, the citizen is considered unlawfully detained.

CRIMINAL PROCEDURE / SEARCH & SEIZURE

The determination whether a seizure has been effected in the first instance is made upon an examination of the totality of the circumstances to determine whether a reasonable person would feel free to leave. Factors relevant to such assessment include: the existence and nature of

any prior seizure; whether there was a clear and expressed endpoint to any such prior detention; the character of police presence and conduct in the encounter under review (i.e., the number of officers, whether they were uniformed, whether police isolated subjects, physically touched them, etc.); geographic, temporal and environmental elements associated with the encounter; and the presence or absence of express advice that the citizen-subject was free to decline the request for consent to search. In general, a full examination must be undertaken of all coercive aspects of the police/citizen interaction.

CRIMINAL PROCEDURE / REASONABLE SUSPICION

Excessive nervousness and furtive movements do not give rise to reasonable suspicion of criminal activity.

CRIMINAL PROCEDURE / REASONABLE SUSPICION

To constitute a valid investigative detention, the seizure must be justified by an articulable, reasonable suspicion that an individual may have been engaged in criminal activity independent of that supporting her initial lawful detention. As a general rule, additional observations made after the initial traffic stop, together with those made during the initial traffic stop, could form the basis of reasonable suspicion.

CRIMINAL PROCEDURE / WRIT OF HABEAS CORPUS

At a preliminary hearing, it is not necessary for the Commonwealth to prove the defendant's guilt beyond a reasonable doubt, but rather, its burden is merely to put forth a prima facie case of the defendant's guilt. A prima facie case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes sufficient probable cause to warrant the belief that the accused committed the offense. The evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to go to the jury. Moreover, inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth's case. Suspicion and conjecture are not evidence and are unacceptable as such.

CRIMINAL PROCEDURE / WRIT OF HABEAS CORPUS

The appropriate procedural means for a defendant to challenge the sufficiency of the evidence at a preliminary hearing is a petition for a writ of habeas corpus.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 855 OF 2008

Appearances: John H. Daneri, Esquire for the Commonwealth
Chad Vilushis, Esquire for the Defendant

OPINION AND ORDER

DiSantis, Ernest J. Jr., J.

This case comes before the Court on Defendant's Omnibus Pretrial Motion.

I. BACKGROUND OF THE CASE[1]

Defendant is currently charged with possession with intent to deliver marijuana, possession of marijuana, possession of a small amount of marijuana, and driving under the influence of a controlled substance — Schedule I, first offense.[2] These charges stem from a traffic stop that occurred on February 28, 2008.

On that date, Pennsylvania State Police Trooper Gary Knott observed the Defendant fail to make a complete stop and use his turn signal while making a right-hand turn onto Route 430 from the off ramp at Exit 32 of Interstate 90. After making his turn onto Route 430, Defendant entered a private driveway[3] and parked his vehicle in front of the garage.[4] Knott activated his overhead lights, entered the driveway and parked approximately 10 or 15 feet behind Defendant's vehicle. Defendant exited his vehicle and walked towards the trooper who had exited his vehicle.

At this point, Trooper Knott asked for Defendant's license and insurance documentation, which Defendant was unable to provide. Knott then instructed Defendant to wait inside his own vehicle while he performed routine background checks. Knott escorted Defendant to Defendant's vehicle. As Defendant opened his driver's side door to re-enter, Knott observed a white pill bottle with cellophane protruding from it. Knott asked to see the bottle. Defendant gave it to him. Knott looked inside and saw vegetable matter in a water/ice mixture. Knott was unable to detect any odor. At this time, Knott asked Defendant about the contents of the pill bottle and Defendant replied it was just "mud". Knott did not believe him.

Trooper Knott kept the bottle and walked back to his police cruiser. He next conducted a check of the Defendant's driver's license and criminal background. As a result, he determined that the Defendant had prior arrests for drugs and driving under the influence. Everything else was in order. While Knott was preparing his written warnings for the motor vehicle violations, Trooper Spaulding arrived and parked his cruiser behind Knott's. Knott's light rack was on throughout this stop.

Trooper Knott re-approached Defendant's vehicle and asked Defendant

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[1] The factual background is derived from testimony adduced at the June 25, 2008 suppression hearing.

[2] 35 P.S. § 780-113 (a)(30), 35 P.S. § 780-113 (a)(16), 35 P.S. 780-113 (a)(31), and 75 Pa.C.S.A. § 3802 (d)(1)(i), respectively.

[3] Defendant and his passenger did not reside at this address.

[4] According to Knott, Defendant told him he pulled into this driveway because he knew that Knott would pull him over.

to step out of his vehicle so that he could explain the written warnings for the traffic violations.[5] After explaining the warnings, Knott told Defendant he was free to leave.[6]

As both Knott and Defendant were returning toward their respective vehicles and before the Defendant could leave the scene, Trooper Knott turned around and asked Defendant if he would answer a few more questions. Defendant replied in the affirmative and walked back toward Knott. Knott asked the Defendant about the substance inside the pill bottle. The Defendant then said it was "mud". Knott then asked the Defendant if he had been arrested and the Defendant replied that he had, for a DUI offense. Knott then confronted him with the drug arrest, to which Defendant replied, "I forgot".

Continuing, Knott asked Defendant if there was anything else of concern in his vehicle. The Defendant replied, "no". The Defendant now appeared nervous. Knott told the Defendant he wanted anything else in the vehicle.[7] Then, the Defendant retrieved a tin from the vehicle. Knott opened it and saw suspected marijuana and paraphernalia.

Knott next asked the Defendant if he could look inside the vehicle. Knott explained that Defendant did not have to consent, but Knott could call for a K-9 unit and obtain a search warrant.[8] Defendant threw up his hands, and told Knott to go ahead. At this time, Defendant's passenger exited the vehicle and Knott searched it. As a result, Knott recovered a large bag of marijuana. Defendant was handcuffed and placed in a cruiser, where he was given his *Miranda*[9] warnings.

On June 25, 2008, Defendant filed the instant Omnibus Pretrial Motion, requesting this Court grant the habeas corpus relief and suppress all statements and physical evidence and/or dismiss the case for lack of reasonable suspicion/probable cause. Defendant's arguments are set forth below.

First, he alleges that Trooper Knott's preliminary hearing testimony failed to establish a prima facie case of possession with intent to deliver. Second, Trooper Knott did not possess reasonable suspicion before or during the traffic stop and failed to physically allow Defendant to leave the scene, despite telling him that he was free to leave. Third, despite

[5] Knott did not issue a summons for the pill bottle because he was unsure of the identity of the substance. Knott was unsure if he returned the bottle or if it still remained in his police cruiser. He did not ask the Defendant for consent to keep the pill bottle.

[6] Although there were two parked police cruisers behind Defendant's vehicle, Knott testified that Defendant could have made a 3-point turn in order to leave the scene.

[7] Knott explained that he had reasonable suspicion to believe there were drugs in the vehicle.

[8] During his cross-examination, Knott testified that based upon the pill bottle, he believed he had reasonable suspicion to believe that drugs were in the vehicle.

[9] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Trooper Knott's declarations to the contrary, Defendant's statement and the physical evidence were obtained as the result of a custodial interrogation. Defendant claims that it was reasonable for him to believe he was under arrest, "if not before the first bag of marijuana was found, immediately after". Defendant's Omnibus Pretrial Motion, 06/25/08, at 3-4. Fourth, Knott's questions evoked admissions by the Defendant, in the absence of any *Miranda* warnings. The Court conducted an evidentiary hearing on July 11, 2008. Trooper Knott was the sole witness.

II. LEGAL ANALYSIS

A. Validity of traffic stop

The Fourth Amendment of the United States Constitution states that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV (1791). The Pennsylvania Constitution provides a similar protection.

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Pa. Const. Art. 1, § 8 (1968).

Three levels of interaction between citizens and the police are recognized by the Pennsylvania Supreme Court:

> The first is a "mere encounter" (or request for information) which need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond. *See, Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319 (1983); *Florida v. Bostick,* 501 U.S. 429, 111 S.Ct. 2382 (1991). The second, an "investigative detention" must be supported by reasonable suspicion; it subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. *See, Berkemer v. McCarthy,* 468 U.S. 420, 104 S.Ct. 3138 (1984); *Terry v. Ohio,* 391 U.S. 1, 88 S.Ct. 1868 (1968). Finally, an arrest or "custodial detention" must be supported by probable cause. *See, Dunaway v. New York,* 442 U.S. 200, 99 S.Ct. 2248 (1979); *Commonwealth v. Rodriguez,* 614 A.2d 1378 (Pa. 1992).

Commonwealth v. Ellis, 541 Pa. 285, 662 A.2d 1043, 1047-48 (1995) (footnote omitted). Relative to vehicle stops, the authority of a police officer to stop a vehicle for a suspected violation of the Motor Vehicle

Code is governed by 75 Pa.C.S.A. § 6308(b), which provides:

> Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has *reasonable suspicion* that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

75 Pa.C.S.A. § 6308(b) (emphasis added) (effective February 1, 2004). Reasonable suspicion exists when an officer is able to "articulate specific observations which, in conjunction with reasonable inferences derived from those observations, led him reasonably to conclude, in light of his experience, that criminal activity was afoot and the person he stopped was involved in that activity." *Commonwealth v. Fulton*, 921 A.2d 1239, 1243 (Pa. Super 2007). The totality of the circumstances must be considered in making this inquiry. *Commonwealth v. Smith*, 917 A.2d 848, 852 n. 4 (Pa. Super. 2007).

Here, Officer Knott testified that he observed Defendant fail to make a complete stop and use his turn signal while making a right-hand turn, in violation of the Pennsylvania Motor Vehicle Code. As such, this Court finds that the initial traffic stop was constitutionally valid.

B. <u>The additional interaction between Trooper Knott and Defendant</u>

Once Trooper Knott verified the Defendant's criminal record, motor vehicle status and explained the written warnings, he informed the Defendant that he was free to leave. However, within seconds Knott re-engaged the Defendant in conversation and inquired whether he could ask the Defendant a few more questions. Accordingly, this Court must determine whether the Defendant when told he was free to leave was subject to a separate mere encounter or investigatory detention or, alternatively, whether this was one continuous encounter in which the Defendant was not free to leave and subject to an investigatory detention requiring reasonable suspicion. This Court must also determine whether the consent was valid.

> The central Fourth Amendment inquiries in consent cases entail assessment of the constitutional validity of the citizen/police encounter giving rise to the consent; and, ultimately, the voluntariness of consent. Where the underlying encounter is found to be lawful, voluntariness becomes the exclusive focus. Where, however, a consensual search has been preceded by an unlawful seizure, the exclusionary rule requires suppression of the evidence obtained absent a demonstration by the government both of a sufficient break in the causal chain between the illegality and the seizure of

> evidence, thus assuring that the search is not an exploitation of the prior illegality, and of voluntariness.

Commonwealth v. Strickler, 563 Pa. 47, 757 A.2d 884, 888-89 (2000) (internal citations and footnoted omitted).

> Where the purpose of an initial, valid traffic stop has ended and a reasonable person would have believed that he was free to leave, the law characterizes a subsequent round of questioning by the officer as a mere encounter. *See Strickler,* 757 A.2d at 898. Since the citizen is free to leave, he is not detained, and the police are free to ask questions appropriate to a mere encounter, including a request for permission to search the vehicle. However, where the purpose of an initial traffic stop has ended and a reasonable person would not have believed that he was free to leave, the law characterizes a subsequent round of questioning by the police as an investigative detention or arrest. *See [Commonwealth v.] Freeman,* [563 Pa. 82,] 757 A.2d [903,] 907 [2000]. In the absence of either reasonable suspicion to support the investigative detention or probable cause to support the arrest, the citizen is considered unlawfully detained.

Commonwealth v. By, 812 A.2d 1250, 1255-56 (Pa. Super. 2002).

"[O]nce the purpose for the stop has been completed, the question arises: Does the individual have objective reasons to believe that he is (or is not) free to end the police/citizen encounter?" *Strickler,* 757 A.2d at 891. "[I]n evaluating a consensual encounter that follows a traffic or similar stop, a central consideration will be whether the objective circumstances would demonstrate to a reasonable citizen that he is no longer subject to domination by police." *Id.* at 899. In determining whether an individual is subject to a seizure, our Pennsylvania Supreme Court has held:

> The determination whether a seizure has been effected in the first instance is made upon an examination of the totality of the circumstances to determine whether a reasonable person would feel free to leave. *See [Strickler].* Factors relevant to such assessment include: the existence and nature of any prior seizure; whether there was a clear and expressed endpoint to any such prior detention; the character of police presence and conduct in the encounter under review (for example -- the number of officers, whether they were uniformed, whether police isolated subjects, physically touched them or directed their movement, the content or manner of interrogatories or statements, and "excesses" factors stressed by the United States Supreme Court); geographic, temporal and environmental elements associated with the encounter; and the presence or absence of express advice that the citizen-subject was free to decline the request for consent to search. In general, a full examination must be undertaken of all coercive aspects of the police/citizen interaction. *See [Strickler]* at _____, 757 A.2d at 889.

Commonwealth v. Freeman, 563 Pa. 82, 757 A.2d 903, 906-07 (2000).

Recently, our Superior Court addressed this issue in *Commonwealth v. Moyer,* 2008 WL 2942119 (Pa. Super. 2008) *(en banc).* There, the Superior Court, relying upon *Freeman* and *Strickler,* affirmed the lower court's order suppressing evidence seized following a traffic stop.

The facts of *Moyer* are that on June 28, 2005, at approximately 11:20 p.m., Corporal Mays, of the Pennsylvania State Police observed a defective taillight on the defendant's vehicle. Mays activated his emergency lights, stopped the defendant's vehicle, and aimed a bright spot light on Moyer's vehicle. At this time, Mays observed furtive movement between the defendant and passenger.

Mays approached the defendant's vehicle and obtained the latter's driver's license and registration card. Mays asked Moyer about his travel and destination. Mays noticed that Moyer had bloodshot eyes and appeared nervous.

Mays performed a criminal history search that disclosed Moyer was previously fingerprinted during a controlled substance incident. Mays thereafter prepared a written warning for the taillight violation and re-approached Moyer's vehicle. He then ordered Moyer to exit his vehicle in order to show him the defective taillight and provide him with a warning card. At this time, Trooper Hertzog was standing near Mays at the rear of the vehicle. Moyer was then told he was free to leave.

As Moyer reached the driver's side of his vehicle, Mays asked if he could ask him a few questions. Mays did not inform Moyer that he could decline this request. Moyer agreed, and Mays told him he was aware of his prior drug arrest, and mentioned the movements he observed in Moyer's vehicle following the traffic stop. Mays then asked Moyer if there were drugs or paraphernalia in the vehicle. Moyer responded no. Mays further questioned Moyer about the presence of controlled substances or paraphernalia. Again, Moyer denied any. Mays then requested consent to search Moyer's vehicle. Without being informed that he could refuse the officer's request, Moyer consented to a search of himself and his vehicle. A crack pipe was found on Mays and another pipe was found inside the vehicle. Moyer admitted to smoking crack cocaine.

The suppression court found that the subsequent interaction between Mays and Moyer that occurred after Mays returned Moyers' paperwork and told him he was free to leave was an investigatory detention that was not supported by reasonable suspicion. The Commonwealth timely appealed and argued that after the traffic stop concluded, the re-initiated contact amounted to a mere encounter.

On appeal, the Superior Court determined that Moyer had been subject to an investigatory detention. In arriving at this conclusion, it considered the factors relevant to assessing whether a subsequent police/citizen

interaction amounted to a mere encounter or seizure.[10] It found that the police created an intimidating atmosphere at the time Mays asked Moyer to exit his car and justify his whereabouts. *Moyer,* 2008 WL 2942119, *6. First, there were two armed, uniformed police officers near Moyer when asked if he would answer further questions. Second, the police activated their emergency lights and directed a spotlight towards Moyers' vehicle. Third, Moyer was never informed that he could decline answering any further questions. Fourth, the police accused Moyer of prior drug activity without sufficient foundation for that accusation. Fifth, it was late at night and the stop was on a rural, unlit road. Sixth, after Moyer denied the presence of drugs, the police asked Moyer for his consent to search without informing him that he could decline. *Moyer,* 2008 WL 2942119, *7.[11] Furthermore, the "reintroduction of questioning occurred within seconds after the admonition that [defendant] could leave the scene, rendering the interdiction virtually seamless. *Moyer,* 2008 WL 2942119, *6.

The *Moyer* Court noted that unlike the factors in *Strickler* (where the initial contact was a mere encounter), Moyer was subject to a traffic stop, asked to exit his vehicle, and questioned about his prior criminal record, movements and drug possession. Furthermore, he was never informed that he did not have to consent to a search. *Moyer,* 2008 WL 2942119, *8.

Finally, the *Moyer* Court concluded that the furtive movements between Moyer and his passenger, Moyers' nervousness and his prior drug encounter did not amount to reasonable suspicion. *Moyer,* 2008 WL 2942119, *9, *citing Commonwealth v. Reppert*, 814 A.2d 1196, 1206 (Pa. Super. 2002) *(en banc)* (finding that excessive nervousness and furtive movements do not give rise to reasonable suspicion of criminal activity).

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[10] Specifically, the *Moyer* Court noted that the factors used included the following:

> 1) the presence or absence of police excesses; 2) whether there was physical contact; 3) whether police directed the citizen's movements; 4) police demeanor and manner of expression; 5) the location of the interdiction; 6) the content of the questions and statements; 7) the existence and character of the initial investigative detention, including its degree of coerciveness; 8) 'the degree to which the transition between the traffic stop/investigative detention and the subsequent encounter can be viewed as seamless, . . . thus suggesting to a citizen that his movements may remain subject to police restrain," *[Strickler];* 9) the 'presence of an express admonition to the effect that the citizen has been informed that he is not required to consent to the search. *Id.* at 74-75, 757 A.2d at 898-899.

Moyer, 2008 WL 2942119, *4.

[11] Although the police did not use a coercive tone, did not display their weapons, and informed the defendant he was free to leave, the *Moyer* court found those factors "did not outweigh the overwhelming indicia supporting the reasonableness of [the defendant's] belief that he could not refuse the officer's requests for more information and to search his car and person." *Moyer,* 2008 WL 2942119, *7.

In the case *sub judice,* this Court finds the circumstances remarkably similar to *Moyer.* Once Trooper Knott reinitiated questioning, the Defendant was subject to an investigatory detention because: 1) at all relevant times, Knott directed the Defendant's movement; 2) Knott did not provide the Defendant a reasonable time in which to leave the scene; 3) the abrupt reintroduction of questions rendered the interdiction virtually, seamless; 4) the Defendant was questioned about his prior criminal history; 5) the presence of two, armed police officers created an intimidating atmosphere; and, 6) the trooper's actions and the presence of two police cruisers parked directly behind Defendant's vehicle made it difficult, if not impossible, for Defendant to leave the scene. In this situation, a reasonable person would not have felt free to simply drive away. Therefore, the Defendant was subjected to an investigatory detention.

This Court must now determine whether Trooper Knott had reasonable suspicion to detain the Defendant and conduct a vehicle search after he issued the motor vehicle citation.

> To constitute a valid investigative detention, the seizure must be justified by an articulable, reasonable suspicion that [an individual] may have been engaged in criminal activity independent of that supporting her initial lawful detention. *See Strickler*, ____ Pa. at ____, 757 A.2d at 889. The question of whether reasonable suspicion existed at the time of a detention must be answered by examining the totality of the circumstances to determine whether there was a particularized and objective basis for suspecting the detainee of criminal activity. *See In re D.M.*, 556 Pa. 160, 164, 727 A.2d 556, 557 (1999)

Commonwealth v. Freeman, 757 A.2d at 908 (emphasis added).

As a general rule, additional observations made after the initial traffic stop, together with those made during the initial traffic stop, could form the basis of reasonable suspicion. *Commonwealth v. Johnson,* 833 A.2d 755, 764-65 (Pa. Super. 2003); S*ee also Commonwealth v. Jones,* 874 A.2d 108, 117 (Pa. Super. 2005), *citing Johnson, supra* at 764-65 ("holding combination of observations made by trooper during routine traffic stop and subsequent investigative detention, including driver's nervous appearance and inconsistent statements, provided reasonable basis for investigative detention"). "A combination of factors, none of which taken alone would justify a stop, may be sufficient to achieve a reasonable suspicion". *Jones, supra, quoting Commonwealth v. Riley,* 715 A.2d 1131, 1135 (Pa. Super. 1998), *appeal denied,* 558 Pa. 617, 737 A.2d 741 (1999).

When Knott detained the Defendant, all he knew was that: 1) the Defendant had committed a motor vehicle violation; 2) he had a pill bottle

in his possession containing an unknown substance; 3) the Defendant appeared nervous; 4) Defendant had been previously arrested; and, 5) Defendant omitted a reference to his drug arrest. These factors do not amount to reasonable suspicion that criminal activity was afoot at that time. *See Freeman*, 757 A.2d at 908; *Commonwealth v. Ortiz*, 786 A.2d 261 (Pa. Super. 2001); *Moyer.*

As this Court noted above, the initial stop predicated upon a violation of the motor vehicle code was lawful. However, the justification for the detention ceased at the point that the Defendant was told he was free to leave. Trooper Knott did not possess sufficient additional facts that established reasonable suspicion to further detain the Defendant and request his consent to search.[12]

B. Writ of Habeas Corpus — Possession with Intent to Deliver

Defendant contends that the Commonwealth failed to establish a prima facie case for possession with intent to deliver. In particular, the Defendant alleges that even drawing the appropriate inferences, "Trooper Knott's testimony never arose above suspicion and conjecture as to the Possession with Intent to Deliver Charge." Defendant's Omnibus Pretrial Motion, 06/25/08, at 4.

There is no constitutional right, federal or state, to a preliminary hearing. *Commonwealth v. Jacobs*, 640 A.2d 1326, 1328 (Pa.Super. 1994). However, Pa.R.Crim.P. 542 provides for one.[13] At a preliminary hearing, a judge is not "authorized to determine the guilt or innocence of an accused; his sole function is to determine whether probable cause exists to require the accused to stand trial on the charges contained in the complaint." *Commonwealth v. Williams*, 911 A.2d 548, 552 (Pa. Super. 2006), *quoting Commonwealth v. McBride*, 528 Pa. 153, 595 A.2d 589, 592 (1991)(citation omitted). The Pennsylvania Supreme Court has defined the pre-trial state of a criminal proceeding as the following:

> At the pre-trial stage of a criminal prosecution, it is not necessary for the Commonwealth to prove the defendant's guilt beyond a reasonable doubt, but rather, its burden is merely to put forth a *prima facie* case of the defendant's guilt. *Commonwealth v. McBride*, 528 Pa. 153, 595 A.2d 589, 591 (1991). A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes sufficient probable cause to warrant the belief that the accused committed the offense. *Id.* (citing

[12] Whether this additional interaction between Trooper Knott and Defendant was one seamless interaction or, alternatively, two separate encounters, is not dispositive because Knott did not possess reasonable suspicion to further detain Defendant after the purpose for the initial stop had been fulfilled.

[13] A preliminary hearing is not a trial, and its principal function is to protect a defendant's right against an unlawful arrest and detention. *Jacobs, supra* at 1328 (quotation omitted).

> *Commonwealth v. Wojdak*, 502 Pa. 359, 466 A.2d 991 (1983))). The evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to go to the jury. *Commonwealth v. Marti*, 779 A.2d 1177, 1189 (Pa. Super. 2001). Moreover, "inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth's case." *Id.* at 1180 (quoting *Commonwealth v. Owen*, 397 Pa. Super. 507, 580 A.2d 412, 414 (1990)).

Commonwealth v. Huggins, 575 Pa. 395, 402, 836 A.2d 862, 866 (2003). "In determining the presence or absence of a prima facie case, inferences reasonably drawn from the evidence of record that would support a verdict of guilty are to be given effect, but suspicion and conjecture are not evidence and are unacceptable as such." *Commonwealth v. Engle*, 847 A.2d 88, 91 (Pa. Super. 2004), *quoting Commonwealth v. Packard*, 767 A.2d 1068, 1071 (Pa. Super. 2001) (citation omitted).

The appropriate procedural means for a defendant to challenge the sufficiency of the evidence at a preliminary hearing is a petition for a writ of habeas corpus. See, *Huggins*, 836 A.2d at 865 n.2 (Pa. 2003), *citing Commonwealth v. Hetherington*, 331 A.2d 205, 209 (Pa. 1975).

Possession with intent to deliver ("PWID"), 35 P.S. § 780-113 (a)(30), is defined as:

> § 780-113. Prohibited acts; penalties
>
> (a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:
>
> . . . .
>
> (30) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

35 P.S. § 780-113 (a)(30).

Upon review of the evidence adduced at the preliminary hearing,[14] this Court finds that the Commonwealth produced sufficient evidence of each of the material elements of PWID and established sufficient probable cause to warrant the belief that the Defendant committed the offense. Trooper Knott testified that based upon his training and experience, the bag of marijuana found under seat (approximately 104 grams) is not consistent with personal use. N.T. Preliminary Hearing, 04/03/08, at 13.

[14] At the habeas corpus hearing, the Commonwealth did not present additional evidence as to the PWID charge.

While this evidence may not be sufficient to carry the Commonwealth's burden of proof at trial, "the sufficiency of evidence required to establish a prima facie case does not rise to the level of that required to sustain a conviction." *Williams*, at 552, *quoting Commonwealth v. Lutz*, 661 A.2d 405, 408 (Pa. Super. 1995). Therefore, the Defendant is not entitled to habeas corpus relief.

III. CONCLUSION

Based upon the above, Defendant's suppression motion shall be granted. However, his request for habeas corpus relief will be denied.

ORDER

AND NOW, this 14th day of August, 2008, for the reasons set forth in the accompanying opinion, it is hereby **ORDERED** that Defendant's Omnibus Pretrial Motion requesting suppression of evidence is **GRANTED**. His request for habeas corpus relief is **DENIED.**

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

ELAINE MARIE CHIMENTI, an Incapacitated Person, by JEAN B. CHIMENTI, Guardian, Plaintiff

v.

NATHAN F. SCHANEY, TIMOTHY JAMES McDONALD and WILLIAM B. BONGORNO, Defendants

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

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

NEGLIGENCE / OPERATION OF VEHICLES

Permitting an unlicensed driver to operate one's vehicle, even if a violation of the Motor Vehicle Code, does not impose liability unless the violation was the proximate cause of plaintiff's injury

NEGLIGENCE / OPERATION OF VEHICLES

Pursuant to 75 PaCSA §§ 1574 (permitting unauthorized person to drive) and 1575 (permitting vehicle to be driven in violation of Motor Vehicle Code), an owner or entrustor of a motor vehicle is vicariously liable if the operator is proven to be negligent.

DAMAGES / PUNITIVE DAMAGES

Punitive damages only are available in cases of outrageous behavior, where defendant's conduct shows either evil motive or reckless indifference to the rights of others.

DAMAGES / PUNITIVE DAMAGES

Defendant's voluntary intoxication could serve as a basis of punitive damage award if his condition impeded or precluded defendant from properly supervising the driving of unlicensed operator who had been entrusted with vehicle.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 11755 OF 2006

Appearances:

S. E. Riley, Jr., Esquire and
Michael A. Fetzner, Esquire, Attorneys for Plaintiff
Eugene C. Sundberg, Esquire, Attorney for Defendant, Nathan F. Schaney
Marcia H. Haller, Esquire and
William J. Kelly, Jr., Esquire, Attorneys for Defendant, Timothy James McDonald
Stephen J. Magley, Esquire for Defendant, William B. Borgorno

OPINION AND ORDER

DiSantis, Ernest J., Judge

This comes before the Court on Defendant William B. Bongorno's ("Bongorno") Motion For Summary Judgment. Plaintiff has filed a

response and argument was conducted on August 18, 2008.

I. BACKGROUND OF THE CASE

On or about September 1, 2005, the Plaintiff, Elaine Marie Chimenti, was a passenger on a 2005 Harley Davison motorcycle owned and operated by Defendant, Nathan F. Schaney ("Schaney"). They were traveling eastbound on East 38th Street in the City of Erie near the intersection of East 38th and Fruit Streets. At the same time and in that vicinity, Defendant Timothy McDonald ("McDonald"), was operating a motor vehicle traveling westbound on East 38th Street. Bongorno was a passenger in that vehicle which was owned by his mother.

At the time, McDonald was 20 years old and was operating under the authority of an Ohio learner's permit. Bongorno was 20 years old and a licensed driver (Pennsylvania). It is alleged that McDonald made a u-turn from the westbound lanes to the eastbound lanes of East 38th Street, driving the vehicle into the path of the motorcycle operated by Schaney. As a result of the collision, Plaintiff sustained serious injuries.

Plaintiff asserts that Bongorno was under the influence of alcohol and did not properly entrust the vehicle to McDonald and supervise his driving. Alternatively, Plaintiff argues that Bongorno was operating the motor vehicle and was negligent. She requests both compensatory and punitive damages from Bongorno.

II. LEGAL DISCUSSION

Summary judgment should only be granted in a case that is clear and free from doubt. *Toy v. Metro Life Ins. Co.*, 928 A.2d 186, 195 (Pa. 2007). 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.

Pa.R.Civ.P. 1035.3 provides, in part:

> (a) the adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty (30) days after service of the motion identifying
>
> (1) one or more issues of fact arising from evidence in the

> record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or
> (2) evidence in the record establishing the facts essential to the cause of action or defense which the motions cite as not having been produced.

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.

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

A. Whether the Plaintiff's Negligent Entrustment Claim Against Bongorno Should Be Stricken Because He Had No Reason To Believe That McDonald Was Incapable of Safely Driving The Vehicle?

The Restatement (Second) of Torts § 390 describes the tort of negligent entrustment in this way:

> **§ 390 Chattel For Use By Person Known To Be Incompetent**
>
> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

As a predicate to liability, the supplier of the chattel is liable if his/her conduct is the legal cause of the bodily harm complained of by the person injured. *Id.*, Comment c.

The Pennsylvania General Assembly has enacted certain provisions of the Motor Vehicle Code which relate to negligent entrustment. See, 75 Pa.C.S.A. §§ 1574 and 1575. In the civil context, entrustment of an automobile to an unlicensed underage person is a question of negligence, rather than negligence *per se*. *Labauch v. Colley,* 129 A.88 (Pa. 1925); *Griesmer v. Netter,* 117 A.205 (Pa. 1922). Furthermore, Pennsylvania law holds that permitting an unlicensed driver to operate one's vehicle, even if a violation of the Motor Vehicle Code, does not impose liability unless the violation was the proximate cause of a plaintiff's injury. *Chamberlain v. Riddle,* 38 A.2d 521 (Pa. Super. 1944). (An automobile owner engaged an unlicensed eighteen year-old to wash his vehicle and drive it to a wash rack where an accident occurred.) Pursuant to §§ 1574 and 1575, an owner or entrustor of a motor vehicle is vicariously liable if the operator is proven to be negligent.

According to the conditions of McDonald's Ohio learner's permit, he was not allowed to operate a motor vehicle unless accompanied by a licensed operator who was at least 21 years of age, occupied a seat next to him and did not have a prohibited amount of blood alcohol in his system. O.R.C. § 4507.05(A)(2)(b).[1] At the time of the incident, Bongorno was 20.

In the ordinary negligent entrustment case, the plaintiff must demonstrate that the defendant knew or had reason to know that the defendant was incompetent or incapable of properly handling the vehicle, and that the defendant's incompetence was a substantial factor in causing the plaintiff's harm. *Christiansen v. Siflies*, 667 A.2d 396, 400 (Pa. Super. 1995) (citations omitted). The instant case is a variation of that tort.

The Pennsylvania Motor Vehicle Code imposes a duty upon one who entrusts a vehicle to another. It presumes that the one entrusting the vehicle is competent to make that decision and can supervise the person holding the learner's permit. Therefore, it follows that when s/he is under the age of 21, or by reason of voluntary intoxication has impaired his/her ability to properly supervise the driver, liability may attach if s/he allows one with a learner's permit to operate the vehicle and the operator is negligent.[2]

After its review of the applicable law, this Court concludes that there exists a genuine issue of material fact as to whether Bongorno negligently entrusted the vehicle to McDonald or failed to properly supervise McDonald's driving. Therefore, Bongorno is not entitled to summary judgment on that issue. Although Bongorno may be jointly and severally liable with McDonald, a violation of 75 Pa.C.S.A. §§ 1574, 1575, or O.R.C. § 4507.05 does not constitute negligence *per se*.

B. Whether Plaintiff's Claim For Punitive Damages Against Bongorno Should Be Stricken?

Punitive damages are awarded to punish a defendant for intentional, willful, wanton or reckless conduct. *SHV Coal v. Continental Grain, Co.*, 587 A.2d 702, 704 (Pa. 1991). These damages lie only in cases of outrageous behavior, i.e., where the defendant's egregious conduct shows either evil motive or reckless indifference to the rights of others. Neither mere negligence nor even gross negligence is sufficient to justify an award of punitive damages. *Hutchinson v. Penske Truck Loading Co.*, 876 A.2d 978, 983-84 (Pa. Super. 2005).

As a basis of her punitive damage claim, Plaintiff alleges that Bongorno was under the influence of alcohol at the time that the incident occurred and fled the scene without attempting to determine the condition of the

[1] O.R.C. denotes Ohio Revised Code.

[2] Cf. 75 Pa.C.S.A. § 1505(b). These statutes require the "immediate supervision" by a licensed driver who is at least 21 years of age.

Plaintiff and/or render assistance. If Bongomo's voluntary intoxication precluded him from properly supervising McDonald, and McDonald negligently caused Plaintiff's injuries, that could support a punitive damage claim.

As to the duty to stop at the scene of an accident, 75 Pa.C.S.A. § 3742 requires the *operator* of a motor vehicle, not the *passenger* to stop and provide information and render assistance. Although there may be a moral imperative for the passenger to stop and remain at the scene, if possible, § 3742 does not require him/her to do so. However, that does not settle the question. Given that Bongorno had an obligation to supervise McDonald's driving, he — at a minimum — had a corresponding obligation to advise McDonald to stop and comply with the requirements of § 3742 if Bongorno was aware that an accident occurred. If McDonald failed to stop, the obligation shifted to McDonald who should have returned to the scene as soon as possible. If voluntary intoxication impeded or precluded him from doing so, that fact could serve as a basis for a claim for punitive damages.

C. Whether The Claim That Bongorno Was Driving The Vehicle (Count IV Should Be Dismissed Because All Evidence Of Record Proves That McDonald Was Driving?

There is no direct or circumstantial evidence to support the conclusion that Bongorno was driving the vehicle. Therefore, summary judgment is appropriate on Count IV.

III. CONCLUSION

Based upon the above, this Court will issue an appropriate order.

ORDER

AND NOW, this 3rd day of September 2008, after having considered Defendant Bongorno's Motion For Summary Judgment, Brief In Support and Plaintiff's Response, as well as oral argument, it is hereby ORDERED as follows:

1. Defendant Bongorno's Motion For Summary Judgment related to Count IV of Plaintiff's Complaint is hereby GRANTED; and
2. In all other respects Defendant Bongorno's Motion For Summary Judgment is DENIED.
3. Pursuant to the parties' request, a settlement conference shall be conducted by this Court on September 30, 2008 at 10:30 a.m.

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

JOSEPH D. KAUFER, Plaintiff

v.

CASSANDRA KAUFER, now STAHL, Defendant

FAMILY LAW / CHILD CUSTODY

When addressing the issue of school selection for minor children, the Court must decide which school serves the best interest of the children.

FAMILY LAW / CUSTODY

A child's preference in determining school selection, although not controlling, is to be considered by the Court in determining the child's best interest.

FAMILY LAW / CHILD CUSTODY

The child's maturity and intelligence, as well as the underlying reason stated for the preference, are to be considered by the Court in weighing the child's preference for school selection.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA FAMILY DIVISION No. 12750-2006

Appearances: Michael J. Visnosky, Esq., on behalf of Plaintiff
Joseph P. Martone, Esq., on behalf of Defendant
Michael J. Nies, Esq., on behalf of the minor children

FINDING OF FACT AND CONCLUSION OF LAW

Domitrovich, J., August 5, 2008

After a thorough review of the testimony and evidence presented at the custody trial, as well as an independent review of the relevant statutory and case law, this Court hereby makes the following Findings of Fact and Conclusions of Law regarding the sole issue of school choice of Joshua, Carolyn, Noah, and Meagan Kaufer:

FINDINGS OF FACT

1. Plaintiff, Joseph D. Kaufer, is an adult individual residing at 15 West Avenue Extension, Albion, PA 16401.

2. Defendant, Cassandra Stahl, is an adult individual residing at 60 Stirrup Lane, Riverside, CT 86878.

3. The parties are the parents of five minor children:

   (a) Joshua Michael Kaufer, born March 9, 1992;
   (b) Carolyn Grace Kaufer, born March 16, 1995;
   (c) Noah James Kaufer, born December 11, 1996;
   (d) Meagan Elizabeth Kaufer, born January 23, 2000;
   (e) Anna Xiju Kaufer, born December 29, 2004.

4. The parties separated in July 2006.

5. On July 25, 2006, this Court entered an Order granting Plaintiff, Joseph Kaufer, full legal and physical custody of the parties' five minor children until further Order of Court. All five of the Kaufer children currently reside with their father at 15 West Avenue Extension, Albion, PA 16401.

6. Religion is very important to both parties and during the parties' marriage, the parties were very concerned with having their children receive a Christian education.

7. The four (4) older Kaufer children began their education through home schooling. At home, Plaintiff taught the children math and Bible study, while Defendant taught the children the rest of their required core subjects.

8. Plaintiff continues to conduct Bible study to all of his children at home.

9. In December of 2003, the parties decided to send Joshua and Carolyn to Cranesville Christian Academy for the spring semester of 2004.

10. After researching the available options at the time, including the option of sending the children to the Northwestern Public School District, the parties made the decision to send Joshua and Carolyn to Cranesville Christian Academy in order to give Defendant a respite from teaching all four children and in order to continue to provide a Christian education for Joshua and Carolyn. The decision to send Joshua and Carolyn to Cranesville Christian Academy was a compromise and a joint decision made by both parents.

11. Additionally, the parties again decided to enroll Joshua and Carolyn in the Cranesville Christian Academy for the spring semester in 2006.

12. The parties separated on or about May 28, 2006 and Defendant moved to Connecticut permanently on or about July 19, 2006. Communication between the parties became strained or non-existent.

13. The four older Kaufer children were enrolled at the Cranesville Christian Academy for the 2006/2007 school year. However, Cranesville Christian Academy closed in the summer of 2006.

14. In August of 2006, Plaintiff, living in Pennsylvania with full legal and physical custody of all five of his children, had to make a determination as to what school the four older Kaufer children would be attending since Cranesville Christian Academy, the school in which the children were enrolled, had closed.

15. Subsequently, Plaintiff enrolled the four older Kaufer children at the Girard Alliance Christian Academy.

16. During the custody trial, Plaintiff credibly stated he enrolled his

children at the Girard Alliance Christian Academy for the following reasons:

a. Girard Alliance Christian Academy was a school very similar to Cranesville Christian Academy that would continue to educate the children with Christian morals.

b. Plaintiff knew other families who sent their children to Girard Alliance Christian Academy.

c. A number of teachers and students from Cranesville Christian Academy transferred to Girard Alliance Christian Academy when it closed.

d. Girard Alliance Christian Academy provided a safe and nurturing learning environment and offered an athletic program for the children to participate.

17. Plaintiff credibly stated he did not initially inform Defendant of his decision to enroll the children at Girard Alliance Christian Academy because at the time there was no communication between the parties and Plaintiff believed he was not required to inform Defendant of the enrollment.

18. Defendant did not know of the children's enrollment at Girard Alliance Christian Academy until September 2006, when the children informed her.

19. At a support hearing in December 2006, Defendant formally objected to the children attending Girard Alliance Christian Academy, and any assessment of tuition against her.

20. During custody and support proceedings in 2007, Defendant again objected to the children attending Girard Alliance Christian Academy. Defendant, considering that the children were already attending Girard Alliance Christian Academy, withdrew her objection to the children attending Girard Alliance Christian Academy for the 2007/2008 school year, and the children finished the 2007/2008 school year at Girard Alliance Christian Academy.

21. Neither party disputes that the Kaufer children are all intelligent children and have performed very well at Girard Alliance Christian Academy. The Kaufer children have achieved a high level of success in academics and have performed well in extracurricular activities while attending Girard Alliance Christian Academy.

22. However, the parties agreed that the issue of school choice for the 2008/2009 school year, the subject of these proceedings, would be postponed until now.

23. During the instant custody proceedings, Plaintiff sought to have the children continue their faith-based education at Girard Alliance Christian Academy. Conversely, Defendant wanted the children to attend the Northwestern Public School District.

24. As of the custody trial, Girard Alliance Christian Academy had total enrollment of sixty- five (65) students. The average class size at Girard Alliance Christian Academy is five (5) students per class. Joshua, who just completed ninth grade, had eleven (11) students in his grade; Carolyn, who just completed seventh grade, had nine (9) students in her grade; Noah, who just completed fifth grade, had four (4) students in his grade; and Meagan, who just completed second grade, had eight (8) students in her grade.

25. There are 1,700 students in the Northwestern Public School District. The average class size at Northwestern is about eighteen (18) students per class.

26. Both parties presented expert witnesses, who explained the advantages and disadvantages of the children attending Girard Alliance Christian Academy and the Northwestern Public School District.

27. Some of the advantages of the children attending Girard Alliance Christian Academy over Northwestern are:

a. The Kaufer children are familiar with Girard Alliance Christian Academy and have already demonstrated they perform exceptionally well there.

b. Generally, private, religious schools, such as Girard Alliance Christian Academy, offer a more nurturing, caring climate than the typical public school setting found in schools such as Northwestern. A transition from a small private school to a large public school may have drastic negative affects on the children, who have been home schooled most of their lives.

c. Teachers with a smaller class size, such as those at Girard Alliance Christian Academy, better know children's strengths and weaknesses. The advantages of a smaller classroom include a much faster turnover of assessment data, assessment of students, and formative assessment. The curriculum can be guided much easier in smaller classes and teachers have better opportunities to work with parents in order to elicit their support. Conversely, in large classroom settings, such as those at Northwestern, teachers tend to teach to the middle of the student body, while more advanced students, such as the Kaufer children, could possibly get "lost in the shuffle."

d. Girard Alliance Christian Academy has also been permitted to participate in the Northwestern Public School District's dual enrollment program for the 2008/2009 school year.

e. Girard Alliance Christian Academy provides the children with the faith-based education, which is very important to both parties.

28. Some of the advantages of the children attending Northwestern over Girard Alliance Christian Academy are:

a. Northwestern facilities are in a closer proximity to the Kaufer children's residence.

b. Northwestern School District is in compliance with No Child Left Behind and state and federal regulations.

c. At Northwestern, all of the teachers are certified in the areas they teach and half of the teachers in the Northwestern School District have a Master's Degree. Only two of the fourteen teachers at Girard Alliance Christian Academy are certified and only two of the teachers at Girard Alliance Christian Academy have a Master's Degree.

d. Northwestern High School offers sixty-seven (67) electives including vocational and art courses. Girard Alliance Christian Academy offers nine (9).

e. Northwestern High School offers Advanced Placement classes in Calculus, U.S. History, European History, and on-line options. Junior and Senior students can also obtain college credits.

f. Academic sports league and gifted courses are offered to students in middle school and high school at Northwestern.

g. Northwestern offers a larger athletic program for students to participate, and the Kaufer children would like to participate in some of these sports, which are not offered at Girard Alliance Christian Academy.

h. Northwestern School District has enough computers that almost every student can have a laptop.

i. Northwestern has twenty-seven (27) extra-curricular activities available to high school students.

j. The Northwestern Public School District offers a larger, diverse student body for the Kaufer children to interact.

29. Joshua Kaufer credibly stated that his mother, the Defendant, and her father have at various times expressed their desire to see Joshua attend Northwestern.

30. Initially, Joshua Kaufer was reluctant to state a preference of Girard Alliance Christian Academy or Northwestern. However, by the end of the custody trial, Joshua Kaufer indicated he is fine with attending either school next year, but he would prefer to attend Northwestern over Girard Alliance Christian Academy since Northwestern has more academic and athletic opportunities. Joshua stated he realized that the decision of which school he attended was out of his control, and he would attend either school, but he preferred to attend Northwestern. Moreover, Joshua expressed concern about which school would better prepare him for college.

31. Carolyn Kaufer also expressed her desire to attend Northwestern over Girard Alliance Christian Academy.

32. Both Carolyn and Joshua shadowed students at Northwestern in

order to experience the public school setting. Both children stated they had friends from their church, sporting teams, and neighborhood that attended Northwestern.

33. While this Court finds Defendant, Cassandra Stahl, has influenced Joshua and Carolyn in stating their preferences to attend Northwestern, this Court finds Joshua and Carolyn Kaufer are intelligent, mature children and their preferences to attend Northwestern over Girard Alliance Christian Academy are of their own volition, on which the children have carefully reflected.

34. Noah and Meagan Kaufer were unable to testify on May 16, 2008 and never expressed any desire for attending one school over the other. Hence, Noah and Meagan Kaufer should continue to remain in the same school environment that their siblings attended until each of them reaches, at least, the eighth grade.

CONCLUSIONS OF LAW

In a child custody case, the paramount concern is the best interests of the child. *Moore v. Moore*, 634 A.2d 163, 169 (Pa. 1993). Furthermore, in determining which school a child should attend, a court must decide which school best serves the best interests of the child. *See Dolan v. Dolan*, 548 A.2d 632 (Pa. Super. Ct. 1988). Moreover, although a child's wishes are important, they are not controlling in custody matters. *Watters v. Watters*, 757 A.2d 966, 969 (Pa. Super. Ct. 2000). However, the child's wishes do constitute an important factor that must be carefully considered in determining the child's best interest. *McMillen v. McMillen*, 602 A.2d 845, 847 (Pa. 1992). "The child's preference must be based on good reasons, and the child's maturity and intelligence must be considered." *Id.* The child's preference, to be given credence, must be based on reasons, which comport with his best interests, whether or not he is able to identify them as such. *Watters, supra* at 969.

The decision to determine where the parties' children attend school for the 2008/2009 school year and beyond is a decision to be made for each Kaufer child on an individual basis. Essentially, after considering all of the factors presented during the custody trial, this Court must determine which school will be in the best interests of each child, individually. This Court not only has to consider the impact either school will have on each child academically and socially, but this Court also has to consider the effect each proposed school will have on the child's moral and spiritual growth. Based upon the evidence presented at the custody trial and considering the familiarity this Court has gained with these parties over the past few years, this Court concludes the religious, spiritual, and moral upbringing of the Kaufer children has been and continues to be of the utmost concern to both parties and to this Court. The Kaufer children are not only intelligent but also good children, who someday

will hopefully contribute greatly to their community. One reason why the Kaufer children are good is because of the moral fiber instilled in them early by their parents. This Court cannot ignore the importance religion has had on the Kaufer children. Therefore, this Court concludes it is in the best interests of Noah and Meagan Kaufer to continue their education at Girard Alliance Christian Academy, which promotes the social values and religious morals in which the children have been raised while providing these children the individualized attention in their studies children need during their formative, tender years.

However, it is in the best interests of Joshua and Carolyn Kaufer to attend the Northwestern School District, which offers the children more opportunities: academically, socially, and athletically. Joshua and Carolyn are mature young adults and as such their preferences must be respected and taken into consideration. While this Court is concerned with Joshua and Carolyn's spiritual and moral growth, Joshua and Carolyn are older than their siblings and have had the benefit of being educated consistent with Christian ideals both at home and at private schools. Since Joshua and Carolyn are older and already have an established moral and spiritual foundation, this Court is compelled to comply with their requests. Moreover, this Court hopes the parties will continue to raise all of their children with the moral, spiritual, and religious values, in which they have always enjoyed.

The following Order is being entered because the parents are incapable in making any decision, which concerns their children without argument or litigation. This Court does not believe it is in the children's best interests to return to the Courthouse intermittently for the Court to make a determination as to where each of them may be attending school in the following years. The two youngest children are fragile and are over-pressured, particularly by their mother and her family. While the Court recognizes the importance of religion and the father's concept of education, the children must be exposed to a broader world-view at the appropriate time.

For all of the foregoing reasons this Court hereby enters the following Order:

ORDER

AND NOW, to wit, this 5th day of August, 2008, after a thorough review of the testimony and evidence presented at the Custody Trial, as well as an independent review of the relevant statutory and case law, and for the reasons set forth in this Court's foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED, ADJUDGED AND DECREED Noah and Meagan Kaufer shall continue to attend Girard Alliance Christian Academy until each of them completes the seventh grade and Joshua and Carolyn Kaufer shall attend the Northwestern School District. Plaintiff, Joseph Kaufer, shall register Noah and Meagan

with Girard Alliance Christian Academy consistent with this Order, that is through their respective completion of seventh grade. Plaintiff, Joseph Kaufer shall register Joshua and Carolyn with the Northwestern Public School District for the 2008/2009 school year and thereafter.

It is further ORDERED the terms of this Order shall remain in effect until further Order of Court or upon mutual agreement by the parties.

BY THE COURT:
/s/ Stephanie Domitrovich, Judge

DANIELLE T. SANDERS, Executrix of the Estate of DAVID W. SANDERS, Plaintiff,
v.
ERIE METROPOLITAN TRANSIT AUTHORITY,
and
DAVID M. JUSTKA,
and
UNITED OIL MANUFACTURING COMPANY, Individually, and d/b/a KWIK FILL / RED APPLE,
and
KWIK FILL CORPORATION,
and
BALWEB, INC.,
and
THOMAS K. CREAL, III,
and
ROBERT L. RABELL,
and
DEPARTMENT OF TRANSPORTATION, COMMONWEALTH OF PENNSYLVANIA, Defendants

PLEADINGS / PRELIMINARY OBJECTIONS

Preliminary objection which result in the dismissal of a cause of action (demurrer) should be sustained only in cases that are so clear and free from doubt that the plaintiff will be unable to prove legally sufficient facts to establish any right to relief. All doubts in this determination should be resolved by overruling the preliminary objections. The question presented by a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

NEGLIGENCE / CONDITION AND USE OF LAND, BUILDING AND STRUCTURES

Chapter 441.3 of the Pennsylvania Code provides that "no driveway, local road or drainage facility or structure shall be constructed or altered within State highway right-of-way and no drainage facility of the Department may be altered or connected onto without first obtaining a permit from the Department. 67 Pa.C.S.A. §441.3

NEGLIGENCE / CONDITION AND USE OF LAND, BUILDING AND STRUCTURES

Chapter 441.3 of the Pennsylvania Code may be applied retroactively. The fact that a property's present dangerous condition arises only from past activities does not affect the appropriateness of invoking the police power to dispel that immediately dangerous condition. 67 Pa.C.S.A. §441.3

NEGLIGENCE / CONDITION AND USE OF LAND, BUILDING AND STRUCTURES

While a tenant in possession is typically responsible for the condition of the property, an owner out of possession may be liable for the condition of the property if the public-use exception for members of the general public applies. Restatement (Second) of Torts §359.

NEGLIGENCE / PROXIMATE CAUSE / CRITERIA FOR PROXIMATE CAUSE

Proximate cause is defined as a wrongful act which was a substantial factor in bringing about the plaintiff's harm. An actor's conduct is a legal cause of harm to another if (1) his conduct is a substantial factor in bringing about the harm and (2) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in harm.

NEGLIGENCE / CONDITION AND USE OF LAND, BUILDING AND STRUCTURES

Chapter 441.3 of the Pennsylvania Code, created for highway safety and designed to prevent accidents from occurring where driveways abut highways, creates a private cause of action for the benefit of a plaintiff who is a member of the class for whom the statute was created. 67 Pa.C.S.A. §441.3

DAMAGES / PUNITIVE DAMAGES

Plaintiff pled sufficient facts to establish that (1) defendant had subjective appreciation of the risk of harm to which plaintiff was exposed and that (2) defendant acted, or failed to act, as the case may be, in conscious disregard of that risk.

PLEADINGS / PRELIMINARY OBJECTIONS

Pennsylvania Rule of Civil Procedure 1028(a)(2) states that a preliminary objection may be filed due to the inclusion of scandalous or impertinent matter.

PLEADINGS / PRELIMINARY OBJECTIONS

Pennsylvania Rule of Civil Procedure 1028(a)(3) states that a preliminary objection may be filed because of insufficient specificity in a pleading.

PLEADINGS / GENERAL REQUIREMENTS

In general, amendments to pleadings are liberally allowed, but an amendment introducing a new cause of action will not be permitted after the statute of limitations has run in favor of a defendant. However, if the proposed amendment does not change the cause of action, but merely amplifies that which has already been averred, it should be allowed even though the statute of limitations has already run.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 14224-2005

Appearances: James P. Lay, Esquire, Attorney for Plaintiff
Raymond A. Pagliari, Jr., Esquire, Attorney for Plaintiff
Bruce Decker, Jr., Esquire, Attorney for Defendant EMTA
Richard J. Parks, Esquire, Attorney for Defendant United Oil
Gerald J. Hutton, Esquire, Attorney for Defendant Balweb
Mark J. Gesk, Esquire, Attorney for Thomas Creal
David G. Ridge, Esquire, Attorney for Robert Rabell
William A. Dopierala, Esquire, Attorney for PennDOT

OPINION

Connelly, J., August 7, 2008.

This matter is before the Court pursuant to United Oil Manufacturing Company's (hereinafter "Defendant United Oil") and Balweb's (hereinafter "Defendant Balweb") Preliminary Objections to Danielle T. Sanders' (hereinafter "Plaintiff') Complaint.

Procedural History

This case stems from a fatal motor vehicle accident that occurred on August 1, 2005 on or near Sterrettania Road, north of its intersection with West 38th Street. *Plaintiff's First Amended Complaint*, ¶¶ *15-21*. Daniel W. Sanders (hereinafter "Decedent") sustained fatal injuries after he was struck by a bus while riding his bicycle along the roadway. *Id. at ¶ 23.* Plaintiff, executrix of Decedent's estate, filed a Complaint on November 8, 2005 naming Erie Metropolitan Transit Authority (hereinafter "EMTA") and David M. Justka as Defendants. The complaint alleged that EMTA and Justka, the bus driver, were negligent. *Complaint*, ¶¶ *11-13*. On or about November 30, 2005, Defendants EMTA and Justka filed an answer arguing that they were entitled protection under the Political Subdivision Tort Claims Act and Plaintiff's claims were barred by comparative negligence. *Defendant EMTA's Answer.* On July 26, 2007, Defendants EMTA and Justka filed a Motion to Compel Settlement arguing that the Tort Claims Act limited recovery. Plaintiff's reply indicated that there were other culpable tortfeasors she was planning to join in the action and therefore settlement was not appropriate. On September 14, 2006, this Court denied Defendants EMTA and Justka's Motion to Compel Settlement. *Order of Connelly, J., Sept. 14, 2006.*

On or about July 16, 2007, Plaintiff filed her First Amended Complaint adding Defendants United Oil, Balweb, Thomas Creal, Robert Rabell, and the Pennsylvania Department of Transportation (hereinafter "PennDOT"). *Plaintiff's First Amended Complaint.* The Complaint alleged that Decedent's injury and subsequent death was proximately caused by the negligence and culpable conduct of Defendants. *Id. at ¶ 46.* Specifically, Plaintiff alleged that Defendants United Oil and Balweb

knew of a dangerous condition involving the driveway of the Kwik-Fill Service Station at or near where the accident occurred and took no action to bring the entrance into compliance with the regulations promulgated by PennDOT. *Id. at ¶ 62.* Plaintiff also alleged that Defendants United Oil and Balweb knew of or invited the use of the service station by the EMTA buses enhancing an already dangerous condition. *Id. at ¶ 63.* Plaintiff argues she is entitled to punitive damages because the conduct of Defendant United Oil and Balweb was outrageous and constituted gross, wanton, and reckless disregard for the rights and safety of the traveling public. *Id. at ¶¶ 64-71.*

Defendant United Oil filed Preliminary Objections to Plaintiff's First Amended Complaint on September 6, 2007 asking for a demurrer because the PennDOT regulation cited by Plaintiff was inapplicable to them as they were not the owner of premises, and as a tenant could not get a permit as required by the regulation. *United Oil's Preliminary Objections to Amended Complaint.* On September 20, 2006, Defendant Balweb filed Preliminary Objections to Plaintiff's First Amended Complaint arguing that because they were an owner out of possession and because the accident occurred on the highway, they were not liable. *Balweb's Preliminary Objections to Amended Complaint.* Defendants Balweb and United Oil also argued the punitive damages claim should be dismissed. Finally, Defendant Balweb argues Paragraph 66 of Plaintiff's Complaint be struck because of its lack of specificity.

On September 27, 2007, Plaintiff filed her Second Amended Complaint amending Paragraphs 13 and 22 and qualifying the location of the accident. *Plaintiff's Second Amended Complaint, ¶¶ 13 and 22*. Plaintiff also filed replies to the Preliminary Objections of Defendants Balweb and United Oil arguing that both entities are subject to the PennDOT regulation despite their assertions otherwise. *Plaintiff's Brief in Opposition to Preliminary Objections of Defendant United Oil.* Defendants Balweb and United Oil both filed new sets of Preliminary Objections incorporating their objections to the First Amended Complaint with their objections to the Second Amended Complaint. In addition to its earlier objections, Defendant United Oil argues that Plaintiff used her Second Amended Complaint to maneuver around case law and that Paragraph 22 of the Second Amended Complaint violates the statute of limitations because it changes the location of the accident. *Defendant United Oil's Brief in Support.* Plaintiff filed a reply to United Oil's Preliminary Objections to her Second Amended Complaint on December 11, 2007 arguing Paragraph 22 was properly pled in a timely matter as the amendment serves only to clarify what was originally there. *Plaintiff's Reply to Preliminary Objections.* The Court must analyze these issues in light of the applicable Pennsylvania law.

Findings of Law

Rule 1028 of the Pennsylvania Rules of Civil Procedure notes that preliminary objections may be filed by any party to any pleading. *Pa. R.C.P. 1028.* All preliminary objections shall be raised at one time and shall state specifically the grounds relied upon and may be inconsistent. *Id.* In ruling on preliminary objections, a court must accept as true all well-pled facts which are relevant and material, as well as all inferences reasonably deducible therefrom. *Texas Keystone, Inc. v. Pa. Dept. of Conservation and Natural Res.,* 851 A.2d 228 (Pa. Cmwlth. 2004).

Preliminary objections which result in the dismissal of a cause of action should be sustained only in cases that are [so] 'clear and free from doubt' that the plaintiff will be unable to prove legally sufficient facts to establish any right to relief. *Bower v. Bower,* 611 A.2d 181, 182 (Pa. 1992). All doubts in this determination should be resolved by overruling the preliminary objections. *National Check v. First Fidelity Bank,* 658 A.2d 1375, 1377 (Pa. Super. 1995).

The question presented by a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. *Eckell v. Wilson,* 597 A.2d 696, 698 (Pa. Super. 1991). A demurrer should be sustained only in cases where the plaintiff has clearly failed to state a claim on which relief may be granted. *Id.* A demurrer should not be sustained if there is any doubt as to whether the complaint adequately states a claim for relief under any theory. *Id.* Only the factual allegations in a complaint are considered to be true for the purposes of a demurrer, not the pleader's conclusions of law. *Id.*

The Court will now address each of Defendant United Oil and Defendant Balweb's Preliminary Objections in light of the applicable Pennsylvania law.

1. Demurrer for failure to state a claim

Defendants United Oil and Balweb's first Preliminary Objection[1] avers that the grant of a demurrer is proper because Plaintiff failed to set forth a cause of action recognized at law against Defendants. *Defendant Balweb's Preliminary Objections to Plaintiff's Second Amended Complaint, ¶ 1; Defendant United Oil's Preliminary Objections to Plaintiff's Second Amended Complaint.* Defendant Balweb also argues that Chapter 441.3 of the Pennsylvania Code does not apply to it because the statute is not directed at them. *Defendant Balweb's Preliminary Objections, ¶ 2.*

Defendant United Oil avers that Chapter 441.3 of the Pennsylvania Code is not applicable to the driveway at issue because the statute cannot be retroactively applied. *Defendant United Oil's Preliminary Objections,*

[1] While Defendants United Oil and Balweb have each filed separate Preliminary Objections to Plaintiff's Complaints, they have both incorporated the objections of the other in their own objections.

¶¶ *13-14.* Specifically, Defendant United Oil notes that the driveways at issue are not in violation of the code because they were already existing and in no way altered after PennDOT constructed a nearby turning ramp in 1991. *Id. at ¶ 11*. However, Defendant cites no case law in support of this premise. Plaintiff avers that Defendants' argument that the regulations do not apply retroactively has been rejected by the Commonwealth Court. *Plaintiff's Brief in Opposition to Preliminary Objections of Defendant United Oil, p. 4.*

Chapter 441.3 of the Pennsylvania Code reads:

> (a) *General rule.* No driveway, local road or drainage facility or structure shall be constructed or altered within State highway right-of-way and no drainage facility of the Department may be altered or connected onto without first obtaining a permit from the Department. A permit may not be required for maintenance. ...
>
> (d) *When to submit applications.* Permit applications shall be submitted prior to the construction of any building which the proposed driveway will serve to assure that the driveway can be constructed in accordance with this Chapter.

67 Pa.C.S.A. § 441.3.

Plaintiff argues Defendant's retroactivity argument was overturned by the Commonwealth Court in 1986 in *Commonwealth, Department of Transportation v. Longo,* 510 A.2d 832 (Pa. Cmwlth. 1986). In *Longo,* the court noted it is well settled the Commonwealth, under its general police power, may restrict or even prohibit vehicular access to and from abutting property in order to promote and protect public health, safety and welfare. *Commonwealth, Dept. of Transp. v. Longo,* 510 A.2d 832 (Pa. Cmwlth. 1986) *citing, Hardee's Food Systems v. Department of Transportation*, 434 A.2d 1209 (Pa. Super. 1981). Moreover, with regard to private driveways, the Supreme Court of Pennsylvania has stated that:

> [T]he public authorities have the undoubted right to regulate the manner of the use of driveways by adopting such rules and regulations, in the interest of public safety, as will accord some measure of access and yet permit public travel with a minimum of danger. The rules and regulations must be reasonable, striking a balance between the public and the private interest. The abutter cannot make a business of his right of access in derogation of the rights of the traveling public. He is entitled to make only such use of his right of access as is consonant with traffic conditions and police requirements that are reasonable and uniform.

Wolf v. Department of Highways, 220 A.2d 868, 871, (Pa. 1966).

The *Longo* Court held, as Plaintiff notes, "[c]learly, the rules and regulations promulgated by the Commonwealth may be applied retroactively, because persons hold their property subject to valid police regulations, made, and to be made for the health and comfort of the people." *Longo,* 510 A.2d 832 at 835. The *Longo* Court also held the fact that a property's present dangerous condition arises only from past activities does not affect the appropriateness of invoking the police power to dispel that immediately dangerous condition. *Longo,* 510 A.2d 832 at 834. Therefore, the Court finds that Defendant United Oil's first argument in support of demurrer is contradicted by established precedent and therefore of no merit.

Defendant United Oil's second argument in favor of a demurrer notes the code section is inapplicable to it because Defendant United Oil is not the owner of the premises and has never received or been transferred any permit. *Defendant United Oil's Brief in Support, p. 5.* Similarly, Defendant Balweb argues that as an owner out of possession it is not responsible for the condition of the property and therefore cannot be held liable for torts that occur on the property. *Defendant Balweb's Brief in Support, p. 6.* Plaintiff argues that the fact that Defendant United Oil did not own the premises is irrelevant because of the definition of the word "own" in 67 Pa.C.S.A. § 441.1. *Plaintiff's Brief in Opposition, p. 6.* Plaintiff also argues that Defendant United Oil applied for the building permit in 1995 for the construction of Kwik-Fill/Red Apple and at that time held itself out as the owner. *Plaintiff's Brief in Opposition, Exhibit D.*

67 Pa. C.S.A. § 441.1 defines "own" as "to hold title to land and or building or be a tenant in a lease that will not terminate within fifteen years of the permit issuance date." *67 Pa.C.S.A. § 441.1.* This definition appears to signify that both Defendants United Oil and Balweb could be considered "owners" under the statute.[2] Plaintiff argues that Defendant Balweb should also be held liable because whether or not they were an owner out of possession at the time of the accident is irrelevant. *Plaintiff's Brief in Opposition to Defendant Balweb's Preliminary Objections, p. 18.* Defendant Balweb argues that under common law as recognized by courts of the Commonwealth, it is the tenant who is in possession of the property that is responsible for the condition of the property. *Defendant Balweb's Brief in Support, p. 7.*

Defendant is correct that a tenant in possession is typically responsible

[2] The property where the Kwik-Fill/Red Apple store now exists is comprised of two parcels of land. Defendant United Oil purchased Parcel No. 1 in 1969, but conveyed it to J. Robert Baldwin in 1970, who then leased it back to Defendant United Oil that same year. *Plaintiff's Brief in Opposition to Defendant Balweb's Preliminary Objections, pp. 19-20; Exhibit H.* In 1995, Defendant Balweb acquired Parcel No. 2, which is immediately northeast of Parcel No. 1 and J. Robert Baldwin conveyed Parcel No. 1. to Defendant Balweb. *Id.* The lease of Parcel No. 2. to Defendant United Oil was signed in 1995, shortly after J. Robert Baldwin assigned his interest in lease for Parcel No. 1 to Defendant Balweb. *Id.*

for the condition of the property, however, Defendant Balweb fails to consider the public-use exception that Pennsylvania courts have long recognized to the general rule. *See, Jones v. Three Rivers Management Corp.*, 394 A.2d 546, (Pa. 1978) (holding an injured spectator at a baseball game had a cause of action against the non-possessory owner of a sports stadium); *Yarkovsky v. The Caldwell Store, Inc.*, 151 A.2d 839, 842 (Pa. Super. 1959) (holding that the lessees as well of the owners of a department store were liable for the injuries of an invitee); *Jones v. Levin*, 940 A.2d 451, 457 (Pa. Super. 2007) (holding only the lessee was responsible for an injury to an employee of the lessee, but affirming the public-use exception for members of the general public); *Restatement (Second) of Torts § 359*.[3] The Court finds the public-use exception applies and Defendant Balweb may be held liable. Plaintiff avers that Balweb knew of the condition of the Kwik-Fill/Red Apple property and that the property would be used for the admission of the public, Decedent was indeed a member of the public and therefore all of the elements of the public-use exception have been met.

Defendant United Oil also argues that Plaintiff has failed to show that the conduct alleged is the proximate cause of Decedent's injury. In her Amended Complaint, Plaintiff asserts the "existence, layout, and design of the said driveway at the northern end of the said turning ramp created confusing, deceptive, unnecessary and unreasonably unsafe points of traffic conflict, and unreasonably unsafe and confusing points of decision for motorists, cyclists, and the traveling public, including Plaintiff's Decedent." *Amended Complaint, ¶ 34.*

In trying to recover for an action in negligence, a party must prove four elements. They are: (1) a duty or obligation recognized by law (2) a breach of the duty (3) *causal connection between the actor's breach of the duty and the resulting injury.* (4) actual loss or damage suffered by complainant. *Reilly v. Tiergarten, Inc.*, 633 A.2d 208, 210 (Pa. Super. 1993) (emphasis added). Proximate causation is defined as a wrongful act which was a substantial factor in bringing about the plaintiff's harm." *Dudley v. USX Corp.*, 606 A.2d 916, 923 (Pa. Super. 1992) (citations omitted). Proximate cause does not exist where the causal chain of events resulting in plaintiff's injury is so as to appear highly extraordinary that the conduct could have brought about the harm. *Id.* The substantial factor

[3] Section 359 of the Restatement (Second) of Torts states: A lessor who leases land for a purpose which involved the admission of the pubic is subject to liability for physical harm caused to persons who enter the land for that purpose by a condition of the land existing when the lessee takes possession, if the lessor: (a) knows or by the exercise of reasonable care could discover that the condition involves an unreasonable risk of harm to such persons, and (b) has reason to expect that the lessee will admit them before the land is put in safe condition for their reception, and (c) fails to exercise reasonable care to discover or to remedy the condition, or otherwise to protect such persons against it.
Restatment (Second) of Torts § 359.

test for determining whether a party's negligence was the proximate or legal cause of another's injury is set forth in *Wisniewski v. Great Atlantic & Pacific Tea Co.:*

> This test provides that the actor's negligent conduct is a legal cause of harm to another if:
>
> (a) his conduct is a substantial factor in bringing about the harm, and
>
> (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in harm.

Wisniewski v. Great Atlantic & Pacific Tea Co., 323 A.2d 744, 748 (Pa. Super. 1974) Here, Plaintiff alleges that the driveway and its construction combined with the fact that Defendants allowed or invited buses into their facility to refuel was a substantial factor in bringing about Decedent's death. Therefore, accepting the facts as pled, Plaintiff has showed the conduct of Defendants could well be the proximate cause of Decedent's death.

Defendants' next argument in favor of a demurrer is that they breached no duty to Decedent as Decedent was never on premises occupied by either Defendant at any time during or prior to the accident. Paragraph 22 of Plaintiff's Second Amended Complaint states "the impact/collision between the front of the said EMTA bus and the person of Plaintiff's Decedent occurred entirely on the Kwik Fill/Red Apple premises at a point several feet east of the western property line of Kwik Fill/Red Apple." While both Defendants dispute the addition of the sentence into the Complaint, the Court finds no problem with the information. This sentence, as discussed below in Preliminary Objection IV, was properly pled and therefore the Court must accept as true the fact that Decedent was on the premises when the accident occurred.

Defendant Balweb and United Oil's final argument in favor of a demurrer is that they are not liable for accidents or injuries occurring on the state highway and the Pennsylvania Code does not establish a private cause of action for adjacent property owners. *Defendant Balweb's Preliminary Objections, ¶¶ 3-4.* Plaintiff contends Section 286 of the Restatement (Second) of Torts, which was adopted in Pennsylvania in the case of *Majors v. Broadhead Hotel*, does establish an applicable standard of conduct. *Majors v. Broadhead Hotel*, 205 A.2d 873 (Pa. 1965); *Plaintiff's Brief in Opposition to Defendant Balweb's Preliminary Objections, p. 15.*

Section 286 of the Restatement (Second) of Torts reads:

> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part (a) to protect a class of persons which

> includes the one whose interest is invaded, and (b) to protect the particular interest which is invaded, and (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results.

Restatement (Second) of Torts §286.

Therefore, in order to determine whether Section 286 applies, the Court must ascertain the purpose of the PennDOT regulations, namely *67 Pa. C.S.A. §441.3*. The purpose section of Title 67, Chapter 441 states "[i]t is in the public interest to regulate the location, design, construction, maintenance and drainage of access driveways, local roads, and other property within State highway right-of-way for the purpose of security, economy of maintenance, preservation of proper drainage and safe and reasonable access." *67 Pa. C.S.A. §441.2*. Because the code itself denotes that the purpose of the statute is for security and safe and reasonable access and because the section deals specifically with traffic and highway safety as related to driveways, it appears that one of the purposes of the statute was to protect the traveling public from injuries or death. Decedent was indeed a member of the traveling public and died as a result of a traffic collision. Therefore, the elements of Section 286 of the Restatement (Second) of Torts have been met and a standard of conduct can be established.

The next inquiry is whether the Pennsylvania Code section creates a private cause of action. Defendant Balweb argues that the Pennsylvania Supreme Court in *Estate of Witthoeft v. Kiskaddon*, held that a statute requiring physicians to report patients' vision problems to the Department of Transportation did not expressly or impliedly create a private cause of action and the doctor could not be held liable because the victim was not foreseeable. *Estate of Witthoeft v. Kiskaddon*, 733 A.2d 623 (Pa. 1999). The *Witthoeft* case involved a bicyclist who was killed by a motorist who had been previously diagnosed with poor vision by an ophthalmologist. *Id.*

The *Witthoeft* Court held that a private cause of action was not created by the code section because the plaintiff was not in the class for whose benefit the statute was created and there was no clear legislative intent that a private remedy was created. *Id.* However, the instant case presents a different set of facts and a different section of the Pennsylvania Code. Here, the purpose section of the statute notes that it was created for highway safety and security. It seems that the regulation is designed to prevent accidents from occurring where driveways abut highways. Plaintiff argues that the accident occurred at the entrance or driveway of the Kwik-Fill/Red Apple station. Therefore, the Decedent is a member of the class for whom the statute was created.

Moreover, it is entirely consistent with the regulation's purpose for

Plaintiff to have a remedy against Defendants for violation of the statute. Here, Plaintiff avers that it was Defendant United Oil and Balweb's noncompliance with the statute that proximately caused the death of Decedent. Therefore, it would be consistent with the statute's underlying goal of public safety to provide Plaintiff with some type of recourse. Because the Court is constrained to grant a demurrer only when it is exceedingly clear that no recovery is possible, Defendants' Preliminary Objection in the nature of a demurrer is overruled.

II. Demurrer as to Punitive Damages Claim

Defendants' next preliminary objection avers that Plaintiff's claim for punitive damages should be stricken as a matter of law as it fails to set forth a cause of action on which punitive damages can be claimed. *Defendant Balweb's Preliminary Objection to Plaintiff's Amended Complaint, ¶¶ 6-9; Defendant United Oil's Preliminary Objections to Plaintiff's Amended Complaint, ¶¶ 56.* Plaintiff avers the allegations contained in her Second Amended Complaint are more than sufficient to support a claim for punitive damages. *Plaintiff's Brief in Response to Defendant United Oil's Preliminary Objections, p. 12; Plaintiff's Brief in Response to Defendant Balweb's Preliminary Objections, p. 22.*

In 1985, the Pennsylvania Supreme Court in *Martin v. Johns Manville Corp.,* noted that with regard to punitive damages the Commonwealth has adopted the Restatement (Second) of Torts. *Martin v. Johns Manville Corp.,* 494 A.2d 1088 (Pa. 1985). Section 908 of the Restatement provides:

> (1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future; (2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

Restatement (Second) of Torts, §908 (1979).

The *Martin* court held that a punitive damages claim must be supported by evidence sufficient to establish that (1) defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) he acted, or failed to act, as the case may be, in conscious disregard of that risk. *Martin,* 494 A.2d at 1097-98.

Plaintiff's Second Amended Complaint avers that Defendants United Oil and Balweb "did in fact know and/or should have known that the driveway entrance here involved was not in compliance with PennDOT's

duly promulgated regulations" and Defendants knew or should have known that the driveway created "an extremely dangerous condition involving an unreasonable risk of harm to the traveling public, including Plaintiff's Decedent." *Plaintiff's Second Amended Complaint, ¶¶ 60, 68.* Plaintiff also alleges "[i]n spite of its considerable knowledge, experience, and/or expertise... [Defendants] either by conscious decision or lack of concern for the safety of the traveling public, did permit the dangerous driveway condition to continue to exist and ... to be exacerbated by increased traffic volume." *Id. at ¶¶ 62, 70.* Moreover, Plaintiff avers that the dangerous condition of the roadway was further exacerbated and enhanced and the risk of harm therefrom increased by Defendant United Oil by their action in permitting, consenting to, and/or inviting the use of the driveway by EMTA buses/drivers. *Id. at ¶ 63.* Plaintiff alleges that the action/inactions of the Defendants "were outrageous and constituted gross, wanton, and/or reckless disregard for the rights and safety of the traveling public, including Plaintiff's Decedent." *Id. at ¶¶ 64, 71.*

Defendant United Oil argues that punitive damages are an "extreme remedy" available only in the most exceptional matters. *Defendant United Oil's Brief in Support of Preliminary Objections, p. 17.* Specifically, Defendant United Oil argues that Plaintiff's claim "breaks down to one of premises liability" and none of Plaintiff's allegations establish that Defendant United Oil has acted in an outrageous fashion due to either its evil motive or reckless indifference to others. *Id. at p. 21.*

The Court must assess whether (1) Defendants had a subjective appreciation of the harm to which Decedent was exposed and (2) Defendants acted or failed to act in conscious disregard of that risk. Here, Defendants were sophisticated business entities with arguable experience in the area of traffic ingress and egress and general safety. There is little doubt that both Defendants had "a subjective appreciation" that operating a fueling station on a busy highway could expose any similarly situated Plaintiff to harm. Moreover, the proximity of the driveway to a busy entrance ramp and Defendant United Oil's alleged knowledge that EMTA buses were using the station magnifies such appreciation. Therefore, accepting all well-pled facts as true, Defendant Balweb and United Oil's Preliminary Objection in the form of a demurrer to strike Plaintiff's punitive damages claim is overruled.

III. Motion to Strike

Defendant Balweb's final objection to Plaintiff's Second Amended Complaint argues that the Complaint includes vague, irrelevant, and prejudicial allegations and specifically takes issue with Paragraph 66. *Defendant Balweb's Preliminary Objection to Plaintiff's Amended Complaint, ¶ 12.* Defendant asks that Paragraph 66 be struck. *Id.* Plaintiff avers that Paragraph 66 is relevant to the punitive damages issue and serves to demonstrate that Defendant Balweb is a sophisticated,

experienced, knowledgeable enterprise.

Paragraph 66 of Plaintiff's Second Amended Complaint reads:

> It is believed and therefore averred that at all times relevant hereto, that Balweb, Inc. and its affiliates did own, lease, develop, maintain, construct, design, manage, control, and/or maintain residential and/or commercial properties in multiple jurisdictions containing hundreds of thousands/millions of square feet.

Plaintiff's Second Amended Complaint, ¶ 66.

Defendant Balweb cites no statutes or case law to support its contention that Plaintiff's averments contain vague and prejudicial statements. The Court can only infer Defendant Balweb is relying on Pa.R.C.P. 1028(a)(2-3) to make its argument. Pennsylvania Rule of Civil Procedure 1028(a)(2) states that a preliminary objection may be filed due to the "inclusion of scandalous or impertinent matter[s]" while Pennsylvania Rule of Civil Procedure 1028(a)(3) notes that a preliminary objection may be filed because of insufficient specificity in a pleading. *Pa.R.C.P. 1028(a)(2) and (3).* In *Rambo v. Green*, the Superior Court held the pertinent question under Pa.R.C.P. 1028(a)(3) is whether the complaint is sufficiently clear to enable the defendant to prepare his defense, or whether the plaintiff's complaint informs the defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may know without question upon what grounds to make his defense. *Rambo v. Green*, 906 A.2d 1232, (Pa. Super 2006).

Here, Paragraph 66 appears to be sufficiently clear so that Defendant Balweb can formulate an answer and/or prepare a defense. Moreover, as Plaintiff indicates in her reply, Defendant Balweb is indeed a sophisticated business enterprise and as such the allegations in Paragraph 66 appear to have a basis in truth and by including such information in her pleadings, Plaintiff appears in no way to be including scandalous or impertinent material. Therefore, Defendant Balweb's Preliminary Objection to Paragraph 66 of Plaintiff's Second Amended Complaint is overruled.

IV. Failure of Pleading to Conform to Law

Defendant United Oil's final Preliminary Objection argues that Paragraph 22 of Plaintiff's Second Amended Complaint should be struck pursuant to Pa.R.C.P. 1028(a)(2) for failure to conform to law. Defendant argues the sole purpose of the amendment of Paragraph 22 was to "manufacture some form of liability against Defendant." *Defendant United Oil's Preliminary Objections to Plaintiff's Second Amended Complaint, ¶ 68.* Plaintiff avers that the amendments to Paragraph 22 of her Complaint only serve to clarify the original language already contained in the original and amended complaints. *Plaintiff's Supplemental Brief in Response to Defendant United Oil's Preliminary*

Objections, p. 3. Plaintiff argues that even without that amendment, she had still clearly pled her action against Defendant United Oil and but for the location of the driveway, the accident resulting in the Decedent's death would never have occurred. *Id. at p. 4.*

Defendant United Oil asserts in its Brief in Support of Preliminary Objections that "[n]early two years and two months after the incident, Plaintiff is for the first time alleging an entirely new theory of premise liability against Defendant by alleging that the incident occurred on the Premises leased by Defendant [United Oil]." *Defendant United Oil's Brief in Support of Preliminary Objections, p. 22.* Defendant United Oil also argues that Plaintiff's attempt to plead an entirely new cause of action more than two years after the incident is in clear violation of the law as it is time-barred. *Id. at p. 23.*

The statute of limitations applicable to both wrongful death and survival actions appears at *42 Pa.C.S. § 5524(2*) and provides that an action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another must be commenced within two years. The two-year period begins to run from the time the cause of action accrued. *42 Pa.C.S. § 5502(a).*

Whether the statute has run on a claim is usually a question of law for the trial judge, but where the issue involves a factual determination, the determination is for the jury. *Smith v. Bell Telephone Co. of Pennsylvania,* 153 A.2d 477, 481 (Pa. Super. 1959). Instantly, there is no factual dispute relative to the defense of statute of limitations. Plaintiff initiated the instant case by filing a Complaint on November 8, 2005, slightly more than three months following the accident that resulted in the death of Decedent, Plaintiff subsequently filed an amended Complaint on July 16, 2007. *Plaintiff's First Amended Complaint.* Therefore, Plaintiff's initial and first amended complaints are clearly not time-barred. The issue is simply whether Plaintiff's Second Amended Complaint, filed September 27, 2007, alleges a new theory of liability and as such is time-barred or merely qualifies other allegations made in the original and amended complaints and should be allowed.

Paragraph 22 of Plaintiff's Amended Complaint states:

> [a]t the time and place aforesaid, the bus owned by Erie Metropolitan Transit Authority and operated by David M. Justka, which had been proceeding in a southerly direction on Sterrettania Road, then proceeded to make a left hand turn by use of the southernmost driveway of Kwik Fill/Red Apple into the Kwik Fill/Red Apple premises. In so doing, the said bus drove directly into the path and person of Plaintiff's Decedent even though he was clearly in view and was lawfully using that portion of the roadway at, in, or immediately adjacent to

> the said southernmost driveway entrance to Kwik Fill/Red Apple.

Plaintiff's Amended Complaint, ¶ 22.

The corresponding Paragraph of Plaintiff's Second Amended Complaint reiterates the above paragraph, but adds the following sentence: "It is further believed and therefore averred that the impact/collision between the front of the said EMTA bus and the person of Plaintiff's Decedent occurred entirely on the Kwik Fill/ Red Apple premises at a point several feet east of the western property line of Kwik Fill/Red Apple." *Plaintiff's Second Amended Complaint, ¶ 22.*

In general, amendments to pleadings are liberally allowed, but an amendment introducing a new cause of action will not be permitted after the statute of limitations has run in favor of the defendant. *Laursen v. General Hospital of Monroe City,* 431 A.2d 237 (Pa. 1981), *compare Vincent v. Fuller Co.,* 616 A.2d 969 (Pa. 1992). However, if the proposed amendment does not change the cause of action, but merely amplifies that which has already been averred, it should be allowed even though the statute of limitations has already run. *Schaffer v. Larzelere*, 189 A.2d 267, 270 (Pa. 1963).

Here, it appears that Plaintiff's amendment to her original and Amended Complaint "merely amplifies that, which has already been averred." *Id.* at 270. She pled in her original and Amended Complaints that the incident that resulted in the death of Decedent occurred "at, in, or immediately adjacent to the said southernmost driveway entrance to Kwik Fill/Red Apple." Therefore, the Court finds that Plaintiff was merely amplifying her Complaint and not "attempting to manufacture some sort of liability against Defendant" as Defendant United Oil avers. Defendant United Oil's Preliminary Objection to Paragraph 22 of Plaintiff's Second Amended Complaint is overruled.

Therefore, for the aforementioned reasons Defendants United Oil and Balweb's Preliminary Objections to Plaintiff's Complaint are overruled.

ORDER

AND NOW, TO-WIT, this 7th day of August, 2008, for the reasons set forth in the foregoing opinion, it is hereby **ORDERED** that Defendants United Oil Company and Balweb's Preliminary Objections are **OVERRULED.**

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

AXEL GARDNER a/k/a AXELL GARDNER and AUDREY GARDNER a/k/a K. AUDREY GARDNER, his wife, Plaintiffs,

v.

CHARLES GARDNER, Defendant

REAL ESTATE / JOINT TENANCY / PARTITION

Real estate owned as joint tenants with the right of survivorship may be severed if anyone of the four unities (interest, time, title or possession) is destroyed.

REAL ESTATE / JOINT TENANCY / PARTITION

A joint tenancy in real estate, owned with the right of survivorship, is severable by a voluntary or involuntary act of either of the parties.

REAL ESTATE / JOINT TENANCY / PARTITION

Each joint owner of real estate has the absolute right to partition property, but can enter into a binding agreement (expressed or implied) to restrict partition; this intention to restrict free alienation of the real estate must be clear.

REAL ESTATE / JOINT TENANCY / PARTITION

Where there was no express agreement prohibiting partition and no overwhelming evidence of an implied agreement against partition, partition of the property was appropriate.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 60062-2003

Appearances: John W. McCandless, Esquire, Attorney for Plaintiffs
Neal R. Devlin, Esquire, Attorney for Defendant

OPINION

Connelly, J., July 21, 2008

This matter is before the Court pursuant to Axel and Audrey Gardner's (hereinafter "Plaintiffs") Petition to Show Cause Why the Properties Should Not Be Partitioned and Charles Gardner's (hereinafter "Defendant") response. A hearing was held before this Court on August 8, 2007 at which the parties were directed to file written arguments as well as proposed findings of fact.

Nature of the Case

This case stems from an alleged property dispute involving two parcels of land originally belonging to Kenneth and Elizabeth Gardner, the Plaintiff Axel Gardner's parents and Defendant's grandparents. *Complaint in Equity, ¶¶ 5-9.* The properties at issue in this matter, the Homestead and Comer Road Farms, have been used together to operate a dairy farm for several decades. *Hearing Transcript, pp. 28-29.*

Kenneth Gardner's will stated that in the event that his wife Elizabeth Gardner predeceased him, the properties would pass to his son, Plaintiff Axel Gardner, and his grandson, Defendant Charles Gardner, in equal shares. *Plaintiff's Proposed Findings of Fact, ¶ 7; Will of Kenneth Gardner.* However, Kenneth Gardner predeceased Elizabeth Gardner. *Hearing Transcript, pp. 28-29.* Upon Kenneth Gardner's death in 1978, Elizabeth Gardner became sole owner of the properties in question. *Defendant's Proposed Findings of Fact, ¶¶ 3-4.* She owned the properties as a tenant in the entirety with her husband and as such became sole owner upon his death. *Id.*

In 1981, Elizabeth Gardner, transferred her sole interest in the properties by quitclaim deeds to Plaintiffs Axel and Audrey Gardner as tenants by the entirety. The deeds were recorded on January 6, 1992 at Book 1444, pp. 213 and 216. *Plaintiffs' Proposed Findings of Fact, ¶ 4.* Defendant testified that he understood that his grandfather, Kenneth Gardner, intended that Charles and Axel would own the farms together and the remainder would pass on to the sole survivor. *Hearing Transcript at pp. 30, 34.*

In 1982, after the property transfer, Plaintiffs' attorney prepared a Contract Not to Amend Reciprocal Wills. *Plaintiff's Proposed Findings of Fact, ¶ 15; Exhibit B.* According to the agreement, Plaintiffs agreed that they would each maintain a will providing for the transfer of the properties to Defendant in the event the other were not alive. *Defendant's Proposed Findings of Fact, ¶ 16; Exhibit B.* Defendant failed to sign the contract and instead had his attorney, Herbert Johnson, prepare a deed granting a present interest in the properties as a joint tenant with rights of survivorship. *Hearing Transcript, Exhibit C.* This deed was subsequently signed by all parties on August 2, 1983. *Id.* Defendant never signed the Contract Not to Amend Reciprocal Wills. *Plaintiffs' Proposed Findings of Fact, ¶ 10; Hearing Transcript, p. 40.* Plaintiff Audrey Gardner testified that her primary intent in executing the Contract Not to Amend Reciprocal Wills and the 1983 deeds was to avoid conflict with Defendant. *Hearing Transcript, pp. 16, 18, and 25-26.*

The parties acted consistently with the terms of this deed for more than two decades and jointly farmed the properties until the early 1990's. *Hearing Transcript, pp. 18-19.* At times when the properties were used for things other than farming, such as the sale of a portion of the Comer Road property, the parties acted together and shared equally in any and all proceeds. *Defendant's Proposed Findings of Fact, ¶ 28; Hearing Transcript, pp. 35-36.*

Defendant testified he paid all property taxes on the properties and continued to maintain the land with his own moneys. *Hearing Transcript, pp. 19, 37.* Defendant and his wife reside on the Homestead property. *Hearing Transcript, p. 10.* Testimony also indicated that Plaintiff Axel

Gardner has not farmed the properties since the early 1990's and Plaintiffs have not received any of the proceeds from the farm. *Id. at pp. 18-19.*

The instant action began when Plaintiffs filed a Complaint in Equity on September 10, 2003 arguing that Plaintiffs and Defendant have an undivided one-half interest in the land as tenants in common and asked that it be partitioned as such. *Complaint in Equity, ¶¶ 6-9.* Defendant subsequently submitted an Answer and New Matter alleging that a joint tenancy with right of survivorship was created by deed in 1982 and because it was coupled with an interest could not be severed by the Plaintiffs. *Defendant's Answer, ¶¶ 10-18.* Defendant also asserts Plaintiffs' claim is barred as a result of their material breach of a contract not to amend reciprocal wills. *Id.* Plaintiffs argue in their Reply to New Matter, that any such contract was never formed because the document lacked sufficient consideration. *Plaintiffs' Reply to New Matter, ¶ 10.*

Plaintiffs filed a motion for partial judgment on the pleadings that this Court subsequently denied on May 26, 2004. During discovery, the Court granted a motion to stay a tax sale on the property. Plaintiffs next filed a motion to show cause as to why the land in question should not be partitioned. Defendant opposed. A hearing was held on August 8, 2008 before this Court at which testimony was given by John Dunn, Plaintiff Audrey Gardner, Defendant, and Herbert Johnson.

Defendant argues that under the contract drafted in 1982, Plaintiffs, in consideration of Defendant's work on the farms agreed not to revoke, amend or alter their respective wills without the written consent of Defendant. *Defendant's Proposed Findings of Fact, ¶ 11*. Defendant also asserts that the creation of a joint tenancy with right of survivorship by the deed dated August 23, 1982 was in compromise and settlement of a dispute and was coupled by an interest therefore making severance impossible. *Id. at ¶¶ 14-15*. Plaintiffs aver that Defendant never accepted the terms of the Contract Not to Amend Reciprocal Wills and therefore the contract was merely an offer of settlement by Plaintiffs. Plaintiffs argue that because Defendant never agreed to the terms of the contract and executed subsequent deeds with differing terms, said contract was merely an offer of settlement and its terms are null and void. *Plaintiff's Proposed Findings of Fact, ¶¶ 12-13.*

The issue before the Court is whether the Plaintiffs have a right to partition the Homestead and Comer Road Farms. Accordingly, the Court makes the following findings of fact.

Findings of. Fact

1. Elizabeth Gardner executed deeds on October 5, 1981 conveying her sole interest in both properties to Plaintiffs as tenants by the entirety. The deeds were recorded at Book 1444, Pages 213 and 216. *Exhibit A.*

2. Defendant objected to this transfer asserting his understanding that his grandfather, Kenneth Gardner, intended that Defendant and Plaintiff Axel Gardner would own the properties together. *Hearing Transcript, pp. 30, 34.*

3. Plaintiffs had their attorney draw up the Contract Not to Amend Reciprocal Wills in an effort to settle a brewing dispute with the Defendant. *Hearing Transcript, pp. 14-15.*

4. The contract was presented to Defendant in 1982 wherein he declined to sign or assent to it and instead chose to review it with his attorney. *Hearing Transcript, p. 31.*

5. Defendant consulted with his attorney, Herbert Johnson, and concluded that he might have a claim for undue influence against Plaintiffs arising out of the earlier transfer of property from his grandmother, Elizabeth Gardner, to Plaintiffs. *Hearing Transcript, p. 51.*

6. Attorney Johnson then began negotiating with Plaintiffs' attorney, David Devine, to resolve the dispute and attempt an amicable settlement. *Hearing Transcript, pp. 52-53.*

7. On March 23, 1982, Plaintiffs signed the Contract Not to Amend Reciprocal Wills, each agreeing that they would each bequeath the property to Defendant in the event the other were not alive. Defendant never signed the agreement. *Exhibit B.*

8. On August 2, 1983, the parties executed a deed for the properties conveying the land from Plaintiffs to Plaintiff Axel Gardner and Defendant as joint tenants with right of survivorship. The deed was recorded at book 1507, page 146. *Exhibit C.*

9. The deed was prepared by Defendant's attorney with the hopes of "put[ting] the matter to rest." *Hearing Transcript pp. 57-58.*

10. Defendant's attorney, Herbert Johnson, testified that there were no other agreements between he and Plaintiff's Attorney with respect to the properties. *Hearing Transcript, pp. 56-57.*

11. Plaintiff Audrey Gardner testified that her attorney did all of the negotiating with Defendant in respect to the properties. *Hearing Transcript, p. 25.*

12. Defendant did not bring any claim against Plaintiffs arising out of the earlier transfer. *Hearing Transcript p. 23.*

13. The executed deed, which granted Defendant a present possessory interest in the properties, contains terms wholly different from the Contract Not to Amend Reciprocal Wills and supersedes the unsigned contract because it gave Defendant a present interest while

the agreement merely offered a guarantee that Plaintiffs would leave the land to Defendant upon their deaths.

14. Moreover, Defendant's failure to sign the Contract Not to Amend Reciprocal Wills or otherwise assent to the terms contained within it makes the agreement and its terms invalid. *Exhibit B.*

15. Plaintiffs are not in breach of the Contract Not to Amend Reciprocal Wills because the contract was never assented to by Defendant and therefore never properly executed.

16. The deed makes absolutely no mention of any intent for the properties to continue to be operated as a dairy farm or of any prohibition on partition. *Exhibit C.*

17. The testimony, the deed conveying the property to Plaintiff Axel Gardner and Defendant, and the will of Kenneth Gardner all serve to indicate that the parties did originally intend for the properties to remain in the family and pass in equal shares to Plaintiff Axel Gardner and Defendant upon the death of Kenneth Gardner. *Exhibit 4; Will of Kenneth Gardner.*

18. The intent of the parties for the properties to remain in the family and pass to the sole survivor is inherent in every joint tenancy and therefore is alone not indicative of an agreement to limit the right to partition.

19. Defendant presented no other evidence sufficient to establish that an agreement not to partition the lands was ever reached between the parties.

20. Plaintiff Audrey Gardner testified that she and her husband wish to partition the land and become sole owners of the Comer Road Farm because they need the moneys generated by property to pay mounting medical bills. *Hearing Transcript, pp. 10-11*.

21. Plaintiff Audrey Gardner testified she and her husband asked Defendant for the opportunity to generate some income from either timbering or selling some of the property, but Defendant refused. *Hearing Transcript, pp. 10-11*.

22. In 2002, Plaintiff Axel Gardner executed a deed conveying his one-half interest in the properties from himself to Audrey and him. *Hearing Transcript, Exhibit 1*.

23. The purpose of this transfer was to sever the joint tenancy that had existed and to partition the properties.

24. Following the deeds in 2002, the parties presently hold interest to the Homestead and Comer Road Farms as tenants in common in the following shares:

a) Plaintiffs Axel and Audrey Gardner as tenants by the entirety, fifty (50) percent;
b) Defendant Charles Gardner, fifty (50) percent.

25. Because the evidence shows there is no express or implied agreement not to partition the land, the Court finds partition is appropriate.

Conclusions of Law

As a general rule a joint tenancy with right of survivorship may be severed by a tenant if any one of the four unities necessary to its existence is destroyed. These four unities include interest, time, title and possession. *Estate of Kotz*, 406 A.2d 524 (Pa. 1979). A partition action which is taken to judgment is sufficient to sever a joint tenancy with right of survivorship. *Sheridan v. Lucey*, 149 A.2d 444 (Pa. 1959). A joint tenancy in realty with right of survivorship is severable by the act, voluntary or involuntary, of either of the parties. *Id.* For example, where both joint tenants executed an agreement of sale, their joint tenancy with right of survivorship was destroyed. *Yannopoulos v. Sophos*, 365 A.2d 1312 (Pa. Super. 1976). Likewise, where property is sold upon execution of a judgment against one of the joint tenants, an involuntary severance of the joint tenancy results. *In re Estate of Larendon*, 266 A.2d 763 (Pa. 1970)

Partition is a possessory action; its purpose and effect being to give to each of a number of joint owners the possession to which he is entitled his share in severalty. *Bernstein v. Sherman*, 902 A.2d 1276 (Pa. Super. 2006). Generally, each joint owner of real estate has the absolute right to partition property, but joint owners are free to enter agreements restricting right of partition. *Marchetti v. Karpowich*, 667 A.2d 724 (Pa. Super. 1995). An agreement to limit to the right to partition is fully enforceable and can be express or implied, *Shoup v. Shoup*, 364 A.2d 1319 (Pa. 1976).

The Courts of the Commonwealth have consistently held that the alienation of property is "a favorite policy of this Commonwealth." *Etnier v. Pascoe*, 119 A. 406, 408 (Pa. 1923). The intention to restrict this policy of free alienation must be clearly made to appear. *Id.* An agreement to deter partition which is not reasonable in duration is an illegal restraint upon alienation. *Id.* However, since partition is an equitable remedy, partition can be denied where equity demands. *Duffy v. Duffy*, 81 Pa. D&C 366 (C.P. Madison 1951).

In *Vargas v. Brinton*, the Pennsylvania Superior Court held that a farm owned by a couple as joint tenants could be partitioned despite evidence that the surviving tenant was to acquire the farm. *Vargas v. Brinton*, 451 A.2d 687 (Pa Super. 1982). Specifically, the court opined the fact the survivor was to acquire the farm is a standard conclusion about all joint tenancies with rights of survivorship and does nothing to assist the court

in determining whether an agreement not to partition existed. *Id.* at 689.

In *Fuhrman v. Doll*, the Superior Court held a prohibition against partition was implied and a hunting club held in the name of trustees could not be partitioned by a single trustee. *Fuhrman v. Doll*, 451 A.2d 530 (Pa. Super. 1982). The court found the existence of an implied prohibition was evidenced by the club's constitution and by-laws and the actions of the twelve club members "in dealing with each other and the club's property at the inception of the association and during its existence." *Id. at 532.*

The Court finds the instant case to be much closer in similarity to *Vargas* than *Fuhrman.* Here, there was clearly no express agreement prohibiting partition. The 1983 deed conveying the property from Plaintiffs to Axel and Charles Gardner as joint tenants with a right of survivorship is not sufficient to demonstrate that such a prohibition was implied, Moreover, the will of Kenneth Gardner does not state that the lands should not be divided, but instead states that it was his intent for the properties to be owned in equal shares by Plaintiff Axel Gardner and Defendant. Furthermore, there is no indication in the 1983 deed conveying the properties to Plaintiff Axel Gardner and Defendant as tenants that the parties intended the prohibition on partition. Moreover, there is no evidence of any other side or subsequent agreements stating such.

The Court has also considered the actions of the Plaintiffs and Defendant over the past thirty years and found no overwhelming evidence that there was any implied agreement against partition. Just as in *Vargas*, the fact that the surviving owner was to acquire the entire property is not dispositive of such an agreement. In fact, testimony indicates that neither Plaintiff Audrey Gardner or Defendant's attorney were aware of any such side agreements made during negotiations about the property in the 1980's. It is true that both parties treated the land as they had for the previous fifty years and it continued to be operated as a dairy farm both before and after the 1983 deed. However, this alone is not sufficient to demonstrate an implied agreement against partition was ever contemplated.

Therefore, because the evidence fails to show there is an express or implied agreement not to partition the land, the Court finds partition appropriate.

ORDER DIRECTING PARTITION

AND NOW, to-wit, this 21st day of July, 2008, upon hearing of the foregoing Petition, it is hereby Ordered that partition be made of the parcels of real estate bounded and described as follows:

> All that certain piece or parcel of land situate in the Township of Washington, County of Erie and State of Pennsylvania, bounded and

described as follows, to- wit:

Beginning at the South West corner of the within described premises at the intersection of a public road known as the Itley or Ash Corners Road extending in a North and South direction and a public road known as the Draketown Road extending in Easterly and Westerly direction; thence in a Northerly direction along the west line of the Itley or Ash Corners Road to land formerly owned by Martin Brothers; thence Eastwardly along the south line of land formerly of the Martin Brothers to land now or formerly of D. Ghere; thence South along the West line of land now or formerly owned by D. Ghere to the North margin of the Draketown Road; thence West along said Draketown Road to the place of beginning. Being that portion of land lying East of the Itley or Ash Corners Road. Erie County Index No. (45) 4-7-4.

ALSO, all that certain place or parcel of land situate in Washington Township, Erie County, Pennsylvania bounded and described as follows, to-wit:

Commencing at a post in the South line of land formerly of C.P. Gardner; thence South along land formerly of H.P. Gardner two hundred and forty-five (245) feet to a post; thence West along land formerly of H.P. Gardner one hundred fifty-four (154) feet to the center of the said Public Road; thence North along the center of said Public Road two hundred forty-five (245) feet; thence East along the South line of land formerly of C.P. Gardner to the place of beginning, containing about one hundred and thirty (130) square perches of land be the same more or less, having erected thereon a two story frame dwelling house.

ALSO, all that certain piece or parcel of land situate in Washington Township, Erie County, Pennsylvania, bounded and described as follows, to-wit:

Beginning at a point in the center of the road, the Northeast corner of Tract letter "H"; thence along the center of the road East 144.3 rods to a post; thence South by land formerly of Henry Drake thirty-four (34) rods to a point; thence West 144.3 rods to the center of the road; thence North along the center of the road thirty-four (34) rods to the place of beginning, containing thirty-four (34) acres of land, be the same more or less.

Parcel two and three above being Erie County Index No. (45)-9-16-1.

ALSO, all that certain piece or parcel of land situate in the Township of Washington, County of Erie and State of Pennsylvania, bounded

and described as follows, to-wit: Beginning at a post in the southeast corner of land of James Lander; thence north twenty-four and eight-tenths (24.8) perches along land of Chancey Ryan to a post; thence west forty-one (41) perches along said Ryan's land to the margin of the Ellis Road; thence south along said road, twenty-four and eight-tenths (24.8) perches to land of Mary Nicholas; thence east to place of beginning. Containing six (6) acres and fifty-six and eight-tenths (56.8) perches of land, be the same more or less.

ALSO, all that certain piece or parcel of land situate partly in Washington Township and partly in Waterford Township, County of Erie and State of Pennsylvania, bounded and described as follows, to-wit:

Beginning at a post in the northeast corner of land of Irvin P. Ryan; thence east ninety-seven and five-tenths (97.5) perches along land of C.A. Ryan to a post; thence south along land of said C.A. Ryan, twenty-four and eight-tenths (24.8) perches to a post; thence west along lands of I.P. Ryan and Mary Nicholas, ninety-seven and five-tenths (97.5) perches to a post; thence north along land of I.P. Ryan, twenty-four and eight tenths (24.8) perches to the place of beginning. Containing fifteen (15) acres and eighteen (18) perches of land, net measure, be the same more or less.

ALSO, all that certain piece or parcel of land situate in Tract No. 411 of Washington Township, County of Erie and State of Pennsylvania, bounded and described as follows, to-wit:

Beginning at a post, the northeast corner of land of David Ash; thence north one hundred and seven and seven-tenths (107.7) perches to a post; thence east along land of C.A. Ryan, seventy-five and seven-tenths (75.7) perches to a post; thence south along lands of said C.A. Ryan and A.H. Martin, one hundred and seven and seven-tenths (107.7) perches to a post; thence west to the place of beginning. Containing fifty (50) acres and one hundred and thirty (130) perches of land, net measure, be the same more or less.

ALSO all that certain piece or parcel of land situate in Washington Township County of Erie and State of Pennsylvania, bounded and described as follows to-wit:

Bounded on the north by lands of Chancie Ryan and James Lander; on the east by lands of James Duncan; on the south by lands of Jonathan Colvin, and on the west by a public road and lands set off to Mary B. Ore, widow. Containing thirty-eight (38) acres of land, more or less. And also all that certain piece or parcel of land adjoining the above described piece which was set off to Mary B. Ore at the death of her husband, upon which the dwelling house

stood and containing about ten (10) acres more or less. Being the same property described in Deed dated April 4, 1905, and recorded in Erie County Deed Book 154, page 190. Excepting and reserving from the above described pieces of land the following pieces: Ten (10) acres of land, more or less, described in Deed Book 157, page 13; fifteen (15) acres of land more or less, described in Deed Book 188, page 641; eight (8) acres and thirty-four (34) perches of land, and fifteen (15) acres of land more or less, described in Deed Book 313, page 248.

The above described land being Erie County Index No. (45)-3-6-5 and Index No. (47)-15-33-5.

Said real property to be partitioned among the following parties, named in the Complaint, in their respective shares:

1. AXEL GARDNER, a/k/a AXELL GARDNER ("Axel Gardner"), and AUDREY GARDNER, a/k/a K. AUDREY GARDNER ("Audrey Gardner"), as husband and wife of 12560 Draketown Road, Edinboro, Erie County, Pennsylvania 16412: fifty (50%) percent;

2. CHARLES K. GARDNER, an individual of 12441 Draketown Road, Edinboro, Erie County, Pennsylvania 16412: fifty (50%) percent.

The parties shall work to facilitate the Court ordered partition. However, if they cannot agree within a reasonable time, then they shall recommend an impartial third party who shall be appointed to serve as Master, to conduct hearings, to make findings of fact and to report to this Court: the shares to which the Plaintiffs and the Defendant are entitled be set out to them in severalty and that all proper and necessary conveyances and assurances be executed for carrying such partition into effect; but that if the property cannot be divided without prejudice to or spoiling the whole, such proper and necessary sale or sales of the property may be made by such persons and in such manner as the Court may direct; and for such accounting between the parties as is just, proper and equitable.

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

UNIFUND CCR PARTNERS, Plaintiff,

v.

NANCY L. ANDERSON, Defendant

PLEADINGS / PRELIMINARY OBJECTIONS

Defendant filed Preliminary Objections to Plaintiff's Amended Complaint alleging that the Amended Complaint was filed past the court-ordered deadline and without the required documentation attached. Because the Amended Complaint was filed late, the Court dismissed the Amended Complaint without analyzing the sufficiency of any required documentation. As Plaintiff's previous Complaint failed to conform to Pennsylvania Rules, and as the Court dismissed the Plaintiff's Amended Complaint for its lack of timeliness, the Court refused to grant Plaintiff leave to file another Amended Complaint. The Court dismissed Plaintiff's claim against Defendant with prejudice for legal insufficiency of pleading.

PLEADINGS / PRELIMINARY OBJECTIONS

Two or more preliminary objections may be raised in one pleading, may be filed by any party to any pleading, shall be raised at one time, shall specifically state the grounds relied upon, and may be inconsistent. *Pa.R.C.P. 1028(a),(b).* The moving party must file a brief in support of the preliminary objections within thirty (30) days after their filing. *Erie L.R. 1028(c)(1).* The nonmoving party may respond to the preliminary objections either by filing an amended pleading within twenty (20) days, or by filing a brief in opposition within thirty (30) days after service of the preliminary objections. *Pa.R.C.P. 1028(c)(1); Erie L.R. 1028(c)(2).*

PLEADINGS / PRELIMINARY OBJECTIONS

If the Court overrules the preliminary objections, "the objecting party shall have the right to plead over within twenty (20) days after notice of the Court's Order or within such other time as the Court shall fix." *Pa.R.C.P. 1028(d).* If the Court sustains the preliminary objections and allows for the filing of an amended or new pleading, the amended or new pleading must be "filed within twenty (20) days after notice of the Court's Order or within such other time as the Court shall fix." *Id. at 1028(e).* Objections that are made to any of these amended pleadings shall be done so by the filing of new preliminary objections within twenty (20) days after service of the amended pleading. *Id. at 1017(a)(4), 1026(a), 1028(f).*

PLEADINGS / PRELIMINARY OBJECTIONS

The Pennsylvania Supreme Court ruled preliminary objections "should be sustained only in cases that are clear and free from doubt.... the pleader will be unable to prove facts legally sufficient to establish his right to relief." *Bower v. Bower,* 611 A.2d 181, 182 (Pa. 1992).

PLEADINGS / PRELIMINARY OBJECTIONS

The Court shall consider as true all of the well-pled material facts set forth in the Amended Complaint, as well as all reasonable inferences that may be drawn from those facts, to determine whether Defendant's Preliminary Objections should be sustained. *See, Id.*

PLEADINGS / COMPLAINT

It is in the Court's discretion whether to allow Plaintiff to file another Amended Complaint. *Pa.R.C.P. 1028(e), 1033.*

PLEADINGS

The filing of an amended pleading causes the withdrawal and supersession of the original pleading. *Braceland v. Hughes,* 133 A.2d 286, 288 (Pa. Super. 1957).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 12631-2007

Appearances: Michael F. Ratchford, Esq., et al., Attorneys for Plaintiff
Lori R. Miller, Esq., Attorney for Defendant

OPINION

Connelly, J., October 17, 2008

This matter is before the Erie County Court of Common Pleas (hereinafter "the Court") pursuant to Preliminary Objections filed by Nancy L. Anderson (hereinafter "Defendant") in response to an Amended Complaint filed by Unifund CCR Partners (hereinafter "Plaintiff").

Procedural History

Plaintiff filed its Complaint on June 25, 2007. *Complaint, ¶¶ 1-15.* Defendant filed Preliminary Objections in response on August 24, 2007, stating Plaintiff's Complaint should be dismissed as Plaintiff failed "to attach to its Complaint a sufficient statement of activity on the account as is required under Pennsylvania Law." *Defendant's Preliminary Objections to Plaintiff's Complaint, ¶ 3.* Plaintiff responded to Defendant's Preliminary Objections to Plaintiff's Complaint on September 10, 2007, stating Defendant's Objections should be denied as its "Complaint is sufficiently specific and the Cardmember Agreement upon which the action is based was attached to the Complaint." *Plaintiff's Response to Defendant's Response to Defendant's Preliminary Objections, ¶¶ 1-4.* Defendant filed a Brief in Support of her Objections on September 20, 2007. *Brief in Support of Preliminary Objections to Plaintiff's Complaint, pp. 1-4.* Plaintiff filed a Brief in Support of its Response to Defendant's Preliminary Objections on October 11, 2007. *Plaintiff's Response to Defendant's Preliminary Objections, pp. 1-4.*

On January 23, 2008, the Court sustained Defendant's Preliminary Objections while granting Plaintiff thirty (30) days to file an Amended Complaint with the appropriate documentation. *Opinion of Connelly, J., Jan. 23, 2008, pp. 1-6.* The Court sustained Defendant's Preliminary Objections on the following grounds:

> Plaintiff has not attached any contract or credit agreement that would have been sent to Defendant along with the disputed credit card. Plaintiff has merely attached an Internet printout describing the online banking of First USA, as listed on a website entitled Card Member Services. This falls short of

> the requirements set forth in *Rule 1019(i), Atlantic Credit and Finance,* and *LVNV Funding.*[1] Finally, Plaintiff has not attached proper documentation of the assignment of Defendant's alleged debt. The assignment included in Exhibit A of Plaintiff's Complaint is only a partial document and makes no reference to the disputed account. Again, Plaintiff's documentation falls short of the requirements set forth in *Rule 1019(i), Atlantic Credit and Finance,* and *LVNV Funding.*[2]

Id. at 4.

On March 10, 2008, Plaintiff filed an Amended Complaint. *Amended Complaint, ¶¶ 1-14; Opinion of Connelly, J. Jan. 23, 2008, p. 6.* Attached to Plaintiff's Amended Complaint is Exhibit A, comprised of several documents included as follows: an "Affidavit of Indebtedness" from Kim Kenny, Plaintiff's Media Supervisor, attesting that Defendant is indebted and said account has been transferred to counsel of record for collection; and a Bill of Sale from Chase Bank USA, N.A. (as successor through merger with Bank One, Delaware, N.A.) to Unifund Portfolio A, transferring "those certain receivables, judgments, or evidences of debt described in Exhibit 1 attached hereto." *Id. at Ex. A.* Also attached to Plaintiff's Amended Complaint is a document entitled Exhibit B, comprised of a two-page Cardmember Agreement. *Id. at Ex. B.* Exhibit C, attached to the Amended Complaint, is comprised of a two-page printout with a Bank One logo, labeled Page 2 of 3 and Page 3 of 3, showing a statement date of November 5, 2004, through December 4, 2004. *Id. at Ex. C.* Exhibit D of the Amended Complaint contains a "Unifund Statement" sent to Defendant stating her account was past due and that she should remit payment to Unifund in the amount of $20,148.10. *Id. at Ex. D.*

Defendant filed Preliminary Objections along with a Brief in Support in response on March 26, 2008, stating Plaintiff's Amended Complaint be dismissed with prejudice. *Preliminary Objections to Plaintiff's Amended Complaint, pp. 2-4; Brief in Support of Preliminary Objections to Plaintiff's Amended Complaint, pp. 1-4.* Plaintiff responded to Defendant's second Preliminary Objections on April 16, 2008, stating Defendant's Objections should be denied as its "Complaint is sufficiently specific and the Cardmember Agreement upon which the action is based was attached to the Complaint." *Plaintiff's Response to Defendant's Preliminary Objections to the Amended Complaint, ¶¶ 1-10.*

Statement of Facts

Plaintiff is engaged in the business of debt purchase and collection and is the alleged assignee of the debt sold by First USA Platinum. *Amended Complaint, ¶ 3.* Plaintiff alleges that Defendant applied for and received a credit card issued by First USA Platinum under the account number

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[1] *See, Pennsylvania Rule of Civil Procedure 1019(i); Atlantic Credit & Fin., Inc., v. Giuliana,* 829 A.2d, 340, 345 (Pa. Super. 2003); *LVNV Funding, L.L.C. v. Lindsey,* Erie County Court of Common Pleas, No. 14119-2006 (Jan. 19, 2007).

[2] *Id.*

5417126716184311. *Id. at ¶ 4.* Plaintiff alleges the remaining balance due, owing, and unpaid on Defendant's account is $17,690.84 with $3,614.51 accrued interest. *Id. at ¶¶ 12, 13.* Plaintiff also seeks court costs and reasonable attorney fees. *Id. at ¶ 14.*

Analysis of Law

Two or more preliminary objections may be raised in one pleading, may be filed by any party to any pleading, shall be raised at one time, shall specifically state the grounds relied upon,[3] and may be inconsistent. *Pa.R.C.P. 1028(a),(b).* The moving party must file a brief in support of the preliminary objections within thirty (30) days after their filing. *Erie L.R. 1028(c)(1).* The nonmoving party may respond to the preliminary objections either by filing an amended pleading within twenty (20)[4] days, or by filing a brief in opposition within thirty (30) days after service of the preliminary objections. *Pa.R.C.P. 1028(c)(1); Erie L.R. 1028(c)(2).* The Erie County Local Rules of Civil Procedure provide:

> If the brief of either the objecting party [i.e., moving party] or nonmoving party is not filed within the time periods above stated. . . . the Court may then: (A) overrule the objections where the objecting party has failed to comply; (B) grant the requested relief where the responding party has failed to comply and where the requested relief is supported by law, or (C) prohibit the noncomplying party from participating in oral argument although all parties will be given notice of oral argument and shall be permitted to be present at oral argument; and/or (D) impose such other legally appropriate sanction upon a noncomplying party as the Court shall deem proper including the award of reasonable costs and attorney's fees incurred as a result of the noncompliance.

Erie L.R. 1028(c)(4)(A)-(D).

If the Court overrules the preliminary objections, "the objecting party shall have the right to plead over within twenty (20) days after notice of the Court's Order or within such other time as the Court shall fix." *Pa.R.C.P. 1028(d).* If the Court sustains the preliminary objections and allows for the filing of an amended or new pleading, the amended or new pleading must be "filed within twenty (20) days after notice of the Court's

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[3] Prelimnary objections 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; (6) pendency of a prior action or agreement for alternative dispute resolution; (7) failure to exercise or exhaust a statutory remedy, and (8) full, complete and adequate non-statutory remedy at law.

Pa.R.C.P. 1028(a)(1)-(8).

[4] "If a party files an amended pleading as of course. the preliminary objections to the original pleading shall be deemed moot." *Pa.R.C.P. 1028(c)(1).*

Order or within such other time as the Court shall fix." *Id at 1028(e).* Objections that are made to any of these amended pleadings shall be done so by the filing of new preliminary objections within twenty (20) days after service of the amended pleading. *Id. at 1017(a)(4), 1026(a), 1028(f).* The Pennsylvania Supreme Court ruled preliminary objections "should be sustained only in cases that are clear and free from doubt . . . . the pleader will be unable to prove the facts legally sufficient to establish his right to relief." *Bower v. Bower,* 611 A.2d 181, 182 (Pa. 1992). The Court shall consider as true all of the well-pled material facts set forth in the Amended Complaint, as well as all reasonable inferences that may be drawn from those facts, to determine whether Defendant's Preliminary Objections should be sustained. *See, Id.*

Defendant states Plaintiff's Amended Complaint was filed past the Court-ordered thirty (30) day deadline and argues it should be dismissed for failure of a pleading to conform to law or rule of court pursuant to Pennsylvania Rule of Civil Procedure 1028(a)(2). *Preliminary Objections to Plaintiff's Amended Complaint, pp. 2-4; Brief in Support of Preliminary Objections to Plaintiff's Amended Complaint, pp. 1-4.* Specifically, Defendant argues Plaintiff's Amended Complaint does not comply with Pennsylvania Rule of Civil Procedure 1019(i) as the Amended Complaint fails to contain the assignment of Defendant's alleged debt and any contract or credit agreement that would have been provided to Defendant along with the disputed credit card. *Id.*

Consequently, the specific issue before the Court is whether the required documentation is attached to Plaintiff's Amended Complaint pursuant to law or rule of court found at Pennsylvania Rule of Civil Procedure 1019(i) that states. "[w]hen 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).* Before the Court is able to determine such, however, it must first find Plaintiff's Amended Complaint conforms to law or rule of court found at Pennsylvania Rule of Civil Procedure 1028(e), which states Amended Complaints must be "filed within twenty (20) days after notice of the Court's Order sustaining preliminary objections or within such other time as the Court shall fix." *Id. at 1028(e).*

Plaintiff was granted thirty (30) days in which to file its Amended Complaint subsequent to the Court's January 23, 2008 Opinion and Order. Plaintiff filed its Amended Complaint forty-seven (47) days later on March 10, 2008, instead of the Court-ordered thirty (30) days. The Court cannot over look Plaintiff's disregard of the January 23, 2008 Order. The Court finds Plaintiff failed to conform to law or rule of court, namely Pennsylvania Rule of Civil Procedure 1028(e), as Plaintiff filed the Amended Complaint seventeen (17) days past the already lenient deadline of thirty (30) days. Therefore Plaintiff's Amended Complaint must be dismissed. As Plaintiff's failure to file the Amended Complaint within thirty (30) days requires its immediate dismissal in and of itself,

the Court finds further analysis as to whether the required documentation was attached pursuant to Pennsylvania Rule of Civil Procedure 1019(i) to be superfluous and therefore, unnecessary.

The Court finds *sua sponte* that further discussion as to dismissal of Plaintiff's entire cause of action against Defendant is warranted as a result of not only the Court's previous finding that Plaintiff's Complaint failed to conform to Pennsylvania Rule of Civil Procedure 1019(i), but also its current dismissal of Plaintiff's Amended Complaint for failure to conform to Pennsylvania Rule of Civil Procedure 1028(e). It is in the Court's discretion whether to allow Plaintiff to file another Amended Complaint.[5] *Pa.R.C.P 1028(e), 1033.* Plaintiff has shown that it is unable to abide by the Court's Orders when given the opportunity to file amended pleadings. Because of this failure, the Court finds that allowing Plaintiff another opportunity to do so is unwarranted. Therefore, the Court will not grant Plaintiff leave to file yet another Amended Complaint.

The filing of an amended pleading causes the withdrawal and supersession of the original pleading.[6] *Braceland v. Hughes*, 133 A.2d 286, 288 (Pa. Super. 1957) (holding pleadings superseded by amendment are out of their respective cases in their capacity as pleadings); *see also, Skelton v. Lower Merion Tp.*, 178 A. 387, 388 (Pa. 1935) (holding the filing of an amended complaint withdraws the original complaint and takes the place of the original pleading in framing the issues). The Court finds its dismissal of the Amended Complaint creates a void of a valid complaint within the current cause of action as Plaintiff's Amended Complaint not only withdrew, but also superseded, the original Complaint. The Court finds that such a void, along with the Court's unwillingness to allow Plaintiff leave to file an Amended Complaint, requires Plaintiff's claim against Defendant be dismissed without prejudice for legal insufficiency of pleadings.

ORDER

AND NOW, TO-WIT, this day of October, 2008, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that, for the reasons set forth in the foregoing Opinion, the following Order is made. Defendant's Preliminary Objections to Plaintiff's Amended Complaint are **SUSTAINED**. Plaintiff's Amended Complaint is therefore **DISMISSED**. Plaintiff's action against Defendant is **DISMISSED WITHOUT PREJUDICE**.

BY THE COURT:
/s/ **SHAD CONNELLY, JUDGE**

[5] A party may also amend his pleading by consent of the adverse party. *Pa.R.C.P. 1033.*

[6] However, statements contained in the original pleading may still be competent as admissions, when they are relevant to the issues in connection with which it is sought to introduce them. *Braceland v. Hughes*, 133 A.2d 286, 288 (Pa. Super. 1957).

AURORA LOAN SERVICING, LLC, Plaintiff
v.
THOMAS CHRISTOPHERSON, Defendant

PLEADINGS / PRELIMINARY OBJECTIONS

Under Pa.R.C.P. Rule 1028, preliminary objections may be filed by any party to any pleading. Preliminary objections shall be raised at one time, shall state specifically the grounds relied upon, and may be inconsistent.

FORECLOSURE

Under Pa.R.C.P. Rule 1147, a complaint in mortgage foreclosure must contain a "description of the land subject to the mortgage."

PLEADINGS

Under Pa.R.C.P. Rule 1019, a pleading containing a claim that is based on a writing must include a copy of the writing, or the material part thereof, or must set forth the substance of the writing in the pleading along with the reason why the writing is not accessible to the pleader. Failure to attach such writing may make the pleading insufficient. In such cases, the Court may allow the pleader to amend the pleading pursuant to Pa.R.C.P. Rule 1033.

PLEADINGS / PRELIMINARY OBJECTIONS

When ruling on preliminary objections, the Court must accept as true all relevant and material well-pled facts, together with all reasonable inferences therefrom.

MORTGAGE

Oral assignments of mortgages are permissible in Pennsylvania.

PLEADINGS

Under Pa.R.C.P. Rule 1019, a written assignment of a mortgage, if in existence, should be attached to a complaint in mortgage foreclosure.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 11809-2008

Appearances: Scott A. Dietterick, Esq., et al., Attorneys for Plaintiff
Stanley G. Berlin, Esq., Attorney for Defendant

OPINION

Connelly, J., October 1, 2008

This matter is before the Erie County Court of Common Pleas (hereinafter "the Court") pursuant to Preliminary Objections filed by Thomas Christopherson (hereinafter "Defendant") in response to a Complaint filed by Aurora Loan Services, LLC (hereinafter "Plaintiff").

Procedural History

Plaintiff filed its Complaint on April 15, 2008. *Civil Action* -

Complaint in Mortgage Foreclosure, ¶¶ 1-9. Defendant filed Preliminary Objections in response on June 7, 2008, stating Plaintiff's Complaint should be dismissed for the following reasons: Plaintiff's Complaint does not properly describe Defendant's residence; Plaintiff failed to attach a copy of a necessary writing to its Complaint; and Plaintiff's Complaint failed to contain proof of Plaintiff's relationships with SIB Mortgage Corporation (hereinafter "Mortgagee") and Mortgage Electronic Registration Systems Incorporated (hereinafter "Mortgagee's Nominee"). *Defendant's Preliminary Objections to Plaintiff's Complaint, ¶¶ 1-4.* Although Defendant had filed Preliminary Objections, Plaintiff filed a request for Default Judgment against Defendant for failure to file an Answer on June 18, 2008. *Praecipe for Default Judgment, pp. 1-8.* Defendant filed a Brief in Support of his Preliminary Objections on June 25, 2008. *Brief in Support of Defendant's Preliminary Objections to Plaintiff's Complaint, pp. 1-2.* Plaintiff filed its Brief in Opposition on July 22, 2008, stating Defendant's Preliminary Objections should be overruled as its Complaint properly pleads a cause of action in mortgage foreclosure pursuant to *Pennsylvania Rule of Civil Procedure* (hereinafter *"PA Civil Rule(s)"*) *§ 1147. Brief in Opposition to Defendant's Preliminary Objections, pp. 1-5.*

Statement of Facts

Defendant executed a Note in Favor of Mortgagee in the original and principal amount of $124,800.00 on or about May 30, 2002. *Civil Action - Complaint in Mortgage Foreclosure, ¶ 3.* Also on or about May 30, 2002, Defendant made, executed, and delivered a Mortgage to Mortgagee's Nominee in the original principal amount on property located at 605 West 8th Street, Erie, Pennsylvania, of which he was the record and real owner as security for payment of the Note. *Id. at ¶ 4, 6.* The Mortgage on this property was recorded in Erie County's Office of the Recorder of Deeds on June 4, 2002. Erie County Mortgage Book Volume 887, pp. 1220-40: *see, Id., Ex. A.* Mortgagee's Nominee ultimately assigned the Note and Mortgage to Plaintiff pursuant to an assignment of mortgage to be recorded. *Civil Action - Complaint in Mortgage Foreclosure, ¶ 5.* Plaintiff avers Defendant is now "in default under the terms of the Mortgage and Note for, inter alia, failure to pay the monthly installments of principal and interest when due." *Id. at ¶ 7.*

Analysis of Law

Pursuant to PA Civil Rules, preliminary objections may be filed by any party to any pleading, and shall be raised at one time and shall state specifically the grounds relied upon and may be inconsistent. *Pa.R.C.P. § 1028(a), (b).* Though the general issue before the Court is whether Plaintiffs Complaint properly pleads a cause of action in

mortgage foreclosure pursuant to PA Civil Rules,[1] the Court, in order to determine such, must address the following specific issues: whether Plaintiff's Complaint properly describes Defendant's residence, i.e., the land subject to the mortgage; whether Plaintiff's failure to attach a copy of the Note results in an insufficient pleading; and, whether Plaintiff's Complaint failed to provide proof of Plaintiff's relationship with Mortgagee and Mortgagee's Nominee. In determining whether Defendant's Preliminary Objections should be sustained, the Court has weighed applicable law as it relates to the facts of this case as well as the merit of the arguments presented by both Plaintiff and Defendant.

I. WHETHER PLAINTIFF'S COMPLAINT PROPERLY DESCRIBES DEFENDANT'S RESIDENCE, i.e. THE LAND SUBJECT TO THE MORTGAGE

Complaints filed regarding actions of mortgage foreclosures must contain a "description of the land subject to the mortgage." *Pa.R.C.P. § 1147(a)(2).* Plaintiff's Complaint contains the following description of the land subject to the mortgage:

> **ALL** that certain piece or parcel of land situate in the City of Erie, County of Erie and Commonwealth of Pennsylvania, bounded and described as follows, to wit: **BEGINNING** at a point at the intersection of the south line of Eighth Street and the westerly line of Cherry Street; thence South 64 degrees 02' West, along the southerly line of Eighth Street, 100 feet to a point; thence South 26 degrees East, on a line parallel to the westerly line of Cherry Street, 108.82 feet to a point; thence North 64 degrees 02' East, 33 feet to a point, thence North 33 degrees 02' East, 21 feet to a point; thence North 64 degrees 02' East, 49 feet to a point on the westerly line of Cherry Street; thence North 26 degrees West, along the westerly line of Cherry Street, 98 feet to the place of beginning. **SUBJECT** to the Driveway Agreement stated in deed dated September 18, 1972 and recorded in Erie County Deed Book 1078 at page 569.
>
> . . . .
>
> *BEING* known and designated as Parcel No. 16-3035-251. In the Deed Registry Office of Erie County, more commonly known as 605 West 8th Street, Erie, PA.

Erie County Mortgage Book Volume 887, p. 1223; see, Civil Action -

[1] Although Plaintiff avers its Complaint properly pleads a cause of action in mortgage foreclosure as it complies with *PA Civil Rule 1147, Brief in Opposition to Defendant's Preliminary Objections, pp. 1-4,* the Court finds the Complaint must conform to all relevant sections of the PA Civil Rules that set out the contents required to be found in civil matter pleadings.

Complaint in Mortgage Foreclosure, ¶ 4, Ex. A. The Court finds the above description of Defendant's residence, i.e., the land subject to mortgage, to be more than sufficient to meet the requirement as set forth in *PA Civil Rule § 1147(a)(2).*

II. WHETHER PLAINTIFF'S FAILURE TO ATTACH A COPY OF THE NOTE RESULTS IN AN INSUFFICIENT PLEADING

PA Civil Rules provide that "when any claim is based on a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing is not accessible to the pleader, it is sufficient so to state, together with the reason, and set forth the substance in writing." *Pa.R.C.P. § 1019(i).* While PA Civil Rules are clear as to the necessity of attaching copies of writings to a complaint when claims are based on such writings, they are also to be liberally construed in a reasonable manner. *Pa.R.C.P. § 126; see, Hoare v. Bell Tel. Co.*, 500 A.2d 1112, 1114 (Pa. 1985). Moreover, Civil Rules provide a remedy for such oversights and omissions by allowing a party, by leave of court, to amend their pleading. *Pa.R.C.P. § 1033.*

Defendant avers his Preliminary Objection should be sustained as Plaintiff failed to attach a copy of the Note executed in favor of Mortgagee, which was subsequently assigned by Mortgagee's Nominee to Plaintiff. *Defendant's Preliminary Objections to Plaintiff's Complaint, ¶¶ 1-4.* Plaintiff argues it is "not necessary to attach a copy of the Note as Plaintiff is proceeding with its *in rem* remedy, namely mortgage foreclosure against the Real Property under the Mortgage." *Brief in Opposition to Defendant's Preliminary Objections, p. 3.* Despite the argument contained in its Brief in Opposition, Plaintiff's Complaint clearly states Defendant is "in default under the terms of the aforesaid Mortgage and Note." *Civil Action - Complaint in Mortgage Foreclosure, ¶ 7 (emphasis added).*

The Court finds a portion of Plaintiff's claim is based on the Note as Plaintiff clearly stated in its Complaint that Defendant was in default under its terms. Due to the importance placed on the Note's terms as found in paragraph seven (7) of Plaintiff's Complaint, its absence renders the Complaint insufficient and void of facts necessary for Defendant to prepare a defense. *See, Paz v. Commonwealth Dep't of Corrections,* 580 A.2d 452, 456 (Pa. Cmwlth. 1990)(holding a complaint must be sufficiently clear to enable the defendant to prepare a defense); *Commonwealth Dep't of Transp. (PennDOT) v. Bethlehem Steel Corp.*, 380 A.2d 1308, 1313 (Pa. Cmwlth. 1977)(holding a complaint must cite facts necessary for a defendant to prepare a defense). Therefore a copy of the Note must be attached to the pleading. Pursuant to a reasonable interpretation of *PA Civil Rule § 1033*, the Court shall allow Plaintiff twenty (20) days to file an amended complaint with either an attached copy of the Note, or if the Note is not accessible to Plaintiff,

the substance of the Note in writing with a statement regarding its inaccessibility. The Court shall dismiss Plaintiff's claim provided Plaintiff fails to do so.

III. WHETHER PLAINTIFF FAILED TO PROVIDE PROOF OF PLAINTIFF'S RELATIONSHIP WITH THE MORTGAGEE AND MORTGAGEE'S NOMINEE

The Court must accept as true all relevant and material well-pled facts, as well as all inferences reasonably deducible therefrom when ruling on preliminary objections. *See, Texas Keystone, Inc., v. Pa. Dep't of Conservation and Natural Res.,* 851 A.2d 228, 240 (Pa. Cmwlth. 2004). Defendant avers his Preliminary Objection should be sustained because as neither the Mortgage nor the Note refers to Plaintiff, Defendant is unaware of Plaintiff's relationship with Mortgagee or Mortgagee's Nominee. *Defendant's Preliminary Objections to Plaintiff's Complaint, ¶ 3.* In its Complaint, Plaintiff states the Note and Mortgage were given by Mortgagee's Nominee to Plaintiff via an assignment of Mortgage to be recorded. *Civil Action - Complaint in Mortgage Foreclosure, ¶ 5.* Accepting Plaintiff's well-pled relationship with Mortgagee and Mortgagee's Nominee as true, the Court finds such an averment provides Defendant a sufficiently clear Complaint regarding its relationship with Mortgagee and Mortgagee's Nominee, which enables Defendant to prepare his defense.

While it finds Plaintiff provided sufficient proof regarding its relationship, via assignment, with Mortgagee and Mortgagee's Nominee, the Court believes an additional statement as to the assignment is necessary in order to form a more complete record. The Pleadings in the present case are not clear as to whether the assignment of the Note and Mortgage was oral or written. Mortgages are interests in land/estate for the purpose of security, and oral assignments of these interests are permissible. S*ee, In re Estate of Bryan,* 522 A.2d 40, 43 (Pa. 1987); *Tryon v. Munson,* 77 Pa. 250, 263-64 (Pa. 1875). While oral assignments of mortgages are permissible, the Court requires Plaintiff to submit any written assignment of the Note and Mortgage along with its Amended Complaint pursuant to *PA Civil Rule § 1019(i)* provided such a written assignment exists.

Pursuant to the above analysis, Defendant's Preliminary Objections are sustained as Plaintiff failed to attach a copy of the Note. Plaintiff has twenty (20) days from the date of this Opinion to file an amended complaint with the appropriate documentation.

ORDER

AND NOW, TO-WIT, this 1st day of October, 2008, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that, for the reasons set forth in the foregoing Opinion, the following Order is made. Defendant's Preliminary Objection is **SUSTAINED**, and Plaintiff shall have twenty (20) days in which to file an amended complaint with the appropriate documentation.

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