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Reports of Cases Decided in the Several Courts of
Erie County for the Year
2009

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XCII

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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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THOMAS C. KEEGAN, Plaintiff,

v.

ROBERT O'MALLEY, Defendant

JURISDICTION / SITUS

When Pennsylvania is the chosen forum state for a civil action, the Commonwealth's rules of procedure govern issues of procedure . . . . no matter what substantive law must be applied in resolving the underlying legal issues.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

The PA Civil Rules § 1035.2, provides that summary judgment is appropriate when the record 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."

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Any party may move for summary judgment, in whole or in part, after the relevant pleadings are closed.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

It is the burden of the moving party to prove that no genuine issues of material fact exist. The Court must examine the record in a light most favorable to the nonmoving party and accept as true all well-pleaded facts in the nonmoving party's pleadings.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

All doubts as to the existence of a genuine issue of material fact are to be resolved against the moving party.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

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.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Plaintiff 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 Defendant.

CONTRACTS / INTERPRETATION

The Court, as a matter of law, has the authority to interpret the Contract between Plaintiff and Defendant provided the terms therein are unambiguous.

CONTRACTS / INTERPRETATION

Provided the Contract is unambiguous, the Court will give effect to Plaintiff's and Defendant's expressed intentions; however, their unexpressed intentions shall be deemed to have no existence. Conversely, if the terms of the Contract are ambiguous, the Contract may be subject

to several reasonable interpretations, and the resolution of the ambiguity is then an issue for the trier of fact.

CONTRACTS / INTERPRETATION

When the language of contracts is unclear or ambiguous, extrinsic evidence may then be considered in an effort to give effect to the parties' intentions.

CONTRACTS / INTERPRETATION

The Court, in testing for ambiguity within the Contract's terms, shall give the "common words" found within the Contract their ordinary meaning, "unless manifest absurdity results, or unless some other meaning is clearly evidenced from the [Contract's] face or [its] overall contents."

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 15032-2006

Appearances: Gregory P. Zimmerman, Esq., Attorney for Plaintiff
Neal R. Devlin, Esq., Attorney for Defendant

OPINION

Connelly, J., September 8, 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 Thomas C. Keegan (hereinafter "Plaintiff") against Robert O'Malley (hereinafter "Defendant"). Defendant opposes Plaintiff's Motion.

Procedural History

Plaintiff filed a Complaint before the Court on December 5, 2006. *Complaint, ¶¶ 1-10.* Defendant filed an Answer and New Matter on January 2, 2007. *Answer and New Matter, ¶¶ 1-10, ¶ 1.* Plaintiff, in return, filed a Reply to Defendant's New Matter on January 10, 2007. *Reply to New Matter, ¶ 1.* Plaintiff filed his Motion for Partial Summary Judgment and Brief in Support on April 28, 2008, stating the calculation of the net proceeds from the sale of the Avalon Hotel in Erie, Pennsylvania (hereinafter, "the Hotel"), from which Plaintiff would receive any money owed him, should be based on its total $5,100,000.00 sale price; and the calculation of the total costs of improvements made to the Hotel subtracted from the net proceeds should only include those improvements made solely by Defendant, as an individual, after December 31, 2001. *Motion for Partial Summary Judgment on Behalf of Plaintiff Thomas C. Keegan, ¶¶ 1-55; Brief in Support of Motion for Partial Summary Judgment on Behalf of Plaintiff Thomas C. Keegan, pp. 1-18.* Defendant filed his Response to Plaintiff's Motion for Partial Summary Judgment on May 28, 2008. *Defendant,*

Robert O'Malley's, Response to Plaintiff's Motion for Partial Summary Judgment, pp. 1-17. On June 16, 2008, Plaintiff filed a Reply Brief to Defendant's May 28, 2008 Response. *Plaintiff's Reply to Defendant's Response to Motion for Partial Summary Judgment on Behalf of Plaintiff Thomas C. Keegan, pp. 1-3.*

Statement of Facts

Plaintiff and Defendant owned Avalon Inn Services, Inc.[1] *Pretrial Narrative Statement of Plaintiff Thomas C. Keegan, p. 2; Defendant, Robert O'Malley's, Response to Plaintiff's Motion for Partial Summary Judgment, p. 2.* Avalon Inn Services, Inc., owned the Avalon Inn located in Warren, Ohio (hereinafter, "the Inn"). *Id.* In addition to Avalon Inn Services, Inc., a partnership named Avalon Hotel Partners[2] was also formed between Plaintiff and Inn Services, Inc.[3] *Motion for Partial Summary Judgment on Behalf of Plaintiff Thomas C. Keegan, ¶¶ 8, 9; Defendant, Robert O'Malley's, Response to Plaintiff's Motion for Partial Summary Judgment, p. 2.* In 1992, Avalon Hotel Partners purchased the Hotel for $500,000.00. *Motion for Partial Summary Judgment on Behalf of Plaintiff Thomas C. Keegan, ¶ 8.*

Prior to December 31, 2001, Plaintiff proposed to Defendant that they sever their joint ownership of the Hotel and the Inn through an exchange of their respective interests, i.e., Plaintiff sell his one-third partnership interest in the Hotel to Defendant, and Defendant sell his two-thirds outstanding stock in the Inn to Plaintiff. *Brief in Support of Motion for Partial Summary Judgment on Behalf of Plaintiff Thomas C. Keegan, p. 3; Defendant, Robert O'Malley's, Response to Plaintiff's Motion for Partial Summary Judgment, p. 2.* Defendant agreed to this proposal and Plaintiff and Defendant retained separate counsel. *Id.* To facilitate this exchange, Plaintiff and Defendant became parties to both a Purchase Agreement and Promissory Note (hereinafter, "the Contract"

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[1] Plaintiff owned one-third of Avalon Inn Services, Inc.'s outstanding stock, while Defendant owned the remaining two-thirds. *Pretrial Narrative Statement of Plaintiff Thomas C. Keegan, p. 2; Defendant, Robert O'Malley's, Response to Plaintiff's Motion for Partial Summary Judgment, p. 2.*

[2] In regards to Avalon Hotel Partners, Plaintiff owned a partnership interest of one-third, while Inn Services, Inc. owned a partnership interest of two-thirds. *Motion for Partial Summary Judgment on Behalf of Plaintiff Thomas C. Keegan, ¶¶ 8, 9; Defendant, Robert O'Malley's, Response to Plaintiff's Motion for Partial Summary Judgment, p. 2.* Avalon Hotel Partners is incorrectly referred to as "Avalon Inn Partners" in the Promissory Note. *Promissory Note, Dec. 31, 2001; see, Motion for Partial Summary Judgment on Behalf of Plaintiff Thomas C. Keegan, Ex. D; Defendant, Robert O'Malley's, Response to Plaintiff's Motion for Partial Summary Judgment, p. 4.*

[3] Inn Services, Inc., is a wholly-owned corporation of which Defendant is the sole shareholder. *Id.*

when referred to collectively)[4] on December 31, 2001, which outlined the above-stated exchange of interests and properties. *Id.*

On October 30, 2006, the Hotel sold for $5,100,000.00. *Complaint, ¶¶ 6, 7; Answer and New Matter, ¶ 6, 7; Motion for Partial Summary Judgment on Behalf of Plaintiff Thomas C. Keegan, ¶¶ 8, 17.* Plaintiff claims as a result of the sale of the Hotel and pursuant to the terms of the Promissory Note, of which he is the Payee, he is owed $400,000.00. *Motion for Partial Summary Judgment on Behalf of Plaintiff Thomas C. Keegan, ¶ 19.*

Analysis of Law

The Contract contains a choice of law clause indicating Ohio law governs interpretation of the agreement. *Purchase Agreement, Dec. 31, 2001, p. 8; see, Motion for Partial Summary Judgment on Behalf of Plaintiff Thomas C. Keegan, Ex. C.* Therefore, the Court shall apply Ohio substantive law to the present case. *See, Chestnut v. Pediatric Homecare of Am., Inc.*, 617 A.2d 347, 350 (Pa. Super. 1992)(holding such clauses to be valid in Pennsylvania). However, "when Pennsylvania is the chosen forum state for a civil action, the Commonwealth's rules of procedure govern issues of procedure . . . . no matter what substantive law must be applied in resolving the underlying legal issues." *Stivason v. Timberline Post & Beam Structures Co.*, 947 A.2d 1279, 1281 (Pa. Super. 2008).

The general issue before the Court is whether Plaintiff, as the moving party, is entitled to partial summary judgment pursuant to the *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[5] 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

[4] Both the Purchase Agreement and the Promissory Note shall be interpreted together as one individual contract as they incorporate one another and are part of the same transaction. *See, Panagouleas Interiors, Inc., v. Silent Partner Group, Inc.*, 2002 WL 441409, *10 (Ohio Ct. App. 2002)(holding, writings executed as part of the same transaction should be read together); *citing, Edward A. Kemmler Mem'l Found. v. 691/733 East Dublin-Granville Rd. Co.*, 584 N.E.2d 695, 698 (Ohio 1992).

[5] 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.*

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.* The Court must examine the record in a light most favorable to the nonmoving party and accept as true all well-pleaded facts in the nonmoving party's pleadings. *Brecher v. Cutler,* 578 A.2d 481, 483-84 (Pa. Super. 1990); *citing, Green v. K & K Ins. Co.,* 566 A.2d 622, 623 (Pa. 1989). Also, all doubts as to the existence of a genuine issue of material fact are to be resolved against the moving party. *Ertel,* 674 A.2d at 1041. 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. Plaintiff 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 Defendant. *See, Washington v. Baxter,* 719 A.2d 733, 737 (Pa. 1998). The Court, in determining whether Plaintiff is entitled to partial summary judgment, has viewed the record in the light most favorable to Defendant, and has weighed applicable law[6] as it relates to the facts of this case as well as the merit of the arguments presented by both parties.

Though the general issue before the Court is whether Plaintiff is entitled to partial summary judgment, the Court, in order to determine such, must address the following specific issues: whether calculation of the net proceeds from the sale of the Hotel, from which Plaintiff would receive any money owed him, should be based on its total $5,100,000.00 sale price; and whether calculation of the total costs of any improvements made to the Hotel subtracted from the net proceeds should only include those improvements made solely by Defendant as an individual after December 31, 2001.

I. WHETHER CALCULATION OF THE NET PROCEEDS FROM THE SALE OF THE HOTEL SHOULD BE BASED ON ITS TOTAL $5,100,000.00 SALE PRICE

As previously stated, summary judgment is appropriate when the record 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. §§ 1035.1, 2.* Defendant believed at the time of executing the Purchase Agreement that only the one-third interest he was buying from Plaintiff would be involved under the Contract; however he now acknowledges the Contract had not

[6] The applicable law in the present case is composed of Ohio substantive law and Pennsylvania procedural law. *See, Stivason,* 947 A.2d at 1281; *Chestnut,* 617 A.2d at 350.

memorialized such a belief. *Defendant, Robert O'Malley's, Response to Plaintiff's Motion for Partial Summary Judgment, p. 14.* Defendant further acknowledges "net proceeds" are defined on page three (3) of the Purchase Agreement solely as the "amount of the purchase price for the property [less identified deductions]." *Id.* Therefore, Defendant concedes that the calculation of the net proceeds from the sale of the Hotel, from which Plaintiff would receive any money owed him, must be based on the Hotel's total $5,100,000.00 sale price as opposed to one-third of said price. *See, Id.*

The Court, therefore, finds no genuine issue of material fact as to this element of the present cause of action, and the calculation of the net proceeds from the sale of the Hotel must be based on the Hotel's total $5,100,000.00 sale price as opposed to one-third of said price. The Court, however, shall make no determination as to the amount remaining from the $5,100.000.00 less the deductions as identified in the Purchase Agreement and Promissory Note.

II. WHETHER CALCULATION OF THE TOTAL COSTS OF IMPROVEMENTS SUBTRACTED FROM THE NET PROCEEDS SHOULD ONLY INCLUDE THOSE IMPROVEMENTS MADE SOLELY BY DEFENDANT AS AN INDIVIDUAL AFTER DECEMBER 31, 2001

Plaintiff argues partial summary judgment should be granted as: (1) Defendant is the Maker of the Promissory Note; (2) Plaintiff is the Holder of the Promissory Note; (3) the Promissory Note unambiguously states the Holder shall only look to the net proceeds of the sale of the Hotel, less the amount of the costs of any improvements made to the Hotel by the Maker; (4) because Defendant did not obtain a partnership interest in Avalon Hotel Partners until the execution of the Purchase Agreement on December 31, 2001 (as Avalon Hotel Partners was comprised of Plaintiff and Inn Services, Inc., prior to the Purchase Agreement), he could not have possibly paid for any improvements to the Hotel as he was not a partner in the entity that owned the Hotel; therefore, (5) the unambiguous language of the Contract shows that the requisite calculation of the total costs of improvements subtracted from the net proceeds, can only include those improvements made solely by Defendant in an individual capacity after December 31, 2001. *Motion for Partial Summary Judgment on Behalf of Plaintiff Thomas C. Keegan, ¶¶ 53-55; Brief in Support of Motion for Partial Summary Judgment on Behalf of Plaintiff Thomas C. Keegan, pp. 16, 17.* Defendant argues against partial summary judgment, stating Plaintiff's argument is: (1) not supported by any language in the Contract; (2) contrary to the provisions and terms of the Contract; (3) inconsistent with Plaintiff's argument that the calculation must include 100% of the net proceeds; and (4) directly contrary to Defendant's, or any party's, reasonable interpretation of the

Contract. *Defendant, Robert O'Malley's, Response to Plaintiff's Motion for Partial Summary Judgment, p. 8.*

The Court, as a matter of law, has the authority to interpret the Contract between Plaintiff and Defendant provided the terms therein are unambiguous. *See, The Long Beach Ass'n, Inc., v. Jones,* 697 N.E.2d 208, 209 (Ohio 1998); *Alexander v. Buckeye Pope Line Co.*, 374 N.E.2d 146 (Ohio 1978); *United States Fid. & Guar. Co., v. St. Elizabeth Med. Ctr.*, 716 N.E.2d 1201, 1208 (Ohio Ct. App. 1998). Provided the Contract is unambiguous, the Court will give effect to Plaintiff and Defendant's expressed intentions; however, their unexpressed intentions shall be deemed to have no existence. *United States Fid. & Guar. Co.*, 716 N.E.2d at 1208.

Conversely, if the terms of the Contract are ambiguous, the Contract may be subject to several reasonable interpretations, and the resolution of the ambiguity is then an issue for the trier of fact. *See, Cent. Ohio Joint Vocational School Dist. Bd. of Educ. v. Peterson Constr.,* 716 N.E.2d 1210, 1214 (Ohio Ct. App. 1998); *Clarke v. Hartley,* 454 N.E.2d 1322, 1326 (Ohio Ct. App. 1982)(holding when provisions of a contract are ambiguous, the court should submit the matter to the jury, with appropriate instructions, for a resolution of those ambiguities). When the language of contracts is unclear or ambiguous, extrinsic evidence may then be considered in an effort to give effect to the parties' intentions.[7] *See, Shifrin v. Forest City Enter., Inc.*, 597 N.E.2d 499, 501 (Ohio 1992). The Court, in testing for ambiguity within the Contract's terms, shall give the "common words" found within the Contract their ordinary meaning, "unless manifest absurdity results, or unless some other meaning is clearly evidenced from the [Contract's] face or [its] overall contents." *See, Alexander,* 374 N.E.2d at 150.

According to the Contract, Defendant promised to pay $400,000.00 to Plaintiff:

> Due and payable only from the Net Proceeds, *as that term is defined in the Purchase Agreement*, ... of the sale of [the Hotel]. . . . *less the costs of any improvements made to [the Hotel] and paid for by the Maker* to [Avalon Hotel Partners],[8]. . . . the holder hereof shall only look to the Net Proceeds of the sale of [the Hotel], *less the amount of the cost of any improvements made to [the Hotel] by the Maker* not paid from mortgage proceeds or from the proceeds of a then unpaid loan to [Avalon Hotel Partners][9] . . . .

[7] If the interpretation of a contract requires consideration of evidence extrinsic to the contract, that, too, is an issue for the trier of fact." *Certified Computer Solutions, Inc., v. Rieth & Antonelli, Co.*, 841 N.E.2d 866, 871 (Ohio Mun. 2005); *citing, Davis v. Loopco Indus., Inc.*, 609 N.E.2d 144 (Ohio 1993).

[8] Note 2, *supra.*

[9] *Id.*

Promissory Note, Dec. 31, 2001; see, Motion for Partial Summary Judgment on Behalf of Plaintiff Thomas C. Keegan, Ex. D (emphasis added). As agreed to by Plaintiff and Defendant, "Net Proceeds" are defined in the Purchase Agreement, via the Promissory Note, as the sale price of the Hotel:

> [L]ess $100,000.00 to be retained by the seller of the subject property for the payment of income taxes, *less the costs of any improvements made to the property by the owner thereof,* not including the cost of any improvements made to the property and paid from mortgage proceeds or a then unpaid loan made by [Plaintiff] or *[Defendant] (Inn Services, Inc.),* as the case may be, and less the amount of any unpaid loans made by [Plaintiff] to the Corporation or made by [Defendant] to the Partnership, as the case may be.

Purchase Agreement, Dec. 31, 2001, pp. 2, 3; see Motion for Partial Summary Judgment on Behalf of Plaintiff Thomas C. Keegan, Ex. C (emphasis added).

The Promissory Note indicates Defendant, in an individual capacity, is the Maker of the Note, and that only improvements made to the Hotel by the Maker shall be deducted from the net proceeds, which are defined in the Purchase Agreement. *Promissory Note, Dec. 31, 2001; see, Motion for Partial Summary Judgment on Behalf of Plaintiff Thomas C. Keegan, Ex. D.* However, the Purchase Agreement indicates Defendant, acting through his wholly-owned corporation, Inn Services, Inc., is the Owner of the Hotel, and that only improvements made to the Hotel by the Owner, i.e., Inn Services, Inc., shall be deducted from the Net Proceeds. *Purchase Agreement, Dec. 31, 2001, pp. 2, 3; see Motion for Partial Summary Judgment on Behalf of Plaintiff Thomas C. Keegan, Ex. C.* Based on such discontinuity between the Promissory Note and the Purchase Agreement (which supposedly is to define terms contained in the Promissory Note) the Court, giving words contained in the Contract their ordinary meaning, finds a reading of the Contract clearly shows there to be an ambiguity regarding to whom improvements made to the Hotel are to be attributed in order to ascertain the net proceeds. Due to such ambiguity, the Court further finds the Contract subject to several reasonable interpretations, and therefore interpretation of the Contract is a matter for the trier of fact. Furthermore, the Court finds no mention of improvements made solely after December 31, 2001, to be contained in the Contract.

Pursuant to the above analysis, partial summary judgment in favor of Plaintiff is proper only as to whether calculation of the net proceeds from the sale of the Hotel should be based on its total $5,100,000.00 sale price. Because Defendant has admitted such, the provided evidence as

viewed in a light most favorable to Defendant clearly reveals a reasonable jury may find in favor of Plaintiff regarding this claim. Consequently, Plaintiff's Motion for Partial Summary Judgment is granted as to whether calculation of the net proceeds from the sale of the Hotel should be based on its total $5,100,000.00 sale price as no genuine issue of material fact remains as to whether net proceeds should be based on the Hotel's sale price.

However, pursuant to the above analysis, judgment in favor of Plaintiff is not proper as to whether calculation of the total costs of improvements subtracted from the net proceeds should only include those improvements made solely by Defendant, as an individual, after December 31, 2001. Because the Contract contains clear ambiguities, which have resulted in several reasonable interpretations of the Contract, the provided evidence as viewed in a light most favorable to Defendant clearly reveals a reasonable jury may find in favor of Defendant regarding this claim. Consequently, Plaintiff's Motion for Partial Summary Judgment is denied as to whether calculation of the total costs of improvements subtracted from the net proceeds should only include those improvements made solely by Defendant, as an individual, after December 31, 2001, as genuine issues of material fact remain as to whom improvements made to the Hotel are to be attributed in order to ascertain the net proceeds.

ORDER

AND NOW, TO-WIT, this 8th day of September, 2008, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that, for the reasons set forth in the foregoing Opinion, Plaintiff's Motion for Partial Summary Judgment is **GRANTED** as to Plaintiffs claim the calculation of the net proceeds from the sale of the Hotel should be based on its total sale price, while Plaintiff's Motion for Partial Summary Judgment is **DENIED** as to Plaintiff's claim the calculation of the total costs of any improvements made to the Hotel subtracted from the net proceeds should only include those improvements made solely by Defendant after December 31, 2001.

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

A.D. LANGDON, Appellant

v.

SCHOOL DISTRICT OF THE CITY OF ERIE, JAMES BARKER, SUPERINTENDENT, SCHOOL BOARD OF THE SCHOOL DISTRICT OF THE CITY OF ERIE, Appellees

APPEAL

A discretionary judgment made by a school district to expel a student should not be overturned by a reviewing court where there is no error of law and where the decision is based upon substantial evidence.

APPEAL

The challenger of a school district's student expulsion decision has a heavy burden and a court is unlikely to interfere in the decision unless it is apparent the School District Board of Directors' actions are arbitrary, capricious and prejudicial to the public interest; in the absence of gross abuse of discretion, the court will not second guess the policies of the school district.

DUE PROCESS

The right to a public education is not a fundamental constitutional right, but rather a statutory right in which appellant has a property interest; in this regard, appellant, a student expelled from high school attendance by a School District Board of Directors, is entitled to procedural due process.

JURISDICTION

The Court of Common Pleas reviews a school district's expulsion of a student through its jurisdiction pursuant 42 Pa.C.S.A. § 933(a)(2), the action governed by Local Agency Law, 2 Pa.C.S.A. §§ 751 *et seq.*, the School District Board of Directors being a "local agency" under the relevant statute and the expulsion decision being "an adjudication" under the Local Agency Law; the Court sits as a reviewing court and hears the matter without a jury upon review of the certified record, without *de novo* review, if a full and complete record of the proceedings is extant.

OPEN, VACATE, OR AMEND

In reviewing the apparent omission of a videotape from consideration during a Board hearing in a school district's student expulsion decision under Local Agency Law, 2 Pa. C.S.A. §§ 751 *et seq.*, the court need not reopen or supplement the record, nor remand the case, where the tape existed and was available at the time of the initial investigation and hearing, where appellant's counsel apparently made no attempt to introduce the tape, and where the tape was neither exculpatory nor favorable to appellant.

SUFFICIENCY OF EVIDENCE

A school district, required to prove its case in the expulsion of a student by a preponderance of the evidence, is not required to present clear and convincing evidence or evidence beyond a reasonable doubt.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 12477 OF 2008

Appearances: John Mir, Esquire, Attorney for Appellant
Jennifer E. Gornall, Esquire, Attorney for Appellees

OPINION AND ORDER

DiSantis, Ernest J., Jr., J.

This case comes before the Court on the appellant's appeal of the decision of the Erie School District to expel him from high school attendance in the Erie School District. The Court has reviewed the record and conducted argument on August 13, 2008.

I. BACKGROUND

The appellant was a ninth grade student at East High School in the School District of the City of Erie ("District") during the 2007-2008 school year. CR - 10a.[1] At the beginning of the school year he was provided a copy of the student handbook which sets forth the student code of conduct. Specifically, the code prohibits:

> the deliberate or reckless attempt to cause or the actual causing of physical pain or injury to another or the deliberate or reckless attempt by physical menace to put another in fear of imminent physical pain or injury.

CR - 136a

Mr. John Pikiewicz taught at East High School. The appellant and two of his friends, M.K. and T.D. were students in Mr. Pikiewicz's class. CR - 23a. On February 14, 2008, at approximately 3:19 p.m., Mr. Pikiewicz ascended the stairwell to his classroom on the second floor of the school. CR - 29a; Exhibit 6.[2] Mr. Pikiewicz's classroom is located approximately ten feet across from the door at the top of the stairwell. CR - 28a. At that time, there were some other students in the halls and stairwells due to dismissal which occurred at 3:10 p.m. CR - 39a.

M.K., T.D. and appellant followed Mr. Pikiewicz up the stairwell.[3] CR - 29a, Exhibit 6. The appellant is pictured on the videotape (Exhibit 6). When first observed, he is not wearing any head covering. CR - 30a, Exhibit 6. The three students loitered in the stairwell. At one point, the appellant descended halfway down the stairwell, looked down, then returned to the top of the stairwell where he rejoined M.K. and T.D.

[1] CR denotes the certified record.

[2] Exhibit 6 was a videotape admitted at the hearing before the School Board ("Board"). It is included in the certified record at page 169a.

[3] M.K., T.D. and appellant were identified as depicted in Exhibit 6 after East High School Principal Pat DePaolo and other school officials reviewed it and other video footage. Although some of the other video material was not saved (CR 34 - 38), the additional tape still exists.

CR - 29a, Exhibit 6. The appellant is then depicted removing his coat or sweatshirt, turning it inside out, putting it on and then placing the hood over his head. CR - 38, Exhibit 6. M.K. has a belt in his hand throughout the time the boys loitered in the stairwell. CR - 30a, Exhibit 6. After approximately two minutes (15:19 until 15:21 as indicated on Exhibit 6), the three boys moved outside the range of the camera. (There were no cameras located in the hallway outside Mr. Pikiewicz's classroom.) Approximately 17 seconds later, three students reappeared in the video, after having crashed through Mr. Pikiewicz's classroom door as they exited. They ran down the stairwell. CR - 30a, Exhibit 6. Shortly thereafter, Mr. Pikiewicz appeared and looked down the stairwell in the direction of the fleeing students. CR - 30a.

Mr. Pikiewicz testified at the Board hearing. He stated that as he was standing by his desk after dismissal, he heard a knock on his door. He opened it and observed three students standing in the doorway with hoods over their faces. CR - 17a. As he described the incident:

> went down to the office to check my mail, the deficiencies, then walked back to my classroom. It's extra help night so I stood at my desk. And there was a knock at the door. So I opened the door and there were three students, individuals, there were hoods over their face; and all I saw was a barrage of like whips coming at me, hitting me on the head. And I ducked down. They hit me again. And then one of them said, "Let's get out of here." They went down the steps... The stairs are right by my classroom. Right outside the door, so they went right down the steps and right outside my classroom...
>
> Q. And you said that you were - - do you distinctly remember three different people hitting you?
>
> A. The people, all three, hit. Look like this. And they're all coming down with some kind of a belt or something. I didn't know what it was at the time, now I know it's belts...
>
> Q. Did you sustain any injuries as a result of the attack?
>
> A. Yes.
>
> Q. What type of injuries?
>
> A. Contusions of the head, concussion, cervical strain and back strain.
>
> Q. The three students who attacked you, do you recognize or would you recognize what they were wearing?
>
> A. Oh, yes. I recognize a white hoodie, a dark hoodie and lighter colored hoodie. This happened real quick, though...
>
> Q. And the three students that they identified were M.K., A.L.

and T.D. Do you have those three students in your class?

A. Yes, they were in my fourth period class.

Q. Did those students ever threaten you prior to the attack?

A. Yes.

Q. In what manner?

A. Actually, one of the students I did write up for possible threat, a threat.

Q. Okay, what did he say? No, tell me - -

A. No - - no names?

Q. - - from your memory.

A. Okay.

Q. Well, you can tell me who his name - - what his name was.

A. M.K.[4]

CR - 17a - 22a.

At the Board hearing, the appellant admitted that he was with M.K. and T.D. as pictured in the video. He spoke to them in the stairwell outside Mr. Pikiewicz's classroom. CR - 67a, 68a, 71a, and 74a. He contends, however, that a fourth student A.H. was also present at the top of the stairwell with M.K. and T.D. CR - 68a. Appellant said he left them and exited the stairwell at the moment that M.K. and T.D. descended. He asserts that M.K., T.D. and A.H. committed the assault. *Id.* He said that he "[heard] someone knock on [Mr. Pikiewicz's] door, and heard Mr. P yell, "Hey". At the time, he was next to Ms. Mead's door. CR - 69a.

Appellant admitted to loitering in the stairwell for more than a minute with T.D. and M.K. (the youth holding the belt). However, he denied any knowledge of what they were discussing. CR - 72a, 73a. He admitted that while standing in the stairwell with them, he turned his jacket inside out and put his hood over his head. CR 72a, 73a. He did it for "No reason. It's reversible." CR - 76a. When asked about reversing his hoodie he responded, "Because it's white." CR - 76a.

On February 15, 2008, Principal Pat DiPaolo asked appellant to prepare a written statement describing anything he could remember about the incident. CR - 70a - 71a, 81a. Appellant was given a copy of the statement to review at the March 4, 2008 expulsion hearing. CR - 78. In that statement he stated: "I was with M.K. and T.D." CR - 78. He does not make any reference to A.H. or the latter's purported involvement in the assault. CR - 70a, 71a. When asked why he failed to provide this information, he responded, "I wasn't thinking of it". CR - 70a.

R.G. testified at the expulsion hearing on behalf of appellant. That

[4] Mr. Pikiewicz stated that M.K. had not threatened him before. CR - 22a.

youth testified, "What I can tell you, like [A.L.] told me that a teacher got hit with a belt, but he didn't say, "We did that." He said that's what he saw, you know." CR - 59a.

M.K. also testified on appellant's behalf. S/he could not recall with whom he ascended the stairwell (CR - 45a, 50a); could not recall talking with his/her peers in the stairwell (CR - 45a, 46a and 50a); and could not remember with whom s/he descended the stairwell. CR - 46a. When M.K. was shown the videotape which depicted her/him, appellant, and T.D. in the stairwell, s/he testified s/he could not remember who the two boys were who were with her/him, nor could s/he remember the two other students with whom s/he committed the assault. CR - 46a, 47a, 50a and 52a. In spite of this virtual total loss of memory, s/he was able to state that the appellant was not involved in the assault. CR - 53a.

T.D., the third student identified as one of the participants, prepared a written statement about the incident. This statement was read into the record without objection. It stated:

> I, A.L. and M.K. yesterday began to leave school and we saw Mr. P walk in through the hall. Then Mr. P began walking up the stairs. We followed behind him and watched him walk into the classroom. Then we knocked on the door. Mr. P opened the door. I began running before anything happened and I heard Mr. P say, "Hey." That's when I ran down the stairwell and proceeded to leaving the building. T.D.

CR - 54a.

Appellant argues that the record should be reopened and/or the matter remanded for rehearing due to the discovery of "new evidence" which he asserts exculpates him. He argues that there exists an additional videotape that will show him partially descending the stairwell located in the vicinity of Mr. Pikiewicz's classroom, looking down and seeing another individual (A.H.), whom he asserts was involved in the assault. Although appellant characterizes this as "new", it existed at the time of the Board hearing, but was not introduced by any party. Appellant also states that the City of Erie Police Department has reopened or is continuing the investigation based upon allegations that it was A. H., not the appellant, who was the assailant.

II. LEGAL DISCUSSION

The Court of Common Pleas has jurisdiction pursuant 42 Pa.C.S.A. § 933(a)(2). The action is governed by the Local Agency Law, 2 Pa.C.S.A. §§ 751 *et seq.* The Erie School District Board of Directors is a "local agency" under the relevant statute and its expulsion decision was "an adjudication" within the meaning of the Local Agency Law.

In these types of cases, the Court of Common Pleas sits as a reviewing court. If a full and complete record of the proceedings is extant, then

the matter is heard without a jury upon review of the certified record. In that instance, the Court does not conduct a *de novo* review. 2 Pa.C.S.A. § 754(a) and (b). *See Monaghan v. Bd. of Sch. Directors of Reading Sch. Dist.*, 618 A.2d 1239, 1241 (Pa. Cmwlth. 1992).

The parties agree that the record is complete and accurate. They diverge on the additional videotape. Appellant argues that this Court should review the tape (which is not part of the record) and then remand this matter for a new hearing so that tape can be considered by the Board. The District argues that the tape is not new evidence because it was available at the time of the expulsion hearing and appellant failed to introduce it. In addition, it implies that the videotape does not exculpate the appellant because it does not show A.H.'s participation in the assault.[5]

Scope of Review

This Court must affirm the District's decision where a complete record was developed, unless this Court determines that the appellant's constitutional rights were violated, an error of law was committed, that the procedure before the local agency was contrary to law or that the necessary findings of facts are not supported by substantial evidence. 2 Pa.C.S.A. § 754(b); *Sparacino v. Zoning Bd. of Adjustment, City of Philadelphia*, 728 A.2d 445, 447 (Pa. Cmwlth. 1999).

This Court will now address the various issues seriatim.

A. Whether the Appellant's Procedural and/or Substantive Constitutional Rights Were Violated By the Actions of the Erie School District Board of Directors?

As the appellee correctly notes, the appellant's right to a public education is not a fundamental constitutional right. It is a statutory right in which the appellant has a property interest. *Goss v. Lopez*, 419 U.S. 656 (1975). In this regard, appellant is entitled to procedural due process.

Appellant does not argue that his procedural rights were violated. He argues that there should be a new hearing so that the Board can consider the second videotape.

The record shows that the Board hearing took place over a span of two hours. Evidence was presented by the District and the appellant. He was represented by counsel and afforded the opportunity to cross-examine witnesses and present evidence. His counsel apparently made no attempt to introduce the second videotape. Therefore, neither appellant's procedural due process or substantive rights were violated.

Although this is not a criminal proceeding, appellant's argument is akin to a claim that there exists exculpatory evidence that would have altered the outcome of the Board's decision. This Court has not viewed the

[5] At the argument, appellant agreed with the District on this point. However, appellant asserts that the videotape corroborates his theory because it depicts A.H. at the bottom of the stairwell establishing his presence in the area at or about the time of the assault.

additional tape because counsel's proffer made at argument demonstrates that the additional tape does not support the appellant's theory that A.H. was the third assailant. According to the proffer it would show A.H.'s presence at the bottom of the stairwell. It would not have placed A.H. in the presence of the appellant and the other assailants at the top of the stairwell proximate to Mr. Pikiewicz's room. Furthermore, it does not depict A.H.'s involvement in the assault. Therefore, based upon the fact that the additional tape existed at the time of the initial investigation and hearing; and the fact that it is neither exculpatory nor favorable; this Court need not reopen or supplement the record, nor remand the case.

B. Whether the District Committed An Error Of Law In Determining That The Appellant Violated The District's Assault's Policy And Expelling Him For That Violation?

After its review of the record, this Court concludes that the District did not commit any legal error.

C. Whether The Board's Procedures Conform With All Statutory Requirements Of The Local Agency Law?

Appellant does not specifically articulate a challenge in this regard. Therefore, it need not be discussed.

D. Whether The Board's Adjudication And Decision Of Expulsion Is Supported By Substantial Evidence Of Record?

The District was required to prove its case by a preponderance of the evidence. It was not required to present clear and convincing evidence or evidence beyond a reasonable doubt.

The appellant's position that the additional tape is new evidence is not a claim that the evidence was insufficient. Rather he requests a re-hearing to take a "second bite of the apple".

The Board was presented with the following direct and circumstantial evidence before it made its decision:

1. the appellant and two other students were ascending the stairwell after Mr. Pikiewicz had done so and entered his classroom. CR - 29a;
2. The appellant admittedly loitered in the stairwell located directly outside Mr. Pikiewicz's classroom with these two other students for at least a minute. CR - 34a;
3. One of the students was holding a belt in his hands. CR - 30a;
4. Appellant descended halfway down the steps, looked down the stairwell, and then rejoined the two other students. CR - 30a;
5. The appellant removed his coat or sweatshirt, reversed and replaced it covering his head with the hood. CR - 30a;
6. The three youths walked out of camera range and reemerged 17 seconds later. During that period, Mr. Pikiewicz was assaulted by three male students wearing hoodies. CR - 30a;

7. Three students then crashed through the door of the stairwell, and fled down the steps with Mr. Pikiewicz in pursuit. CR - 30a;
8. The Board heard the statement of T.D. which identifies the appellant as one of the three students present outside Mr. Pikiewicz's room. CR - 54a.

It was the Board's province and responsibility to determine issues of credibility. *Hickey v. Bd. of Sch. Directors of Penn. Manor Sch. Dist.*, 328 A.2d 549, 551 (Pa. Cmwlth. 1974). In rejecting the appellant's account as incredible, it properly considered the following as well as those factors delineated above:

1. the appellant was in the company of T.D. and M.K. while the latter was holding a belt, but yet testified that he had no idea about what they were talking about. CR - 29a, 30a, 67a, 72a and 73a.
2. The appellant's actions in descending halfway down the stairwell, looking around and then returning is circumstantial evidence that he was acting as a "lookout" before the assault began. When asked why he performed these actions, he gave no specific reason. CR - 74a and 75a.
3. The appellant reversed his jacket or hooded sweatshirt and covered his head and gave a feeble explanation for doing so. CR 72a - 76a.
4. Appellant told R.G. that a teacher got hit with a belt. Although this is not an admission, it showed appellant's knowledge of the incident proximate to the time it occurred. CR - 59a. It was proper for the Board to infer that he knew this because he participated.
5. Finally, when asked to give a written account of what occurred, the appellant never mentioned A.H. as the other assailant. CR - 70a - 71a.

Discretionary judgments made by school districts should not be overturned by reviewing courts where there is no error of law, and where the decision is based upon substantial evidence. In cases such as this, one who challenges a school board has a heavy burden and courts, "are not prone to interfere unless it is apparent that the school board's actions are arbitrary, capricious and prejudicial to the public interest...In the absence of a gross abuse of discretion, the courts will not second-guess policies of the school board." *Flynn-Scarcella v. Pocono Mountain Sch. Dist.*, 745 A.2d 117, 120 (Pa. Cmwlth. 2000) (citation omitted); *In re: Giles*, 367 A.2d 399, 400 (Pa. Cmwlth. 1996).

After its review of the record and the applicable law, this Court finds that: (1) the record is complete; (2) the additional tape is not new evidence and is not exculpatory or favorable to appellant; (3) the District properly applied the law; and (4) its decision was based upon substantial evidence.

III. CONCLUSION

Based upon the above, this Court shall issue an order affirming the adjudication of the School District of the City of Erie Board of Directors and dismiss the appeal.

ORDER

AND NOW, this 25th day of August 2008, for the reasons set forth in the accompanying opinion, it is hereby ORDERED that the adjudication of the School District of the City of Erie Board of Directors is hereby AFFIRMED and the appellant's appeal is DISMISSED.

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

COMMONWEALTH OF PENNSYLVANIA
v.
LYNNE M. BROWN

CONFESSIONS / MIRANDA WARNINGS

The voluntariness of a confession when *Miranda* warnings have been given is determined based upon the totality of the circumstances.

CONFESSIONS / VOLUNTARINESS REQUIREMENT

Promises of a recommendation of reduced sentence/ARD/PWOV/ retention of nursing license are impermissible and misleading inducements affecting the voluntariness of confession.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION Case No. 838 of 2008

Appearances: Robert Sambroak, Esquire, District Attorney's Office
J. Timothy George, Esquire, Attorney for Defendant

OPINION and ORDER

Dunlavey, Michael E., J.

Findings of Fact

1. Lynne Brown (hereinafter Defendant) is charged with one count of Unlawful Acts under the Pharmacy Act.

2. Defendant is alleged to have taken 19 Vicodin pills from her employer, Saint Mary's East nursing home.

3. Defendant testified that she is a Registered Nurse and has been licensed for 36 years.

4. Defendant testified that she was aware that a criminal conviction could result in the possible loss of her nursing license and her job.

5. On the afternoon of January 3, 2008, Defendant appeared at the Region VII Office of the Pennsylvania Office of the Attorney General at the request of Agent Ronald Golembeski. She was accompanied by her partner, Laura Luke.

6. Defendant and Ms. Luke were aware that Agent Golembeski wanted to speak to Defendant regarding the investigation of a complaint by her employer.

7. Agent Golembeski informed Defendant of her *Miranda* rights and advised that she was free to leave at any time. Defendant also signed a rights form and agreed to talk to Agent Golembeski. (Commonwealth Exhibit 1).

8. Defendant testified that she was very nervous and concerned about losing her job and her nursing license.

9. Agent Golembeski testified that he discussed possible favorable resolutions to Defendant's case, including Accelerated Rehabilitation Disposition (ARD) and Probation Without Verdict (PWOV). This conversation lasted approximately 15-20 minutes after the signing of the rights form and before questioning began.

10. Defendant spoke to Agent Golembeski for more than an hour. During that time, she made incriminating statements to Agent Golembeski.

11. Based on his eighteen years experience as a Narcotics Agent, Agent Golembeski testified that he believed Defendant's case fit the criteria for ARD or PWOV. He further testified that he informed the Defendant and her partner of this conclusion.

12. Agent Golembeski testified that he did not promise or guarantee that Defendant would receive ARD or PWOV. He testified that he would recommend such to the District Attorney's office, but the final determination was solely up to that office.

13. Defendant and Ms. Luke both testified that Agent Golembeski was "very nice."

14. Defendant and Ms. Luke both testified that they were relieved to hear about the probability of ARD or PWOV and that Luke [sic] fit the criteria for acceptance into the program.

15. Defendant testified that her drug counselor had suggested the possibility of ARD prior to the meeting with Agent Golembeski.

16. Ms. Luke testified that she believed if she and Defendant left the meeting with Agent Golembeski, without giving a statement, the chances for receiving ARD or PWOV might be diminished.

17. During the meeting, Ms. Luke asked Agent Golembeski if they needed a lawyer. He did not answer the question.

18. Neither Defendant nor Ms. Luke requested an attorney during the meeting with Agent Golembeski. They also did not consult with an attorney prior to the meeting with Agent Golembeski.

19. On May 26, 2008, Defendant applied for ARD. She was denied ARD on June 10, 2008.

Conclusions of Law

The voluntariness of a confession given after the reading of *Miranda* rights and promises of leniency should be viewed under the totality of the circumstances. *Commonwealth v. Nestor*, 551 Pa. 157, 709 A.2d 879 (1998) and *Commonwealth v. Templin*, 568 Pa. 306, 795 A.2d 959 (2002). Once a suspect requests an attorney, police may not induce a

confession with promises of leniency. *Commonwealth v. Gibbs*, 520 Pa. 151, 553 A.2d 409 (1989). Informing a suspect that his or her cooperation will be made known to authorities does not necessarily negate the voluntariness of a confession. *Commonwealth v. Parker*, 847 A.2d 745 (2004). However, promises of recommendations of a reduced sentence or in this case promises of a recommendation of ARD or PWOV which would result in no conviction and retention of a nursing license are impermissible inducements affecting the voluntariness of the confession, *Gibbs, Nestor and Templin*.

After reviewing the totality of the circumstances in this case, the Court concludes that the Defendant was induced into making incriminating statements to Agent Golembeski. While the agent did not specifically guarantee ARD or PWOV, his sharing of past favorable experiences with cases similar to Defendant's and his promise of a recommendation for ARD or PWOV to the Prosecutor persuaded her to cooperate with his interrogation. The Court finds that Agent Golembeski's style of questioning was non-confrontational and appropriate and played on Defendant's desire as a nurse to do the right thing.

The Court finds the situation in the case at bar to be analogous to *Gibbs*. The Court finds that the agent was aware of Defendant's concerns about her nursing license and her job and that he continued to emphasize that her cooperation with the investigation would lead to a favorable recommendation for ARD or PWOV to the Prosecutor. Agent Golembeski's failure to answer Ms. Luke's question whether Defendant needed an attorney also contributed to her belief that leaving the meeting without cooperating would jeopardize chances of ARD or PWOV.

Based upon the above, Defendant's Motion to Suppress Evidence shall be **GRANTED.**

ORDER

AND NOW, to-wit, this 1st day of October 2008 based upon the testimony and evidence presented and case law submitted by counsel, it is hereby **ORDERED, ADJUDGED**, and **DECREED** that Defendant's Motion to Suppress Evidence is **GRANTED.**

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

THERESA MASTROSTEFANO, individually and as Administratrix of the Estate of DONALD MASTROSTEFANO, a/k/a DONALD MASTERY, Decedent, Plaintiff,

v.

ST. VINCENT HEALTH CENTER, NURSE JANE DOE, FRANCES P. FOTI, M.D., ASSOCIATES IN NEPHROLOGY, P.C., JESSIE J. MARTIN, M.D., and ST. VINCENT MEDICAL EDUCATION and RESEARCH INSTITUTE, INC., Defendants

PLEADING / MOTION FOR SUMMARY JUDGMENT

Pennsylvania Rule of Civil Procedure 1035.2 provides that any party may move for summary judgment in whole or in part as a matter of law (1) whenever there is no genuine issue of material fact as to a necessary element of the cause of action or (2) if, after the completion of discovery relevant to the motion 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.

PLEADING / MOTION FOR SUMMARY JUDGMENT

Entry of summary judgment is proper where the plaintiff fails to plead facts sufficient to toll the statute, or admits facts sufficient to admit the limitations defense or fails in his or her response, by affidavits, or as otherwise provided, to set forth facts showing that there is a genuine issue for trial or where the evidence relied upon by the plaintiff is inherently incredible.

PLEADING / WRIT OF SUMMONS

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 or she has just set in motion.

SERVICE / GOOD FAITH ATTEMPT

It is not necessary that the plaintiff's conduct be such that it constitutes some bad faith act or overt attempt to delay; simple neglect and mistake to fulfill the responsibility to see that requirements for service are carried out may be sufficient to constitute a lack of good faith to effectuate service.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - MEDICAL PROFESSIONAL LIABILITY ACTION No. 13729 - 2005

Appearances: Rudolph L. Massa, Esquire, Attorney for Plaintiff
Lynn Bell, Esquire, Attorney for Defendants Frances P. Fote, M.D., and Associates in Nephrology
Joel M. Snavely, Esquire, Attorney for Defendants St. Vincent Health Center, Nurse Jane Doe, Jessie J. Martin, M.D., and St. Vincent Medical Education and Research Institute, Inc.

OPINION

Garhart, J., October 9, 2008

This Opinion is filed in response to Plaintiff's Statement of Matters Complained of on Appeal Pursuant to Pa.R.App.P. 1925(b). For the reasons that follow, the judgment of the Court should be affirmed.

Factual and Procedural History

This medical malpractice/wrongful death action arose out of the medical care provided to Plaintiff's decedent, Donald Mastrostefano, who passed away on October 17, 2003. The underlying facts surrounding his care need not be repeated in this instance, as the issues before the Court deal solely with the service of the Writ of Summons in this case and the application of *Lamp v. Heyman*, 469 Pa. 465, 366 A.2d 882 (1976), and its progeny.

In late September of 2005, Plaintiff approached Rudolph Massa, Esquire about the possibility of filing a medical malpractice lawsuit related to the death of her husband.

After deciding to take the case, Attorney Massa had his paralegal, Lauren Conway, contact the Erie County Prothonotary's Office to determine the manner in which a writ of summons was issued and served in Erie County because he was personally unfamiliar with the process in Erie County. *See* Aff. of Rudolph L. Massa, Esquire at ¶ 5. According to Mrs. Conway, she was told that the writs would be sent directly to the Sheriff by the Prothonotary and that the Sheriff would then require the Defendants' addresses and service instructions. *See* Aff. of Lauren R. Conway at ¶ 5.

A Praecipe for Writ of Summons was received in the Prothonotary's Office on October 7, 2005. Attached to the Praecipe was a hand-written post-it note, which read, "Please return writs in self addressed stamped envelope provided - do not forward to sheriff." Aff. of Kelly Spusta, at Ex. B (emphasis in original). The handwritten note is in Gloria Fryer's handwriting. *See* Depo. of Lauren R. Conway at 50. Mrs. Fryer was a receptionist in Attorney Massa's office in October of 2005. *See id.* at 12.

The Writs were issued on October 10, 2005 and were recorded on the list of docket numbers whereby the attorney requested to have the writ returned to the attorney for service. *See* Aff. of Spusta at ¶ 10. The Writs were returned to Attorney Massa's office and placed in his file. *See* Aff. of Massa at ¶ 6. According to Attorney Massa's office, no one realized that they had received the original Writs. *See id.* at ¶ 6; *see also* Aff. of Conway at ¶ 7.

In the meantime, Mrs. Conway conducted a search for the whereabouts of the Defendants. *See* Aff. of Massa at ¶ 7. Mrs. Conway asserted she was unable to determine service addresses for Nurse Jane Doe, Jessie J. Martin, M.D., or Saint Vincent Emergency Services. *See* Aff. of Conway at ¶ 11. However, Mrs. Conway admitted that she accessed the St. Vincent

Health Center website on October 5, 2005, and that Dr. Jessie Martin and St. Vincent Emergency Health Services were both listed on the site along with an address. *See* Depo. of Conway at 90-91. Mrs. Conway also had access to Dr. Martin's address through Health Grade's website which she access on October 4, 2005. *See id.* at 60; Ex. F. Additionally, Mrs. Conway testified that the name "Lorri Collins" was written legibly on Mr. Mastrostefano's resuscitation record, his patient admission assessment screening tool, and progress notes. *See id*. at 31-34. But, in attempting to locate Nurse Collins, Mrs. Conway did not take the basic step of looking in the phone book—where she would have quickly found Nurse Collins' listed phone number and address. *See id.*

On November 8, 2005 - one day before the Writs were set to expire - Mrs. Conway contacted the Sheriff's Office to provide service instructions for all Defendants. *See* Aff. of Conway at ¶ 13. Only then did she learn that the Sheriff's Office did not have the original Writs. *See id.* at ¶ 15. The original Writs were located in Attorney Massa's file on November 14, 2005, and were sent, along with service instructions, to the Sheriff's Office by overnight mail that same day. *See id.* at ¶ 15. However, the Sheriff could not serve the Writs because they had expired. *See id.* at ¶ 16. Plaintiff filed a Praecipe to Reissue Writ of Summons on November 15 with directions to forward the Writs to the Sheriff for service. *See id.* at ¶ 17. Defendants were ultimately served with the Writs on November 28, 2005. Prior to that day, Defendants had no notice of this lawsuit.

All Defendants filed Motions for Summary Judgment arguing that, although Plaintiff had filed the Praecipes for Writs of Summons prior to the expiration of the statute of limitations, she failed to have them timely served, and thus the application of *Lamp v. Heyman* bars this action. The Court granted the Motions for Summary Judgment on the basis of *Lamp*. This timely appeal followed.

Discussion

Plaintiff raises two allegations of error. First, she contends that the Court erred when it found that she failed to make a good faith effort to effectuate legal process and granted the Motions for Summary Judgment. Second, she contends that the Court erred in failing to grant her request for reconsideration to consider additional evidence. The Court will address each allegation in turn.

1. Motions for Summary Judgment

With regard to the granting of the Motions for Summary Judgment, Plaintiff contends that the Court erred in granting the Motions because: (1) the finding was not supported by the evidence; (2) the Court applied the incorrect legal standard (the applicable standard required a finding that Plaintiff's conduct amounted to an intentional effort to stall the judicial machinery, not an absence of a good faith effort); and (3) that

the Court resolved a disputed factual issue that was not appropriate for resolution on summary judgment.

The standard for summary judgment is well-settled:

> Pennsylvania Rule of Civil Procedure 1035.2 provides that any party may move for summary judgment in whole or in part as a matter of law (1) whenever there is no genuine issue of 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 the jury.
>
> In addition, we are mindful that in considering a motion for summary judgment the court must examine the record in the light most favorable to the non-moving party; that the court's function is not to decide issues of fact but merely to determine whether any such issues exist; and that all doubts as to the existence of a genuine issue of material fact must be resolved in favor of the non-moving party. We also note that ordinarily most questions relating to the applicability of the defense of the statute of limitations are questions of fact to be determined by the jury. Specifically, the questions of whether a plaintiff has exercised due diligence in discovering the incidence of his injury is usually a jury question. Whether the statute has run on a claim is usually a question of law for the judge, but where ... the issue involves a factual determination, i.e. what is a reasonable period, the determination is for the jury.
>
> This is not to say that there are not instances where summary judgment may be ordered in malpractice actions based upon a statute of limitations defense. Entry of summary judgment is proper where the plaintiff fails to plead facts sufficient to toll the statute, or admits facts sufficient to admit the limitations defense or fails in his response, by affidavits, or as otherwise provided, to set forth facts showing that there is a genuine issue for trial or where the evidence relied upon by the plaintiff is inherently incredible.

Ward v. Rice, 828 A.2d 1118 (Pa. Super. 2003)(citation omitted).

In resolving the issue of whether the statute of limitations has been tolled by the filing of a writ of summons, the courts are tasked with following the *Lamp* line of cases to determine whether the plaintiff has made a good faith effort to effectuate notice of the lawsuit to the defendant. In *Lamp*, the Supreme Court announced:

> we now conclude that there is too much potential for abuse in a rule which permits a plaintiff to keep an action alive without proper notice to a defendant merely by filing a praecipe for a writ of summons and then having the writ reissued in a timely fashion without attempting to effectuate service. ... Our purpose is to avoid the situation in which a plaintiff can bring an action, but, by not making a good-faith effort to notify a defendant, retain exclusive control over it for a period in excess of that permitted by the statute of limitations.
>
> . . .
>
> Accordingly, pursuant to our supervisory power over Pennsylvania courts, we rule that henceforth, i.e., in actions instituted subsequent to the date of this decision, 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 v. Heyman, 469 Pa. 465, 478, 366 A.2d 882, 888 (1976).

The Superior Court has recently summarized the good faith standard:

> It is well settled in this Commonwealth pursuant to *Lamp v. Heyman*, 469 Pa. 465, 366 A.2d 882 (1976), and *Farinacci v. Beaver County Industrial Development Authority*, 510 Pa. 589, 511 A.2d 757 (1986), that service of original process completes the progression of events by which an action is commenced. Once an action is commenced by writ of summons or complaint the statute of limitations is tolled only if the plaintiff then makes a good faith effort to effectuate service. *Moses v. T.N.T. Red Star Express*, 1999 PA Super 31, 725 A.2d 792 (Pa. Super. 1999), *appeal denied*, 559 Pa. 692, 739 A.2d 1058 (1999). "What constitutes a 'good faith' effort to serve legal process is a matter to be assessed on a case by case basis." *Id.* at 796; *Devine v. Hutt*, 2004 PA Super 460, 863 A.2d 1160, 1168 (Pa. Super. 2004) (citations omitted). "[W]here noncompliance with *Lamp* is alleged, the court must determine in its sound discretion whether a good-faith effort to effectuate notice was made." *Farinacci* at 594, 511 A.2d at 759.
>
> In making such a determination, we have explained:
>
> 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.

> *Devine, supra* at 1168 (quoting *Rosenberg v. Nicholson,* 408 Pa. Super. 502, 597 A.2d 145, 148 (Pa. Super. 1991), *appeal denied,* 530 Pa. 633, 606 A.2d 903 (1992)). "[A]lthough there is no mechanical approach to be applied in determining what constitutes a good faith effort, it is the plaintiff's burden to demonstrate that his efforts were reasonable." *Bigansky v. Thomas Jeffers on University Hospital,* 442 Pa. Super. 69, 658 A.2d 423, 433 (Pa. Super. 1995), *appeal denied,* 542 Pa. 655, 1668 A.2d 1119 (1995).

Englert v. Fazio Mech. Serv., Inc., 932 A.2d 122 (Pa. Super. 2007).

The Pennsylvania Supreme Court has also recently re-visited the *Lamp* issue. In the case of *McCreesh v. City of Philadelphia,* 585 Pa. 211, 888 A.2d 664 (2005), the plaintiff commenced an action against the City of Philadelphia by filing a praecipe to issue a writ of summons two days before the applicable statute of limitations would expire. The plaintiff tried to serve the City by sending the writ to the City Law Department by certified mail. The City acknowledged that it received the writ. The plaintiff later had the writ reissued and properly served on the City by hand delivery. The City filed preliminary objections asserting that the initial writ was ineffective because it had not been served properly and that the claims were therefore time-barred.

The trial court overruled the preliminary objections finding that the plaintiff had made a good faith effort to serve notice of the suit on the City by sending it certified mail. The Commonwealth Court reversed holding that plaintiff's failure to comply with the Rules of Civil Procedure was demonstrative of his failure to make a good faith effort to serve notice of the suit.

In discussing the progression of the *Lamp* case, the Supreme Court noted that two lines of cases had developed in this area. The *Teamann* line of cases required strict compliance with the Rules of Civil Procedure; whereas the *Leidich* line of cases permitted cases to go forward despite procedural defects in service where the defendant had actual notice of the lawsuit and is not prejudiced by the failure to strictly comply with the Rules of Civil Procedure. *See McCreesh,* 585 Pa. at 219, 888 A.2d at 669. The Supreme Court then held that it would follow the *Leidich* line of cases, which "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." *McCreesh,* 585 Pa. at 227, 888 A.2d at 674. The decision of the Commonwealth Court was reversed because the plaintiff had provided the City with actual notice of the suit.

The Supreme Court observed in a footnote "that there may be situations where actual notice may not be absolutely necessary so long as prejudice did not result, but we need not delineate such an exception here because the issue is not before us." *Id.* This is precisely the issue placed before

this Court.

The Superior Court has reviewed a case factually similar to this one in light of the *McCreesh* opinion. In the case of *Englert v. Fazio Mech. Serv., Inc.*, 932 A.2d 122 (Pa. Super. 2007), the plaintiffs commenced their lawsuit by praecipe for writ of summons on September 19, 2003, well before the expiration of the applicable statute of limitations. The plaintiffs provided the sheriff with the address of the defendant's business as it was listed in the telephone directory. However, the sheriff was unable to serve the writ on the defendant because they had moved from that address almost six months prior to the date the praecipe for writ of summons was filed. The sheriff's office filed a return of service on October 23, 2003, indicating that the defendant had not been served because they moved and noted the defendant's new address on the return. Plaintiffs' counsel moved his office shortly after the time the sheriff filed the return of service, and plaintiffs' counsel apparently never received a copy of the return because he was experiencing problems with mail deliveries. Plaintiff's counsel never contacted the Prothonotary's office to determine whether service had been effected.

The defendant's insurance carrier contacted plaintiffs directly in March of 2004 inquiring whether they would make a claim for their injuries and reminding them that the statute of limitations would end on March 25, 2004. In March of 2004, plaintiffs' counsel finally received the sheriffs return of service in the mail. On March 31, 2004, two years and six days after the accident, plaintiffs' counsel filed a praecipe to reissue the writ of summons. The trial court dismissed the suit finding that the plaintiffs had failed to establish they made a good faith effort to accomplish service.

The Superior Court affirmed the decision. After reviewing the *McCreesh* decision, the *Englert* court stated:

> We discern no abuse of discretion under the circumstances presented here, where Appellants took no action whatsoever once the writ was issued to ascertain whether service was properly made and relied instead on counsel's customary practice of waiting for word from the Sheriff's office, no matter how long that might take and in spite of the difficulties he had experienced receiving his mail in a timely manner. Appellant's conduct clearly amounted to neglect to fulfill the responsibility to see that requirements for service were carried out. In other words, Appellants' inaction demonstrated an intent to stall the judicial machinery which was put into motion by the filing of the initial writ and simply cannot be excused.

Englert, supra at 126-27. Moreover, the *Englert* court distinguished its case from *McCreesh* on the basis that the plaintiffs had not provided actual notice of the suit to the defendants.

This Court found that this case was similar to *Englert* in that Plaintiff had not provided Defendants with actual notice of this action, and that

her counsel's instruction to the Prothonotary's Office to return the Writs to him was evidence of an intent to stall the judicial machinery. As in *Englert*, the Plaintiff here had the writs reissued and properly served shortly after the statute of limitations ended.

The *McCreesh* Court noted that the purpose behind the statutes of limitations "is to expedite litigation and thus discourage delay and the presentation of stale claims which may greatly prejudice the defense of such claims." *McCreesh*, 585 Pa. at 222, 888 A.2d at 671. Once an action is commenced, the defendant must be notified of the lawsuit in order to fulfill that purpose. *See id.* In the *McCreesh* case and in the *Leidich* line of cases, the Courts were willing to overlook procedural defects in service of the lawsuits because the plaintiffs had actually notified the defendants about the lawsuits within the statutes of limitations or within the time for serving notice of the lawsuit. That is not the situation presented here. Here, Defendants had no notice of the lawsuit until the Writs were actually served on November 28, 2005 - 42 days after the statute of limitations ended and 19 days after the original Writs expired.

The Court found that the note attached to the Praecipes directing that the Writs be returned to Attorney Massa's office was evidence of intent to maintain complete control over the Writs and to stall the judicial machinery. Even it the Court disregards the note, the actions of Plaintiff's counsel after discovering that the Sheriff did not have the original Writs and could not serve them demonstrated a lack of a good faith effort to serve Defendants with notice of the suit. The carelessness and neglect in arranging to have the Writs served demonstrated in this case is similar to the neglect seen in *Englert.* Plaintiff did not provide Defendants with actual notice of the lawsuit, and she did not file a Praecipe to Reissue and/or Replace the Lost Writs. Instead, nothing was done until the Writs were found in Attorney Massa's file on November 14, 2005 - five days later. Timewise, this is not unlike the situation presented in *Englert* where the Praecipe to Reissue the writ was issued two days after the statute of limitation expired.

Contrary to Plaintiff's assertion, the Court does not read *McCreesh* to require Defendants prove that Plaintiff intended to stall the judicial machinery rather than demonstrate Plaintiff failed to put forth a good faith effort. The *McCreesh* Court specifically stated that it was "merely re-animating the purpose of *Lamp.*" *McCreesh*, 585 Pa. at 227, 888 A.2d at 674. It was *Lamp* that first introduced the concept of requiring a plaintiff to make a good faith effort to notify the defendant about the lawsuit. Nothing in *McCreesh* abolishes the good faith requirement; to hold otherwise would eviscerate *Lamp*. Moreover, the Courts have routinely held that bad faith or an overt effort to delay the proceedings is not necessary to bring the *Lamp* rule into play; mere neglect or unintentional conduct may be evidence of lack of good faith. *See Farinacci v. Beaver*

County Indust. Develop. Auth., 510 Pa. 589, 511 A.2d 757 (1986); *Englert, supra; Devine v. Hutt,* 863 A.2d 1160 (Pa. Super. 2004). Thus, it was not error for the Court to rely on the good faith standard.

2. Refusal to grant reconsideration

With regard to the refusal to grant reconsideration, Plaintiff contends that the Court erred in failing to grant reconsideration to consider the additional evidence. The Court did consider the affidavits and exhibits attached to Plaintiff's Motion for Reconsideration. Indeed, the arguments set forth in the Motion for Reconsideration were presented, to a certain extent, at the argument on the Motion for Summary Judgment. There was nothing in the Motion for Reconsideration or the affidavits and exhibits attached thereto that compelled the Court to reverse its decision.

Conclusion

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

BY THE COURT:
/s/ **John Garhart, Judge**

RASHEEN PUGH, a minor, by and through his parents and natural guardians, WILLIAM PUGH and CRYSTAL PUGH, and WILLIAM PUGH and CRYSTAL PUGH, individually, Plaintiffs,

v.

HAMOT MEDICAL CENTER, Defendant

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

A party can move for summary judgment when there is no genuine issue of material fact that is a necessary element of the cause of action or defense that could be established through additional discovery or expert report. Pa. R.C.P. 1035.2(1).

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary judgment is proper when the evidentiary record either shows that the material facts are undisputed or there is insufficient evidence to establish a prima facie cause of action or defense.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

It is incumbent upon the adverse party to provide essential evidence to preserve the cause of action. If the non-moving party fails to provide sufficient evidence to establish or contest a material issue the moving party is entitled to judgment as a matter of law.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

The court must examine the record in the light most favorable to the non-moving party and resolve all doubts against the moving party as to the existence of a tribal issue in all motions for summary judgment.

CIVIL PROCEDURE / MENTAL HEALTH PROVIDER

A mental health provider is subject to liability for harm caused to a third party by a patient when the patient conveyed a specific threat to harm the third party. The duty of the mental health care provider is limited to warning the third party of the threat conveyed by the patient.

CIVIL PROCEDURE / MENTAL HEALTH PROVIDER

The courts have held that there is no common law duty to protect third parties in situations where it is alleged that the provider had a duty to control the conduct of a third party to protect another from harm, unless there is a special relationship that imposes a duty upon the actor to control the third person's conduct or unless there is a special relation between the actor and the other.

CIVIL PROCEDURE / MENTAL HEALTH PROCEDURES ACT

In the absence of willful misconduct or gross negligence medical providers who discharge a patient shall not be civilly or criminally liable for such decision or for any of its consequences. 50 Pa. Cons. Stat.; 7114(a).

CIVIL PROCEDURE / GROSS NEGLIGENCE

Gross negligence is the flagrant and gross deviation from the ordinary standard of care.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 14095-1997

Appearances: George M. Schroeck, Esq. for the Plaintiffs
Peter W. Yoars Jr., Esq. for the Defendant

OPINION

Connelly, J., October 9, 2007

This matter is before the Court pursuant to Hamot Medical Center's (hereinafter "Defendant") Motion for Summary Judgment. Defendant alleges that Rasheen Pugh, a minor, by and through his parents and natural guardians, William Pugh and Crystal Pugh, and William Pugh and Crystal Pugh, individually (hereinafter, collectively, "Plaintiffs") have failed to allege gross negligence by Defendant and have failed to establish that Defendant owed a duty to Plaintiffs. Defendant also sought to have the case dismissed due to inactivity, but that request has been withdrawn.

Statement of Facts

This case stems from the actions of Devin Daniels (hereinafter "Daniels"), the brother of Crystal Pugh and uncle of Rasheen Pugh. *Plaintiffs' Brief in Opposition of Motion for Summary Judgment* at 1. Daniels was released from Temple University Medical Center in June of 1997, following treatment for psychological distress, and subsequently relocated to Erie. *Id.* at 2. On June 30, 1997, Daniels went to Plaintiffs' home, where it was visible to Crystal Pugh that Daniels was not well. *Id.* She took him to Defendant's emergency room. *Id.* During the visit, a behavioral nurse interviewed Daniels, Crystal Pugh, and Rasheen Pugh. *Id.* The nurse completed a Behavioral Health Emergency Service Assessment. *Id.* Daniels was discharged from the emergency room and transported to the Crisis Residential Unit at Community Integration, Inc. (hereinafter "CRU") by a CRU staff member. *Id.* An Adult Assessment was completed at the CRU and Daniels denied he was a danger to himself or others. *Defendant's Motion for Summary Judgment, Appendix 2,* p. 1. However, on July 2, 1997, the CRU transported Daniels back to Hamot because Daniels experienced paranoia and suicidal thoughts and expressed a desire to be hospitalized. *Defendant's Motion for Summary Judgment, Appendix 2,* p. 11. At this visit, Daniels was again interviewed by a behavioral nurse and indicated he was seeking help and medication for his symptoms. *Id.* He denied having any thoughts to hurt himself or others. *Id.* at 12. A doctor also conducted a behavioral health evaluation and Daniels did not meet the emergency criteria for inpatient admission. *Id.* at 14. He was referred back to the CRU. *Id.* Daniels was upset that he was not admitted. *Plaintiffs' Brief in Opposition* at 3. He returned to the CRU but left the facility later that morning. *Id.*

Daniels then went to Plaintiffs' home. *Id.* Rasheen, who was home

alone, was watching television in his bedroom around 10:00 am when he noticed someone creeping into his room. *Id.* Rasheen realized it was Daniels, who was carrying two knives in one hand. *Id.* Daniels, raising the knives, said to Rasheen, "You guys tried to kill me for some insurance money ... I'm just going to kill you." *Id.* A struggle ensued and Rasheen broke free, ran into the dining room, and tried to call 911. *Id.* Another struggle occurred, which ended in Daniels being tangled in the phone cord. *Id.* Rasheen grabbed the knives, stabbed Daniels in the leg, and ran to the neighbor's house. *Id.* Before the police arrived, Daniels started three fires in the house that, although the fire department extinguished them, caused significant damage. *Id.*

Plaintiffs seek to recover for a variety of damages they allegedly suffered. The house sustained severe fire, smoke, and water damage. *Plaintiffs' Pretrial Narrative Statement,* p. 3. The second floor of Plaintiffs' home was used as a rental property and Plaintiffs lost the rental income, plus Plaintiffs had to rent a home for their own family. *Id.* Personal belongings had to be repaired and replaced. *Id.* Rasheen Pugh was distraught, sought counseling, and missed work. *Id.* Crystal Pugh missed over nine days of work. *Id.* Plaintiffs' special damages total $96,667.04. *Id.* at 4. Plaintiffs allege their damages and injuries were a result of the negligence and carelessness of Defendant, specifically that Defendant failed to exercise ordinary care in releasing an individual it knew or should have known to be dangerous into the population, failing to follow its internal policies and protocols for evaluating and treating an individual with mental illness that it knew or should have known to be dangerous, and failing to follow accepted and established procedures for evaluation and treatment of persons for mental illness. Defendant responds that Plaintiffs have failed to state a *prima facie* cause of action for medical malpractice in the mental health context because Plaintiffs cannot establish that Defendant engaged in willful misconduct or gross negligence, and that absence such showing, a treating entity such as Defendant is entitled to immunity from civil liability.

Findings of Law

A party can move for summary judgment when there is no genuine issue of material fact that is a necessary element of the cause of action or defense that could be established through additional discovery or expert report. *Pa.R.C.P. 1035.2(1).* Further, a motion for summary judgment may be filed if, after the close of discovery including the production of expert reports, an adverse party has failed to produce evidence of fact essential to the cause of action or defense in which a jury would need to decide the issues. *Pa.R.C.P. 1035.2(2).*

The standard that the Court must apply when considering a motion for summary judgment is set forth in *McCarthy v. Dan Lepore & Sons Co., Inc.*, 724 A.2d 938 (Pa. Super 1998), *alloc. den.*, 743 A.2d 921 (Pa.1999).

McCarthy states:

> A grant for summary judgment is proper when the evidentiary record either shows that the material facts are undisputed or there is insufficient evidence to establish a prima facie cause of action or defense. Furthermore, it is incumbent upon the adverse party to provide essential evidence to preserve the cause of action. If the nonmoving party fails to provide sufficient evidence to establish or contest a material issue the moving party is entitled to judgment as a matter of law. It is the non-moving party that bears the burden of providing sufficient evidence on issues that, are essential to the case such that a jury could return a verdict favorable to the non-moving party. The court must examine the record in the light most favorable to the non-moving party and resolve all doubts against the moving party as to the existence of a triable issue in all motions for summary judgment.

Id. at 940 (citations omitted).

This Court will first address whether Defendant owed Plaintiffs, a third party, any duty, a basic foundation requirement for any negligence claim.

The Pennsylvania Supreme Court has held that a mental health provider is subject to liability for harm caused to a third party by a patient when the patient conveyed a specific threat to harm the third party. *Emerich v. Philadelphia Center for Human Development*, 720 A.2d 1032 (Pa. 1998). *Emerich* created a carefully designed and limited cause of action based upon a failure to warn. Under the majority decision, a failure-to-warn cause of action will exist only when the mental health patient has conveyed a specific threat to harm the actual victim. In such a case, the duty of the mental health care provider is limited to warning the third party of the threat conveyed by the patient.

While the Pennsylvania Supreme Court has not specifically addressed the common-law duty to protect third parties in situations other than failure to warn, the Pennsylvania Superior Court has twice stated that there is no common-law duty to protect third parties in situations like the one presented here. In *F.D.P. v. Ferrara,* 804 A.2d 1221 (Pa. Super. 2002), the parents of a girl who was sexually assaulted by a resident of a mental health facility brought suit against the operators of that facility. They alleged, *inter alia*, that the mental health facility was negligent in failing to seek a civil commitment of the resident, who had a long history of sexual misconduct. *Id.* at 1225. The court found that there was no general duty to control the conduct of a third party to protect another from harm "unless there is a special relationship ... that imposes a duty upon the actor to control the third person's conduct or unless there is a special relation between the actor and the other ...." *Id.* at 1228. No such duty existed as to the facility. Further, the court declined to adopt Section 319

of the Restatement (Second) of Torts, which imposes a duty to prevent a third-person from doing harm on "[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled." *Restatement (Second) Torts § 319*. Based on the need to balance policy considerations, the court stated:

> If we allow recovery against mental health and mental retardation providers for harm caused by patients except in the clearest circumstances, we would paralyze a sector of society that performs a valuable service to those in need of mental health care. Thus, we decline to impose a duty of ordinary care under Restatement (Second) of Torts § 319 on providers of mental health and mental retardation services.

F.D.P. at 1232.

The Pennsylvania Supreme Court has delineated the considerations that must be weighed when deciding whether to create a duty. The primary consideration is simply social policy. Our Supreme Court explained:

> In determining the existence of a duty of care, it must be remembered that the concept of duty amounts to no more than "the sum total of those considerations of policy which led the law to say that the particular plaintiff is entitled to protection" from the harm suffered. To give it any greater mystique would unduly hamper our system of jurisprudence in adjusting to the changing times.

Gardner v. Consolidated Rail Corp., 573 A.2d 1016 (Pa. 1990).

Finally, in a factually similar case, *Heil v. Brown,* the Court was faced with whether the plaintiff could recover from the hospital that had released a patient with known mental infirmities, rather than having him admitted on an emergency treatment basis. *Heil v. Brown,* 662 A.2d 669 (Pa. Super. 1995). A day after being released the patient ran his vehicle into the police officer's marked vehicle, resulting in the police officer's severe injuries. *Id.* The trial court granted the defendant hospital's motion for summary judgment and the plaintiff police officer appealed that decision. *Id.* The Superior Court stated:

> The legal obstacle to finding liability is that there is no relationship between appellees and appellant which creates any legal obligation, a duty, from appellees to this appellant. As explained by Justice Cardozo, negligence is a matter of relation between parties, and must be founded upon the foreseeability of harm to the person in fact injured. *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 at 101 (1928)."

Id. at 671.

The Superior Court affirmed the grant of summary judgment. "To discount the important element of foreseeability would effectively overrule well-established and precedential tort law, and would extend liability ... to treating physicians vis-à-vis third party victims." *Id.* at 672.

Based upon the well-established caselaw in this Commonwealth, it is clear that Plaintiffs cannot claim Defendant owed them a duty under any common-law theory. Therefore, Defendant could not have breached any duty when it owed no duty.

In addition to common-law duties, a Plaintiff may rely on a statutory duty if one has been created by the legislature. In 1976, the Pennsylvania legislature passed the Mental Health Procedures Act (hereinafter "MHPA"). The relevant portion reads:

> In the absence of willful misconduct or gross negligence, a county administrator, a director of a facility, a physician, a peace officer or any other authorized person who participates in a decision that a person be examined or treated under this act, or that a person be discharged, or placed under partial hospitalization, outpatient care or leave of absence, or that the restraint upon such person be otherwise reduced, or a county administrator or other authorized person who denies an application for voluntary treatment or for involuntary emergency examination and treatment, shall not be civilly or criminally liable for such decision or for any of its consequences.

50 Pa. Cons.Stat. § 7114(a).

In order to recover from an institution involved in mental health decisions, a plaintiff must prove more than simple negligence. The MHPA grants immunity to such institutions unless the plaintiff can show willful conduct or gross negligence. *50 Pa. Cons.Stat. § 7114(a).*

The Supreme Court has further explained the scope of the duty created by the MHPA. *Goryeb v. Pennsylvania Department of Public Welfare,* 575 A.2d 545 (Pa.1990). The language in the MHPA states that no liability will be imposed for the decision itself "or for any of its consequences," *50 Pa. Cons.Stat. § 7114(a)* "Clearly, the words 'any of its consequences' indicate the legislative recognition that discharging a severely mentally disabled person ... is a potential serious danger not only to the patient himself but to others.'" *Goryeb* at 549. Therefore, whenever a plaintiff can prove that the hospital failed to meet its duty to refrain from gross negligence in decisions regarding treatment, discharge or commitment of a patient, the hospital is liable for injury "to the person or property of third parties where such injury resulted from a hospital's negligent failure to meet its responsibility." *Id.*

The Supreme Court has defined gross negligence as the flagrant and gross deviation from the ordinary standard of care. *Albright v. Abington*

Memorial Hospital, 696 A.2d 1159 (Pa. 1997). The *Albright* court also held that, where there is no question that gross negligence is not present, summary judgment may be granted to a mental health provider. *Id.* In *Albright*, the husband of a mental health patient filed a lawsuit against the hospital, both individually and as executrix of his wife's estate, alleging gross negligence. *Id.* Mrs. Albright had been involuntarily committed after suffering several psychotic episodes and making threats and physical attacks against her husband. *Id.* at 1161. After she no longer met the requirement for inpatient treatment, Mrs. Albright was ordered to 90 days of involuntary outpatient treatment. *Id.* Nearing the end of her treatment, Mrs. Albright failed to attend her appointments and her condition began to deteriorate. *Id.* Her husband called the medical staff, but received no response. *Id.* Upon finally reaching a case manager, Mr. Albright described his wife's changes in behavior as follows: He stated that his wife had let the dinner burn in the oven so that smoke was coming out of the oven when he arrived home from work. He explained that Mrs. Albright had been walking at night and was chain smoking. Finally, he described cigarette burns in six-month-old furniture, but was not sure when the burns were made. *Id.* at 1162.

The case manager informed Mr. Albright that this was not enough to seek further involuntary treatment. *Id.* The case manager confirmed this with his supervisor the next day and scheduled an appointment with Mrs. Albright for the first available date, which was a few days later. *Id.* The next evening, a fire erupted in the home while Mr. Albright was asleep upstairs and his wife was asleep in the den. *Id.* at 1163. Mrs. Albright died in the fire, which was determined to have originated in the den, likely from careless smoking. *Id.* Mr. Albright filed suit against the hospital. *Id.* The hospital filed a motion for summary judgment on the basis of immunity under the MHPA. *Id.* The trial court granted summary judgment and the Superior Court and Supreme Court affirmed that decision. *Id.* Specifically, the Supreme Court stated that a trial court could make a summary judgment determination because:

> [t]o require mental health employees and their employers to defend jury trials on the issue of gross negligence where the trial judge finds as a matter of law that, at best, only ordinary negligence has been established, would gut the limited immunity provision of the Act of any meaning and unfairly subject such employees and facilities to protracted and expensive litigation.

Id. at 1165.

After looking closely at the relevant facts, the Supreme Court found that summary judgment was appropriate as Mr. Albright failed to establish that the hospital's actions were grossly negligent. *Id.* at 1167.

Likewise, in the case at bar, after a close examination of the facts it is

clear that Defendant did not act in a grossly negligent manner. In fact, Defendant acted far more prudently than the *Albright* defendant. Daniels was evaluated on two different dates at Defendant's emergency room. On both dates, a behavioral health nurse completed a thirteen page Behavioral Health Emergency Service Assessment. At the first visit, Daniels denied any self-destructive behaviors or any thoughts of hurting others, but he did feel people were after him and trying to hurt him. At one point, Daniels did admit to suicidal ideations, but had no specific plan. Daniels was also evaluated by the emergency room physician and a psychiatrist and was ultimately referred to the CRU, where he was transferred that day. At the CRU, Daniels again thought people were trying to kill him and that he heard unspecified voices. On July 2, Daniels requested that he be hospitalized so that he could receive "medication" to "take care of his sickness." Daniels was still concerned people were trying to kill him. Daniels was transported to Defendant's emergency room again. At the hospital, Daniels told the staff that he "need to get back on medications, want to come to hospital." At this visit, Daniels denied having any current thoughts of hurting himself or others. Again, a physician reviewed the Assessment and determined that Daniels did not meet the criteria for emergency inpatient admission. The physician referred him back to the CRU for further evaluation. Daniels was willing to return to the CRU, and he returned there later that day. Clearly, Defendant's staff completed a thorough evaluation of Daniels' condition each time he presented himself. Plaintiffs have also presented to the Court the written opinion of their expert, Dr. David Bawden. Dr. Bawden opines that he believes Defendant deviated from the community standards by not admitting Daniels. Specifically, Dr. Bawden states "Hamot failed to follow their own admission criteria, community standards, and EMTALA standards by not admitting Devin J. Daniels on two occasions. By referring him to outpatient treatment and failing to stabilize his emergency psychiatric condition they failed to prevent harm to others." Defendant also presents its own expert witness who opines that Defendant's actions were well within the accepted standard of care. Even in viewing all the facts in a light most favorable to Plaintiffs, this Court cannot find that Defendant's actions were grossly negligent. Daniels received far more individualized attention than the *Albright* patient. He was given two full assessments and never made any specific threats or had any specific plans to harm himself or others. The emergency room physicians and psychiatrists determined that the best method of treatment would be for Daniels to follow up with the CRU, and he was discharged from the hospital into the CRU's care. As such, Defendants cannot be held to have grossly deviated from the standard of care under the MHPA.

Plaintiffs clearly pled a breach of ordinary care by Defendant, and that allegation is all that is supported by Plaintiffs' expert. In response

to Defendant's Motion for Summary Judgment, Plaintiffs ask this court to hold that a reasonable jury could find gross negligence on the part of Defendant, thereby precluding summary judgment. However, even viewing the evidence in favor of the non-moving party, it is clear to this Court that Plaintiffs have solely relied upon a breach of the duty of ordinary care. It would be error for this Court to allow Plaintiffs to introduce a gross negligence claim after the statute of limitations has run. Furthermore, Plaintiffs' new allegations relating to the Emergency Medical Treatment and Active Labor Act (hereinafter "EMTALA") have occurred only after Plaintiffs received the report of their expert. Plaintiffs made no reference to EMTALA in their complaint and the statute of limitations has since run on this claim. It would be error for this Court to allow Plaintiffs to rely on EMTALA, if it were found to be applicable, at this stage of the proceedings.

Therefore, based on the foregoing reasons, Defendant's Motion for Summary Judgment is granted.

ORDER

AND NOW, to-wit, this 9th day of October, 2007, for the reasons set forth in the foregoing **OPINION,** it is hereby **ORDERED, ADJUDGED** and **DECREED** that Defendant Hamot Medical Center's Motion for Summary Judgment is **GRANTED.**

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

Editor's Note: Pugh v. Hamot Medical Center was appealed to the Superior Court of Pennsylvania
No. 2034 WDA 2007
Order affirmed December 15, 2008

JOSEPH SARVADI, Plaintiff

v.

FAMILY FIRST SPORTS PARK, INC., GARY RENAUD, an individual, and JAMES RIMMER, an individual, Defendants

TORTS / INTERFERENCE WITH PROSPECTIVE ADVANTAGE

Interference with Prospective Advantage, the publication of disparaging statements concerning the business of another, is actionable where each of the following elements have been met: (1) the statement which concerns the business of another is false; (2) the publisher either intends the publication to cause pecuniary loss or reasonably should recognize that publication will result in pecuniary loss; (3) pecuniary loss does, in fact, occur; and (4) the publisher either knows that the statement is false, or acts in reckless disregard of its truth or falsity.

TORTS / INTERFERENCE WITH PROSPECTIVE ADVANTAGE

Where employee's position was terminated following employee's extra-marital affair with his secretary and employee's subsequent employment leave for personal issues and stress, statements made by employer to prospective employers stating that employee had taken leave from employment "for personal reasons" and was terminated "as a result of (employee's) extra-marital affair", and those statements were admitted by Plaintiff in the pleadings to be factually accurate, they did not satisfy the 'false statement' requirement to permit a claim of Interference with Prospective Advantage, and summary judgment on this issue was proper.

TORTS / DEFAMATION

In an action for Defamation, Plaintiff has the burden to prove the following:

(1) the defamatory character of the Defendants' statements; (2) that Defendants published the statements; (3) that the recipients of the statements understood the defamatory meaning of them and understood that the statements were intended to be applied to the Plaintiff; (4) that Plaintiff suffered special harm as the result of the publication of the defamatory statements; and (5) that the Defendants abused a conditionally privileged occasion in publishing the information contained in the statements.

TORTS / DEFAMATION

Under Pennsylvania law, truth of an alleged defamatory statement is a complete and absolute defense to a civil claim for Defamation.

TORTS / DEFAMATION

Where statements about employee's termination for conducting extra-marital affair with secretary and for taking employment leave for personal reasons were made by former employer to prospective employers of terminated employee, such statements, while possibly "inappropriate",

were nonetheless admitted to be "factually truthful" by the Plaintiff in the pleadings, the truth of the statements provides a complete bar to Plaintiff's claim for Defamation, and summary judgment is appropriate.

PLEADING / TORTS / INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In order to state a claim under which relief for Intentional Infliction of Emotional Distress may be granted, the Plaintiff must allege physical injury. Physical manifestations of emotional suffering found sufficient to state a cause of action in cases alleging Negligent Infliction of Emotional Distress, such as depression, nightmares, stress and anxiety resulting from the Defendants' actions, are also sufficient to support a claim for Intentional Infliction of Emotional Distress when properly plead by Plaintiff.

PLEADING / TORTS / INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Plaintiff's allegations of physical manifestation of emotional suffering following termination of his employment by Defendants through depression, anxiety, anger, panic and suicidal tendencies, all supported by the medical documentation of his treating medical and psychological professionals, were sufficient to preclude summary judgment in Plaintiff's claim of Intentional Infliction of Emotional Distress.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 13280-2002

Appearances: Richard E. Filippi, Esq., Attorney for Plaintiff
W. Parrick Delaney, Esq. and Matthew W. Fuchs, Esq., Attorneys for Defendants

OPINION

Connelly, J., July 23, 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 Family First Sports Park, Gary Renaud, and James Rimmer (hereinafter "Defendant Family First," "Defendant Renaud," and "Defendant Rimmer;" "Defendants" when referred to collectively) against Joseph Sarvadi (hereinafter "Plaintiff").

Procedural History

On July 1, 2003, Plaintiff filed a Complaint before the Court. *Complaint, ¶¶ 1-63.* Defendants filed Preliminary Objections in response on August 8, 2003, as well as a Brief in Support on August 22, 2003. *Preliminary Objections to Complaint,¶¶ 1-34; Defendants' Brief in Support of Preliminary Objections to Complaint, pp. 1-10.* On September 5, 2003, Plaintiff filed a Reply and a Brief in Opposition to

Defendants' Preliminary Objections. *Plaintiff's Reply to Preliminary Objections of Defendant, pp. 1- 7; Plaintiff's Brief in Opposition to Preliminary Objections of Defendant, pp. 1-9.* On November 5, 2003, Plaintiff filed a Supplemental Brief regarding his opposition to Defendants' Preliminary Objections. *Plaintiff's Supplemental Brief in Opposition to Preliminary Objections of Defendant, pp. 1-6.* In a January 16, 2004 Opinion of the Court, Judge Anthony granted in part and denied in part Defendants' Preliminary Objections resulting in Plaintiff filing a February 2, 2004 Amended Complaint. *Opinion of Anthony, J., Jan. 16, 2004, pp. 1-8; Amended Complaint, ¶¶ 1-64.*

On February 27, 2004, Defendants filed Preliminary Objections to Plaintiff's Amended Complaint. *Preliminary Objections to Amended Complaint, p. 1-2.* On March 8, 2004, Plaintiff filed a Second Amended Complaint which contained the following counts: Count I, Intentional Interference with Business Relations; Count II, Interference with Prospective Advantage; Count III, Defamation; and Count IV, Intentional Infliction of Emotional Distress. *Second Amended Complaint, ¶¶ 1-55.* Defendants filed their Answer on May 26, 2005, and subsequently amended such on December 12, 2007. *Answer to the Second Amended Complaint, ¶¶ 1-55; Amended Answer to Plaintiff's Second Amended Complaint, ¶¶ 1-55; New Matter, ¶¶ 1-2.*

On December 19, 2007, Defendants filed their Motion for Partial Summary Judgment and Brief in Support stating Plaintiff's claims for Interference with Prospective Advantage, Defamation, and Intentional Infliction of Emotional Distress should be dismissed. *Defendants' Motion for Partial Summary Judgment, pp. 1-7; Defendants' Brief in Support of Motion for Partial Summary Judgment, pp. 1-11.* Plaintiff filed his Brief in Opposition to Defendants' Motion on March 7, 2008. *Brief in Opposition to Defendants' Motion for Summary Judgment, pp. 1-15; Plaintiff's Reply to Defendants' Motion for Summary Judgment, pp. 1-5.* On March 12, 2008, Defendants replied to Plaintiff's March 7, 2008 Brief. *Defendants' Reply Brief to Plaintiff's Brief in Opposition to Motion for Partial Summary Judgment, pp. 1-3.* On June 11, 2008, Plaintiff filed additional exhibits regarding his opposition to Defendants' Motion for Summary Judgment. *Supplemental Exhibits to the Plaintiff's Reply to the Defendants' Motion for Summary Judgment, p. 1.*

Statement of Facts

On March 18, 1996, Plaintiff began employment as Director of Basketball Operations for Defendant Family First, and on June 20, 1998, entered into an individual employment contract in connection with his promotion to Director of Operations. *Second Amended Complaint, ¶¶ 7-8; Answer to the Second Amended Complaint, ¶ 7; Defendants' Motion for Partial Summary Judgment, p. 1.* On or about October 2001, Plaintiff became involved in a three-week extramarital affair with his

secretary. *Second Amended Complaint, ¶ 12; Defendants' Motion for Partial Summary Judgment, p. 1*. Either during or after the affair, Plaintiff contacted Defendant Rimmer. *Second Amended Complaint, ¶ 13; Defendants' Motion for Partial Summary Judgment, p. 1*. At that time, Defendant Rimmer was Director of Leadership employed by Defendant Family First. *Id.* In January of 2002, Plaintiff took personal leave for the following reasons: "personal issues that [he] needed to deal with," and that he was "stressed out." *Second Amended Complaint, ¶¶ 14-15; Defendants' Motion for Partial Summary Judgment, p. 2, Exhibit A, p. 42*.

On January 30, 2002, Plaintiff had a meeting in the office of Defendant Renaud where he met with both Defendant Renaud and Defendant Rimmer. S*econd Amended Complaint, ¶¶ 16-18; Defendants' Motion for Partial Summary Judgment, pp. 2-3, Exhibit A, p. 37*. During this meeting, Defendant Renaud relayed to Plaintiff that Defendant Rimmer had advised him of Plaintiff's affair, and as a result, Plaintiff would be fired from his employment with Defendant Family First.[1] *Id*. Once fired, Plaintiff sought work from the following employers: Edinboro University of Pennsylvania, via Bruce Baumgartner; Hospitality Services Incorporated, via Lisa Titcombe; Enterprise Rent-A-Car, via Mike Parry; Kress Financial Services, via Dan Kress; and Pennbriar Athletic Club, via Rick Sertz. *Second Amended Complaint, ¶¶ 20-21; Defendants' Motion for Partial Summary Judgment, pp. 2-4, Exhibit A, pp. 56, 58, 61, 63.* As a result of Plaintiff seeking employment from the above organizations, Defendant Rimmer was involved in conversations with each of the above-mentioned contacts. *Second Amended Complaint, ¶¶ 22-28.* During these discussions, Defendant Rimmer informed the contacts that Plaintiff had taken his leave for mental health and/or his termination was a result of his affair. *Id.; Defendants' Motion for Partial Summary Judgment, pp. 3- 4, Exhibit A, pp. 56, 58, 61, 63.*

Beginning February 5, 2002, Plaintiff received care from Dr. Victor Masone, a Ph.D. specializing in counseling services. *Brief in Opposition to Defendants' Motion for Summary Judgment, pp. 6-7; Plaintiff's Reply to Defendants' Motion for Summary Judgment, Exhibit 1*. According to a June 5, 2008 letter written by Dr. Masone, Plaintiff was already receiving treatment at the time of his termination for depression and family issues. *Supplemental Exhibits to the Plaintiff's Reply to the Defendants' Motion for Summary Judgment, Exhibit 1*. Dr. Masone also indicated Plaintiff suffered from a "distressed emotional state following his dismissal," was

[1] Plaintiff avers his termination was solely the result of his affair. *Second Amended Complaint,* ¶ 16. Defendants aver Plaintiff's termination to have been the result not only the affair, but also the result of his failures to comply with company policy and his mishandling of company funds. *Answer to Second Amended Complaint,* ¶ 16; *Defendants' Brief in Support of Motion for Partial Summary Judgment, p. 2, Exhibit B, pp. 61-65.*

"distraught," and was "having difficulty emotionally at that time." *Id.* On or about January 2003, Plaintiff relocated to Texas for employment. *Second Amended Complaint, ¶ 30.* While in Texas, Plaintiff was treated by Chad A. Hogan, M.D. *Plaintiff's Reply to Defendants' Motion for Summary Judgment, Exhibit 2.* Dr. Hogan's records show Plaintiff largely suffered from the following: anxiety, depression, and suicidal tendencies. *Id.* Other medical documents reveal Plaintiff suffered from depression and anxiety subsequent to his January 30, 2002 termination. *Plaintiff's Reply to Defendants' Motion for Summary Judgment, Exhibits 1-2; Supplemental Exhibits to the Plaintiff's Reply to the Defendants' Motion for Summary Judgment, Exhibits 1-2.*

Analysis of Law

The general issue before the Court is whether Defendants collectively, as the moving party, are entitled to partial summary judgment, that is, whether they have shown the absence of genuine issues of material fact as to necessary elements of the current causes 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 that 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. Defendants are 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 Defendants are entitled to partial summary judgment, the Court,

[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.*

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 the parties.

Though the general issue before the Court is whether Defendants are entitled to partial summary judgment, the specific issue before the Court is whether Plaintiff has failed to produce evidence of facts essential to three of the four causes of action as contained in his Second Amended Complaint.[3] These three actions are as follows: Interference with Prospective Advantage, Defamation, and Intentional Infliction of Emotional Distress.

COUNT II: INTERFERENCE WITH PROSPECTIVE ADVANTAGE

Interference with Prospective Advantage, i.e., the publication of disparaging statements concerning the business of another, is actionable where each of the following elements have been met: (1) the statement - which concerns the business of another - is false; (2) the publisher either intends the publication to cause pecuniary loss or reasonably should recognize that publication will result in pecuniary loss; (3) pecuniary loss does in fact result; and (4) the publisher either knows that the statement is false or acts in reckless disregard of its truth or falsity. *See, Pro Golf Manufacturing v. Tribune Review Newspaper Co.,* 761 A.2d 553, 555-56 (Pa. Super. 2000); *rev'd on other grounds,* 809 A.2d 243 (Pa. 2002). Plaintiff avers Defendants' statements of and concerning his mental state and extra-marital affair published to his potential employers constitute Interference with Prospective Advantage. *Second Amended Complaint ¶ 37 - 43.*

The Pennsylvania Superior Court in *Pro Golf Manufacturing* clearly found that in order to succeed on a claim of Interference with Prospective Advantage, each of the above-four elements must be met. *Id.* at 555-56. A thorough reading of the record reveals that while Plaintiff believed the comments made by Defendant Rimmer to each of the potential employers were "inappropriate," he stated such comments were, however, "factually truthful." *Defendants' Motion for Partial Summary Judgment, p. 4, Exhibit A, p. 56, 58, 61, 63; Plaintiff's Reply to Defendants' Motion for Summary Judgment, ¶ 15.* As Plaintiff admits the statements made to the prospective employers were truthful, the Court finds element one (which requires the statement to be false) cannot be met. Due to Plaintiff's deposed admission of the statements' truth, each of the elements cannot be met and it is, therefore, clear to the Court that no reasonable jury could find in favor of Plaintiff regarding his claim of interference with Prospective Advantage.

[3] Count I of Plaintiff's Second Amended Complaint, Intentional Interference with Business Relations, has not been challenged in Defendant's Motion for Partial Summary Judgment. *Second Amended Complaint, ¶¶ 32-36*; *Defendant's Motion for Partial Summary Judgment, ¶¶ 1-32; Defendant's Brief in Support of Motion for Partial Summary Judgment, pp. 1-11.*

COUNT III: DEFAMATION

In his action for Defamation, Plaintiff has the burden of proving the defamatory character of Defendants' statements; that Defendants published those statements; that those statements applied to Plaintiff; that the recipients of those statements understood the defamatory meaning, and understood the statements were intended to be applied to Plaintiff; that Plaintiff suffered special harm as a result of the publication; and that Defendants abused a conditionally privileged occasion. *See, 42 P.S. § 8343(a).* However, in Pennsylvania, defamatory statements will not provide a basis for recovery when such statements are true. *See, Bobb v. Kraybill,* 511 A.2d 1379 (Pa. Super. 1986), *citing, Hepps v. Philadelphia Newspapers, Inc.,* 485 A.2d 374 (Pa. 1984); *Dunlap v. Philadelphia Newspapers, Inc.,* 448 A.2d 6, 12 (Pa. Super. 1981). In Pennsylvania, truth of the alleged defamatory statement is a complete and absolute defense to civil actions for Defamation. *Id.*

Once more, while Plaintiff believes the comments to each of the potential employers were "inappropriate," he stated such comments were, however, "factually truthful." *Defendants' Motion for Partial Summary Judgment, p. 4, Exhibit A, p. 56, 58, 61, 63; Plaintiff's Reply to Defendants' Motion for Summary Judgment, ¶ 15.* As Plaintiff admits the statements made to the prospective employers were true, the Court finds the truth of the published statements to be a complete and absolute defense to Plaintiff's claim of Defamation. Due to Plaintiff's deposed admission of the statements' truth, it is clear to the Court that no reasonable jury could find in favor of Plaintiff regarding his claim of Defamation as Defendants have pled a complete and absolute defense to such a claim.

COUNT IV: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Regarding Intentional Infliction of Emotional Distress, the Pennsylvania Supreme Court found:

> It is basic to tort law that an injury is an element to be proven. Given the advanced state of medical science, it is unwise and unnecessary to permit recovery to be predicated on an inference based on a defendant's outrageousness without expert medical confirmation that the plaintiff actually suffered the claimed distress. Moreover, the requirement of some objective proof of severe emotional distress will not present an insurmountable obstacle to recovery. Therefore, if the tort of intentional infliction of severe emotional distress is to be accepted in the Commonwealth of Pennsylvania, at the very least, existence of the alleged emotional distress must be supported by competent medical evidence.

Kazatsky v. King David Memorial Park, Inc., 527 A.2d 988, 995 (Pa. 1987). Supplementing the Pennsylvania Supreme Court's decision in *Kazatsky*, the Pennsylvania Superior Court found, "there is much controversy over whether Pennsylvania jurisprudence recognizes the tort of intentional infliction of emotional distress . . . . [h]owever, it is clear that in Pennsylvania, in order to state a claim under which relief can be granted for intentional infliction of emotional distress, the plaintiffs must allege physical injury." *Hart v. O'Malley*, 647 A.2d 542, 553-54 (Pa. Super. 1994). The Pennsylvania Superior Court in *Hart*, in order to support its finding that a plaintiff must allege physical injury in order to state a claim under which relief can be granted for Intentional Infliction of Emotional Distress, cites (*inter alia*) a 1992 Pennsylvania Superior Court case holding a plaintiff must allege physical injury for claims of Negligent Infliction of Emotional Distress. *Hart*, 647 A.2d at 553-54, *citing*, *Love v. Cramer*, 606 A.2d 1175 (Pa. Super. 1992).

The Pennsylvania Superior Court in *Love*, found that physical manifestations of emotional suffering, i.e., depression, nightmares, stress, and anxiety, resulting from a defendant's actions were sufficient to sustain a cause of action for Negligent Infliction of Emotional Distress as they constitute physical injury. *Love*, 606 A.2d at 1179. In the present case, Plaintiff similarly exhibited exacerbated physical manifestations of emotional suffering resulting from his termination, namely: depression, anxiety, anger, panic, and suicidal tendencies. *Plaintiff's Reply to Defendants' Motion for Partial Summary Judgment, Exhibits 1, 2; Supplemental Exhibits to the Plaintiff's Reply to the Defendants' Motion for Summary Judgment, Exhibits 1, 2*. Plaintiff's alleged physical manifestations of emotional suffering resulting from Defendants' actions are supported by the medical documentation of Doctors Masone and Hogan. *Id.*

Pursuant to the Pennsylvania Supreme Court's ruling in *Kazatsky*, the Court finds the existence of Plaintiff's alleged emotional distress is supported by competent medical evidence. Pursuant to the Pennsylvania Superior Court's ruling in *Hart*, the Court finds Plaintiff's alleged emotional distress constitutes alleged physical injuries according to physical injury as defined by the Pennsylvania Superior Court in *Love*.[4] As Plaintiff has alleged physical injuries manifesting themselves though emotional suffering, the Court finds he has produced evidence of facts essential to his Intentional infliction of Emotional Distress cause of

[4] The Court is aware the Pennsylvania Superior Court's decision in *Love* focused on Negligent (and not Intentional) Infliction of Emotional Distress. However, the Court finds the analysis in *Love*, as to what constitutes a physical injury, to be applicable in the present case as the Pennsylvania Superior Court cited *Love* as precedent in *Hart* to support its position that physical injury is required for claims of Intentional Infliction of Emotional Distress. *See*, *Hart*, 647 A.2d at 553-54, *citing*, *Love*, 606 A.2d at 1179.

action.

Pursuant to the above analysis, summary judgment in favor of Defendants as to Plaintiff's claims of Interference with Prospective Advantage and Defamation is proper. Because Plaintiff admitted the statements that were made to prospective employers were true - which provides Defendants absolute defenses to such claims - the provided evidence as viewed in a light most favorable to the nonmoving party clearly reveals no reasonable jury could find in favor of Plaintiff regarding these two claims. Consequently, Defendants' Motion for Partial Summary Judgment is granted as to Plaintiff's claims of Interference with Prospective Advantage and Defamation only because no genuine issues of material fact remain as to these two counts.

Pursuant to the above analysis, summary judgment in favor of Defendants as to Plaintiff's claim of Intentional Infliction of Emotional Distress is not proper. Because Plaintiff suffers from medically documented physical / emotional injuries, the provided evidence as viewed in a light most favorable to the nonmoving party clearly reveals a reasonable jury could find in favor of Plaintiff regarding this claim. Consequently, Defendants' Motion for Partial Summary Judgment is denied as to Plaintiff's claim of Intentional Infliction of Emotional Distress because genuine issues of material fact remain as to this one count.

ORDER

AND NOW, TO-WIT, this 23rd day of July, 2008, it is hereby **ORDERED, ADJUDGED,** and **DECREED** that, for the reasons set forth in the foregoing Opinion, Defendants' Motion for Partial Summary Judgment is **GRANTED** as to Plaintiff's claims of Interference with Prospective Advantage and Defamation, while Defendant's Motion for Partial Summary Judgment is **DENIED** as to Plaintiff's claim of Intentional Infliction of Emotional Distress. Therefore, Counts II and III of Plaintiff's Second Amended Complaint are hereby dismissed.

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

DEBORAH S. BULL, Plaintiff

v.

DAVID L. CLARK, Defendant

FAMILY LAW / DIVORCE / COMMON LAW MARRIAGE

In PA a common-law marriage contracted before January 1, 2005 is a valid marriage.

FAMILY LAW / DIVORCE / COMMON LAW MARRIAGE

A common-law marriage can only be created by an exchange of words in the present tense, spoken with the specific purpose that the legal relationship of husband and wife is created by said exchange.

FAMILY LAW / DIVORCE / COMMON LAW MARRIAGE

A written common-law marriage statement stating the intent of the parties to be legally married executed for the purpose of obtaining health insurance is admissible and probative evidence of common-law marriage.

FAMILY LAW / DIVORCE / COMMON LAW MARRIAGE

When faced with contradictory evidence of intent the Court may consider evidence of constant cohabitation and reputation of marriage in determining common-law marriage.

FAMILY LAW / DIVORCE / COMMON LAW MARRIAGE

Portraying themselves as married on documents such as cell phone and cable service agreements and tax returns is evidence of intent of common-law marriage.

FAMILY LAW / DIVORCE / COMMON LAW MARRIAGE

Parties announcing themselves as Mr. and Mrs. on Christmas cards and in wedding announcements is evidence of intent of common-law marriage.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11474-2008 AND NS200800616
PACES NO. 472109932

Appearances: Jennifer B. Hirneisen, Esq,. Attorney for Plaintiff
James H. Richardson, Jr., Esq., Attorney for Defendant

OPINION

Kelly, Elizabeth K., President Judge

October 10, 2008: This divorce matter is before the Court by referral from a support conference officer for determination of whether a valid common law marriage exists between Debora S. Bull and David L. Clark.

BACKGROUND

Mr. Clark and Ms. Bull met in 1987. *See* N.T., August 1, 2008, at 6; *see also* N.T. August 25, 2008 at 56. They began dating in February of 1989. *See* N.T., August 1, 2008, at 6. In August of 1992, the couple began residing together. *See* N.T., August 1, 2008 at 6.

Ms. Bull testified that, beginning in 1994, Mr. Clark began introducing her as his wife and Ms. Bull began introducing him as her husband. *See* N.T., August 1, 2008 at 7, 10 and 31; *see also* N.T. August 25, 2008 at 27-28. Mr. Clark testified that he never introduced Ms. Clark as his wife and he never held her out as his wife. *See* N.T., August 25, 2008 at 68. Contrary to Mr. Clark's assertions, but consistent with the testimony of Ms. Bull, the parties began to portray themselves as husband and wife. For example, for the 1995 tax year, the parties had a tax filing status of "married filing jointly." *See* Exhibit 2. Similarly, Mr. Clark, on a Cuna Mutual Group Certificate of Insurance with an April 1, 1995 effective date, designated Ms. Bull as the beneficiary of his life insurance. *See* Exhibit D; *see also* N.T., August 1, 2008 at 12 and 39-40.

Thereafter, on November 5, 1996, Mr. Clark and Ms. Bull signed a Common Law Marriage Statement before a notary public at Snap-tite, Inc, the family-owned business owned by the Clark family. *See* N.T., August 1, 2008 at 7-9. The Statement provides:

> We David L. Clark and Debora S. Bull of 4500 Old State Rd. McKean, PA 16426, do hereby declare that we are living together as husband and wife and intend to be considered legally married for all purposes under the laws of the Commonwealth of Pennsylvania. We acknowledge that our marriage can only be dissolved by death, annulment or divorce.

Exhibit A. As Ms. Bull testified, the parties signed the Statement to legalize their relationship and to give Ms. Bull the benefit of Mr. Clark's health insurance. *See* N.T., August 1, 2008 at 8-9, 31, and 36-37.

Subsequent to signing the Common Law Marriage Statement, the parties represented to multiple entities and individuals, not just Mr. Clark's health insurer, that they were husband and wife. For example, on June 18, 1999, Mr. Clark signed an application for insurance with First Colony Life Insurance Company describing himself as married and listing Ms. Bull as his spouse and the primary beneficiary of the policy. *See* Exhibit E; *see also* N.T., August 1, 2008 at 12-13 and N.T., August 25, 2008 at 78-79, 83-84. Similarly, Ms. Bull, on July 10, 2001 signed a life insurance policy with The Penn Mutual Life Insurance Company listing Mr. Clark as her husband and contingent beneficiary on the policy. *See* Exhibit F; N.T., August 1, 2008 at 13-15. Moreover, Ms. Bull and Mr. Clark jointly signed a Mortgage, dated September 11, 2001, as husband and wife. *See* N.T., August 1, 2008 at 17-21 and N.T., August 25, 2008 at 79-80 and 84; *see also* Exhibits I and J. In addition, Mr. Clark and Ms. Bull filed joint tax returns for the years 2003 through 2007 as a married couple.[1] *See* N.T., August 1, 2008

[1] A representation was made to the Court that tax returns were filed jointly since 1995, although, only returns from 2003 through 2007 were introduced as evidence.

at 10; *see also* Exhibit B. Mr. Clark and Ms. Bull also maintain a joint savings account with Community National Bank. *See* N.T., August 1, 2008 at 15-16 and 40-41; *see also* Exhibit G. Furthermore, the parties maintain a joint automobile insurance policy. *See* N.T. August 1, 2008 at 16-17; *see also* Exhibit H.

As a further representation of marital status, the parties, often identified Ms. Bull by using Mr. Clark's surname.[2] *See* N.T., August 1, 2008 at 21-22; *see also* Exhibits K, M and N. For example, Ms. Bull, on June 13, 2007, signed a Dish Network Service Agreement as "Debora S. Clark." *See* Exhibit M. Similarly, Mr. Clark set up cellular phone service for Ms. Bull under the name "Debora Clark." *See* N.T., August 1, 2008 at 24; *see also* Exhibit N. Moreover, the parties sent and received personal greetings, including Christmas cards, as "Mr. and Mrs." Clark. *See* N.T. August 1, 2008 at 26-31; *see also* N.T. August 25, 2008 at 44 and 50-51; *see also* Exhibits Q, R, S, and T. Similarly, in 2006, the parties were announced to all of the guests present at Ms. Bull's son's wedding reception as "Mr. and Mrs. David Clark." *See* N.T. August 25, 2008 at 28-29.

Mr. Clark and Ms. Bull separated in December of 2007. *See* N.T., August 1, 2008 at 6. On March 24, 2008, Ms. Bull filed a Complaint in Divorce Under Section 3301(C) of the Divorce Code alleging entitlement to a divorce on the grounds that the marriage is irretrievably broken and requesting equitable distribution of marital property. Thereafter, on April 4, 2008, Ms. Bull filed a Complaint for Support requesting spousal support, alimony *pendente lite*, medical/dental coverage, and mortgage assistance. At the support conference, Mr. Clark challenged the validity of the marriage, which Ms. Bull contends is a valid common law marriage. The conference officer referred the matter to the Court for a determination on the validity of the marriage.

DISCUSSION

In Pennsylvania, any common-law marriage contracted on or before January 1, 2005 is a valid marriage[3]. *See* 23 Pa.C.S.A. 1103. Pennsylvania law provides:

> A common law marriage can only be created by an exchange of words in the present tense, spoken with the specific purpose that the legal relationship of husband and wife is created by such exchange. *Staudenmayer v. Staudenmayer,* 552 Pa. 253, 714 A.2d 1016 (Pa. 1998).

[2] Ms. Bull did not, however, formally change her legal name to Debora Clark because Mr. Clark was previously married to a Debora Clark. *See* N.T., August 1, 2008 at 21. Mr. Clark was upset that Ms. Bull retained her ex-husband's last name. *See* N.T., August 25, 2008 at 69.

[3] The legislature amended the Domestic Relations Code to abolish common law marriages in Pennsylvania. *See* 23 Pa.C.S.A. §1103. The amendment does not impact the present matter as the alleged marriage took place prior to January 1, 2005.

Bell v. Ferraro, 849 A.2d 1233, 1235 (Pa. Super. 2004). The proponent of the marriage has the burden of proving a common law marriage. *Id.* A specific form of words is not required. *See Staudenmayer v. Staudenmayer*, 714 A.2d 1016, 1020 (Pa 1998). It is, however, essential to prove that there was an agreement to enter into the legal relationship of marriage at the present time. *See id.* An Affidavit of Common Law Marriage is admissible and probative evidence, although, it is not irrebuttable evidence. *See Bell v. Ferraro*, 849 A.2d 1233, 1235 (Pa. Super. 2004).

Mr. Clark and Ms. Bull signed a Common Law Marriage Statement declaring their living arrangement as that of husband and wife, stating their intent to be legally married, and acknowledging that their marriage could only be dissolved by death, annulment or divorce. Specifically, the parties made the present tense statement that "we...do hereby declare that we are living together as husband and wife and intend to be considered legally married....." They further announced their intention to be legally married through their pronouncement that: "[w]e acknowledge that our marriage can only be dissolved by death, annulment or divorce." Accordingly, the present exchange of words with the intent of the parties to marry is clear from the document alone.

Nevertheless, Mr. Clark asserts that adding Ms. Bull to his health insurance was the document's exclusive purpose. *See* N.T., August 25, 2008 at 60-65. Ms. Bull agrees that medical insurance was one reason for signing the document, however, she further testified that the parties wished to formalize their arrangement as husband and wife. Because the court is faced with contradictory testimony regarding intent, it may consider evidence of constant cohabitation and reputation regarding the marriage. *See Staudenmayer v Staudenmayer*, 714 A.2d 1016, 1021 (Pa. 1998).

The evidence presented supports Ms. Bull's position that, beyond the benefit of adding her to Mr. Clark's health insurance, the parties intended to enter into a relationship as husband and wife. First, subsequent to signing the Statement, the parties represented, in far more forums than just health insurance, that they were husband and wife. They not only signed major financial documents such as insurance papers, tax returns and mortgage papers as husband and wife, but they also portrayed themselves as married on less significant documents like cell phone and cable service agreements. While Mr. Clark represented to the Court that the parties filed joint tax returns exclusively for the economic benefit, the fact that the parties acted as husband and wife even in insignificant arenas such as cable television agreements discredits Mr. Clark's position. The Court further notes that finding otherwise would indicate that the parties used the Common Law Marriage Statement to open the door to defraud not only the insurance company, but also the IRS and financial

institutions. Rather than engaging in such widespread wrongful acts, the Court believes that the parties signed such documents as a married couple because they intended, on November 5, 1996, to establish the relationship of husband and wife.

Moreover, while they may not have made their marriage a topic of conversation with each and every one of their friends and family members, the parties acted as a married couple. For example, they generally announced their relationship through sending out Christmas cards as "Mr. and Mrs." and by being announced at a family member's wedding as "Mr. and Mrs. David Clark."

As a final note, despite quick resolution of Ms. Bull's health problems, the parties never attempted to revoke the Common Law Marriage Statement. *See* N.T., August 25, 2008 at 77, 81-82.

Considering all of their actions as husband and wife, it simply does not make sense that Mr. Clark and Ms. Bull signed the Common Law Marriage Statement simply for the benefit of health insurance. In that respect, the Court does not find credible Mr. Clark's testimony that the Common Law Marriage Statement was intended solely to allow Ms. Bull to be added to his health insurance. Instead, Ms. Bull and Mr. Clark intended, on November 5, 1996, to enter a relationship as husband and wife.

In a further attempt to rebut the Common Law Marriage Statement, Mr. Clark testified that Ms. Bull rejected two marriage proposals that he extended to her, one of which was after the parties signed the Statement. *See* N.T. August 25, 2008 at 58-60. Mr. Clark's assertion contradicts his testimony that, after he divorced his first wife, he developed and maintained the position that he would never again get married. *See* N.T., August 28, 2008 at 55. Mr. Clark's testimony was simply not credible.

Even though the need for health insurance was a motivating factor for the Common Law Marriage Statement, it does not take away from each party's intent to enter into the legal relationship of husband and wife. Specifically, the Pennsylvania Supreme Court held that, in considering the validity of a common law marriage, the reason underlying the decision to marry is not relevant to the intention to marry. *See In re Estate of Gower,* 284 A.2d 742, 743 (Pa. 1971). In *Gower,* the parties, who had been living together for ten years after Ms. Gower's divorce, appeared before the Selective Service Board and executed a document declaring that they were common law spouses in order for the alleged husband to avoid military service.[4] The *Gower* Court found that because

[4] The document stated, in relevant part, that :

> "For the purpose of establishing marriage status for consideration of Selective Service Board No. 1 and thereby request and secure deferred classification based on a claim for dependents in order to avoid conscription for military service, I William Charles Gulick, hereby say and declare that I consider and regard

the document demonstrated a present intent of the parties to accept each other as husband and wife, the purpose of establishing marriage in order to avoid military service did not invalidate an otherwise valid common law marriage. *Id.* at 743-44. The document alone established by clear and convincing evidence that a marriage existed and, therefore, the court did not consider whether proof of cohabitation and reputation corroborated or independently established the validity of the marriage. *Id.* at 744.

As a result, Ms. Bull produced clear and convincing evidence of the exchange of words in the present tense stated with the purpose of establishing a marital relationship. Accordingly, the Court finds that, on November 5, 1996, Mr. Clark and Ms. Bull entered into a common law marriage.

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

[4] continued

> Ada Gower Gulick, nee Ada Gower, as my wife and as such I have heretofore, likewise do now, and will forever hereafter, assume all of her living expenses and provide her with the necessities of life, as well as endow her with full rights and all privileges of a wife, together with a wife's legal right to, and interest in, whatsoever property I am now possessed of or should hereafter acquire."
>
> "Be it known, and I hereby further declare that I have always regarded Ada Gower Gulick (Ada Gower), as my (common-law) wife ever since and during our entire cohabitation began in 1930 and which has continued without interruption to date, pursuant to an understanding by and between us that we are in all respects to be husband and wife...."
>
> "I Ada Gower Gulick, nee Ada Gower, have read the declaration and statements of my husband, William Charles Gulick, as herein contained, which are made for the purpose of establishing marriage status before, and for the consideration of, the Selective Service Board, and I hereby subscribe to his statements in every particular and respect."

In re Estate of Gower, 284 A.2d 742, 743 (Pa. 1971)

MARVIN J. BOSTAPH, Executor of the Estate of BONNIE J. BOSTAPH, deceased, Plaintiff

v.

CARL LAUER, M.D. AND VASCULAR & ENDOVASCULAR SURGICAL ASSOCIATES, INC., Defendants

EVIDENCE / EXPERT TESTIMONY / SCOPE OF REPORT

The key to determining whether proffered testimony is beyond the scope of report is concept of fairness in light of particular circumstances of case. The testimony is to be precluded if the discrepancy between report and testimony is such that it prevents the adversary from making a meaningful response or misleads the adversary as the nature of an appropriate response.

EVIDENCE / EXPERT TESTIMONY / SCOPE OF REPORT

In medical negligence action arising from claim that defendant physician advanced obturator/sheath combination too far, expert testimony at trial as to the depth to which the obturator/sheath combination was advanced was within the fair scope of expert's report which included no specific statement as to depth other than the conclusion that "the depth of the dilators and sheath was proper" because, inter alia, depth of obturator/sheath was central issue in case and thus adversary could not credibly claim surprise.

EVIDENCE / EXPERT TESTIMONY / BASIS OF EXPERT TESTIMONY

Generally, an expert can base an opinion or inference on facts perceived by or made known to the expert at or before the hearing. Pa.R.E. 703.

EVIDENCE / EXPERT TESTIMONY / QUALIFICATIONS

Expert physician, an actively practicing vascular surgeon who regularly reviewed chest x-rays in his practice, was qualified to offer testimony interpreting chest x-rays taken following dialysis catheter placement surgery.

POST-TRIAL MOTIONS

Allegedly erroneous rulings on damages were not reversible error when jury found no negligence attributable to defendants and thus any error was harmless.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW NO. 10960-2006

Appearances: Elizabeth L. Jenkins, Esquire, Attorney for Plaintiff
Francis J. Klemensic, Esquire, Attorney for Defendant

OPINION

Kelly, Elizabeth K., J., January 9, 2009

This medical professional liability action came before the Court as

the result of the death of Bonnie J. Bostaph (hereinafter "Decedent") following a dialysis catheter replacement performed by Carl Lauer, M.D. (hereinafter "Defendant"), a vascular surgeon, at Saint Vincent hospital on February 18, 2005.[1] Presently before the Court is Marvin J. Bostaph's (hereinafter "Plaintiff") Appeal.

FACTUAL AND PROCEDURAL HISTORY

Decedent suffered from end-stage kidney disease. N.T., October 14, 2008, at 124, 170. In order to facilitate dialysis, the Defendant, in November of 2004, placed a catheter in Decedent. The Defendant replaced the catheter on January 24, 2005. Thereafter, the hub on the catheter cracked and replacement was again necessary. Accordingly, on February 18, 2005, the Defendant replaced the dialysis catheter. N.T., October 14, 2008 at 5-6. At the completion of the February 18, 2005 catheter exchange, the Decedent was stable. N.T., October 15, 2008 at 80-81. Several minutes later, however, her heart stopped pumping. N.T., October 15, 2008 at 83-87. Despite efforts to reestablish a beating heart, Decedent died. N.T., October 15, 2008 at 91-102.

On March 8, 2006, Plaintiff filed a Complaint in Civil Action alleging, in relevant part, that Defendant was negligent in that he tore a hole in Decedent's vena cava, advanced the obturator/sheath combination too far during catheter placement, failed to use the appropriate wire and dilators during the February 18, 2005 procedure, and failed to diagnose and treat cardiac tamponade during Decedent's asystole. This Court presided over a jury trial on October 13, 14, 15 and 16, 2008. The jury, on October 16, 2008, found that Defendant was not negligent.

On October 23, 2008, Plaintiff filed a Motion for Post-Trial Relief alleging that this Court made a number of legal errors in rulings pertaining to the testimony of Dr. Satish Muluk, the Defendants' expert, and in rulings pertaining to damages. Accordingly, Plaintiff requested a new trial. This Court, by Order dated October 30, 2008, denied Plaintiff's Motion for Post-Trial Relief. Defendant, on November 4, 2008, filed Praecipe to Enter Judgment Pursuant to Pa.R.C.P. 227.4(2) and judgment in favor of the Defendants was entered. On November 17, 2008, Plaintiff filed a Notice of Appeal.

In Plaintiff's Statement of Matters Complained of on Appeal, he presents the following:

> (1) Plaintiff will first argue that this court erred in permitting certain testimony from Defendants' expert, Satish Muluk, M.D. Dr. Muluk testified about the specific depth to which the obturators/dilators were advanced into Decedent when his

[1] St. Vincent Health Center was dismissed as a defendant to the action. See N.T., Jury Trial Day One of Four, October 13, 2008 at pp. 5-7.

report simply said that the obturators/dilators were properly advanced without detailing how far. Additionally, Dr. Muluk testified that the entry site of Defendant's last procedure was in the right chest wall as opposed to the based of the right neck and was different from that of the two prior procedures performed by defendant on the decedent. All of this testimony was outside the scope of Dr. Muluk's expert report. Moreover, the testimony specifically regarding the area of Decedent's body where the incision was made to allow insertion of the obturator/dilator and facilitate the change of the dialysis catheter, should also not have been permitted because it was based upon facts not of record when Dr. Muluk authored his report. Although Defendant Lauer testified at his deposition that insertion was done at the base of Decedent's right neck, he changed his testimony at trial and stated that the insertion was done in the area of Decedent's right chest.

(2) Plaintiff will next argue that this court erred in permitting Dr. Muluk to testify at trial concerning the content and the interpretation of x-rays of Decedent taken subsequent the procedure. This testimony was outside the area of Dr. Muluk's medical expertise and was also outside the scope of his expert report.

(3) Plaintiff will next argue that this Court erred in refusing to permit Plaintiff to present various testimony concerning damages. This court refused to allow any testimony concerning wrongful death damages, i.e., the loss of numerous services and contributions that Decedent made to her adult children and that Plaintiff and his siblings reasonably believed that these services and contributions would continue in the future. Moreover, Plaintiff believes this Court erred when he was precluded from offering any testimony concerning the state of Decedent's health which was relevant on the question of Decedent's life expectancy had Defendants not been negligent; Decedent's life expectancy was certainly relevant to Plaintiff's claim for wrongful death and survival damages.

(4) Plaintiff will next argue that this Court erred with regard to the survival claim when he was permitted to argue to the jury only about Decedent's pain and suffering from the time of Defendants' negligence until Decedent died less than an hour later. Further, the Court also precluded Plaintiff from claiming that Decedent had sustained damages based upon the loss of life's pleasures during that same time period and into the future.

(5) Plaintiff will next argue that this Court erred in charging the jury. Except for the funeral bill and medical expenses, the Court refused to charge the jury concerning any other elements of wrongful death damages set forth above and in Plaintiff's motion for post-trial relief and that Plaintiff was entitled to be awarded survival damages for Decedent's loss of past and future life's pleasures. Further, the Court compounded these errors when it refused to charge on Decedent's life expectancy with regard to Plaintiff's loss of future contributions and services that Decedent would have provided and with regard to Decedent's future loss of life's pleasures.

(6) It is expected that Defendants will argue that all of Plaintiff's allegations of error concerning damages need not be considered because of the jury's finding that Defendant Lauer had not been negligent. If this is the case, Plaintiff will finally argue that this Court's erroneous rulings concerning damages had the affect of trivializing Plaintiff's entire case in the eyes of the jury, thereby prejudicing the jury's deliberations as to negligence.

See Plaintiff's Statement of Matters Complained of on Appeal.

DISCUSSION

I. The Expert Testimony of Satish Muluk. M.D.

Dr. Satish Muluk is a vascular surgeon board certified in general and vascular surgery. *See* N.T. Jury Trial Day Four of Four, October 16, 2008 at 10-12. Dr. Muluk further serves as the director of vascular surgery at Allegheny General Hospital in Pittsburgh where he directs vascular surgery services, including surgery, vascular and laboratory. *See id.* at 12. He has been continually licensed to practice vascular surgery since 1994. *See id.* at 11. He is a member of the Society of Vascular Surgery, the American College of Surgeons and the Society of University Surgeons. *See id.* at 13. Moreover, he serves as a reviewer for the Journal of Vascular Surgery and he has published numerous articles in his field of practice. *See id.* at 13-16. In addition, he has given multiple lectures accredited for continuing medical education credit. *See id.* at 13. He has daily patient care activities, including the initial insertion and exchanges of dialysis catheters. *See id.* at 15-17.

Dr. Muluk was qualified as an expert in vascular surgery and catheter access, without objection. *See* N.T., October 16, 2008 at 17-18.

A. Testimony Regarding Death of Obturator/Dilator Advancement

Plaintiff first argues that this Court erred in allowing Dr. Muluk to testify to the depth to which the obturators/dilators were advanced. Plaintiff asserts that Dr. Muluk's report provides only that the obturators/dilators were advanced, without detailing how far, and, therefore, his testimony at trial was outside the scope of his report.

When considering the permissible scope of expert testimony, Pennsylvania law provides:

> To the extent that the facts known or opinions held by an expert have been developed in discovery proceedings under subdivision (a)(1) or (2) of this rule, the direct testimony of the expert at the trial may not be inconsistent with or go beyond the fair scope of his or her testimony in the discovery proceedings as set forth in the deposition, answer to an interrogatory, separate report, or supplement thereto. However, the expert shall not be prevented from testifying as to facts or opinions on matters on which the expert has not been interrogated in the discovery proceedings.

Pa.R.C.P. 4003.5(c). In determining whether an expert's trial testimony is beyond the fair scope of his or her report:

> the trial court must determine whether the report provides sufficient notice of the expert's theory to enable the opposing party to prepare a rebuttal witness. In other words, in deciding whether an expert's trial testimony is within the fair scope of his report, the accent is on the word "fair." *The question to be answered is whether, under the particular facts and circumstances of the case, the discrepancy between the expert's pre-trial report and his trial testimony is of a nature which would prevent the adversary from making a meaningful response, or which would mislead the adversary as to the nature of the appropriate response.*

Brodowski v. Ryave, 885 A.2d 1045, 1065 (Pa.Super. 2005); *see also Corrado v. Thomas Jefferson Univ. Hosp.*, 790 A.2d 1022 (Pa. Super. 2001).

The depth to which Defendant advanced the obturators/dilators has consistently been a driving factor on Plaintiff's theory regarding how he believed the laceration resulting in the cardiac tamponade occurred. In his Complaint, Plaintiff alleged that Defendant was negligent in "advancing the obturator/sheath combination too far." *See Complaint in Civil Action ¶ 18.* Dr. Muluk acknowledged the importance of the advancement depth to Plaintiff when stating in his expert report: "Allegedly, Dr. Lauer advanced the obturator/sheath combination too far before removing the wire and obturator." *See Ltr. To Francis J. Klemensic from Satish Muluk, M.D.*, October 23, 2007, at p. 5, a copy of which is attached to Pre-Trial Narrative Statement on Behalf of Defendants. With regard to the February 18, 2005 procedure, Dr. Muluk opined in his report that "the depth of the dilators and sheath was proper" and "use of these dilators and obturators was appropriate and in compliance with standards of care." *See id* at 7. The Plaintiff, who placed at issue the depth of advancement of the dilators, cannot now claim surprise or prejudice when the Defendant's

expert, who acknowledged and addressed depth of advancement in his report, discussed the depth of advancement at trial.

Accordingly, Dr. Muluk's testimony was within the fair scope of his report.

B. Testimony Regarding Entry Site of the Procedure

Plaintiff further asserts that the court erred in permitting Dr. Muluk to testify that the entry site of the procedure was in the right chest wall, as opposed to the base of the right neck, because such testimony was outside the scope of Dr. Muluk's expert report and it was based upon facts not of record when Dr. Muluk authored his report.

Contrary to Plaintiff's assertion, Dr. Muluk, in his report, references the entry site as being in the right chest. *See Ltr. To Francis J. Klemensic from Satish Muluk, M.D.*, October 23, 2007, at p. 4; s*ee also* N.T. Jury Trial Day Four of Four at pp. 22-23. Specifically, in his report, Dr. Muluk, in reference to the February 18, 2005 procedure, states: "During that procedure, Dr. Lauer resected the old catheter from the subcutaneous tract in the right chest." Accordingly, Plaintiff's assignment of error is without merit.

Moreover, Plaintiff's assertion that the entry site being in the right chest wall was not of record when Dr. Muluk authored his report is inaccurate. Specifically, in preparing his report, one of the documents that Dr. Muluk reviewed was the February 18, 2005 Operative Report. *See* N.T., Jury Trial Day Four of Four, October 16, 2008 at 18; *see also Ltr. To Francis J. Klemensic from Satish Muluk, M.D.*, October 23, 2007. The February 18, 2005 Operative Report indicates that the entry site for the procedure was in the right chest wall. *See* N.T. Jury Trial Day Four of Four at pp. 22-23; N.T., Jury Trial Day Three of Four, October 15, 2008 at 113-115; *see also* Exhibit H, February 18, 2005, Special Procedure Operative Report.

Regardless, Plaintiff's argument is without merit because "the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert ***at*** or before the hearing." Pa.R.E. 703 (emphasis added).

Accordingly, the allegations of error contained in Paragraph 1 of Plaintiff's Statement of Matters are without merit.

C. Testimony Regarding X-Rays

Plaintiff further argues that this court erred in permitting Dr. Muluk to testify about the content and interpretation of x-rays taken of the Decedent subsequent to the procedure as Plaintiff contends that said testimony was outside the area of Dr. Muluk's medical expertise and was also outside the scope of his expert report.

First, Dr. Muluk reviewed the x-rays in preparing his report. *See* N.T. Jury Trial Day Four of Four, October 16, 2008 at 18-19; *see also Ltr. To*

Francis J. Klemensic from Satish Muluk, M.D., October 23, 2007, at pp. 1-2. In his report, Dr. Muluk indicates:

> The first chest x-ray, taken 20 minutes after the procedure, found the catheter in good position with the tip in the superior vena cava. The right and left diaphragms were apparent. The heart size was within normal limits... . A second chest x-ray was obtained about 30 minutes after the procedure. The diaphragm remained sharp with the lungs fully inflated, and there was no pneumothorax.
>
> . . .
>
> Tamponade after line placement is very rare. Dr. Lauer focused on much more common potential complications such as hemothorax and tension pneumothorax. These complications were effectively excluded by the chest x-rays.

See Ltr. To Francis J. Klemensic from Satish Muluk, M.D., October 23, 2007, at pp. 4-5 and 8. Dr. Muluk's testimony at trial was consistent with his report. *See* N.T. Jury Trial Day Four of Four, October 16, 2008 at 31.

Moreover, Dr. Muluk's experience with radiology films made permissible his testimony regarding the same. X-rays are used in practice by Dr. Muluk, as well as by other vascular surgeons. Specifically, Dr. Muluk testified that he has reviewed numerous chest x-rays. *See* N.T. Jury Trial Day Four of Four, October 16, 2008 at 76. Similarly, Dr. Paul E. Collier, the Plaintiff's expert vascular surgeon, testified to his regular use of x-rays following insertion of a dialysis catheter and that it is good medical practice to obtain x-rays to verify catheter placement. *See* N.T., Jury Trial Day Two of Four, October 14, 2008, at 64, 67, 112-113, 130-31, 139-40. Likewise, the Defendant testified to his regular use of x-rays. *See id.* at 14, 30-32. Accordingly, Plaintiff's allegation that Dr. Muluk's testimony concerning the x-rays was outside the area of his medical expertise is without merit because, as an actively practicing vascular surgeon, he has had experience in reviewing and interpreting x-rays.

For the aforementioned reasons, the allegations contained in Paragraph 2 of Plaintiff's Statement of Matters are without merit.

II. <u>Damages and Jury Charge</u>

Plaintiff's remaining allegations of error pertain to rulings that this Court made with regard to damages.

"[T]o constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party." *Miller v. Ginsberg*, 874 A.2d 93 (Pa. Super. 2005) *quoting Ettinger v. Triangle-Pacific Corp.,* 2002 PA Super 142, 799 A.2d 95, 110 (Pa.

Super. 2002). Evidentiary rulings "which do not affect the verdict will not provide a basis for disturbing the jury's judgment." *Miller,* 874 A.2d at 97 *quoting Bryant v. Reddy,* 2002 PA Super 47, 793 A.2d 926, 928 (Pa. Super. 2002).

Plaintiff's allegations pertaining to damages do not constitute reversible error because the jury never reached the issue of damages. As a result, any evidentiary rulings regarding damages did not affect the verdict and, therefore, were neither harmful nor prejudicial to the Plaintiff. In that respect, Plaintiff's third, fourth and fifth assignments of error are without merit.

Accordingly, the judgment in this case should be affirmed.

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

COMMONWEALTH OF PENNSYLVANIA
v.
TERI RHODES

CRIMINAL LAW / SENTENCING / TOTALITY OF CIRCUMSTANCES

A court rendering a sentence is not to focus only on a narrow window of time and on selective facts but to base the decision on all of the defendant's conduct. In the sentencing of a defendant who has entered a plea of guilty to voluntary manslaughter of her newborn daughter, the Court bases its decision upon the defendant's awareness of her pregnancy, the efforts of others to confront defendant about her pregnancy, defendant's lies to those inquiring about her condition, her course of deception to prevent people from knowing what she was doing, her choice not to utilize numerous available options to assist her and save the life of her child, her conscious choice to proceed with the birth and the killing, the calculated and cunning behavior demonstrating her ability to remain focused and manipulative, the intentional actions and presence of mind to divert others from her actions and to cover up her crime, which are reflective of her criminal intent and consciousness of guilt.

A sentencing judge is not bound to accept factual representations of a party, especially where those representations are selective, self-serving and inaccurate.

CRIMINAL LAW / SENTENCING / REASONABLENESS

Upon review of all factors, the Court finds that the sentence is not too harsh, excessive or unreasonable. The factors which distinguish this case from other manslaughter cases include the defenseless nature and age of the victim, the infant's inability to harm the defendant, the parental relationship of trust and responsibility, the time available to defendant to consider options other than killing the victim, the available resources to help the defendant, the evidence of premeditation, and the absence of any need for the defendant to take the actions leading to the death of the baby.

CRIMINAL LAW / SENTENCING / MITIGATING FACTORS

The Court declines the proposal of defendant that a neonaticide perpetrator should be given preferential treatment. It is a function of the legislature to determine whether neonaticide requires a different approach. To date, the Pennsylvania legislature has not chosen to adopt a different approach to neonaticide cases and has demonstrated concern about the protection of children by requiring lengthy minimum sentences for heinous crimes against children with mandatory minimum sentences applicable regardless of mitigating circumstances.

Defendant in the current case is not facing any mandatory sentence and is eligible for a pre-release program eighteen months prior to the expiration of her minimum sentence.

The defendant's case was mitigated by the permission granted her to enter a plea to voluntary manslaughter which avoided exposure to the

sentences for first degree or third degree murder. Cases with factual similarities in the form of attempts to conceal the pregnancy, killing taking place shortly after birth, suffocation, attempts to hide the victim, and fabricated stories, have lead to murder convictions and resulting sentences far longer than those imposed upon defendant.

The court considered all evidence of mitigation presented by the defendant, including the personal characteristics of the defendant, the situation in which she found herself, her remorsefulness, the reasons for compassion for the defendant, and the exemplary life which she led until the events of this crime. The court balanced all of the evidence of mitigation with the nature and extent of defendant's criminal conduct including her abandonment of her integrity and honesty, the course of intentionally deceptive behavior, and her choice to commit a heinous crime against an infant totally dependent upon defendant for survival. The result was a sentence less than that the defendant would have received if she had committed a crime such as the rape of a child, involuntary deviate sexual intercourse with a child or aggravated indecent assault and less than the statutory maximum for voluntary manslaughter.

CRIMINAL LAW / SENTENCING REPORTS

A presumption exists that where a pre-sentence report exists, the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations with the mitigating statutory factors. In this case, the court read the pre-sentence report in its entirety and duly weighed the mitigating evidence submitted by the defendant.

CRIMINAL LAW / SENTENCING / "SHAM" PROCEEDING

The court rejects the defendant's assertion that the sentencing was a sham proceeding. All procedural safeguards required by Pa.R.Crim.P. 704(c) were met. The defendant had a full opportunity to present all information including testimony of the defendant and ten witnesses, a sentencing memorandum, reports of experts, and supporting correspondence. All materials submitted were read by the court prior to sentencing. Both defense counsel and the district attorney were given the opportunity to present all argument and the proceeding was recorded by a court stenographer.

CRIMINAL LAW / SENTENCING / WRITTEN STATEMENT

The court is required to provide a contemporaneous written statement of the reasons for deviation if a sentence is outside of the sentencing guidelines; 42 Pa.C.S.A. §9721(b). The court's preparation of a written sentencing rationale presented at the time of sentencing and filed that morning is not indicative of a bias or pre-determination of the sentence. It is instead reflective of the court's deliberative process in reviewing all the information, including that submitted on behalf of the defendant, prior to formulation of an appropriate sentence. Further, the sentencing rationale did not include the actual sentence to be imposed, as the court did not

make a final decision until all evidence was presented at the sentencing.

No authority requires defense counsel be given a copy of the written sentencing rationale prior to presentations of the parties' respective cases.

CRIMINAL LAW / SENTENCING / FACTUAL BASIS

A sentencing court may receive any relevant information enabling the exercise of discretion in determining the proper sentence and is not bound by the restrictive rules of evidence applicable to trial. Courts have wide latitude in considering facts, whether or not they are produced by witnesses seen or heard by the court, and the court may consider official reports and reports of probation officers, psychiatrists, and other individuals.

It is the responsibility of the sentencing judge to have sufficient information to determine the circumstances of the offense and the character of the defendant. To fulfill this responsibility, the judge must order a pre-sentence report or conduct sufficient pre-sentence inquiry as to the circumstances of the offense and the defendant's personal history and background. A more extensive investigation is called for in felony convictions, particularly where a long term of confinement is contemplated.

The court, being presented with little information in the pre-sentence report and the defendant's sentencing memorandum, reviewed the police reports and accompanying documents, which information the court found to be reliable. The defendant did not object to this procedure nor can the defendant claim surprise in light of the lengthy opportunity the defendant had to challenge any of the evidence in the police report, and the defendant acknowledged at her plea that she had sufficient information and time to enter an informed plea and consult with her attorney. The defendant also benefitted from the relaxed evidentiary rules for sentencing which allow consideration of double hearsay contained in expert reports submitted on behalf of the defendant.

The defendant proffered as a serious provocation for the killing the sudden and intense passion brought on by the unexpected delivery of a child. Thus, it was important to the court to know the circumstances surrounding the killing to determine whether a mitigated sentence was warranted on the grounds of serious provocation. As it was important to the court to know the circumstances to determine whether a mitigated sentence was warranted and therefore the court studied the police reports and the documents submitted on behalf of the defendant so that the court could consider all relevant information.

CRIMINAL LAW / SENTENCING / VOLUNTARY MANSLAUGHTER-PREMEDITATION

Premeditation is not an element of voluntary manslaughter but this does not mean that evidence of premeditation must be ignored for sentencing purposes.

The court did not sentence the defendant for a crime she did not commit

but instead considered evidence of the defendant's intent in determining the circumstances surrounding the crime. The defendant was sentenced within the confines of the voluntary manslaughter statute based upon all circumstances of the case, including defendant's admission that she intentionally killed her child. The defendant understood the court's discretion to disregard or reject the positions of the parties.

Premeditation does not require planning or prior thought or any particular length of time; all that is required is sufficient time that the defendant can and does fully form intent to kill and is conscious of that intention. The circumstances show that the defendant had fully formed an intent to kill and was conscious of that intention and it was for this conduct that she was sentenced closer to the maximum sentence for voluntary manslaughter than requested by the defendant.

CRIMINAL LAW / SENTENCING / MORALITY

The court rejects defendant's contention that the court substituted its view of morality for the law where the court's reference to a moral stand was based upon the specific facts of the case and the consideration of the protection of the public which, in this case, specifically includes youths against whom crimes are committed.

Sentencing guidelines have no binding effect and create no presumption. They are advisory guideposts which must be respected and considered and they recommend rather than require a particular sentence. The court's comments were a rejection of the sentencing position of a defense expert who claimed that neonatacide cases are seldom prosecuted and infrequently involve incarceration where the defense expert revealed a lack of familiarity with neonatacide cases in Pennsylvania.

CRIMINAL LAW / SENTENCING / REHABILITATIVE NEEDS

The court finds that the defendant in this case does not present with significant rehabilitative needs as there do not appear to be substance abuse issues and she has not been diagnosed with any mental illnesses, although there may be a need for counseling relating to honesty in light of the clear-minded pattern of deceptive behavior.

CRIMINAL LAW / SENTENCING

While empathetic to defendant's personal circumstances, the court will not turn a blind eye to what occurred and focus only on defendant's personal circumstances as it would diminish what happened to this victim. The circumstances of this case involving the intentional suffocation of a defenseless child who was thereby deprived of the pleasures of life at the hands of a parent with the responsibility of protecting the child warrants the sentence imposed. The sentence was mitigated by the personal circumstances over which defendant had control.

CRIMINAL LAW / RECUSAL

The court rejects the defense request for recusal where the court is not related to any of the parties, does not know the defendant and her family

and her witnesses, the court was not a witness or served as a lawyer in any matter affecting the parties and where the court has no financial or fiduciary interest in the case. It is insufficient basis for recusal that a court enters a sentence with which the defendant disagrees.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 110 of 2008

OPINION

Cunningham, William R., J.

On August 12, 2007, the Defendant intentionally killed her newborn daughter by suffocating her in a plastic bag.

On August 8, 2008, the Defendant entered a negotiated plea. On a general charge of Criminal Homicide, the Defendant entered a plea of guilty to Voluntary Manslaughter. Four other charges were withdrawn by the Commonwealth, to-wit, Concealing Death of a Child, Endangering Welfare of a Child, Recklessly Endangering Another Person and Abuse of a Corpse.

On November 21, 2008, the Defendant was sentenced. On December 1, 2008, the Defendant filed a Post Sentence Motion seeking to vacate and/or modify the sentence. This Opinion is entered to explain the reasons for denial of the Defendant's Motion.[1]

I. THE DEFENDANT'S CRIMINAL CONDUCT

The primary focus of the Defendant's sentencing position was on the Defendant's personal characteristics. For the circumstances surrounding the crime, Defense Counsel presented a Potemkin Village in terms of a facade that the Defendant was a young college student who did not know she was pregnant and panicked irrationally when the childbirth process began. The Defendant wanted this Court to focus only on a narrow window of time around the childbirth and then only on selective facts.

However, the circumstances leading to the crime began in the preceding nine months. While the Defendant wants to airbrush out of the picture any incriminating conduct, the sentencing decision has to be based on all of the Defendant's conduct.

Five days prior to sentencing, Defense Counsel submitted a seven-page Sentencing Memorandum that discussed the facts of the crime in these two limited paragraphs:

> Teri returned to Mercyhurst College in August, 2007 for volleyball camp. On August 10, 2007, she underwent a pre-

[1] At the time of the Defendant's sentencing, this Court was required by law to provide a written statement of the reasons for the sentence which was done in a document titled Statement of Sentencing Rationale. This document is referenced in this Opinion as "Sentencing Rationale."

Any cites to the plea proceeding held on August 8, 2008 are noted as *"P.T."*. Any cites to the sentencing of November 21, 2008 are noted as *"S.T."*. Any cites to the police reports of the Erie Police Department shall be *"P.R."*.

> participation physical evaluation with Dr. Cherinor Sillah. Dr. Sillah noted that she had a protuberant abdomen and suspected that she might be pregnant. He, however, cleared her to play volleyball and ordered a sonogram for the subsequent week. Teri underwent physical testing on August 10 and went to two practices on August 11. Those practices involved diving, serving and passing and were very physical in nature. Teri finished practice at approximately 9:00 p.m. and had severe cramps. She took Advil and Midol tablets and attempted to sleep.
>
> On the following morning, August 12, she awoke and went to morning practice. She told the coaches that she was too ill to practice and returned to her apartment. She went through labor in her apartment bathroom alone and after hours of labor delivered the child in a breech delivery. She lost a great deal of blood and placed the baby into a plastic bag that she left in the bathroom. Her assistant coach came to her apartment and took her to St. Vincent Health Center for treatment in the emergency department.

Sentencing Memorandum, p. 2.

This recitation of facts was not elaborated on at sentencing. When these two paragraphs are dissected, it is obvious Defense Counsel overstates some facts, understates others and omits a host of significant facts. A breakdown of these two paragraphs is in order to explain why the Defendant's sentencing position was unsupportable.

Notably, Defense Counsel immediately fast-forwarded the picture to August 10, 2007. Because she was cleared to play volleyball after a physical on August 10th, Defense Counsel suggests the Defendant had little or no reason to believe she was pregnant and was thus surprised two days later to be giving birth.[2]

By starting the chronology of events on August 10th, Defense Counsel bypassed a number of important circumstances in the prior months that establish the Defendant was well aware of her pregnancy by the time of her physical.

The Defendant knew she was sexually active during the preceding winter. The Defendant knew she had consensual sex with her college boyfriend "a couple of times." *Defense Exhibit "C," Report of Dr. Sadoff p. 5 (hereafter "Sadoff Report").* The Defendant acknowledged she had consensual sex twice during the likely month of conception; she insisted her boyfriend used a condom each time. *Id. pp. 5, 7.* The Defendant

[2] A medical doctor may not have been the one to clear the Defendant to play volleyball as averred by Defense Counsel. According to the Commonwealth, it is unclear who conducted the physical examination of the Defendant on August 10, 2007. The examiner was not a medical doctor according to the District Attorney, but perhaps was a medical student or intern. *S.T. p. 46.* This may be a collateral point but it could also be Defense Counsel inflating the status of the person who allegedly cleared the Defendant to play volleyball.

said she never used birth control pills. *Id. p. 5.* She confirmed with Lt. Spizarny that she was sexually active with two partners, albeit during different time frames. *P.R. p. 21.*[3]

When the Defendant returned home from college in the spring of 2007, her parents noticed her weight gain. To their credit, during the summer months each parent separately asked the Defendant if she was pregnant. *Sadoff Report pp. 2, 3.* The Defendant's mother asked her on two different occasions if she was pregnant. In every response to her parents the Defendant said she was not pregnant. *Id.* The Defendant's mother also asked her about her menstrual cycle and the Defendant replied that she was having regular periods. *Id.* The fact her parents were asking these questions certainly raised the prospect of her pregnancy to the Defendant.

There are discrepancies in what the Defendant told people after the crime about her menstrual history while pregnant. The Defendant told the emergency room ("E.R.") nurse Kathy Pruchniewski that from January, 2007 on she was spotting monthly. *P.R. pp. 8, 10.* The next day, on videotape, the Defendant told Lt. Spizarny she missed her menstrual period in January, 2007, but thought it was a fluke. *P.R. p. 20.* She also said in the following months she had either a little or a short period. *Id.* By contrast, the Defendant told her mother and Dr. Sadoff her menstrual periods were regular during her pregnancy. *Sadoff Report pp. 3, 5, 7.*

There were other physiological changes occurring with the Defendant that put her on notice of her pregnancy. The Defendant gained 20-25 pounds since her physical for volleyball in the prior year. *P.R. p. 20.* Her weight gain was immediately apparent to her roommate, coaches and the trainer who saw her on August 10th. *Id. pp. 6, 12, 15, 23, 29.* The autopsy report stated the Defendant's baby weighed approximately 6 ¼ pounds. *P.R. p. 29.* This means the Defendant was carrying in her abdomen a child weighing around 6 pounds at the time of her physical on August 10th.[4]

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[3] The Defendant also told at least three different people about an incident at a party during the possible time of conception. She first mentioned this subject to the E.R. nurse, Kathy Pruchniewski, whom she told she was at a party over the winter, got drunk and had sex. *P.R. pp. 8, 10.* The next day, the Defendant told Lt. Spizarny (on videotape) a slightly different version. The Defendant said she was at party at a house on Pine Avenue in December, 2006 with some volleyball players, had one drink, got tired, fell asleep in a back room and woke in the morning. *P.R. p. 17.* She felt sick, but she was still dressed and did not suspect anything had happened. *Id.* She did not elaborate any further. *Id.* In the sole interview the Defendant had with Dr. Sadoff over five weeks later, on September 24, 2007, the Defendant said she had a drink, passed out and awoke to find her pants unbuttoned. She was nauseated and "didn't feel right in her vagina" although there was no bleeding or physical evidence of trauma. *Sadoff Report, p. 5.* There is no evidence the Defendant sought medical attention after this incident or reported it to anyone, e.g. her roommate, friends, family, coaches, counselor or the police.

[4] The Defendant told Lt. Spizarny on videotape that when she was questioned about the mass in her abdomen during the physical, she just thought she had "a tight ab." *P.R. p. 20.*

The assistant coach for the Defendant's volleyball team, Sarah King, noticed during exercises on August 10th, the Defendant's belly button was protruding consistent with a pregnant woman. *Id. p. 15.* The Defendant acknowledged that her breasts were getting bigger. *Sadoff Report p. 3.* All of these physical changes to her body were objective medical evidence the Defendant cannot dispute as reasons to know she was pregnant.

The most overt evidence of the Defendant's knowledge of her pregnancy comes from her computer. The Defendant's computer records show she expended a considerable amount of time doing extensive research on the Internet over the summer of 2007 about pregnancy and ways to kill a fetus. She researched topics such as "what can kill a fetus", "alternative methods of ending pregnancy", "dilate the cervix", "dilation and evacuation", "herbal abortion techniques", "pregnancy termination" and "terminating pregnancy." *See p. 3* of the Probable Cause Affidavit of the Defendant's arrest warrant.

When asked why she was doing this research, the Defendant told Lt. Spizarny on videotape that she was nervous because people were telling her stuff. P*.R. p. 21.* She wanted to know "what to expect." *Id.* She became concerned so she did research on what could harm her or the baby. *Id.* She looked up pregnancy and pregnancy tests. *Id. p. 22.* The Defendant thought about having an abortion and researched abortion on the Internet. *Id.* She also thought that she could not have a baby. *Id.* She ruled out abortion stating she was brought up better than that. *Id.* These thoughts and this research confirmed the Defendant's knowledge of her pregnancy. Moreover, the Defendant's Internet research is consistent with someone looking for ways to terminate a pregnancy.

Also, the Defendant altered her dressing habits. She told Dr. Sadoff "she wore loose fitting clothes to hide the fact that she was gaining weight." *Sadoff Report p. 3.* Julia Butler, her college roommate, noticed during the weekend of August 10th the Defendant was wearing extra large shirts and was more private in her dressing habits. *P.R. p. 12.* Unlike the prior year when the Defendant would take showers after practice with her teammates at the athletic center, the Defendant went back to her apartment after practice to shower in private. *Id.* Bryan Bentz, one of the trainers for the volleyball team, observed the Defendant was frequently pulling her shirt down over her stomach making sure her stomach did not show. *P.R. p. 6.*

During the Defendant's physical on August 10th, a mass was noted in her abdomen. The examiner directly asked the Defendant numerous times (fifteen times, according to Bryan Bentz), if she was pregnant. *P.R. p. 29.* In response to each of these inquiries, the Defendant said she was not pregnant. *Id.* The examiner also recommended the Defendant take a pregnancy test. *P.R. p. 20.* Concerned, the examiner ordered an

ultrasound test for the following week. *Id.*

The constellation of these circumstances established the Defendant's knowledge of her pregnancy. The Defendant was aware of her consensual sexual activities with her college boyfriend, the party incident and her recent menstrual history. She had been asked directly several times by her parents whether she was pregnant. She researched pregnancy, abortion and related issues on the Internet. She was concerned about what harm could occur to her or her baby and wanted to know "what to expect." She thought about an abortion and ruled it out. The physiological changes to the Defendant's body were undeniable. Her dressing habits were more private and she was making a concerted effort not to expose her stomach to others. She was asked repeatedly during a physical on August 10, 2007 whether she was pregnant because there was a mass in her abdomen. She was carrying a six pound baby. An ultrasound test was ordered.

The Defendant's lack of candor about her pregnancy on August 10 during her physical was not consistent with all of the circumstances known by her. Despite the fact the Defendant was cleared to play volleyball after the physical, this circumstance alone did not mean the Defendant was unaware of or had little reason to suspect her pregnancy.

Next, Defense Counsel avers in the Sentencing Memorandum the Defendant underwent physical testing on August 10, 2007 and two volleyball practices on August 11, 2007 that "involved diving, surveying, passing and were very physical in nature." *Sentencing Memorandum p. 2.* The Defendant wanted this Court to believe because she underwent physical testing and could participate in "very physical" activities, including diving for a volleyball, she must not have realized that she was pregnant. Unfortunately, Defense Counsel has underreported what occurred.

The Defendant's performance in volleyball practices was limited and unimpressive. She finished last in every physical test on Friday, August 10, 2007, according to her head coach, Ryan Patton. *P.R. p. 23.* To the observation of Sarah King during the last practice on August 11, the Defendant was not diving on her stomach during drills that called for her to do so. *Id. p. 15.* While there may be several reasons for her reluctance to dive on her stomach, among them would include the Defendant's knowledge she was pregnant.

Likewise, there may be several reasons the Defendant finished last in all of the physical tests on Friday. However, it is hard to reconcile the Defendant's poor performance with the fact she had the physical skills to play college volleyball as a freshman on a partial scholarship. *Sadoff Report p. 2.* In any event, the inference sought by Defense Counsel, that the Defendant's participation in physical tests and drills meant she was not aware of her pregnancy is unsustainable under these circumstances.

Also, there were a number of significant events on Saturday, August

11th which establish the Defendant was confronted with the fact of her pregnancy. There were several people who were suspicious the Defendant was pregnant and tried to help her.

Defense Counsel did not mention Coach Patton was so concerned about the Defendant's physical condition and possible pregnancy that after Saturday morning's practice he tactfully asked her "if there was anything he should know." *P.R. p. 24.* The Defendant's consistent response was to say she had not worked out enough over the summer. *Id.*

Glaringly absent from the Defendant's recitation is a discussion she had with Sarah King in the privacy of King's office after practice on Saturday afternoon. During their Saturday discussion, Sarah King directly asked the Defendant if she was pregnant and she denied it. *P.R. p. 15.* King was not swayed and pleaded with the Defendant to consider the risk to her and the baby associated with her participation in volleyball. *Id.* The Defendant continued her denial. *Id.*

Sarah King begged the Defendant to take a pregnancy test. *Id.* King was so concerned she offered to reimburse the Defendant the cost of a pregnancy test. Eventually the Defendant agreed to go to a nearby CVS pharmacy, buy a pregnancy test and tell King the results. *Id.* Within forty-five minutes of agreeing to do so, the Defendant electronically sent King an instant message saying the pregnancy test was negative. *Id.*

The Defendant directly lied to Sarah King and to Lt. Spizarny several times about the pregnancy test she purportedly took on that Saturday.

When the Defendant was interviewed by Lt. Spizarny on videotape beginning at 7:20 p.m. on August 13, 2007, the Defendant acknowledged that Sarah King met with her after Saturday's practice and that King asked her to take a pregnancy test. *P.R. p. 20.* The Defendant told Lt. Spizarny she went to the CVS pharmacy store at 38th and Pine Avenue after practice on Saturday afternoon and bought a pregnancy test. *Id.* She described the test kit as "First Response" in a purple box. *Id.* She took the pregnancy test at her apartment and it was negative. *Id.* She threw the tester away in the garbage in the kitchen. *Id.* She then sent an instant message to Sarah King saying the pregnancy test results were negative. *Id. p. 27.*

Subsequently, she was confronted by Lt. Spizarny with the fact a pregnancy test kit was not found in the trash in her apartment. *P.R. p. 21.* The Defendant's response was that Julia Butler had taken out the trash after she had placed the test kit in it. *Id.*

Later during this discussion, Lt. Spizarny asked the Defendant what she was wearing when she went to the pharmacy to buy the pregnancy test, but she could not remember. *Id. p. 22.* She said she did not purchase anything other than the pregnancy test. *Id.* This demonstrates that twice during this conversation with Lt. Spizarny the Defendant confirmed she bought a pregnancy test on Saturday at the CVS store.

If the Defendant had gone to CVS, it would have been around 4:00 p.m. The store records from CVS reflect that no pregnancy tests kits were sold on Saturday, August 11 between 3:00 p.m. and the store's closing that evening. Hence, the Defendant lied to Sarah King on Saturday and twice two days later to Lt. Spizarny about buying a pregnancy test kit at CVS. It appears the Defendant told another lie to cover up these lies to Spizarny. Her explanation to Lt. Spizarny why no pregnancy test kit was found in her apartment was because her roommate took out the garbage after she put the test kit in it. This story is not corroborated. According to Julia Butler, she took out the garbage on the way to breakfast on Saturday morning. *P.R. p. 24.* This would mean that Butler took out the garbage before the Defendant purportedly purchased the pregnancy test late in the afternoon. However, given the fact that no pregnancy tests were purchased at the time and place the Defendant claimed, it is immaterial when the garbage was taken out other than it reflects on the Defendant's willingness to tell one lie to cover up a prior lie. Thus, the Defendant's intent to deceive continued through the day after the crime.

Separately, the discussion about pregnancy in Sarah King's office on Saturday on the heels of the Defendant's questioning by the medical examiner on Friday, the pending ultrasound test, the inquiry by her head coach on Saturday, her admitted weight gain, her protruding belly button, her swelling breasts, the weight of the baby and her last place finishes in physical tests all establish the Defendant was repeatedly confronted with the prospect of her pregnancy well before the childbirth process started and in time to avoid suffocating her child.

In the Sentencing Memorandum, Defense Counsel described the remaining events of Saturday evening as follows, "Teri finished practice at approximately 9:00 p.m. and had severe cramps. She took Advil and Midol tablets and attempted to sleep." *Id.* p. 2. These statements are accurate but only give a glimpse of what occurred.

After practice, the Defendant spent the remainder of Saturday evening at her apartment with her roommate, Julia Butler. The two were alone in the apartment. Julia Butler was someone the Defendant trusted and requested to room with her. *P.R. p. 21*. At any time, the Defendant could have confided in her roommate and asked for help without anyone else knowing. She consciously chose to ignore this opportunity for help for herself and her baby.

Next, Defense Counsel attempted to minimize the events of Sunday, August 12, 2007 by omitting several important circumstances. According to Defense Counsel, all that happened was Teri Rhodes "awoke and went to morning practice. She told the coaches that she was too unwell to practice and returned to her apartment. She went through labor in her apartment bathroom alone and after hours of labor delivered the child in a breeched delivery. She lost a great deal of blood and placed the baby

into a plastic bag which she left in the bathroom. Her assistant coach came to her apartment and took her to St. Vincent's Health Center for treatment in the emergency room." *Sentencing Memorandum p. 2.*

Defense Counsel sidestepped the Defendant's discussions with people who were trying to help her that day as well as the Defendant's course of deception that prevented people from knowing what she was actually doing.

The Defendant had a conversation about her condition with Julia Butler on Sunday morning at their apartment and on the way to volleyball practice. She told Butler she was having menstrual cramps. *P.R. p. 12.* She never went beyond this point to ask for help from or confide in Butler. *Id.*

When the Defendant arrived at the athletic center, she had another discussion with Sarah King in the privacy of King's office. She was asked pointblank by Sarah King whether she was in labor. *Id. p. 16.* This was a confidential setting in which the Defendant could have easily confided in her concerned coach who was a female. Yet she stuck to her story that she was just having menstrual cramps. *Id.* The Defendant was excused from practice by Coach King, who, despite the Defendant's denial, still thought she was in labor and mentioned it to the trainer. *Id.*

It was the Defendant's decision to return to her apartment late in the morning knowing that her roommate would still be at volleyball practice and then possibly at lunch. The Defendant put herself in a position of being alone without medical assistance. It was another conscious choice by the Defendant to forfeit an opportunity for help. She could have gone straight to the campus health center. She could have accessed an abundance of national, state and local organizations. She could have gone to one of several local hospitals. She could have called her parents or a sibling. Possibly, she could have called the biological father of the child. The Defendant could have contacted a Catholic priest or nun. She could have utilized the services of the Campus Ministry available at her Catholic college. The Defendant chose none of these accessible and confidential options.

Next, Defense Counsel represented the Defendant went through "hours" of labor "alone" in the apartment before the actual birthing. *Sentencing Memorandum p. 2.* This point was emphasized at sentencing in the these words of Defense Counsel: "I ask the Court to consider who she is and what happened here, all the factors of a young woman alone in an apartment delivering a breach baby with no family, no medical support, nothing." *S.T. p. 8.*

There were two points Defense Counsel was trying to make in these written and oral representations. First, Defense Counsel wanted this Court to believe the Defendant was alone in her apartment when she gave birth. Secondly, that the Defendant was alone for hours during labor

in her apartment. Both representations are clearly false as reflected in the following chronology.

On two occasions, the Defendant told Lt. Spizarny she returned to her apartment between 11:30 a.m. and noon on August 12, 2007. *P.R. pp. 11, 18.* At first, the Defendant said the child delivery began about 12:30 p.m. but later changed that to closer to 1:00 p.m. *Id. pp. 11, 19.*

Prior to the actual delivery of the Defendant's child, Julia Butler returned to the apartment. Defense Counsel had the benefit of the videotaped statement of Julia Butler as well as his client's two statements to Lt. Spizarny. Within the statements of the Defendant and Julia Butler, it is very clear that Julia Butler returned to the apartment before the onset of the delivery. The Defendant places herself in the bathroom when Butler arrived home. *P.R. pp. 11, 19.* The Defendant said she had not yet begun delivery of the child when Butler arrived. *Id. pp. 11, 13.* Butler inquired how she was doing and the Defendant replied she was okay, that she was constipated. *Id.*

To the Defendant's knowledge, Julia Butler was present and in a position to help. Instead of asking for and receiving the help of Julia Butler, whose help could have saved the life of this child, the Defendant consciously chose to remain hidden behind the bathroom door and proceed with the birth and the killing.

What is revealing is the Defendant's calculating behavior during this crucial time when Defense Counsel wants to portray her as panicked and in a dissociative state. This contention by Defense Counsel was undermined when the Defendant decided to get Julia Butler out of the apartment by asking her to go to the CVS store to get Midol. At that point in time, by the Defendant's own admission, she was giving birth to the victim. *P.R. pp. 11, 19.* She made the request for Midol while hidden behind the bathroom door. *Id.*

The Defendant did not come out from the bathroom to talk to Julia Butler. She did not ask Butler to come into the bathroom. The Defendant told Butler to get the money for the Midol from her bedroom. *Id. p. 13.*

All of this conduct was consistent with someone who knew what was occurring and did not want to expose herself or her child to Butler. Alternatively, the Defendant could have communicated to Butler the truth of what was occurring in the bathroom or said nothing at all.

The register receipt from the CVS store indicates the time of purchase for the Midol by Julia Butler was 12:38 p.m. on August 12, 2007. *Id. p. 23.* The time on this receipt means Butler had returned to their apartment from lunch roughly some time before or around 12:30 p.m. This also means the Defendant was not alone for hours in her apartment while in labor as represented by Defense Counsel.

The Defendant had a second reason for getting Julia Butler out of the apartment. The Defendant needed to get scissors from her bedroom so

she could cut the umbilical cord. By her admission, while Butler was on the Midol errand, the Defendant left the bathroom and retrieved the scissors from the desk in her room so that she could cut the umbilical cord. *P.R. p. 11*. The Defendant could have asked Butler before she left for the store to hand in scissors from her desk. However, to do so may have exposed a baby attached to the Defendant.

When Julia Butler returned from CVS in about ten minutes, the Defendant was back secreted behind the bathroom door. *P.R. pp. 11, 19.* Julia Butler offered to hand in the Midol that she had just bought for the Defendant. *Id. p. 13.* The Defendant had the presence of mind to not allow Julia Butler into the bathroom, instead directing her to put the Midol in her bedroom. *Id.* The Defendant's behavior was not consistent with someone in a state of panic or dissociated from reality as Defense Counsel avers. Moreover, it is not consistent with someone whose purported menstrual cramps were so severe she sent her roommate on an urgent errand to the store for Midol. Rather, it is consistent with someone cunning enough to hide from her roommate what she was actually doing in the bathroom.

Next, Defense Counsel downplays the circumstances of the Defendant's trip to the hospital. Defense Counsel simply said, "Her assistant coach came to her apartment and took her to St. Vincent Health Center for treatment in the emergency department." *Sentencing Memorandum p. 2.* Defense Counsel omitted a host of conduct that further demonstrated the Defendant's ability to be focused and manipulative during a time when she was allegedly in a dissociated state of mind.

Sarah King came to the apartment at the distressed request of Butler, who was upset by the Defendant's behavior. *P.R. pp. 13, 16.* King then talked to the Defendant. King immediately noticed the Defendant's stomach looked thinner. *P.R. p. 16.* King asked the Defendant what was the problem and the Defendant replied that she was having a heavy bleed. *Id.* She did not disclose she had just given birth and the baby was in the bathroom.

This was another crucial time when the Defendant could have made a different decision that may have saved the life of her child. At this point in time, the Defendant was in the privacy of her apartment with two women with whom she enjoyed a comfortable relationship. Through that time Butler and King had gone out of their way to help the Defendant. The autopsy report shows the Defendant had given birth to a live, breathing baby that lived for an undetermined period of time. Rather than be forthright with her roommate and coach, the Defendant chose a continued path of deception that possibly snuffed out the last chance this newborn had to live.

Like what she did with Julia Butler, the Defendant had the presence of mind to find a reason to get Sarah King to do something for her. The

Defendant asked King to get her some clothes and towels from her bedroom. *Id.* King retrieved these items from the bedroom and handed them into the Defendant in the bathroom. *Id.*

According to Julia Butler, it took the Defendant "forever to finish" in the bathroom before leaving with King for the hospital. *Id. p. 13.* The Defendant was alone in the bathroom during this time. *Id. pp. 13, 16.*

When she did emerge, the Defendant did not bring out the baby she had just birthed. She did not tell Butler or King there was a newborn baby in the bathroom. Instead, she intentionally hid the victim in a plastic bag. She placed the dead child on the floor of the bathtub. The shower curtain was pulled closed in such a fashion that the victim was not openly or easily visible to a person in the bathroom.

Before leaving with the Defendant, Sarah King stepped into the bathroom to look around. *Id. p. 16.* She checked in the trash can and saw some bloody paper. *Id.* She did not see the victim hidden behind the shower curtain. *Id.*

Julia Butler was also suspicious about what happened in the bathroom. After the Defendant left with King, Butler went in the bathroom. She saw some bloody toilet paper in the trash can. *Id. p. 13.* The shower curtain was half closed. Butler did not look behind the shower curtain. Upset by the sight of the blood, Butler left the apartment. *Id.*

In their quick inspections of the bathroom, Butler and King were not able to see the victim hidden behind the shower curtain. As far as the Defendant knew when she left the apartment for the hospital, no one was aware of the crime that occurred in the bathroom or the hidden baby.

The Defendant's presence of mind to conceal the baby in this way reflected her criminal intent and consciousness of guilt. The Defendant had sufficient time and several opportunities to disclose to her accommodating roommate and coach the truth of what just occurred in the bathroom. She consciously chose to create a ruse. This was the genesis of the Defendant's cover-up. It further demonstrates the Defendant's ability to coolly manipulate her circumstances during a time when she was alleged to have been in a dissociative state.

En route to the hospital with King, the Defendant never admitted to King she had just given birth to a child. *Id. p. 16.* While in King's car on the way to the hospital, the Defendant had a cell phone conversation with her father. It sounded to King as though the Defendant's father was repeatedly asking her what was occurring and whether she was okay. *Id.* King was upset the Defendant was not forthcoming in responding to her father's multiple inquiries. *Id.*

Upon arrival at the hospital, the Defendant told admissions personnel her presenting symptom was heavy menstrual cramps. *Id. pp. 7, 8, 10, 20.* This blatant lie was contrary to what the Defendant knew occurred within the preceding hour.

This lie at the hospital demonstrated not only the Defendant's consciousness of guilt but also her intent to complete the cover up of her crime. The Defendant's criminal intent was further manifested while she was waiting for medical attention at the hospital. The Defendant left a message for Julia Butler at 3:07 p.m. on August 12, 2007, instructing Butler to not go into the bathroom because it was a mess. *P.R. p. 14.* This message made no mention of the childbirth or the victim in a plastic bag behind the shower curtain in the bathtub.

At this point in time, the Defendant still had not told anyone about killing her child. To her knowledge, the victim remained undiscovered in her hiding place. There was still a chance the Defendant could return to the apartment and dispose of the body before anyone could find out. This explains why the Defendant continued to lie to people at the hospital.

When the Defendant was subsequently treated in the Emergency Room, she maintained her ruse when she told the emergency room nurse and doctor her presenting symptom was menstrual cramps. When asked directly if she had recently given birth, the Defendant flatly denied it. *P.R pp. 8, 10.* It was only when confronted by the objective medical evidence of a tear found by the E.R. doctor that the Defendant eventually relented and separately disclosed the childbirth to a nurse. *Id. p. 10.*

The Defendant's reluctant confession to the E.R. nurse did not mean her criminal intent had ended. Instead, she persisted with several lies designed to allow her to dispose of the baby before authorities could find the evidence of the crime.

Thus, the Defendant baldly lied to the E.R. nurse by telling her the baby was in a dumpster on Briggs Avenue. *P.R. p. 10.* The Defendant knew this information was false. The Defendant told the same lie a short time later at the hospital to Lt. Spizarny. *Id. p. 10.* This lie was despite the advice by Spizarny at the outset of the conversation emphasizing the need for the Defendant to be truthful and that he was aware she had already made statements to hospital personnel that were false. *Id.* There was no purpose to be served by these lies by the Defendant other than furthering her criminal design.

Toward the end of their second conversation at the hospital, the Defendant told Spizarny the baby was in her apartment on Briggs Avenue. On this point a correction needs to be made to the reasons for the sentence stated by this Court at sentencing. This Court's original impression was the Defendant did not disclose to Spizarny near the end of their conversations at the hospital the location of the baby in her apartment. However, the probable cause affidavit for the arrest warrant indicates that after she first said the baby was in a dumpster, the Defendant later admitted the baby was in her apartment.

In fairness to the Defendant, what this means is that she was eventually forthright with Spizarny on this point. It also means there is one less

reason to question her motive in hiring a cab and leaving the hospital bound for Tinseltown. She may not have been trying to quickly get back to her apartment to dispose of the baby if she knew the police were now aware of the baby's location.

Nonetheless, Sarah King was still at the hospital when the Defendant was released. It remains questionable why the Defendant did not get a ride home from the hospital with Sarah King. It was King who cared enough for the Defendant that she immediately came to the Defendant's apartment to help, drove the Defendant to the hospital and waited for hours on a Sunday afternoon in August for the Defendant to receive medical treatment. *P.R. p. 16.* Rather than locate King upon her release from the hospital, the Defendant made the necessary arrangements to leave in a cab. It is hard to reconcile this conduct with the Defendant being in a state of panic or detached from reality.

In review, the Defendant's deceptive behavior with Butler, King, the hospital personnel and Lt. Spizarny all demonstrate the Defendant was acutely aware of what had occurred and what she had done. The Defendant had a fully formed intent to commit the crime and then cover it up. The killing of the baby and the lies the Defendant told to cover up what she was doing were the product of a cool, calculating mind. These lies were not produced by someone in a state of panic or a dissociated mental state.

When all of the circumstances are considered, the Defendant was not a naïve college student who panicked on August 12th when she first discovered she was pregnant as she began to give birth. The Defendant knew of her circumstances for a significant time and consciously chose to forego many opportunities to resolve her situation other than by suffocation of the child.

The Defendant was not disconnected from reality; to the contrary, the Defendant was devious and deliberate in the months, days and hours leading up to the killing. As part of her deliberation, the Defendant did extensive research on the Internet about pregnancy and ways to kill a fetus.

The Defendant consciously created a set of circumstances designed to keep her pregnancy a secret and continue her lifestyle. In so doing, the Defendant deceived or attempted to deceive her family, friends, coaches, medical personnel and the police.

Importantly, the Defendant was not alone nor did she need to be alone at the time she killed this child. This killing was unnecessary and easily avoidable.

A sentencing judge is not bound to accept the factual representations of a party. This is especially true in this case because the factual presentation by the Defendant was selective, self-serving and inaccurately portrayed what occurred. In the end, the Defendant's sentencing position was unsupportable.

II. WHETHER THE SENTENCE WAS TOO HARSH, EXCESSIVE AND UNREASONABLE

The Defendant seeks a sentence reduction by arguing her sentence is too harsh, excessive and unreasonable. Further, the Defendant contends there were insufficient reasons stated for the sentence. These allegations are without merit.

There are a host of circumstances distinguishing this case from other manslaughter cases. These factors are summarized hereafter.

A. The Nature and Age of the Victim

The Defendant killed her newborn daughter. This infant was completely defenseless. Her survival primarily depended on the care provided by her mother. This child could not talk. She could not feed or clothe herself. It is uncontroverted the victim was a living, breathing human being. Absent other maladies or misfortunes, she would be nearly eighteen months old now with the prospect of a fulfilling life. That prospect was eliminated when she was intentionally suffocated by her own mother.

The first distinction in this case is the nature of the victim. Her age alone is a salient fact. In *Commonwealth v. Walls,* the age of the victim, a seven-year old girl who was sexually molested by her grandfather, was deemed an aggravating factor by the Pennsylvania Supreme Court. *Commonwealth v. Walls,* 926 A.2d. 957, 967 (Pa. 2007). On remand, the Pennsylvania Superior Court affirmed the sentence for Walls of twenty-one to fifty years, which included consecutive sentences of ten to twenty years each for rape and involuntary deviate sexual intercourse. *Walls,* 938 Ad.1122 (Pa. Super. 2007)(Table). Notably, Walls had sexual intercourse with and fondled his seven-year old granddaughter, but he did not kill her.

Unlike most manslaughter cases, this infant presented no ability to harm her killer. This victim was no threat to her mother's physical health or well-being. This was not a case where the Defendant had to choose between her own death or her newborn's death. The Defendant's survival was not affected by the birth of this child. Also, since the Defendant had no other children, this was not a situation where the continued life of this victim would have adversely affected the health and well-being of other children.

The Defendant could have lived a comfortable and full life had this victim been allowed to live. Indeed, her pregnancy was a life-altering event for the Defendant, but it was not a life-threatening matter for her or her child. To permit the Defendant to kill her child under these circumstances and then return to her comfortable lifestyle as suggested by Defense Counsel is unacceptable.

B. Parental Relationship of Trust and Responsibility

Another salient factor is the unique relationship of the Defendant to

the victim, who had only one birth mother to protect her. As the victim's mother, the Defendant was obligated to ensure the health and safety of her daughter. Unlike most manslaughter cases, the Defendant was in a position of trust and responsibility regarding the victim.

In many areas of our law, parents are charged with a myriad of legal duties intended to ensure the well-being and development of offspring. The parental relationship is so important that our civil laws provide for the highest burden of evidentiary proof to terminate a parental relationship. This most important position of trust and responsibility was severed permanently when the Defendant intentionally suffocated her defenseless daughter.

C. Ample Time to Consider Options Other Than Killing the Victim

Another distinguishing factor is the length of time the Defendant had to ponder her options. This case differs from other manslaughter cases where the circumstances suddenly arise or erupt as a result of cumulative events. The Defendant had possibly eight to nine months to decide what to do. She had hours, days and months before the killing to contemplate her options. This was ample time for the Defendant to address her situation other than by suffocating her baby.

D. Available Resources to Help the Defendant Resolve Her Dilemma Without Killing Her Child

Unlike almost every other form of manslaughter, the Defendant had a plethora of resources to assist her and avoid killing another human being. In the months leading up to August 12, 2007, the Defendant had access to national, state and local organizations whose raison d'etre is to help women in the Defendant's situation. This help was available in the Defendant's home state of Michigan and her collegiate state of Pennsylvania. Confidential assistance was available on her college campus. All of these options could have preserved the secrecy of her pregnancy, her lifestyle and saved the life of this child.

In her Sentencing Memorandum and at sentencing, the Defendant presented with a close-knit family consisting of two loving parents and three sisters. The Defendant had many opportunities to confide in them right up until the time of the killing. With their assistance, this killing need not have occurred.

If the Defendant was not comfortable discussing this matter with her immediate family, she was blessed with a deep pool of relatives, neighbors and friends with whom she could have sought refuge. She also had available her trusted roommate, Julia Butler, who was with her right through the time of the killing. The Defendant was fortunate to have a very caring assistant coach, Sarah King, who bent over backwards to help her in the days before the killing.

The Defendant's head coach, Ryan Patton, expressed concern for

her in plenty of time to avert this killing. The Defendant's volleyball teammates were in proximity and could have helped her, as was a team trainer, Bryan Bentz. She could have sought advice from the medical examiner during her physical on August 10, 2007. It is possible the biological father could have helped her. The Defendant could have gone to her Catholic priest back in Michigan or consulted with a priest or nun in Pennsylvania. She could have sought refuge through the Campus Ministry at the Catholic college she was attending. She could have called a Hotline advisory service.

The Defendant had more resources readily available to her for months than many women in her situation. She consciously spurned all of these options.

E. Evidence of Premeditation

Another prominent factor that distinguishes this case from other manslaughter cases is the Defendant's premeditation. This was not a spontaneous killing done in a state of panic by a person who did not know she was pregnant until she began to give birth. The Defendant had plenty of time and reasons to know she was pregnant. While she may have been in denial and wished away her pregnancy, she was not detached from reality. To the contrary, she was deliberate and devious in her behavior.

Perhaps the most damaging evidence of premeditation is the Defendant's extensive research on the Internet about pregnancy and ways to kill a fetus. There would be little reason to do this type of research if you were not aware of your pregnancy and were not plotting ways to kill your fetus/child.

There were many forks in the road for the Defendant during the course of her pregnancy. There were many pivotal points when she had to make a decision what to do about her pregnancy. There were many chances the Defendant had to make decisions that would not have sent her down the road to suffocation of her child.

These decisions included the Defendant's responses to the inquiries from her parents about the appearance of her pregnancy. At that point the Defendant had choices. She was aware of her sexual and menstrual history in the preceding months. She could have taken a pregnancy test to answer the questions posed to her.

During the summer of 2007, the Defendant was experiencing physical changes to her body that would have required some thought and response on her part. She had to decide whether to seek a medical opinion about what was occurring to her. She chose to forego a medical opinion.

The Defendant was obviously contemplating her options when she went on the Internet. Her research may have answered some questions for her. However, the nature of the topics she was researching reflect the Defendant's thoughts that helped form her remaining decisions.

When she was confronted about her pregnancy during her volleyball physical on August 10th, the Defendant had a decision to make. She could have confided in the medical examiner, a person with some expertise she needed. The Defendant could have accepted the examiner's suggestion she take a pregnancy test. She decided against any of these options. Her decision was to repeatedly deny her pregnancy to the examiner despite all of the information known to her at that time.

She had a decision to make whether to confide in her trusted roommate, Julia Butler. Despite many opportunities to do so over the summer and during the week-end of August 10th, 2007, the Defendant went to great lengths to keep her secret from Butler. Perhaps the most egregious decisions the Defendant made were the calculated deceptions she used to prevent Butler from helping her during the week-end of August 10th. The decisions the Defendant made on Sunday, August 12th intentionally prevented Julia Butler from becoming aware of the Defendant's pregnancy and from helping her. Had the Defendant made a different decision at any point over the week-end, this baby would not have been suffocated.

The Defendant had many decisions to make whether to confide in Sarah King and to accept King's direct offers of help. The Defendant could have talked about her situation with King at any time over the August 10th week-end. The Defendant had two golden opportunities to confide in King in the confidential setting of King's office. On Saturday afternoon, the Defendant was alone with King in the privacy of King's office. The Defendant was pointedly asked by King whether she was pregnant. King pleaded with the Defendant to consider the risks to her and her baby. During this discussion, the Defendant had a series of decisions to make about confiding in King, buying a pregnancy test and taking a pregnancy test. We know the dishonest decisions the Defendant made with King on that Saturday.

Likewise on Sunday morning, the Defendant was alone with King. The Defendant was asked if she was in labor. The Defendant decided not to confide in King or accept the opportunity for help for her or her baby. We also know the Defendant's decision to lie to King later that day when King first arrived at the Defendant's apartment.

During the same week-end, the Defendant had decisions to make about her interactions with Coach Patton. After practice on Saturday morning, the Defendant had a direct opportunity to talk to Coach Patton about her situation. She decided not to confide in him or accept that opportunity for help.

The Defendant had decisions to make with all of the other people who were available to help her over the August 10th week-end. Bryan Bentz, the trainer, was trying to help the Defendant at various times throughout the week-end. The Defendant's teammates were accessible for help. The

Defendant could have sought refuge with her family, friends and many other people and organizations. Instead, she chose a criminal course.

At all of these pivotal moments of decision, the Defendant chose secrecy and not to access the resources that could have helped her and her baby. Almost all were conscious decisions the Defendant made at a time when she was not undergoing the stress of the childbirth process.

During the child delivery process, the Defendant displayed a remarkable ability to stay focused despite all of the physical and emotional trauma she was enduring. While in the bathroom in the early afternoon of August 12th, the Defendant coolly made calculated decisions that enabled her to prevent others from knowing what she was doing.

The thread that runs through all of the decisions the Defendant made to deceive others forms the fabric of her premeditation. The Defendant intentionally told a series of lies to her roommate, coaches, medical personnel and the police to conceal her intent and her crime. She made choices that ultimately lead her to kill her child. These choices by the Defendant constitute her premeditation.

F. No Need for Killing

This was a killing that was unnecessary and avoidable. Unlike most manslaughter cases, the victim was not involved in a bar fight or a domestic dispute with the killer. The victim was not armed. The victim did not engage in a series of abusive behaviors over time toward her killer. The victim did nothing to provoke her death.

G. Summary

The totality of the Defendant's conduct was different from most manslaughter cases. The Defendant's sentence holds her accountable for what she did. The sentence was individualized and dictated by the conscious decisions the Defendant made over an extended period of time that enabled her to intentionally suffocate her helpless daughter.

III. CONSIDERATION OF MITIGATING FACTORS

The Defendant contends the sentence did not include any consideration of her mitigating evidence. This contention is belied by the record as a whole.

From the beginning, Defense Counsel has taken the position that neonaticide should be treated differently from any other form of killing. Also, in part because the Defendant purportedly fits an FBI profile of neonaticide perpetrators, she should be given preferential treatment. Neither of these positions is supportable under the facts of this case.

Our state legislature is free to hold public hearings and receive evidence from the finest minds in the medical, psychiatric and psychological fields about the state of mind of a woman who commits neonaticide. The legislature can consider the plight of women situated similarly to

the Defendant. The legislature can then decide whether the people of this Commonwealth want to take a different approach to neonaticide cases. To date, our legislature has chosen not to do so.

To the contrary, our state legislature has created serious sanctions for crimes committed against children. As noted at the Defendant's sentencing, the people of Pennsylvania have expressed genuine concern about the protection of children by enacting laws mandating lengthy minimum sentences for defendants who commit heinous crimes against children.

Specifically, a law in our Sentencing Code titled "Sentences for Offenses Against Infant Persons" provides a mandatory minimum sentence of ten to twenty years in jail for the rape of a child.[5]

Likewise, having involuntary deviate sexual intercourse (meaning sexual acts orally or anally) with a child less than thirteen years old results in a mandatory minimum sentence of ten to twenty years in jail.[6]

Similarly, a mandatory minimum sentence of ten to twenty years is required for Aggravated Indecent Assault against a child under age thirteen.[7]

Meanwhile, certain forms of Aggravated Assault against a child under thirteen require a mandatory minimum sentence of five to ten years in jail.[8] Likewise, a different form of Aggravated Indecent Assault against a child under thirteen warrants a mandatory minimum sentence of five to ten years.[9]

For all of these mandatory sentences, parole shall not be granted until the minimum term of imprisonment has been served.[10]

Enactment of these mandatory laws means there are severe consequences for a defendant who commits a serious crime against a child. By contrast to most other crimes, where advisory, non-binding sentences are suggested by way of the sentencing guidelines, these mandatory laws foreclose judicial discretion and require a minimum period of lengthy incarceration.

In other words, the citizens of Pennsylvania have not suggested a sentence by way of the sentencing guidelines; instead a minimum period of incarceration is mandated. These mandatory sentences reflect the collective judgment of the citizens of Pennsylvania about how criminals should be treated for certain crimes against children.

Notably, these mandatory minimum sentences are applicable regardless

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[5] See 42 Pa.C.S.A. §9718 (1),(3). It should be noted that at page 31 of the Sentencing Rationale, this section of the statute was incorrectly cited as §9721.

[6] 42 Pa. C.S.A. §9718 (1). These provisions were applicable in the *Walls, supra* case.

[7] *Id.* §9718 (3).

[8] *Id.* §9718 (2)

[9] *Id.* §9718 (3)

[10] *Id.* §9718 (b)

of the mitigating circumstances in the defendant's life. Accordingly, a person who is situated similarly to the Defendant, to-wit, no prior criminal record, age 18 at the time of the crime, middle to upper class economically, stable nuclear family, an established religious base, high school graduate, two years of college with success at every academic level, athletic achievements, volunteer work in the community and favorable references from relatives and friends in her hometown, would still be going to jail for at least ten to twenty years if she were convicted of Rape, Involuntary Deviate Sexual Intercourse or Aggravated Indecent Assault of a child. The perpetrator would be going to jail for at least five to ten years for Aggravated Assault or other forms of Aggravated Indecent Assault. The offender also would not be eligible for parole until the mandatory minimum has been served. These sentences are mandated by the people of Pennsylvania regardless of the defendant's mitigating circumstances.

In this case, the Defendant is not facing any of the described mandatory sentences. Nor is the Defendant facing the possibility she is not eligible for parole prior to the expiration of her minimum sentence. By contrast, the Defendant is eligible for release from a state prison into a pre-release program eighteen months prior to the expiration of her minimum sentence, with participation in a pre-release program beginning twelve months before the expiration of her minimum sentence.

Contrary to the Defendant's Post Sentence Motion, the Defendant's case was mitigated. She was permitted to enter a plea to Voluntary Manslaughter thereby avoiding exposure to a life sentence for first degree murder or a possible maximum sentence of forty years for third degree murder. The Defendant overlooks the fact there are a host of women who committed neonaticide in Pennsylvania under similar circumstances as this case and who are serving more severe sentences than the Defendant, including life in prison for first degree murder.

On March 11, 2008, a jury in Washington County convicted Jessica Rizor of first degree murder and other charges for giving birth to a newborn baby in the bathroom of the home she shared with her husband and mother, killing the newborn child and then placing the baby in a trash bag.[11] Rizor told her husband the trash bag contained Thanksgiving leftovers. At trial, Rizor contended she suffered from a "depersonalization disorder" in which she did not appreciate what she was doing. The jury did not agree. Rizor was sentenced on June 5, 2008 to life in prison.

A jury in Northumberland County convicted Tracy Dupre of first degree murder and related charges for giving birth in her bathtub, drowning the baby and then placing the child in a garbage bag.[12] The victim was subsequently found in a dumpster. Dupre was sentenced on December 10,

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[11] *See Commonwealth v. Rizor, Washington County Docket Number 2637 of 2004.*

[12] *Commonwealth v. Dupre, Northumberland County Docket Number 01-914.*

2002 to life imprisonment without parole and an aggregate consecutive sentence of 6 months to 19 years for the related charges. The Superior Court affirmed by Opinion and Order dated January 11, 2005.[13]

The Defendant holds out her age as a mitigating factor. Yet two women who were younger than the Defendant at the time of killing a newborn child are doing life sentences without parole for first degree murder.

Melisa McManus was sixteen years old on April 1, 1993 when her newborn child was suffocated in a trash bag. Like the Defendant, McManus concealed her pregnancy, tried to hide the victim's body and lied to authorities afterwards about the crime. She was tried as an adult in Lancaster County and convicted of first degree murder on May 6, 1994.[14]

Melisa McManus was sentenced to life in prison without parole. This result was affirmed by the Superior Court on May 1, 1995.[15] The Pennsylvania Supreme Court denied allocatur on November 14, 1995.[16]

A similar case occurred in Dauphin County. Tina Marie Brosius was almost five months younger than Teri Rhodes when she drowned her newborn infant in a portable toilet in a public park on May 8, 1994.[17] Tina Brosius was convicted of first degree murder and is serving a sentence of life in prison without parole.

A separate case of neonaticide in Dauphin County resulted in a conviction for Third Degree Murder and Endangering the Welfare of a Child. Lori Pinkerton suffocated her son within an hour of giving birth and then gave bogus stories to authorities about the circumstances surrounding the birth and the whereabouts of the dead body.[18] She was sentenced to the maximum sentence existing then for Third Degree Murder of ten to twenty years of incarceration.[19] The Pinkerton case was affirmed by the Superior Court by Opinion and Order dated April 8, 1997.[20]

There are many factual similarities between these cases and the Defendant's case. There was an attempt to conceal the pregnancy. The killing took place shortly after giving birth. There are instances of suffocation in a plastic bag. There are attempts to hide the victim afterwards. Fabricated

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[13] *Commonwealth v. Dupre*, 866 A.2d 1089 (Pa. Super. 2005)

[14] *Commonwealth v. McManus, Lancaster County Docket Number 2039 of 1993.*

[15] *Commonwealth v. McManus, 445 Pa. Super. 628, 664 A.2d 1057 (1995) (Table, No. 1930 PHL 94).*

[16] 543 Pa. 692, 670 A.2d 141 (1995) (Table, No. 376 M.D. Alloc. 1995).

[17] *Commonwealth v. Tina Brosius, Dauphin County Docket Number 1540 of 1994.*

[18] *Commonwealth v. Pinkerton, Dauphin County Docket No. 1736 CD 1995.*

[19] The maximum sentence for Third Degree Murder was increased to forty years effective April, 1998. *See* 18 Pa.C.S.A. §1102(d). The forty year maximum for Third Degree Murder was in effect on August 12, 2007 when the Defendant's crime occurred.

[20] *Superior Court Docket Number 0100 Harrisburg 1996, April 8, 1999.*

stories about what happened or where the body was located are told by the defendant to medical and legal authorities afterward.

All of these defendants are serving sentences longer than the Defendant. In fact, all but Pinkerton serving life sentences without parole.

By comparison, the Defendant had the benefit of a plea bargain accepted in which her homicide charge was reduced to Voluntary Manslaughter. The Defendant's exposure to a life sentence for First Degree Murder or a forty year maximum sentence for Third Degree Murder was eliminated.

Four additional charges against the Defendant were withdrawn. Two of the withdrawn charges, Concealing the Death of a Child and Endangering Welfare of a Child, were first degree misdemeanors each carrying a five year maximum sentence. The charges of Recklessly Endangering Another Person and Abuse of a Corpse were second degree misdemeanors each carrying a maximum sentence of two years in jail.

Added together, the dismissal of these four charges eliminated a possible fourteen years of additional sentencing exposure for the Defendant. Remember, Tracy Dupre received six months to nineteen years of incarceration for the crimes committed in addition to the life in prison for murder.

The Defendant received a fair resolution of her case by a plea to one reduced charge and the dismissal of four related charges.

Her sentence was also mitigated by the circumstances over which she had control. All of the mitigating circumstances as cited in Paragraphs 22 A and B of the Defendant's Post Sentence Motion were reviewed in the first two pages of the Sentencing Rationale. This Court accepted as true all of the representations about the personal characteristics of the Defendant as reflected in these comments:

> I want to begin with what has been proffered as the mitigation in this case. And I certainly empathize deeply with the family of Teri Rhodes, with Teri Rhodes herself. I know it has to be devastating. I respect the fact that all the folks that have come here today to speak on her behalf and to be here in support of her, that took time and came here from Michigan and set aside what they were doing in their lives to speak on her behalf.
>
> I have no reason to dispute or not believe what they say, and I accept what they say as accurate. I accept their characterizations. I think Teri is a very kind-hearted and loving person. And you've lived your life, for the most part, to earn what has been said here today.
>
> I take into account all your circumstances that have been described here, all your character traits, and it's pretty obvious what they are.
>
> I do note I may have made one mathematical mistake, which is my mistake. I had it written as you were 19, you may have

been 18 at the time you were pregnant.

I do accept the representations that you're remorseful for what occurred in this case and I note you've accepted responsibility by way of your plea to voluntary manslaughter, and I take that into account.

S.T. pp. 36-37.

The Defendant was also informed: "This Court is empathetic to the situation Teri Rhodes found herself in January, 2007. This Court fully appreciates the reasons for compassion for Teri Rhodes and her family." *Sentencing Rationale pp. 28-29.* Further, "The parties are correct that Teri Rhodes has lived an exemplary life until the events leading up to the killing of this child." *Id. p. 29.*

The sentence imposed by this Court took into consideration all of the evidence of mitigation presented by the Defendant. These circumstances were then balanced with the nature and extent of her criminal conduct. As the Defendant was informed, the mitigation in the form of her good character existed at the time she got pregnant and throughout her pregnancy. The Defendant's character should have deterred her from committing this crime.

The Defendant abandoned her integrity and honesty and engaged in a course of intentionally deceptive behavior that enabled her to lie to her family, peers, coaches, medical personnel and the police. She chose not to use her intelligence, talents and resources to resolve the challenge she faced with her pregnancy. Ultimately, the Defendant chose the worse possible option.

None of the Defendant's character witnesses were there in the days leading up to the Defendant's crime and may not be aware of all of her conduct or the circumstances she created. While their opinions of the Defendant's character are solidly based on years of contact with her, the undeniable fact remains the Defendant has proven capable of committing a heinous crime against an infant who was totally dependent upon her for survival.

By contrast, none of the people who were with the Defendant in the days leading up to her crime attested to her character. Julia Butler, Sarah King, Ryan Patton and Bryan Bentz did not submit letters or speak on the Defendant's behalf at sentencing. Nor did any members of the Defendant's college volleyball team. In the broader view, there were no letters or appearances at sentencing by any of the Defendant's friends, classmates, teachers or administrators from Mercyhurst College.[21]

[21] Interestingly, the parents of the Defendant's roommate her freshman year wrote but their daughter did not. Specifically, Edward and Jean Ross, who live a short distance from the Defendant's parents in Michigan, wrote letters on behalf of the Defendant, but their daughter, Amanda Ross, the Defendant's roommate freshman year, did not write on the Defendant's behalf for sentencing purposes.

In the end, the Defendant received a lesser sentence than if she raped a child, had involuntary deviate sexual intercourse with a child or committed an aggravated indecent assault of a child. It was also less than the statutory maximum of ten to twenty years for Voluntary Manslaughter. To say evidence of mitigation for the Defendant was not considered is inaccurate.

In Commonwealth v. Devers, 546 A.2d 12 (Pa. 1988), the Pennsylvania Supreme Court held:

> "(w)here pre-sentence reports exist, we shall continue to presume that the sentencing judge was aware of the relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors."

Devers, 546 A.2d at 18.

In this case, the Pre-Sentence Report was read in its entirety. There were no objections to it by either party. This Court also had the benefit of the mitigating evidence submitted by the Defendant prior to and at sentencing that was duly weighed. The fact the Defendant does not like the sentence does not mean that her evidence of mitigation was not utilized.

This opinion will continue in next week's issue of
the Erie County Legal Journal
Vol. 92 No. 13 - March 27, 2009

COMMONWEALTH OF PENNSYLVANIA
v.
TERI RHODES

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 110 of 2008

This opinion is continued from last week's issue of the Erie County Legal Journal - Vol. 92 No. 12 - March 20, 2009

IV. WHETHER THE SENTENCING WAS A "SHAM" PROCEEDING

Defense Counsel alleges the Defendant's sentencing was a "sham" proceeding. *Post Sentence Motion Paragraph 28.* The law and the record expose this characterization as hollow.

By law, the following is required at a sentencing:

> (1) At the time of sentencing, the Judge shall afford the Defendant the opportunity to make a statement in his or her behalf and shall afford counsel for both parties the opportunity to present information and argument relative to sentencing.
> (2) The Judge shall state on the record the reasons for the sentence imposed.
> (3) The Judge shall determine on the record that the Defendant has been advised of all post sentencing rights.
> (4) The Judge shall require that a record of the sentencing proceedings be made and preserved so that it can be transcribed as needed…

Pa.R.Crim.P. 704 (C)(1)-(4).

Consistent with these requirements, the Defendant had a full opportunity to present any and all information for sentencing purposes. In fact, ten witnesses testified in addition to the Defendant.

Further, Defense Counsel provided to this Court a Sentencing Memorandum on Monday, November 17, 2008 setting forth the Defendant's background, a very brief statement of the facts and other sentencing considerations to support the Defendant's requested sentence.

Attached to the Sentencing Memorandum was a report dated May 31, 2008 from Dr. Neil S. Kaye, who holds himself as an expert on neonaticide. *See Defendant's Exhibit "A."* Also attached was a report dated October 30, 2008 from Dr. Cathy Pietrofesa, a therapist who has worked with the Defendant. *See Defendant's Exhibit "B."* A third report was attached from Dr. Robert Sadoff dated September 4, 2008 which has

been identified as the "Sadoff Report." *See Defendant's Exhibit "C."*

Also provided with the Sentencing Memorandum were a compilation of letters from relatives and friends in support of the Defendant. *See Defendant's Exhibits "D1-D68."*[22] The ten witnesses who were called to testify at the time of sentencing each had submitted a letter within Exhibit "D." *See Exhibits "D5, 6, 8, 21, 36, 45, 54, 58, 59 and 66."*

The Defendant's Sentencing Memorandum, three reports and the letters of support were all read prior to sentencing. Defense Counsel was so informed at the outset of the sentencing proceeding. *S.T. p. 5.*

The Defendant was given an unlimited opportunity to exercise her right of allocution. The Defendant did speak on her own behalf. *S.T. pp. 22-23.*

Defense Counsel was given an unlimited opportunity to present any and all argument he deemed appropriate on the Defendant's behalf. *S.T. pp. 5-23.*

The District Attorney stated his position and was given as much time as he desired to make his presentation. *S.T. pp. 23-34.*

Once all the parties were done, this Court set forth on the record the reasons for the sentence imposed. The entire proceeding was preserved on the record by a court stenographer. The Defendant was duly informed of all of her post-sentencing rights.

Accordingly, the Defendant fully had her day in court at the time of sentencing as required under the law. For the Defense Counsel to characterize this proceeding as a sham is unfortunate.

Next, Defense Counsel objects to the preparation by the Court of a written statement of the reasons for the sentence imposed. Defense Counsel contends the Sentencing Rationale demonstrates a bias and that the sentence was predetermined. *Post Sentence Motion Paragraph 17.* As a matter of law and fact, these objections are baseless.

By law, if a sentence is going to be imposed outside of the sentencing guidelines, "the Court shall provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines. Failure to comply shall be grounds for vacating the sentence and re-sentencing the Defendant." 42 Pa.C.S.A. §9721(b). In this case, the sentence was outside of the sentencing guidelines, thus §9721(b) mandated a contemporaneous written statement of the reasons for the sentence. In accord therewith, the Sentencing Rationale was presented to the parties at the time of sentencing and filed that morning.

Obviously the statutory requirement of a written statement contemplates that a judge think about an appropriate sentence ahead of time and be prepared to provide a written statement at the time of sentencing. Prior

[22] Defense Counsel said there were 68 letters. Actually there were 66. There were duplicate letters from Kristina Hutson and Gerald Anderson.

to most cases, the judge is provided a pre-sentence report to read before sentencing.

As Defense Counsel knows, he provided a lengthy Sentencing Memorandum, three reports and voluminous letters to be read ahead of time. Defense Counsel wanted the Court to consider the Defendant's evidence and position prior to sentencing. There is nothing wrong with this procedure; in fact, it is common. As a practical matter, if this information is not reviewed ahead of time, what is left is a situation where all of the parties have to wait as a judge sits there and reads a stack of documents, hears from the parties and then decides a sentence on the spot. This latter scenario is not an efficient or effective method to arrive at a sentencing decision.

The procedure used in this case, including by Defense Counsel, was consistent with the manner in which sentences historically have occurred in Erie County and probably throughout the Commonwealth. It allows for a more deliberative process of formulating an appropriate sentence.

There is another key fact that Defense Counsel overlooks. The Sentencing Rationale did not include the actual sentence to be imposed. This omission was intentional because a final sentencing decision was not made until all of the evidence was presented at sentencing. The Sentencing Rationale was prepared ahead of time in the event the sentence was outside of the guidelines. If the sentence were within the guidelines, the Sentencing Rationale, while not required by §9721(b), still served the purpose of stating the reasons for the sentence in this highly emotional case.

Also, Defense Counsel's sentencing position was well known prior to sentencing and did not change at sentencing. By way of his Sentencing Memorandum and the supporting documents, Defense Counsel was seeking a sentence below the mitigated range of the sentencing guidelines in the form of either community service, probation or, at most, a county-level jail sentence.

All of the evidence presented by the Defendant at the time of sentencing was consistent with this sentencing position. There were no surprises or new revelations by way of the evidence or arguments presented on behalf of the Defendant at sentencing. This was not a case where there was startling new information revealed at sentencing that enhanced the Defendant's sentencing position. Hence, the Defendant had a full opportunity to present her sentencing position.

Lastly, Defense Counsel objects because he was not given a copy of the Sentencing Rationale until after the parties had presented their case. This objection is not supported by any legal authority.

Admittedly, the Sentencing Rationale was lengthy as necessitated by what occurred in this case. By law, there is no requirement the Defendant be provided with the Court's written reasons ahead of time. There is

no provision empowering Defense Counsel to cross-examine the Court on its written reasons for the sentence imposed. Hence, the request by the Defense Counsel for a recess to read the Sentencing Rationale was properly denied.

Contrary to what is pled, Defense Counsel was given an opportunity to object and state the reasons for his objections:

MR. FRIEDMAN:	Your Honor, could we have an opportunity to read this and also see the Court in chambers before - -
THE COURT:	No. I don't - - I don't think we need - -
MR. FRIEDMAN:	I am disturbed about just receiving this at this time.
THE COURT:	You may be.
MR. FRIEDMAN:	I have things I'd like to put on the record then.
THE COURT:	Go ahead.
MR FRIEDMAN:	I'll wait.

S.T. pp. 34-35.

As the record reflects, Defense Counsel decided to wait until after sentencing to object. In fact, after sentencing Defense Counsel placed objections on the record to the proceeding.[23] Hence, all of the Defendant's objections have been preserved for appellate purposes and the Defendant has not suffered any actual or legal prejudice. None of the claims in the Defendant's Post Sentence Motion have been declared to be waived.

The Defendant's sentencing was conducted consistent with all procedural and statutory requirements. Because the Defendant does not like the sentence does not render the proceeding a sham nor is there a basis for post-sentence relief.

V. THE FACTUAL BASIS FOR THE SENTENCE

The Defendant argues her sentence should be vacated because the proceeding was a "star chamber procedure", that the Court held an "in-camera non-jury proceeding" in which findings of fact and conclusions of law were entered without the opportunity for the Defendant to participate by way of cross-examination or presenting witnesses. *Post Sentence Motion Paragraphs 10, 24, 27.* To the contrary, the Defendant had an uninterrupted opportunity to participate in the proceeding. The

[23] After the Defendant's sentencing, a short recess was taken from 11:05 a.m. until court was reconvened at 11:13 a.m. At that time, Defense Counsel placed his objections on the record. This latter proceeding was really a continuation of the Defendant's sentencing but was given a separate transcript by the court stenographer. Thus, the cite to when Defense Counsel placed his objections on the record is still *S.T.*, but it is at pp. 2-5 of the latter transcript which starts at 11:13 a.m.

Defendant's contention also ignores the long history of sentencing law in Pennsylvania.

Over the years, our appellate courts have held "The court in sentencing may receive any relevant information which will enable it to exercise its discretion in determining the proper sentence or penalty. A proceeding to determine a sentence is not a trial, and the court is not bound by the restrictive rules of evidence properly applicable to trials." *Commonwealth v. Orsino,* 178 A.2d 843, 846 (Pa.Super. 1962)(*Internal citations omitted.)*

As far back as 1940, the Pennsylvania Supreme Court held: "(I)n determining what the penalty shall be after convictions in criminal cases, courts have a wide latitude in considering facts, whether or not these facts are produced by witnesses whom the members of the court see and hear. In many jurisdictions courts in determining proper sentences consider official records and the reports of probation officers, psychiatrists and others. This court without seeing or hearing any witnesses can determine whether a sentence of death for murder in the first degree should be reduced to life imprisonment." *Commonwealth v. Petrillo,* 16 A.2d 50, 58 (Pa. 1940).

More recently, the Pennsylvania Superior Court addressed the responsibilities of a sentencing judge in ensuring there is sufficient information about the crime to impose an appropriate sentence:

> The first responsibility of the sentencing judge is to be sure that he has before him sufficient information to enable him to make a determination of the circumstances of the offense and the character of the defendant." *Commonwealth v. Carter,* 336 Pa.Super. 275, 485 A.2d 802, 804 (1984). Thus, a sentencing judge must either order a PSI report or conduct sufficient pre-sentence inquiry such that, at a minimum, the court is apprised of the particular circumstances of the offense, not limited to those of record, as well as the defendant's personal history and background. *See Martin,* 466 Pa. at 134 n.26, 351 A.2d at 658 n. 26 (1976). While the extent of the pre-sentence inquiry may vary depending on the circumstances of the case, "a more extensive and careful investigation is clearly called for in felony convictions, particularly where long terms of confinement are contemplated." *Id. (Citation omitted.)*

Commonwealth v. Goggins, 748 A2d. 721,728 (Pa. Super. 2000).

In this case, a Pre-Sentence Report was reviewed by this Court prior to sentencing. *Sentencing Rationale p. 3.* However, the Pre-Sentence Report shed little light on the facts surrounding the crime. Under the heading "Description of Offense," the Pre-Sentence Report contains this two-sentence description:

> On 08/12/07, the Defendant secretly gave birth to a daughter in the bathroom of her apartment, unassisted by medical personnel. She placed the live, full-term infant in a plastic garbage bag where the baby died of asphyxia.

Pre-Sentence Report p. 2.

This meager description provided little insight into the circumstances surrounding this crime. The only other document presented prior to sentencing with any reference to the facts was the Defendant's Sentencing Memorandum. As was discussed, this document woefully described the circumstances of the crime.

The Defendant proffers as serious provocation for the killing the proposition that she was faced with a sudden, intense passion brought on by the unexpected delivery of a child. The Defendant contended the cumulative effect of a series of events leading up to the child's delivery was sufficient to constitute serious provocation.

The Defendant was seeking a mitigated sentence based on the circumstances surrounding the killing. Obviously it was important to know those circumstances to decide whether a mitigated sentence was warranted.

To determine what happened, the logical place to look was in the police reports. Historically, police reports have been part of a pre-sentence report or can be made available at the request of the sentencing judge. This is particularly true when a Defendant enters a plea. If the sentencing judge had the benefit of presiding over a trial and hearing all of the evidence, there is less need for the sentencing judge to read the police reports.

As was stated at the time of sentencing, this Court requested and received from the Commonwealth the police reports from the City of Erie Police Department and some of the reports from the County Detective's Office. *S.T. pp. 23-24.* This Court acknowledged reading the police reports at the time of the sentencing. *S.T. p. 26.*

At no time did the Defendant ever object to the fact this Court read the police reports. The police reports reviewed by this Court are the same ones known to all parties. In the Sentencing Rationale, full disclosure was made of all the documents reviewed for purposes of sentencing. *Sentencing Rationale pp. 3-4.*

In the interest of further disclosure, attached hereto is a copy of the police reports provided by the District Attorney's Office and reviewed by this Court for sentencing purposes. *Court Exhibit "A."* These are the same reports that would have been provided to Defense Counsel during discovery. *P.T. p.5.*

What also has to be noted is that the information reviewed in the police reports was reliable. This information included the evidence from the Defendant's computer. Also within the police reports were the contents of the statements the Defendant gave to Lt. Spizarny on August 12, 2007

and August 13, 2007. The Defendant's second statement was videotaped. *P.R. p. 18.* The Defendant cannot impeach her own statements or what her computer records show.

The police reports also included contemporaneous statements made by the Defendant to her roommate, coaches and other people who were with her in the days and hours leading up to the crime. These witnesses were inherently reliable given their relationships to the Defendant. These people were making extensive, personal efforts to help the Defendant and would have little or no motive to fabricate. Also, at the time these statements were given, the Defendant had not been charged with any crime.

The information coming from Sarah King, Julia Butler, Ryan Patton and Bryan Bentz is based on their videotaped statements to the police. Hence the actual words of these witnesses are preserved. There is no question about what the witnesses told the police. These videotaped statements were available to the Defendant during discovery well in advance of the Defendant's plea and sentencing.

The information from these witnesses was also reliable based in part on the Defendant's statements because she admits some of what the witnesses said. Also, there is uncontroverted physical evidence that supports these witnesses. Preserved as evidence are the contents of the Defendant's electronic message to Sarah King on Saturday stating the pregnancy test was negative and the records from the CVS pharmacy showing the Defendant did not purchase a pregnancy test on August 11th. *P.R. p. 27.*[24]

All of this information was known to the Defendant for a long time prior to sentencing. After all, she knew what was in her computer that was seized by the police. She knew what she told the police. She would be aware of her conversations with her roommate, coaches and others associated with the volleyball team. The Defendant cannot claim surprise by the use of information created by her and possessed by her for months before the entry of her plea and her sentencing.

Also, the Defendant had a lengthy opportunity to challenge any of the evidence in the police reports prior to her plea. The Defendant was arrested on September 18, 2007. The Defendant signed a Waiver of Arraignment on February 19, 2008 that was filed on February 21, 2008 thus beginning the time period for the Defendant to formally seek discovery. It also began the time period for the Defendant to file any pre-trial motions. The Defendant did not file any pre-trial motions within the thirty-day time period.

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[24] The instant messaging between King and the Defendant on Saturday includes the Defendant's inquiry whether an ultrasound had already been ordered. King responded that the ultrasound would be scheduled on Monday and hopefully be performed no later than Wednesday. *P.R. p. 27.*

On March 26, 2008, Defense Counsel filed a "Motion to Extend Time in Which to File Omnibus Pretrial Motion" averring a need for additional time to receive and review discovery from the Commonwealth and then determine whether any pretrial motion was warranted. The Defendant's request was granted by this Court by Order dated March 26, 2008. The deadline for any pretrial motions was moved to April 25, 2008.

The Defendant still did not file any pretrial motions. The Defendant has never claimed the Commonwealth withheld any discovery or made a motion seeking resolution of a discovery issue. Despite the extension of time to do so, the Defendant never filed a pretrial motion challenging any part of the police investigation or any evidence within the police reports.

The Defendant had nearly eleven months between her arrest on September 18, 2007 and her plea on August 8, 2008, to review and challenge any of the evidence against her. At her plea, the Defendant acknowledged she had sufficient time to review her case with her attorney:

> MR. FOULK: And it's my understanding that Mr. Friedman has been representing you throughout these proceedings; is that correct?
>
> THE DEFENDANT: Yes.
>
> MR. FOULK: Do you feel that you have had ample time to discuss this case with Mr. Friedman prior to coming in there this morning?
>
> THE DEFENDANT: Yes.
>
> MR. FOULK: Is it your understanding that the Commonwealth has provided all of the discovery necessary to try this case to your attorney, and have you had the opportunity to go over all of the options with him?
>
> THE DEFENDANT: Yes.

P.T. pp. 5-6.

> THE COURT: Is that why you're entering a plea is because in fact you're guilty?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you feel like you're, in entering your plea, you're giving up any valid legal defense in this case?
>
> THE DEFENDANT: No.
>
> THE COURT: Or any defense at all that you would like to assert to these charges?

THE DEFENDANT: No.

P.T. p. 19.

THE COURT: And is your plea here today the product of a lot of thought on your part?

THE DEFENDANT: Yes.

THE COURT: Have you had enough time to discuss your case with Mr. Friedman?

THE DEFENDANT: Yes.

P.T. p. 24.

The Defendant stated under oath at her plea that she had received discovery and reviewed it with her attorney. Further, in entering her plea, she did not feel she was giving up any valid defense to the charge. The Defendant was satisfied she had enough information to enter an informed plea and sufficient time to consult with her attorney.

The Defendant's sentencing was held on November 21, 2008. Thus the defense had over fourteen months to prepare for sentencing, including review of the police reports. The defense cannot in good faith claim any prejudice or surprise by the information used at sentencing from the police reports.

The circumstances described by this Court for sentencing purposes were not pulled out of thin air or created from an extraneous, irrelevant source. All of the information about the crime relied upon for sentencing purposes came directly, or by logical inference, from the information contained within the police reports. More importantly, this information was largely derived directly from the Defendant's statements, conduct and computer.

All of this information cannot be simply ignored. The Defendant cannot pretend there are no witnesses to her crime. The Defendant cannot wish away the physical evidence of her crime.

Given the averments of the Post Sentence Motion, it appears the Defendant wants the benefit of a trial within a plea. If the Defendant wanted a trial, she was free to exercise her right to do so and have a public airing of all the facts in her case. A sentencing is not a trial.

Notably, Defense Counsel asked this Court to accept evidence from three experts who did not testify at sentencing and from fifty-six people who submitted letters but did not testify at sentencing. These experts and letter-writers were not subject to cross-examination, yet the relaxed evidentiary rules for sentencing allowed consideration of hearsay.

The Defendant's report from Dr. Sadoff was considered even though it was largely double hearsay because it contained a lengthy discussion of what the Defendant told Dr. Sadoff about herself, her family and this crime. Defense Counsel received the benefit of introducing the

Defendant's testimony through Dr. Sadoff's report without any cross-examination about the inconsistencies of what she said to Dr. Sadoff versus what she did or said otherwise. Further, the opinions expressed by Dr. Sadoff were considered despite the fact he was not subject to cross-examination, particularly about the basis for the opinions rendered.

The Defendant also had the benefit of her testimony considered in the form of double hearsay as set forth in the report of Dr. Pietrofesa. *See Defendant's Exhibit "B."* In this report the Defendant talked about herself, her family and this crime. The Defendant also had the benefit of the opinions expressed by Dr. Pietrofesa about an appropriate sentence for the Defendant. *Id.* The Defendant's statements within this report were not subject to cross-examination for the inconsistencies. Dr. Pietrofesa's opinions were also not subject to cross-examination.

The Defendant had the benefit of the report of Dr. Kaye who did not testify. Dr. Kaye did report on the Defendant's childbirth on August 12, 2007. *See Kaye Report,* Defendant's Exhibit "A," *p. 3.* This information as presented in his Report was double hearsay and not subject to cross-examination. Dr. Kaye also expressed various opinions about the Defendant's situation and sentence. Hence, the Defendant had the benefit of her case being presented through Dr. Kaye.

Some of the Defendant's letter-writers who did not testify discussed the Defendant's level of criminality. The hearsay from all of these defense witnesses was considered despite the fact they were not subject to cross-examination.

The Defendant's hearsay evidence is no different from the hearsay statements of Julia Butler, Sarah King, Ryan Patton and Brian Bentz. Like the Defendant's witnesses, Butler, King, Patton, *et al.,* were conveying information based on what they saw or heard from the Defendant. Unlike the Defendant's experts, these witnesses were not going farther and expressing their opinions about the Defendant's conduct.

Stated differently, the Defendant presented two layers of hearsay. The first layer consisted of the Defendant's statements to her experts, family, friends and other supporters. Layered thereon are the opinions expressed by the defense experts regarding the statements, conduct and sentencing of the Defendant. By comparison, the hearsay from Butler, King, *et al.,* does not get beyond the first layer of hearsay and does not express any opinions about the Defendant's conduct or sentence.

Distilled, the Defendant's position is that only her hearsay can be considered at sentencing. According to Defense Counsel, this Court can consider any hearsay or double hearsay proffered by the Defendant, including what she said to her experts, about the crime. However, no other hearsay, including anything the Defendant said to her roommate, coaches, medical personnel and Lt. Spizarny is permissible.

Further, the Defendant's witnesses are not subject to cross-examination,

but all other witnesses must be subject to cross-examination at sentencing. Defense Counsel thinks he controls what information can be considered by his experts and by a sentencing court. This position is untenable and undermines the responsibility of a sentencing judge to be fully informed of the circumstances of the crime.

This Court is not bound to accept the opinions proffered by the defense experts. Had the defense experts been provided with the police reports, including the videotaped statements and the physical evidence, then subjected to cross-examination, it is possible the expert opinions would have been different.

Also, the Defendant's argument was forfeited when the Defendant entered a plea. It is noteworthy the Defendant is not now seeking to withdraw her plea. Further, in her Post Sentence Motion, the Defendant has not challenged the evidence produced from her computer, the accuracy of the statements she gave to the police or the accuracy of the statements provided by Sarah King, Julia Butler, Ryan Patton and Brian Bentz.

For months prior to the sentencing Defense Counsel had the police reports. Defense Counsel had access to the statements of his client. The defense was aware of the videotaped statements of Sarah King, Julia Butler, Ryan Patton and Bryan Bentz. None of this information was sprung on the defense by surprise at the sentencing. The Defendant was not ambushed by any new evidence not previously known by the defense.

In a cryptic objection, Defense Counsel states: "(t)he court further notes in its Statement of Sentencing Rationale that: 'however, there is no objective evidence that she was undergoing any stress or impairment of her reasoning or judgment in the months, days and hours leading up to the child birth.' (p. 25). The defendant was not given an opportunity to present any such evidence." *Post Sentence Motion Paragraph 12.*

This allegation is factually false. Defense Counsel was given as much time as needed to present any evidence. Defense Counsel was not limited in the presentation of any evidence. The Defendant had a full opportunity to testify at sentencing. The Defendant called ten additional witnesses and had the benefit of three expert reports.

The Defendant did present evidence on this subject in the form of her statements to Dr. Sadoff and Dr. Pietrofesa. The Defendant had the benefit of the opinions expressed by her three experts.

The Defendant's allegation is an insult to the three experts tendered by Defense Counsel. Each expert expressed an opinion about the Defendant's mens rea and the stressful circumstances the Defendant faced. Dr. Sadoff opined at length about the Defendant's circumstances during her pregnancy and her state of denial as a defense mechanism. *Sadoff Report, pp. 7, 8.*

Defense Counsel does not identify any evidence he would have otherwise presented at sentencing. It is unlikely the defense could recall the Defendant as a witness at sentencing. According to Dr. Pietrofesa, the Defendant has only a vague recollection of what occurred during the crime. *Defendant Exhibit "B," p. 1.*

The Defendant had the benefit of her testimony concerning the months of her pregnancy by virtue of all of her statements reported by Drs. Sadoff and Pietrofesa.

What the Defendant did in the months leading up to the crime is not subject to many differences. The Defendant went home at the end of the 2007 school year in a physical condition that prompted her parents to inquire whether she was pregnant. The Defendant did extensive research on the Internet about pregnancy and ways to kill a fetus. The Defendant cannot dispute what her computer records show.

None of the 69 witnesses for the Defendant identified any problems the Defendant was having in the months leading up to August 12, 2007 that showed any evidence of a disconnect from reality. Defense Counsel proffers no objective evidence that was not available for review or presentation at sentencing.

The Defendant's sentencing started at 9:15 a.m. and concluded at 11:05 a.m. (followed by the objections placed on the record by Defense Counsel). The Defendant presented all of her available evidence. The defense fired all of the guns at their disposal at sentencing. The Defendant had a full opportunity for her story to be told in its entirety at sentencing. The Defendant's story was retold through her experts.

The fact that some of the evidence presented by the Defendant was not accorded the significance the Defendant wants does not mean she did not get her day in court. The decision by Defense Counsel to focus primarily on the Defendant's personal circumstances does not mean the Defendant gets a second bite of the apple by way of a second sentencing. The fact Defense Counsel chose not to call any of his experts as a live witness does not entitle the Defendant to a second sentencing. It is not the role of the Court to tell Defense Counsel how to present the Defendant's case.

To grant the Defendant post sentence relief on the basis of this record is to set a precedent based on deception. The defense, despite having knowledge of what was in the Defendant's computer, in the Defendant's statements to the police and what others said on videotape about the circumstances leading up to the crime, chose to present a skewed picture of what occurred. The defense had every opportunity to be forthright. The fact this Court did not accept the Potemkin Village presented by Defense Counsel does not mean the Defendant is entitled to another sentencing.

This Court was charged with the responsibility of understanding the circumstances of the Defendant's crime. All relevant information was

considered. This Court was not limited to just the evidence presented by the Defendant. When all of the circumstances were reviewed, the Defendant's sentencing position was unsupportable.

VI. A PREMEDITATED AND INTENTIONAL KILLING

The Defendant shifts gears to argue: "The court improperly in its in camera proceeding determined that the defendant had committed a 'premeditated and intentional killing.' The court did so based upon evidence that it obtained outside the record. By reaching this conclusion the court impermissibly sentenced the defendant for a crime for which she had not been convicted or had been given due process of law." *Post Sentence Motion Paragraph 27.*

In making this argument, Defense Counsel overlooks the fact the Defendant admitted under oath at her plea to intentionally killing her child. *P.T. pp.11-14.*

It is accurate that premeditation is not an element of Voluntary Manslaughter. However, that does not mean all evidence of premeditation must be ignored for sentencing purposes. Sadly, there is considerable evidence this killing was premeditated.

A long line of appellate decisions holds that premeditation can be formed in a very brief time. *See, e.g., Commonwealth v. Thornton,* 431 A.2d 248 (Pa. 1981). Further, premeditation "does not require planning or previous thought or any particular length of time. It can occur quickly. All that is necessary is that there is time enough so that the defendant can and does fully form an intent to kill and is conscious of that intention." *Pa. S.S.J.I. (Crim) 15.2502A(4), Second Edition.*

The evidence of premeditation was cited to explain in part the reasons for the Defendant's sentence. While the Defendant wants to disregard this evidence, in determining the circumstances surrounding the crime, evidence of the Defendant's intent cannot be swept under the rug.

The Defendant's argument she was sentenced for a crime she did not commit is misguided. The sophistry of this argument is that the Defendant admitted by way of her plea that she intentionally killed her child. Consistent with the description of premeditation, the circumstances show the Defendant had fully informed an intent to kill and was conscious of that intention. She was sentenced for this conduct. Apparently the Defendant thinks that she should not be sentenced for an intentional killing despite her plea to it.

The Defendant fails to identify for what crime she was sentenced but was not convicted. The Defendant was not sentenced for a premeditated murder, which would have meant a sentence of life in prison. The Defendant also was not sentenced under the guidelines and forty year maximum for Third Degree Murder. Her sentence was less than the maximum sentence for Voluntary Manslaughter.

As the Defendant was informed, the circumstances of her case are

closer to murder than to manslaughter. *Sentencing Rationale p. 28.* A review of the cases of Jessica Rizor, Tracy Dupre, Melisa McManus, Tina Brosius and Lori Pinkerton reveals striking similarities with the circumstances of this case. However, this does not mean the Defendant was sentenced for a crime she did not commit. It does explain why the Defendant was sentenced closer to the maximum sentence for Voluntary Manslaughter than requested by the Defendant.

The Defendant entered an open plea in which she was fully advised in writing and orally that the sentencing positions of the parties were not binding, the sentencing guidelines were not binding and that she could receive a sentence of up to twenty years in jail. The Defendant acknowledged she understood her sentencing exposure:

> THE COURT: And there will be a lot of factors going into what the appropriate sentence should be; do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And do you understand that in entering your plea at the time of sentencing you face the possibility of going to jail for up to 20 years, which would mean a sentence of 10 to 20 years?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And the maximum fine of $25,000.
>
> THE DEFENDANT: Yes.
>
> THE COURT: And Mr. Foulk has touched upon the fact that there are sentencing guidelines in your case and I believe - - correct me if I am wrong, Mr. Friedman - - but I believe in the mitigated range it's 24 months; and the standard range it's 36 to 54; and in the aggravated range, 66 months. Does that comport with your understanding?
>
> MR. FRIEDMAN: That's correct, your Honor.
>
> THE COURT: Do you understand what sentencing guidelines are:
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay. Mr. Friedman's explained that to you?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay. Now, do you understand also that those are simply guidelines; they're not mandatory?
>
> THE DEFENDANT: Yes.

THE COURT: In other words, they're not binding on a judge who is imposing sentence in this case.

THE DEFENDANT: Yes.

THE COURT: And in your case, the Commonwealth, through Mr. Foulk, is making certain representations to you about the Commonwealth's position for sentencing purposes.

THE DEFENDANT: Yes.

THE COURT: But do you understand that the final determination of what your sentence will be is up to a judge?

THE DEFENDANT: Yes.

THE COURT: And it's not up to the Commonwealth.

THE DEFENDANT: Yes.

THE COURT: And the judge can disregard or reject what the Commonwealth's position is and disregard or reject what your lawyer is saying on your behalf and impose whatever sentence the Judge thinks is appropriate; do you understand that?

THE DEFENDANT: Yes.

MR. FOULK: The Court can also accept the Commonwealth's recommendations as well, your Honor.

THE COURT: Well, that's true. But do you understand that for purposes of this proceeding and this plea that if the Commonwealth's position isn't accepted per se, that's not to say that it ultimately won't be the Court's position.

THE DEFENDANT: Yes.

THE COURT: My point is, I guess I want to make sure you understand this: when you enter a plea today, the Judge isn't bound by any position of the parties.

THE DEFENDANT: I understand that, your Honor.

THE COURT: And, in fact, you could get a sentence - - legally you could get a sentence of up to 10 to 20 years; do you understand that?

THE DEFENDANT: I do.

THE COURT: Are you entering a plea expecting to receive any certain type of sentence?

THE DEFENDANT: No.

THE COURT: I'm sure that there are sentences that you would like to receive, but has anyone said, "If you enter a plea,

you'll get this kind of sentence?"

THE DEFENDANT: No.

P.T. pp. 20-23. See also p. 7.

The Defendant entered her plea fully knowing her sentence was up to the judge. She recognized she could go to jail for up to twenty years regardless of her requested sentence. She knew the sentencing position of the Commonwealth was not binding, neither were the sentencing guidelines. There were no promises made to the Defendant regarding her sentence.

The reasons for her sentence have been stated orally and in writing. The Defendant was sentenced within the confines of the Voluntary Manslaughter statute based on all of the circumstances of this case. There is no basis for post sentence relief.

VII. MISUSE OF MORALITY

The Defendant complains: "The court substituted its view of morality for the provisions of the Sentencing Code and the law of the Commonwealth of Pennsylvania. As the court stated: "This court is mindful of the various cases cited by Dr. Kaye about the disposition of neonaticide in other jurisdictions. To the extent that disposition of this case may differ with those cases, so be it. At some point we have to take a moral stand." *Post Sentence Motion Paragraph 33.*

There are at least three reasons why the Defendant's complaint is baseless.

First, like so much of what Defense Counsel has done in this case, there is the selective use of information. In this instance, Defense Counsel has excerpted only a portion of what was said by this Court; from there Defense Counsel extrapolates to a factual point for which there is no support.

To understand what was excerpted by Defense Counsel, it is necessary to consider the surrounding comments:

> This Court is familiar with the statistics cited by Dr. Kaye regarding how neonaticide historically has been treated. This Court recognizes that in many countries, including some in Europe, neonaticide is not considered a crime. However, the people of this country have not yet spoken through their legislative bodies to provide for the decriminalization of neonaticide. To the contrary, while laws have been created by the appellate courts and the legislature recognizing a woman's right to privacy and to an abortion, there has yet to be any law in this country making a distinction between neonaticide and the killing of a child who is more than twenty-four hours old.
>
> This Court is also mindful of the various cases cited by Dr. Kaye about the disposition of neonaticide in other jurisdictions.

> To the extent the disposition of this case may differ with those cases, so be it. At some point we have to take a moral stand.
>
> Notably, the moral stand here is based on the specific facts of this case. In addition, consideration also has to be given to the protection of the public in terms of the future suffocation of newborn infants.

Sentencing Rationale pp. 30-31.

Contrary to what Defense Counsel says, these comments were not the Court substituting a personal morality for the provisions of the Sentencing Code. The moral stand was "based on the specific facts of this case".

Defense Counsel also ignores the excerpted comments were stated in consideration of one of the sentencing factors under the Sentencing Code, namely the protection of the public. 42 Pa.C.S.A. §9721(b). The Defendant ignores the discussion at sentencing about the criminal sanctions imposed for crimes committed against youth. *Sentencing Rationale pp. 31-32. See also* 42 Pa.C.S.A. §9721. The Defendant ignores the fact the Sentencing Guidelines were reviewed. *Sentencing Rationale p. 3.*

Further, Defense Counsel misstates the law. The Sentencing Code and the sentencing guidelines give guidance to a sentencing judge. The guidelines are not binding. As stated by the Pennsylvania Supreme Court: "The Court has no duty to impose a sentence considered appropriate by the Commission. The guidelines must only be 'considered' and, to ensure that such consideration is more than mere fluff, the court must explain its reasons for departure from them." *Commonwealth v. Sessoms,* 532 A.2d 775, 781 (Pa. 1987).

The Supreme Court has consistently held this position, "…we reaffirm that the guidelines have no binding effect, create no presumption in sentencing, and do not predominate over sentencing factors – they are advisory guideposts that are valuable, may provide an essential starting point, and that must be respected and considered; they recommend, however, rather than require a particular sentence." *Commonwealth v. Walls, supra,* 926 A.2d at 964-965. Contrary to the Defendant's averment, the sentencing guidelines provide non-binding advice for a sentence and do not dictate the sentence to be imposed.

Lastly, this Court's comments were a rejection of the sentencing position advocated by one of the Defendant's experts, Dr. Kaye. Like Defense Counsel, Dr. Kaye's position was based on a very selective use of dispositional data. Dr. Kaye holds himself out as a national expert on neonaticide and wanted this Court to believe that most prosecutors tucked away neonaticide cases in a drawer somewhere and seldom prosecuted them. If prosecuted, the sentences infrequently involved incarceration. The most serious disposition was a plea to involuntary manslaughter.

For a national expert, Dr. Kaye did not evince familiarity with

neonaticide cases in Pennsylvania. For example, even though his report was dated May 31, 2008, Dr. Kaye did not mention the Rizor case in which a Washington County jury found her guilty of first degree murder on March 11, 2008. Jessica Rizor is serving a sentence of life in prison without parole.

Dr. Kaye did not mention a case in Northumberland County where Tracy Dupre was convicted by a jury of first degree murder. Dupre is serving life sentence plus an additional 6 months to 19 years sentence. Her case was affirmed by the Superior Court in 2005.

Inexplicably, Dr. Kaye did not disclose the Pennsylvania cases in which women younger than Teri Rhodes who committed neonaticide are doing life in prison for first degree murder. Melisa McManus was 16 years old when she committed neonaticide. She was treated as an adult and remains incarcerated on a life sentence for first degree murder. Her case was affirmed by the Superior Court in 1995.

Tina Marie Brosius was almost five months younger than Teri Rhodes when her newborn drowned in a portable toilet. She continues to do a lifetime sentence without parole for first degree murder.

Dr. Kaye overlooked the conviction of Lori Pinkerton in Dauphin County for Third Degree Murder and her maximum sentence of ten to twenty years of incarceration. Her case was affirmed by the Superior Court in 1997.

All of these cases have facts in common with the Defendant's case and are a matter of public record. Yet Dr. Kaye does not mention one of these dispositions. Instead, Dr. Kaye only references two cases in Pennsylvania because those dispositions suit the position he advocates.[25] Given his slanted presentation of the data, it appears Dr. Kaye is more of an advocate than an unbiased expert.

What the cited cases mean is that jurors in various counties have not always accepted the Defendant's theory or Dr. Kaye's opinion that neonaticide is caused by a woman in a dissociative state. Jurors have found, as recently as March 11, 2008, in Washington County, that killing a newborn child can be intentional and with premeditation regardless of the physiological and psychological trauma of the childbirth process.

Trial Judges in Pennsylvania have imposed life sentences for neonaticide. In at least one instance, a maximum sentence of ten to twenty years for Third Degree Murder was imposed in a neonaticide case. Appellate Courts have reviewed and affirmed these dispositions. By

[25] In the last paragraph of his report, Dr. Kaye mentions the case of *Commonwealth v. Mako* in Clarion County. He gave no cite for this case nor any specifics other than the defendant pled guilty to involuntary manslaughter. In the same paragraph, Dr. Kaye references a pending case in Pennsylvania involving a 22 year-old woman awaiting sentence for a "criminally negligent homicide" without any identifying information. *Kaye Report, Defendant Exhibit "A," p. 3.*

comparison, the Defendant's sentence was not unreasonable or excessive given all of the circumstances she created.

VIII. THE DEFENDANT'S REHABILITATIVE NEEDS

The Defendant does not present with any significant rehabilitative needs. There does not appear to be any substance abuse issues. She has not been diagnosed with any mental illnesses.

There may be a need for individual counseling on a character issue relating to her honesty. Separate from the Defendant's proven ability to kill a child, this Court is concerned about the extent and depth of the Defendant's deceptive behavior that enabled her to commit this crime. The Defendant did not just tell an impulsive lie in a moment of panic on August 12, 2007. The Defendant engaged in a clear-minded pattern of deceptive behavior demonstrating she is capable of deceiving or attempting to deceive her parents, friends, coaches, medical personnel and the police. She did so over an extended period of time in a variety of settings before, during and after her crime. Her statements to Dr. Sadoff were calculated to put her in a better light and were inconsistent with what she said to others and her actual conduct.

CONCLUSION

Under the circumstances of this case, the intentional suffocation of a living, breathing human being, a defenseless child without any recourse, a person who was deprived of the pleasures of life, at the hands of a parent who bore the responsibility of protecting the child, warrants the sentence imposed. This sentence was mitigated by the personal circumstances over which the Defendant had control.

Although the Defendant wants this Court to turn a blind eye to what occurred and focus only on her personal circumstances, to do so would diminish what happened to this victim. This Court is truly empathetic to the Defendant's personal circumstances and for her family, but constrained to hold the Defendant accountable for her conduct.

Wherefore, the Motion to Vacate and/or Modify the sentence is **DENIED**.

ORDER

For the reasons set forth in the accompanying Opinion, the Defendant's Post Sentence Motion is DENIED.

Defense Counsel has also requested recusal pursuant to Cannon III (c) of the Code of Judicial Conduct. As Defense Counsel is aware, this Court is not related to any of the parties involved in this case. This Court does not know the Defendant and/or her family and/or any witnesses tendered in this case. Further, this Court was not a witness to any of the events nor has this Court ever served as a lawyer in any matter affecting the parties. This Court has no financial or fiduciary interest in this case.

The fact this Court entered a sentence with which a defendant disagrees has never been, nor is it now, a basis for recusal. Therefore, the Defendant's Motion to Recuse is **DENIED.**

A hearing on the Defendant's Motion for Bond Pending Appeal shall be held on the 4th day of February, 2009 at 8:45 a.m. before the undersigned.

SO ORDERED, this 26th day of January, 2009.

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

COLDWELL BANKER SELECT REALTORS, Plaintiff

v.

ERIC V. WALTERS and LINDA K. WALTERS, husband and wife, Defendants

CONTRACTS

A broker's right to a commission is a matter of contract, whether express or implied. *See Solis-Cohin v. Phoenix Mutual Life Ins. Co.*, 413 Pa. 633, 198 A.2d 554 (1964).

CONTRACTS / MODIFICATION

A listing agent does not have the right to unilaterally change the effective date of a listing agreement simply because the prior agent had not yet removed the listing from the MLS.

CONTRACTS / MODIFICATION

The effective date of the agreement is of the essence of the contract, and neither party is free to unilaterally change such an essential term, despite what may be common practice among realtors.

CONTRACT / INTERPRETATION

By law, and by the express terms of the listing agreement, the length of the agreement could not exceed one year. *See* 49 Pa. Code 35.332(c)(1).

CONTRACT / MODIFICATION

Notwithstanding the rather informal method of allowing oral modifications to the listing price of the residence, the Court finds that the history of informal dealings between the real estate agent and seller does not relieve the real estate agent of strict compliance with the requirement that changes to the contract be in writing and signed by both the realtor and the seller when extending the term of the contract.

CONTRACT / INTERPRETATION

According to the terms of the listing agreement, no fee is due to the broker since the sale did not occur within 90 days of the ending date of the agreement.

CONTRACT / QUANTUM MERUIT

"[W]here an express contract exists on the very issue of commission, no quantum meruit/unjust enrichment recovery is permitted." *Coldwell Banker Phyllis Rubin Real Estate v. Romano,* 619 A.2d 379 (Pa. Super. 1993)

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW & EQUITY
NO. 10625-2005

Appearances: Neal R. Devlin, Esquire, Attorney for Plaintiff
John F. Mizner, Esquire, Attorney for Defendants

FINDINGS OF FACT

1. Plaintiff, through its agent Kathé Rafferty, and Defendants entered into an exclusive listing contract ("listing agreement") to market Defendants' residential property at 8050 Marietta Drive, Erie, PA for sale.
2. The listing agreement was the standard form agreement provided by Plaintiff Coldwell Banker.
3. Plaintiff's agent Kathé Rafferty and Defendants met to execute the listing agreement at Defendants' home on November 24, 2002.
4. Kathé Rafferty testified that she did not sign the listing agreement on November 24, 2002, but rather signed and dated it on November 30, 2002 when the papers were returned to her office.
5. The copy of the listing agreement provided to Defendants indicates that Kathé Rafferty dated the agreement on November 30, 2002. *See* Def.'s Ex. A.
6. Kathé Rafferty testified that she re-dated the listing agreement on December 2, 2002 – the first day that the property could be listed on the Multiple Listing Service.
7. She did not provide Defendants with a copy of the newly dated agreement.
8. The listing agreement provides that it starts when it is signed by the seller and the broker.
9. The listing agreement provides, in pertinent part:

   2. STARTING AND ENDING DATES OF LISTING CONTRACT (also called "**Term**")
   A. No Association of REALTORS® has set or recommended the term of this contract. By law, the length or term of a listing contract may not exceed one year. Seller and Broker have discussed and agreed upon the length or term of this contract.
   B. **Starting Date:** This Contract starts when signed by Seller and Broker, unless otherwise stated here: _____.
   C. **Ending Date:** This Contract ends on _____.

   6. **PAYMENT OF BROKER'S FEE**
   B. Seller will pay Broker's Fee if negotiations that are pending at the Ending Date of this Contract result in a sale.
   C. Seller will pay Broker's Fee after the Ending Date of the Contract IF:
   (1) A sale occurs within 90 days of the Ending Date, AND
   (2) The buyer was shown or negotiated to buy the Property during the term of this contract.

28. CHANGES TO THIS CONTRACT

All changes to this contract must be in writing and signed by Broker and Seller.

Pl.'s Ex. 1.

6. Kathé Rafferty marketed Defendants' property for sale, originally listing it for $1,175,000.00.
7. Agent Rafferty showed the home several times between December of 2002 and September of 2003.
8. Because Defendants were living in Savannah, Georgia much of the time, Agent Rafferty communicated with them primarily by phone and by mail.
9. On September 2, 2003, following a phone call from Linda Walters, Agent Rafferty completed a change authorization form - changing the listing price of the property to $1,090,000.00. *See* Pl.'s Ex. 4.
10. The change authorization form was never mailed to the Walters and was never signed by them.
11. On September 29, 2003, Defendants authorized another price reduction to $990,000.00. Again, the authorization was made by phone, and the change authorization was not mailed to the Walters. *See* Pl.'s Ex. 5.
12. Between October 7, 2003 and October 23, 2003, the property was shown on multiple occasions to Frank and Que Lasky.
13. Defendants and the Laskys engaged in several rounds of offers and counter-offers in late October and early November of 2003.
14. Ultimately the Laskys offered $765,000.00, and the Defendants held firm at $975,000.000; no agreement was reached. *See* Def.'s Ex. C.
15. On November 13, 2003, Onex, the business of which Defendant Eric Walters was the president and chief executive officer, suffered a substantial fire.
16. On November 25, 2003, Eric Walters contacted his attorney about re-financing the house to pay for expenses related to the fire until the insurance coverage was worked out. Ultimately, the re-financing was not required as the insurance money was paid out in mid-December of 2003.
17. At the end of November 2003, Kathé Rafferty and Linda Walters spoke on the phone about the listing agreement.
18. Kathé Rafferty testified that she telephone Linda Walters to advise her that the listing agreement was soon set to end, and to ask Mrs. Walters if she would extend the listing.
19. Kathé Rafferty further testified that Linda Walters agreed over the

phone to extend the listing for a period of two weeks.

20. On December 2, 2003, Kathé Rafferty completed a change authorization form extending the listing to December 16, 2003. *See* Pl.'s Ex. 7. Again, the change authorization form was not sent to the Walters.
21. Linda Walters testified that she spoke with Kathé Rafferty and indicated that they would not be re-listing the house - that because of the fire at Onex their future was uncertain and they might be staying in the house.
22. Linda Walters testified that she never authorized the extension of the listing agreement.
23. In early December of 2003, the house again appeared in a real estate advertisement.
24. On December 15, 2003, Linda Walters called Kathé Rafferty to conclusively end the listing.
25. Kathé Rafferty testified that Mrs. Walters called and indicated that they wanted to withdraw the listing to do some work on the house and further indicated that they might re-list the house in the spring.
26. Linda Walters testified that she called the office very upset that the house had been included in the latest advertisement and told them to stop advertising the house right away.
27. Sometime in mid-December 2003, Frank Lasky appeared at the Defendants' home to inquire about purchasing it.
28. Linda Walters told him that the house was still under contract with the realtor and Mr. Lasky would need to work with them. Mr. Lasky purportedly replied that he did not want to work with them anymore.
29. Eric Walters provided Mr. Lasky with a copy of the listing agreement.
30. Frank Lasky did not contact Plaintiff about the property after that time.
31. In March of 2004, Frank Lasky again approached the Walters about purchasing the home.
32. On or about March 5, 2004, the Walters and the Laskys entered into an agreement for the sale of real estate for the price of $900,000.00. The agreement specifically stated that the Walters did not believe any broker's commission was owed as the house had not been listed with a broker within the previous 90 days. *See* Pl.'s Ex. 10.
33. The closing was held on April 8, 2004.

CONCLUSIONS OF LAW

1. A broker's right to a commission is a matter of contract, whether express or implied. *See Solis-Cohen v. Phoenix Mutual Life Ins. Co.,* 413 Pa. 633, 198 A.2d 554 (1964).
2. Coldwell Banker Select Realtors and Eric and Linda Walters entered into a valid exclusive listing agreement.
3. The Court finds that the listing agreement started, at the latest, on November 30, 2002, the day Kathé Rafferty originally signed and dated the agreement.
4. Kathé Rafferty did not have the authority to unilaterally change the effective date of the listing agreement simply because the Walters' prior real estate agent had not yet removed her listing from the MLS.
5. It was incumbent upon Agent Rafferty, if she wanted to change the effective date of the agreement, to re-contact Defendants and seek their assent to the change. The effective date of the agreement is of the essence of the contract, and neither party is free to unilaterally change such an essential term, despite what may be a common practice among realtors.
6. It is fatal to Plaintiff's claim that Agent Rafferty did not send a copy of the re-dated agreement to the Defendants.
7. By law, and by the express terms of the listing agreement, the length of the agreement could not exceed one year. *See* 49 Pa. Code 35.332(c)(1); Pl.'s Ex. 1 at ¶ 2.A.
8. As such, the listing agreement expired, at the latest, on November 30, 2003 - one year from the date Kathé Rafferty signed the agreement.
9. The Court finds that the exclusive listing agreement executed by the parties could not be extended in the manner Plaintiff purports. The Court finds that the agreement started on November 30, 2002. It therefore ended on November 30, 2003. Kathé Rafferty testified that she obtained permission to extend the agreement on December 2, 2003. However, since the agreement had ended on November 30, 2003, a valid agreement no longer existed, and it could not be extended. If the parties wished to continue their agreement, a new written listing agreement had to be executed.
10. Even assuming that the agreement could have been extended, the agreement required that changes to the contract be made in writing and be signed by both the broker and the sellers. *See* Pl.s' Ex. 1 at ¶ 28.
11. Moreover, although Kathé Rafferty entered a written change authorization form purporting to extend the listing agreement an additional two weeks, this was neither mailed to, nor signed by the Walters. Accordingly, the Court finds that the listing agreement

could not have been extended in such a manner.

12. Notwithstanding the rather informal method of allowing oral modifications to the listing price of the residence, the Court finds that the history of informal dealings between Plaintiff and Defendants does not relieve the real estate agent of strict compliance with the requirement that changes to the contract be in writing and signed by both the realtor and the seller when extending the term of the contract.
13. The Court rejects Plaintiff's argument, that the practice and history of permitting change authorizations over the telephone without written notice to the sellers, permitted Agent Rafferty to extend the agreement in the same manner. Were the Court to accept this argument, the realtor could change the essential terms of the agreement, and the sellers would never know when the agreement expired for the purpose of calculating the 90 day lookback period.
14. Negotiations between the Walters and the Laskys ended on or about November 12, 2003. *See* Def.'s Ex. C.
15. No negotiations were pending at the time the listing agreement expired.
16. The agreement for sale between the Walters and the Laskys was entered into on March 5, 2004.
17. This was more than 90 days after the ending of the listing agreement.
18. According to the terms of the listing agreement, no fee is due to the broker since the sale did not occur within 90 days of the ending date of the agreement.
19. "[W]here an express contract exists on the very issue of commission, no quantum meruit/unjust enrichment recovery is permitted." *Coldwell Banker Phyllis Rubin Real Estate v. Romano,* 619 A.2d 376 (Pa. Super. 1993).
20. Plaintiff cannot recover under a quantum meruit theory.

ORDER

AND NOW to-wit, this 2nd day of January 2009, it is hereby ORDERED, ADJUDGED, and DECREED that Judgment is granted in favor of Defendants Eric V. and Linda K. Walters.

BY THE COURT:
/s/ **John Garhart, Judge**

SAFE AUTO INSURANCE CO., Plaintiff

v.

MELODY BERLIN and MCKEAN HOSE CO., Defendants

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law; the moving party has the burden of proof that there exists no genuine issue of material fact.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

In resolving a Motion for Summary Judgment the court must view the record in the light most favorable to the non-moving party and is appropriate when the uncontroverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record and submitted affidavits demonstrate that no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

The court may grant summary judgment only when the right to such judgment is clear and free from doubt.

INSURANCE / INTERPRETATION OF POLICIES

If the language of an insurance policy is clear and unambiguous, the court is required to give effect to that language; when a provision in a policy is ambiguous, the policy is to be construed in favor of the insured to further the contract's prime purpose of indemnification and against the insurer, as the insurer drafts the policy and controls coverage.

INSURANCE / INTERPRETATION OF POLICIES

The language of an insurance policy is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense.

INSURANCE / INTERPRETATION OF POLICIES

In interpreting an insurance policy, the court will not assume that policy language was chosen carelessly; it will not consider merely individual terms utilized in the insurance contract, but it will consider the entire insurance provisions as a whole to ascertain the intent of the parties.

INSURANCE / INTERPRETATION OF POLICIES

The costs associated with rendering emergency services following an automobile accident do not fall within an insurance policy's definition of "damages," "loss, losses," or "property damage" nor are they consequential damages; rather they are not losses or damages at all but are costs associated with rendering emergency services.

CONTRACT / UNJUST ENRICHMENT

The doctrine of unjust enrichment is inapplicable to those providing a public service.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 10588-2008

Appearances: Patrick J. Shannon, Esq., Attorney for Plaintiff
Matthew J. Parini, Esq., Attorney for Defendant Berlin
James D. McDonald, Esq. and Bethany A. Blood, Esq.,
Attorneys for Defendant McKean Hose Company

OPINION AND ORDER

DiSantis, Ernest J., Jr., J., December 5, 2008

Before the Court are Plaintiff's, Safe Auto Insurance Company ("Safe Auto"), Motion for Summary Judgment, Defendant's, Melody Berlin ("Berlin"), Cross Motion for Summary Judgment, and Defendant's, McKean Hose Company, ("McKean") Motion for Summary Judgment.

I. BACKGROUND OF THE CASE

This case involves a declaratory judgment action filed by Safe Auto requesting that the Court declare it has no duty to pay for certain expenses arising out of an accident involving its insured.

On April 3, 2007, Berlin was involved in a single-vehicle motor vehicle collision in McKean, Erie County, Pennsylvania. As a result, McKean responded to the scene and provided emergency services, including the use of various equipment, supplies and apparatus. At the time of the accident, Berlin was insured with Safe Auto.

Following the accident, PA Fire Recovery Services, an independent contractor, sent invoices to Safe Auto, requesting reimbursement in the amount of $1,194.00 for the cost of equipment, apparatus and services provided at the scene by McKean. On February 4, 2008, Safe Auto filed a Complaint in Declaratory Judgment. It contends that the claim is for items that are not "damages" covered under the insurance policy.[1]

On August 8, 2008 Safe Auto filed a Motion for Summary Judgment and supporting brief. On September 2, 2008, Berlin filed an Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment and supporting brief. On September 8, 2008, McKean filed an Answer to Plaintiff's Motion for Summary Judgment, Motion for Summary Judgment, and brief. On September 29, 2008, Safe Auto filed answers and briefs to the parties' respective motions for summary judgment.

On October 29, 2008, this Court held argument on the parties' summary judgment motions.

[1] On March 3, 2008, McKean filed an Answer, New Matter, and Cross-Claim. On March 30, 2008, Safe Auto filed a Reply to New Matter. On May 22, 2008, Berlin filed an Answer and New Matter. On June 2, 2008, Safe Auto filed a Reply to New Matter. On June 11, 2008, McKean filed an Amended Cross-Claim. On June 30, 2008, Berlin filed an Answer to Amended Cross-Claim. On July 18, 2008, McKean filed a Counter Reply to New Matter to Amended Cross-Claim.

II. DISCUSSION

Rule 1035.2 of the Pennsylvania Rules of Civil Procedure provides that after the relevant pleadings are closed, a party may move for summary judgment in the following circumstances:

> (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.C.P. 1035.2.

Summary judgment may be granted where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law. A moving party has the burden of proving that no genuine issue of material fact exists. *Gutteridge v. A.P. Green Services, Inc.*, 804 A.2d 643, 651 (Pa. Super. 2002) (citation omitted). In determining whether a moving party is entitled to relief, this Court "must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party." *Id.* (citation omitted). Therefore, summary judgment is appropriate when "the uncontroverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law." *Id.* (citation omitted). "[A] court may grant summary judgment only where the right to such a judgment is clear and free from doubt." *Toy v. Metropolitan Life Ins. Co.*, 593 Pa. 20, 928 A.2d 186, 195 (2007)(citation omitted).

In addressing the parties' respective arguments, this Court is mindful of the well-established rules of insurance contract interpretation:

> The task of interpreting [an insurance] contract is generally performed by a court rather than by a jury. The purpose of that task is to ascertain the intent of the parties as manifested by the terms used in the written insurance policy. When the language of the policy is clear and unambiguous, a court is required to give effect to that language. When a provision in a policy is ambiguous, however, the policy is to be construed in favor of the insured to further the contract's prime purpose of indemnification and against the insurer, as the insurer drafts the policy, and controls coverage. Contractual language is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense. Finally, in determining what the parties intended

> by their contract, the law must look to what they clearly expressed. Courts in interpreting a contract, do not assume that its language was chosen carelessly. Thus, we will not consider merely individual terms utilized in the insurance contract, but the entire insurance provision to ascertain the intent of the parties.

401 Fourth St. v. Investors Insurance Group, 879 A.2d 166, 171 (Pa. 2005) (internal citations and quotation marks omitted).

Safe Auto contends that according to the clear and unambiguous language of the insurance policy, the items for which McKean seeks reimbursement are not included in the definition of "property damage" under the policy. Safe Auto Motion for Summary Judgment, 08/08/08, at ¶ 15. It argues that McKean is charging for services and equipment it used at the scene, rather than for the loss of use of tangible property. Brief in Support of Motion for Summary Judgment, 08/08/08, at 4. Furthermore, it asserts that, "the costs asserted by [McKean] do not arise from a 'direct' loss or damage from the accident. They are an indirect and consequential cost associated with the rendering of services at the scene of the accident." *Id.* Finally, it contends that McKean is a stranger to the insurance contract and, therefore, its interpretation of the insurance contract and arguments for coverage are irrelevant. Safe Auto Motion for Summary Judgment, 08/08/08, at ¶ 14.

Berlin contends that the contract definitions of "damages", "property damage", and "loss" are ambiguous and conflicting. Therefore, the contract should be construed against Safe Auto as the drafter of the contract and the Court should treat McKean's expenses as property damages that resulted from the accident which are covered under the policy. Berlin's Opposition and Cross Motion for Summary Judgment, 09/02/08, at ¶ 7; Brief in Opposition, 09/02/08, at 4-5.

Berlin also asserts that the insurance coverage includes, by implication, consequential damages. Berlin notes that although Safe Auto specifically excluded "similar damages that result secondarily from initial damages" by excluding punitive and exemplary damages from the policy, it did not specifically exclude consequential damages. Berlin's Opposition and Cross Motion, 09/02/08, at ¶ 8; Brief in Opposition, 09/02/08, at 6-7.

In its Motion for Summary Judgment, McKean contends it is entitled to summary judgment on the issues of whether the insurance policy extends to purported damages sustained by McKean, and whether McKean is entitled to reimbursement from Safe Auto "for the damages incurred represented by the cost of equipment, apparatus and services rendered". McKean Motion for Summary Judgment, 09/08/08, at ¶ 13. In support, McKean alleges that it used eight flares, two hand lights, four hand tools, one generator, cribbing, Truck 69, Rescue 62 and Squad 64, performed a battery disconnect and provided post-accident scene lighting. McKean Motion for Summary Judgment, 09/08/08, at ¶ 4. Furthermore,

as a non-profit volunteer firefighting company, it is considered a local governmental agency while providing emergency services, and may charge fees for services rendered that are reasonably proportional to the costs of the services performed. *Id.*, at ¶¶ 7-8. It contends that its fees, costs and expenses are reasonable, necessary and consistent with customary charges for such services and equipment and, therefore, it is entitled to reimbursement for the $1,194.00 cost of equipment, apparatus and services rendered at the accident scene. *Id.*, at ¶¶ 9-10.

In support, McKean cites *Rizzo v. City of Philadelphia*, 668 A.2d 236, 238 (Pa. Cmwlth. 1995), where the Commonwealth Court held that the City of Philadelphia could charge for emergency medical services when the city began charging the fees to defray the costs of service and that the amount of money collected was less than operating costs. McKean Brief in Support, 09/08/08, at 7. McKean also cites to *Lima Fire Co. No. 1, v. Rowe*, 83 Del. 141 (1996), which held that under an unjust enrichment theory, an insurance company had an obligation to reimburse a fire department for services and expenses incurred when responding to accidents.

In its brief in support of motion for summary judgment and in opposition to Safe Auto's motion for summary judgment, McKean, like Berlin, concludes that the insurance policy is ambiguous because the definitions of "loss", "damages", and "property damage" are subject to more than one reasonable interpretation. McKean Brief in Support, 09/08/08, at 4-5. It argues that when responding to the accident, McKean temporarily lost the use of the equipment and apparatus it used at the scene, thereby sustaining "property damage". *Id.* at 5. It further argues that the equipment's "useful life" was partially expended when responding to the accident scene and the eight flares were completely exhausted. *Id.* McKean contends that these items may be considered consequential damages that are not specifically excluded from the insurance policy because the loss of use and damage "resulted from its *response* to the accident, not from the actual accident itself" and amounts to consequential damages to McKean. *Id.* at 6.

The Agreement

The contract provides that:

PART I - LIABILITY COVERAGE

INSURING AGREEMENT

We will pay damages, other than punitive or exemplary, for bodily injury or property damage for which you, a relative or any additional driver listed on the Declarations page becomes legally responsible for because of an auto accident. . .

. . . .

DEFINITIONS USED THROUGHOUT THIS POLICY

Damages mean the cost of compensating those who suffer bodily

injury or property damage from an auto accident.

Loss, losses means sudden, direct, and accidental loss or damage.

Property Damage means physical damage to, destruction of, or loss of use of tangible property.

Safe Auto's Complaint in Declaratory Judgment 02/04/08, Exhibit "B".

After its review of the insurance policy, this Court concludes the policy language is clear and unambiguous. The items for which McKean claims reimbursement do not fall within the contractual definitions of "damages", "loss, losses" or "property damage", nor are they consequential damages. In fact, they are not losses or damages at all, but rather costs associated with rendering emergency service. Although McKean provided a valuable public service in this instance, that fact - although commendable - does not permit this Court to torture the contractual definitions to allow it to recover under the policy.

McKean's reliance upon *Rizzo and Lima Fire Co.* does not aid it. In *Rizzo,* the City of Philadelphia had adopted a regulation allowing the fire department to be reimbursed for emergency medical services. Here, there is no such regulation or ordinance.

Regarding *Lima Fire Co.*, this Court notes that:

> The elements of unjust enrichment are 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. Whether the doctrine applies depends on the unique factual circumstances of each case. In determining if the doctrine applies, we focus not on the intention of the parties, but rather on whether the defendant has been unjustly enriched.
>
> Moreover, the most significant element of the doctrine is whether the enrichment of the defendant is *unjust.* The doctrine does not apply simply because the defendant may have benefited as a result of the actions of the plaintiff.

Stoeckinger v. Presidential Financial Corp., 948 A.2d 828, 833 (Pa. Super. 2008)(citation omitted).

Instantly, this Court concludes that McKean provides a public service. That renders the doctrine of unjust enrichment inapplicable. If it did apply, Berlin would be responsible because she benefited from the services provided.[2]

[2] Emergency medical service providers, like McKean, render a valuable service that benefits the public. However, absent a contractual relationship, reimbursement for services is either a private or legislative funding issue and should not be resolved by the use of contract law or equitable doctrines that are not applicable.

ORDER

AND NOW, this 5th day of December, for the reasons set forth in the accompanying opinion, it is hereby ordered that:

1.) Plaintiff's, Safe Auto Insurance Company, Motion for Summary Judgment is **GRANTED**. Plaintiff does not have a contractual obligation to reimburse McKean Hose Company for the items for which McKean seeks compensation.

2.) Defendant's, Melody Berlin, Cross Motion for Summary Judgment is **DENIED**.

3.) Defendant's, McKean Hose Co., Motion for Summary Judgment as it relates to the insurance coverage issue is **DENIED**.

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

IN THE MATTER OF THE ADOPTION OF K.N.W.

FAMILY LAW / ADOPTION / TERMINATION OF PARENTAL RIGHTS / GROUNDS

A trial court may terminate a parent's rights with regard to a newborn child if the petitioning agency can show by clear and convincing evidence that:

> the parent knows or has reason to know of the child's birth, does not reside with the child, has not married the child's other parent, has failed for a period of four months immediately preceding the filing of the petition to make reasonable efforts to maintain substantial and continuing contact with the child and has failed during the same four-month period to provide substantial financial support for the child.

FAMILY LAW / ADOPTION / TERMINATION OF PARENTAL RIGHTS / EVIDENCE

Clear and convincing evidence is "testimony that is so clear, direct, weighty, and convincing as to enable a trier of fact to come to a clear conviction, without hesitance of the truth of precise facts in issue.

When considering adoption issues, Pennsylvania appellate courts in this state have consistently held that the legislative provisions of the Adoption Act must be strictly complied with, and that courts cannot and should not create judicial exceptions where the legislature has not seen fit to create such exceptions.

FAMILY LAW / ADOPTION / TERMINATION OF PARENTAL RIGHTS

Birth Father's rights will not be terminated where within the applicable statutory time period, he immediately requested a paternity test when the mother informed him that she considered him to be the child's natural father; after paternity was established he requested visitation and pictures of the child and made child support payments and grounds for termination of parental rights has not firmly been established by the Agency.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHANS COURT DIVISION NO. 88-2008

Appearances: Eric Hackwelder, Esquire for the Erie County Office of Children and Youth
Catherine A. Allgeier, Esquire, Attorney for E.S., Jr.
Kevin Jennings, Esquire, Attorney for K.N.W.

OPINION

Bozza, John A., J. March 13, 2009

This matter is currently before the Court on the Petition for Involuntary Termination of Parental Rights to a Child Under the Age of Eighteen (18) Years, filed by the Petitioner, Erie County Office of Children and Youth

(hereinafter "ECOCY"). ECOCY filed the petition on July 7, 2008, for the purpose of terminating the parental rights of J. W. (hereinafter the "mother") and E. S., Jr. (hereinafter the "father"), to K.N.W., born March 25, 2008 (hereinafter the "child").

FACTUAL AND PROCEDURAL HISTORY

The mother and father began a consensual sexual relationship in early 2007, which continued sporadically over the course of approximately one year. The couple never married, nor did they live together during their relationship.[1] On March 25, 2008, the mother gave birth to the child. Shortly before the child's birth, the mother not only informed the father that she was pregnant, but that she believed he was the natural father of the child. The father denied this assertion, and informed the mother that he would not acknowledge that he was the child's father unless a paternity test proved otherwise. The father based this belief on his knowledge of the mother's sexual relationships with other men during the time period that he was involved with her, and because of her history as a frequent drug user.

At the time of birth, both mother and child tested positive for cocaine.[2] On April 10, 2008, ECOCY detained the child and placed her in foster care, where she has remained. ECOCY filed a Dependency Petition on April 14, 2008, and an adjudication hearing was held on April 22, 2008. The mother listed Mr. S. as the biological father of the child at the time the dependency petition was filed, and at the adjudication hearing. When ECOCY first spoke to the father regarding his relationship to the child, he stated that he was unsure whether he could be her natural father, citing his concerns about the mother's sexual history and her drug habits. He also requested that paternity testing be conducted, and the Court issued an Order to this effect at the adjudication hearing.

The Juvenile Court held a Dispositional Hearing on May 28, 2008. At this hearing, ECOCY recommended a treatment plan for Mr. S. that included a goal of reunification with the child if the paternity test results later revealed that he was her father. The father did not attend this hearing. Because Mr. S. did not appear at either the adjudication or the disposition hearing, the Court identified the permanency goal as adoption, and directed the agency to proceed accordingly.

The father seemingly maintained his position that he was unsure whether he was the child's father during the entire period that the paternity test results were pending. However, it appears that he did speak to an ECOCY caseworker on several occasions regarding matters

[1] In fact, the father was legally married to another woman at this time.

[2] ECOCY asserts that the mother engaged in drug and alcohol use throughout her pregnancy with the child.

concerning the child, his responsibilities and potential relationship to her, and his financial obligations for support of the child. In June of 2008, he indicated to the caseworker on two occasions that even if the paternity test revealed that he was the child's biological father, neither himself nor any member of his family had the financial resources to care for her at the time. The first and only occasion that the father spent time with the child during this period was on a scheduled visit to the child's maternal grandmother's house in late-June 2008, which was supervised by an ECOCY caseworker. However, this visit was very brief, and the agency did not allow or offer Mr. S. any further visits with the child.

On July 7, 2008, ECOCY filed a petition to involuntarily terminate the parental rights of both mother and father. The paternity test results were released two days later on July 9, 2008, confirming that Mr. S. was the biological father of the child. The Court entered an order to this effect on the same day.

Upon receiving the results of the paternity test, the father contacted an ECOCY caseworker and, for the very first time, requested a visitation plan and pictures of the child. However, the caseworker informed the father that because the goal had been changed to adoption, his requests would not be honored. The father then asked if ECOCY would allow him to have a "final visit" with the child, but this request was also denied.[3] Shortly thereafter, an Order was issued directing the father to begin paying child support in August 2008. The amount of support was applied retroactively to the time of the child's birth, and the father continues to make these payments.

On January 15, 2009, this Court held a hearing on the merits of the petition to involuntarily terminate the rights of both mother and father.[4] The mother did not appear at this hearing, and all participating parties have agreed that her parental rights should be terminated, and the mother has not voiced any opposition. Following the presentation of testimony and argument, this Court held that ECOCY did not sufficiently prove that the father's parental rights should be terminated under 23 Pa. C.S. § 2511(a)(2) and dismissed this claim. Thus, grounds for termination could only exist under § 2511(a)(6). In support of their respective positions the parties have submitted briefs regarding the applicability of this section to the evidence presented. As set forth below, the Court concludes that ECOCY has not met its burden of proving by clear and convincing evidence all of the elements under § 2511(a)(6).

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[3] Involuntary Termination Hearing, January 15, 2009, pg. 31.

[4] This hearing was originally scheduled for October 6, 2008. The Court granted ECOCY a continuance in order to amend their original petition to allow 23 Pa. C.S. § 2511(a)(6) as a ground for termination. The amended petition was filed on November 7, 2008. At the January 15, 2009 hearing, the agency proceeded under 23 Pa. C.S. §§ 2511(a)(2) and (6) as grounds for termination (IVT Hearing, January 15, 2009, pg. 6).

LEGAL DISCUSSION

A trial court may terminate a parent's rights with regard to a newborn child if the petitioning agency can show by clear and convincing evidence that:

> the parent knows or has reason to know of the child's birth, does not reside with the child, has not married the child's other parent, has failed for a period of four months immediately preceding the filing of the petition to make reasonable efforts to maintain substantial and continuing contact with the child and has failed during the same four-month period to provide substantial financial support for the child.

23 Pa. C.S. §2511(a)(6), § 2512(a)(2) (2008); *In re Adoption of Atencio,* 539 Pa. 161, 650 A.2d 1064 (1994). Clear and convincing evidence is "testimony that is so clear, direct, weighty, and convincing as to enable a trier of fact to come to a clear conviction, without hesitance of the truth of precise facts in issue." *Atencio*, 539 Pa. at 166, 650 A.2d at 1066. In this case, it is apparent that the father knew of the child's birth, did not reside with her, and did not marry the child's mother. Therefore, the only question is whether the father made reasonable efforts to maintain substantial and continuing contact with the child, and provided substantial financial support to her during the four-month period immediately preceding the filing of the petition.

When considering adoption issues, Pennsylvania appellate courts in this state have consistently held that the legislative provisions of the Adoption Act[5] must be strictly complied with, and that courts "cannot and should not create judicial exceptions where the legislature has not seen fit to create such exceptions." *In re Adoption of K.M.W.,* 718 A.2d 332, 333 (Pa. Super. 1998); *See also In re Adoption of R.B.F.,* 569 Pa. 269, 803 A.2d 1195 (2002) *In re Adoption of Hess,* 530 Pa. 218, 608 A.2d 10 (1992); *Gibbs v. Ernst,* 538 Pa. 193, 647 A.2d 882 (1994).

It is the position of ECOCY that the father knew, or at least had reason to know, that he was the child's biological father since he had a long sexual relationship with the mother, and was informed by the mother prior to the child's birth that she considered him to be the natural father.

In *T.J.B. v. E.C.* ,[6] the Superior Court faced a factually similar scenario to the one present here. In that case, the mother informed the father that she was pregnant approximately six months before the child's birth, and she insisted that he was the natural father. 438 Pa. Super. at 535. The father, however, denied this assertion, and wanted paternity testing done once the child was born. *Id.* at 536. In the meantime, the mother took the necessary steps towards putting the child up for adoption. *Id.* at 535.

[5] 23 Pa. C.S. § 2101 *et seq.*

[6] 438 Pa. Super. 529, 652 A.2d 936 (1995).

Throughout the six month period before the child's birth, the father not only denied impregnating the mother, but he also refused to grant his consent to an adoption unless a paternity test revealed that the baby was his child. *Id.* at 536.

Once the child was born, he was immediately placed in foster care, and a paternity test was conducted over a month later at the father's expense. *Id.* The test results were released three months after the child's birth, revealing that the father was indeed the natural father of the child. *Id.* Upon learning this information, the father sent a letter to the foster parents' counsel, which informed them that he acknowledged his paternity for the first time, and that he would not consent to any adoption unless a visitation schedule with the child could be arranged. *Id.* In addition, the letter stated that the father would seek custody if his demands were not complied with. *Id.* The foster parents did not file their petition to involuntarily terminate the father's parental rights until after they received the father's letter demanding visitation. *Id.*

The Court ultimately denied the petition, focusing on the fact that even though the father knew of the child's birth and that he may be the father, he never actually knew or acknowledged that he was the child's natural father until the release of the paternity test results. *Id.* at 544. The Court found that the father made reasonable efforts to maintain continuing and substantial contacts with the child once he was absolutely certain that the child was his own. *Id.* at 545. Specifically, the Court focused on the father's efforts during the four month period preceding the filing of the petition: he requested and paid for paternity testing, he hired counsel to represent his interests in the child, and he informed the foster parents that he wanted a visitation schedule and would seek custody if his requests were not granted. *Id.*

Much like the father in *T.J.B.*, the record in this case clearly shows that the father was at all times truly uncertain as to his parental status with the child, and he never acknowledged that he was the child's father until he received the results of the paternity test on July 9, 2008. He immediately requested a paternity test once the mother informed him that she considered him to be the child's natural father. His subsequent assertion that he could not care for the child was not an indication of his belief in his paternity but a recognition of the limitations of his practical circumstances.

Of further consideration in this case is the fact that ECOCY filed the petition to terminate the father's parental rights before paternity was established. The father in *T.J.B.* had the benefit of a three-month period between the release of the paternity test results and the filing of the petition to maintain substantial and continuing contact with the child. The father in this case had no such opportunity.

At all times prior to receiving the paternity test results, Mr. S.'s position

was that he was unsure whether he was the father. Once paternity was established, the father requested visitation and pictures of the child, but these requests were denied by ECOCY. And apparently believing that his parental rights were about to be terminated, he requested a final visit, which was also denied. Mr. S. has made and continues to make support payments for his daughter's benefit.

In *T.J.B.* the Superior Court analyzed the legislative history of § 2511(a)(6) in order to ascertain the intent of the legislature. Noting an exchange between two members of the Pennsylvania House of Representatives, the Court inferred that "the General Assembly did not intend to deprive a natural father of his parental rights to his child when he does not…know that he has a child." *T.J.B.*, 438 Pa. Super. at 545, n.9. Here, there is no dispute that Mr. S. challenged his paternity. The question is whether his position was taken in good faith and otherwise reasonable in light of the circumstances that then existed. On the record before the court it must be concluded that it was. He was not married to the mother and obviously believed that because of her drug use she was promiscuous. While his failure to appear at the child dependency proceedings most certainly complicated the proper determination of his daughter's welfare, such failure was consistent with his belief that he was not her father.

In addition, the record does not support a finding that Mr. S.'s failure to care for and support his daughter extended to a period of four months prior to the filing of the petition to terminate his parental rights. The child was born on March 25, 2008, and the petition was filed by ECOCY on July 7, 2008. While it was amended on November 7, 2008 to allow the assertion of 23 Pa. C.S. § 2511(a)(6) as a ground for termination, when the petition was filed the child was less than four months old. Moreover, any failure on Mr. S.'s part to meet his parental obligations following the filing of the petition and before the amended petition is for the most part the result of imposed limitations on his ability to have contact with the child.

The Court cannot allow for termination of a father's parental rights where the failure to care for and support a child is the result of a good faith and otherwise reasonable belief that he is not the child's father, or where the applicable statutory time period is not firmly established.

For the reasons set forth above, the Petition to Involuntarily Terminate the parental rights of E. S., Jr. is **DENIED,** and the Petition to Involuntarily Terminate the parental rights of J. W. is **GRANTED.**

ORDER

AND NOW, to-wit, this 13th day of March, 2009, for the reasons set forth in this Court's Opinion dated March 10, 2009, it is hereby **ORDERED, ADJUDGED and DECREED** that the Petition for Involuntary Termination of Parental Rights to a Child Under the Age of 18 Years against the father of the above child, E.S. Jr., is hereby **DENIED.**

DECREE

AND NOW, To-Wit, this 13th day of March, 2009 on the petition of the Erie County Office of Children and Youth for a determination of the involuntary termination of K.N.W. it is

ORDERED, ADJUDGED AND DECREED that:

The parental rights of J.W. to K.N.W. are hereby terminated, since

1) the repeated and continued incapacity, abuse, neglect or refusal of the parent has caused the child to be without essential parental care, control or subsistence necessary for the physical or mental well-being of said child and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent;

2) the child has been removed from the care of the parent by the Court or under a voluntary agreement with an agency for a period of at least six (6) months, the conditions which led to the removal or placement of the child continue to exist, the parent cannot or will not remedy those conditions within a reasonable period of time, the services or assistance reasonably available to the parent are not likely to remedy the conditions which led to the removal or placement of the child within a reasonable period of time and termination of parental rights would be serve the needs and welfare of the child;

3) Termination of the parental rights of J.W. is in the best interest and welfare of the child.

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

COMMONWEALTH OF PENNSYLVANIA

v.

JOSEPH RALPH SPADE

CRIMINAL PROCEDURE / INEFFECTIVE ASSISTANCE OF COUNSEL

To prevail on an ineffective assistance of counsel claim, Petitioner/Defendant must demonstrate that (1) that the claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and, (3) that, but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different.

CRIMINAL PROCEDURE / INEFFECTIVE ASSISTANCE OF COUNSEL

Trial counsel will be found ineffective and appellate rights will be reinstated *nunc pro tunc* when Petitioner/Defendant demonstrates that (1) Petitioner directly requested that trial counsel file an appeal on his behalf or (2) if trial counsel has failed to adequately consult with the Petitioner regarding the advantages and disadvantages of an appeal where there is reason to think that a Defendant would want to appeal.

CRIMINAL PROCEDURE / INEFFECTIVE ASSISTANCE OF COUNSEL

Counsel must file an appeal on defendant's behalf if (1) a rational defendant would want to appeal (for example, due to the existence of non-frivolous grounds for appeal) or (2) the defendant reasonably demonstrated to counsel that he was interested in appealing.

CRIMINAL PROCEDURE / INEFFECTIVE ASSISTANCE OF COUNSEL

Counsel must adequately and timely consult with a defendant before the time limit for appealing and counsel's failure to consult with the defendant will only entitle the defendant to reinstatement of his appellate rights if the defendant shows prejudice.

CRIMINAL PROCEDURE / INEFFECTIVE ASSISTANCE OF COUNSEL

Appellate rights will be reinstated and trial counsel will be found ineffective when fee agreement was not clear as to duty to file appeal, Petitioner/Defendant was visibly upset about his sentence, family members contacted trial counsel following sentencing regarding the proceedings, Petitioner/Defendant filed his own *pro se* motion for reconsideration and trial counsel failed to inform Petitioner/Defendant of the result of that motion or the fact that a hearing on that motion had taken place, and trial counsel failed to file an appeal on Petitioner/Defendant's behalf.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA Nos. 1947, 1948 & 1537 of 2007

Appearances: William J. Hathaway, Esq., Attorney for Defendant
Lisa Ferrick, Esq., Attorney for Commonwealth

OPINION

Bozza, John A., J.

Procedural History

On August 31, 2007, the petitioner, Joseph Ralph Spade, entered guilty pleas to the crimes of criminal conspiracy to commit access device fraud[1], criminal conspiracy to commit forgery[2], and criminal trespass[3]. On October 5, 2007, the petitioner received the following sentence:

Count 1 of Docket 1537:	Criminal Trespass; Break Into Structure - thirty-six (36) months to ninety-six (96) months incarceration, consecutive to state sentence at previous docket
Count 1 of Docket 1947:	Criminal Conspiracy to Commit Access Device Fraud - costs, restitution, thirty-six (36) months to seventy-two (72) months incarceration, consecutive to Docket 1537 of 2007;
Count 1 of Docket 1948:	Criminal Conspiracy to Commit Forgery - costs, restitution, twenty-four (24) months to sixty (60) months incarceration, consecutive to Docket 1947 of 2007[4].

On October 24, 2007, the petitioner filed a Motion for Modification of Sentence, which was denied by way of Order dated November 6, 2007. No appeal was filed following the denial of this motion. The petitioner filed the instant PCRA on August 29, 2008, in which he asserted that there were violations of his constitutional rights, that his guilty plea was unlawfully induced, that he was denied effective assistance of counsel at trial, and that his sentence exceeded the lawful maximum. This Court appointed William J. Hathaway, Esq. as the petitioner's PCRA counsel on September 9, 2008.

After a review of the petitioner's file and his PCRA petition, Mr.

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[1] 18 P.S. § 903(a)(1), § 4106.

[2] 18 P.S. § 903(a)(1), § 4101.

[3] 18 P.S. § 3503(a)(1)(ii).

[4] The petitioner received an aggregate sentence of ninety-six (96) months to two hundred and twenty-eight (228) months incarceration, or eight (8) to nineteen (19) years consecutive.

Hathaway filed a Supplemental PCRA petition on December 2, 2008, which asserted that the only meritorious issue contained in the original petition concerned Mr. Spade's allegation that he was denied effective assistance of counsel at trial. Specifically, Mr. Spade claimed that his trial counsel, Dennis Williams, Esq., did not notify him that this Court had denied his Motion for Modification of Sentence, and that Mr. Williams failed to file an appeal of Mr. Spade's sentence to the Pennsylvania Superior Court, which Mr. Spade requested him to do following his Sentencing Hearing. The Supplemental PCRA requested that the Court provide Mr. Spade with an evidentiary hearing in order to address these issues. The Commonwealth filed a response by way of letter dated December 15, 2008, which also requested an evidentiary hearing. Subsequently, this Court held a hearing on the matter on February 24, 2009. For the reasons that follow, this Court grants the petitioner's PCRA and his appellate rights will be reinstated *nunc pro tunc*.

Facts

Mr. Spade's family retained Mr. Williams on May 15, 2007, to provide legal representation to Mr. Spade for the criminal charges against him at the above-listed dockets. The retainer agreement, submitted by the Commonwealth at trial, states that for the sum of $2500 Mr. Williams will provide representation to Mr. Spade at his Preliminary Hearing, and that his hourly fee is $250 per hour. The retainer agreement also states that "[s]hould the matter go beyond the Preliminary Hearing, an additional fee arrangement will be made."[5]

At the PCRA hearing, Mr. Spade testified regarding the extent of the legal representation provided to him by Mr. Williams. He stated that immediately after receiving his sentence, Mr. Williams hurriedly walked out of the courtroom without speaking to him about how he wished to proceed in the matter.[6] Mr. Spade was eventually able to track down Mr. Williams briefly in the hallway outside the courtroom, where he told Mr. Williams that he wanted to appeal his sentence.[7] Mr. Spade stated that Mr. Williams told him that there were no appealable grounds, and proceeded to walk away again.[8] While he acknowledged that Mr. Spade was visibly upset after receiving his sentence, Mr. Williams denied that Mr. Spade ever directly asked him to file an appeal or a post-sentence motion after the hearing.[9]

After sentencing, Mr. Spade was transferred to the Erie County Prison

[5] PCRA Hearing, 2/24/09, Commonwealth Exhibit 4, ¶3.

[6] N.T., PCRA Hearing, 2/24/09, pg. 5.

[7] *Id.* pp. 5, 22.

[8] *Id.* at 5.

[9] *Id.* at 42-43.

for approximately nine days.[10] During this period, Mr. Williams initiated no contact with his client about his desire to file a post sentence motion or appeal. Mr. Spade tried to have various members of his family contact Mr. Williams by telephone in order to discuss filing a post-sentence motion or an appeal.[11] He did not personally contact Mr. Williams by phone at this location because he was placed "in the hole," and thus, he did not have access to a telephone.[12] Mr. Spade was permitted to draft and send letters, and although he claimed that he wrote Mr. Williams a letter from the Erie County Prison requesting him to appeal his sentence, he was not able to produce a copy of this letter at the hearing, and Mr. Williams denied ever receiving such a letter.[13]

Instead, Mr. Spade drafted a Motion for Modification of Sentence and sent it directly to this Court.[14] The Court forwarded this motion to Mr. Williams and directed him to proceed accordingly.[15] Thereafter, Mr. Williams attached a cover sheet to the petitioner's hand-written motion, requested oral argument, and filed the motion on behalf of Mr. Spade.[16] The Court granted the request for oral argument, but Mr. Williams appeared at this hearing without Mr. Spade.[17] Mr. Spade testified that he never received notice from Mr. Williams that his attorney incorporated his motion into a formal document, nor that the Court had scheduled a hearing.[18] When the Court denied the motion by way of Order, the clerk of courts served Mr. Williams, who was still listed as Mr. Spade's attorney of record, with a copy of this Order. Mr. Williams stated that his standard procedure would have been to inform Mr. Spade by forwarding this copy to Mr. Spade. However, Mr. Williams could not recollect whether he did in fact send Mr. Spade a copy of this Order, and the Commonwealth did not produce any evidence that he sent notification to Mr. Spade, or that he otherwise was aware that the motion was denied. Most importantly, Mr. Spade testified that he never received notice from Mr. Williams that his motion had been denied.[19]

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[10] *Id.* at 6.

[11] *Id.* at 5-6.

[12] *Id.* at 14.

[13] N.T., PCRA Hearing, 2/24/09, pp. 14-15.

[14] *Id.* at 6-7. Mr. Spade testified that he filed this motion on his own because he remained uncertain whether Mr. Williams was going to file anything to preserve his appellate rights.

[15] *Id.* at 48.

[16] *Id.* at 48.

[17] *Id.* at 8.

[18] *Id.*

[19] *Id.* When he was asked why Mr. Spade claimed that he never received notice of the hearing on his Motion for Modification of Sentence or its denial, Mr. Williams explained that he sent all correspondence to the only known address he had for Mr. Spade, which was the Erie County Prison.[19] Mr. Williams also stated that none of his mailings to Mr. Spade were ever returned back to his law office as undeliverable or otherwise, which led Mr. Williams to believe that Mr. Spade was receiving mail and that he had notice of the hearing and the denial of his motion for modification.

After his stay in the Erie County Prison, Mr. Spade was transferred to the Albion State Correctional Institution.[20] Mr. Spade testified that he still intended to file an appeal, but he was unable to reach Mr. Williams by phone.[21] Thus, Mr. Spade contacted his sister, Angela Spade, and told her to phone Mr. Williams and inform him that he wanted his case record, and his sentencing and plea transcripts for the purpose of filing an appeal.[22] Ms. Spade, who also testified at the PCRA Hearing, stated that she contacted Mr. Williams by phone and made these requests.[23] However, Mr. Williams informed Ms. Spade that he would only do so if she paid him the necessary filing fees payable to the Clerk of Courts office.[24] She made no payment to Mr. Williams for these transcripts, and she did not contact Mr. Williams after this.[25]

Mr. Spade's only direct contact with Mr. Williams after sentencing was a letter he wrote from SCI-Albion, dated November 26, 2007, which contained a request for his sentencing and plea transcripts, as well as his sentencing order. Mr. Spade did not make a request to file an appeal in this letter, but he does state that he is "working with deadlines," and the overall tone of the letter reveals that Mr. Spade was not happy with the legal services Mr. Williams provided him.[26] Mr. Williams replied to Mr. Spade by way of letter dated November 28, 2007, informing Mr. Spade that in order to obtain these transcripts he would need $500 to cover the court costs associated with this request.[27] There was no mention that the defendant's motion for modification had been denied or that the appellate deadline was rapidly approaching.[28]

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[20] N.T., PCRA Hearing, 2/24/09, pg. 10.

[21] Although Mr. Spade had access to a telephone at this location, he could not reach Mr. Williams' law office by phone in order to inform him that he wanted to appeal his sentence. Mr. Spade testified that this was due to the fact that he was only given access to the telephone at night and on the weekends, and that no one at Mr. Williams' office answered his phone calls at these times. He also stated that he could not leave a voice message because the recipient of his phone call had to first accept the call before he could leave a message, and because no one was present at Mr. Williams' office to accept Mr. Spade's phone calls at these times, he could not leave a message. *See id.* at 8-17.

[22] *Id.* at 9, 28-29.

[23] *Id.* at 31.

[24] *Id.* at 29, 47.

[25] *Id.* at 31-32.

[26] *See* Commonwealth Exhibit 1; Mr. Spade testified that he wrote this letter with knowledge that his appeal period had expired, and he was upset that Mr. Williams had not contacted him in the interim. N.T., PCRA Hearing, 2/24/09, pp. 21.

[27] PCRA Hearing, 2/24/09, Commonwealth Exhibit 3.

[28] As a result of the Court's denial of the motion, the defendant would have had until December 6, 2007 to file his notice of appeal.

Mr. Williams also recalled having several telephone conversations with some members of Mr. Spade's family concerning Mr. Spade's sentence, the cost of an appeal, appealable issues, and his opinion of Mr. Spade's likelihood of success on appeal.[29] He stated that at no time during any of these discussions did any of Mr. Spade's family members directly ask him to file an appeal.[30] Mr. Williams told these family members that although he did not believe an appeal would be successful, he would still file an appeal provided that he would be paid accordingly for these services.[31]

Legal Analysis

In general, an ineffective assistance of counsel claim is cognizable as a ground for relief under Section 9543(a)(2)(ii) of the PCRA, which requires that the petitioner must plead and prove by a preponderance of the evidence "ineffectiveness of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. 42 Pa. C.S.A. § 9543(a)(2)(ii). In addition, the petitioner must make the following showing in order to succeed on an ineffective assistance of counsel claim: "(1) that the claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and, (3) that, but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different." *Commonwealth v. Kimball*, 555 Pa. 299, 724 A.2d 326, 333 (1999).

The Pennsylvania Supreme Court has stated that the "unjustified failure to file a requested direct appeal is ineffective assistance of counsel *per se*,…" and a petitioner need not show the prejudice prong of the test for ineffectiveness. *Commonwealth v. Bath*, 2006 PA Super 235, 907 A.2d 619, 622 (Pa. Super. Ct. 2006) (citing *Commonwealth v. Lantzy*, 558 Pa. 214, 736 A.2d 564, 571 (1999)). However, before the court finds ineffectiveness for failing to file a direct appeal, the defendant must first prove that he requested counsel to appeal, and that counsel ignored this request. *Bath*, 2006 PA Super 235, 907 A.2d at 622 (citing *Commonwealth v. Knighten*, 1999 PA Super 291, 742 A.2d 679, 682 (Pa. Super. Ct. 1999).

Even assuming that Mr. Spade did not directly request Mr. Williams to file an appeal, he can still establish that he is entitled to relief in another manner. Where no direct request for an appeal has been made, counsel may still be found to be ineffective if he or she has failed to "adequately

[29] N.T., PCRA Hearing, 2/24/09, pp. 44-45.

[30] *Id.* at 46-47.

[31] *Id.* at 56-57.

consult with the defendant as to the advantages and disadvantages of an appeal where there is reason to think that a defendant would want to appeal." *Roe v. Flores-Ortega*, 528 U.S. 470, 478, 120 S. Ct. 1029 (2000); *Commonwealth v. Touw*, 2001 PA Super 229, 781 A.2d 1250, 1254 (Pa. Super. Ct. 2001). "The failure to consult may excuse the defendant from the obligation to request an appeal … such that counsel could still be found to be ineffective in not filing an appeal even where appellant did not request the appeal. *Roe*, 528 U.S. at 480, 484; *Touw*, 781 A.2d at 1254.

Under both *Roe* and *Touw*, if counsel has reason to believe that either "(1) … a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing[,]" then there is a constitutional duty placed upon counsel to adequately consult with the defendant about an appeal. *Touw*, 781 A.2d at 1254; *See also Commonwealth v. Gadsden*, 2003 PA Super 336, 832 A.2d 1082 (Pa. Super. Ct. 2003) ("When addressing [a claim of ineffective assistance of counsel], a PCRA court must consider whether counsel **adequately** and **timely** consulted with the petitioner before the filing deadline and whether counsel's failure or refusal to file a petition for allowance of appeal with the Pennsylvania Supreme Court was justified." (emphasis in original)).

In *Roe*, the U.S. Supreme Court stated that when considering what type of consultation qualifies as adequate and timely, in general, courts "must judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct," and that courts should be "highly deferential" to counsel's performance. *Rowe*, 528 U.S. at 478. The Court also defined "consult" as "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Id.*

Counsel's failure to consult with the defendant "does not automatically entitle the defendant to reinstatement of his or her appellate rights; the defendant must show prejudice." *Touw*, 781 A.2d at 1254. A defendant can show prejudice by demonstrating that "but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.* (quoting *Roe*, 528 U.S. at 484).

In *Touw*, the Pennsylvania Superior Court remanded the case to the PCRA court to determine whether counsel's consultation was adequate, and the court made the following observations. Counsel's consultation with the defendant's parents did not satisfy the consultation requirement outlined by the Supreme Court in Rowe; the consultation must be with the defendant. *Touw*, 781 A.2d at 1254.

A post-sentence letter sent to the defendant's stepfather also failed to meet the consultation requirement. *Id.* However, the court stated that the consultation requirement may have been met in counsel's discussions with the defendant *before* sentencing. *Id.* at 1255. The Court also held that counsel had a clear duty to consult with the defendant because counsel acknowledged that he believed the Court incorrectly applied the sentencing guidelines to his client's sentence and thus, there was reason to believe that a rational defendant would want to appeal. *Id.*

In this case, Mr. Spade's actions reasonably demonstrated to counsel that he was interested in appealing; indeed, he testified that he told Mr. Williams that he wanted to appeal his sentence. Mr. Williams' actions fall well short of the duty to consult as set out by our Superior Court in *Touw.* Mr. Williams acknowledged that Mr. Spade was visibly frustrated with his sentence, yet he never attempted to find out how Mr. Spade wanted to proceed with his case. When Mr. Williams received Mr. Spade's Motion for Modification of Sentence from the Court, it provided him with clear indication that Mr. Spade was interested in appealing, given that Mr. Spade was informed at his sentencing and plea hearings that filing this motion was a necessary step toward filing an appeal. However, Mr. Williams failed to inform his client that he had resubmitted the motion, that argument had been scheduled on the motion, and that the motion had been denied. Although Mr. Williams contends that his standard procedure would have been to give notice to Mr. Spade of these developments, the record does not support his contention. The Commonwealth provided no proof at the PCRA Hearing that Mr. Williams sent these documents to Mr. Spade, and Mr. Spade testified that he never received notice of these developments.

In addition, Mr. Williams received several phone calls from Mr. Spade's family members in which he discussed, among other things, the advantages and disadvantages of filing an appeal, and his opinion of the likelihood of success in filing an appeal. As the Court in *Touw* clearly stated, discussions with family members do not meet the consultation requirement; the discussions must occur with the defendant. Discussions of this nature never occurred with Mr. Spade. Mr. Williams was informed by and through these family members that, at the very least, Mr. Spade was contemplating filing an appeal.

It is also important to note that the fee agreement signed by the defendant's sister does not support the Commonwealth's position. Any notion that Mr. Williams' duty to consult with his client about the prospect of an appeal was limited by the terms of the fee agreement is not supported by the record. Although the agreement, in letter form, states that an additional fee arrangement will be made if the matter progresses

beyond the Preliminary Hearing, and that Mr. Williams' hourly fee is $250 per hour, the course of his representation indicates that this was not in fact the nature of what transpired. The matter did go beyond the Preliminary Hearing, as Mr. Williams continued to act on behalf of Mr. Spade and represented him at both a plea proceeding and the sentencing hearing without working out an additional fee arrangement. He also resubmitted the petitioner's Motion for Modification of Sentence, and appeared at the argument on this motion. A reasonable defendant in the position of Mr. Spade would have believed, as he indicated in his testimony, that Mr. Williams was continuing to represent him throughout the course of the criminal proceedings, including the filing of a notice of appeal.

Finally, it should be noted that Mr. Williams' communications with Mr. Spade following the Sentencing Hearing would not meet the duty imposed upon attorneys to communicate with their clients as set forth in Rule 1.4 of the Pennsylvania Rules of Professional Conduct. In pertinent part, "[a] lawyer shall (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent…is required by these Rules;…(3) keep the client reasonably informed about the status of the matter; [and]; (4) promptly comply with reasonable requests for information…." Pa. R.P.C. 1.4(a)(1), (3), (4). The comment for section (a)(3) further provides that a lawyer must "keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation." As set forth above, Mr. Spade never received notice of the developments regarding his Motion for Modification of Sentence. This failure to notify directly affected Mr. Spade's opportunity to appeal his sentence to the Superior Court. Had he received such notice, it is likely he would have asked Mr. Williams to file a notice of appeal.

Based on the actions of Mr. Spade and his family members, Mr. Williams had reason to believe that his client was interested in appealing his sentence. Mr. Williams' did not adequately consult with Mr. Spade regarding the post-sentencing options available to him, and Mr. Spade has demonstrated that but for Mr. Williams' actions, he would have timely appealed his sentence. Thus, Mr. Spade has established that he received ineffective assistance of counsel at trial, a cognizable claim for relief under the PCRA.

For the reasons set forth above, the defendant's petition will be granted and his appellate rights will be reinstated *nunc pro tunc*.

Signed this 20th day of April, 2009.

ORDER

AND NOW, to-wit, this 20th day of April, 2009, upon consideration of the defendant's Petition for Post Conviction Collateral Relief and following a hearing thereon, it is now hereby **ORDERED, ADJUDGED AND DECREED** that the petition is **GRANTED** and the defendant's direct appellate rights are reinstated *nunc pro tunc*.

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

DOMINICA JULIANO, a minor, By and through her parent and natural guardian, Ginnisue Juliano, Plaintiff

v.

COUNTRY FAIR, INC., Defendant

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

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).

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary judgment can be granted at the close of pleadings (1) When there is no genuine issue of any material facts 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, at 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

CIVIL PROCEDURE / BURDEN OF PROOF

In personal injury cases it is not necessary that expert medical testimony be admitted by a plaintiff to prove his/her case when the disability complained of is the natural and probable result of the injuries. The two must be so closely connected and so readily apparent that a laymen could diagnose, except by guessing, the causal connection.

CIVIL PROCEDURE / BURDEN OF PROOF

When a plaintiff has medical reports from their expert opining to a reasonable degree of medical certainty that the injuries were caused as a direct result of exposure to a LED checkout scanner, the plaintiff has breached the threshold of a genuine issue of material fact, and summary judgment will be denied.

CIVIL PROCEDURE / INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In order to maintain a claim for intentional infliction of emotional distress extreme and outrageous conduct by the defendant is a necessary element. As plaintiffs could not show the defendant's action to be more than negligent or inappropriate, a request for summary judgment will be granted.

CIVIL PROCEDURE / SCOPE OF EMPLOYMENT

When an employee commits an act within the course of one's employment that injures another, the employer will not ordinarily be excused from liability, although the employee abused his authority and thereby inflicted injury upon another. *Potter Title & Trust Company v.*

Knox, 113 A.2d 549, 551 (Pa. 1955).

CIVIL PROCEDURE / SCOPE OF EMPLOYMENT

An employer is vicariously liable for the negligence of an employee only when the employee is acting within the scope of his/her employment. *Cesare v. Cole*, 210 A.2d 491, 493 (Pa. 1965).

CIVIL PROCEDURE / SCOPE OF EMPLOYMENT

Generally the scope of the employee's employment is a question of fact for the jury. *Anzenberger v. Nickols*, 198 A.2d 309, 311 (Pa. 1964). However, when no factual dispute exists the court may decide the issue.

CIVIL PROCEDURE / SCOPE OF EMPLOYMENT

Vicarious liability for an employee's intentional or criminal acts are considered within the scope of employment when the employee's conduct (1) is of a kind in nature that the employee is employed to perform; (2) occurs substantially within the authorized time and space limits; (3) is actuated at least in part, by a purpose to serve the employer; and (4) if force is intentionally used by the employee against another, the use of force is not unexpected by the employer.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 13954-2004

Appearances: Jeff A. Connelly, Esq., Attorney for Plaintiff
Bruce L. Decker, Jr., Esq., Attorney for Defendant

OPINION AND ORDER

DiSantis, Ernest J., Jr., Judge

This comes before the Court on the Defendant's Motion for Summary Judgment.

I. BACKGROUND OF THE CASE

This is a personal injury action arising out of an incident that occurred on June 23, 2004 at the Country Fair Convenience Store located at the corner of 18th and Sassafras Streets in the City of Erie. The minor plaintiff, Dominica Juliano and her grandmother, Susan Juliano were patrons of the store on that day. While standing at the checkout counter with her grandmother, the cashier, Robert Harps, shined the light from the light- emitting diode ("LED") scanner on the plaintiff's neck and face. While doing it he encouraged her to smile. The incident lasted less than a minute. Susan Juliano also saw the cashier shine the LED on another young girl. Plaintiff alleged four separate causes of action or claims in her complaint: (1) Count I - negligence; (2) Count II - battery; (3) Count III - intentional infliction of emotional distress; and (4) Count IV - punitive damages.

The minor plaintiff alleges that as a result of Harps' conduct, she

sustained various personal injuries, including a burn, swelling and chronic irritation of her left cheek and eye as a result of being exposed to the LED light. She further alleges that she developed Tourette's Syndrome, Post Traumatic Stress Disorder ("PTSD") and a nervous tic as a result of the incident.

The defendant has moved for summary judgment arguing: (1) plaintiff has failed to produce competent medical evidence that her exposure to the scanner LED light caused her alleged physical injuries; (2) plaintiff has failed to produce evidence that the defendant Country Fair and/or its employee, Mr. Harps, engaged in outrageous conduct sufficient to support a claim for intentional infliction of emotional distress; (3) plaintiff has failed to produce evidence that the conduct of the defendant Country Fair would support an award of punitive damages and, in the alternative, (4) Harps' conduct in shining the light on the plaintiff was so abnormal and/or whimsical as to fall outside the scope of his employment with defendant Country Fair.

At the argument conducted March 13, 2009, plaintiff conceded that the evidence was insufficient to support a claim for punitive damages. The Court agrees that the evidence of record would not support the claim. It will now address the remaining issues.

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).

The purpose of the summary judgment rule "is to eliminate cases prior to trial where a party cannot make out a claim or defense". *Miller v. Sacred Heart Hospital,* 753 A.2d 829, 833 (Pa. Super. 2000). The Court must examine the record in the light most favorable to the non-moving party and resolve all doubt against the moving party. *Aetna Casualty and Surety Company v. Roe,* 650 A.2d 94, 97 (Pa. Super. 2004).

A. Whether Plaintiff's Claim For Physical Harm Resulting From Exposure To The LED Should Be Dismissed Because Plaintiff Has Produced No Competent Evidence That The LED Light Either Caused Or Was Capable of Causing Physical Injury?

The defendant concedes that it is not necessary in all personal injury cases that expert medical testimony be admitted by the plaintiff to prove his/her case. In *Smith v. German,* 253 A.2d 107 (Pa. 1969), the Pennsylvania Supreme Court stated that:

> The law of this Commonwealth is well settled as to when medical testimony will be required to establish a causal connection between the event demonstrated and the result sought to be proved...thus..."where there is no obvious causal relationship, unequivocal medical testimony is necessary to establish the causal connection... (citations omitted).

Id. at 108.

The Court went on to say:

> But where "the disability complained of is the natural and probable result of the injuries, the fact-finding body may be permitted to so find, even in the entire absence of expert opinion."... (citations omitted). The two must be "so

> closely connected and so readily apparent that a layman could diagnose (except by guessing) the causal connection. (citations omitted).

Id. at 109.

The plaintiff has produced medical reports from the minor plaintiff's primary care physician, Raymond McAllister, M.D. He opined to a reasonable degree of medical certainty that Dominica Juliano's Tourette' Syndrome was caused as a direct result of the checkout scanner. See Exhibit D to Defendant's Motion For Summary Judgment (letter of April 25, 2008). Dr. McAllister also penned a more detailed opinion letter on December 9, 2008. In that letter, Dr. McAllister noted that: "Dominica was seen shortly after this event by an ophthalmologist and diagnosed acute blepharitis and inflammation of the eyelid". The ophthalmologist, Dr. Subramanyan Segu, evaluated the minor plaintiff on June 25, 2004 (directly after the incident) and documented swelling and irritation about the plaintiff's left eye. See Exhibit 8 to Plaintiff's Brief In Opposition To Motion For Summary Judgment.[1]

Recognizing that the plaintiff can prove her case by both direct and circumstantial evidence, the Court finds that a genuine issue of material fact exists as to Count 1.

B. Whether Plaintiff's Claim For Intentional Infliction For Emotional Distress Should Be Dismissed Because The Plaintiff Has Failed To Present Sufficient Evidence That A Genuine Issue Of Material Fact Exists As To That Issue?

Pennsylvania Courts have implicitly recognized a cause of action for intentional infliction of emotional distress. *See Kazatsky v. King David Memorial Park*, 527 A.2d 988, 995 (Pa, 1987). However, extreme and outrageous conduct by the defendant is a necessary element of the claim. See *Papieves v. Kelly*, 263 A.2d 118, 121-122 (Pa. 1970). As the *Kazatsky* Court noted:

> [1] The gravamen of the tort of intentional infliction of emotional distress is outrageous conduct on the part of the tortfeasor. Section 46(1) of the Restatement (Second) of Torts, on which the Kazatskys rely, provides as follows:
>
> § 46. **Outrageous Conduct Causing Severe Emotional Distress**
>
> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

[1] The fact that the plaintiff has not produced expert opinion concerning any harmful effects of the LED scanner does not require a grant of summary judgment on this point.

The availability of recovery under section 46 is highly circumscribed. The tortious conduct contemplated by the drafters of section 46 is described in their commentary:

> d. *Extreme and outrageous conduct.*
> The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"
>
> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to harden to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's [sic] feelings are hurt. Restatement (Second) of Torts § 46 comment *d.* (1965).

Kazatsky, 527 A.2d at 991 - 992. (*See also, Small v. Juniata College,* 682 A.2d 350, 355 (Pa. Super. 1996) (quoting *Jones v. Nissenbaum, Rudolph and Seidner,* 368 A.2d 770, 773 (Pa. Super. 1970)). It is for the Court to determine, in the first instance, whether the defendant's conduct was so extreme and outrageous that recover may be justified. *Reimer v. Tien,* 514 A.2d 566, 569 (Pa. Super 1986); see also, Restatement (Second) of Tort § 46, Comment (h) (1965).

After its review, this Court concludes that the evidence of record does not support the plaintiff's position. While Mr. Harps' conduct may have been negligent or inappropriate, it was not outrageous. Therefore, the Court will grant the defendant's request for summary judgment as to Count III.

C. Whether The Plaintiff's Claims Against The Defendant Should Be Dismissed Because The Acts of Mr. Harps Fell Outside The Scope Of His Employment?

When an employee commits an act within the course of one's employment that injures another, the employer will not ordinarily be excused from liability although the employee abused his authority and thereby inflicted injury upon another. *Potter Title & Trust Company v. Knox*, 113 A.2d 549, 551 (Pa. 1955). An employer is vicariously liable for the *negligence* of an employee only when the employee is acting within the scope of his/her employment. *Cesare v. Cole*, 210 A.2d 491, 493 (Pa. 1965). Generally, the scope of the employee's employment is a question of fact for the jury. *Anzenberger v. Nickols*, 198 A.2d 309, 311 (Pa. 1964). However, when no factual dispute exists, the Court may decide the issue. *Ferrell v. Martin*, 419 A.2d 152, 155 (Pa. Super. 1980).

Vicarious liability for an employee's *intentional or criminal* acts are considered within the scope of employment when the employee's conduct:

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

R. A. v. First Church of Christ, 748 A.2d 692, 699 (Pa. Super. 2000) (citation omitted); *see also, Hill v. Acme Markets, Inc.*, 504 A.2d 324 (Pa. Super 1986) (cashier became upset, left work and was involved in auto collision); Restatement (Second) Torts § 317.

As the Superior Court has stated:

> ...moreover, our courts have held that an assault committed by an employee upon another for personal reasons, or in an outrageous manner, is not actuated by an intent to perform the business of the employer and, as such, is not within the scope of employment. *Id. See also, Potter Title & Trust Co. v. Knox*, 381 Pa. 202, 207, 113 A.2d 549, 551 (finding acts committed by employee in an outrageous or whimsical are not within the scope of employment). (citation omitted).

See R.A. v. First Church of Christ, 748 A.2d at 700.

After this Court's review of the plaintiff's allegations, it concludes that there is no issue of material fact as to Country Fair's vicarious liability as to the intentional tort of battery. There is no evidence that Mr. Harps' conduct was actuated, at least in part, by a purpose to serve his employer. Furthermore, it was not of a kind in nature that he was employed to perform. However, the negligence claim that focuses upon Country Fair's purported duty to oversee and supervise Harps' activities may proceed to disposition because there is a genuine issue of material fact as to that issue.

III. CONCLUSION

Based upon the above, this Court will grant the defendant's motion for summary judgment as to Counts II, III and IV of the complaint. It will be denied as to Count I.

ORDER

AND NOW, this 22nd day of April 2009, for the reasons set forth in the accompanying opinion, it is hereby ORDERED that the defendant's motion for summary judgment as to Counts II, III and IV is GRANTED. It is DENIED as to Count I.

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

EVE DIAZ, Natural Mother and Guardian of Minor Child TYDEUS DIAZ, Plaintiff

v.

PENNSYLVANIA FINANCIAL RESPONSIBILITY ASSIGNED CLAIMS PLAN, Defendant

PLEADINGS / PRELIMINARY OBJECTIONS

Preliminary Objections in the form of demurrers should be sustained when the facts averred are clearly insufficient to establish the pleaders right to relief. When taking into account a Motion for a Demurrer, the Trial Court must recognize as true "all well pleaded material facts set forth in the Complaint and all inferences barely deducible from those facts."

PLEADINGS / PRELIMINARY OBJECTIONS

Conclusions of law and unjustified inferences are not admitted by the pleadings and the Trial Court must resolve the intrinsic worth of the Preliminary Objections solely on the basis of the pleadings and not on testimony or evidence outside the Complaint.

INSURANCE / AUTOMOBILE INSURANCE / ASSIGNED CLAIMS PLAN

The purpose of the Assigned Claims Plan is to provide benefits for those individuals injured in a motor vehicle accident who through no fault of their own have no other available source of insurance coverage.

INSURANCE / AUTOMOBILE INSURANCE

A person who suffers an injury arising out of the maintenance or use of a motor vehicle, if not an occupant of a motor vehicle, shall recover first party benefits from the policy on any motor vehicle involved in the accident.

INSURANCE / ASSIGNED CLAIMS PLAN

An uninsured, unauthorized driver of a rental car who is excluded from the vehicle's insurance coverage as a non-permissive user is not under any obligation to comply with the Pennsylvania Motor Vehicle Financial Responsibility Law, and is therefore not uninsured, rendering persons injured by his negligence ineligible for Uninsured Motorist benefits from the Assigned Claims Plan.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION LAW NO. 13064-2008

Appearances: John M. Bonanti, Esquire, Attorney for Plaintiff
Roger H. Taft, Esquire, Attorney for Defendant

OPINION AND ORDER

DiSantis, Ernest J. Jr., J.

This case comes before the Court on the Preliminary Objections of the defendant that were filed on December 12, 2008. Plaintiff filed a response on January 9, 2009 and argument was held on February 27, 2009.

I. BACKGROUND OF THE CASE

Eve Diaz, the natural mother and guardian of Tydeus Diaz, filed a complaint on Tydeus' behalf against the defendant seeking to recover benefits in the amount of $15,000.00 under the Assigned Claims Plan provisions of the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 Pa.C.S.A. §§ 1751-1757. The complaint relates to an alleged motor vehicle/bicycle collision that occurred on or about May 7, 2007 in the vicinity of the intersection of West 18th and Myrtle Streets in Erie, Pennsylvania. It is alleged that the child was riding his bicycle when he was struck by a car operated by Mario Henry and leased to Gwyneth Henry by Avis Rent-a-Car. The car was owned by PV Holding Corporation.

At the time of the incident, Ms. Diaz's insurance coverage on her motor vehicle (a 1994 Ford Taurus) had lapsed for non-payment of premiums. PV Holding Corporation is self-insured.

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.

Generally, preliminary objections in the form of demurrers should be sustained when the facts averred are clearly insufficient to establish the pleader's right to relief. *HCB Contractors v. Liberty Palace Hotel Associates*, 652 A.2d 1278, 1279 (Pa. 1995). Moreover, when taking into account a motion for a demurrer, the trial court must recognize as true '"all well-pleaded material

facts set forth in the complaint and all inferences fairly deducible from those facts.'" *Yocca v. Pittsburgh Steelers Sports, Inc.*, 854 A.2d 425, 436 (Pa. 2004) (quoting *Small v. Horn*, 722 A.2d 664, 668 (Pa. 1998)).

Additionally, "conclusions of law and unjustified inferences are not admitted by the pleadings," *Lobolito, Inc., v. North Pocono Sch. Dist.*, 755 A.2d 1287, 1289 n.2 (Pa. 2000), and the trial court must resolve the intrinsic worth "of the preliminary objections 'solely on the basis of the pleadings' and not on testimony or evidence outside the complaint." *Belser v. Rockwood Casualty Ins. Co.*, 791 A.2d 1216, 1219 (Pa. Super. 2002) (quoting *Williams v. Nationwide Mut. Ins. Co.*, 750 A.2d 881, 883 (Pa. Super. 2000)); see also *Texas Keystone, Inc., Pennsylvania Department of Conservation and Natural Resources*, 851 A.2d 228, 239 (Pa.Cmwlth. 2004). A demurrer confronts the pleadings insisting that under the cause of action, relief cannot '"be granted *under any theory of law*.'" See *Regal Industrial Corp., v. Crum and Forster, Inc.*, 890 A.2d 395, 398 (Pa.Super. 2005); *Sutton v. Miller*, 592 A.2d 83, 87 (Pa. Super. 1991); see also *Prevish v. Northwest Med. Cir.*, 692 A.2d 192, 197 (Pa. Super. 1997) (citing *Chiropractic Nutritional Assoc., Inc. v. Empire Blue Cross and Blue Shield*, 669 A.2d 975, 984 (Pa.Super. 1995) ("...a dismissal of a cause of action should be sustained only in cases that are [so] 'clear and free from doubt' that the plaintiff [litigant] will be unable to prove legally sufficient facts to establish any right to relief.").

In evaluating the preliminary objections, this Court must first determine whether the plaintiff is an eligible claimant under 75 Pa.C.S.A. § 1752 who is entitled to recover benefits under the Assigned Claims Plan provisions of the motor vehicle code. It states:

§ 1752. Eligible claimants

(a) General rule. - A person is eligible to recover benefits from the Assigned Claims Plan if the person meets the following requirements:

(1) Is a resident of this Commonwealth.

(2) Is injured as the result of a motor vehicle accident occurring in this Commonwealth.

(3) Is not an owner of a motor vehicle required to be registered under Chapter 13 (relating to registration of vehicles).

(4) Is not the operator or occupant of a motor vehicle owned by the Federal Government or any of its agencies, departments or authorities.

(5) Is not the operator or occupant of a motor vehicle owned by a self-insurer or by an individual or entity who or which is immune from liability for, or is not required

to provide, benefits or uninsured and underinsured motorist coverage.

(6) Is otherwise not entitled to receive any first party benefits under section 1711 (relating to required benefits) or 1712 (relating to availability of benefits) applicable to the injury arising from the accident.

(7) Is not the operator or occupant of a recreational vehicle not intended for highway use, motorcycle, motor-driven cycle or motorized pedalcycle or other like type vehicle required to be registered under this title and involved in the accident.

75 Pa.C.S.A. § 1752(a)(1) - (7). In order to recover under the Assigned Claims Plan, a claimant must satisfy all seven elements. *Walker v. Fennell*, 672 A.2d 771, 772 (Pa. 1993).

Defendant claims that Eve Diaz is not an "eligible claimant" because she is the owner of a motor vehicle that is required to be registered in Pennsylvania and, therefore, fails to meet the requirements of 75 Pa.C.S.A. § 1752(a)(3). Defendant also argues that she is ineligible under § 1752(a)(6) because:

(a) 75 Pa.C.S.A. § 1787(a)(1) mandates that a self-insurer, such as PV Holding Corporation, must provide first-party benefits required by 75 Pa.C.S.A. § 1711;

(b) 75 Pa.C.S.A. § 1711(a) requires a first-party medical benefit in the amount of $5,000.00;

(c) under 75 Pa.C.S.A. § 1713(a)(4), a person who is not an occupant of a motor vehicle, such as Tydeus Diaz, and who is injured as a result of the maintenance or use of a motor vehicle is entitled to recover first-party benefits from the coverage provided on any motor vehicle involved in the accident;

(d) PV Holding Corporation may not deny first-party medical benefits to Diaz based on the terms of a rental contract with Gwyneth Henry because such contract terms would violate the statutory requirement of 75 Pa.C.S.A. § 1787(a)(1) that a self-insurer must provide a first-party medical benefit in the amount of $5,000.00 to a third party who is injured as a result of the maintenance and use of a self-insured rental car. *Gutman v. Worldwide. Ins. Co.*, 428 Pa. Super. 309, 313, 630 A.2d 1263, 1265 (1993) (self-insurer cannot use provisions in car rental contract to avoid statutory coverage requirements under Section 1787(a)); and

(e) Diaz, therefore, does not meet the requirements of 75 Pa.C.S.A. § 1752(a)(6) because she is entitled to receive first-party medical benefits from PV Holding Corporation as a result of the May 7, 2007 motor vehicle accident.

Defendant's Preliminary Objections, 12/12/08, at ¶¶ 8 (a) - (e).

Defendant further argues that even if Eve Diaz is an eligible claimant (pursuant to § 1752), she is not entitled to recover "additional coverage benefits" for personal injury under § 1754 because the alleged tortfeasor (Mario Henry): (1) did not own a motor vehicle and had no obligation to provide liability insurance or self-insurance; and (2) did not fail to comply with the financial responsibility requirements of Pennsylvania law. *Id.* at ¶ 12. Defendant cites *Mangum v. Pennsylvania Financial Responsibility Assigned Claims Plan*, 672 A.2d 1324 (Pa. Super. 1996) in support. *Mangum* stands for the proposition that a person who seeks to recover from an Assigned Claims Plan must prove that there were no insurance policies from which s/he could recover first party benefits. *Id.* at 1327.

Continuing, it is alleged that PV Holding Corporation is self-insured. Therefore, 75 Pa.C.S.A. § 1787 applies. That statute states in part:

§ 1787. Self-insurance

(a) General rule. - Self-insurance is effected by filing with the Department of Transportation, in satisfactory form, evidence that reliable financial arrangements, deposits, resources or commitments exist such as will satisfy the department that the self-insurer will:

(1) Provide the benefits required by section 1711 (relating to required benefits), subject to the provisions of Subchapter B (relating to motor vehicle liability insurance first party benefits), except the additional benefits and limits provided in sections 1712 (relating to availability of benefits) and 1715 (relating to availability of adequate limits).

75 Pa.C.S.A. § 1787(a)(1).

Required benefits are mandated under Section 1711, which states:

§ 1711. Required benefits

(a) Medical benefit. - An insurer issuing or delivering liability insurance policies covering any motor vehicle of the type required to be registered under this title, except recreational vehicles not intended for highway use, motorcycles, motor-drive cycles or motorized pedalcycles or like type vehicles, registered and operated in this Commonwealth, shall include

coverage providing a medical benefit in the amount of $5,000.

75 Pa.C.S.A. § 1711(a).

The defendant states that § 1787(a)(1) requires that a self-insurer provide the first-party medical benefit required by § 1711(a) and that § 1713 creates a priority system to determine the source of first-party medical benefits. It concludes that under § 1713(a)(4), a non-insured, non-occupant of a motor vehicle (such as Tydeus Diaz) may recover for first-party medical benefits under § 1711 based on coverage provided for any vehicle involved in the accident. See 75 Pa.C.S.A. § 1713(a)(4). Therefore, under this logic, PV Holding Corporation, the owner and self-insurer of the rental car operated by Mario Henry at the time of the incident, is required to provide first-party medical benefits in the amount of $5,000.00 under §§ 1787(a)(1) and 1711(a) of the statute.

Plaintiff counters that the focus should not be on Eve Diaz, but upon Tydeus Diaz, the minor. Plaintiff argues that the child did not own or operate a motor vehicle and was not required to maintain motor vehicle insurance. Plaintiff further argues that Mario Henry was an "impermissible driver" under the auto rental agreement to which Gwyneth Henry was a party. Plaintiff concludes that because neither the tortfeasor nor any other party had liability insurance to cover the loss, uninsured benefits are available under 75 Pa.C.S.A. § 1752.

In analyzing the situation, it is important to distinguish the roles of Eve Diaz and her son Tydeus. Ms. Diaz is involved in the lawsuit in her representative capacity of a minor. Tydeus Diaz is the real party in interest. Therefore, the relevant statutes must be analyzed assuming that premise.

The purpose of the Assigned Claims Plan is to provide benefits for those individuals injured in a motor vehicle accident, who through no fault of their own, have no other available source of insurance coverage. *See*, *Penn. Assigned Claims Plan v. English*, 664 A.2d 84, 86-87 (Pa. 1995); *Zeigler v. Constitution State Service*, 634 A.2d 261 (Pa. Super. 1993).

In determining whether Tydeus is an eligible claimant under § 1752, the Court notes the following: (1) he is a resident of the Commonwealth; (2) he was allegedly injured as a result of a motor vehicle accident occurring in the Commonwealth; (3) he is not an owner of a motor vehicle; (4) he was not the operator or occupant of a motor vehicle owned by the Federal Government; (5) he was not an operator or occupant of a motor vehicle owned by a self-insurer, or one immune from liability for, or is not required to provide benefits or uninsured or underinsured motorist coverage; and (6) he was not the operator or occupant of a recreational vehicle not intended for highway use, etc. The remaining question is whether he is entitled to first party benefits from any other source.

In Pennsylvania, rental car companies (such as Avis) are required

to provide liability insurance. See *Gutman v. Worldwide Ins. Co.*, 630 A.2d 1263, 1265 (Pa. Super. 1993). Furthermore, the owner of the motor vehicle, PV Holding Corporation was required to provide insurance. See 75 Pa.C.S.A. § 1711, *Gutman v. Worldwide Ins. Co.*, 630 A.2d 1263, 1265 (Pa. Super. 1993). It was self-insured.[1]

Title 75 Pa.C.S.A. § 1787 requires that the self-insurer provide benefits mandated by § 1711 of the statute. Section 1711 mandates a minimum coverage of $5,000.00 in medical benefits. Continuing, 75 Pa.C.S.A. § 1713 establishes the following priority system to determine the source of first-party benefits:

> **§ 1713. Source of benefits**
>
> **(a) General rule.** - Except as provided in section 1714 (relating to ineligible claimants), a person who suffers injury arising out of the maintenance or use of a motor vehicle shall recover first party benefits against applicable insurance coverage in the following order of priority:
>
> (1) For a named insured, the policy on which he is the named insured.
> (2) For an insured, the policy covering the insured.
> (3) For the occupants of an insured motor vehicle, the policy on that motor vehicle.
> (4) For a person who is not the occupant of a motor vehicle, the policy on any motor vehicle involved in the accident. For the purpose of this paragraph, a parked and unoccupied motor vehicle is not a motor vehicle involved in an accident unless it was parked so as to cause unreasonable risk of injury.

75 Pa.C.S.A. § 1713(a)(1) - (4).

Section (a)(4) is applicable. Under Subsection (a)(4), Tydeus Diaz is entitled to recover on the policy on any motor vehicle involved in the accident. Therefore, he must first look to Avis Rent-a-Car and PV Holding for first party benefits. Assuming Avis has a contractual defense that would allow it to avoid liability, PV Holding, which was not a party to the lease agreement, cannot avoid providing first party benefits. See, *Selected Risks Ins. Co. v. Thompson*, 552 A.2d 1382, 1388 (Pa. 1989). Given any event, the defendant is not required to provide first party benefits to him.

The plaintiff also seeks to recover (additional coverage) benefits for personal injury pursuant to 75 Pa.C.S.A. § 1754. That provision of the Motor Vehicle Code provides that:

[1] PV Holding Corporation was not a party to the lease agreement between Avis Rent-a-Car and Gwyneth Henry.

> An eligible claimant who has no other source of applicable uninsured motorist coverage and is otherwise entitled to recover in an action in tort against a party who has failed to comply with this chapter [Chapter 17 - Pennsylvania Motor Vehicle Financial Responsibility Law] may recover for losses or damages suffered as a result of the injury up to $15,000 subject to an aggregate limit for all claims arising out of any one motor vehicle accident of $30,000. If a claimant recovers medical benefits under section 1753 (relating to benefits available), the amount of medical benefits recovered or recoverable up to $5,000.00 shall be set off against any amounts recoverable in this section.

75 Pa.C.S.A. § 1754.

Here, the alleged tortfeasor (Mario Henry) was not under any obligation to comply with the Pennsylvania Motor Vehicle Financial Responsibility Law. Therefore, plaintiff is not an eligible claimant who can collect under § 1754.

III. CONCLUSION

Based upon the above, this Court will sustain the defendant's Preliminary Objections.

ORDER

AND NOW, this 17th day of March 2009, for the reasons set forth in the accompanying opinion, it is hereby ORDERED that the defendant's Preliminary Objections To Complaint are SUSTAINED and the complaint is DISMISSED WITH PREJUDICE.

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

ERIE INSURANCE EXCHANGE, Plaintiff

v.

VINCENT WILLIAM MARKS, MARK E. KENNELLEY, MARK EDMUNDS, DARLENE EDMUNDS, his wife, and ROBERT BORTZ, Defendants

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

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

CIVIL, PROCEDURE / MOTION FOR SUMMARY JUDGMENT

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.

NEGLIGENCE / ACTS OR OMISSIONS CONSTITUTING

There is no general legal duty to come to the aid of another when one is free from fault in causing or contributing to the peril.

INSURANCE / INTENTIONAL ACTS / DUTY TO DEFEND / DUTY TO INDEMNIFY

Where defendants are involved in the underlying intentional tort that created a duty to protect or assist the injured party, plaintiff-insurer has no duty to defend or indemnify them because, without their active involvement in the intentional tort (which is not an insured "occurrence"), their duty to assist or protect the injured party, even if otherwise insurable, would not have arisen.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION - EQUITY
NO. 14049 OF 2006

Appearances: William C. Wagner, Esquire, Attorney for Plaintiff
Tibor R. Solymosi, Esquire, Attorney for Defendants Mark Edmunds and Darlene Edmunds
Richard T. Ruth, Esquire
Dale E. Huntley, Esquire
Jeffrey S. Cole, Esquire
Gary J. Shapira, Esquire

OPINION AND ORDER

DiSantis, Ernest J., Jr., J.

This case comes before the Court on the Plaintiff's Motion For Summary Judgment filed February 13, 2009. The defendants have responded.

I. BACKGROUND OF THE CASE

On November 3, 2006, the plaintiff filed a complaint in declaratory

judgment pursuant to 42 Pa.C.S.A. § 7531 *et seq*. and Pa.R.Civ. P.1601 *et seq*. The purpose of the action is to determine whether the plaintiff has an obligation to defend and/or indemnify defendants, Vincent William Marks and/or Mark E. Kennelley, arising out of an alleged incident that occurred on July 30, 2005 at 2946 Poplar Street in Erie, Pennsylvania. As a result Mark Edmunds and his wife, Darlene, filed suit against Vincent William Marks, Mark Kennelley and Robert Bortz on November 3, 2005 alleging that Marks, Kennelley and Bortz intentionally committed an assault and battery upon him outside Mr. Edmund's home. They also alleged that the three conspired to commit the assault and battery and that each was negligent by failing to prevent the others from assaulting Mr. Edmunds, by failing to come to his aid and by failing to call the police.[1] They seek compensatory and punitive damages. See Erie County Civil Docket Number 14158-2005.

At the time of the alleged incident, plaintiff had issued a Homeprotector HP Extra-cover Insurance Policy to Daryl E. Marks and Karen A. Marks as named insured's. (Policy Number Q58-2706120). Their son, Vincent Marks, lived with them.

Plaintiff also issued a Homeprotector Ultra Cover Insurance Policy to Kelly Bauer and Mark E. Kennelley. (Policy Number Q50-0504944).

Briefly stated, plaintiff seeks summary judgment asserting that it has no contractual liability under the homeowners' policies to defend and/or indemnify Vincent Marks or Mark Kennelley.

The defendants counter that there are genuine issues of material fact that preclude the grant of summary judgment

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.

[1] The facts of record are that Mr. Edmunds had a confrontation with Marks, Kennelley and Bortz at an Erie night club (Kings Rook) on the evening in question. Later, the three (3) went to Edmund's home where they allegedly assaulted him in front of his residence.

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).

The resolution of this matter necessitates an examination of the applicable insurance policy provisions, specifically the scope of coverage. As the Pennsylvania Supreme Court has stated:

> The task of interpreting [an insurance] contract is generally performed by a court rather than by a jury. The purpose of that task is to ascertain the intent of the parties as manifested by the terms used in the written insurance policy. When the language of the policy is clear and unambiguous, a court is required to give effect to that language. When a provision in a policy is ambiguous, however, the policy is to be construed in favor of the insured to further the contract's prime purpose of indemnification and against the insurer, as the insurer drafts the policy, and controls coverage. Contractual language is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense. Finally, in determining what the parties intended by their contract, the law must look to what they clearly expressed. Courts in interpreting a contract, do not assume that its language was chosen carelessly. Thus, we will not consider merely individual terms utilized in the insurance contract, but the entire insurance provision to ascertain the intent of the parties.

401 Fourth St. v. Investors Insurance Group, 879 A.2d 166, 171 (Pa. 2005) (internal citations and quotation marks omitted).

It is not disputed that the Marks and Kennelley policies contain identical provisions. In particular they provide:

> **BODILY INJURY LIABILITY COVERAGE**
>
> **PROPERTY DAMAGE LIABILITY COVERAGE**
>
> **OUR PROMISE**
>
> We will pay all sums up to the amount shown on the **Declarations** which **anyone we protect** becomes legally obligated to pay as damages because of **bodily injury** and **property damage** caused by an occurrence during the policy period. **We** will pay for only **bodily injury** and **property damage** covered by this policy.

Exhibit A, at 17 and Exhibit B at 14.[2]

> **We** may investigate or settle any claim or suit for damages against anyone we **protect** at our expense. If **anyone we protect** is sued for damages because of **bodily injury** or **property damage** covered by this policy, we will provide a defense with a lawyer we choose, even if the allegations are not true. We are not obligated to pay any claim or judgment or defend any suit if we have already used up the amount of insurance by paying a judgment or settlement.

Continuing, the policies state:

> **WHAT WE DO NOT COVER-EXCLUSIONS**
>
> **Bodily Injury Liability Coverage**
>
> **Property Damage Liability Coverage**
>
> **Personal Injury Liability Coverage**
>
> **Medical Payments To Others Coverage**
>
> **We** do not cover under Bodily Injury Liability Coverage, Property Damage Liability Coverage, Personal Injury liability Coverage and Medical Payments to Others Coverage:
>
> 1. **Bodily injury, property damage or personal injury** expected or intended by **anyone we protect** even if:
>
> a. The degree, kind and quality of the injury or damage is different than what was expected or intended; or
>
> b. a different person, entity, real or personal property sustained the injury or damage than was expected or intended.
>
> We do not cover reasonable acts committed to protect persons and property....

[2] References are to the Plaintiff's Appendix In Support Of Motion For Summary Judgment.

9. **Personal Injury** arising out of a willful violation of a law or ordinance **by anyone we protect**

Exhibit A at 17 and Exhibit B at 15.

The policies also exclude punitive or exemplary damages and related costs. Exhibit A, Exclusion 12 at 19 and Exhibit B, Exclusion 12 at 16.

The definition section of the policies defines the term "occurrence" as "an accident including continuous repeated exposure to the same general harmful conditions". *Id.,* Definitions at 5. The term does not include the term "intentional acts".

Under Pennsylvania Law, when the term "occurrence" includes an accident and does not specifically provide coverage for intentional, willful and malicious conduct, the latter situations are excluded from coverage. *See, Gene's Rest. v. Nationwide Ins. Co.,* 548 A.2d 246, 247(Pa. 1988); *Erie Ins. Exch. v. Fidler,* 587, 590 (Pa.Super 2002). citing *United Serv. Auto. Ass 'n v. Elitzky,* 517 A.2d 982, 985 (Pa.Super 1986).

In *Donegal Mutual Insurance Company v. Baumhammers,* 938 A.2d 286 (Pa.2007), *Donegal* asked the Court to determine whether multiple shootings perpetrated by Richard Baumhammers that resulted in the death of five (5) people and serious bodily injury to another, qualified as an "accident" under an insurance policy issued by *Donegal.* The assailant's parents were insured under a homeowner's policy issued by *Donegal* covering them and any relative residing in their household, which Richard Baumbammer was. The Pennsylvania Supreme Court noted that in *Gene's Restaurant, supra,* intentional acts or torts are not accidents that trigger a duty to defend and/or indemnify. *Id.* at 291. However, the Court went on to say:

> "While *Donegal* is correct that intentional conduct may not qualify as "accidental," the complaint in the instant case contains allegations of negligence on the part of the insured. Our conclusion in *Gene's Restaurant* that injuries caused by intentional conduct are not "accidental" does not absolve an insurer of the duty to defend its insured when the complaint filed against the insured alleges that *the intentional conduct of a third party was enabled by the negligence of the insured.*

(emphasis added)

It then reviewed its rationale in *Mohn v. Am. Casualty Co. of Redding,* 326 A.2d 346 (Pa.1974). In *Mohn,* the dependant son of the insured was fatally shot by police while attempting to flee from the scene of a crime that he was in the process of committing. The insured-parent sought reimbursement from his insurer for the expenses incurred as a result of his son's hospitalization and treatment before he died. The Supreme Court determined that the assailant sustained an "accident" and "the fact that the event causing the injury may be traceable to an intentional act of

a third party does not preclude the occurrence from being an 'accident'." *Id.* at 348. The Court noted that the determination of whether the injury is a result of an accident is determined from the viewpoint of the insurer. *Id.*

In *Donegal* it was significant that the allegation of negligence was predicated upon the assailant's parents' purported duty to take possession of their son's gun and/or alert law enforcement authorities and others of his dangerous propensities. *Donegal,* 938 A.2d, at 291. That differs from the allegations here in that Marks, Kennelley and Bortz are all alleged to have been involved in the underlying intentional tort that the Edmunds allege created the duty to protect or assist Mr. Edmunds.. This is significant because absent their active involvement in the intentional tort or conspiracy, they would not have had any duty to assist or protect Mr. Edmunds. This distinguishes the instant case from *Donegal*, *Mohn* and *Gene's Restaurant.*

The *Donegal* Court's discussion of the term "accident" is also significant. As it said:

> We further observed in *Mohn*, that the test of whether injury is the result of an accident is to be determined from the viewpoint of the insured and not from the viewpoint of the one that committed the act causing the injury." *Id.* ... to determine whether *Donegal* has a duty to defend its insured in the actions brought by Plaintiffs it is necessary for this court to examine whether the injuries that are the impetus of the action were caused an "accident" so as to constitute an occurrence under the policy. The *Donegal* homeowner's insurance policy provides no definition of the term "accident". However, we have established that the term "accident" within insurance policies refers to an unexpected and undesirable event occurring unintentionally, and that the key term in the definition of the "accident" is "unexpected" which implies a degree of fortuity. (citation omitted). An injury therefore is not "accidental" if the injury was the natural and expected result of the insured's actions. (citation omitted) ... it is an undersigned, unexpected event. (citation omitted).

Id. at 292.

In *Mohn,* it was the father of the assailant who sought recovery for hospitalization costs. His role vis-à-vis the event is distinguishable from that of Messrs. Marks, Kennelley and Bortz because he was not an alleged participant. Only Ms. Edmunds is not alleged to have participated. However, she is not an insured or covered under either the Kennelley or Marks policies, as was the case *Mohn.*

As to the negligence counts, Marks, Kennelley and Bortz were under

no legal duty to become "good samaritans" and come to the aid of Mr. Edmunds unless, perhaps, they had taken some action to instigate or facilitate the alleged fight.[3] That entails intentional conduct and is not an accident or negligence. The gist or essence of the Edmunds' case is one of intentional tort and the negligence counts are inextricably intertwined. Without it, the negligence counts cannot stand on their own. Because intentional conduct is not an "accident", plaintiff has no obligation to defend and/or indemnify Marks and Kennelley.

III. CONCLUSION

Based upon the above, the Plaintiff's Motion For Summary Judgment shall be granted.

ORDER

AND NOW, this 15th day of April, 2009, for the reasons set forth in the accompanying Opinion, the Plaintiff's Motion For Summary Judgment is GRANTED.

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

JAMES R. WASSINK, Plaintiff

v.

HARWHIT BROTHERS, INC., And COMPRESSOR & PUMP COMPONENTS CO., INC., d/b/a PETRO-CHEM, INC., Successor Corporation to MASTER BLASTER CORPORATION d/b/a TEXTILE ENGINEERING ASSOCIATES, INC. d/b/a TEXTILE ENGINEERING ASSOCIATES, PRESS TECH ENVIRONMENTAL SERVICES, INC., and TEXTILE ENGINEERING, INC., d/b/a TEXTILE ENGINEERING, Defendants

JURISDICTION / CORPORATIONS

Pennsylvania long-arm statute controls exercise of in personam jurisdiction over nonresident corporate defendants.

CIVIL PROCEDURE / COMMENCEMENT OF ACTION

Exercising jurisdiction over an out of state defendant depends on several factors, including the forum state's interest in resolving the dispute, plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in the most efficient resolution of controversy, and the interest of several states in furthering substantive social policies.

JURISDICTION / CORPORATIONS

Jurisdiction under the Pennsylvania long arm state can be exercised when foreign corporations and manufacturers sell deficient equipment that causes injury or harm to plaintiffs.

JURISDICTION / CORPORATIONS CIVIL PROCEDURE / DISCOVERY

A defendant corporation may be subject to discovery unrelated to underlying cause of action in order to determine if defendant is indeed "doing business" in Pennsylvania.

JURISDICTION / CORPORATIONS

Having a continuous interest in the sale and use of equipment (via a Pennsylvania distributor) also constitutes "doing business" within Pennsylvania.

JURISDICTION / CORPORATIONS

A defendant company may also be considered a "successor" based on allegations that successor continued in same line of business, took over predecessor's accounts, employees, and clients, and did business under same name as predecessor.

JURISDICTION / CORPORATIONS

A predecessor corporation's activities may be attributed to a successor for jurisdictional purposes without violating this section or due process, even though new corporate entity was not result of statutory merger or consolidation.

JURISDICTION / CORPORATIONS

In order to determine whether a subsidiary is the alter ego of its parent, the court should consider: (1) ownership of all or most stock of subsidiary; (2) common officers and directors; (3) common marketing image; (4) common use of trademark or logo; (5) common use of employees; (6) integrated sales system; (7) interchange of managerial and supervisory personnel; (8) performance of business functions by subsidiary that principal corporation would normally conduct through its own agents or departments; (9) marketing by subsidiary on behalf of principal corporation, or as principal's exclusive distributor; and (10) receipt by officers of subsidiary corporation of instruction from principal corporation.

CIVIL PROCEDURE / PLEADINGS / GENERAL REQUIREMENTS

A plaintiff may commence a cause of action against any additional defendant by filing a praecipe for writ of summons, a complaint, or an agreement for amicable action.

CIVIL PROCEDURE / PLEADINGS / GENERAL REQUIREMENTS

Amendments to the caption may be permitted after the expiration of the statute of limitations to reflect the correct name of a defendant.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 11514-2007

Appearances: James Stuczynski, Esquire, Attorney for Plaintiff
Edwin Smith, Esquire, Attorney for Defendant

MEMORANDUM OPINION

Procedural History

Dunlavey, Michael E., J., April 24, 2009

Plaintiff filed a products liability action against Defendants on April 10, 2007, arising from an industrial accident that occurred in May 2005. After several attempts to conduct discovery and serve interrogatories on Defendants in the State of Texas, Plaintiff filed a Motion to Amend the Caption on March 25, 2008. Oral argument was held before this Court on August 7, 2008. The Court subsequently granted Plaintiff's Motion and denied Defendant Compressor & Pump Components, Co., Inc.'s Preliminary Objections. Defendant Compressor & Pump Components, Co., Inc. (hereinafter CPC) filed a timely Notice of Appeal. On March 11, 2009, CPC filed a Concise Statement of Errors Complained of on Appeal (hereinafter Concise Statement), raising three allegations of error.

Argument

CPC first alleges that the Court erred in overruling its Preliminary Objections related to Pennsylvania's long-arm statute 42 Pa.C.S.A. §5301 and §5322.

Long-Arm Jurisdiction

Pennsylvania long-arm statute controls exercise of in personam jurisdiction over nonresident corporate defendants. *Rogers v. Icelandair/ Flugleider International,* 522 F.Supp. 670 (E.D.Pa., 1981). Exercising jurisdiction over an out of state defendant depends on several factors, including the forum state's interest in resolving the dispute, plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in the most efficient resolution of controversy, and the interest of several states in furthering substantive social policies. *Kingsley and Keith (Canada) Ltd. v. Mercer Intern. Corp.,* 435 A.2d 585, 291 Pa.Super. 96, Super.1981, *affirmed* 456 A.2d 1333, 500 Pa. 371, *certiorari denied* 104 S.Ct. 423, 464 U.S. 982, 78 L.Ed.2d 358. Here, it is undisputed that CPC is a nonresident corporation. Pennsylvania has an interest in resolution of the matter because its citizen resides here, was injured here, and is seeking relief (i.e. damages) here.

Further, jurisdiction under the Pennsylvania long arm state can be exercised when foreign corporations and manufacturers sell deficient equipment that causes injury or harm to plaintiffs. *See Saccamani v. Robert Reiser & Co., Inc.,* 348 F.Supp. 514 (W.D.Pa., 1972) (German manufacturer who sold machinery through Pennsylvania distributor where meat packer's employee was injured by rotor), *PPG Industries, Inc. v. Systonetics, Inc.,* 614 F.Supp. 1161 (W.D.Pa., 1985) (California corporation which sold computer equipment and technology to Pennsylvania buyer where software was installed in Pennsylvania by the seller's employees) and *Heller v. Centrax Products Corp.,* 543 F.Supp. 318 (E.D.Pa., 1982) (Massachusetts manufacturer who shipped defective machine to Pennsylvania that caused injuries to plaintiff's right hand). Here, it is clear that Plaintiff was injured by equipment sold by CPC and its successors to Pennsylvania, thus long-arm jurisdiction is appropriate.

Personal Jurisdiction

CPC also argues that the Court lacked personal jurisdiction over it because it was not "doing business" here, nor was an "alter ego" or "successor corporation".

A defendant corporation may be subject to discovery unrelated to underlying cause of action in order to determine if defendant is indeed "doing business" in Pennsylvania. *Superior Coal Co. v. Ruhrkohle, A.G.,* 83 F.R.D. (414 E.D.Pa., 1979). Having a continuous interest in the sale and use of equipment (via a Pennsylvania distributor) also constitutes "doing business" within Pennsylvania. *Kelly v. U. S. Steel Corp.,* 198 F.Supp. 640 (W.D.Pa., 1960).

A defendant company may also be considered a "successor" based on allegations that successor continued in same line of business, took over predecessor's accounts, employees, and clients, and did business under

same name as predecessor. *Huth v. Hillsboro Ins. Management, Inc.*, E.D.Pa.1999, 72 F.Supp.2d 506. A predecessor corporation's activities may be attributed to a successor for jurisdictional purposes without violating this section or due process, even though new corporate entity was not result of statutory merger or consolidation. *Simmers v. American Cyanamid Corp.*, 394 Pa.Super. 464, 576 A.2d 376 (1990)

In order to determine whether a subsidiary is the alter ego of its parent, the court should consider: (1) ownership of all or most of stock of subsidiary; (2) common officers and directors; (3) common marketing image; (4) common use of trademark or logo; (5) common use of employees; (6) integrated sales system; (7) interchange of managerial and supervisory personnel; (8) performance of business functions by subsidiary that principal corporation would normally conduct through its own agents or departments; (9) marketing by subsidiary on behalf of principal corporation, or as principal's exclusive distributor; and (10) receipt by officers of subsidiary corporation of instruction from principal corporation. *Simeone ex rel. Estate Of Albert Francis Simeone, Jr. v. Bombardier-Rotax GmbH.* 360 F.Supp.2d 665 (E.D.Pa., 2005).

Here, the Court found that CPC was doing business in Pennsylvania as a successor to Master Blaster, *et al.* The Court accepts Plaintiff's contention that Defendants' name was "all over the documents received from North East Municipal Authority pertaining to Plaintiff's accident. *N.T. Plaintiff's Motion to Amend Caption Hearing,* August 7, 2008, p. 12. Further, the Court found nothing to indicate that CPC was not in the same line of business as Master Blaster, *at al*, even though no merger or consolidation had taken place.

Particularly, the Court found that Clifton Wolf and Alan Scott were central figures of the corporation, appearing on tax returns and other corporate documents, and serving as corporate officers and/or registered agents for Textile Engineering, Inc., Compressor & Pump Components Co., Inc., and Petro-Chem, Inc. The similarity of corporate names, common stock ownership, and interchangeable personnel strongly indicated an "alter ego" relationship. For example, at the hearing, Plaintiff argued that even Mr. Wolf was often confused about who owned what stock in which corporation. *N.T. Plaintiff's Motion to Amend Caption Hearing,* August 7, 2008, p. 3, lines 15-22. The Court also accepts Plaintiff's argument that the corporate names were deceptively similar names, leading to possible confusion and difficulty in effectuating proper service.

Expiration of Statute of Limitations

CPC next alleges that the Court erred in overruling its Preliminary Objections because the applicable statute of limitations had expired on the underlying personal injury claims.

A plaintiff may commence a cause of action against any additional defendant by filing a praecipe for writ of summons, a complaint, or an agreement for amicable action. *Aivazoglou v. Drever Furnaces, et a1.*, 418 Pa. Super. 111, 613 A.2d 595 (1992). Amendments to the caption may be permitted after the expiration of the statute of limitations to reflect the correct name of a defendant. *Zimmer v. Benchmark Management Corporation*, 20 Pa. D. & C. 4th 1 (Erie County Court of Common Pleas, 1993). *See also Waugh v. Steelton Taxi Co.*, 371 Pa. 436, 89 A.2d 527 (1995). "When the plaintiff... uses the name of the entity supplied by defendant, the defendant should not be heard to complain that the name was wrong, and amendment of the complaint should be permitted." *Clark v. Wakefern Food Corp. t/a Shop Rite # 411*, 2006 Pa. Super. 298, 910 A.2d 715, at 719.

After review of the record, the Court notes the repeated entry of several Praecipe to Reinstate Complaint filed within the statute of limitations by Plaintiff against CPC and the other captioned defendants. The Court also acknowledges Plaintiff's efforts to identify the correct defendant by searching the Texas Corporation Bureau of Records and conducting Internet searches as well. *N.T. Plaintiff's Motion to Amend Caption Hearing*, August 7, 2008, pp. 10-11. Thus, the Court finds CPC's allegation as to the statute of limitations to be without merit.

Proper Service

Lastly, CPC alleges the trial court erred in finding that Plaintiff properly served CPC and claims that no proofs of service were ever filed. Again, the Court points to the docketed multiple attempts at service by Plaintiff and the difficulties in effectuating proper service as explained by Plaintiff and unrefuted by CPC.

Further, the Court notes that counsel has consistently appeared on behalf of CPC at all stages of the proceedings thus far. See *McCullough v. Clark*, 784 A.2d 156, (2001) where attorney entered his appearance on behalf of two defendants on the docket, giving the court personal jurisdiction over both in negligence action, even though one of them was not served with process.

Conclusion

CPC ultimately seems to argue that the Court should assume that the similar names and players involved in this case are nothing more than mere coincidences.[1] However, the Court found several which could not be ignored. Plaintiff is simply asking for the opportunity to conduct further discovery into a foreign corporation, which the Court has broad power to grant. *See* Pa.R.C.P. 4001, *et seq.* Defendant is not without remedy

[1.] As Yogi Berra once said, "That's too coincidental to be coincidence."

as discovery progresses. CPC could seek further discovery, requests for admissions, summary judgment or judgment on the pleadings.

Based on the foregoing reasons and case law, Defendant CPC's claims should be dismissed as having no merit in fact or law.

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

Date: April 24, 2009

JUDITH A. LAMB and TERRY LAMB, her husband, Plaintiffs
v.
PENNSYLVANIA ELECTRIC COMPANY a/k/a PENELEC/FIRST ENERGY, Defendant

EQUITY / INJUNCTIONS

In ruling on a preliminary injunction request, a trial court has "apparently reasonable grounds" for its denial of relief where it properly finds that any one of the following "essential prerequisites" for a preliminary injunction is not satisfied.

EQUITY / INJUNCTIONS

First, a party seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. Second, the party must show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings. Third, the party must show that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. Fourth, the party seeking an injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits. Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity. Sixth and finally, the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest.

REAL ESTATE / EASEMENTS

It is clear that restricting the defendant's rights under the easement will affect the public interest of insuring utility service for approximately fourteen thousand citizens.

EQUITY / INJUNCTIONS AND REAL ESTATE / EASEMENTS

This Court has balanced defendant's easement rights, the plaintiffs' right to the enjoyment of the tree, its aesthetic qualities, and the potential harm to 14,000 citizens who rely upon the electric power provided by defendant for heating, lighting, cooking, etc.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 14249-2008

Appearances: Charles D. Agresti, Esq., Attorney for Plaintiffs
Mark E. Mioduszewski, Esq., Attorney for Defendant

OPINION AND ORDER

DiSantis, Ernest J., Jr., J.

This case is before the Court on the plaintiffs' Complaint For Injunction seeking to prohibit the defendant from removing a red maple tree located

on plaintiffs' property. Defendant maintains that it is necessary to do so in order to maintain its utility easements that affect that property. A hearing was conducted on December 2, 2008. The parties were afforded additional time to submit briefs.

I. BACKGROUND OF THE CASE AND FACTUAL FINDINGS

Plaintiffs are owners and residents of a parcel of property located at 8635 Hamot Road in Waterford, Pennsylvania. Defendant is the electrical utility provider for Erie County. At the time that plaintiffs purchased their property, it was subject to a utility easement or right of way. See 12/2/08 Hearing Courtroom Exhibit 1.

On or about April 15, 2008, defendant notified the plaintiffs that defendant intended to perform vegetation maintenance work within its right-of-way.

The utility lines in question consist of a major transmission line and other wires, the major line carrying 115,000 volts. Plaintiffs assert, and as their expert witness - arborist William Brooks, Jr. concurs - that the tree could be trimmed and treated with growth-retardant chemicals to ensure that the tree does not grow much more than it currently has. Mr. Brooks opined that the tree is in good health. N.T. 35 - 37.[1]

The defendant relied on the testimony of two witnesses, Scott Wirs - a civil engineer in charge of FirstEnergy Corporation's Transmission Vegetation Management Program and David Kozy - Manager of Transmission Engineering. In sum, these witnesses testified that given the current requirements of the National Electrical Safety Code (NESC), that removal of the tree is the only viable option.[2] See N.T., 62 - 63.

II. DISCUSSION

The Easement

The easement in question is defined in Court Exhibit 1.[3] It was recorded on March 3, 1942 and granted defendant's predecessor (and successors and assigns), "the right to construct, maintain and operate an electric line consisting of wood poles, conductors, overhead and underground lightning protective wires, private communication wires, guys, push braces and other accessory apparatus and equipment deemed by grantee to be necessary ..." *Id.* In addition to permitting the utility the right to install the line (including additional apparatus and equipment), it allowed the utility to trim, cut or remove trees, underbrush and other obstructions, "that are within forty (40) feet of any wire strung on said

[1] N.T. denotes the 12.2.08 hearing transcript.

[2] The National Electrical Safety Code (NESC) was enacted to implement the federal governmental interest in standardizing safety precautions regarding utility lines. The Code was spawned after the notorious 2003 blackout that occurred in the northeastern United States.

[3] The easement is recorded at Contract Book No. 22, page 332 (Erie County).

line: provided, however, any damage (other than for said trimming, cutting or removing) to the property of grantors, caused by said grantee, in maintaining said line, shall be borne by said grantee." *Id.* The utility also had a right to remove other trees, not located within the forty-feet easement, but which endangered its line. In that instance, it is bound to pay the fair value of the trees removed.

The easement distinguishes between/among the electric line and individual wire(s) strung on the line. The transmission line (MF line) consists of individual conductors, poles, lightning protective wires, communication wires, guys push braces and other apparatus and equipment. As the evidence demonstrated, the line consists of actually five separate wires. The MF line transmits electrical power from the power plant to a sub station. It conducts electricity at higher voltages and for greater distances than does a distribution line. It serves a greater number of customers. It is 33.5 miles long and serves areas both Erie and Crawford Counties. Approximately 14,000 customers are served. N.T. 54 - 55.

The MF line consists of 3 wires located on wood frames (H-frames) that measure 60 feet in height with 25 foot cross arms. Three phase wires are mounted to the cross arms of the tower approximately 25 feet apart. They conduct 115 kV electricity. The towers are portioned 750 - 1,000 feet apart and the midpoint of the wires within that span is 20 feet above ground. Two neutral or static wires are attached to the tower and are also part of the MF line. Lines that deliver the power from the substation to individual homes are known as the distribution lines.

The plaintiffs argue that the easement in question is not defined and therefore, calls into question the defendant's rights to effectuate actions concerning the tree. Furthermore, they argue that there are alternatives to cutting down the tree, such as trimming and growth retardation which will satisfy the defendant's concerns. Defendant claims that it has a right to remove the tree.

The Red Maple Tree

The red maple tree at issue was planted in approximately 1976. It possesses a potential lifespan of 150 years. N.T. 25. It is approximately 50 feet high and its branches cover a span of 44 feet. The tree has a potential for growth of up to 60 to 90 feet in height and an additional 10 feet in diameter and spread. N.T. 36 - 37, 60.

The centerline of the trunk is approximately 37 feet from the nearest phase wire of the MF line. Branches have grown within 15 feet of that wire. More than half of the tree is located within 40 feet of the nearest phase wire of the MF line. N.T. 19 - 20; see also Plaintiffs' Exhibits A, B and C. Although the prevailing winds blow in a direction away from the line, the location and size of the tree are in a position, which, if it fell in the direction of the line, would fall onto the MF line conductor.

N. T. 41 - 42.

From the plaintiffs' perspective, the tree is not only aesthetically pleasing, but it provides their home with a considerable amount of shade (50% to 75% of the house) during the warmest part of the day. N.T. 21.

The Vegetation Management Policy

Defendant engages in a vegetation management program within its easements or rights-of-way. This is usual in the industry because trees and other vegetation are capable of damaging wires and equipment used in transmitting and distributing electrical power. There are additional safety issues because tree branches can conduct electrical energy when they come in contact with electrical wires or when they come close enough to the wires to pull an arc from the wire. The result can be fires and electrical shock. N. T. 52 - 54, 61; 79 - 80. Paramount in the defendant's consideration is the 2003 blackout which affected extensive areas of the United States. N. T. 50 - 52, 63; 88.

The defendant, like a number of utilities throughout the country, abides by the provisions of the NESC. The Court takes judicial notice that this is a source of guidance for the standard of care to which electric utilities must adhere. *See Poorabaugh v. Pennsylvania Public Utility Commission,* 666 A.2d 744 (Pa. Cmwlth. 1995); *Densler v. Metropolitan Edison Company,* 345 A.2d 758 (Pa. Super. 1975). The NESC, specifically Table 234-1, establishes the minimum vertical and horizontal clearances of electrical conductors from fixed objects. N.T. 79 - 84. Section 218 addresses vegetation management considerations. As the testimony indicated, utility lines move laterally as a result of wind and other atmospheric conditions, and therefore, determining the position of a wire on a transmission line and its relationship to vegetation is not a static determination. N.T. 84 - 86. This causes utilities to take a proactive approach to vegetation management.

III. LEGAL DISCUSSION

The first issue to be addressed is whether the plaintiffs are entitled to injunctive relief. A preliminary injunction is an equitable remedy. As the Pennsylvania Supreme Court has stated:

> In ruling on a preliminary injunction request, a trial court has "apparently reasonable grounds" for its denial of relief where it properly finds that any one of the following "essential prerequisites" for a preliminary injunction is not satisfied. *See Maritrans GP, [Inc. v. Pepper, Hamilton & Scheetz,]* 529 Pa. 241, 602 A.2d [1277,] 1282-83 [(Pa. 1992)] (requirements for preliminary injunction are "essential prerequisites"); *County of Allegheny v. Commonwealth,* 518 Pa. 556, 544 A.2d 1305, 1307 (1988) ("For a preliminary injunction to issue, every one of the [] prerequisites must be established; if the petitioner fails

> to establish any one of them, there is no need to address the others."). First, a party seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. ... Second, the party must show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings. ... Third, the party must show that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. ... Fourth, the party seeking an injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits. ... Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity. ... Sixth and finally, the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest.

Gaming Control Board v. City Council, 928 A.2d 1255, 1277 (Pa. 2007) *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 573 Pa. 637, 828 A.2d 995, 1001 (Pa. 2003) (supporting citations omitted).

Plaintiffs' request for equitable relief is premised on an invocation of this Court's responsibility to balance the rights of the property owner against the reasonable needs of the defendants who are the grantee of the easement.

In the first instance, plaintiffs argue that the easement is undefined. On this point, the Court disagrees. As noted above in its description of the easement, this Court finds that the easement is well defined, even though it is not described by metes and bounds. It is clear from the description that it extends 40 feet from any wire strung on the line. The testimony established that the line (including all attendant wires), as well as the 40-feet distance from the end of any line, covers 105 feet. The Court now turns to an analysis of the requirements for issuance of a preliminary injunction.

A. Whether The Injunction Is Requested To Prevent Irreparable Harm?

Obviously, if this tree is removed, the plaintiffs will lose the enjoyment and benefit of it. However, as discussed below, this fact is not dispositive.

B. Whether Greater Injury Would Result By Refusing The Injunction Rather Than By Granting It?

Granting the injunction would thwart the defendant's vegetation management policy and create a risk of a potential disruption in utility service. This could affect approximately 14,000 customers in two

counties. Therefore, granting the injunction would cause the greater injury.

C. Whether The Preliminary Injunction Will Properly Restore The Parties To The Status That Existed Prior To The Alleged Wrongful Act?

The element is not applicable because the defendant has not performed any unlawful act. It is the potential for the destruction of the tree that is plaintiffs' concern.

D. Whether The Plaintiffs Have Shown That Their Right to Relief Is Clear, The Wrong Is Manifest And They Are Likely To Prevail On The Merits?

In balancing the respective rights of the parties', the right of the defendant's exercise of its easement prevails over that of the plaintiffs. It is unlikely that the plaintiffs will prevail on the merits. (See "F", infra at 8)

E. Whether An Injunction Is Reasonably Suited To Abate The Offending Activity?

Balancing the respective rights, the plaintiffs have failed to show that restricting the defendant's rights under the easement is justified.

F. Whether Plaintiffs Have Demonstrated That An Injunction Would Not Adversely Affect The Public Interest?

It is clear that restricting the defendant's rights under the easement will affect the public interest of insuring utility service for approximately fourteen thousand citizens.

Based upon its review, this Court concludes that plaintiffs have failed to establish a right to injunctive relief. Although that is the only issue before this Court for disposition, that does not preclude the defendant from trimming the tree if it wishes to voluntarily accommodate plaintiffs' request that the tree not be removed at this time. (As a suggestion, the tree could be trimmed to anticipate two to three year's growth and be re-examined by defendant after that time.) As to the plaintiffs' argument that retardation chemicals be utilized, this creates a policing problem which places an unfair burden upon the utility to constantly monitor the growth of this tree. It also presents a dangerous precedent because the Court would be micromanaging the defendant's vegetation management policy and permit the plaintiffs and similarly situated individuals to dictate the specifics of the defendant's exercise of its rights under the easement.

IV. CONCLUSION

Based upon careful consideration, this Court finds that the plaintiffs have failed to establish their right to an injunction. In reaching its decision, this Court has balanced defendant's easement rights, the plaintiffs' right to the enjoyment of the tree, its aesthetic qualities, and the potential harm to 14,000 citizens who rely upon the electric power provided by defendant for heating, lighting, cooking, etc. Therefore

plaintiffs' request shall be denied and the defendant shall be able to proceed to effectuate its vegetation management program with respect to the red maple tree. This may include trimming or removal of the tree by the defendant.

ORDER

AND NOW, this 20th day of January 2009, for the reasons set forth in the accompanying opinion, it is hereby **ORDERED** that the plaintiffs' Request For Injunctive Relief is **DENIED**.

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

COMMONWEALTH OF PENNSYLVANIA

v.

DANIEL C. WYANT

POST-CONVICTION RELIEF ACT / TIMELINESS OF PETITION

The PCRA requires that any petition, including second or subsequent petitions, must be filed within one year after the judgement of sentence becomes final, unless the petitioner can prove that one of the three statutory exceptions apply.

POST-CONVICTION RELIEF ACT / TIMELINESS EXCEPTION

A defendant may pursue filing an otherwise untimely claim under the PCRA, if the right asserted is a constitutional right recognized by the U.S. Supreme Court or the PA Supreme Court after the normal PCRA time period and has been held to apply retroactively.

POST-CONVICTION RELIEF ACT / UNTIMELY PETITION

The defendant's claim based upon a newly recognized constitutional right does not satisfy the timeliness exception of the PCRA, since the newly recognized constitutional right, that defendant alleged, has not been held to apply retroactively.

POST-CONVICTION RELIEF ACT / TIMELINESS EXCEPTION

A defendant may pursue filing an otherwise untimely claim under the PCRA, if the facts that support his claim were unknown to him and he could not have uncovered them by exercising due diligence.

POST-CONVICTION RELIEF ACT / MERITS OF CLAIM

The defendant's conflict of interest claim is timely where he filed a PCRA petition within 60 days of discovering that the prosecutor had a romantic relationship with a paralegal working for the attorney representing the co-defendant. However, the claim must fail absent any evidence that confidential information was ever shared between the prosecutor and paralegal. Additionally the claim fails since any conflict that may have existed would have only affected the co-defendant, not petitioner.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA Nos. 249 and 307 of 1992

Appearances: Robert A. Sambroak, Jr., Esq., for the Commonwealth
Deanna L. Heasley, Esq., for the Defendant
Jessica A. Fiscus, Esq., for the Defendant

OPINION

Bozza, John A., J.

On May 14, 1992, the Petitioner, Daniel C. Wyant, along with his codefendant, Robert Grinnell, were found guilty by a jury of second

degree murder (felony murder),[1] robbery,[2] criminal conspiracy to commit robbery,[3] recklessly endangering another person,[4] terroristic threats,[5] and carrying a firearm without a license.[6] On June 22, 1992, the petitioner received the following sentence:

Docket No. 249 at Count I:	Criminal homicide – life in prison;
Docket No. 307 at Count I:	Robbery - five (5) to ten (10) years incarceration consecutive to Count I of Docket No. 249 of 1992;
At Count II:	Conspiracy – a consecutive term of five (5) to ten (10) years incarceration;
At Count III:	Recklessly Endangering Another Person – a consecutive term of one (1) to two (2) years incarceration;
At Count IV:	Terroristic Threats – a consecutive term of two (2) to five (5) years incarceration.

Following the imposition of sentence, the Petitioner filed a Motion for Reconsideration of Sentence on July 10, 1992, which was denied by way of Order on July 16, 1992. The Petitioner then filed his first Motion for Post Conviction Collateral Relief *pro se* on October 30, 1992, asking that the Court reinstate his appellate rights *nunc pro tunc* due to trial counsel's ineffectiveness in failing to file a requested direct appeal. The Court held an evidentiary hearing on the matter and granted Mr. Wyant's request to appeal *nunc pro tunc* on March 16, 1993. On March 19, 1993, the Petitioner filed a Notice of Appeal *nunc pro tunc*, but the Superior Court affirmed his judgment of sentence on all counts except robbery, which was vacated due to merger. Subsequently, Mr. Wyant filed a petition for allowance of appeal in the Supreme Court, but the Court denied this petition on September 9, 1994.

On January 31, 1996, Mr. Wyant filed another *pro se* PCRA petition, which was denied by way of Order on October 16, 1996. A Notice of Appeal was filed on October 25, 1996, and the Superior Court affirmed the PCRA court's denial on April 23, 1997. The Petitioner filed another petition for allowance of appeal with the Supreme Court on June 9, 1997, which was ultimately denied by the Court on March 31, 1998. Mr. Wyant also filed a *pro se* petition for writ of habeas corpus in federal district court on February 24, 1999, which was denied on January 18,

[1] 18 Pa. C.S. § 2502(b).

[2] 18 Pa. C.S. § 3701.

[3] 18 Pa. C.S. § 903.

[4] 18 Pa. C.S. § 2705.

[5] 18 Pa. C.S. § 2706.

[6] 18 Pa. C.S. § 6106.

2002, and thereafter filed a *pro se* notice of appeal in the U.S. Circuit Court of Appeals for the Third Circuit on April 4, 2002, but the Court of Appeals dismissed this appeal on December 13, 2002, due to a failure to file the appeal in a timely fashion.

Mr. Wyant filed the instant PCRA on December 16, 2008, wherein he argues that he is entitled to a new trial for two reasons: (1) a violation of the confrontation clause occurred when his codefendant's statements were read into evidence during the trial; and (2) that a conflict of interest existed due to the non-disclosure of a romantic relationship between the trial prosecutor, James K. Vogel, and the paralegal of his codefendant's attorney, Deborah Bostaph. In addition, the Petitioner asserts that these claims satisfy exceptions to the time bar restrictions of the Post-Conviction Relief Act.

Because on its face it appears that his PCRA is not timely, Mr. Wyant, in support of his confrontation clause claim, asserts that the after-recognized constitutional right and the unknown facts exceptions apply, and that these claims were brought within sixty (60) days of his learning of the United States Supreme Court's decision in *Danforth v. Minnesota*, 128 S. Ct. 1029 (2008)[7]. In support of his conflict of interest claim, the Petitioner argues that the governmental interference exception and the unknown facts exception to the time-bar apply, and that he brought this claim within sixty (60) days of learning that the relationship existed.[8]

The Court held a hearing on the petition on April 2, 2009, and the Petitioner, through PCRA counsel, filed an amended petition. The amended petition added a governmental interference exception to the time-bar issue on the Petitioner's confrontation clause claim. In addition, the amended petition asserts that a miscarriage of justice occurred that no civilized society could tolerate.

Facts

The facts of this case stem from a shooting that occurred during the early morning hours of December 10, 1991, in the area of 13th and Sassafras Streets in the city of Erie, and at the time of trial were largely not in dispute.[9] Several hours before the shooting of Donald Kremer, the Petitioner obtained a Valor .25 caliber semi-automatic pistol that he planned to sell to another man.[10] He then went to his mother's house,

[7] The petitioner avers that although the decision in *Danforth* was issued on February 20, 2008, he was not provided with access to this decision at the State Correctional Institute at Albion until December 10, 2008.

[8] Mr. Grinnell filed his own Post Conviction Relief Act petition on April 18, 2008. Mr. Grinnell's petition raised the same claims that Mr. Wyant is raising in the instant petition. This Court partially granted Mr. Grinnell's petition because the Commonwealth conceded the validity of the defendant's position.

[9] Jury Trial Transcript, May 13, 1992, pg. 90.

[10] *Id.* at 13-14, 89.

where Robert Grinnell, his co-conspirator, was waiting for him.[11] The two men set out on foot toward the area of 14th Street in Erie, where they met a boy they knew named J.J., who told the two men that he had been in the area "yanking people," which meant that he was robbing them.[12] Shortly thereafter, the victim pulled up in his car alongside the men on 14th Street and motioned for one of them to come over to his car window.[13]

Mr. Wyant stated that the three individuals agreed that he would be the only person to enter Mr. Kremer's car.[14] They planned to have Mr. Wyant act as a "decoy" in order to lure Mr. Kremer to an area near the train station, where all three would then "overpower him and take the money and…split it three ways."[15] Mr. Wyant then entered Mr. Kremer's car and instructed him to drive towards the train station, while the other two individuals headed towards that same area on foot.[16]

Mr. Kremer drove his car to the area designated by the Petitioner, and put the car in park with the motor running.[17] Mr. Wyant stated that Mr. Kremer then began making sexual advances towards him, but he resisted.[18] A struggle ensued between the two men, and Mr. Wyant attempted to exit through the passenger side door.[19] Both men then noticed Mr. Grinnell and J.J. approaching the car.[20] At that moment, Mr. Kremer put the gearshift in drive and the car began to move.[21] Mr. Wyant then pulled out the .25 caliber pistol, pointed it at Mr. Kremer's head, and threatened to shoot.[22] However, the struggle continued, and the Petitioner fired the gun at Mr. Kremer.[23] Mr. Wyant then jumped out of the car, met up with Mr. Grinnell and J.J., and all three individuals ran away from the scene.[24]

Mr. Kremer's car continued heading down 13th Street, where it eventually smashed into a pole.[25] When paramedics arrived at the scene they attempted to revive Mr. Kremer by performing CPR and delivering oxygen, but he was pronounced dead shortly thereafter.[26] Two autopsies were performed, and a forensic pathologist testified that the victim died from a gunshot wound to the chest.[27] At trial, a ballistics expert testified that both the bullet found lodged inside Mr. Kremer and the shell casing found inside Mr. Kremer's car matched the weapon used by

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[11] *Id.* at 89.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 89-90.

[15] *Id.* at 90-92.

[16] *Id.*

[17] *Id.* at 90.

[18] *Id.*

continued on page 181

the Petitioner.[28] This expert also testified that the muzzle of the gun was pointed between three and twelve inches away from Mr. Kremer when it was fired.[29]

Police eventually apprehended both Mr. Wyant and Mr. Grinnell several hours after the shooting. After receiving their *Miranda* warnings and being apprised of their constitutional rights, both men waived these rights and agreed to provide investigators with written and videotaped statements regarding their involvement in the crime.

The cases against the Petitioner and Mr. Grinnell were consolidated for trial. The Court appointed Attorney John Moore to represent the Petitioner, and Attorney Elliott Segel to represent Mr. Grinnell. On February 28, 1992, Attorney Moore filed a motion to suppress the written and videotaped statements that Mr. Wyant made to police following his arrest. The Court denied the motion following a pretrial argument on April 7, 1992. Neither defendant filed a motion for severance.

During the trial Commonwealth witness Detective Sergeant William Turner read aloud to the jury the partially redacted written statements both men gave to the police upon apprehension.[30] The Commonwealth also played each defendant's videotaped statement for the jury. Before these statements were read into evidence, the Court gave a limiting instruction to the jury, which advised them that they must consider each statement only with regard to the liability of the defendant making the statement, and that they should not consider it as evidence against their codefendant. Although it was noted that each statement was redacted by the prosecutor, the names of the codefendants were mentioned many times in each of the defendant's statements as related to the jury. However, at no time did either defendant's attorney make an objection or raise any concern, and the issue was not addressed during the trial by

continued from page 180

[19] *Id.* at 90-91.

[20] *Id.* at 91.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] Jury Trial Transcript, May 12, 1992, pg. 47.

[26] *Id.* at 46-48.

[27] Jury Trial Transcript, May 13, 1992, pg. 31, 35.

[28] *Id.* at 65.

[29] *Id.*

[30] The trial transcript indicates that the prosecutor noted to the court that the matter of the codefendant's statements was addressed pre-trial and that he had redacted them apparently to the satisfaction of the parties.

the Court.

When Mr. Grinnell's statement was read, he discussed his involvement in the crime and he mentioned the Petitioner's name numerous times. Mr. Grinnell's statement mirrors the Petitioner's in many respects. He admits that the two of them went walking to the same area, that they met up with a boy they knew named J.J., who told them that he had been robbing people in the area, and that the group planned to rob Mr. Kremer.[31] He stated that the Petitioner got into the passenger seat of Mr. Kremer's car, and the car headed in the direction of 13th and Sassafras Streets.[32] He also stated that he and J.J. headed towards that area, that they saw Mr. Kremer's car start to pull away, and heard a gunshot.[33] He then saw Mr. Wyant jump out of the car and start running toward the train tracks.[34]

Mr. Grinnell's statement added a few details that were not mentioned by Mr. Wyant in his statements to the police. He stated that just before the robbery, he told the Petitioner that he "didn't want to use the gun, [he] wanted to use [his] hands."[35] He also stated that the Petitioner told him that he was "going to go out like a gangster" if the police came to arrest them, and that the two of them should "run away to Philadelphia together."[36]

At trial, the Commonwealth sought to convict the Petitioner of first-degree murder, which as applied to the facts of this case requires proof of a specific intent to kill another human being. 18 Pa. C.S.A. §§ 2501; 2502(a), (d). The Commonwealth argued that the Petitioner intentionally pulled out the gun on the victim, threatened to shoot him, and intentionally pulled the trigger. However, as previously mentioned, after considering all of the evidence in the case the jury rejected that argument and convicted both men of, among other things, second-degree murder, commonly referred to as felony murder.

Legal Analysis

I. Timeliness

As noted, on its face it appears that Mr. Wyant's PCRA petition is not timely. The PCRA requires that any petition, including second or subsequent petitions, must be filed within one year after the judgment of sentence becomes final, unless the petitioner can prove that one of three statutory exceptions listed in 42 Pa. C.S.A. § 9545(b)(1) apply.

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[31] *Id.* at 107.

[32] *Id.* at 107-08.

[33] *Id.* at 108.

[34] *Id.* at 108.

[35] *Id.* at 110-11.

[36] *Id.* at 109-10.

A petition raising any of the claims listed in § 9545(b)(1) must be filed within sixty (60) days of the date that the claim could have been raised. *Id.* at § 9545(b)(2). A petitioner has ninety (90) days to file a petition for writ of certiorari in the United States Supreme Court. U.S. Sup. Ct. R. 13. A judgment of sentence becomes final once direct review has concluded, "including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." *Id.* at § 9545(b)(3). Finally, these requirements are jurisdictional in nature, and courts do not have jurisdiction to issue relief unless the petitioner can plead and prove that one of the exceptions to the time bar listed in 42 Pa. C.S. § 9545(b)(1)(i) – (iii) applies. *Commonwealth v. Fahy,* 558 Pa. 313, 737 A.2d 214, 217 (1999). The Petitioner asserts that the claims raised in his petition satisfy the timeliness requirements of the PCRA.

In this case, the Supreme Court denied the Petitioner's petition for allowance of appeal on September 9, 1994; thus, the Petitioner's judgment of sentence became final on December 8, 1994. In order to be considered timely under the PCRA, a petition must have been filed no later than December 8, 1995. Since the instant petition was not filed until December 16, 2008, this petition is untimely on its face. Thus, the petitioner asserts that the claims raised in his petition satisfy the timeliness exceptions of the PCRA.

A. After-Recognized Constitutional Right Exception - Confrontation Clause Claim

For his confrontation clause claim, the Petitioner argues that the U.S. Supreme Court's decisions in *Crawford v. Washington,* 541 U.S. 36 (2004), and *Danforth v. Minnesota,* 128 S. Ct. 1029 (2008), created a new constitutional right enabling him to retroactively challenge his conviction based upon the introduction of Mr. Grinnell's written and videotaped statements at trial. In *Crawford,* the defendant was on trial for assault and attempted murder. 541 U.S. at 38. During trial, the State played to the jury the recorded statements that the defendant's wife made to police interrogators, which tended to negate her husband's self-defense claim. *Id.* This statement was not subject to cross-examination at the time it was taken, and the wife did not testify at trial because of the state of Washington's marital privilege claim, which prevents one spouse from testifying against her spouse without the consent of that spouse. *Id.* at 40. The Court found that the introduction of the statements made by the defendant's wife violated the defendant's Sixth Amendment right to be confronted by the witnesses against him. *Id.* at 68. The Court issued a new rule, stating that testimonial statements of unavailable witnesses cannot be introduced at trial unless that witness was subject to cross-examination. *Id.* The Court did not define what statements are testimonial, but added that the term "applies at a minimum to …

[statements made during] police interrogations." *Id.*

In *Danforth*, the Court dealt with the applicability of *Crawford* in state court proceedings and whether a new rule of criminal procedure can be applied retroactively to cases that involved violations of a constitutional right before the announcement of that right. 128 S. Ct. at 1035. The Court held that States are free to provide retroactive relief to criminal defendants who challenge their state convictions based on new rules of criminal procedure. *Id.* at 1046. *Danforth* was decided in February 2008, and the Petitioner did not file his PCRA until December 2008, which falls outside of the sixty-day period to invoke the after-recognized constitutional right exception. However, the Petitioner also asserts that the unknown facts exception and the governmental inference exception apply because he was not provided with access to the *Danforth* decision at the State Correctional Institute at Albion, where he has been confined, until December 2008. At his PCRA hearing, the petitioner presented evidence indicating that a copy of the *Danforth* decision did not reach the prison library at Albion until that time.

The Petitioner essentially argues that *Danforth* gives him the opportunity to retroactively challenge his conviction on the ground that a new confrontation clause right under *Crawford* was violated when Mr. Grinnell's statements were played and read to the jury because these statements directly named or otherwise made reference to him, implicating his involvement in the killing of Donald Kremer.

The constitutional right exception to the time limitations for filing a PCRA provides that a defendant may pursue an otherwise untimely claim if:

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

§ 9545(b)(1)(iii). The threshold question then is whether the rule announced by the Supreme Court in *Crawford* involved a "constitutional right that was recognized…" after December 8, 1995, the last day a PCRA petition could have been filed by Mr. Wyant.

At the time of the Petitioner's trial, the rule concerning the use of a codefendant's statements in a joint criminal trial was governed by the holdings of *Bruton v. United States*, 391 U.S. 123 (1968), and *Richardson v. Marsh*, 481 U.S. 200 (1987). In *Bruton*, the Supreme Court held that a defendant's Sixth Amendment right to confrontation was violated when his nontestifying codefendant's confession naming and incriminating the defendant was played for the jury. *Bruton*, 391 U.S. at 137. The Court further held that such a violation could not be cured by a judge's limiting instruction to the jury to ignore references to the defendant made by the codefendant. *Id.*

In *Richardson*, the Court narrowed the scope of *Bruton* in holding that there is no confrontation clause violation by the admission of a nontestifying codefendant's confession where (1) "the [codefendant's] confession is redacted to eliminate not only the defendant's name, but any reference to [the defendant's] existence," and (2) the jury is given a proper limiting instruction not to use the codefendant's confession against the defendant. *Richardson*, 481 U.S. at 211. The Court distinguished the redacted confession in that case with the confession in *Bruton*, which "expressly implicated" the defendant by referring to him by name. *Id.* at 208.

Additionally, Pennsylvania law at the time of the Petitioner's trial made clear that redaction was the accepted method of admitting codefendants' statements in a joint criminal trial. "The confession of a co-defendant is admissible if it can be edited so that it retains its narrative integrity and yet in no way refers to the other defendant." *Commonwealth v. Chester,* 526 Pa. 578, 596, 587 A.2d 1367, 1376 (1991) (citing *Commonwealth v. Johnson*, 474 Pa. 410, 412, 378 A.2d 859, 860 (1977)).

As previously mentioned, the written and videotaped statements of Mr. Grinnell were apparently introduced in some manner of redacted form. However, it is apparent from the record relied on by the parties in this proceeding that the statements presented to the jury included many references to Mr. Wyant. Mr. Wyant's counsel, Attorney John Moore, did not object to the introduction of the statements at any time during the proceeding, nor was this issue raised in any other post-trial proceeding. By implication, Mr. Wyant now asserts that while at the time of the trial the introduction of the inadequately redacted statements was proper, the advent of *Crawford* now dictates a different result and should be made retroactive. This position is incorrect.

The law announced in *Crawford* did not change the law that existed at the time of Daniel Wyant's trial. The law in 1991 as it applied to the introduction of codefendant statements was well developed. *Bruton* and *Richardson* precisely held that a defendant's rights under the confrontation clause of the Sixth Amendment were violated if a nontestifying codefendant's confession directly naming and implicating the defendant was introduced in a joint trial. *Bruton*, 391 U.S. at 137; *Richardson*, 481 U.S. at 211. A rule providing that redaction of the provisions of a statement identifying or making references to the codefendant could be sufficient to avoid a confrontation clause problem was also firmly in place and recognized in Pennsylvania. *Chester*, 526 Pa. at 596. Nothing announced by the Court in *Crawford* changed or expanded these rules.

In *Crawford*, the issue before the Court was whether to allow into evidence the statements of a nontestifying *witness*; not a co-defendant. The witness in *Crawford* was the defendant's wife, who was not a

codefendant. Her statement directly implicated her husband and there was no effort to redact it. It was, in fact, introduced for the explicit purpose of implicating the defendant. Pre-*Crawford* case law permitted such statements to be admitted if the witness was unavailable and the statement bore an "adequate indicia of reliability," meaning that the evidence fell within a "firmly rooted hearsay exception," or contained "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). Here, there was no rule, whether as an exception to the hearsay rule or otherwise, that would have allowed Mr. Grinnell's statement to have been introduced in his joint trial with Mr. Wyant unless it had been sufficiently redacted to avoid any reference to his codefendant. However, in a sufficiently redacted form the statement would avoid a confrontation clause problem because it would implicate only the speaker, who would not in such a circumstance be a witness against the co-defendant. *See Richardson*, 481 U.S. at 211.

Recently, in *Commonwealth v. Brown*, 592 Pa. 376, 925 A.2d 147 (2007), the Pennsylvania Supreme Court had its first opportunity to address the merits of a case involving redacted confessions following the *Crawford* decision.[37] In *Brown*, the Commonwealth introduced the redacted confessions that a codefendant made to police. *Id.* at 383. The redacted statements contained no references to the defendant, whose name was replaced with neutral phrases. *Id.* The Court also gave a limiting instruction to the jury before the statements were introduced. *Id.* at 384. However, during closing argument the prosecutor referred to the defendant directly by name as the person mentioned in the statement, and defense counsel made an objection for a mistrial. *Id.* at 385-86.

Although it is not known whether any of the parties raised the holding in *Crawford*, what is most instructive is the Courts' very precise re-iterance of the holding in *Bruton*, indicating that unredacted codefendant's statements are inadmissible in a joint trial even with a limiting instruction from the court. The Court made no mention of a new constitutional rule that would have been applicable to the facts of the case, and decided the issue before it against the defendant directly on the basis of *Bruton.*

In addition, the Petitioner has failed to show that the second part of the constitutional right test has been met: namely, that the rule announced in *Crawford* was held to apply retroactively. The Court is not aware of any such decision, and the petitioner cites no case law from either the U.S. Supreme Court or the Pennsylvania Supreme Court that grants retroactive application of the *Crawford* rule. The Court in *Danforth* did

[37] The U.S. Supreme Court announced the decision in *Crawford* in March 2004, and the trial in *Brown* appears to have been conducted in June 2002. It is not known whether the holding in *Crawford* was presented to the Court for consideration in any post-trial or appellate proceeding in the *Brown* case.

not make the holding in Crawford retroactive but rather gave the states the option of doing so. Thus, this claim cannot be considered timely on these grounds as well.

Since no new constitutional rule was announced in *Crawford* that would have expanded Mr. Wyant's right to confrontation at the time of his trial, the exception to the PCRA's time limitations he relies on is inapplicable and his petition is not timely.[38] However, for purposes of judicial economy, this Court has addressed the merits of his position below in section II, and finds that even if it would have been considered timely it is in error.

B. Unknown Facts Exception - Conflict of Interest Claim

The Petitioner argues that the "unknown facts" exception contained in 42 Pa. C.S.A. § 9545(b)(1) of the PCRA applies to the conflict of interest claim contained in his petition. In order to show this exception applies, the Petitioner is required to plead and prove that (1) the facts that support his claim were unknown to him, and (2) that he could not have uncovered them by exercising due diligence. *Commonwealth v. Bennett*, 593 Pa. 382, 400, 930 A.2d 1264, 1273 (2007). Evaluating whether this exception applies does not require "any merits analysis of the underlying claim." *Id.* at 395, 930 A.2d at 1271.

The essence of the Petitioner's conflict of interest claim concerns the secret romantic relationship that existed at the time of his trial between Assistant District Attorney Vogel and a defense paralegal, Deborah Bostaph. Mr. Wyant argues that this relationship presented a conflict of interest at trial because Ms. Bostaph may have been privy to confidential information that passed between Attorney Segel and Mr. Grinnell, the Petitioner's codefendant, and that she may have informed Attorney Vogel of such information. Mr. Wyant asserts that neither he nor his attorney knew that this relationship existed at the time of trial, and that he did not learn of the relationship until late-November 2008.[39] He also argues that this information could not have been ascertained by the exercise of due diligence because no circumstances existed to put him on notice of the relationship.

While the merits of this claim will be addressed further in this Opinion, the Court finds that the Petitioner has sufficiently plead that he has satisfied the timeliness aspect of this claim. There is nothing in the record to suggest that Mr. Wyant knew or should have known that this relationship existed at an earlier point in time. He asserts that

[38] The Petitioner has not suggested that his counsel was ineffective for failing to object to the introduction of the statement at issue.

[39] Attorney Moore testified that he did not know about the relationship until the couple was married on October 10, 1992, which was approximately five (5) months after the conclusion of the Petitioner's jury trial. Mr. Moore did not represent the Petitioner at that time. Petitioner's Amended Petition, Exhibit 1.

he did not learn of the relationship until late-November 2008, and he filed the instant petition on December 16, 2008, which is well within the sixty (60) day period to file his petition. Thus, the Petitioner has met his burden with regard to proving that the "unknown facts" exception to the time bar applies to his conflict of interest claim.

The Petitioner also asserts that the governmental interference exception contained in § 9545(b)(1)(i) applies to his conflict of interest claim. However, because the Court finds that Mr. Wyant has satisfied one of the exceptions contained in § 9545(b)(1), it will not address whether the governmental interference exception has been met for this claim.

Nevertheless, assuming that each claim contained in this petition would be considered timely under the exceptions listed in § 9545(b)(1), the Petitioner has failed to assert that he is entitled to relief under the PCRA for the following reasons listed below.

II. Merits of the Petitioner's Confrontation Clause Claim

Although the Court holds that the Petitioner's confrontation clause claim does not satisfy the timeliness requirements of the PCRA, given that this case has been ongoing for a long period of time and in the interest of bringing the issues before the court to final resolution as expediently as possible, the Court will nonetheless address the merits of the underlying issue.

The Petitioner argues that a violation of the Confrontation Clause occurred when Mr. Grinnell's statements were admitted into evidence because they were not sufficiently redacted to remove all references to Mr. Wyant by name. As the Court noted above, the *Crawford* Court held that in order for testimonial statements to be introduced into evidence at trial, the declarant must be unavailable and the statements must have been subject to cross-examination. 541 U.S. at 68. Testimonial statements include statements elicited during police interrogations. *Id.* In addition, the Court in *Danforth* held that criminal defendants may seek retroactive relief in state court when they allege that a new rule of constitutional law was violated prior to the establishment of that rule. 1029 S. Ct. at 1047.

In this case, the statements of Mr. Grinnell that were admitted at trial were testimonial because they occurred during police interrogation. The Petitioner argues that his confrontation clause rights under the Sixth Amendment were violated by the admission of these statements because Mr. Grinnell mentioned the Petitioner's name numerous times and further implicated the Petitioner in the killing of Mr. Kremer. As mentioned above, although these statements were supposed to appear in their redacted form at trial, the Petitioner's name still appeared many times. At one point in the written statement, Mr. Grinnell says that he told Mr. Wyant that he didn't want to use the gun to complete the robbery,

and that he only wanted "to use his hands."[40] Additionally, Mr. Grinnell was never cross-examined by the Petitioner concerning the assertions he made in those statements. Thus, Mr. Wyant argues that a violation of *Crawford* appears on its face. He also asserts that *Danforth* gives him the ability to challenge his conviction under the announcement of the rule established in Crawford, since the Supreme Court did not issue the *Crawford* decision until 2004, which was twelve years after Mr. Wyant's trial.

However, assuming that a violation of *Crawford* did occur, the mere admission of Mr. Grinnell's redacted statements does not entitle the Petitioner to a new trial if this error was harmless. *See Commonwealth v. Uderra*, 550 Pa. 389, 399, 706 A.2d 334, 339 (1998) ("In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.") In *Commonwealth v. Markman*, 591 Pa. 249, 916 A.2d 586 (2007), the Pennsylvania Supreme Court stated that an error will be deemed harmless if it meets any of the following criteria:

(1) the error did not prejudice the defendant or the prejudice was de minimus;…

(2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or

(3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict."

Id. at 278, 916 A.2d at 603. In addition, the Commonwealth has the burden of proving harmlessness beyond a reasonable doubt. *Id.* Upon consideration of the evidence that exists in the record, and the arguments put forth by the parties in their briefs, this Court is satisfied that the Commonwealth has met its burden, and thus, the error of admitting the statements of Mr. Grinnell was harmless.

The admittance of Mr. Grinnell's statement was cumulative of other properly admitted evidence that was substantially similar to the erroneously admitted evidence, and the prejudicial effect of admitting Mr. Grinnell's statement was de minimis. As the Commonwealth correctly points out, there are no major inconsistencies in the statements of Mr. Grinnell and Mr. Wyant in the events leading up to the shooting. Both men stated that they arrived in the area of 14th and State Street

[40] Jury Trial Transcript, May 13, 1992, pp. 110-11.

to meet J.J., and that J.J. told them that he had been robbing people in the area. Both also stated that they planned on robbing somebody in the vicinity immediately before Mr. Kremer's car pulled up near them, and that Mr. Kremer became the intended target. In fact, Mr. Wyant readily admitted that "[he] was the decoy and Rob and J.J. were going to overpower him and take the money and we were going to split it three ways."[41] Both men also said that Mr. Wyant was the only person who entered the victim's car, and that their plan was to lure the victim to an area near the train tracks in order to effectuate the robbery. When Mr. Kremer's car headed in that direction, both men stated that Mr. Grinnell and J.J. made their way over to the planned meeting area on foot. The only other portion not mentioned in Mr. Grinnell's statement was what transpired in the car between Mr. Wyant and the victim. However, Mr. Wyant admitted that he pulled out the gun and pointed it at Mr. Kremer, threatened to shoot him, and the gun was fired.

It is important to note that the jury chose not to find the Petitioner guilty of first degree murder, but instead found that he was guilty of second degree felony murder. 18 Pa. C.S.A. § 2502(b). The evidence presented at trial was sufficient to find that the jury could have believed that the killing had occurred during the commission of the felony of robbery. At the time of Mr. Wyant's trial, a person could be found guilty of robbery if he committed it during the course of committing a theft, which includes an attempt to commit a theft. 18 Pa. C.S.A. § 3701(a), (b). A person is guilty of attempt when, with the specific intent to commit a crime, he performs an act constituting a substantial step toward the commission of that crime. 18 Pa. C.S.A. § 901(a). Here, the Petitioner's own statement reveals that the group planned to commit a robbery on Mr. Kremer. That plan included luring the victim to a designated area by using the Petitioner as a decoy, and having the other two individuals sneak up on Mr. Kremer to complete the robbery. Both of these acts occurred, and both constitute substantial steps toward the commission of the crime of robbery.

In addition, the properly admitted evidence in this case was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the guilty verdict. Besides the Petitioner's own confession that the robbery had been planned, there is overwhelming evidence to support a second degree felony murder conviction. Jamie Prescott, the individual who the Petitioner was supposed to sell the gun to, testified that he saw the Petitioner with the gun on the day before the shooting.[42] Two autopsies revealed that Mr. Kremer died of a gunshot wound to the heart. The

[41] Jury Trial Transcript, May 13, 1992, pg. 92.

[42] Jury Trial Transcript, May 13, 1992, pp. 14-15.

bullet found inside Mr. Kremer, as well as a shell casing found inside his vehicle, matched the .25 caliber pistol that Mr. Wyant intended to sell to Mr. Prescott, which was the same gun he used during the robbery. Ballistics tests revealed that the muzzle of the pistol was between three and twelve inches away from Mr. Kremer when the gun was fired. Mr. Wyant also admitted that he pulled out the weapon and pointed it at Mr. Kremer just before the gun was fired.

The Petitioner further implicated himself by showing investigators where the car was parked, where the shot was fired, and the wooded area where he threw his clothes during flight after the shooting.[43] While he lied to investigators at first about where the gun was located, he confessed shortly thereafter that it was "wrapped in a shirt placed on the back steps" where his girlfriend lived.[44] When police arrived at that location, they recovered the weapon.[45]

The Petitioner contends that Mr. Grinnell's statements were self-serving in that they were used to make it appear as if Mr. Wyant obtained the gun for the purpose of orchestrating the robbery. However, the Petitioner does not address the fact that in both his written and videotaped statements, he readily admitted to planning a robbery with the other members of the group. The crime of robbery does not require use of a weapon; it merely requires the use of force, or threat of the use of force. Here, even assuming that the Petitioner did not intend to use the gun during the robbery, his own statement verified that the group still conspired to take the victim's property by using some type of force.[46]

Furthermore, the opening and closing remarks by the defense attorneys in this case indicate that both defendants conceded that certain events took place, and the facts were largely undisputed. The prime concern from Mr. Wyant's perspective appeared to be negating the allegation that he had the intent to kill Mr. Kremer. None of Mr. Grinnell's statements contradicted this position, and thus, any error in admitting these statements was harmless.

Even if Mr. Grinnell's statements were erroneously admitted, such admission was de minimis and merely cumulative of the other untainted evidence used to convict the Petitioner. Mr. Wyant's own statement regarding the planned robbery of the victim would have been sufficient to establish a second degree murder conviction in this case. Thus, this Court finds that the Commonwealth has met it's burden of proof

[43] *Id.* at 93-94.

[44] *Id.* at 97.

[45] *Id.*

[46] It is also worth pointing out once again that when the codefendants' statements were introduced, neither attorney objected, even though both codefendants clearly identified the other codefendant by name in their respective statements. Although it is not entirely clear why neither attorney objected, the statements largely mirror each other in detail and form.

in establishing that the admission of the illegally tainted evidence was harmless error, and the Petitioner is not entitled to a new trial based on his Confrontation Clause claim.

III. Conflict of Interest

The Petitioner also argues that a conflict of interest occurred at trial due to the undisclosed romantic relationship involving the trial prosecutor, Assistant District Attorney Vogel, and Attorney Segel's paralegal, Deborah Bostaph. Mr. Wyant asserts that these two individuals were living together at the time of trial, and they did not disclose to the Court or the two defendants that this relationship existed. As such, the Petitioner claims that this nondisclosure justifies awarding him a new trial.

The Petitioner cites *Commonwealth v. Wisor,* 902 A.2d 1245 (Pa. Super. 2006) for the proposition that where an "actual conflict of interest affecting the prosecutor exists in the case," the prosecution is barred from proceeding. *Id.* at 1247. "Under such circumstances a defendant need not prove actual prejudice in order to require that the conflict be removed." *Id.* He cites Rule 1.9 of the Rules of Professional Conduct, which prohibits lawyers from participating in cases involving actual or perceived conflicts of interest where privileged information could pass during the course of their representation. He also cites Rule 3.8 in asserting that as a prosecutor, Attorney Vogel had a heightened duty of responsibility to ensure that a defendant "is accorded procedural justice." *Id.*

Whatever professional duty Attorney Vogel may have violated, Mr. Wyant has failed to assert that any privileged information passed between Attorney Vogel and Ms. Bostaph. Instead, he claims that he finds it "incredibly difficult [for the couple] not to discuss the trial."[47] Despite this belief, there is no direct evidence that confidential information was passed between them. This assertion amounts to nothing more than pure speculation by the Petitioner. Furthermore, it is important to note that Ms. Bostaph was employed by Attorney Segel, who represented Mr. Grinnell at trial, not Mr. Wyant. Any conflict that existed would have only affected the representation of Mr. Grinnell, since both defendants had separate trial counsel who employed separate trial strategies. Therefore, without any evidence suggesting that confidential information was passed along to the trial prosecutor through Ms. Bostaph, the Court finds that the Petitioner is not entitled to a new trial based on his conflict of interest claim.

IV. Miscarriage of Justice

Finally, in his amended petition the Petitioner has added a claim that a miscarriage of justice occurred due to violations of the state and federal

[47] Petitioner's Brief in Support of Amended Petition for Post-Conviction Collateral Relief, pg. 45.

right to confront witnesses, and the trial prosecutor's failure to disclose his romantic relationship with a defense paralegal. The Petitioner has added this claim due to the Pennsylvania Superior Court's holding in *Commonwealth v. Burkhardt*, 833 A.2d 233, 236 (Pa. Super. 2003), which states that second or subsequent petitions for relief under the PCRA will not be reviewed absent a strong prima facie showing that a miscarriage of justice occurred.

In the alternative, the Petitioner claims that this requirement should no longer apply because such a requirement is not listed in the language of the PCRA, and the Supreme Court's displeasure with Superior Court for adding such language to the Act, as addressed in *Commonwealth v. Bennett*, 593 Pa. 382, 930 A.2d 1264 (2007). Because the Court has already sufficiently explained why the instant petition does not give the Petitioner the right to a new trial, and it would be redundant to list these reasons again. Thus, the Court does not offer an explanation as to this claim.

V. Conclusion

Since the Petitioner has failed to assert that he is entitled to a new trial based on the claims that he has raised in his petition, for the reasons set forth above, the petition is hereby **DENIED.**

ORDER

AND NOW, to-wit, this 11th day of August, 2009, upon consideration of the Petition for Post Conviction Collateral Relief filed by the defendant, Daniel C. Wyant, the briefs of the Petitioner and the Commonwealth, and following a hearing thereon, it is hereby **ORDERED, ADJUDGED and DECREED** that said petition is **DENIED.**

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

CLYDE E. KENDALL, JR., JANICE E. KENDALL, and KENDALL AUTO PARTS, INCORPORATED, Plaintiffs,

v.

NORTHWEST SAVINGS BANK, Defendant

PLEADING / PRELIMINARY OBJECTIONS

Preliminary objections should be sustained only in cases that are clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish his right to relief. The court should consider as true all of the well-pled material facts set forth in the pleading of the nonmoving party, as well as all reasonable inferences that may be drawn from those facts to determine whether the preliminary objections should be sustained.

CONTRACTS / PRIVITY

It is a general rule of law in Pennsylvania that where several instruments are made part of one transaction through reference and/or incorporation, they will be jointly read, construed as one instrument, and interpreted as a whole and together. A court must look at all instruments made part of a single transaction before finding privity fails to exist between parties.

DAMAGES / PLEADING

Pleading damages in a lump sum does not violate Civil Rule 1019(f) where pleading contains sufficient information with which defendant may prepare its defense. Defendant may avail itself of the Pennsylvania Rules of Civil Procedure regarding discovery if it wishes to obtain itemized damages not contained in the complaint.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 14599-2008

Appearances: Christopher J. Sinnott, Esq., Attorney for Plaintiffs
Kurt L. Sundberg, Esq., Attorney for Defendant

OPINION

Connelly, J., April 8, 2009

This matter is before the Court of Common Pleas of Erie County, Pennsylvania (hereinafter "the Court"), pursuant to Preliminary Objections filed by Northwest Savings Bank (hereinafter "Defendant") in response to an Amended Complaint filed by Clyde E. Kendall, Jr.; Janice E. Kendall (hereinafter "Plaintiff Clyde Kendall" and "Plaintiff Janice Kendall," respectively; "Plaintiffs Kendall" when referred to collectively); and Kendall Auto Parts, Incorporated (hereinafter "Plaintiff Kendall Auto," "Plaintiffs" when referred to collectively with Plaintiffs Kendall).

Procedural History

Plaintiffs filed a Complaint on September 22, 2008. *Complaint, ¶¶ 1-44.*

Defendant filed its first set of Preliminary Objections along with a Brief in Support thereof on October 7, 2008. *Defendant's Preliminary Objections, ¶¶ 1-22; Defendant's Brief in Support of Preliminary Objections, pp. 1-6.* Responding to Defendant's first set of Preliminary Objections, Plaintiffs filed an Amended Complaint on October 23, 2008. *Amended Complaint, ¶¶ 1-41.* Defendant, in turn, filed Preliminary Objections to Count II of Plaintiffs' Amended Complaint and a Brief in Support thereof on January 30, 2009. *Defendant's Preliminary Objections to Amended Complaint, ¶¶ 1-22; Defendant's Brief in Support of Preliminary Objections to Amended Complaint, pp. 1-5.* Plaintiffs filed their Brief in Opposition to Defendant's second set of Preliminary Objections on February 13, 2009. *Brief in Opposition to Preliminary Objections, pp. 1-5.*

Statement of Facts

Plaintiffs Kendall entered into a construction agreement with L.C. Renninger Company, Inc., for construction of a 47,836 square foot metal building (hereinafter "Project") to be located at 1561 East Twelfth Street, Erie, Pennsylvania (hereinafter "Subject Property"), for a cost of $1,340,900.00. *Amended Complaint ¶ 9, Ex. B.* To finance the Project, Plaintiffs Kendall entered into a Construction Loan Agreement with Defendant wherein Defendant would provide $1,100,000.00 for the Project in exchange for Plaintiffs' Kendall execution and delivery to Defendant of, *inter alia*, a Term Note, Mortgage, and Security Agreement (hereinafter "the Obligations" which also include the Construction Loan Agreement) on forms prepared by Defendant. *Id. at ¶¶ 10, 11, Ex. C.* In order to extend the financing addressed in the Construction Loan Agreement to Plaintiffs Kendall, Defendant required Plaintiff Kendall Auto to act as a corporate guarantor for obligation of payment and satisfaction of the Obligations. *Id. at Ex. E.* All of the Obligations were collectively entered into and signed on the December 31, 2003 (hereinafter "Date of Contract").

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,[1] and may be inconsistent.

[1] The grounds on which preliminary objections may be relied upon are limited to the following:

(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).

Pa.R.C.P. 1028(e),(b). Preliminary objections are to be filed within twenty (20) days after service of the preceding pleading. *Pa.R.C.P. 1026, 1017(a)(4).* The moving party, i.e., the objecting party, must also file a brief in support of their preliminary objections within thirty (30) days after the filing of their preliminary objections; likewise, 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 to the preliminary objections within thirty (30) days after service of the preliminary objections.[2] *Pa.R.C.P. 1028(c)(1); Erie L.R. 1028(c)(2).*

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).*

The Pennsylvania Supreme Court ruled preliminary objections "should be sustained only in cases that are clear and free from doubt . . . . [that] 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). The Court shall consider as true all of the well-pled material facts set forth in the pleading of the nonmoving party, as well as all reasonable inferences that may be drawn from those facts to determine whether the Preliminary Objections should be sustained. *See, Id.* In determining whether the 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 Plaintiffs and Defendant.

Defendant states Count II of Plaintiffs' Amended Complaint must be dismissed for lack of capacity to sue pursuant to Pennsylvania Rule

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[2] The Erie County Local Rules of Civil Procedure provide:

> If the brief of either the objecting 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).

of Civil Procedure (hereinafter "Civil Rule") 1028(a)(5) or, in the alternative, it must be stricken for failure of a pleading to conform to law or rule of court pursuant to Civil Rule 1028(a)(2), i.e., Civil Rule 1019(f).[3] *Defendant's Preliminary Objections to Amended Complaint, ¶¶ 1-22; Defendant's Brief in Support of Preliminary Objections to Amended Complaint, pp. 1-5.* Defendant argues that as Plaintiff Kendall Auto "does not plead [in the Amended Complaint] that there was any contract between [it] and [Defendant] that was breached . . . there is no privity of contract to allow Plaintiff Kendall Auto to maintain [its] action," and as such Plaintiff Kendall Auto lacks the capacity to sue Defendant. *Defendant's Brief in Support of Preliminary Objections to Amended Complaint, pp. 2-3.* In the alternative, Defendant also argues Count II of the Amended Complaint fails to conform to Civil Rule 1019(f) as Plaintiffs failed to specifically state their supposed special damages, but instead "arbitrarily plead in Count II a lump sum amount of damages allegedly constituting excess rent or lost profits." *Defendant's Brief in Support of Preliminary Objections to Amended Complaint, pp. 3-5.* Consequently, the specific issues before the Court are as follows: one, whether privity of contract exists between Plaintiff Kendall Auto and Defendant; and two, whether the lump sum amount of damages pled by Plaintiffs violates Civil Rule 1019(f).

I. WHETHER PRIVITY OF CONTRACT, WHICH ALLOWS PLAINTIFF KENDALL AUTO TO MAINTAIN ITS BREACH OF CONTRACT ACTION, EXISTS BETWEEN IT AND DEFENDANT

A plaintiff that is not a direct party to a contract and whose name does not appear thereon must establish existence of privity between it and defendant in order to allege its right to sue upon the contract at issue. *Fredericks v. Hamm,* 45 Pa.D.&C.2d 687, 689-90 (1968). However, lack of privity is not conclusively established merely by an indirect party's name failing to appear on one of several instruments involved in a single transaction. This is due to the fact that it is a general rule of law in Pennsylvania that where several instruments are made part of one transaction through reference and/or incorporation, they will be jointly read, construed as one instrument, and interpreted as a whole and together. *Shehadi v. Northeastern National Bank of Pennsylvania,* 378 A.2d 301, 306 (Pa. 1977); *Wilson v. Viking Corp.,* 3 A.2d 180, 182-83 (Pa. Super. 1938). Thus, when able, a court must look at all instruments made part of a single transaction before finding privity fails to exist between parties. *See, Id.*

[3] While Defendant never explicitly states its Preliminary Objection as to Count II of the Amended Complaint is based on Civil Rule 1028(a)(2), the Court has determined it must have been as Defendant's argument is centered on Plaintiffs' alleged non-conformity with Civil Rule 1019(f).

The Continuing Guaranty entered into between Defendant and Plaintiffs reads, in pertinent part, as follows:

> [Plaintiffs Kendall, are] on this date, borrowing money from [Defendant] and may from time to time hereafter desire to borrow additional moneys from [Defendant], such current and future borrowings to be evidence by notes and related documents to be executed and delivered by [Plaintiffs Kendall] to [Defendant]; and whereas, [Defendant] as a condition of extending credit to [Plaintiffs Kendall] as represented by the Obligations requires that [Plaintiff Kendall Auto] obligate [itself] unconditionally for the payment and satisfaction of the Obligations; and whereas, to induce [Defendant] to extend credit to [Plaintiffs Kendall] as represented by the Obligations, [Plaintiff Kendall Auto is] willing to guaranty the Obligations.
>
> . . . .
>
> Now, therefore, for good and valuable consideration and intending to be legally bound hereby, [Plaintiff Kendall Auto] agree[s] as follows . . . .

Amended Complaint, Ex. E. A reading of the Continuing Guaranty clearly reveals that Defendant required Plaintiff Kendall Auto to act as an indirect party regarding the Project's financing as a corporate guarantor. Furthermore, as the Continuing Guaranty references the Obligations and was entered into on the Date of Contract as well, the Court finds it to be one of several instruments made part of the transaction at issue. As Defendant itself established privity between it and Plaintiff Kendall Auto via the Continuing Guaranty (which is one of several instruments made part of the transaction at issue on the Date of Contract), the Court finds the required privity exists between Plaintiff Kendall Auto and Defendant for Plaintiff Kendall Auto to maintain its breach of contract action against Defendant.

II. WHETHER THE LUMP SUM AMOUNT OF DAMAGES PLED BY PLAINTIFFS VIOLATES CIVIL RULE 1019(f)

Defendant argues Plaintiffs' Amended Complaint is in violation of Civil Rule 1019(f)[4] as Plaintiffs "have arbitrarily pled in Count II a lump sum amount of damages allegedly constituting excess rent or lost profits," and therefore "must plead how the claim for lost profits was ascertained and calculated so that [Defendant] can adequately respond to the claim." *Defendant's Brief in Support of Preliminary Objections to*

[4] Civil Rule 1019(f) reads, "Averments of time, place, and Items of special damage shall be specifically stated." *Pa.R.C.P. 1019(f)*.

Amended Complaint, pp. 4-5.

The Pennsylvania Supreme Court has ultimately found that in matters surrounding the level of specificity in pleadings, the Court has broad discretion in determining the amount of detail that must be averred in a given pleading.[5] *United Refrigerator Co. v. Applebaum*, 189 A.2d 253, 254 (Pa. 1963). In lieu of preliminary objections, a party may avail itself of the Pennsylvania Rules of Civil Procedure regarding discovery at 4001 *et. seq.*, if it believes facts are required which were not contained, as desired, in a particular pleading. *Brandeis v. Kenny*, 31 Pa. D. & C. 2nd 347, 349 (C.P. Montgomery Co. 1963)(holding that if a party believes themselves unable from the pleadings alone to make adequate preparations for trial they may resort to the Pennsylvania Rules of Civil Procedure). As between the use of preliminary objections and/or discovery to obtain material facts as to a party's cause of action or defense, a court (using the broad discretion as defined in *United Refrigerator Co.*) may dismiss the preliminary objections if it believes discovery to be more practical than further pleadings. *Brandeis*, 31 Pa. D. & C. 2nd at 352.

While Plaintiffs' damages, as contained in the Amended Complaint, are displayed in a lump sum amount, this figure when read in conjunction with the rest of the Amended Complaint along with Plaintiffs' other pleadings, provide Defendant with enough information to begin preparation of its defense. *See, Yacoub v. Lehigh Medical Center, P.C.* 805 A.2d 579, 588 (Pa. Super. 2002)(holding courts may look not only to the particular paragraphs at issue, but also to those paragraphs in the content of the other allegations in the pleadings to determine if a paragraph contains the appropriate specificity); *Hock*, 69 D. & C. 2nd at 423. Therefore, the Court finds Civil Rule 1019(f) has not been violated as Plaintiffs' pleading contains sufficient information with which Defendant may prepare its defense in that the Amended Complaint's lump sum amount puts Defendant on notice of what causes of action Plaintiffs will pursue against it regarding the specific terms of the contract at issue. Defendant may avail itself of the Pennsylvania Rules of Civil Procedure regarding discovery if it wishes to obtain itemized damages not contained in the Amended Complaint.

[5] At the very least a pleading must be sufficiently clear to enable a party to prepare its defense against the opposing party. *Paz v. Commonwealth Dep't of Corrections*, 580 A.2d 452, 456 (Pa. Cmwlth. 1990). Additionally, the Court of Common Pleas of Columbia County, Pennsylvania, found "all averments of the complaint must be considered together and appraised in the light of the nature of the case. It is enough that, considering the complaint as a whole, it contains sufficient material facts to show the existence of a cause of action." *Hock v. L. B. Smith, Inc.*, 69 D. & C. 2nd 420, 423 (C.P. Columbia Co. 1974).

ORDER

AND NOW, TO-WIT, this 8th day of April, 2009, 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 are **OVERRULED.**

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

COMMONWEALTH OF PENNSYLVANIA,
By THOMAS W. CORBETT, JR., ATTORNEY GENERAL,
Petitioner,

v.

PARAGON PROMOTIONS, INC., Respondent

TRADE REGULATION / STATUTES AND REGULATIONS

The purpose of the Charities Act is to protect the citizens of Pennsylvania by requiring full public disclosure of the identity of persons who solicit contributions from the public, the purposes for which such contributions are solicited and the manner in which they are actually used. 10 P.S.§ 162.2.

TRADE REGULATION / STATUTES AND REGULATIONS

The Secretary of the Commonwealth can make or cause to be made an investigation of an applicant for registration under the Charities Act. 10 P.S.§ 162.4. The Attorney General may also investigate any person and issue subpoenas under the Charities Act. 10 P.S.§ 162.16.

TRADE REGULATION / STATUTES AND REGULATIONS

The Secretary of the Commonwealth can decide matters relating to the issuance, renewal, suspension or revocation of registrations and can take action to initiate any civil or criminal proceedings necessary to enforce the Charities Act. 10 P.S.§ 162.4.

TRADE REGULATION / STATUTES AND REGULATIONS

The Charities Act requires a charitable organization to keep true fiscal records as to its activities in Pennsylvania in a form which will enable the charity to accurately provide information under the Charities Act. The records shall be made available for inspection upon demand by the Secretary of the Commonwealth or the Attorney General. 10 P.S.§ 162.12.

TRADE REGULATION / STATUTES AND REGULATIONS

Under the Charities Act, a charitable organization may only solicit contributions for the charitable purpose expressed in its solicitation for contributions or the registration statement of the charitable organization and may only apply contributions in a manner substantially consistent with that purpose. 10 P.S.§ 162.13(a).

TRADE REGULATION / STATUTES AND REGULATIONS

Regulation under the Charities Act is done by full and transparent disclosure of records. Failure to provide full and transparent disclosure of financial and solicitation records in violation of an administrative subpoena and a Court Order compelling disclosure subjects the non compliant party to a maximum civil penalty of $5,000, attorneys fees incurred by the Commonwealth and an injunction prohibiting the charity from continuing its activities until it comes into full compliance of the subpoena and the Court Order.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 11358-2008

Appearances: Sandra Mackey Renwand, Esq., for Petitioner
Elliott J. Ehrenreich, Esq., for Respondent

OPINION

Connelly, J., April 3, 2009

This matter is before the Court pursuant to a Petition for Contempt and Civil Penalties filed by the Commonwealth of Pennsylvania (hereinafter "Petitioner"). Paragon Promotions, Inc. (hereinafter "Respondent") opposes. A hearing was held before this Court.

Statement of the Facts

Respondent is a registered charitable organization located in Erie County that has engaged in the solicitation of funds from citizens and businesses in Erie County. Petitioner began an investigation regarding Respondent's solicitation practices and charitable activities in October of 2006 after receiving complaints from Erie area residents and Erie law enforcement agencies. *Petitioner's Order to Compel Compliance, ¶¶ 4-5.* In order to determine if Respondent was complying with the Solicitation of Funds for Charitable Purposes Act (hereinafter "Charities Act") Petitioner served a demand letter on Respondent on November 13, 2006. *Id. at ¶ 9.* Petitioner argues that despite repeated attempts to obtain information Respondent failed to produce the requested information.[1] *Id, at ¶¶ 9-14.* In a final attempt to obtain the information, Petitioner served an administrative subpoena (hereinafter "the Subpoena") on Respondent on September 20, 2007.

The instant action was filed by Petitioner on March 18, 2008 after Respondent failed to comply with the Subpoena. *Id. at ¶ 15.* The Court issued an order dated April 14, 2008, directing Respondent to comply with the Subpoena within ten (10) days. *Order of Connelly, J.; April 14, 2008.* Respondent filed a Motion for Reconsideration with the Court on April 22, 2008 asking that the Court consider Respondent's pleading that had been timely filed on April 14, 2008. *Respondent's Motion for Reconsideration, ¶ 9.* The Court granted Respondent's Motion for Reconsideration on April 30, 2008 and rescinded its Order of April 14, 2008. *Order of Connelly, J., April 30, 2008.* The Court further ordered Respondent's compliance with the Subpoena within fourteen (14) days of the date of the Order. *Id.* The April 30, 2008 Order also mandated that Respondent pay all costs and expenses, including attorney fees,

[1] The only information Petitioner received in response to its demand letters was a three sentence letter from Respondent indicating when the solicitation campaign ran, the total revenue collected and a list of Respondent's employees. *Petitioner's Order to Compel Compliance, Exhibit C.*

incurred by Petitioner in connection with the Subpoena enforcement action. *Id.*

Respondent filed an appeal to this Court's Order with the Superior Court on April 13, 2008, which was docketed at 835 WDA 2008. The record was sent to the Superior Court on May 20, 2008. On June 6, 2008 Respondent filed a Motion with this Court asking for a Stay of the Order of April 30, 2008 pending appeal. *Respondent's Application for Stay of Order, p. 1.* Petitioner filed a Brief in Opposition to the Application for Stay of Order on June 16, 2008. *Petitioner's Brief in Opposition.* On June 27, 2008 this Court denied Respondent's Application for Stay of Order. *Order of Connelly, J., June 27, 2008.* Respondent then discontinued its appeal with the Superior Court on June 30, 2008.

On September 5, 2008, Petitioner filed a Petition for Contempt and Civil Penalties arguing that Respondent never produced the requested information and documents and was in general violation of the Charities Act. *Petition for Contempt and Civil Penalties.* Respondent filed an Answer to the Petition on September 18, 2008, asserting that it had complied with the Court's Order of June 16, 2008 and produced "full and complete information." *Respondent's Answer and New Matter.* On October 3, 2008, Petitioner filed a Reply to Respondent's New Matter noting that the Commonwealth did request documents in the Subpoena and Respondent, in direct violation of the law, intentionally withheld documents and information. *Petitioner's Reply to New Matter.* A hearing at which both parties presented argument was held before this Court on December 3, 2008.

The Court must decide these issues in light of the applicable Pennsylvania law.

Analysis of Law

The Charities Act, *10 P.S. §§ 162.1-162.23*, first promulgated in 1990, was intended to

> protect the citizens of this Commonwealth by requiring full public disclosure of the identity of persons who solicit contributions from the public, the purposes for which such contributions are solicited and the manner in which they are actually used, ... by providing civil and criminal penalties for deception and dishonest statements and conduct in the solicitation and reporting of contributions for or in the name of charitable purposes and by publicizing matters relating to fraud, deception and misrepresentation perpetrated in the name of charity.

10 P.S. § 162.2

Under the Act, the Secretary of the Commonwealth can make or cause to be made an investigation of an applicant for registration under the Act. *10 P.S. §162.4; Commonwealth v. Pennsylvania Com'n on Charitable Organizations*, 579 F. Supp. 172 (M.D. Pa. 1984). The Secretary of the Commonwealth can also decide matters relating to the issuance, renewal, suspension or revocation of registrations and can take appropriate action to initiate any civil or criminal proceedings necessary to enforce the Charities Act. *10 P.S. §162.4.*

Under the Charities Act, a charitable organization is required to "keep true fiscal records as to its activities in this Commonwealth as may be covered under this Act, in such forms as will enable them to accurately provide information under this Act. Such records shall be made available for inspection upon demand by the department or the Attorney General." *10 P.S. §162.12.* Under the Act, a "charitable organization may only solicit contributions for the charitable purpose expressed in its solicitation for contributions or the registration statement of the charitable organization and may only apply contributions in a manner substantially consistent with that purpose." *10 P.S. §162.13(a).* Moreover, 10 P.S. § 162.16 notes the Attorney General may make an investigation of any person as deemed necessary and such investigation can include the issuance of subpoenas, among other things. *10 P.S. § 162.16.*

There is no dispute that Respondent is classified as a charitable organization under the Act and as such must follow its guidance.

Here, Petitioner alleges Respondent failed to adequately comply with the Subpoena first issued on September 20, 2007 despite repeated attempts to obtain the requested information. Petitioner asserts that Respondent has failed to comply with this Court's order of April 30, 2008 directing that Respondent "shall comply with the Commonwealth's Subpoena ... and shall produce all documents and information requested therein within fourteen (14) days from the date of this Order." *Petitioner's Petition for Contempt, p. 2, quoting Order of Connelly, J., April 30, 2008.*

Respondent counters that at all times it believed it was in compliance with Petitioner's Subpoena and the Court's Order. *Respondent's Answer and New Matter to Petition for Civil Contempt and Penalties, ¶ 12.* Respondent argues it has provided full and accurate answers to all materials as itemized in Petitioner's Subpoena and notes it has provided the names of its campaigns, a record of revenues and expenses, all identifying information for all of the persons and businesses which have purchased advertising, and has provided full and complete records of all distributions of journals/guides. *Id. at ¶ 29.* Finally, Respondent argues that the relief requested by Petitioner is not proportionate to any harm it has allegedly suffered as Respondent has provided information covering

a larger time period than what was required under the Subpoena and the Court Order. *Id. at ¶ 38.*

Therefore, the instant dispute centers on whether Respondent provided all of the information ordered by the Court.

Petitioner's Subpoena asked for "[a] complete and accurate list of any and all campaigns conducted by [Respondent] from January 1, 2006 to the present"; "[c]omplete and accurate copies of books, ledgers, or record of revenues and expenses related to solicitations conducted by [Respondent]"; "[a] complete and accurate list of any and all businesses and/or consumers who purchased advertising from [Respondent] ... to include name, address, phone number of each contributor and indicate which Journal or Guide each contributed to"; and "[a] complete and accurate list of any and all schools and/or businesses which [Respondent] has distributed or plans to distribute a Journal or Guide."

On May 14, 2008, Respondent forwarded to Petitioner a single sheet listing Respondent's campaigns through December 31, 2007; a single sheet of financial records listing fifteen (15) line item expenses and total revenue for both 2007 and 2008; a list of persons and businesses that purchased advertising space seemingly between 2000 and 2008; and a list of schools and businesses where Respondent had already distributed a Journal or Guide. *Petition for Contempt and Civil Penalties.* On May 30, 2008, Petitioner wrote a letter to Respondent noting that it felt the submission fell short of what was ordered by the Court. *Id. at Exhibit 4.* Specifically, Petitioner argued that Respondent failed to mention a solicitation campaign, failed to submit true and accurate copies of financial records, provided an incomplete list of individuals and businesses who have purchased advertising and failed to include the requested phone numbers, and the listing of school and businesses that had received a Journal or Guide was cryptic and incomplete. *Id.*

Respondent replied on June 6, 2008 with a complete list of campaigns and a glossary of abbreviations used in the prior submission. *Id. at Exhibit 5.* Respondent also indicated that it believed the one-page financial record provided was sufficient to comply with the Court's Order. After more correspondence between the parties, Respondent submitted to Petitioner a one-page record of revenues listing line item expenses and revenue from January 1, 2008 and June 30, 2008. *Id.* Respondent also argued that with these additional financial records, it was in compliance with the Court's Order of April 30. *Id.*

Respondent asserts the information provided is in full compliance with the Subpoena and Court Order and in fact Respondent has provided more information than was required. *Respondent's Answer and New Matter, ¶ 38.* Respondent also argues that the Subpoena did

not request financial statements or reports. *Id. at ¶ 33.* At the hearing, Respondent, through its counsel, indicated it was doing its best to be transparent.

The Court finds Respondent in violation of its Order of April 30, 2008. Petitioner's Subpoena requests complete and accurate copies of books, ledgers, or record of revenues and expenses related to solicitations conducted by Paragon Promotions, Inc., from January 1, 2006 to the present. In response to this, Respondent submitted a very short listing of line item expenses and one lone figure listing revenue. This can certainly not be classified as transparent. The Subpoena and subsequent correspondence between the parties when read in conjunction with the Charities Act indicate Petitioner requested and was entitled to more than these conspicuously incomplete financial records. Specifically, in a letter dated July 1, 2008, Petitioner clearly indicated that the financial document submitted by Respondent was not sufficient.

Respondent argues that it provided all that was asked of it, however, the Court has difficulty reconciling this argument with the Subpoena, correspondence between the parties and the Charities Act. The Subpoena specifically asks for a "record of revenues and expenses related to the solicitations conducted by [Respondent]." The document submitted by Respondent does not appear to comply with the Subpoena or the Court Order. The submitted document appears merely to be a summary of a few line item expenses set against one single revenue number prepared by Respondent in response to the Subpoena. The financial records also give absolutely no inclination as to how the revenue was raised or during what specific solicitation campaign.

The Charities Act was intended to protect the citizens of the Commonwealth by regulating organizations that solicit contributions from the public. Such regulation is done by full and transparent disclosure of records. The Court finds that Respondent has failed to provide full and transparent disclosure of its financial and solicitation records. Petitioner's Subpoena and the subsequent correspondence between the parties made it clear that Petitioner was looking for more than a simple summary of Respondent's financial records. Petitioner is entitled under the Charities Act to request and receive these records, yet Respondent is trying to couch its noncompliance with the argument it did not understand what it was being asked to provide. Here, the Court finds there is little question that Petitioner was seeking more detailed financial records than those provided, therefore Respondent is in violation of the Subpoena and consequently the Court Order.

Therefore, because Respondent has been found to be in violation of the Court Order and the Charities Act, the Court must determine what if any sanctions should be imposed. Petitioner argues that Respondent's

conduct appears to be a calculated attempt to avoid disclosure of financial information, in direct contravention of the Charities Act. *Petitioner's Reply to New Matter, ¶ 38.* Moreover, Petitioner argues that the civil penalties it is asking for arose out of Respondent's pre-Petition refusal to comply with the Subpoena and subsequent demand letters. *Id. at ¶ 39.* Petitioner also avers that Respondent should be enjoined from continuing its Charities Act activities until it comes into compliance by making a full and complete disclosure of revenues and expenses related to each one it its more than fourteen (14) solicitation campaigns. *Id.*

10 P.S. § 162.16 (f) states

> Any person upon whom a notice is served pursuant to this section shall comply with the terms thereof unless otherwise provided by an order of court. Any person who fails to appear or, with intent to avoid, evade or prevent compliance, in whole or in part with any civil investigation under this act, removes from any place, conceals, withholds or destroys, mutilates, alters or by any other means falsifies any documentary material in the possession, custody or control of any person subject to any notice, or knowingly conceals any relevant information, shall be assessed a civil penalty of not more than $5,000. The Attorney General or the District Attorney may petition for an order of court for enforcement of this section.

10 P.S. §162.16(f).

Moreover, 10 P.S. §162.19 notes that whenever the Attorney General should have reason to believe that a person is operating in violation of the Charities Act the Attorney General may bring an action in the name of the Commonwealth to enjoin such person from continuing such violation and for other such relief as the court deems appropriate. *10 P.S. § 162.19(a).*

Here, it appears to the Court that Respondent is knowingly withholding information that Petitioner requested and is entitled to under the Charities Act. Therefore, 10 P.S. §162.16(f) applies. Respondent not only failed to comply with the Charities Act and the Subpoena, Respondent also blatantly failed to comply with an Order of this Court. Such noncompliance cannot be tolerated. Therefore, Respondent is hereby assessed the maximum civil penalty of $5,000 in addition to the attorney fees which have already been ordered. Respondent is hereby enjoined from continuing its Charities Act activities until it comes into full compliance by making a full and complete disclosure of revenues and expenses related to each of its solicitation campaigns.

ORDER

AND NOW, TO-WIT, this 3rd day of April, 2009, it is hereby **ORDERED, ADJUDGED, and DECREED** that the Commonwealth's Petition for Sanctions is ***GRANTED.*** Respondent, Paragon Promotions, Inc., is hereby ***ORDERED*** to pay the Commonwealth civil penalties in the amount of five thousand dollars ($5,000.00) and to comply with the Commonwealth's request for full financial disclosure within ten (10) days from the date of this Order. Paragon Promotions is hereby enjoined from continuing its Charities Act activities until it comes into full compliance by making a full and complete disclosure of revenues and expenses related to each of its solicitation campaigns. As previously Ordered, Paragon Promotions, Inc., shall pay all costs and expenses incurred by the Commonwealth in connection with the Commonwealth's Subpoena enforcement action.

BY THE COURT:
/s/ **SHAD CONNELLY, JUDGE**

MARY GRACE GOETZ

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF TRANSPORTATION

MOTOR VEHICLE / LICENSING REQUIREMENT

Section 1519(a) of the Motor Vehicle Code grants PennDOT the authority to require a licensee to submit to [one or more] examinations to determine a licensee's competency to safely operate a motor vehicle, including a driver's examination.

MOTOR VEHICLE / LICENSE RECALL

Section 1519(c) of the Motor Vehicle Code grants PennDOT the authority to recall the driving privileges of any licensee, who is determined to be incompetent after being examined in any of the manners as provided in Section 1519(a), until satisfactory evidence is presented to establish such person is competent to drive a motor vehicle.

MOTOR VEHICLE / LICENSING REQUIREMENT

Once PennDOT has cause to believe a person is not physically or mentally qualified to drive a motor vehicle, Section 1519(a) grants the Department the authority to subject the licensee to authorized examinations, which may include a mental, physical and/or driving examination.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11915-2009

Appearances: Richard E. Filippi, Esq., for the Plaintiff
Chester Karas, Esq., on behalf of the Department of Transportation

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Domitrovich, J., August 13, 2009

After a thorough review of the testimony and evidence presented at the hearing conducted on July 1, 2009, as well as an independent review of the relevant statutory and case law, this Court hereby enters the following Findings of Fact and Conclusions of Law regarding Mary Grace Goetz's appeal from the Pennsylvania Department of Transportation's (PennDOT's) suspension of her driving privileges for an indefinite period of time, due to Appellant's failure to pass a driving examination, which was required under 75 Pa. C.S. § 1519(c).

FINDINGS OF FACT

1. Appellant, Mary Grace Goetz, was born on May 28, 1921 and is currently 88 years old.
2. Appellant is a licensed driver, whose current driver's license was issued on March 19, 2007 and is not set to expire until May 29, 2011.

3. In November of 2008, Appellant was examined by Dr. Sharon McKenna.

4. On December 8, 2008, Dr. Sharon McKenna completed a PennDOT Initial Reporting Form, also known as a DL - 13 form, regarding Appellant's ability to safely operate a motor vehicle. Dr. McKenna then submitted this Initial Reporting Form to PennDOT.

5. In the Initial Reporting Form, Appellant was diagnosed with the Neuropsychiatric Disorder known as Dementia. Moreover, when asked whether Appellant's condition affects her ability, from a medical standpoint only, to safely operate a motor vehicle, Dr. McKenna stated "Yes."

6. Upon receiving the Initial Reporting Form completed by Dr. McKenna, which stated Appellant suffered from a medical condition, which may affect her ability to safely operate a motor vehicle, PennDOT, through a letter dated December 31, 2008, informed Appellant she was required to undergo a physical examination to determine if she met PennDOT's medical standards for driving. With its December 31, 2008 letter to Appellant, PennDOT enclosed a Cognitive Impairment Form, also known as a DL - 131 form, which was to be completed by Appellant's health care provider and returned to PennDOT.

7. In its December 31, 2008 letter to Appellant, PennDOT also informed Appellant that, "[b]ased on the results of this examination, you may be required to have an additional medical evaluation and/or take a driver's test."

8. On January 19, 2009, Appellant's family physician, Dr. David Overare, returned to PennDOT the completed Cognitive Impairment Form, in which Dr. Overare concluded Appellant is competent to operate a motor vehicle.

9. However, by a letter dated February 3, 2009, PennDOT informed Appellant she was required to successfully pass a driving examination within 30 days of the date of the letter.

10. Upon Appellant's refusal and/or inability to successfully pass a driving examination, PennDOT informed Appellant by letter dated March 28, 2009 that Appellant's driving privilege would be suspended indefinitely on May 2, 2009 until Appellant is able to successfully pass a driving examination. In its March 28, 2009 letter, PennDOT also informed Appellant that if she did not successfully pass a driving examination by May 2, 2009, Appellant would be required to also pay a restoration fee to restore her driving license.

11. On April 24, 2009, Appellant filed the instant Petition For Appeal From A Suspension Of Operating Privilege.

CONCLUSIONS OF LAW

Section 1519(a) of the Motor Vehicle Code [75 Pa. C.S. § 1519(a)] grants PennDOT the authority to require a licensee to submit to examinations to determine a licensee's competency to safely operate a motor vehicle, including a driver's examination. Section 1519(a) specifically states "[t]he department, having cause to believe that a licensed driver or applicant may not be physically or mentally qualified to be licensed, **may require the applicant or driver to undergo one or more of the examinations authorized under this subchapter** in order to determine the competency of the person to drive." (emphasis added). Since the driving examination requirements contained in Sections 1508 and 1514(b) of the Motor Vehicle Code are included in the same subchapter as Section 1519, the Commonwealth Court of Pennsylvania has held that Section 1519 grants PennDOT the authority to require a licensee to submit to a driving examination as set forth in Sections 1508 and 1514(b) when PennDOT has cause to believe that a licensed driver or applicant may not be physically or mentally qualified to be licensed. *See Montchal v. DOT, Bureau of Driver Licensing*, 794 A.2d 973, 976 (Pa. Commw. Ct. 2002). Moreover, PennDOT may require the licensee to undergo more than one type of examination, once PennDOT has cause to believe the licensee may not be physically or mentally qualified to be licensed. 75 Pa. C.S. § 1519(a).

Furthermore, Section 1519(c) of the Motor Vehicle Code grants PennDOT the authority to recall the driving privileges of any licensee, who is determined to be incompetent after being examined in any of the manners as provided in Section 1519(a). Section 1519(c) specifically states:

> The department shall recall the operating privilege of any person whose incompetency has been established under the provisions of this chapter. The recall shall be for an indefinite period until satisfactory evidence is presented to the department in accordance with regulations to establish that such person is competent to drive a motor vehicle. The department shall suspend the operating privilege of any person who refuses or fails to comply with the requirements of this section until that person does comply and that person's competency to drive is established.

In the instant matter, PennDOT had cause to believe Appellant was not physically or mentally competent to drive based on the Initial Reporting Form submitted by Dr. McKenna, in which Dr. McKenna, an independent medical professional, concluded Appellant did not have the ability, from a medical standpoint, to safely operate a motor vehicle. Therefore, PennDOT correctly had the authority to ask Appellant to undergo one or

more examinations to determine whether Appellant was safe to operate a motor vehicle. In compliance with its authority to determine whether Appellant is competent to safely operate a motor vehicle, PennDOT requested Appellant to undergo a physical evaluation to determine her competence to drive. Additionally, PennDOT notified Appellant she may be required to undergo an additional medical evaluation and/or a driver's test, which is completely permissible under Section 1519(a) of the Motor Vehicle Code.

However, Appellant's argument, as stated at the time of the July 1, 2009 hearing, as well as in her Memorandum of Law, is essentially that once Appellant submitted Dr. Overare's Cognitive Impairment Form to PennDOT, which stated Dr. Overare concluded from a medical standpoint that Appellant was physically and mentally competent to operate a motor vehicle, PennDOT no longer had cause to believe Appellant was not physically or mentally competent to safely operate a motor vehicle. Appellant further argues the Initial Reporting Form submitted by Dr. McKenna did not establish that Appellant was incompetent to drive, and Dr. Overare's conclusion rebutted PennDOT's cause to believe Appellant was incompetent to operate a motor vehicle. Appellant continues by arguing the instant matter is analogous to the "fruit of the poisonous tree" doctrine, and the matter should have ended when Appellant was cleared to drive by Dr. Overare. Thus, Appellant argues that after Dr. Overare submitted his Initial Reporting Form, PennDOT could no longer request Appellant to undergo any further examinations.

However, Appellant's argument is meritless. As stated previously, the Commonwealth Court of Pennsylvania held that PennDOT has the discretion to require a licensee to complete a driver's examination if it has cause to believe the licensee is not competent to drive. *Montchal, supra* at 976. PennDOT's cause to request Appellant to submit to a driver's examination does not wane just because Appellant provided PennDOT with Dr. Overare's Initial Reporting Form.

Moreover, in *Neimeister v. DOT, Bureau of Driver Licensing*, 916 A.2d 712 (Pa. Commw. Ct. 2006), the Commonwealth Court of Pennsylvania has completely rejected Appellant's argument that once Appellant submitted Dr. Overare's Initial Reporting Form concluding Appellant is competent to operate a motor vehicle, PennDOT was precluded from requesting Appellant to submit to a driver's examination. In *Neimeister, supra,* PennDOT requested the then 86-year-old licensee to undergo a physical examination to determine the licensee's physical and mental competency to drive after PennDOT received a Local Police Recommendation For: A Special Medical/Driver Examination due to an incident where the licensee was swerving into the wrong lane of traffic. The licensee's physician completed and returned PennDOT's General

Medical Form, concluding the licensee was physically and mentally competent to operate a motor vehicle. However, after receiving the licensee's physician's conclusion, PennDOT still required the licensee to take a driving examination to determine whether the licensee met the Department's medical standards for driving. The trial court sustained the licensee's appeal by reasoning that once the licensee submitted the successful results of her medical examination to PennDOT, PennDOT could not subject the licensee to the subsequent driving examination because it no longer had cause to believe that she was not physically or mentally qualified to be licensed. This is the same argument now presented by Appellant in the instant matter.

In *Neimeister, supra*, the Commonwealth Court of Pennsylvania reversed the trial court's decision and explicitly rejected the argument now presented by Appellant in the instant matter. In rejecting the argument now presented by Appellant, the Commonwealth Court of Pennsylvania stated in *Neimeister, supra* at page 717:

> We do not believe Section 1519(a) or our holding in *Montchal* should be read so narrowly. The phrase, "having cause to believe a person is not physically or mentally qualified," is merely a preliminary requirement that is satisfied by the submission of the examination recommendation to the Department. At that point, Section 1519(a) grants the Department the authority to subject the licensee to "one or more of the examinations authorized under this subchapter in order to determine the competency of the person to drive." The required examinations may include a mental examination, a physical examination, or any other examination included in the subchapter, which as we held in Montchal, includes a driving examination. Section 1519(a) further states that a qualified person appointed by the Department will then consider "all medical reports and testimony in order to determine the competency of the driver or applicant to drive."

Like the licensee in *Neimeister, supra*, Appellant has been requested to successfully complete two exams to determine Appellant's competency to drive after PennDOT had cause to believe Appellant was not physically or mentally competent to drive. Although Appellant's physician, Dr. Overare, has submitted a medical report stating he believes Appellant is competent to drive, PennDOT still has the authority to request Appellant to successfully pass a driver's examination. Since Appellant has failed to successfully pass a driver's examination, PennDOT has properly suspended Appellant's operating privilege until she is able to do so.

The Court reserves the opportunity to make additional Findings of Fact

and Conclusions of Law, as necessary. For all of the foregoing reasons, this Court dismisses Appellant's license suspension appeal and enters the following Order:

ORDER

AND NOW, to wit, this 13th day of August, 2009, upon consideration of Mary Grace Goetz's Petition For Appeal From A Suspension Of Operating Privilege, the testimony and evidence presented at the July 1, 2009 hearing, both parties' Memoranda of Law submitted to Court, as well as an independent review of the relevant statutory and case law, it is hereby **ORDERED, ADJUDGED, AND DECREED** that Mary Grace Goetz's license suspension appeal is hereby **DISMISSED** for all of the reasons set forth in the foregoing Findings of Fact and Conclusions of Law.

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

DARLENE J. WAWREJKO, Plaintiff,

v.

SHANNON CALHOUN, Defendant

TORTS / INTENTIONAL TORTS

Erie County Probation Officer's providing allegedly false incident report to detective who charged plaintiff criminally does not constitute "process" in determining whether abuse of legal process tort elements are alleged.

TORTS / INTENTIONAL TORTS

Claim for malicious prosecution against probations officer who provided allegedly false incident report to detective who charged plaintiff criminally fails because the probation officer was not the individual who actually initiated the criminal charges.

TORTS / DEFAMATION

Erie County probation officer who completed incident report about plaintiff pursuant to her duties as a probation officer and as a witness to events enjoys immunity in her official capacity.

TORTS / INTENTIONAL TORTS

There is no cause of action for civil conspiracy absent a civil cause of action for a particular act.

CIVIL PROCEDURE / COMPLAINT

The Court is within its discretion in striking a second amended complaint filed without the consent of either the Court or the defendant.

CIVIL PROCEDURE / COMPLAINT

The Court may sustain demurrers and dismiss a case with prejudice where the Court believes there is no reasonable possibility amendment can be accomplished successfully.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW NO. 10082-2008

Appearances: Darlene J. Wawrejko, Pro Se
Matthew J. McLaughlin, Esq., Attorney for Defendant

OPINION

Garhart, J., July 31, 2009

This Opinion is filed in response to Plaintiff's Statement of Matters Complained of on Appeal. For the following reasons, the decision of the Court should be affirmed.

I. FACTUAL AND PROCEDURAL BACKGROUND

This civil action arises from an incident that took place at Plaintiff's residence on September 8, 2005. The Defendant, an Erie County Probation Officer, went to Plaintiff's residence to visit Plaintiff's husband, a probationer, residing with her. Defendant was accompanied by a

fellow Probation Officer (P.O.). The Defendant went to the front door of the residence and was greeted by the Plaintiff. While there, Plaintiff's husband attempted to abscond by leaving out of the back door of the house and getting into his vehicle.

Plaintiff avers that she instinctively dashed to the vehicle and grabbed the keys from her husband while the P.O. stood by. When the husband exited the vehicle, the P.O. asked the Plaintiff to stand back from the vehicle, and warned the Plaintiff that she would call the police. The Defendant then reached the vehicle to assist her partner, who had already subdued the husband.

The Defendant and her fellow P.O. each wrote up an incident report. These incident reports are attached to the Amended Complaint and are referred to repeatedly in the factual averments of the Amended Complaint. The Defendant's fellow P.O. reported that the Plaintiff was barring entry into the house when the P.O.'s first called to the husband to come to the door. After the husband left out the back door of the residence, the Defendant reported that she attempted to keep the Plaintiff back, as she was very uncooperative. The Defendant reported that the Plaintiff broke past the Defendant when the other P.O. was attempting to get the husband out of the vehicle. Both Officers reported that the Plaintiff was lying across the lap of her husband and grabbed the keys from the fellow P.O. The fellow P.O. reported that she requested the Plaintiff to stand back several times, to which Plaintiff did not comply. Plaintiff was warned that she was hindering apprehension.

On October 4, 2005, Plaintiff was charged with: obstructing administration of law, resisting arrest, and disorderly conduct. An Erie Detective prepared the Probable Cause Affidavit. Plaintiff claims he did not contact her and charged her based solely on the incident reports. In April of 2006, the charges against the Plaintiff were nolle prosed.

On September 19, 2007, the Plaintiff brought suit in District Court. She alleged the Defendant committed tortious abuse of process by intentionally presenting false reports to authorities; that the Defendant's conduct amounted to official oppression and fraud upon the Commonwealth, and finally, defamation. The District Judge ruled against the Defendant. Plaintiff appealed in the Court of Common Pleas and October 31, 2008, this Court granted Plaintiff's Motion to Re-Open Case. On November 12, 2008, Plaintiff filed her original Complaint. On December 30, 2008, in response to the Defendant's Preliminary Objections, the Plaintiff filed an Amended Complaint, thus rendering the Preliminary Objections moot.

In the Amended Complaint, Plaintiff brought nine (9) counts: (1) Abuse of Office/Official Oppression, (2) Intimidation of Witness, (3) False Reports to Law Enforcement Authorities, (4) Unsworn Falsification, (5) False Reports to Law Enforcement Authorities, (6) Tampering With or Fabricating Physical Evidence, (7) Barratry, (8) Defamation, and (9)

Fraud. In the concluding paragraphs, the Plaintiff prayed for damages for intentional infliction of emotional distress, but did not plead it as a separate cause of action. In addition, Counts 1 through 7 contained the words, "Tortious Act by," before the criminal statutes cited as causes of action.

On January 13, 2009, the Defendant filed Preliminary Objections in the Nature of a Demurrer and Motion to Strike the Amended Complaint. Rather than responding to Defendant's Brief in support of Preliminary Objections, as required by Erie Local Rule 1028(c), Plaintiff filed a Second Amended Complaint. In response, Defendant filed a Motion in Opposition to Plaintiff's Request to Amend Her Complaint a Second Time. In that Motion, the Defendant requested that Plaintiff's Second Amended Complaint be stricken.

In Plaintiff's Second Amended Complaint, she also alleges 9 counts: (1) Abuse of Process, (2) Wrongful Initiation of Process, (3) - (6) Abuse of Process, (7) Civil Conspiracy, (8) Defamation, and (9) Fraud.

On April 29, 2009, this Court held oral argument regarding the Defendant's Preliminary Objections and the filing of a Second Amended Complaint without leave of Court. On April 30, 2009, this Court entered an Order striking the Second Amended Complaint, as Plaintiff did not comply with Local Rules. The Court sustained the Demurrers to the First Amended Complaint and dismissed the suit with prejudice.

On May 28, 2009, the Plaintiff filed a timely Notice of Appeal.

II. MATTERS COMPLAINED OF ON APPEAL - ARGUMENT

A. The Legal Sufficiency of the Causes of Action

In Counts 1 through 7 of the Amended Complaint, the Plaintiff asserts that Defendant violated various criminal statutes. In the heading for each Count, the Plaintiff inserts the words, "Tortious Act by." In the Second Amended Complaint, the Plaintiff changes the heading of these Counts, and refers to them as Abuse of Process, Wrongful Initiation of Process, and Civil Conspiracy. In examining these Counts, the Court does not believe that Plaintiff's averments, in both Complaints, factually support causes of action under those theories.

Abuse of Process is defined as the use of legal process against another primarily to accomplish a purpose for which it is not designed. *Werner v. Plater-Zyberk*, 799 A.2d, 776, 785 (Pa.Super. 2002). The Court in *Werner* explained,

> To establish a claim for abuse of process it must be shown that the defendant (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused to the plaintiff. Abuse of process is, in essence, the use of legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process. The gravamen of this tort is the perversion of

> legal process to benefit someone in achieving a purpose, which is not an authorized goal of the procedure in question.

Id.

In Counts 1 through 6 of the Amended Complaint, and Counts 1, 3, 4, 5 and 6 of the Second Amended Complaint all refer to the false incident report given to law enforcement as the abuse of a legal process. The Court believes that this is not "process" under the elements. Typical forms of abuse of process include extortion by means of attachment, execution or garnishment, and blackmail by means of arrest or criminal prosecution. *See Rosen v. Tesoro Petroleum Corp.,* 582 A.2d 27, 33 (Pa. Super. 1990). Defendant was not in a position to use a legal process against the Plaintiff. She merely wrote an incident report.

In Count 2 of both Complaints, the Plaintiff refers to witness intimidation and the initiation of criminal proceedings for a wrongful purpose. In the Second Amended Complaint, she specifically heads the Count as Wrongful Initiation of Process.

Assuming the Plaintiff is attempting to raise a claim for malicious prosecution by the Defendant, her argument still fails to meet the requirements set forth in *Bradely v. General Accident Insurance Co.,* 778 A. 2d 707 (Pa. Super 2001). This Court specifically finds that it was the Detective who brought the charges against the Plaintiff and not the Defendant.

With regards to Plaintiff's Defamation claim, the Court believes that Defendant, an Erie County Probation Officer, who completed her incident report pursuant to her duties as a Probation Officer and as a witness to the events, enjoys immunity in her official capacity. *Pawlowski v. Smorto,* 588 A.2d 36 (Pa.Super. 1991).

With regards to the Plaintiff's Fraud claim, the Plaintiff fails to plead an action for Fraud.

At Count 7 of the First Amended Complaint, the Plaintiff brings a cause of action for Barratry. In the Second Amended Complaint, this Count is re-titled, "Civil Conspiracy" and contains many of the same factual averments. Absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit the act. *Phillips v. Selig,* 959 A.2d 420, 437 (Pa.Super. 2008). As Plaintiff's underlying civil causes of action are legally insufficient, so too is her cause of action for Civil Conspiracy.

B. Liberal Granting of Amendments to Complaints

Rule 1033 of the Pennsylvania Rules of Civil Procedure allow a party to amend a pleading with the consent of the adverse party or the leave of court. Pa.R.C.P. 1033. Additionally, "where a trial court sustains a demurrer, the right to amend should not be withheld where there is some reasonable possibility that amendment can be accomplished

successfully." *Unified Sportsmen of Pennsylvania v. The Pennsylvania Game Commission*, 903 A.2d 117, 127 (Pa. Cmwlth 2006), citing *Otto v. Am. Mut. Ins. Co.*, 393 A.2d 450, 451 (1978).

In its Order striking the Second Amended Complaint, the Court stated that the Plaintiff violated Local Rules of Court. Under Erie County Local Rule 1028(c), when an objecting party timely files a brief in support of preliminary objections, the non-moving party shall file a responding brief within thirty (30) days of receipt of the objecting party's brief. If the brief of the non-moving party is not filed within the time period, the Court may grant the relief requested when supported by law. The Plaintiff did not have the consent of the Defendant or the Court to file a second Amended Complaint, the Court was within its discretion to strike the Second Amended Complaint as requested by the Defendant in his Motion in Opposition.

With regards to sustaining the demurrers to the Amended Complaint and dismissing the case with prejudice, it is the Court's belief that there is no reasonable possibility that amendment can be accomplished successfully. All three of Plaintiff's Complaints are similar in their respective averments. Even if the Second Amended Complaint were allowed to stand, it too would be legally insufficient to support a cause of action under the theories proposed. Additionally, due to the length and repetitive nature of the averments, the Court believes that the Plaintiff has fully developed the factual basis for her proposed causes of action, and that no amendment will cure the deficiency.

C. The Statute of Limitations

Plaintiff claims that the Defendant raised the Statute of Limitations defense as a preliminary objection, thus violating Rules of Civil Procedure. Beginning at page 9 of the Transcript of the Proceeding, the Court engaged the parties in a discussion relating to the effect the Statute of Limitations could have on the Plaintiff's ability to amend her complaint further. The Court notes that the Defendant did not raise the defense in her Preliminary Objections, and it was mentioned briefly in a footnote in Defendant's Brief in Support: In evaluating the Plaintiff's case, the Court did not reach a decision based upon the Statute of Limitations, but rather the legal sufficiency of the Plaintiff's claims and her ability to amend her complaint successfully.

D. Defendant's Motion in Opposition to Plaintiff's Request to Amend Her Complaint a Second Time

In response to Plaintiff's filing of a second Amended Complaint without first responding to the Defendant's Preliminary Objections or having leave of Court, the Defendant filed a Motion in Opposition to Plaintiff's Request to Amend Her Complaint a Second Time. The Court notes that no such request to amend the complaint a second time was docketed.

Plaintiff claims that this Motion violates Rules of Civil Procedure. The Court feels that this matter is without merit and not determinative to the issue at hand.

E. Sustaining Defendant's Preliminary Objections By Using Other Testimony or Evidence

The Court's Order sustaining the Preliminary Objections is based upon the legal sufficiency of the pleadings and nothing else. Plaintiff's statement is without merit.

F. Court's Predisposition Against Pro Se Litigant

Plaintiff claims that Defense counsel has been given preferential treatment by this Court, specifically, leniency for procedural errors. Plaintiff's claim is without merit, and not determinative to the issue of whether or not her causes of action were legally sufficient.

BY THE COURT:
/s/ **John Garhart, Judge**

KIMBERLY THOMAS, Plaintiff,

v.

PETER G. LEVINSON, M.D., MARK E. TOWNSEND, M.D., HAMOT MEDICAL CENTER, and LAKE ERIE WOMEN'S CENTER, P.C., d/b/a LAKE ERIE WOMEN'S CENTER and alternatively d/b/a LAKESIDE OB/GYN WOMEN'S CENTER, Defendants

PLEADINGS / PRELIMINARY OBJECTIONS

On Preliminary Objections in the form of demurrers, a Trial Court must recognize as true all well-pleaded material facts set forth in the Complaint and all inferences fairly deductible from those facts.

NEGLIGENCE / ACTIONS AND PLEADINGS

In regard to medical informed consent, a failure to disclose risk factors personal to a surgical physician involving a surgical procedure might constitute a misrepresentation.

ACTIONS AND PLEADINGS

Neither the MCARE Act nor case law has abrogated the cause of action for common law battery.

NEGLIGENCE / ACTIONS AND PLEADINGS

In order to recover for negligent infliction of emotional distress, a Plaintiff must establish, as in any other negligence case, the Defendant's breach of a duty and damages proximately caused thereby, and the Plaintiff must suffer immediate and substantial physical harm.

Plaintiff's pleading causes of action for both intentional infliction of emotional distress and negligent infliction of emotional distress must allege specifics as to when Plaintiff learned of the facts alleged, the source of the knowledge and the specific substantial harm that was caused by the emotional distress.

DISCOVERY / PROTECTIVE ORDERS

A Motion for a Protective Order may be granted for good cause shown in order to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense.

The granting of relief in a discovery proceeding is dependent upon a showing of necessity and the moving party bears the burden of establishing the objectionable nature of the discovery and a showing of evidence that harm will result from disclosure.

DISCOVERY/PROTECTIVE ORDERS/ATTORNEY CLIENT PRIVILEGE

A subpoena of a client's legal file may not be overly broad in its request.

CIVIL PROCEDURE / COMPLAINT/FILING CERTIFICATE OF MERIT

Pa. R.C.P. 1042.3 contemplates that a certificate of merit in a professional negligence complaint shall be filed within sixty (60) days of the filing of the original Complaint unless the Court upon good cause shown shall extend the time for filing of a certificate of merit for a period not to exceed sixty days.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 14412-2008

Appearances: Richard E. Filippi, Esq., Attorney for Plaintiff
Leonard G. Ambrose, III, Esq., Attorney for Plaintiff
Steven J. Forry, Esq. and Michael Dube, Esq., Attorneys for Defendants Levinson, Townsend and Lake Erie Women's Center
Marcia H. Haller, Esq., Attorney for Defendant Hamot Medical Center

OPINION AND ORDER

DiSantis, Ernest J. Jr., J

This matter comes before the Court on the following: (1) Defendants, Peter G. Levinson, M.D. ("Levinson"), Mark E. Townsend, M.D. ("Townsend"), and Lake Erie Women's Center, P.C., d/b/a Lake Erie Women's Center and alternatively d/b/a Lakeside OB/GYN Women's Center ("Lake Erie Women's"), Preliminary Objections to the Plaintiff's Amended Complaint and Memorandum of Law in Support of Preliminary Objections; (2) Defendants', Levinson, Townsend, and Lake Erie Women's, Motion to Strike Documents Attached to the Plaintiff's "Reply to Preliminary Objections"; (3) Defendants', Levinson, Townsend, and Lake Erie Women's, Objections to Subpoenas and Motion For a Protective Order; and (4) Defendants', Levinson, Townsend, and Lake Erie Women's, Motion to Strike Plaintiff's Amended Certificate of Merit. On February 26, 2009, this Court held argument.

I. Background of the Case

This is a medical professional liability action arising out of a laparoscopic assisted vaginal hysterectomy that Plaintiff underwent on October 29, 2007. In brief, Plaintiff claims she suffered physical and emotional injuries as a result of the actions and inactions of Defendants. On September 11, 2008, Plaintiff filed a Complaint against Defendants and individual Certificates of Merits as to Levinson and Townsend. On September 30, 2008, Plaintiff filed a Praecipe to Reinstate Complaint. On October 16, 2008, Defendants Levinson, Townsend and Lake Erie Women's filed Preliminary Objections and supporting memorandum. On October 16, 2008, Lake Erie Women's filed a Notice of Intention to Enter Judgment of Non Pros On Professional Liability Claim. On October 20, 2008 Defendant, Hamot Medical Center ("Ramon, filed its Notice of Intention to Enter Judgment of Non Pros On Professional Liability Claims. On October 22, 2008, Plaintiff filed an Amended Complaint and separate Certificates of Merit as to Hamot and Lake Erie Women's. On November 5, 2008, Defendants, Levinson, Townsend, and Lake Erie Women's filed Preliminary Objections to the Plaintiff's Amended Complaint and Memorandum of Law in Support of

Preliminary Objections. On November 24, 2008, Plaintiff filed a Reply to the Preliminary Objections and Brief in Opposition. On November 24, 2008, Defendants filed a Praecipe for Entry of Judgment of Non Pros on Professional Liability Claim. On November 25, 2008 Plaintiff filed separate Amended Certificates of Merit as to Lake Erie Women's and Hamot.

On December 29, 2008, Defendants, Levinson, Townsend, and Lake Erie Women's filed a Motion to Strike the Plaintiff's Amended Certificate of Merit, Motion to Strike Documents Attached to the Plaintiffs Reply to Preliminary Objections, and Objections to Subpoenas and Motion for a Protective Order. Plaintiff filed replies to all.

II. Legal Discussion

A.) Preliminary objections[1]

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

Additionally, "conclusions of law and unjustified inferences are not admitted by the pleadings," *Lobolito, Inc., v. North Pocono Sch. Dist.*, 755 A.2d 1287, 1289 n.2 (Pa. 2000), and the trial court must resolve the intrinsic worth "of the preliminary objections 'solely on the basis of the pleadings' and not on testimony or evidence outside the complaint." *Belser v. Rockwood Casualty Ins. Co.*, 791 A.2d 1216, 1219 (Pa. Super. 2002), *quoting Williams v. Nationwide Mut. Ins. Co.*, 750 A.2d 881, 883 (Pa. Super. 2000)); *see also Texas Keystone, Inc., Pennsylvania Department of Conservation and Natural Resources*, 851 A.2d 228, 239 (Pa.Cmwlth. 2004). A demurrer confronts the pleadings insisting that under the cause of action, relief cannot "'be granted *under any theory of law.*'" *See Regal Industrial Corp. v. Crum and Forster, Inc.*, 890 A.2d 395, 398 (Pa.Super. 2005); *Sutton v. Miller*, 592 A.2d 83, 87 (Pa. Super. 1991); *see also Prevish v. Northwest Med. Ctr.*, 692 A.2d 192, 197 (Pa.

[1] This Court will not consider those documents attached to Plaintiff's Reply to Preliminary Objections. *See, Hess v. Fox Rothschild, LLP*, 925 A.2d 798, 805 (Pa. Super. 2007) ("[N]o testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer.") (citation omitted). Additionally, the traffic citation and pleading from an unrelated civil action amount to scandalous material and appear to have been included for no other reason other than to embarrass Defendant Levinson. As such, these documents will be stricken from the record and Plaintiff will not be granted leave to amend his Amended Complaint in order to attach the documents as exhibits.

Super. 1997), *citing Chiropractic Nutritional Assoc., Inc. v. Empire Blue Cross and Blue Shield,* 669 A.2d 975, 984 (Pa.Super. 1995) ("...a dismissal of a cause of action should be sustained only in cases that are [so] 'clear and free from doubt' that the plaintiff [litigant] will be unable to prove legally sufficient facts to establish any right to relief.").

1.) Motion to Strike paragraphs 69, 70, 72 & 73 of Count III (Lack of Informed Consent)[2]

Defendants seek to strike as legally insufficient those paragraphs of Count III that aver: (1) Levinson failed to disclose that he was "addicted to or abusing mind altering substances" that could negatively impact his medical/surgical judgment and/or performance, and that this information "would have been a substantial factoring her ultimate decision to proceed or not to proceed with the surgery (Amended Complaint, ¶¶ 69, 72); and, (2) Levinson failed to disclose that he was "suffering from a severe left cervical radiculopathy which was causing increasing weakness and clumsiness in his left upper extremity that could negatively impact his medical/surgical judgment and/or performance," and that this information "would have been a substantial factor in her ultimate decision to proceed or not proceed with the surgery." (Amended Complaint, ¶¶ 70, 73). Defendants Preliminary Objections, ¶¶ 5,6.

Defendants argue that in enacting the Medical Care Availability and Reduction of Error Act of 2002 ("MCARE"), the Pennsylvania legislature codified the lack of informed consent cause of action and, therefore, lack of informed consent causes of action accruing after the enactment are governed by 40 P.S. § 1303.504. *Id.*, at ¶¶ 8,9. Defendants argue that 40 P.S. § 1303.504 is applicable and does not authorize Plaintiff's instant claims. *Id*., at ¶ 13. Defendants further assert that Plaintiff failed to allege that Levinson's purported addiction/abuse of mind-altering substances, or purported left cervical radiculopathy, caused or contributed to Plaintiff's injuries or that Levinson made a knowing misrepresentation. *Id.*, at ¶ 15.

Plaintiff contends that her assertion that Dr. Levinson was either an alcoholic or suffering from a severe physical impairment clearly relate to a physician's professional credentials, training or experience, and are relevant considerations for a proper informed consent under 40 P.S. § 1303.504. Plaintiff's Reply to Preliminary Objections, at ¶ 14. Plaintiff further contends there is no requirement to prove causation as part of her lack of informed consent claim. *Id.*, at ¶ 15.

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[2] In Count III, Plaintiff also averred that Levinson failed to discuss the alternatives to and potential complications of the laparascopically assisted vaginal hysterectomy, and that the availability of that information "would have been a substantial factor in her ultimate decision to proceed or not to proceed with the surgery." Amended Complaint, at ¶¶ 68, 71. Defendants are not moving to strike those paragraphs.

The relevant portions of the MCARE Act provide:[3]

§ 1303.504. Informed consent

(a) Duty of physicians.--Except in emergencies, a physician owes a duty to a patient to obtain the informed consent of the patient or the patient's authorized representative prior to conducting the following procedures:

. . . .

(b) Description of procedure.--Consent is informed if the patient has been given a description of a procedure set forth in subsection (a) and the risks and alternatives that a reasonably prudent patient would require to make an informed decision as to that procedure. The physician shall be entitled to present evidence of the description of that procedure and those risks and alternatives that a physician acting in accordance with accepted medical standards of medical practice would provide.

. . . .

(d) Liability.--

(1) A physician is liable for failure to obtain the informed consent only if the patient proves that receiving such information would have been a substantial factor in the patient's decision whether to undergo a procedure set forth in subsection (a).

(2) A physician may be held liable for failure to seek a patient's informed consent if the physician knowingly misrepresents to the patient his or her professional credentials, training or experience.

40 P.S. § 1303.504.

Here, the Plaintiff has stated a claim against Levinson for lack of informed consent based upon Levinson's failure to disclose evidence of his addiction and/or radiculopathy. If Plaintiff can prove that Defendant

[3] Before enactment of the relevant MCARE sections, the doctrine of informed consent did not encompass a claim that a physician misrepresented his/her background or qualifications. Specifically, in *Kaskie v. Wright*, 589 A.2d 213 (Pa. Super. 1991), the Court held that the doctrine of informed consent was not applicable to a physician's failure to inform a patient that he was an alcoholic and unlicensed to practice in Pennsylvania. The Court refused to expand the doctrine of informed consent "to include matters not specifically germane to surgical or operative treatment." *Id.*, at 217. In noted that, "[t]o do so, where the absent information consists of facts personal to the treating physician, extends the doctrine into realms well beyond its original boundaries". *Id.*

In *Duttry v. Patterson*, 771 A.2d 1255 (Pa. 2001), our Pennsylvania Supreme Court held that the doctrine of informed consent was not applicable where a physician knowingly misrepresented his experience with a particular surgery. The Court held that evidence of a physician's personal characteristics and experience was irrelevant to an informed consent claim. *Id.*, at 1259. However, the Court noted that in this type of situation, a plaintiff may have a cause of action for misrepresentation. *Id.*

Levinson had these conditions, they would constitute risk factors attendant with the surgical procedure. Also, this failure to disclose then might well constitute a misrepresentation. 40 P.S. § 1303.504 (b), (d) (1), (2). Therefore, Defendants' motion to strike Count III (lack of informed consent) will be overruled.

2.) Motion to Strike Count II (common law claim of battery)

Defendants contend MCARE abrogated a cause of action for common law battery, and that Plaintiff's exclusive remedy is under 40 P.S. § 1303.504. In support, Defendants cite to *Pollock v. Feinstein,* 917 A.2d 875, 878 n.1 (Pa. Super. 2007).[4] According to Defendant, Plaintiff has included this count against Levinson "in an effort to bypass the requirement, set forth in 40 P.S. § 1303.504, of pleading and proving that the information she allegedly did not receive would have been a substantial factor in her decision to undergo the procedure at issue in this case." Defendants' Preliminary Objections, at ¶ 23.

In reply, Plaintiff contends that the footnote in *Pollock* is dictum and asserts that MCARE has not abrogated a cause of action for common law battery. Plaintiff also requests permission to amend the Count should the Court sustain the preliminary objection.

Upon review, this Court concludes that neither the Act nor case law has abrogated the cause of action for common law battery. Furthermore, the Plaintiff has sufficiently pled a cause of action. Therefore, Defendants' motion to strike Count II will be overruled.

3.) Motion to Strike Counts X and XI (Vicarious Liability of Lake Erie Women's)

Defendants argue that any claims that Lake Erie was vicariously liable for any alleged failure to obtain informed consent should be stricken with prejudice. Defendant's Preliminary Objections, at ¶ 31. In support, they cite *Valles v. Albert Einstein Medical Center,* 805 A.2d 1232 (Pa. 2002). There, the Pennsylvania Supreme Court held that a "medical facility cannot be held vicariously liable for a physician's failure to obtain informed consent." *Id.,* at 1236.

In reply, Plaintiff alleges she did not advance that claim. Rather, Plaintiff's Amended Complaint alleges "vicarious liability on the basis

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[4] That footnote provides, in relevant part:

> Although these statutory definitions now expressly permit a defendant to present evidence that information provided regarding procedure was within acceptable professional standards, 40 P.S. § 1303.504 (b), whether this evidentiary standard legislatively overturns our case law regarding the battery theory of the informed consent claim, or whether an informed consent claim based upon negligence principles is more appropriate as a matter of policy, are issues more properly for our Supreme Court, and, in any event, unnecessary for us to reach for the disposition of this appeal.

Id.

of the aforestated acts of negligence and/or carelessness and/or wrongful conduct" of Levinson and Townsend. Plaintiff's Reply to Preliminary Objections, at ¶¶ 26, 31. She contends her claims are based on Lake Erie Women's liability for the underlying negligence of Levinson and Townsend. Plaintiff's Brief, at 11.

To the extent that Plaintiff argues that Lake Erie Women's was vicariously liable for any alleged lack of informed consent, she can not prevail and Defendants' motion to strike Counts X and XI (as they reflect that claim) will be sustained. To the extent that Counts X and XI are based upon a negligence theory, they remain intact subject to this Court's determination of the certificate of merit issue. *See,* pp. 18-24 of this Opinion.

4.) Motion to Strike Counts VIII and IX (Corporate Liability of Lake Erie Women's)

Defendants contend that Pennsylvania law does not recognize a cause of action of corporate liability against a professional corporation, such as Lake Erie Women's. *See, Thompson v. Nason Hospital,* 591 A.2d 703 (Pa. 1991). Because Plaintiff agrees and stipulates to the withdrawal of Counts VIII and IX against Lake Erie Women's, those counts will be stricken with prejudice.

5.) Motion to Strike Count IV (Intentional and/or Negligent Infliction of Emotional Distress -Levinson).[5]

Defendants contend that Plaintiff has failed to state a claim for either intentional infliction of emotional distress or negligent infliction of emotional distress against Levinson.

Intentional infliction of emotional distress is defined in Section 46 of the Restatement (Second) of Torts which provides, *inter alia,* that: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Restatement (Second) of Torts, § 46 (1).[6] "[T]he conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in any civilized society." *Hoy v. Angelone,* 720 A.2d 745, 754 (Pa. 1998) (citation omitted).

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[5] In her Reply, Plaintiff attempts to support her Amended Complaint by relying upon evidence outside the record. As noted *supra*, this Court will not consider that evidence when arriving at its decision.

[6] Although our Courts have never expressly recognized a cause of action for intentional infliction of emotional distress, they have done so implicitly. *See, Taylor v. Albert Einstein Medical Center,* 754 A.2d 650, 652 (Pa. 2000); *Kazatsky v. King David Memorial Park,* 527 A.2d 988 (1987).

> Cases which have found a sufficient basis for a cause of action of intentional infliction of emotional distress have had presented only the most egregious conduct. See e.g. *Papieves v. Lawrence*, 437 Pa. 373, 263 A.2d 118 (1970) (defendant, after striking and killing plaintiff's son with automobile, and after failing to notify authorities or seek medical assistance, buried body in a field where discovered two months later and returned to parents (recognizing but not adopting Section 46)); *Banyas v. Lower Bucks Hospital*, 293 Pa. Super 122, 437 A.2d 1236 (1981) (defendants intentionally fabricated records to suggest that plaintiff had killed a third party which led to plaintiff being indicted for homicide); *Chuy v. Philadelpia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979) (defendant's team physician released to press information that plaintiff was suffering from fatal disease, when physician knew such information was false).

Id., at 754.

"In order to recover for negligent infliction of emotional distress a plaintiff must establish, as in any other negligence case, the defendant's breach of a duty and damages proximately caused thereby. In the context of a claim for emotional distress the action may be sustained under the impact rule, the zone of danger rule or the bystander rule." *Shumosky v. Lutheran Welfare Svcs. of Northeastern PA*, 784 A.2d 196, 199 (Pa. Super. 2001). Recently, Pennsylvania Superior Court recently stated that:

> . . . the cause of action for negligent infliction of emotional distress is restricted to four factual scenarios: (1) situations where the defendant had a contractual or fiduciary duty toward the plaintiff; (2) the plaintiff was subjected to a physical impact; (3) the plaintiff was in a zone of danger, thereby reasonably experiencing a fear of impending physical injury; or (4) the plaintiff observed a tortious injury to a close relative.

Toney v. Chester County Hosp., 961 A.2d 192, 197-98 (Pa. Super. 2008). *See also*, Restatement (Second) of Torts, § 313.[7] In all four scenarios,

[7] Restatement (Second) of Torts § 313 provides:

> (1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor
>
> (a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and
>
> (b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.
>
> (2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.

Restatement (Second) of Torts, § 313.

"a Plaintiff who alleges negligent infliction of emotional distress must suffer *immediate* and *substantial* physical harm." *Doe v. Philadelphia Community Health Alternatives AIDS Task Force*, 745 A.2d 25, 28 (Pa. Super. 2000), *aff'd*, 564 Pa. 264, 767 A.2d 548 (2001) (emphasis in original).

In Count IV of the Amended Complaint, Plaintiff alleged that at all relevant times, Levinson was addicted to or abusing mind altering drugs which impaired his ability to make medical decisions and/or provide medical treatment regarding the care, diagnosis and treatment of Plaintiff. Amended Complaint, at ¶ 76. Additionally, Plaintiff alleged that Levinson suffered a severe left radiculapathy causing weakness and clumsiness of his left upper arm which impaired his ability to make medical decisions and/or provide medical treatment regarding the care, diagnosis and treatment of Plaintiff. *Id.*, at ¶ 77. Furthermore, Plaintiff alleges that:

> The negligent and careless acts of [Levinson] in the care, diagnosis and treatment of [Plaintiff] were done willfully, intentionally, outrageously and/or recklessly intending to cause or inflict emotional distress upon Plaintiff and/or were done in reckless disregard of the probability of causing Plaintiff emotional distress, and these acts have in fact resulted in severe emotional distress causing Plaintiff the damages stated above.
>
> In the alternative, the acts of [Levinson] in the care, diagnoses and treatment of [Plaintiff] were, due to [Levinson's] impairments, negligent and careless and done in reckless and/or negligent disregard of the probability of causing Plaintiff severe emotional distress and these acts have in fact resulted in severe emotional distress causing the Plaintiff damages stated above.

Plaintiff's Amended Complaint, at ¶¶ 78-79.

The Court finds that the amended complaint does not sufficiently plead causes of action for both intentional infliction of emotional distress and negligent infliction of emotional distress. In particular, the Plaintiff has failed to allege when Plaintiff learned of Defendant Levinson's purported addiction and radiculapathy, the source of the knowledge, and the specific substantial physical harm that is a necessary element of these torts. *Love v. Cramer,* 606 A.2d 1175 (Pa. Super. 1992). Therefore, Defendants' preliminary objections to Count IV shall be sustained.

6.) Motion to Strike Count I (Negligence-Levinson) in Part as to 61 (d) & (e).

Defendants request that the Court strike the words "careless and/or reckless" from ¶ 61 (d) and ¶ (e) as legally insufficient because "there are no degrees of negligence in Pennsylvania." Defendants' Preliminary

Objections, at ¶¶ 60-63. In reply, Plaintiff argues that negligence, carelessness and recklessness "are essentially synonymous all being a standard of conduct below that of an ordinary prudent person." Plaintiff's Reply, at ¶ 63.

The Court finds that there is no need to strike the term "careless and/or reckless."

B.) Discovery Issues

1. Defendants' (Levinson, Townsend, and Lake Erie) Objections to Subpoenas and Motion for Protective Order.

Defendants seek a protective order pursuant to Pennsylvania Rule of Civil Procedure 4012. This rule provides:

> (a) Upon motion by a party or by the person from whom discovery or deposition is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense. . . .

Pa.R.C.P. 4012 (a).

> "The granting of relief in a discovery proceeding is dependent upon a prima facie showing of necessity, since the relief is not to be granted as a matter of right." *In re Estate of Roart,* 390 Pa. Super. 38, 47, 568 A.2d 182, 187 (1989). "The party moving for a protective order based on Pa.R.C.P. 4012 bears the burden of establishing the objectionable nature of the discovery he [or she] is withholding." *Griffiths v. Ulmer,* 55 D & C 4th 370, 373 (Lacka. Cty. 2002); *Platinum Corp. v. Blong,* 43 D & C 4th 445, 446-47 (Fayette Cty. 1998), citing *Cipollone v. Liggett Group, Inc.*, 106 F.R.D. 573, 585 (1985). In order to establish the "good cause" required, the party moving for the protective order must produce, "at a minimum, some evidence upon which a court can make a determination that harm will result from disclosure." *Ornsteen v. Bass,* 50 D & C 3d 371, 374 (Phila. Cty. 1988). "The determination of whether good cause does or does not exist *must be based upon appropriate testimony and other factual data, not the unsupported contentions and conclusions of counsel." Id.*, citing *Davis v. Romney,* 55 F.R.D. 337, 340 (1972). (emphasis added).

Fanelli v. Independence Blue Cross, 75 Pa. D & C 4th 10 (Phila. Cty. 2005)(internal footnote omitted).

Defendants object to the proposed subpoenas directed to the following individuals: (1) **Thomas S. Talarico, Esquire,** requesting all file materials, excluding those covered by the attorney-client privilege and/or constituting attorney work product, involving his representation of Levinson in an unrelated, civil action; (2) **Anthony M. Ruffa, D.O.,**

requesting Levinson's medical documentation; and, (3) **James A. DeMatteis, M.D.,** requesting Levinson's medical documentation. Defendants' Objections to Subpoena and Motion for Protective Orders, 12/29/08, at ¶¶ 5-8.

At the outset, Defendants contend that the Subpoenas should be quashed because of pending preliminary objections. *Id.*, at ¶ 11. In support, Defendants cite *Potts v. Consolidated Rail Corp.*, 37 Pa. D & C 4th 196 (Allegheny Cty. 1998) and argue that the Court should bar discovery until preliminary objections are resolved and defendants have filed answer to complaint. Plaintiff argues that Potts is factually distinguishable, the filing of preliminary objections do not automatically stay discovery, Hamot already filed an Answer, and Defendants waived this theory when they issued Interrogatories to Plaintiff on December 4, 2008 after the filing of preliminary objections. Plaintiff's Reply to Objections to Subpoenas and Motion for Protective Order, 01/02/09, at ¶¶ 11-12.

Based upon this Court's findings concerning the preliminary objections set forth earlier in this Opinion, it will address the remaining issues.

a.) Talarico Subpoena

As to Attorney Talarico's records, Defendants contend all the items are protected by the confidential work product doctrine and/or the attorney-client privilege. Defendants' Objections to Subpoena and Motion for Protective Orders, 12/29/08, at ¶ 15. In response, Plaintiff's argue they are seeking items otherwise discoverable in the unrelated civil action, such as medical records obtained by Attorney Talarico and letters to and/or from the defending insurance company regarding Levinson's alleged disabilities. Plaintiff's Reply to Objections to Subpoena and Motion for Protective Order, 01/02/09, at ¶ 15.

The attorney-client privilege is codified in Pennsylvania as follows:

> In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

42 Pa.C.S.A. § 5928.[8] Pursuant to this statute, the following four elements must be satisfied in order to invoke the protections of the attorney-client privilege:

> 1.) The asserted holder of the privilege is or sought to become a client.

[8] The attorney-client privilege does not protect information counsel obtained from third parties in the course of the representation. *MacQuown v. Dean Witter Reynolds Co.*, 47 Pa D & C 3d 21, 24-25 (Alleg. Cty. 1987). "Thus, any communications from counsel to the client disclosing information from third parties would not be protected because the underlying communication between counsel and the third party is not protected." *Id.*, at 25.

2.) The person to whom the communication was made is a member of the bar of a court, or his subordinate.
3) The communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort.
4) The privilege has been claimed and is not waived by the client.

Nationwide Mut. Ins. Co. v. Fleming, 924 A.2d 1259, 1265 (Pa. Super. 2007).

Under the attorney work product doctrine, "discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." Additionally:

> The underlying purpose of the work-product doctrine is to shield the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case. The doctrine promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients. However, the work-product privilege is not absolute and items may be deemed discoverable if the "product" sought becomes a relevant issue in the action.

Gocial v. Independence Blue Cross, 827 A.2d 1216, 1222 (Pa. Super. 2003)(internal citations omitted).

> The party who has asserted attorney-client privilege must initially set forth facts showing that the privilege has been properly invoked; then the burden shifts to the party seeking disclosure to set forth facts showing that disclosure will not violate the attorney-client privilege, *e.g.*, because the privilege has been waived or because some exception applies.

Nationwide Mut. Ins. Co., *supra. at* 1266.

This Court first notes that only Levinson can assert the confidentiality privilege. Second, it finds Plaintiff's subpoena for Attorney Talarico's legal file to be overly broad. Although medical history may be discoverable, Plaintiff can obtain this information from other sources, including the Defendant Levinson and his health care providers. In addition, much of the information may be - as Plaintiff implies - available as part of the public record in the unrelated lawsuit. The Talarico subpoena, as it now stands, is a fishing expedition.

(b) Ruffa and DeMatteis subpoenas

As to these subpoenas, this Court finds that evidence of Levinson's medical diagnoses and treatment are relevant and discoverable, subject to any valid claim of privilege. Moreover, Levinson put those issues in

the public domain when he filed his civil action at *Dr. Peter G. Levinson, M.D. v. Professional Casualty Association,* Erie County DKN# 14741-2008. Therefore, Defendants' motion shall be granted in part, and denied in part.

C.) Defendants' Motion to Strike the Plaintiff's Amended Certificate of Merit.

Defendants request an order striking the Amended Certificate of Merit ("COM") as to Lake Erie Women's, and striking Counts X and XI of the Plaintiff's Amended Complaint (vicarious liability counts). They contend that Plaintiff improperly filed the Amended COM following a Judgment of Non Pros and that Plaintiff failed to file a COM or motion for an extension of time within 60 days after the filing of the complaint in regards to Counts X and XI of the Amended Complaint.

Pa.R.C.P. 1042.3 applies[9] and "[t]he rule contemplates that a [COM] will be filed contemporaneously with or shortly after the filing of the complaint, and provides a 60-day window after the filing of the complaint to accomplish the filing of the [COM]." *Zokaites Contracting, Inc., et. al. v. Trant Corp., Inc.,* 2009 Pa. Super 35, ¶ 12, *quoting Varner v. Classic Cmtys. Corp.,* 890 A.2d 1068, 1073 (Pa. Super. 2006) (citation, internal quotation marks, and brackets omitted).[10] As Pa.R.C.P. 1042.3 provides, in part:

> **Rule 1042.3. Certificate of Merit**
>
> (a) In any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the attorney or party that either
>
> (1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or

[9] On June 16, 2008, the Pennsylvania Supreme Court amended the Civil Rules governing the entry of a judgment of *non pros* for failing to file a COM. *See, In RE; Adoption of Rule of Civil Procedure 1042.6 and Amendment of Rules 1042.1 et. seq. Governing Professional Liability Actions,* No. 493 Civil Procedure Rules, Docket No. 5, *(per curiam* Pa. 2008) (filed June 16, 2008, effective immediately). These amendments are applicable to the case at bar.

[10] *See, also Ditch v. Waynesboro Hosp.,* 917 A.2d 317, 322 (Pa. Super. 2007), *appeal granted in part,* 934 A.2d 1150 (Pa. 2007) (noting that a certificate of merit must be filed within sixty days of the filing of an original complaint and the filing of an amended complaint does not give a plaintiff an additional sixty days to file a certificate of merit) (citations omitted).

(2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, or

(3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.

(b) (1) A separate certificate of merit shall be filed as to each licensed professional against whom a claim is asserted.

(2) If a complaint raises claims under both subdivisions (a)(1) and (a)(2) against the same defendant, the attorney for the plaintiff, or the plaintiff if not represented, shall file

(i) a separate certificate of merit as to each claim raised, or

(ii) a single certificate of merit stating that claims are raised under both subdivisions (a)(1) and (a)(2),

. . .

(d) The court, upon good cause shown, shall extend the time for filing a certificate of merit for a period not to exceed sixty days. A motion to extend the time for filing a certificate of merit must be filed by the thirtieth day after the filing of a notice of intention to enter judgment of non pros on a professional liability claim under Rule 1042.6 (a) or on or before the expiration of the extended time where a court has granted a motion to extend the time to file a certificate of merit, whichever is greater. The filing of a motion to extend tolls the time period within which a certificate of merit must be filed until the court rules upon the motion.

Note: There are no restrictions on the number of orders that a court may enter extending the time for filing a certificate of merit provided that each order is entered pursuant to a new motion, timely filed and based on cause shown as of the date of filing the new motion.

The moving party must act with reasonable diligence to see that the motion is promptly presented to the court if required by local practice.

In ruling upon a motion to extend time, the court shall give appropriate consideration to the practicalities of securing expert review. There is a basis for granting an extension of time within which to file the certificate of merit if counsel for the plaintiff was first contacted shortly before the statute of limitations was about to expire, or if, despite diligent efforts by counsel, records necessary to review the validity of the claim are not available.

Pa. R. C.P. 1042.3.

In *Womer v. Hilliker*, 908 A.2d 269 (Pa. 2006), the plaintiff against whom a Rule 1042.6 judgment of non pros was entered, failed to file a COM. The Pennsylvania Supreme Court found that although the plaintiff served an expert report on the defendant, this did not amount to "substantial compliance" with the Rules of Civil Procedure governing the filing of a certificate of merit. In discussing the difference between "no compliance" and "substantial compliance" under Pa.R.C.P. 126, the Pennsylvania Supreme Court stated:

> In our view, Hilliker's position is the correct one, since Womer took no steps to comply with Pa.R.C.P. No. 1042.3. Rule 1042.3 is clear and unambiguous in its mandate that in every professional liability action a specific representation about the plaintiff's claim must be filed in the official record in a document called a "certificate of merit" at the time the complaint is filed or within sixty days thereafter. Pa.R.C.P. No. 1042.3(a). Pa.R.C.P. No. 1042.8 provides that "the certificate required for filing by Rule 1042.3(a) shall be substantially in the following form...." and displays a sample COM that shows precisely what Rule 1042.3 requires. Moreover, Pa.R.C.P. No. 1042.3(d), which allows for the filing and granting upon good cause shown of a motion to extend the time for filing a COM, sets forth the one and only step that a plaintiff is to take if he finds himself unable to secure a COM and desires to avoid the consequences of not satisfying Rule 1042.3 (a)'s COM filing requirement in a timely fashion. Womer, however, did nothing of the sort. Rather, he served discovery materials on Hilliker, which included an expert report. In our view, this was no procedural misstep within the meaning of Pa.R.C.P. No. 126. It was instead, a wholesale failure to take any of the actions that one of our rules requires, of the type that we have heretofore refused to overlook under Rule 126. See *Sahutsky*, 782 A.2d at 1001.
>
> In contending that even though he made no effort to follow Pa.R.C.P. No. 1042.3's requirements, Rule 126 can apply in his circumstances because he fulfilled 1042.3's purpose, Womer is essentially arguing that the doctrine of substantial compliance in Rule 126 not only excuses a party who commits a procedural misstep in attempting to do that which a rule instructs, but also excuses a party who does nothing that a rule requires, but whose actions are consistent with the objectives he believes the rule serves. This is simply not so. The equitable doctrine we incorporated into Rule 126 is one of substantial compliance, not one of no compliance. We reiterate what our case law has taught: Rule 126 is available to a party who makes a substantial attempt to conform, and not to a party who disregards the terms of a rule in their entirety and determines for himself the steps he can take to satisfy the procedure that we have adopted to enhance the functioning

> of the trial courts. See *Sahutsky*, 782 A.2d at 1001; *Commonwealth v. Metz*, 534 Pa. 341, 633 A.2d 125, 127 (Pa. 1993). Therefore, we conclude that Womer did not substantially comply with Pa.R.C.P. No. 1042.3 for purposes of Pa.R.C.P. No. 126's application, and hold that the Superior Court erred in including Pa.R.C.P. No. 126 as a factor in its analysis as to whether the trial court correctly denied Womer's request that the judgment of *non pro*s be opened.

Id., at 278.[11]

On September 11, 2008, Plaintiff filed her original Complaint and also contemporaneously filed certificates of merit as to Levinson and Townsend. On October 16, 2008, pursuant to Pa.R.C.P. 1042.6[12], Lake Erie Women's filed a Notice to Enter Judgment of Non Pros on Counts VIII, IX, X and XI of the Complaint (these involve corporate negligence and vicarious liability claims against Lake Erie Women's). On October 22, 2008, Plaintiff filed an Amended Complaint and a COM as to Lake Erie Women's (addressing corporate negligence only). On November 24, 2008, pursuant to Pa.R.C.P. 1042.7[13], Defendants filed a Praecipe of Judgment of Non Pros as to Count X (vicarious liability) and Count XI (vicarious liability) against Lake Erie Women's. The Erie County Prothonotary's Office docketed the Praecipe but did not enter judgment due to the COM filed on October 22, 2008.[14]

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[11] On June 16, 2008, Rule 1042.8 was renumbered as 1042.9.

[12] Rule 1042.6 provides that, ". . . a defendant seeking to enter a judgment of non pros under Rule 1042.7 (a) shall file a written notice of intention to file the praecipe and serve it on the party's attorney of record. . . no sooner than the thirty-first day after the filing of the complaint. Pa.R.C.P. 1042.6 (a).

[13] Rule 1042.7 provides that:

> (a) The prothonotary, on praecipe of the defendant, shall enter a judgment of non pros against the plaintiff for failure to file a certificate of merit within the required time provided that
>
> (1) there is no pending motion for determination that the filing of the certificate is not required or no pending timely filed motion seeking to extend the time to file the certificate,
>
> (2) no certificate of merit has been filed,
>
> (3) except as provided by Rule 1042.6 (b), the defendant has attached to the praecipe a certificate of service of the notice of intention to enter the judgment of non pros, and
>
> (4) except as provided by Rule 1042.6(b), the praecipe is filed no less than thirty days after the date of the filing of the notice of intention to enter the judgment of non pros.

[14] The accompanying note to Pa.R.C.P. 1042.7 states that "Rule 237.1 does not apply to a judgment of non pros entered under this rule." Pa.R.C.P. 1042.7 note. Accordingly, under Pa.R.C.P. 236, the Prothonotary must provide a party with written notice of entry of the judgment and note in the docket the giving of such notice. *Mumma v. BTPW*, 937 A.2d 459, 464 (Pa. Super. 2007). Furthermore, "the 60 day time limitation of Civil Rule 1042.3 cannot be extended based upon the mere fact that the entry of judgment was technically deficient under Civil Rule 236." *Id.*, at 465.

On November 25, 2008, over 60 days from filing the original complaint and one month from the date she filed her amended complaint and COM alleging only negligence, Plaintiff filed an Amended COM, addressing the corporate negligence and vicarious liability claims against Lake Erie Women's.

Defendants claim that Plaintiff improperly filed the Amended Certificate of Merit following Judgment of Non Pros and, therefore, request this Court to strike the Amended Certificate of Merit and Counts X and XI of Plaintiffs Amended Complaint. Defendants' Motion to Strike the Plaintiff's Amended Certificate of Merit, 12/29/08, at ¶¶ 9-11. In response, Plaintiff claims that counsel inadvertently omitted the second paragraph dealing with vicarious liability from the certificate of merit filed on October 22, 2008. 01/06/09, at ¶ 4-6.[15] Plaintiff further argues that: (1) judgment of non pros has not been entered, (2) the amended certificate of merit corrected a typographical error, and (3) Defendants have suffered no prejudice.

After its review, this Court finds that relevant to the COM filed on October 22, 2008, more than a typographical error was involved. Furthermore, Plaintiff failed to seek court approval before filing the November 25, 2008 Amended COM. Therefore, the Defendants' Motion to Strike shall be granted without prejudice. Plaintiff shall be afforded twenty (20) days to file a motion requesting an extension to file an amended COM.

III. CONCLUSION.

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

ORDER

AND NOW, this 27th day of April, for the reasons set forth in the accompanying opinion, it is hereby ordered that:

1.) Defendants' Preliminary Objections are SUSTAINED, in part, and OVERRULED, in part, as follows:

(a) Motion to Strike paragraphs 69, 70, 72 & 73 of Count III (Lack of Informed Consent) is OVERRULED;

(b) Motion to Strike Count II (common law claim of battery) is OVERRULED;

(c) Motion to Strike Counts X and XI (vicarious liability of Lake Erie Women's Center, P.C., d/b/a Lake Erie Women's Center and alternatively d/b/a Lakeside OB/GYN Women's Center, is SUSTAINED with prejudice, to the extent those counts allege vicarious liability for failure to obtain informed consent;

[15] Plaintiff claims that at the time, counsel had an expert report which supported vicarious liability.

(d) Motion to Strike Counts VIII and IX (Corporate Liability of Lake Erie Women's Center) is SUSTAINED with prejudice;

(e) Motion to Strike Count IV (Intentional and/or Negligent Infliction of Emotional Distress) is SUSTAINED without prejudice to Plaintiff. Plaintiff may, within twenty (20) days from the date of this Order, file an Amended Complaint as to Count IV;

(f) Motion to Strike Count I (Negligence) in part as to ¶ 61 (d) and (e) is OVERRULED.

2.) Defendants' Motion to Strike Documents Attached to the Plaintiff's Reply to Preliminary Objections is GRANTED;

3.) Defendants' Objections to Subpoenas and Motion for Protective Order is GRANTED in part, and DENIED in part as follows:

(a) A Motion for Protective Order as to the Talarico Subpoena is GRANTED;

(b) A Motion for Protective Order as to the Ruffa and DeMatteis Subpoenas is DENIED, subject to any valid claim of privilege.

4.) Defendants' Motion to Strike Plaintiff's Amended Certificate of Merit is GRANTED without prejudice to the Plaintiff. Plaintiff may, within twenty (20) days from the date of this Order, file a motion for extension of time in which to file an amended certificate of merit as to Defendant, Lake Erie Women's Center, P.C., d/b/a Lake Erie Women's Center and alternatively d/b/a Lakeside OB/GYN Women's Center.

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

GERALD PAUL and NANCY PAUL, Appellants,
v.
HOME RULE BOROUGH OF EDINBORO, Appellee

ZONING / APPEALS

If additional evidence is not received, the standard for the trial Court when reviewing a decision of a zoning hearing board is limited to determining whether the board committed a manifest abuse of discretion or an error of law.

ZONING / APPEALS

An abuse of discretion occurs only where the board's findings are not supported by substantial evidence in the record.

ZONING / NON-CONFORMING USES

A non-conforming use is an activity which was lawful when it commenced and came into existence prior to enactment of a zoning regulation that does not authorize that activity.

ZONING / NON-CONFORMING USES

Where the Borough had a long-standing ordinance requiring landowners to obtain a license in order to rent their properties and owners had rented their property after securing such licenses annually, the owners' use as a rental property was not a non-conforming use as it did not preexist the municipal regulation but, instead, existed because of compliance with it.

ZONING / NON-CONFORMING USES

There is no constitutionally protected right to create a non-conforming use in the face of a pending ordinance.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 10056-2009

Appearances: Robert C. Ward, Esquire, Attorney for Appellants
Ritchie T. Marsh, Esquire, Attorney for Appellee
David R. Devine, Esquire, Attorney for Zoning Hearing Board of Edinboro

OPINION

Connelly, J., July 9, 2009

This matter is before the Court pursuant to a Land Use Appeal filed by Gerald and Nancy Paul (hereinafter "Appellants"). The Appeal was filed in response to a decision of the Zoning Hearing Board of Edinboro, Pennsylvania (hereinafter "Zoning Board"). The Home Rule Borough of Edinboro (hereinafter "Appellee") and the Zoning Board oppose.

Statement of the Facts

Appellants own a single-family home near the lake at 112 Maple Street, Edinboro, Pennsylvania. *Brief in Support of Land Use Appeal, p. 1.* Appellants allege they have rented the home to college students during the school year for the past twenty (20) years and utilized the residence as a summer home during the summer months. *Id.* Appellants aver they had a conforming use until Appellee modified the zoning ordinance in May of 2008 and again in August 2008. *Id.*

Appellee has long had a rental ordinance that required landowners to obtain a license in order to rent their property. *Brief in Opposition of Appeal, p. 3.* Appellants had a rental license for the 2006-07 period. During the 2007-08 rental year, Appellants did not obtain a rental permit and had no renters. *Id.; Brief in Support of Appeal, p. 3.* On July 3, 2008, Appellee published its Notice of Intent to Adopt a New Ordinance that modified, restricted and changed the ability of individuals to rent their properties.[1] *Brief in Opposition of Appeal, p. 3, Exhibit A.* Appellants approached the Edinboro Zoning Administrator shortly after the posting and requested an application for a 2008-09 Regulated Rental Year License. *Id. at p. 3.* The 2008-09 application was dated July 23, 2008 and was mailed that same day from Appellants' permanent residence in Aliquippa, Pennsylvania with a check for payment. *Id.* A 2007-08 application was mailed July 24, 2008 from the same location.

The Zoning Administrator rejected Appellant's application for a 2007-08 Rental Year License noting that because the application was untimely, it could not be accepted. *Brief in Support, p. 5.* Appellants appealed the decision of the Borough's Zoning Officer to the Zoning Board. After a hearing, the Zoning Board upheld the denial of the requested permit in a decision dated December 23, 2008. *Brief in Opposition of Appeal, Exhibit A.* The instant appeal followed.[2]

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[1] Ordinance 563, which was enacted August 11, 2008, amended Ordinances 545 and 561. Ordinance 563 defines a Student House and notes "[n]o single family home, townhouse, duplex, or conversion unit, used as a Student House shall be located on a lot, any portion of which is closer to another lot containing a Student House than a distance determined by multiplying twenty times the minimum width required for a single family dwelling in the district in which the Student House is located." Ordinance 563 also states that no more than one structure on a lot may contain a Student House.

[2] Appellants named The Home Rule Borough of Edinboro as Appellee in the instant case. In response, The Home Rule Borough of Edinboro and the Edinboro Zoning Hearing Board filed a Motion to Quash and or Dismiss alleging that Appellants' suit was untimely as The Home Rule Borough of Edinboro did not render the decision that is being appealed and the incorrect Appellee was named. This Court denied the Motions on February 10, 2009. *Order of Connelly, J., February 10, 2009.*

Analysis of Law

The standard for the Court of Common Pleas when reviewing a decision of a Zoning Hearing Board, if the Court does not take additional evidence, is limited to determining whether the Board committed a manifest abuse of discretion or an error of law. *Swemley v. Zoning Hearing Board of Windsor Twp.*, 698 A.2d 160 (Pa.Cmwlth.Ct. 1997). An abuse of discretion occurs only where the board's findings are not supported by substantial evidence in the record. *Spahn v. Zoning Board of Adjustment*, 922 A.2d 24 (Pa. Cmwlth.Ct. 2007). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Rittenhouse Row v. Aspite*, 917 A.2d 880 (Pa.Cmwlth.Ct. 2006). Further, in weighing evidence presented before the zoning hearing board, the trial court may not substitute its interpretation for that of the board because determinations about the credibility and the weight to be given to the evidence are to be made by the board. *In re: Cutler Group, Inc.*, 880 A.2d 39 (Pa.Cmwlth.Ct. 2005), *appeal denied*, 897 A.2d 461 (Pa. 2006). The Superior Court has held that in zoning cases, all courts need to determine is whether there is some basis for the borough's action or, in other words, whether the action was arbitrary or capricious. *Boyle Appeal*, 116 A.2d 860 (Pa.Super. 1955).

Here, the decision of the Zoning Board notes that the standard rental permit period had run from August 15 through August 14 since the year 2000. *Brief in Opposition of Appeal, Exhibit A.* The Zoning Board also held that the "Pending Ordinance Doctrine" provides that the municipality may deny an application for zoning relief, if, at the time of the application, a zoning ordinance is pending which will prohibit use of land sought by application. *Zoning Hearing Board, Conclusions of Law, ¶ 1, relying upon, Baron Oil Co. v. Kimple,* 284 A.2d 744 (Pa. 1971). The Zoning Board held that because the amended ordinance was pending at the time Appellants filed their rental application, they no longer had a conforming use. *Id. at ¶¶ 5-8.* The Zoning Board also relied on the 1968 Pennsylvania Supreme Court case of *Penn Township v. Yecko Bros.*, which held that a party must act in good faith and cannot race to beat a new zoning ordinance. *Penn Township v. Yecko Bros.*, 217 A.2d 171 (Pa. 1968).

The Pending Ordinance Rule holds that "a municipality may properly refuse a building permit for a land use repugnant to a pending and later enacted zoning ordinance even though application for the permit is made when the intended use conforms to existing regulations." *A.J. Aberman, Inc. v. New Kensington,* 105 A.2d 586 (Pa. 1954). In its decision, the Board noted that until the time of the first publication of the new zoning ordinance on July 3, 2008, Appellants had a conforming use. *Brief in Opposition of Appeal, Exhibit A.* However, the Board denied Appellants' applications in 2008 as they were for rental permits for a non-conforming

use, which was prohibited by the pending ordinance. *Id.*

Appellee contends that Appellants' late application for the 2007-08 rental period demonstrates bad faith on their part. Appellant Nancy Paul testified at the hearing that she became aware of the new ordinance during a meeting with the Zoning Administrator on or about July 18, 2008. *Hearing Transcript, pp. 35, 52*. She also testified that she knew the only way to defeat the pending ordinance was to file an application for a 2007-08 rental license. *Id. at pp. 53-54.* The Court finds that the hearing testimony indicates Appellants did indeed apply for a 2007-2008 license less than one month before the close of the rental period in an apparent attempt to beat the zoning ordinance.

Appellants assert that the Zoning Hearing Board of Edinboro rendered a decision, ostensibly supported with very limited facts from the record. *Brief in Support of Appeal, p. 8.* Appellants contend that their use of the property as a student residence for the past several years was never abandoned. *Id. at p. 9.* Appellants also argue that the Zoning Hearing Board should have utilized the *Haller* Doctrine rather than the Pending Ordinance Rule. In the *Haller* case, the Pennsylvania Supreme Court held that the use in question need not be in actual operation at the time of the ordinance's enactment in order to retain its nonconforming status. *Haller Baking Co.'s Appeal*, 145 A. 77, 79 (Pa. 1928). *See also, Latrobe Speedway v. Zoning Hearing Board of Unity Township*, 720 A.2d 127 (Pa. 1998).

Pennsylvania courts have long held that a use entitled to recognition as nonconforming does not lose that protection unless the use is abandoned. However, the Court notes that Appellants' use of the land was never nonconforming and instead conformed to the zoning ordinances then in effect. Appellants' intended use of the property only became nonconforming in 2008 after the pending ordinance was published and Appellants sought to obtain a rental license. Appellee contends that Appellants' arguments regarding abandonment are not applicable to the case at bar because a different standard is applied in instances where there is an application for a permit when there is a pending ordinance which would affect the subject property. *Brief in Opposition of Appeal, p. 8.*

According to *Ryan's Pennsylvania Zoning Law and Practice*, a nonconforming use is any activity which came into existence prior to the zoning restriction involved and violates that restriction or a use that came into existence under a permissive zoning ordinance and now finds itself in violation of the restrictive amendment. *Pennsylvania Zoning Law and Practice, Ryan, § 7.1.1.* The owner of a nonconforming use bases his case not on the rules of variance but on the simple proposition that his activity predates the zoning restriction and is exempted for that reason. *Id. See also, Hanna v. Board of Adjustment,* 183 A.2d 539, 543 (Pa. 1962).

Appellants argue that their use of the property as a student residence for the past several years was never abandoned. *Brief in Support of Appeal, p. 9.* However, the Court notes that Appellants' use of the land was never nonconforming and instead conformed to the zoning ordinances then in effect. The Court agrees with Appellee's contention that Appellants' arguments regarding abandonment are not applicable to the case at bar because a different standard is applied in instances where there is an application for a permit when there is a pending ordinance which would affect the subject property. *Brief in Opposition of Appeal, p. 8.*

The right to create a nonconforming use in the face of a pending ordinance is not constitutionally protected. The cases are clear that a municipality may properly refuse a building permit for a land use repugnant to a pending and later lawfully enacted zoning ordinance even though the application for the permit is made when the intended use conforms to existing regulations. *Honey Brook Township v. Alenovitz,* 243 A.2d 330 (Pa. 1968).

Appellants' final argument notes their rental application cannot be considered untimely because Appellee issued rental permits to other individuals as late as April, 2008.[3] The Court notes that rental applications for the 2008-09 rental year were mailed out in June of 2008, more than a month before Appellants filed an application for the 2007-08 rental year. Moreover, at the time of Appellants' application less than one month remained of the 2007-08 rental year. Therefore, the Court finds that it was within the Zoning Board's discretion to find their application untimely.

The Court is constrained to uphold the decision of the Zoning Board as long as there is some basis for the Borough's action. Here, the Zoning Board utilized the Pending Ordinance Rule to deny Appellant's application. Therefore, there indeed appears to be some basis for the Borough's action and Appellant's Land Use Appeal is hereby dismissed.

ORDER

AND NOW, TO-WIT, this 9th day of July, 2009, it is hereby **ORDERED,** that Appellant's Land Use Appeal is **DENIED** and the decision of the Home Rule Borough of Edinboro and the Edinboro Zoning Hearing Board is upheld.

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

[3] One renewal permit was issued on July 24, 2008 by the Borough of Edinboro. However, hearing testimony indicates that the application for the permit had been submitted prior to June of 2008 and was delayed because of a question with the application. This application therefore predates the publication of the amended ordinance.

MICHAEL T. PAUL, Plaintiff,

v.

THE IGLOO ICE ARENA, INC., Defendant

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate only when, reviewing the record in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party's right to judgment is clear and free from doubt.

NEGLIGENCE / ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE / CONDITION AND USE OF LAND, BUILDING AND STRUCTURES

Under §§ 343 and 343A of the Restatement (Second) of Torts, a possessor of land is not liable to an invitee for a dangerous condition on the land if the dangerous condition and the risk of the specific harm are apparent to a reasonable person in the position of the invitee.

JUDGMENTS / SUMMARY JUDGMENT

When 15 year old Plaintiff was injured when he fell as a result of his head hitting an overhanging net as the Plaintiff attempted to exit the ice, Defendant Ice Rink owner was not entitled to summary judgment in its favor since genuine issues of material fact exist as to whether the condition of the overhanging net was open and obvious to a person in Plaintiff's position.

TORTS / DEFENSES / ASSUMPTION OF RISK

When 15 year old Plaintiff was injured when he fell as a result of his head hitting an overhanging net as the Plaintiff attempted to exit the ice, Defendant Ice Rink owner was not entitled to summary judgment in its favor on its assumption of the risk defense since genuine issues of material fact exist as to whether the condition of the overhanging net was obvious, and whether Plaintiff appreciated and accepted the risk of the injury he sustained.

JUDGMENTS / SUMMARY JUDGMENT

When 15 year old Plaintiff was injured when he fell as a result of his head hitting an overhanging net as the Plaintiff attempted to exit the ice, Defendant Ice Rink owner was not entitled to summary judgment in its favor on argument that it did not have notice of the alleged dangerous conditions of its premises, since genuine issues of material fact exist as to whether the Defendant had knowledge of the condition of the overhanging net.

JUDGMENTS / SUMMARY JUDGMENT

When 15 year old Plaintiff was injured when he fell as a result of his head hitting an overhanging net as the Plaintiff attempted to exit the ice, Defendant Ice Rink owner was not entitled to summary judgment in its favor on its "no duty" argument under *Jones v. Three Rivers Management Corp.*, 394 A.2d 546 (1978), since falling due to a low hanging net and alleged negligent maintenance of an ice rink are not risks expected in the course of playing hockey.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 15339 of 2007

Appearances: Richard E. Filippi, Esquire, Attorney for Plaintiff
George N. Stewart, Esquire, Attorney for Defendant

OPINION AND ORDER

DiSantis, Ernest J., Jr., J.

This matter comes before the court on Defendant's Motion for Summary Judgment.

I. BACKGROUND OF THE CASE

This case arises out of injuries and damages allegedly sustained by Plaintiff, Michael T. Paul ("Paul"), as a result of a fall that occurred at Defendant's, The Igloo Ice Arena, Inc. ("Igloo"), premises on December 12, 2003.[1] Complaint, ¶ 4. On that day, Paul was a member of a hockey team participating in a hockey tournament at the Igloo. Complaint, ¶ 5. After the tournament ended, Paul attempted to exit the ice pad through the door in the boards. As he was looking down in preparation of stepping down from the ice pad to the outside rubberized surface, his helmet caught in the overhead net. Complaint, ¶ 12. As a result, Paul fell backward 1 to 1 ½ feet from the ice surface onto the floor below the ice surface. Complaint, ¶¶ 12-13. He allegedly suffered injuries, including an unstable fracture of his left ankle. Complaint, ¶ 19.

On December 4, 2007, Paul filed a Complaint, alleging that he was an "invitee" at the time of his fall and, therefore, Igloo had a duty to "remedy all known dangerous conditions existing on or about the premises and further had a duty to conduct reasonable inspections and investigations to discover such dangerous conditions and defects" and to warn Paul of those conditions. Complaint, ¶¶ 16-17. Paul further alleged that the netting surrounding the door exiting the ice pad had been negligently installed, there was no lip along the edge of the ice pad where the door to the boards was located, there was an approximate 1 to 1 ½ foot drop off from the ice pad to the floor, and the arena was poorly lit. Complaint, ¶¶ 8-11. Therefore, Paul alleged that the Igloo breached its duty as follows:

a. In failing to inspect the protective netting hanging from the outside of the ice rink to ensure that it was properly placed so as not to obstruct the safe pathway of players entering and exiting the ice pad;

b. In failing to undertake improvements to the placement of the protective netting to prevent said netting from obstructing the safe pathway for players entering and exiting the ice pad;

[1] Paul was a 15 year-old minor at the time of the alleged incident.

c. In failing to properly warn "invitees" of the arena in question as to the dangerous conditions of the protective netting and permitting the arena in question to remain in such condition;

d. In failing to properly maintain the surface of the ice so as to avoid the dangerous lack of an edge at the ice at the door in the boards thereby further obstructing the safe pathways of hockey players attempting to enter and exit the ice pad;

e. In failing to warn invitees such as the Plaintiff of the dangerous condition of the ice pad caused by the lack of an edge at the end of the ice surface which obstructed the safe pathway of hockey players attempting to enter and exit the ice pad;

f. In designing, constructing and/or maintaining the ice arena with a 1 to 1 ½ foot drop off from the ice surface to the surrounding floor;

g. In failing to warn invitees of the arena of the dangerous condition of the drop off from the ice surface to the floor;

h. In failing to provide adequate lighting at the location of the Plaintiff's fall;

i. In failing to conduct adequate inspections of the facility to discover the dangerous conditions aforesaid;

j. In failing to provide adequate warning of the dangerous conditions aforesaid; and

k. In failing to remedy the dangerous conditions aforesaid.

Complaint, ¶ 18 (a)-(k).

On March 16, 2009, Defendant filed a Motion for Summary Judgment and supporting brief. On April 13, 2009, Plaintiff filed a Reply to Motion for Summary Judgment and supporting brief.

II. DISCUSSION

Rule 1035.2 of the Pennsylvania Rules of Civil Procedure provides that after the relevant pleadings are closed, a party may move for summary judgment in the following circumstances:

> (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.C.P. 1035.2.

Summary judgment may be granted where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law. A moving party has the burden of proving that no genuine issue of material fact exists. *Gutteridge v. A.P. Green Services, Inc.*, 804 A.2d 643, 651 (Pa. Super. 2002) (citation omitted). In determining whether a moving party is entitled to relief, this Court "must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party." *Id.* (citation omitted). Therefore, summary judgment is appropriate when "the uncontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law." *Id.* (citation omitted). "[A] court may grant summary judgment only where the right to such a judgment is clear and free from doubt." *Toy v. Metropolitan Life Ins. Co.*, 593 Pa. 20, 928 A.2d 186, 195 (2007) (citation omitted).

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

Shepard v. Temple University, 948 A.2d 852, 856 (Pa. Super. 2008), *quoting Murphy v. Duquesne University,* 565 Pa. 571, 777 A.2d 418, 429, (2001) (citations omitted) (emphasis added).

A. Whether a genuine issue of material fact exists as to whether the purported condition of the Igloo was open and obvious?

The Restatement (Second) of Torts 343[2] sets forth the duty owed to invitees as a result of dangerous conditions on premises. It provides:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

[2] Restatement (Second) of Torts §§343 and 343A are recognized as the law of Pennsylvania. *Atkins v. Urban Redevelopment Authority of Pittsburgh,* 414 A.2d 100 (Pa. 1980).

Although § 343 imposes a high duty upon a landowner, the duty is not absolute. § 343A provides that:

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Restatement (Second) of Torts, § 343A. A dangerous condition is obvious when "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising normal perception, intelligence, and judgment." *Carrender v. Fitterer,* 469 A.2d 120, 123 (Pa. 1983), *quoting Restatement, supra,* § 343A comment b. "For a danger to be 'known', it must 'not only be known to exist, but . . . also be recognized that it is dangerous and the probability and gravity of the threatening harm must be appreciated.'" *Id.* Normally, the question of whether a danger was known or obvious is a question of fact for the jury. *Id.*, at 124. However, the court may decide this question where reasonable minds cannot differ as to the condition. *Id.*; Restatement, supra, § 328B comments c and d.

Igloo contends it did not breach any duty owed to Paul because according to the evidence of record, the conditions that purportedly caused Paul's fall "were open and obvious, had been discussed prior to the game according to the coach, and that despite the fact that [Paul] was aware of those conditions, he voluntarily proceeded to encounter the conditions when he exited the ice." Igloo's Motion for Summary Judgment, ¶¶ 9, 13. Igloo further argues that Paul "assumed the risk of injury" and that it did not have a duty to protect him. Igloo's Motion for Summary Judgment, ¶ 14.

In support, Igloo relies upon the following: (1) Paul's deposition testimony in which he stated that he was aware of the 1 to 1 ½ foot step up onto the ice and the low hanging netting; (2) deposition testimony of Paul's coach, Raye Butler, who warned Paul and the other players about the condition of the net. Igloo's Motion for Summary Judgment, ¶¶ 10, 11.

In response, Paul argues that he did not know of the dangerous condition (the low hanging netting) and did not appreciate the probability and gravity of the potential threatened harm. Paul's Brief In Opposition, at 7, 10. He contends that as a 15 year old kid playing hockey, he was not in a position to calculate the threat of harm and the nature and extent of its probability of occurring. *Id.* at 10. Rather, his attention was focused on playing the hockey game and the 8 to 12 inch drop off when exiting the ice pad. *Id.* at 9. Moreover, Paul contends that "[w]hether a fifteen (15) year old kid playing hockey could reasonably ascertain the dangers he faced by the Igloo's poorly designed and maintained facility is a question

upon which, at a minimum, reasonable minds could differ" *Id.* at 11. In support of his argument, Paul relies upon his affidavit and deposition testimony, together with the deposition of Raye Butler.

Upon review, this Court finds that a genuine issue of material fact exists as to whether the condition of the Igloo were open and obvious to Paul. As reflected in his deposition testimony, Paul was focused on the hockey game. When it was time to exit the ice pad, Paul was focused on the 8 to 12 inch drop and the fear of running into other players while attempting to maneuver the steep drop. Paul Deposition, at 23, 27. In effect, while attempting to exit the ice pad, Paul encountered the drop off, low hanging netting, and lack of a lip along the edge of the ice pad. This Court finds that reasonable minds could differ as to whether the condition and risk of the low netting was apparent to Paul or a similarly situated fifteen year old hockey player and would be recognized as a dangerous condition.

In regard to Igloo's claim that Paul assumed the risk of injury and, therefore, owed him no duty, this Court notes that in *Hughes v. Seven Springs Farm, Inc.*, 762 A.2d 339 (Pa. 2000), the Pennsylvania Supreme Court declared that:

> As a general rule, the doctrine of assumption of the risk, with its attendant "complexities" and "difficulties," see, generally, *Howell v. Clyde*, 533 Pa. 151, 620 A.2d 1107 (1993) (Opinion Announcing the Judgment of the Court by Flaherty, J.), has been supplanted by the Pennsylvania General Assembly's adoption of a system of recovery based on comparative fault in the Comparative Negligence Act. 42 Pa.C.S. § 7102 (a)-(b).

Hughes, 762 A.2d at 341. The *Hughes* Court noted that the doctrine of voluntary assumption of risk remained in effect for cases involving downhill skiing. *Id.*, *citing* 42 Pa.C.S.A. § 7102 (c). Subsequent to *Hughes*, § 7102 was amended by including subsection (b.3), which extends the doctrine to off-road vehicle driving. Furthermore, the Pennsylvania Superior Court has applied the assumption of the risk doctrine in other types of cases. *See, e.g., Loughran v. Phillies*, 888 A.2d 872 (Pa. Super 2005) (applying some form of the doctrine for cases involving baseball).

Based upon the above, the doctrine of assumption of the risk remains viable. In *Hadar v. Avco Corp.*, 886 A.2d 225 (Pa. Super. 2005), our Superior Court noted that:

> "[T]o grant summary judgment on the basis of assumption of the risk it must first be concluded, as a matter of law, that the party consciously appreciated the risk that attended a certain endeavor, assumed the risk of injury by engaging in the endeavor despite the appreciation of the risk involved, and that the injury sustained was, in fact, the same risk of injury that was appreciated and assumed.

> The appreciation of a general risk is not sufficient to prevent a case from going to the jury. Rather, the 'risk of injury from the transaction that actually took place must be so immediately apparent as to be equivalent to an appreciation and acceptance of that risk and a relinquishment of the right to complain.'"

Hadar, 866 A.2d at 229.

As noted above, it is not entirely clear that the netting was an obvious and dangerous condition. Here, a genuine issue of material fact exists as to whether the purported negligent placement of the netting was immediately apparent so that Paul appreciated and accepted the risk. Likewise, reasonable minds can differ on whether Paul voluntarily and knowingly proceeded in the face of an obvious and dangerous condition.

B. Whether Igloo was on notice of the dangerous condition?

Igloo further contends that it did not have any reason to know that the netting or the step down from the ice pad prevented an unreasonable risk of harm to those entering or exiting the ice pad. Igloo's Motion for Summary Judgment, ¶ 15. In support, Igloo relies up the deposition testimony of Pierre LaGace, Igloo's president, who testified that the Igloo never received complaints in regard to the netting or elevation of the entrance/exit of the ice pad and, furthermore, was unaware of anyone ever tripping or falling as they exited ice. Igloo's Motion for Summary Judgment, ¶¶ 16, 17.

In response, Paul contends that LaGace's deposition testimony does establish Igloo's knowledge of the dangerously low hanging netting. Brief in Opposition, at 13-16. Paul further argues that reasonable minds could differ as to whether Paul's injury was foreseeable due to a combination of factors, i.e., low hanging netting, steep elevation from the ice surface to the floor, lack of protective edging to prevent skaters from sliding off the ice, and inadequate lighting. *Id.* at 16. Furthermore, Igloo's president, Pierre LaGace, admitted that the netting would periodically get pulled down and that it would have to be pulled back up. LaGace Deposition, at 53, 55.

Upon review, this Court finds that a genuine issue of material fact exists as to whether Igloo was aware of the dangerous condition of the netting.

C. Whether the "no-duty rule", as set forth in *Jones v. Three Rivers Management Corp.*, 394 A.2d 546 (1978), is applicable?

"The operator of a place of amusement is 'not an insurer of his patrons,' and therefore, patrons will only be able to recover for injuries caused by the operator's failure to exercise 'reasonable care in the construction, maintenance, and management of the facility.'" *Loughran v. The Phillies*, 888 A.2d 872, 875 (Pa. Super. 2005) (citations omitted). The "no-duty rule" provides that a defendant owes no duty of care to warn, protect,

or insure against risks which are "common, frequent and expected" and "inherent" in an activity. *Jones v. Three Rivers Management Corporation*, 394 A.2d 546, 551 (Pa. 1978). This rule applies "only to risks which are 'common, frequent and expected,'. . . and in no way affect the duty of theatres, amusement parks and sports facilities to protect patrons from foreseeable dangerous conditions not inherent in the amusement activity." *Jones*, 394 A.2d at 551.

"If it is determined the no-duty rule is applicable to a negligence claim, a plaintiff will be unable to set forth a *prima facie* case of liability." *Craig v. Amateur Softball Ass'n of America*, 951 A.2d 372, 375-76 (Pa. Super. 2008). "Only when the plaintiff introduces adequate evidence that the amusement facility in which he was injured *deviated in some relevant respect from established custom* will it be proper for an 'inherent risk' case to go to the jury." *Loughran, supra., citing Jones*, 394 A.2d at 550. Moreover, "the 'no duty' rule has evolved into a modified version of the assumption of the risk doctrine, which has been largely abolished in Pennsylvania." *Id.* (citation omitted).

Igloo contends that it is not liable under the "no duty rule", whereby those individuals who organize, participate in sporting events are not liable to participants and/or spectators for inherent risks in sport events. Igloo's Motion for Summary Judgment, ¶ 21. According to Igloo, a slip and fall, including a fall while exiting the ice, "is common, frequent and expected." Defendant's Brief in Support of Motion for Summary Judgment, at unnumbered 12.

In response, Paul argues that *Three Rivers* is factually distinguishable from the case at bar. In particular, he argues that the purported negligent maintenance of the ice facility "is not a 'risk inherent in the conduct of the game' but is an independent negligent act of the facility owner." Brief in Opposition, at 17-18.

Upon review, this Court finds that the "no-duty" rule is not applicable to the case at bar. Despite Igloo's argument to the contrary, a fall while exiting the ice due to any low hanging netting and purported negligent maintenance of the ice rink, is not a common, frequent and expected risk in playing hockey.

III. CONCLUSION

Based upon the above, this Court will issue an appropriate order.

ORDER

AND NOW, this 2nd day of June, 2009, for the reasons set forth in the accompanying opinion, it is hereby ordered that the Defendant's Motion for Summary Judgment is DENIED.

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

BRENDA J. VAUGHN, Executor of the Estate of Christine D. Vaughn, Deceased, and GLENDA ARRINGTON, Executor of the Estate of Christine D. Vaughn, Deceased, Plaintiffs

v.

FAIRVIEW MANOR; HCF OF FAIRVIEW, INC.; DAVID C. LESSESKI, D.O., and PRESQUE ISLE FAMILY MEDICINE, INC., Defendants

PLEADINGS / PRELIMINARY OBJECTIONS

Preliminary objections in the form of a demurrer should be sustained only when the facts averred are clearly insufficient to establish the pleader's right to relief. The Court's analysis must be limited to the pleadings alone and may not include testimony or evidence outside the Complaint. Grant of demurrer is appropriate only in those cases so 'clear and free from doubt' that plaintiff will be unable to prove legally sufficient facts to establish any right to relief.

PLEADINGS / GENERAL REQUIREMENTS

While 42 Pa.R.C.P. 1019(a) requires pleadings "to allege the material facts on which a cause of action...is based...in a concise and summary form" the Court has broad discretion in determining the level of specificity that is required. While the pleadings alone may not be sufficient for an adverse party to make adequate preparations for trial, the Court may nevertheless dismiss preliminary objections seeking greater specificity if the Court believes it would be more practical for the adverse party to use discovery to obtain the necessary information.

ALTERNATIVE DISPUTE RESOLUTION / ARBITRATION

Arbitration agreement entered into by decedent will not be enforced in wrongful death and survival lawsuit when lawsuit included parties (wrongful death plaintiffs and a defendant) and claims (wrongful death) that were not subject to arbitration agreement because bifurcation of the arbitrable claims would be an inefficient use of resources for the parties; would create risk of inconsistent results on the same facts; and would unnecessarily protract resolution of the issues.

PLEADINGS / PRELIMINARY OBJECTIONS

Statute of limitations defense may not be raised via preliminary objection.

NEGLIGENCE / ACTS OR OMISSIONS CONSTITUTING

Negligence *per se* can be established by demonstrating (1) the violation of a statute or regulation designed to protect a group of individuals (as opposed to the public) (2) which statute clearly applies to the defendant's conduct; and (3) the violation of which is the proximate cause of plaintiff's injury.

NEGLIGENCE / ACTS OR OMISSIONS CONSTITUTING

18 Pa. C. S. § 2713, which defines offenses relating to the neglect of a dependent person by a "caretaker," has as its purpose the protection of

care-dependent individuals and may be furthered by claims of plaintiffs alleging injury stemming from a violation of the act. Thus, its violation may establish negligence *per se*.

NEGLIGENCE / ACTS OR OMISSIONS CONSTITUTING

The corporate liability doctrine imposes on hospitals: (1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment; (2) a duty to select and retain only competent physicians; (3) a duty to oversee all persons who practice medicine within its walls as to patient care; and (4) a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for patients.

NEGLIGENCE/ACTS OR OMISSIONS CONSTITUTING

The corporate liability doctrine applies to nursing homes when there is a comprehensive control by the nursing home over the resident's medical treatment and care.

NEGLIGENCE / NECESSARY ALLEGATIONS OF PLEADINGS

Allegations in complaint that resident entered nursing home; engaged the home to provide nursing care; and also selected the nursing home's medical director to be her primary physician sufficiently described the pervasive nature of the nursing home's control over her care to withstand nursing home's demurrer to claim of corporate negligence.

PLEADINGS / PRELIMINARY OBJECTIONS

Failure to identify the specific employees or agents whose actions give rise to a claim for vicarious liability is not a fatal pleading defect because the defendant employer can obtain this information through the discovery process.

NEGLIGENCE / ACTS OR OMISSIONS CONSTITUTING

Nursing home does not have duty to notify each and every family member of dependent's physical condition but nursing home does have a duty to so notify the resident or her guardian, power of attorney or contact person and cause of action premised on nursing home's failure to so notify an appropriate person will not be dismissed on preliminary objection.

TORTS / BATTERY / INFORMED CONSENT

Allegation that defendant physician was negligent in "(H)olding out expertise which induced decedent and her family that adequate and proper care would be provided when, in fact, adequate proper and reasonable care were not provided" is not sufficient to serve as the basis of a claim for lack of informed consent because informed consent sounds in battery, not negligence.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 15969-2008

Appearances: Christina S. Nacopoulos, Esq., Attorney for Plaintiffs Brenda Vaughn and Glenda Arrington
Thomas M. Lent, Esq., Attorney for Defendants, Fairview Manor and HCF of Fairview, Inc.
Steven S. Forry, Esq., Attorney for Defendants, David C. Lesseski, D.O. and Presque Isle Family Medicine, Inc.

OPINION AND ORDER

DiSantis, Ernest J., Jr., J.

This case comes before this Court on the preliminary objections filed by all defendants and the Motion For Sanctions pursuant to Rules 1023.2 and 1023.4 filed by Fairview Manor and HCF of Fairview, Inc.

I. BACKGROUND OF THE CASE[1]

A. Procedural History

Plaintiffs initiated this action by filing a writ of summons on December 10, 2008. Defendant Lesseski filed a Rule To File Complaint on February 23, 2009. On March 12, 2009, plaintiffs filed a Motion For Pre-Complaint Discovery/Motion To Stay Rule To File Complaint. Defendants Fairview Manor and HCF of Fairview, Inc. ("HCF") objected. Plaintiffs' motion was granted in part by this Court. On May 12, 2009, plaintiffs filed a 71-page Complaint alleging wrongful death and survival actions against each defendant. Plaintiffs further allege cause of actions for corporate liability and negligence *per se* against Fairview Manor. On June 4, 2009, Lesseski and Presque Isle Family Medicine, Inc. ("PIFM") filed preliminary objections and a brief in support. On June 4, 2009, Fairview Manor and HCF filed preliminary objections. They filed a supporting brief on June 12, 2009. On June 24, 2009, Lesseski and PIFM filed a supplemental brief in connection with the parties' pending preliminary objections. On June 26, 2009, Fairview Manor and HCF filed the motion for sanctions referred to above. On July 6, 2009, plaintiffs filed a brief in opposition to the Lesseski and PIFM preliminary objections. On July 8, 2009, plaintiffs filed a brief in opposition to the preliminary objections filed on behalf of Fairview Manor and HCF. On July 8, 2009 plaintiffs filed a brief in response to Fairview Manor & HCF's Motion To Compel Arbitration and Lesseski and PIFM's supplemental brief regarding arbitration. Ancillary filings followed.

B. Factual History

On January 25, 2005, Christine D. Vaughn was admitted to Fairview Manor for nursing care. During the course of her stay, Dr. Lesseski, Fairview Manor's Medical Director, became her personal physician.

[1] The background of the case is based upon the filings of record.

Upon admission, Ms. Vaughn was ambulatory and free of any pressure sores or infections. Her medical conditions were manageable and none were life-threatening. During her stay at Fairview Manor, she developed pressure ulcers, immobility and a deterioration of her physical condition. She had a number of accidents which resulted in unexplained bruising and skin breakdowns. The pressure ulcers occurred on several areas of her body, including her feet, coccyx and thighs. The skin breakdown occurred on virtually all areas of her body. In and around December 2006, she experienced a clostridium difficile infection that caused diarrhea. This condition eventually progressed to toxic colitis. She became so dehydrated that her kidneys shut down. In October, 2006, she was hospitalized at Hamot Medical Center in Erie. After treatment, she was discharged. She was readmitted on December 11, 2006, when she showed signs of massive dehydration and stage four pressure ulcers. They were oozing, painful and fist-deep. Her clostridium difficile infection had progressed to the point that her white blood cell count was so grossly abnormal that she had no chance of recovering. Ms. Vaughn died on December 20, 2006.

II. THE MOTIONS BEFORE THE COURT

The motions currently before the Court can be summarized as follows:

A. Preliminary Objections of Fairview Manor and HCF

Defendants assert that this matter must be submitted to arbitration, relying upon Section IV of the Admissions Agreement signed by Glenda Vaughn (as Christine Vaughn's power of attorney) on January 25, 2005. They request that, pursuant to Pa.R.Civ. P. 1028(a)(6), preliminary objections be sustained because the agreement compels alternative dispute resolution.

They also request this Court strike Count I ¶¶ 30 - 34, 98 - 102, 160 - 162, 165 - 168, 172 - 173, 183 - 184, subparagraphs 185(a) - (i), (o) - (u), 9(w) - (ff), (jj) - (nn), (pp) - (ccc), (eee) - (qqq) and 186 of the complaint. They posit that the plaintiffs' allegations are so vague and overbroad that plaintiffs can assert almost any theory of liability, without specifically defining their claims. See, ¶¶ 26 - 30 of the preliminary objections.

These defendants further argue that the complaint is deficient because plaintiffs have failed to identify the names of agents, servants, employees, staff members, etc. who were engaged in conduct that supports the claims. See, ¶¶ 31 - 39 of the preliminary objections. Defendants point out that plaintiffs - through pre-complaint discovery - had the means to identify those individuals who treated the plaintiff. Defendants state it is virtually impossible for them to respond to the vicarious liability claim because defendants do not know through whom the actions are imputed. See, ¶¶ 40 - 46 of the preliminary objections.

Defendants have moved to strike all alleged scandalous and

impertinent material. They strenuously object to the plaintiffs' allegations of negligence *per se* predicated upon the violation of a criminal statute, 18 Pa.C.S.A. § 2713.[2] They further object to plaintiffs' assertion of a cause of action based upon Fairview Manor's failure to notify the deceased's family of the nature, extent and severity of her condition. They argue that no such duty exists in Pennsylvania. See, ¶¶ 47 - 56 of the preliminary objections.

Defendants further argue that many of the events occurred beyond the two-year statute of limitations. See, ¶¶ 58 - 64 of the preliminary objections.

Defendants also contend that allegations of corporate liability/ negligence should be stricken from the complaint because Pennsylvania's appellate courts do not recognize a cause of action for corporate negligence against a nursing home. See, ¶¶ 66 - 75 of the preliminary objections.

Finally, defendants have moved to strike any claim for punitive damages for insufficient specificity of the pleading.

B. Preliminary Objections of Defendants Lesseski and PIFM

These defendants first argue that there is no Pennsylvania law supporting the plaintiffs' purported theory that there was a duty to notify the patient's entire family of the nature, extent and severity of her condition. They state that there is no negligence survival claim extant in Pennsylvania predicated upon that basis. See, ¶¶ 8 - 12 of the preliminary objections. They also argue that the alleged cause of action for lack of informed consent against Dr. Lesseski cannot stand absent an allegation that he misrepresented his expertise and that this caused the decedent to choose him rather than another physician. See, ¶¶ 13 - 15 of the preliminary objections.

Defendants move to strike plaintiffs' allegation of lack of informed consent based upon plaintiffs' claims that Dr. Lesseski was negligent by: "Holding out expertise which induced decedent and her family that adequate and proper care would be provided when, in fact, adequate proper and reasonable care were not provided". Complaint, ¶ 192 vv.

---

[2] That statute provides, in part:

> **§2713. Neglect of care-dependent person**
>
> **(a) Offense defined.** -- A caretaker is guilty of neglect of a care-dependent person if he:
>
> (1) Intentionally, knowingly or recklessly causes bodily injury or serious bodily injury by failing to provide treatment, care, goods or services necessary to preserve the health, safety or welfare of a care-dependent person for whom he is responsible to provide care....

The term "caretaker" is defined in subsection (f) of the statute. It includes the owner, operator, manager or employee of a nursing home.

After review, this Court agrees with defendants that this cannot serve as the basis of a lack of informed consent claim because that type of claim sounds in battery, not negligence. To the extent plaintiffs allege a cause of action for fraudulent representation, it is not properly pleaded.

Defendants also move to strike paragraphs 192(ww) through 192(bbb) of the complaint on the grounds that the allegations are vague and boilerplate. See, ¶¶ 16 - 21 of the preliminary objections.

Defendants next argue that: (1) references to "punitive" and "reckless" conduct found in Complaint ¶¶ 193, 197 - 209 should be stricken because there are no degrees of negligence in Pennsylvania; and (2) the allegations do not support a claim for punitive damages. See, ¶¶ 22 - 35 of the preliminary objections.

Defendants also move to strike ¶ 193(d), a survival claim, because under their interpretation of Pennsylvania Law, these damages are only available under the Wrongful Death Act, 42 Pa.C.S.A. § 8301. They conclude that duplicative damages cannot be awarded. See, ¶¶ 36 - 40 of the preliminary objections.

Plaintiffs have filed a response asserting counter arguments.

C. Motion For Sanctions

Defendants Fairview Manor and HCF filed a Motion For Sanctions pursuant to Pa.R.Civ.P. 1023.2 and 1023.4. In brief, they seek to strike any allegations that the defendants violated 18 Pa.C.S.A. § 2713. They further request sanctions because the plaintiffs refused to submit the controversy to arbitration. As part of their claim, they request reasonable attorneys' fees and costs for preparing and presenting the sanctions motion, as well as for preparing and presenting their preliminary objections and brief.

Plaintiffs oppose this motion as well.

III. 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.

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

Additionally, "conclusions of law and unjustified inferences are not admitted by the pleadings," *Lobolito, Inc., v. North Pocono Sch. Dist,* 755 A.2d 1287, 1289 n.2 (Pa. 2000), and the trial court must resolve the intrinsic worth "of the preliminary objections 'solely on the basis of the pleadings' and not on testimony or evidence outside the complaint." *Belser v. Rockwood Casualty Ins. Co.,* 791 A.2d 1216, 1219 (Pa. Super. 2002) (quoting *Williams v. Nationwide Mut. Ins. Co.,* 750 A.2d 881, 883 (Pa. Super. 2000)); see also *Texas Keystone, Inc., Pennsylvania Department of Conservation and Natural Resources,* 851 A.2d 228, 239 (Pa.Cmwlth. 2004). A demurrer confronts the pleadings insisting that under the cause of action, relief cannot "'be granted *under any theory of law*.'" See *Regal Industrial Corp., v. Crum and Forster, Inc.,* 890 A.2d 395, 398 (Pa.Super. 2005); *Sutton v. Miller,* 692 A.2d 83, 87 (Pa. Super. 1991); see also *Prevish v. Northwest Med. Ctr.,* 692. A.2d 192, 197 (Pa.Super. 1997), affirmed, 553 Pa. 73, 717 A.2d 1023 (1998) (citing *Chiropractic Nutritional Assoc., Inc. v. Empire Blue Cross and Blue Shield,* 669 A.2d 975, 984 (Pa.Super. 1995) ("...a dismissal of a cause of action should be sustained only in cases that are [so] 'clear and free from doubt' that the plaintiff [litigant] will be unable to prove legally sufficient facts to establish any right to relief.").

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

The General State Authority v, The Sutter Corporation, 403 A.2d 1022, 1025 (Pa.Cmwlth. 1979).

Regarding the level of specificity in pleadings, the court has broad discretion in determining the amount of detail. *United Refrigerator Co. v. Applebaum,* 189 A.2d 253, 254 (Pa. 1963). In lieu of preliminary objections, a party may avail itself of the Pennsylvania Rules of Civil Procedure regarding discovery at 4001 *et seq.*, if it believes facts are required which were not contained, as desired, in a particular pleading. *Brandeis v. Kenny,* 31 Pa. D. & C. 2d 347, 349 (C.P. Montgomery Co. 1963) (holding that if a party believes themselves unable from the pleadings alone to make adequate preparations for trial they may resort to the Pennsylvania Rules of Civil Procedure). As between the use of preliminary objections and/or discovery to obtain material facts as to a party's cause of action or defense, a court may dismiss the preliminary objections if it believes discovery to be more practical than further pleadings. *Brandeis,* 31 Pa. D. & C. 2d at 352.

Whether this controversy should be submitted to arbitration?

The arbitration provision is set forth in Section IV of the Admission Agreement which was signed by Glenda Vaughn (as Christine Vaughn's power of attorney) and Fairview Manor on January 25, 2005, the day of Christine Vaughn's admission. It provides that:

> **IV. RESOLUTION OF LEGAL DISPUTES**
>
> The parties wish to work together to resolve any disputes in a timely fashion and in a manner that minimizes both of their legal costs. Therefore, in consideration of the mutual promises contained in this Agreement, You and the Manor agree to submit legal disputes to binding arbitration, as follows:
>
> **A. Disputes To Be Arbitrated.** Any legal controversy, dispute, disagreement or claim of any kind now existing or occurring in the future between the parties arising out of or in any way relating to this Agreement or the Resident's stay at the Manor shall be settled by binding arbitration, including but not limited to, all claims based on breach of contract, negligence, medical malpractice, tort, breach of statutory duty, resident's rights, and any departures from accepted standards of care. This includes claims against the Manor, its employees, agents, officers, directors, any parent, subsidiary or affiliate of the Manor.

Section V of the Admission Agreement (miscellaneous matters) states, in pertinent part, as follows:

> **E. Partially Illegality.** This Agreement shall be construed in accordance with the laws of the State of Pennsylvania, and

> the county in which the Manor is located, and shall be the sole and exclusive venue for any dispute between the parties. If any portion of this Agreement is determined to be illegal or not in conformity with applicable laws and regulations, such part shall be deemed to be modified so as to be in accordance with such laws and regulations, and the validity of the balance of this Agreement shall not be affected,

(emphasis added). The last page also has a caveat (in bold capitalization) as follows:

> **I DO FOR MYSELF (AND ON BEHALF OF THE RESIDENT, IF APPROPRIATE), AND THE HEIRS, ADMINISTRATORS AND EXECUTORS OF MYSELF AND THE RESIDENT, AGREE TO THE TERMS OF THIS AGREEMENT IN CONSIDERATION OF THE FACILITY'S ACCEPTANCE OF AND RENDERING SERVICES TO THE RESIDENT.**

Arbitration agreements are strictly construed and should not be extended by implication. *Hassler v. Columbia Gas Transmission Corp.*, 464 A.2d 1354 (Pa Super 1983); *Cumberland - Perry Area of Vocational - Technical School Authority v. Bogar & Bink*, 396 A.2d 433 (Pa. Super. 1978). They are contracts and it is for the court to determine whether an expressed agreement between the parties to arbitrate exists or existed. *Smith v. Cumberland Group, LTD.*, 687 A.2d 1167, 1171 (Pa. Super. 1997). The Court may enforce certain provision of arbitration agreements while setting aside others based upon valid contract defenses such as duress, illegality, fraud and unconscionability. *Lytle v. CitiFinancial Services*, 810 A.2d 643, 656-657 (Pa. Super. 2002). abrogated on other grounds by *Sally v. Option One Mortgage Corp.*, 925 A.2d 115, 129 (Pa. 2007). Title 42 Pa.C.S.A. § 7303 reflects that proposition.

Plaintiffs argue that there are eight persons (decedent's children) who have independent personal claims against the defendants for the wrongful death of Ms. Vaughn. They are listed at page six of the Plaintiffs' Brief filed July 8, 2009. Plaintiffs assert that because decedent's children are not parties to the contract, they have no obligation to arbitrate. Plaintiffs further assert that because the children have separate claims under the Wrongful Death statute, and because a wrongful death action and survival action must be consolidated for trial [Pa.R.Civ.P. 213(e)], the matters cannot be bifurcated and submitted for arbitration. See, *Graziosi v. Altoona Center For Nursing Care, LLC*, Blair County No. 2006 GN 4189 (December 20, 2006, Sullivan, J.). Plaintiffs also argue that as a matter of judicial economy, severing the claims would "engender

enormous costs and expenses to the plaintiffs, which would impair their ability to proceed further". See Plaintiffs' Brief at 9. See, *Central Contracting Co. v. C.E. Youngdahl & Co.*, 209 A.2d 810, 816 (Pa. 1965). Plaintiffs note that Defendant Lesseski is not a party to the agreement and, therefore, claims against him, as well as PIFM, could not be arbitrated.

Plaintiffs also argue that the Arbitration Agreement is voidable because it is the product of a confidential relationship. Because such a contract is presumptively voidable, the matter cannot be submitted for arbitration. See, *Frowen v. Blank*, 425 A.2d 412, 416 (Pa. 1981).[3]

First, the only parties to the admission agreement were Christine Vaughn and the defendants, Fairview and HCF. Second, it does appear that certain claims related to her care could be raised after her death if asserted during the applicable statute of limitations. See, Arbitration Code of Procedure, Rule 10 at 11. (Plaintiffs' Brief, Exhibit "3"). Third, Christine Vaughn's children have separate causes of action under the Wrongful Death Act, 42 Pa.C.S.A. § 8301(b). Fourth, although the law favors the arbitration of disputes, it would be a waste of resources to bifurcate the survival claim (which may be subject to the arbitration agreement) from the wrongful death claim. Cf. Pa.R.Civ.P. 213(e). There will be two proceedings involving the same facts and possibly some of the same defenses. This will not only increase expenses, but it will unnecessarily protract resolution of the issues. Therefore, the actions should be consolidated for disposition and this lawsuit is the appropriate procedural vehicle to accomplish that end.

Defendants Fairview Manor and HCF's Motion To Strike Certain Paragraphs contained in Count 1 of the Complaint because they are vague, overbroad and/or contain scandalous or impertinent material.

Defendants are correct when they assert that, "[e]ven our present liberalized system of pleadings requires that the material facts upon which a cause of action is premised must be plead with sufficient specificity so as to set forth the *prima facie* elements of the tort or torts alleged." See, *Feingold v. Hill*, 521 A.2d 33, 38 (Pa. Super. 1987), alloc. denied, 533 A.2d 714 (1989). Furthermore, statements are not scandalous or impertinent unless they are immaterial and inappropriate to the proof involved in the case, totally irrelevant and lacking any influence on the result. See, *Department of Environmental Resources v. Peggs Run Coal Company*, 423 A.2d 765, 769 (Pa. Cmwlth. 1980).

After its review of the complaint, this Court finds no need to grant the defendants' request.

[3] The Court disagrees with this proposition.

Whether the Statute of Limitations Bars Some of Plaintiffs' Claims?

Defendants allege that many of the alleged events of negligence occurred beyond the two-year statute of limitations. However, this issue is not appropriate for disposition by way of preliminary objections. See, Pa.R.Civ.P. 1028, 1030; *Farinacci v. Beaver County Industrial Development Authority,* 511 A.2d 757 (Pa. 1986); *Devine v. Hutt,* 863 A.2d 1160, 1166 - 67 (Pa. Super. 2004),

Whether the Plaintiffs Can Advance A Negligence *Per Se* Claim?

Plaintiffs allege a cause of action based upon negligence *per se* asserting that the defendants violated 18 Pa.C.S.A. § 2713. See, Note 2, *supra*. If the plaintiffs can demonstrate that a violation of a statute or regulation that is clearly applicable to the conduct of a defendant is a proximate cause of a plaintiff's injury, it can establish negligence *per se*. See, *Wagner v. Anzon, Inc.,* 684 A.2d 570 (Pa. Super, 1996).

It has been noted that: "the concept of negligence *per se* establishes both duty and the required breach of duty where an individual violates an applicable statute, ordinance or regulation designed to prevent a public harm...." *Braxton v. PennDOT,* 634 A.2d 1150, 1157 (Pa. Cmwlth. 1993). The purpose for the statute upon which the claim is based must be to protect the interest of a group of individuals, as opposed to the public, and the statute must clearly apply to the conduct of the defendant. There must be a direct connection between the harm sought to be prevented by the statute and the injury. See, *Wagner v. Anzon, Inc.,* 684 A.2d 570, 574 (Pa. 1996). It is the plaintiffs' burden to establish that the purpose of the particular statute is to protect the interest of a group of individuals, as opposed to the general public, and whether the statute clearly applies to the conduct of the defendant. See, *Cabiroy v, Scipione,* 767 A.2d 1078, 1081 (Pa. Super. 2001) (citation omitted).

Title 18 Pa.C.S.A. § 2713 does not provide a private cause of action to a nursing home patient. Nevertheless, the purpose of this penal statute is to protect a group of individuals, i.e., care-dependent persons. Therefore, the act may be furthered by plaintiffs' claim.

The parties are reminded that we are at the pleading stage and the Court's focus is quite different than it would be at the summary judgment phase. Analyzing ¶¶ 30 - 34, 98 - 102, 160 - 162, 165 -168, 172 - 173, 181 and 183 - 186 in light of the preliminary objection standard, this Court finds that there is no basis upon which to strike them.

Whether the Plaintiffs Can Advance A Corporate Liability Negligence Claim?

The Defendants have moved to strike allegations of corporate liability/negligence. They argue that the causes of action for corporate

liability and vicarious liability are separate and should be addressed in separate counts. They further assert that a corporate negligence claim against a nursing home is not recognized by the Pennsylvania appellate courts and that such a claim can only be asserted against a hospital. In support of their position, they cite *Thompson v. Nason Hospital*, 591 A.2d 703 (Pa. 1991) and *Shannon v. McNulty*, 718 A.2d 828 (Pa. Super. 1998).

The genesis of the corporate liability doctrine is summarized in the following passage:

> Hospitals in the past enjoyed absolute immunity from tort liability. (citation omitted) The basis of that immunity was the perception that hospitals function as charitable organizations. (citation omitted) However, hospitals have evolved into highly sophisticated corporations operating primarily on a fee-for-service basis. The corporate hospital of today has assumed the role of a comprehensive health center with responsibility of arranging and coordinating the total health care of its patients.[4] (footnote omitted) As a result of this metamorphosis, hospital immunity was eliminated. (citation omitted).

Thompson v. Nason Hospital, 591 A.2d at 706.

The elements of this cause of action are: (1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment; (2) a duty to select and retain only competent physicians; (3) a duty to oversee all persons who practice medicine within its walls as to patient care; and (4) a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients. *Id.* at 707. The doctrine was expanded to cover health maintenance organizations. *Shannon v. McNulty*, 718 A.2d at 835.

No Pennsylvania appellate court has extended this cause of action to nursing homes. However, some courts of common pleas have allowed the cause of action to be pleaded, leaving ultimate resolution of the issue to the summary judgment stage of the case. See, *Capriotti v. Beverly Enterprises Pennsylvania Inc.*, 72 Pa. D.&C. 4th 564, 572 (Fayette County, 2004) and *Frantz v. HCR Manor Care Inc.*, 64 Pa. D.&C. 4th 457 (Schuylkill County, 2003).

This Court concludes that the corporate negligence doctrine may be applicable in some situations where there is a comprehensive control by the nursing home over the resident's medical treatment and care. It is particularly significant in this case that when Christine Vaughn entered Fairview Manor, she not only engaged it to provide nursing care, but she also selected its medical director to be her primary physician. In effect, her entire care was provided by or through Fairview Manor. Given the pervasive nature of Fairview Manor's control over her care, the Court

finds that, for preliminary objection purposes, the plaintiffs' claim of corporate negligence can stand.

The doctrine of vicarious liability is a separate concept. A nursing home, like other entities, can be vicariously liable under certain circumstances based upon the negligence of its agents and employees which may be imputed to it, given the proper evidentiary foundation. The fact that the specific employees, agents, etc. have not been specifically named at this stage in the proceedings is not fatal to plaintiffs' pleadings; although it may eventually support a defense request for summary judgment. The defendants can obtain this information through the discovery process. Therefore, the vicarious liability claims against Defendants Fairview Manor and HCF can stand.

The Court agrees with the defendants' argument that they had no duty to notify each and every family member of Christine Vaughn's physical condition. However, they did have a duty to apprize the deceased or her guardian, power of attorney or contact person of her health status as part of their overall duty to provide care for her. That duty was owed to Christine Vaughn and is relevant to the survival claim. Therefore, read in that context, the complaint is not defective.

As to the defendants' separate punitive damages argument, this Court notes that plaintiffs must allege facts that, if proven, would establish a claim for punitive damages. Punitive damages are recoverable in those instances where a defendant's conduct is outrageous due to either "the defendant's evil motive or reckless indifference to the rights of others". *Phillips v. Cricket Lighters*, 883 A.2d 439, 445 (Pa, 2005). Punitive damages should not be awarded for mere inadvertence, mistake, errors of judgment, and the like, which constitute ordinary negligence. See, Restatement (Second) of Tort § 908, Comment (b). The essence of punitive damages is not compensation, but punishment and deterrence.

After its review, this Court finds that ¶¶ 197 - 209 of the complaint sufficiently plead a claim for punitive damages based upon the allegations of reckless indifference.

Defendants Fairview Manor and HCF's Motion For Sanctions

As noted above, the Motion For Sanctions is related to two issues: (1) defendants' claim that this entire controversy is subject to an arbitration agreement; and (2) that the plaintiffs have improperly alleged a negligence *per se* theory predicated upon 18 Pa.C.S.A. § 2713.

The Court incorporates the rationale set forth above and finds that the defendants have failed to establish a claim for sanctions.

III. CONCLUSION

Based upon the above, this Court will issue the appropriate order. To the extent the Court has not addressed a specific ground for relief asserted by defendants, it concludes that it was not necessary to do so in light of its findings set forth in this opinion.

ORDER

AND NOW, this 6th day of October 2009, for the reasons set forth in the accompanying opinion, it is hereby ORDERED that the Defendants Fairview Manor and HCF of Fairview Inc.'s Preliminary Objections are OVERRULED and their Motion For Sanctions is DENIED. As to Defendants' (David C. Lesseski, D.O. and Presque Isle Family Medicine, Inc.) Preliminary Objections, Complaint Paragraph 192 vv is hereby STRICKEN. In all other respects, their preliminary objections are OVERRULED.

All defendants shall have thirty (30) days from the date of this order to answer the complaint.

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

ERIE INSURANCE EXCHANGE, a Pennsylvania reciprocal insurer, Plaintiff

v.

DEBORAH PRICE and JAMES PRICE, her husband, Defendants

Editor's Note: This Opinion and Order were vacated July 24, 2009 - see Order on page 276

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

A motion for summary judgment can be granted at the close of the pleadings if the court finds either (a) there is no genuine issue of any material fact concerning a necessary element of the action/defense, or (b) upon the completion of discovery, including exchange of expert reports, the party who bears the burden of proof has failed to produce evidence of essential facts that would require the issue be submitted to a jury.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

As a general rule, a movant is entitled to judgment as a matter of law when the non-moving party fails to produce sufficient evidence establishing the existence of an essential element to his/her case.

CIVIL PROCEDURE / MOTION FOR JUDGMENT ON PLEADINGS

A court ruling on a motion for judgment on the pleadings should limit itself to the complaint, answer, reply to new matter, and any attached exhibits.

JUDGMENTS / COLLATERAL ESTOPPEL

As a general rule, the doctrine of collateral estoppel only applies where: (1) The identical issue in controversy has already been decided in a prior adjudication; (2) there exists a final judgment on the merits; (3) party against whom the doctrine is asserted was a party or in privity with a party to the prior adjudication; (4) party opponent has had a full and fair opportunity to litigate the issue in question in the prior action; and (5) determination of the prior suit was essential to the judgment.

JUDGMENTS / COLLATERAL ESTOPPEL

Doctrine of collateral estoppel does not apply when prior adjudication on a similar issue did not constitute a final judgment on the merits and was issued by court of parallel jurisdiction.

INSURANCE / AUTOMOBILE INSURANCE / FINANCIAL RESPONSIBILITY LAW

Based upon the current state of the law in Pennsylvania, a provision in an insurance contract requiring an insured to submit to reasonable medical examinations as a condition precedent to insurance coverage is enforceable notwithstanding 75 Pa.C.S.A. §1796(a) of the Motor Vehicle Financial Responsibility Law.

INSURANCE / AUTOMOBILE INSURANCE / FINANCIAL RESPONSIBILITY LAW

The purpose of 75 Pa.C.S.A. §1796(a) of the Motor Vehicle Financial Responsibility Law is to ensure that claimants seeking first party benefits are not forced to submit to unnecessary examinations sought in bad faith and an insurance policy clause that is at odds with the statutory provision, cannot stand since it would violate public policy.

INSURANCE / AUTOMOBILE INSURANCE / FINANCIAL RESPONSIBILITY LAW

Section 1796 of the Motor Vehicle Financial Responsibility Law does not grant an insurance carrier the ability to draft contractual agreements that give them complete and unlimited control over the IME process inasmuch as such provision derogates from the underlying public policy of the Act.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 13274 OF 2008

Appearances: James D. McDonald, Jr., Esquire, Attorney for Plaintiff
John W. McCandless, Esquire, Attorney for Defendants

OPINION AND ORDER

DiSantis, Ernest J., Jr., J

This case comes before the Court on the Defendants' Motion For Judgment on the Pleadings and the Plaintiff's Motion For Partial Summary Judgment.[1] Argument was conducted on June 1, 2009.

I. BACKGROUND OF THE CASE

On or about January 13, 2004, Deborah Price was involved in a motor vehicle collision during which the Ford F-150 truck she was driving was struck from behind by another motor vehicle in the 400 block of East Tenth Street in Erie, Pennsylvania. At the time of the incident, she and her husband, James Price, were the named insureds on an insurance policy issued by the plaintiff (Q11 1304955 E). On or about January 25, 2004, Mrs. Price submitted an application to plaintiff for first party medical and wage loss benefits under the policy. On or about October 11, 2004, she and her husband submitted a claim to the plaintiff for uninsured motorist benefits under the policy.

After the incident, the Prices retained John W. McCandless, Esquire to represent them relative to an uninsured motorist claim against plaintiff. Plaintiff retained the services of William C. Wagner, Esquire to represent it on the uninsured motorist claim. As of September 13, 2005, the full $15,000.00 wage loss benefit had been paid and the policy limits were

[1] Defendants' Motion for Protective Order will be addressed in a separate order.

exhausted. The first party medical benefit and the uninsured motorist benefit claim were ongoing.

On or about August 13, 2007, Attorney Wagner requested, without court approval, that Deborah Price submit to an independent medical examination ("IME") in accordance with the policy.[2] All relevant correspondence from Attorney Wagner regarding the medical evaluation referenced only the UIM Claim. On or about March 6, 2008, Mrs. Price submitted to the IME which was performed by Paul S. Lieber, M.D. As a result of that examination, on or about April 2, 2008, Kathleen Hart, plaintiff's Medical Management Specialist, notified Attorney McCandless that plaintiff would discontinue further payment of Mrs. Price's medical bills under the first party medical benefits provisions of the policy. Furthermore, plaintiff did not advise the Prices that they intended to use the results of the IME to deny Mrs. Price first party medical benefits.

On or about April 9, 2008, Attorney McCandless notified plaintiff that in his opinion, discontinuance of first party medical benefits, based upon the results of the IME, was improper because plaintiff had not sought court approval for the IME as required by 75 Pa.C.S.A. § 1796(a) of the Motor Vehicle Financial Responsibility Law ("MVFRL").

On July 9, 2008, plaintiff filed the instant declaratory judgment action, asserting that a genuine dispute exists between the parties as to:

(a) Whether EIE is entitled to consider the results of an independent medical examination in the evaluation of all pending first party claims, including the first party medical benefit claim as well as the uninsured motorist claim;

(b) whether EIE is precluded from considering the results of an independent medical examination in the evaluation of a first party medical benefit claim because the independent medical examination was secured to the language of the Policy rather than court approval pursuant to Section 1796(a) of the MVFRL;

(c) whether Section 1796(a) of the MVFRL provides the exclusive vehicle to secure an independent medical examination which may be considered in the evaluation of a first party medical benefit claim; and

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[2] IMEs related to first party benefits may be required under ¶ 13 of the Rights and Duties - General Policy Conditions of the agreement. *See*, Insurance Policy, attached to Defendants' Motion for Judgment on the Pleadings as Exhibit "A". That provision states:

When there is an accident or loss, **anyone we protect** will:...
d. at **our** request; ....
8) submit to physical and mental examination by doctors **we** choose as often as **we** reasonably require. (We will pay for these examinations);...

Id. at p. 12.

(d) whether EIE was required to ignore the existence of the independent medical examination by Paul S. Lieber, M.D. and seek an additional independent medical examination by petition under Section 1796(a) of the MVFRL for the purpose of evaluation of the first party medical benefit claim.

Plaintiff's Complaint - Action for Declaratory Judgment, at ¶ 20 (a) - (d).

On March 16, 2009, Defendants filed a Motion for Judgment on the Pleadings and supporting brief. They argued that the plaintiff is collaterally estopped from utilizing the IME because it did not seek court approval under Section 1796(a) of the MVFRL. In support, Defendants rely primarily on the case of *Erie Ins. Exchange v. Dzadony,* 39 Pa.D. & C. 3d 33 (Allegheny Cty. 1986)(Wettick, J.). In addition, they assert that when first party benefits are at issue, Section 1796(a) is the sole authority for conducting an IME. Accordingly, they contend that plaintiff's actions were in violation of Section 1796(a) and public policy.

In reply, Plaintiff counters that it had the contractual authority to request an IME of Mrs. Price, notwithstanding Section 1796(a). It further argues that collateral estoppel does not apply.

On April 16, 2009, Plaintiffs filed a Motion for Partial Summary Judgment and supporting brief. In essence, it contends that collateral estoppel is not applicable and that it has a clear right to the relief sought in its Complaint.

Although there are a number of issues before the Court, they are all interrelated.

II. LEGAL DISCUSSION

A. The Legal Standards

1. Summary Judgment

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).

The purpose of the summary judgment rule "is to eliminate cases prior to trial where a party cannot make out a claim or defense". *Miller v. Sacred Heart Hospital*, 733 A.2d 829, 833 (Pa. Super. 2000). The Court must examine the record in the light most favorable to the non-moving party and resolve all doubt against the moving party. *Aetna Casualty and Surety Company v. Roe*, 650 A.2d 94, 97 (Pa. Super. 2004).

2. Judgment On The Pleadings

A motion for judgment on the pleadings should only be granted where the pleadings demonstrate that no genuine issue of fact exists, and the moving party is entitled to judgment as a matter of law. *See* Pa.R.C.P. 1034. On a motion for judgment on the pleadings, which is similar to a demurrer, the court accepts as true all well-pleaded facts of the non-moving party and only the facts specifically admitted by the non-moving party may be used against it. *Mellon Bank v. National Union Ins. Company of Pittsburgh*, 768 A.2d 865 (Pa. Super. 2001).

In ruling on a motion for judgment on the pleadings, a court should confine itself to the pleadings, such as the complaint, answer, reply to new matter and any document or exhibit properly attached to them. *Kelly v. Nationwide Ins. Co.*, 606 A.2d 470, 471 (Pa. Super 1992). Such a motion may only be granted in cases where no material facts are at issue and the law is so clear that a trial could be a fruitless exercise. *Ridge v. State Employees Retirement Board*, 690 A.2d 1312, 1314 n.5 (Pa.Cmwlth. 1997).

B. Whether the Doctrine of Collateral Estoppel Applies?

The doctrine of collateral estoppel only applies in those situations

where:

1. the issue decided in a prior adjudication is identical with one presented in the later action;
2. there was a final judgment on the merits;
3. the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication;
4. the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in a prior action; and
5. the determination of the prior suit was essential to the judgment therein.

Matson v. Housing Authority of the City of Pittsburgh, 473 A.2d 632, 634 (Pa. Super. 1984); *Banker v. Valley Forge Ins. Co.,* 585 A.2d 504, 509 (Pa. Super. 1991).

Here, defendants assert that under *Dzadony*, the plaintiff is collaterally estopped from asserting its current claim. In that case, in response to the Dzadonys' claims for payment of medical bills allegedly incurred as a result of an automobile collision, Erie Insurance Exchange filed a petition to compel a physical examination by a physician it selected. *Dzadony,* at 34. In rejecting Erie's contention that the Dzadonys should be compelled to undergo the examination, Judge Wettick noted:

> First, the policy provision upon which Erie relies should not be enforced because it is inconsistent with the obligations imposed upon an insurance company to pay benefits under the Motor Vehicle Financial Responsibility Law. The Motor Vehicle Financial Responsibility Law is comprehensive legislation governing the rights and obligations of the insurance company and the insured under liability insurance policies covering motor vehicles.... Provisions within an insurance contract which impose additional burdens on an insured before the insured may recover these benefits to which the insured is statutorily entitled, are inconsistent with this legislative scheme. Thus, we will not enforce a provision within an insurance policy that would make payment of benefits dependent upon the insured appearing for a physical examination that the law does not require.

Id. at 36.

Judge Wettick further noted that, "[i]f the Motor Vehicle Financial Responsibility Law had not dealt with the issue of when an insured may be compelled to submit to a physical examination, this matter could perhaps be governed by the insurance contract. *Id.* at 36-37. Judge Wettick then concluded "the clause which Erie seeks to enforce is inconsistent with Erie's obligation to pay benefits whenever the insured

submits reasonable proof supporting his or her claim." *Id.* at 38.

This Court finds that although the issue addressed by Judge Wettick is similar to the one presented here, it was addressed in a different procedural context and involved a separate contract. Judge Wettick's decision did not constitute a final judgment on the merits of a declaratory judgment action. Moreover, Judge Wettick's interpretation of § 1796 is not precedental. Given the learned reputation of that jurist, his opinions are often persuasive. However, this Court is not bound by the statutory interpretation of another judge of a parallel jurisdiction. Therefore, the doctrine of collateral estoppel does not apply.

C. Whether 75 Pa.C.S.A. § 1796(a) Exclusively Provides That Court Approval Is Necessary For An Independent Medical Examination of a Claimant?

75 Pa.C.S.A. § 1796(a) provides that:

> Whenever the mental or physical condition of a person is material to any claim for medical, income loss or catastrophic loss benefits, a court of competent jurisdiction or the administrator of the Catastrophic Loss Trust Fund for catastrophic loss claims may order the person to submit to a mental or physical examination by a physician. The order may only be made upon motion for good cause shown. The order shall give the person to be examined adequate notice of the time and date of the examination and shall state the manner, conditions and scope of the examination and the physician by whom it is to be performed. If a person fails to comply with an order to be examined, the court or the administrator may order that the person be denied benefits until compliance.

In interpreting § 1796, this Court is mindful that, "[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions." 1 Pa.C.S.A. § 1921 (a). Furthermore, "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S.A. § 1921 (b).

After review of the language of § 1796 and relevant legal authority, this Court finds that nothing contained in the statutory language specifically precludes an IME that is required pursuant to an insurance contract. If the intent of the Pennsylvania General Assembly was to render § 1796 the exclusive vehicle for IMEs related to first party benefits, it would (or could) have said so.

In *Fleming v. CNA Insurance Companies*, 597 A.2d 1206 (Pa. Super. 1991), a trial court granted CNA's Motion To Compel A Medical

Examination directing the Flemings to submit to an independent medical examination by a physician of CNA's choosing. *Id.* at 1206. The Flemings appealed, asserting that the trial court had wrongfully compelled the medical exam when CNA had failed to show "good cause" as specified under § 1796.

On appeal, the *Fleming Court* was not asked to determine whether § 1796 is the exclusive method for obtaining an IME when first party medical benefits are at issue. However, given that court's analysis, it is highly unlikely that it would have. *Id.* at 1207 - 1208.

In *Williams v. Allstate Insurance Company,* 595 F.Supp.2d 532 (E.D. Pa. 2009), the United States District Court for the Eastern District of Pennsylvania had an opportunity to analyze the relationship of § 1796 and a similar insurance contract provision regarding a physical examination. Although the case is not precedental, the District Court's analysis is worth considering. As it stated:

> Defendant Allstate premises its motion on the theory that because the precise policy terms condition payment of benefits on Plaintiff's submission to medical examinations as often as Allstate may "reasonably require", Plaintiff's undisputed refusal to submit to a medical examination regarding her gastrointestinal injuries constitute a breach of contract, entitling Allstate to curtail continued payment of benefits.

Id. at 537. In assessing Williams' argument that the medical examination provision of the policy was rendered unenforceable by § 1796, the District Court framed the issue this way:

> In light of these conflicting arguments, the Court must determine whether an insurance policy that permits an insured to demand reasonable examinations of its insured as a condition precedent to coverage is valid and enforceable in light of § 1796 (a) of the MVFRL.

Id.

The District Court first concluded that the submission of the claim to the insurance carrier, not the institution of legal proceedings, triggers the insurance company's right to file a petition with the court requiring the insured to submit to a physical examination. *Id.* Continuing, it noted that: "the Pennsylvania Supreme Court has yet to opine on the breadth of this statute and whether it forecloses conflicting policy provisions". *Id.* at 538. *Citing Fleming*, the District Court stated that: "The Pennsylvania Superior Court, however, explicitly discussed the interplay between section 1796 and a policy of insurance that permits and insurance company to unilaterally compel medical examinations, without a showing of 'good cause'". *Id.* at 538, *citing Fleming*, at 1206.

Approving *Fleming*, the District Court said that:

> As this Court is bound to accord significant weight to rulings of an intermediate appellate court in the absence of a "persuasive indication that the highest state court would rule otherwise," we decline to reject the fundamental premise of Fleming.

Id. at 541 - 542 (citation omitted).

It found that the MVFRL was passed "to foster financial responsibility for damages caused to individuals on the roadways". *Id.* at 542, *citing*, *Donegal Mut Ins. Co. v. Long*, 387 Pa. Super. 574, 564 A.2d 937, 944 (1989), aff'd., 528 Pa. 295, 597 A.2d 1124 (1991). *Id.* at 542 In its estimation, the specific of purposes of § 1796 were to prevent harassment, untoward intrusion and unwarranted examination and to insure that the insured could not ignore reasonable limitations on treatment by continuing treatment without validation or justification. *Id.* at 542 - 543. Therefore, a contractual provision requiring the insured to attend the medical examination as a prerequisite to benefits does not violate these purposes. *Id.*

Williams suggests that a more plausible interpretation of § 1796 is that it was intended to govern a situation where an insurance contract does not address the right to a medical examination, or when a party outside the insurance contract making a claim for medical or wage loss benefits is involved. As it stated: "In short, based on the current state of the law in Pennsylvania, this court predicts that the Pennsylvania Supreme Court would find that a contractual provision, which requires an insured to submit to reasonable medical examinations as a condition preceded to insurance coverage, is enforceable, notwithstanding section 1796 of the MVFRL." *Id.* at 545.

The District Court also noted that, "[s]econd, both Judge Wettick's and Plaintiff's efforts to distinguish *Fleming* on public policy grounds are meritless." *Id.* at 542. The *Williams'* Court recognized "heavy burden required to declare an unambiguous provision of an insurance contract void as against public policy". *Id.*

In the case at bar, the defendants, unlike *Fleming* but like *Williams*, assert that the actions taken here by the plaintiff and the contract provision are against public policy.[3] Their argument must be addressed in light of the purpose of § 1796. The fact that case law (particularly *Fleming*) suggests that § 1796 does not preclude the parties from contractually agreeing to an IME does not mean that the statute can be ignored. The purpose of that act is to insure that claimants seeking first party benefits should not be forced to submit to unnecessary examinations sought

[3] The *Fleming* Court specifically noted: "appellants did not challenge this policy provision as being void as against public policy or void as unconscionable...." *Id.* at 1208.

in bad faith. *Horne v. Centry Ins. Co.*, 588 A.2d 546, 548 (Pa. Super. 1991). Furthermore, an insurance policy clause that is at odds with a statutory provision cannot stand because it would violate public policy. See, *Pennsylvania National Mutual Casualty Company v. Black*, 916 A.2d 569 (Pa. 2007) and *Prudential Property and Casualty Insurance Company v. Colbert*, 813 A.2d 747 (Pa. 2002).

This Court finds persuasive the decision in *Miller v. United States Fidelity & Guarantee Company*, 909 S.W.2d 339 (Ky. App. 1995). In that case, the Kentucky Court of Appeals addressed a circuit court's ruling that required Miller to submit to an independent medical examination in an action where the insurance company contested the necessity of treatments. The company refused to pay Miller's medical bills without an independent examination. Both the policy provision and the relevant Kentucky statute are similar to those before this Court. In particular, KRS 304.39-270(1) contains a "good cause" requirement just as § 1796(a) does.

Miller argued that the insurance contract "imposed upon a basic reparation insured a requirement much broader than any that the legislature saw fit to impose...." *Id.* at 10. The Kentucky Court of Appeals, addressing the public policy issue consideration, stated:

> In this case we have been confronted with that very issue and have decided, in light of the purposes of the MVRA, that the policy provision simply may not be enforced as being clearly violative of the public policy underlying our statute.

Id. at 12. Importantly, it found that the public policy underlying the statute precluded the insurance company from enforcing an "overreaching policy provision...in clear derogation of the statutory language." *Id.* at 11. The Kentucky Court of Appeals left open the question of whether an insurance policy provision, differently worded, could comport with the requirements of the statute.

This Court is confronted with contrasting views and the absence of any clear appellate authority. On the one hand, it has Judge Wettick's Opinion in *Dzadony* that, if followed to its logical conclusion, would render § 1796 the sole authority for IMEs. On the other hand, the language of § 1796 and the opinions in *Fleming*, *Williams* and *Miller* do not foreclose the parties' ability to contractually agree to IMEs as long as those contracts do not violate the language and intent of § 1796, as well as the public policy upon which the statute is based.

Assuming our appellate courts would allow contractual agreements related to IMEs, it is doubtful that they would approve of the policy provision at issue because it gives plaintiff complete, unlimited control over the IME process. Clearly, § 1796 does not grant the insurance carrier such authority. Therefore, as currently drafted, the provision derogates

from the underlying public policy of the act. To the extent *Fleming* and *Williams* imply otherwise, this Court respectfully diverges from the rationale of those learned courts.[4]

ORDER

AND NOW, this 1st day of July 2009, for the reasons set forth in the accompanying opinion, it is hereby **ORDERED** that the Defendants' Motion For Judgment on the Pleadings is **GRANTED** and the Plaintiff's Motion For Partial Summary Judgment is **GRANTED** as to the Collateral Estoppel issue, only. In all other respects, Plaintiff's Motion for Partial Summary Judgment is **DENIED.**

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

[4] Whether the plaintiff may use the results of the IME is a question to be resolved at a later time because it involves, among other things, the defendants' possible consent and/or waiver.

Editor's Note: This Opinion and Order were vacated per the Order below:

ORDER

AND NOW, this 24th day of July 2009, after review of the plaintiff's Application For Reconsideration Of Order Entered July 1, 2009 Pursuant To Rule 1701 (b)(3) of the Pennsylvania Rules of Appellate Procedure, and argument of counsel conducted today, it is hereby **ORDERED** that this Court's Opinion and Order of July 1, 2009 are hereby **VACATED**.

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

GAIL R. CZARNECKI, Plaintiff

v.

ERIE COUNTY FARMS, INC., Defendant

EVIDENCE / OPINIONS / EXPERT TESTIMONY / TREATING PHYSICIAN REPORT

To admit a treating physician's opinion that is beyond opinion testimony regarding observations and treatment of the Plaintiff, the treating physician must be named and a report submitted, containing the additional opinions.

EVIDENCE / OPINIONS / EXPERT TESTIMONY / BASIS OF EXPERT TESTIMONY

An expert need not use special language, and as long as the opinion is to a reasonable degree of certainty, it should be allowed.

EVIDENCE / OPINIONS / LAY WITNESS

A lay witness opinion is properly limited to those opinions and inferences which are rationally based on the perception of the witness, helpful to a clear understanding of the witness' testimony or the determination of a factual issue, and not based on scientific, technical or other specialized knowledge.

DAMAGES / MEDICAL BILLS / RECOVERY

A plaintiff seeking recovery of medical bills must prove the following: I) medical services were rendered; 2) the reasonable charges for those services: 3) that the services rendered were necessary; and 4) that the medical services rendered were related to the injury that occurred.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 12915-2004

Appearances: George M. Schroeck, Esquire, Attorney for Plaintiff
Sharon L. Bliss, Esquire, Attorney for Defendant

OPINION

Connelly, J., June 5, 2009

Presently before the Court are Motions in Limine filed by Erie County Farms, Inc. (hereinafter "Defendant"). The Motion seeks to preclude all medical testimony regarding bills and treatment because Plaintiff has never submitted any expert reports.[1] Gail R. Czarnecki (hereinafter

[1] The Court notes that the instant case was certified for the February trial term. On February 18, 2009, immediately prior to scheduled jury selection Defendant presented its Motions in Limine to the Court. The Hon. William R. Cunningham issued an Order February 18, 2009, continuing the case to the June, 2009 term of court noting that "[t]his case was not in a position to be tried during the February term of court." *Order of Cunningham, J., February 18, 2009.* The Order also mandated Plaintiff "file on or before May 1, 2009, a written report from any expert that Plaintiff intends to call at trial, including any medical expert or otherwise. Further, the Plaintiff shall provide to the Defense a copy of any and all medical records for the Plaintiff since 2006 and/or an authorization for the Defendant to receive such records." *Id.*

"Plaintiff") opposes Defendant's Motions noting that any testimony sought to be presented is testimony from her treating physicians and not outside experts and adequate medical records have been provided to Defendant.

CONCLUSIONS OF LAW

A treating physician is not an expert for the purposes of Pa.R.C.P. 4003.5 and 4003.6, so long as the testimony is restricted to personal observations and opinions needed for treatment. A treating physician need not be named nor any report submitted pursuant to interrogatories filed under Rule 4003.5 unless the physician has been specially retained for purposes beyond treating the party. *Kurian v. Anisman,* 851 A.2d 152, 156 (Pa.Super. 2004). *Compare, Smith v. Southeastern PA Transp. Authority,* 913 A.2d 338, 344 (Pa. Cmwlth. 2006) (holding a party may not shield a physician from the requirements of Pa.R.C.P. 4003.5 simply by virtue of designating him as a treating physician. Treating physicians, whose testimony would otherwise not be covered by Pa.R.C.P. 4003.5, may still be considered experts and be subject to the discovery requirements regarding expert testimony if the opinion to be expressed during testimony was developed in anticipation of litigation and was not within the normal course of treatment).

Pa.R.C.P. 4003.5(a) covers any testimony which was "acquired or developed in anticipation of litigation or for trial." When determining if an individual's testimony qualifies as expert testimony under the Rule, a court looks to see if the individual's opinion was developed "with an eye toward litigation." *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 532 (Pa. 1995). If it has been so developed, the party forming the opinion is deemed an "expert" for purposes of rendering that opinion, and the additional requirements of Pa.R.C.P. 4003.5 apply. *Kurian,* 851 A.2d at 156.

Defendant's first argument avers that any and all medical testimony should be precluded "in light of the failure to provide an expert report in compliance with the Pennsylvania Rules of Civil Procedure." *Motion in Limine, ¶ 9.* Plaintiff asserts that Pennsylvania Rule of Civil Procedure 212.2, which governs pre-trial statements, notes that "a copy of the written report, or answer to written interrogatory consistent with Pa.R.C.P. 4003.5, containing the opinion and the basis for the opinion of any person who may be called as an expert witness," shall be contained in the pre-trial statement. *Pa.R.C.P. 212.2(a)(5).* Plaintiff also asserts that the rule contains a note indicating that the notes or records of a physician may be supplied in lieu of written reports. *Id.* Plaintiff filed her Pre-Trial Narrative Statement on January 29, 2009 and provided Defendant with the relevant medical records subsequent to its filing.[2]

[2] Defendant's Motion in Limine incorrectly states that Plaintiff never filed a Pre-Trial Statement. *Motion in Limine, ¶ 5.*

Because the doctors Plaintiff intends to call as witnesses are Plaintiff's treating physicians, they are not considered experts under Pa.R.C.P. 4003.5. Therefore, they are not required to file expert reports so long as their testimony is restricted to observations and opinions related to their treatment of Plaintiff. Therefore, Defendant's Motion in Limine to preclude all medical testimony is denied.

Defendant next argues that the testimony of Dr. Bradley Fox, Plaintiff's primary care physician, should be precluded in its entirety for his failure to testify within a reasonable degree of medical certainty. Defendant notes that although Dr. Fox testified as to his treatment of the Plaintiff, at no time did he testify that any or all of his opinions were stated within a reasonable degree of medical certainty. *Motion in Limine, ¶ 11.*

Although the expert need not use special language with expert medical testimony, the expert must state an opinion within a reasonable degree of medical certainty. *Gartland v. Rosenthal,* 850 A.2d 671, 677 (Pa. Super. 2004), *reargument denied.* The *Gartland* Court opined that even when a physician uses words like "likely" and "would" because such terms are normal in medical records, the physician's testimony can still be considered if he offered his opinions to a reasonable degree of medical certainty. Here, Dr. Fox's testimony does not use the phrase "within a reasonable degree of medical certainty", however, he unequivocally stated that he believed Plaintiff's complaint of pain was related to the fall at Defendant's store. The Court finds Dr. Fox's testimony meets the requisite certainty standard and therefore should be allowed.

Defendant next argues Dr. Fox's testimony should be limited only to those matters contained specifically in Dr. Fox's records authored by Dr. Fox and therefore no opinions may be offered by Dr. Fox to the jury. *Motion in Limine ¶ 13.* Defendant also argues that Dr. Fox's testimony be limited to treatment before October 2006 because Defendant only had access to Plaintiff's medical records created on and before that date. *Id. at ¶¶ 14-15.*

As noted previously, Dr. Fox is not an expert, but instead is Plaintiff's treating physician and as such he is permitted to testify to his observations and opinions needed for treatment. Therefore, Pa.R.C.P. 4003.5 does not apply. Moreover, the record shows Defendant received updated medical records on February 12, 2009, just before the deposition of Dr. Fox. Plaintiff asserts that she was not in possession of any medical records prepared after October, 2006 until the date of deposition and therefore was not in a position to supplement Defendant's records. Defendant received updated records on February 12, 2009, which predates, but is still in compliance with Judge Cunningham's Order of February 18, 2009 mandating Plaintiff turn over said records. Therefore, Defendant's Motion in Limine to limit Dr. Fox's testimony is denied.

Defendant also argues that testimony of Plaintiff's February 2007

surgery should be precluded because neither Plaintiff's counsel nor Defendant's counsel knew of or had record of Plaintiff's February 2007 surgery until February 12, 2009 (the date of Dr. Fox's deposition) and because Dr. Fox did not testify that the surgery was a result of the fall underlying Defendant's instant action. *Motion in Limine, ¶¶ 17-19.* Defendant asserts that none of the records or reports received indicate that the February 2007 surgery was related to the fall. *Id.* Plaintiff avers that Pennsylvania Rule of Evidence 703 allows an expert to base an opinion or inference on facts or data made known to the expert at or before the hearing. *Response to Defendant's Motion in Limine, p. 7.*

Here, Plaintiff is attempting to utilize Dr. Fox's testimony as expert testimony rather than testimony of a treating physician. Without an expert report as required under Pa.R.C.P. 4003.5, Dr. Fox cannot be used as an expert.[3] As a treating physician, Dr. Fox's testimony is limited to his observations and opinions for treatment. Plaintiff had ample opportunity to file a Rule 4003.5 report and failed to do so. Moreover, Plaintiff fully admits that there are no records or reports received indicating that the surgery of February 2007 was in any way related to the underlying incident and Dr. Fox never testified at his deposition that the surgery was related to Plaintiff's fall. Therefore, Defendant's Motion in Limine is granted and testimony related to the surgery of February, 2007 is precluded.

Defendant's next Motion in Limine asks to preclude any and all testimony concerning ongoing pain and discomfort. Defendant argues that because no records were received for treatment post October, 2006 testimony of the Plaintiff and any other witness should be precluded as to any ongoing pain, discomfort, or treatment. *Motion in Limine, ¶¶ 23-24.* Plaintiff asserts that because Defendant was provided with medical records from Dr. Fox noting pain suffered by Plaintiff and because no expert testimony is necessary for a Plaintiff and/or third party witness to testify to pain and suffering, the testimony is proper.

Plaintiff's Pre-Trial Narrative Statement notes that Plaintiff and her treating physicians will testify to ongoing pain and discomfort. It also indicates that lay witness Tina Figueroa will testify to liability. Pennsylvania Rule of Evidence 701 limits a lay witness's opinion testimony to "those opinions or inferences which are rationally based on the perception of the witness, helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge[.]" *Pa.R.E. 701.* Pennsylvania courts have held that lay witnesses may testify to

[3] Plaintiff's counsel filed a Pre-Trial Narrative statement on January 29, 2009 before he became aware of the February, 2007 surgery. Therefore, the Statement makes no reference to the surgery. Plaintiff never filed a Supplemental Pre-Trial Statement referencing the surgery or containing the opinion and the basis for the opinion of any person who may be called as an expert witness relative to the surgery.

someone's readily observable physical condition or appearance that does not require medical training. *See, Cominsky v. Donovan,* 846 A.2d 1256, 1259 (Pa.Super. 2004).

Therefore, because Defendants were provided with medical records relative to Plaintiff's ongoing pain and suffering and because testimony on the issue will be provided only by Plaintiff, her treating physicians and possibly a lay witness, the Court sees no need for an expert report. Defendant's Motion in Limine to preclude any and all testimony concerning ongoing pain or discomfort is denied.

Defendant's final Motion in Limine seeks to preclude any and all medical bills because Plaintiff's counsel has failed to produce evidence that the treatment Plaintiff received after December 17, 2003 was related to the fall. *Motion in Limine, ¶ 25.*

It is well-settled law that a plaintiff seeking special medical damages must prove the following: (1) medical services were rendered; (2) the reasonable charges for those services; (3) that the services rendered were necessary; and (4) that the medical services rendered were related to the injury that occurred. *Ratay v. Chen Liu,* 260 A.2d 484, 486 (Pa.Super. 1969). Here, Plaintiff has provided medical records from her treating physicians and Dr. Fox's deposition testimony indicates the treatment he provided and the referrals he made were a result of Plaintiff's 2003 fall. Moreover, Plaintiff's Pre-Trial Narrative lists various physicians' billing clerks as potential witnesses to testify to the damages in this case. Therefore, Defendant's Motion in Limine to preclude any and all medical bills is denied.

ORDER

AND NOW, to-wit, this 5th day of June, 2009, it is hereby **ORDERED, ADJUDGED** and **DECREED** that Defendant's Motions in Limine are **GRANTED** in part and **DENIED** in part as follows:

1. Defendant's Motion in Limine to preclude any and all medical testimony is **DENIED.**
2. Defendant's Motion in Limine to preclude testimony in its entirety for failure to testify within a reasonable degree of medical certainty is **DENIED.**
3. Defendant's Motion in Limine to limit Dr. Bradley Fox's testimony is **DENIED.**
4. Defendant's Motion in Limine to preclude testimony related to Plaintiff's February, 2007 surgery is **GRANTED.**
5. Defendant's Motion in Limine to preclude any and all testimony concerning ongoing pain or discomfort is **DENIED.**
6. Defendant's Motion in Limine to preclude any and all medical bills is **DENIED.**

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