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Reports of Cases Decided in the Several Courts of
Erie County for the Year
2010

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

Volume 93

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ATHANASIOS MIHADAS, Plaintiff

v.

STACY GIANNOPOULOS, Defendant

CHILD CUSTODY / BEST INTERESTS OF CHILD

Where all other considerations are essentially equal, best interests is determined by the advantage to the child to primarily reside in the home which will maximize time for direct interaction with a parent.

CHILD CUSTODY / GRUBER ANALYSIS

Where the court must choose the primary residence for a child who has resided 50% of the time with each parent in two different states for 4 years and a primary residence must be chosen as the child has reached school age, a mechanical *Gruber* analysis is not appropriate, but the court considered *Gruber* factors as related to a best interests analysis.

EXPERTS / WITNESS AT TRIAL

Expert witness was not permitted to testify where expert's report and CV were not provided prior to trial, despite requests made by opposing counsel.

CHILD CUSTODY / ADEQUACY OF SUBSTITUTE VISITATION

Where substitute visitation provided under *Gruber* analysis, no requirement that time be identical to prior arrangement, only that it foster ongoing relationship between child and non-custodial parent.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 13918-2004

Appearances: John R. Evanoff, Esq., Attorney for the Plaintiff
Edward J. Niebauer, Esq., Attorney for the Defendant

OPINION

October 8, 2009: Before the Court is a dispute regarding the appropriate custodial arrangement for E.M.M., born July 20, 2004 (hereinafter "Child"). Specifically, Stacy Giannopoulos (hereinafter "mother") requested modification of an April 6, 2005 Order which granted her and Athanasios Mihadas (hereinafter "father") equal shared custody of the child on an alternating weekly schedule.

PROCEDURAL AND FACTUAL HISTORY

The parties were married on October 26, 2003. N.T. July 14, 2009 at 19. The child was born July 20, 2004. *Id.* at 21. Just three months later, on October 21, 2004, the parties separated. *Id.* at 5 and 97. Upon separation, mother moved with the child to Whitestone, New York to reside with her parents. *Id.* at 5.

On October 28, 2004, father filed a Custody Complaint requesting legal and physical custody of the child. In the Complaint, father alleged that it would be in the child's best interests to be in his legal and physical

custody because mother wrongfully moved the child to New York, he played a substantial role in meeting the child's needs, moving the child to New York would not substantially improve the child's quality of life, realistic substitute visitation arrangements were not available and an evidentiary hearing must be conducted prior to moving the child outside of the jurisdiction. On the same date, father presented to the Honorable Michael E. Dunlavey a Petition for Emergency relief alleging that mother, on October 21, 2004, moved the child to Whitestone, New York without his knowledge or consent. Father further requested sole legal and physical custody of the child, pending a custody conference. By an October 28, 2004 Order, Judge Dunlavey awarded father sole legal and physical custody of the child, pending a custody conference.

Mother did not relinquish custody of the child to father and she failed to attend a December 20, 2004 custody conference. After the Court entered an order maintaining father as the child's sole legal and physical custodian, however, mother filed a Request for Adversarial Hearing listing relocation, primary residence, and alleged abusive conduct by father as the issues for consideration. Moreover, mother filed an Answer, New Matter and Counter-Complaint for Custody alleging that abusive circumstances by father and his family caused her to flee to New York with the child and that it would be in the child's best interests for mother to have custody in New York.

Pursuant to an agreement of the parties, Judge Dunlavey, on April 6, 2005, entered an Order requiring the parties to exchange the child on a week to week basis every Sunday at 4:00 p.m. at the State Police Barracks in Rockview, Pennsylvania, the approximate midway point between New York City, New York and Erie, Pennsylvania. *See* N.T. April 6, 2005. For the past four years, the parents have followed the April 6, 2005 Order. N.T. July 14, 2009 at 9.

On June 26, 2009, mother filed a Petition for Custody Modification requesting modification of the April 6, 2005 Order to accommodate the child's commencement of formal education. Specifically, mother requested that the weekly travel be eliminated and an appropriate custody schedule be entered taking into consideration the child's school schedule. This Court presided over the Custody Trial regarding this matter on July 14, 2009 and July 28, 2009.

On August 12, 2009, this Court entered its Order granting the parents shared legal and physical custody of the child, with mother receiving primary residential custody. The Order further provides that father shall receive custody of the child the second and fourth weekend of every month, the child's Thanksgiving break from school, the child's Christmas/Winter Break from school, any fall break from school and any Easter and Spring break. Furthermore, father is granted custody for the summer, with the exception that mother shall have three long weekends of custody during the summer break plus one seven day period of custody. Moreover, the

Order requires each parent to permit and encourage telephone contact between the child and the non-custodial parent.

Father, on September 9, 2009, filed his Notice of Appeal.

A. Mother

Mother lives in Whitestone, New York with her parents. N.T. July 14 at 5, 16. She and the child have lived in their present residence since the parties' separation in October of 2004. *Id.* at 5. It is a three bedroom, two bathroom residence with two dining rooms, living rooms, play rooms, two kitchens and a back yard with a garden. *Id.* at 6, 26-29; *see also* Exhibit A.

Mother is forty years old. N.T. July 14 at 12. She has a Master's degree in Early Elementary School Education with a specialty in children's literature. *Id.* at 17. Mother obtained her teacher's certification in New York and she taught in New York from 1994 until June of 2003 when she married father and moved to Pennsylvania. *Id.* at 18-19.

Mother does not currently work. N.T. July 14 at 7. She receives financial support from her father who is a long-time restaurant owner who also has substantial income from real estate. *Id.* at 7-9 and 81. Specifically, mother's father owns one whole block in Manhattan, with an estimated worth of $30 million. *Id.* at 7-9 and 81. Mother's father is willing to continue to support mother and the child. *Id.* at 9. Nevertheless, mother plans to serve as a substitute teacher in the same school district where the child will attend school in New York. *Id.* at 52-53.

B. Father

Father resides in Erie, Pennsylvania in a three-bedroom three and one-half bath home. N.T. July 14 at 87 and 98. Father's parents live next door to him and his sister lives on the other side of his parents. *Id.* at 98 and 115-16. Father's parents, his sister, his aunt and his godmother provide childcare for father. *Id.* at 98 and 119-20.

Father has a B.S. in accounting. *Id.* at 97. He is the owner of a Meineke Car Care Center. *Id.* at 100. His hours are from 8:00 a.m. to 6:00 p.m. Monday through Saturday. *Id.* at 118.

C. The Child

In New York, the child has her own bedroom and a playroom. N.T. July 14 at 6, 26 and 79; *see also* Exhibit A. The child and mother have meals with mother's parents in the home. N.T. July 14, 2009 at 40.

While in her mother's custody, the child attends Broadway shows, the circus, playgrounds, Central Park, and church services with mother and her extended family. *Id.* at 6-7, 41-42. Mother and the child also do a daily activity together, which might include going to the library, baking or watching a movie. *Id.* at 40. In addition to mother and her maternal grandparents, the child has a great-grandmother, aunts, uncles and cousins in New York. *Id.* at 61. The child regularly engages in activities

with this extended family, as well as with other children her age. *Id.* at 61-62, 78.

In New York, the child attended pre-school five days per week from 8:30 until 1:30. N.T. July 14, 2009 at 13 and 25. Mother enrolled the child in the pre-school program when she was three years old. *Id*. at 22. Mother maintained daily contact with the child's teachers. *Id.* at 25. Moreover, mother works with the child to teach her how to read, write and learn her numbers. *Id.* at 11 and 76-78.

The child has experienced some developmental delays. *Id.* at 33-34; *see also* Exhibits D-O. Accordingly, prior to her enrollment in pre-school, the child received Early Intervention services. N.T. July 14, 2009 at 22-23, 35; *see also* Exhibits D-F. Some portions of the therapy provided through Early Intervention continued through the child's pre-school in New York. N.T. July 14, 2009 at 23-25, 35; *see also* Exhibits G-O. The Early Intervention services offered to the child in Erie, however, discontinued in September of 2006. N.T. July 14, 2009 at 104.

The child cries when she goes to custodial exchanges from mother to father. *Id.* at 10, 58, 75 and 84. Mother, however, encourages the child to spend time with her father. *Id.* at 10, 58, 75 and 84.

The child has a doctor and dentist in New York. *Id.* at 36-38. The child also has a doctor in Pennsylvania. *Id.* at 96. Each parent maintains medical coverage for the child. *Id.* at 58 and 97.

In Erie, the child has her own bedroom. N.T. July 14, 2009 at 98. Sometimes, however, she sleeps at her paternal grandparents' house or at her aunt's house. *Id.* at 116-17. In Erie, the child is involved in preschool, toddler aerobics, swimming, soccer, basketball and ballet. *Id.* at 89-91, 99 and 111-112; *see also* Exhibit P-1. Moreover, she is enrolled in a reading program at Tracy Elementary School. N.T. July 14, 2009 at 94 and 99. The child's preschool was Monday, Wednesday and Friday from 9:30 until 2:30, with extracurricular classes on Tuesday and Thursday from 9:30 until 2:30. *Id.* at 119.

The school proposed for the child's attendance in New York is PS-79 in Whitestone, New York. *Id.* at 30-31; *see also* Exhibit R. The school is within walking distance of mother's home and mother and her father will transport the child to and from school. N.T. July 14, 2009 at 32. The school proposed for the child in Erie is Villa Elementary School. *Id.* at 96.

DISCUSSION

The paramount concern of the Court in a child custody case is the best interests of the child. *Collins v. Collins*, 897 A.2d 466, 471 (Pa. Super. 2006). In determining what is in the child's best interests, the Court must assess, on a case-by-case basis, all factors that may legitimately affect the child's physical, intellectual, moral and spiritual well-being. *Id.* When a custody case involves relocation, the best interests analysis must include: (1) assessment of the potential advantages of the proposed

move and whether the move is likely to significantly improve the quality of life for the parent and the child; (2) assurance that the move is not motivated simply by a desire to frustrate the visitation rights of the non-custodial parent or to impede the development of a meaningful parent/child relationship; and (3) consideration of the feasibility of substitute visitation arrangements to insure a continued relationship between the child and the non-custodial parent. *Gruber v. Gruber*, 400 Pa. Super. 174, 583 A.2d 434, 439 (1990). When a court reviews a request for change of custody and relocation in the context of an equal shared custody arrangement, there are two primary family units and, therefore, the *Gruber* factors must be analyzed in the context of two competing custodial environments. *McAlister v. McAlister*, 747 A.2d 390, 392 (Pa. Super. 2000) *citing Thomas v. Thomas*, 739 A.2d 206, 210-11 (Pa. Super. 1999)(en banc). The *Gruber* factors are but one aspect of the overall best interests analysis when the court is formulating a primary physical custody order involving relocation of the child. *Klos v. Klos*, 934 A.2d 724, 729 (Pa. Super. 2007); *see also Clapper v. Harvey*, 716 A.2d 1271 (Pa. Super. 1998).

As discussed in Section IIA below, this case is not a traditional *Gruber* case. Nevertheless, to some extent, the *Gruber* factors were relevant to this fact scenario. Accordingly, this Court, to the extent relevant to the child's physical, intellectual, moral and spiritual well-being, considered the *Gruber* factors as part of its best interests analysis.

I. BEST INTERESTS OF THE CHILD

First, it is clear that both parties are capable and loving parents.

Both parents ensure the child's physical well-being. Whether in mother's custody or father's custody, the child has adequate physical living arrangements, neither with an obvious benefit over the other. Moreover, each residence either includes a support network of extended family, or is directly next door to extended family. Furthermore, each parent ensures the child's physical care through maintaining healthcare coverage in his/her home state and through providing medical care.[1]

In addition, each parent looks out for the child's intellectual needs. For example, when the child displayed some developmental delays, each parent obtained early intervention services for the child in his or her home town. Furthermore, each parent pursued pre-school education for the child during the time that the child was in his/her custody.

[1] It is noteworthy that, at one point, a lack of communication between the parties resulted in the child receiving duplicate shots. N.T. July 14, 2009 at 36-37. It is completely inappropriate and unacceptable that such an incident occurred. Nevertheless, the testimony of both parties indicates that the parties now understand the harm of their juvenile behavior and the Court believes that communication is improving between the parties and that they can work together for the best interests of this child. *Id.* at 54-56, 63-64, 70-71, 102. Father attempted to demonstrate that the lack of communication was one-sided. The Court notes, however, that father, like mother, failed to provide relevant information regarding the child's care and activities while in his custody. *Id.* 55, 69, 72 and 110-112.

Moreover, it is clear that mother has been personally involved in the child's education, staying in daily contact with the child's teachers and working with the child to teach her to read, write, and learn her numbers. Similarly, father works with the child on her reading and he enrolled her in an extracurricular reading class. N.T. July 14, 2009 at 94-95.

Furthermore, the experts[2] agree that both parents are capable and loving parents and that the child responds to and shows love toward both parents. For example, Dr. Victor Masone indicated in his report as follows:

> During the observations of E.M. with her parents, E.M. tended to respond to requests equally. She tended to be emotionally attached to both, showed affection to both and had no difficulty interacting with both parents. It is obvious that both parents made attempts to direct her play and to give her appropriate prompts when needed. Neither parent seemed to be overly demanding or harsh with E.M. during the course of the evaluation.

Psychological (Custody) Evaluation, Victor Masone, Ph.D., at 12. Dr. Masone further provided:

> there does not appear to be any significant information that would suggest either one of the parents would be unfit to parent this child. Both of these people have been parenting her since 2005 and providing her with the interventions and services and activities that she will need to develop appropriately.
>
> . . .
>
> A review of the mental health assessments of both parents indicate that neither parent appears to be better equipped emotionally to handle E.M.'s educational needs and emotional needs than the other. Both parents have very strong and supportive families that provide support, physical as well as mentally. Strong family systems are present in which E.M. could thrive.
>
> . . .
>
> Impressions of E.M.'s perception of her relationship with her parents was evaluated (at her ability and maturity level). She seems to have an attachment to both. She reports loving both parents and liking to be with and visit both parents.

Psychological (Custody) Evaluation, Victor Masone, Ph.D., at 15-16. Similarly, Dr. Marcus noted: "[t]rying to discern what is in [the Child's] best interests is extremely difficult for she loves both of her adequate and doting hands-on parents, as they do her." Report of Paul Marcus, Ph.D. at p. 2. Furthermore, Dr. Marcus observed that "both [father] and [mother]

[2] Each party employed a psychologist to perform a psychological custody evaluation. The experts did not testify in this case. Instead, the parties stipulated to the admission of the expert reports of Dr. Paul Marcus and Dr. Victor Masone. N.T. July 14 at 43-44.

were attentive, responsive and affectionate with [the child] and capable of setting reasonable limits with her. There was nothing to criticize in terms of their hands-on parenting skills..." *See* report of Paul Marcus, Ph.D. at p. 8. Along with the expert reports, it is clear from witness testimony and photographs that, despite some hesitation on custodial exchange days, the child is happy and well cared for in each parent's home.

Accordingly, it is clear that each environment available to this child is loving, appropriate, positive and truly structured in favor of the child's best interests. As the child's educational needs require a primary residence, however, the question arises as to which of these seemingly equal and positive environments provides advantages to the child which will serve her best interests.

With regard to father's home, an apparent advantage is that father, unlike mother, has financial independence. Nevertheless, the home that mother provides for the child in New York is financially stable. Specifically, it is clear that mother's parents have the desire and the ability to support both mother and the child, a position to which they have demonstrated a commitment for more than four years. Furthermore, mother has the education and desire necessary to resume her career now that the child is school age. In that respect, the Court believes that it is likely that mother will gain financial independence, despite a lack of any indication that she will need it. Regardless, due to the unwavering support of mother's parents, a lack of financial independence does not equate to instability in this case.

With regard to mother's home, the child has available an optimum amount of first-hand parental care. Specifically, mother is not currently employed, so her focus is exclusively on the child and the child's needs. Moreover, as mother returns to work, she will be on precisely the same work schedule as the child's school schedule.

Father, on the other hand, works six days per week from 8:00 a.m. until 6:00 p.m. as the owner of a car care center. He attempted to lead this Court to believe that being the owner of the company allows him the flexibility to be very involved with the child, including actively participating in many activities with her. The unrebutted testimony of Gregory Heintz, a private investigator hired by mother, clearly indicates, however, that the use of Father's flexible schedule is merely to leave work in order to chauffer the child to and from her multiple activities. N.T. July 28 at 9-20. When father drops the child off at one of her activities, he does not stay and engage in the activity with the child, or even observe her participation.[3] *Id.* Instead, he leaves her in the care of a third party and

[3] Father testified that he participates in the child's swimming with her on open swim days and he passes the soccer ball around with her. N.T. July 14, 2009. Considering the testimony of Gregory Heintz, as well as father's clear commitment to his business, it is apparent that these are isolated incidents. N.T. July 28, 2009 at 9-20.

then he returns to work. *Id.* When the child's activities end, father returns to pick the child up and delivers her to the care of one of his relatives for several hours while he returns to work. *Id.* These exchanges take merely a matter of minutes; father does not stay and spend time with the child. *Id.* In this respect, it is clear that the child spends the majority of her waking hours engaged in an activity with someone other than father.

While there is absolutely no indication that the time that the child spends with her paternal relatives or learning skills in a structured activity is negative, the fact remains that when the child is in mother's custody, mother, unlike father, is personally available to the child at all times in which the child is in her care. Mother has never had to use a daycare provider or babysitter for the child when the child has been in her custody. N.T. July 14 at 40. Instead, she utilizes her custodial time to personally participate in activities with the child and to be personally involved in the child's education. When the child is not in school, mother and the child engage in constructive activities together. They bake, go to the library, work on reading and writing skills, go on play dates, prepare things for show and tell and simply spend time together. *Id.* at 40, 61-62, 76-78. As Athena Giannopoulous, the child's maternal grandmother, testified with regard to the child's love of playing school with mother, "you should see it, I admire both of them, it's funny sometimes. But, you should see them, you think you're watching teacher and a student." *Id.* at 76. As Ms. Giannopoulous' testimony demonstrates, this child benefits from the time that she has to actually engage in activities with mother.

Considering that the child must endure a significant transition in her custody arrangement, but that each household available to the child is a positive environment, the Court sees it as an advantage to the child to be in the home that will maximize the time that she has for direct interaction with a parent. In this respect, the Court agrees with Dr. Marcus that, given the essentially equal living environments, this advantage to the child is controlling. *See* report of Paul Marcus, Ph.D. at pp. 17-18. Mother, unlike father, is completely available to the child to provide maximum parental contact and care.

Moreover, with regard to a comparison of the educational opportunities available to the child in Pennsylvania versus New York, there is no indication that one environment is better for the child than the other. *See Psychological (Custody) Evaluation* of Dr. Masone at p. 15; *see also* report of Dr. Marcus at p. 17. Nevertheless, it is noteworthy that mother has a degree in Early Elementary School Education. Mother's background, combined with her hands-on parenting and personal availability to the child, has the potential to benefit this child - who has experienced some developmental delays - as she begins her early elementary school education. It is apparent that mother takes advantage of her time with the child to personally teach her things important for her

education. In addition to helping her with reading, writing and numbers, mother also incorporates education into the child's play in a manner that the child enjoys. N.T. July 14, 2009 at 76-77. While father's testimony indicates that he also works with the child on learning to read and he even enrolled her in an extracurricular reading class, mother is much more active in the child's education. For example, mother maintained daily contact with the child's teachers and she personally engages the child in educational activities like taking her to the library and mimicking a school setting at home. Mother's background, approach and availability appear to be a unique educational opportunity and benefit for the child.

Despite the advantages that mother offers to the child, the Court is compelled to address the concern raised by Dr. Masone that mother's removal of the child from Pennsylvania and her refusal to stop using a doctor that father objects to indicate that mother has a propensity to alienate the child from father. *See Psychological (Custody) Evaluation*, Victor Masone, Ph.D., ¶5 at 16. While mother may not have made the best choices, the Court does not believe that her motive in seeking primary custody of the child is questionable. First, witness testimony clearly indicates that mother encourages the child to attend visits with father, even when the child cries. N.T. July 14 at 10, 58, 75 and 84. Moreover, in her testimony, mother acknowledged that the child loves her father and that he loves her. Furthermore, both of the experts in this case clearly indicate that the child has a loving relationship with both parents, she likes visiting both parents and she has an attachment to both. It is highly unlikely that the child would have such a positive relationship with her father if mother were truly trying to impede the child's relationship with him. Considering the wonderful relationship that the child has with each parent, as well as the parties' strict adherence to an equal shared custody arrangement for four years, the Court believes that neither mother nor father seek primary custody of the child in an attempt to frustrate the other's visitation rights or to impede the parent/child relationship. This child has simply reached school age and it is obvious that she cannot shift between two different schools in separate states on a weekly basis.

With regard to the feasibility of substitute visitation arrangements to insure a continued relationship between the child and the non-custodial parent, it is clear that alternate arrangements are available in this case. Specifically, each parent has, without any apparent difficulty, been able to exercise shared custody of the child, despite the distance, for more than four years. The child's school schedule mandates that the custodial arrangement will be different from that to which the parties and the child have become accustomed. Nevertheless, the Court established a schedule with the intent to maximize the non-custodial parent's time, without jeopardizing the child's educational needs.

In sum, both of these parents are good parents with equally wonderful

relationships with the child. Obviously, neither distance nor either party is an impediment to this child's relationship with the other parent. Moreover, both parents can be faulted for the lack of communication which has, at times, worked to the child's detriment. Nevertheless, there is no indication that either parent wishes to impede the other parent's custodial time with the child. In that respect, it was difficult to determine whether it would be in the best interests of the child to be in mother's primary custody or whether it would be in her best interests to be in father's primary custody. For the aforementioned reasons, the Court selected mother as the child's primary custodian.

II. STATEMENT OF MATTERS

In his Concise Statement of Matters Complained of on Appeal, father alleges that this court erred when it failed to apply *Gruber,* failed to take testimony from Dr. Doris Gernovich, failed to "maximize the time the child spends with the parents based upon the parties schedules," and its findings were against the weight of the evidence.

A. *Gruber*

With regard to *Gruber,* this Court considered the *Gruber* factors as part of its overall best interests analysis. Nevertheless, as this case presents the unusual scenario of an equal shared custody arrangement occurring for four years while the parties live nearly ten hours apart, this was not the typical *Gruber* case. As recently stated by the Superior Court in a case wherein the parent requesting primary custody of the child was already established in the relocation state:

> ...[t]he use of the term "relocation" in this case, as understood in the traditional *Gruber* case, is somewhat incorrect, in that, only the minor children would be "relocating" to Florida because Father is already a Florida resident. Therefore, in reality, the primary focus for the trial court, and, by extension, this Court, was to determine whether the living situation for the minor children at either Mother's home or Father's home in Florida serves the minor children's best interests, i.e., whether Mother or Father should be granted primary physical custody of the minor children. Consequently, the trial court's examination of the factors enunciated in *Gruber* constituted only a small component of that broad analysis. As such, we will not, as Mother would have us, perform a mechanical analysis of the *Gruber* factors, but we will instead incorporate our analysis of these issues into the broader question of whether the trial court's custody award was in the best interests of the minor children.

See Klos v. Klos, 934 A.2d 724, 729 (Pa. Super. 2007)(citations omitted). Even more unusual in this case, is the fact that even the child is established in the "relocation" state as she has lived in New York on an equal basis

as her time spent in Pennsylvania. In that respect, there is a degree of difficulty in trying to force this fact scenario into the traditional *Gruber* analysis. For example, it is difficult to consider whether relocating the child to New York is likely to significantly improve the quality of life for mother and the child when, in fact, Mother and the child already have a quality life firmly established in New York. On the other hand, it is possible to consider the potential advantages of the child living primarily in New York as opposed to her living primarily in Pennsylvania, which this Court analyzed as discussed above. Accordingly, with the ultimate goal of serving the best interests of the child, this Court applied the *Gruber* factors as relevant. In that respect, father's first assignment of error is without merit.

B. Testimony of Dr. Gernovich

Father further alleges that this Court erred by precluding the testimony of Dr. Gernovich.

On June 30, 2009, father filed an Initial Pre-Trial Narrative Statement that listed Dr. Doris Gernovich as an expert. No other information regarding Dr. Gernovich or her anticipated testimony was provided. Accordingly, at trial, mother's counsel asked for an offer of proof with regard to Dr. Gernovich. N.T. July 28, 2009 at 37. In response, father's counsel indicated that Dr. Gernovich was being called to have her qualified as an expert in the field of elementary school education. N.T. July 28, 2009 at 37-38. Counsel further indicated that Dr. Gernovich did a comparison of Villa Maria Elementary, the school that the child would attend in Erie, with PS 79, the school that the child would attend in New York. N.T. July 28, 2009 at 37-38. In response, mother's counsel indicated "I don't even have a curriculum vitae as to her qualifications. I have no report. I've asked for the report and was given the answer that she does not prepare reports, and hasn't in the past." N.T. July 28, 2009 at 38. The record further reflects that, on July 8, 2009, mother filed a Notice of Serving Interrogatories and Request for Production of Documents on father's counsel.[4]

Considering that mother's counsel was, without reasonable explanation, denied additional information regarding Dr. Gernovich's anticipated testimony, despite requesting it, this Court precluded Dr. Gernovich's testimony. *See* Pa.R.C.P. 4003.5; *see also Klyman v. Southeastern Pennsylvania Transp. Authority,* 480 A.2d 299 (Pa. Super. 1984). Without information regarding the facts and opinions to which the expert was expected to testify, as well as the basis for those opinions, mother had not even the most basic information upon which to prepare a meaningful response to the testimony presented at trial. In that respect,

[4] Judge Cunningham, by Order dated June 25, 2009, granted the parties leave to conduct discovery.

mother clearly would have been prejudiced by the testimony.

Accordingly, father's second assignment of error is without merit.

C. Maximizing the Child's Time with her Parents

Father further alleges that this Court failed to maximize the time the child spends with the parents based upon the parties' schedules.

After four and one-half years of equal shared custody, it is difficult to formulate an arrangement that seems fair to either party. The law, however, requires only that realistic substitute visitation arrangements exist to foster an ongoing relationship between the child and the non-custodial parent; not that the schedule available is identical to the custodial arrangement currently in place. *See Billhime v. Billhime*, 869 A.2d 1031, 1039-40 (Pa. Super. 2005).

As discussed above, the Court considered the parties' schedules and selected mother as the child's primary custodian for the specific reason of maximizing the amount of time that the child has with a parent. The schedule provided for father's custodial time was an attempt to give the child as much time as possible with her father, considering that she is now school age. The Court fails to see how a schedule, which ensures that the child is with a parent at all times while in the care of her primary custodian and grants the non-custodial parent greater time than father proposed for the non-custodial parent's custody, fails to maximize the time that the child spends with her parents. N.T July 14 at 102-103. This is particularly puzzling to the Court when father testified that he has a flexible work schedule because he owns his own business. N.T. July 14 at 104.

For the foregoing reasons, father's third allegation of error is without merit.

D. Weight of the Evidence

For the reasons discussed above, this Court's August 12, 2009 Order was not against the weight of the evidence. Accordingly, father's final allegation of error is without merit.

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

RON D. PORTER, Plaintiff

v.

ROBERT BENJAMIN WILEY COMMUNITY CHARTER SCHOOL, Defendant

MOTION FOR JUDGMENT ON 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; and the law is so clear that a trial could be a fruitless exercise.

MOTION FOR JUDGMENT ON PLEADINGS

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.

MOTION FOR JUDGMENT ON PLEADINGS

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.

POLITICAL SUBDIVISIONS

Section 8541 of the Political Subdivision Tort Claims Act, 42 Pa.C.S.A. § 8541, expressly provides, with limited exceptions, that "no local agency shall be liable for any damages on account of any injury to person or property caused by any act of the local agency or an employee thereof or any other person." 42 Pa.C.S.A. §8541.

POLITICAL SUBDIVISIONS

Charter schools are entitled to immunity in the same manner as political subdivisions and local agencies.

POLITICAL SUBDIVISIONS

Section 8542(a) of the Political Subdivision Tort Claims Act, 42 Pa.C.S.A. § 8542(a), imposes liability on a local agency for damages on account of injury to a person or property only when the injury was caused by the "negligent acts" of the local agency or its employee, and such acts fits one of the eight exceptions to governmental immunity identified in Section 8542(b) of the Act.

POLITICAL SUBDIVISIONS

A claim of defamation, which is an intentional tort, does not constitute a "negligent act" under Section 8542(a) of the Political Subdivision Tort Claims Act, 42 Pa.C.S.A. §8542(a), nor does defamation fall into any of the eight enumerated acts that provide exceptions to governmental immunity, as outlined in Section 8542(b) of the Act.

POLITICAL SUBDIVISIONS

Section 8550 of the Political Subdivision Tort Claims Act, 42 Pa.C.S.A. §8550, provides that the limitations and immunities of the Act do not

apply in a claim of "willful misconduct" against a local agency or an employee thereof. Section 8550 does not, however, create an exception to Section 8542 and, as a result, does not permit the imposition of liability on a local agency for the willful conduct of its employees.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 18127 - 2008

Appearances: Vicki Kuftic Horne, Esq., Attorney for Plaintiff
G. Jay Habas, Esq., Attorney for Defendant

OPINION AND ORDER

DiSantis, Ernest J., Jr., J.

This matter comes before the Court on Defendant's, Robert Benjamin Wiley Community Charter School ("Charter School"), Motion for Judgment on the Pleadings. Argument on this matter was conducted on October 28, 2009, before this Court.

1. BACKGROUND OF THE CASE[1]

Plaintiff, Ron D. Porter ("Porter"), served as the Charter School's director of human resources from July 1, 2007 until his resignation from employment on January 4, 2008. Porter's Complaint, at ¶¶ 5, 38. Porter was a cabinet member of the Charter School and responsible for employee benefits. *Id.,* at ¶¶ 10, 12

The Charter School serves students in kindergarten through eighth grades from the City of Erie and Pennsylvania. *Id.,* at ¶ 8. From August of 2007 until his death, Theo Overton ("Overton") was the Charter School's Chief Administrative Officer. *Id.,* at ¶ 8. Porter reported directly to Overton, and Overton reported directly to the Charter School's Board of Trustees. *Id.,* at ¶¶ 8, 11.

On January 2, 2008, Diane Barko, a teacher at the Charter School, telephoned Porter at home to report that she was unable to use her medical insurance card when she attempted to obtain medical services. *Id.,* at ¶ 16. At that time, Porter informed her that the medical coverage was in place and that he would call the insurance provider the next morning to confirm that fact. *Id.*

On January 3, 2008, Porter called the insurance provider, C.H. Reams & Associates, concerning the school's medical coverage. *Id.,* at ¶ 17. Porter then received a telephone call from Overton who asked Porter when he had learned about a problem with the employee's health insurance. Porter responded that he became aware of the problem at 9:00 a.m. that morning. *Id.,* at ¶ 18. According to Porter, two teachers were in Overton's office at the time of the telephone call. After Overton hung up, he told the teachers that Porter had lied to him before. *Id.,* at ¶ 21.

[1] The relevant facts and procedural history are derived from the pleadings.

Porter claims that Overton also told the teachers that Porter was weak and incompetent. *Id.,* at ¶ 22.

At Overton's request, Porter and Overton drove to the Reams' office where they were assured that medical coverage was in place. *Id.,* at ¶ 25. It was also confirmed that a rider was signed by Overton and that Porter called about the medical coverage issue that morning. *Id.,* at ¶ 25.

On that same day, Overton called for a meeting of the entire staff, including teachers, administrators, clerical, support and maintenance, to discuss a problem with the health insurance cards. *Id.*, at ¶¶ 27, 28. At the meeting, Overton apologized for the confusion and informed the staff that human resources, i.e. Porter, was responsible for the benefits. *Id.,* at ¶ 29. Porter claims that Overton told the staff that someone in the Cabinet had lied to them and then called Porter to come forward to explain the health insurance issue. *Id.,* ¶¶ 30-31. While Porter was speaking to the employees, Overton stated, "No Ron, don't lie to them; tell them the truth." *Id.,* at ¶ 33. On January 4, 2008, Porter resigned.

In December 2008, Porter filed a Writ of Summons and on March 12, 2009, filed a Complaint against the Charter School, alleging an action for common law defamation. Porter claims Overton was an agent of the Charter School at the time alleged defamatory statements were made.

On April 13, 2009, the Charter School filed preliminary objections, which this Court denied on June 4, 2009. On August 25, 2009, the Charter School filed a Motion for Judgment on the Pleadings and supporting brief. Porter filed his brief in opposition on September 28, 2009. On October 5, 2009, the Charter School filed a reply to Porter's brief in opposition.

II. LEGAL DISCUSSION

A. Standard of Review

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 Defendant is entitled to absolute immunity under the Political Subdivision Tort Claims Act, 42 Pa.C.S.A. §§8541, *et. seq.*

Section 8541 of the Political Subdivision Tort Claims Act, 42 Pa.C.S.A. § 8541 ("Act"), expressly provides that, "[e]xcept as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." 42 Pa.C.S.A. § 8541. Charter schools are entitled to immunity in the same manner as political subdivisions and local agencies. *Warner v. Daniel Lawrence and World Communications Charter School*, 900 A.2d 980, 985 (Pa. Cmwlth. 2006), *citing*, 24 P.S. § 17-1714-A(a)(2) and 24 P.S. § 17-1727-A.

There are, however, exceptions to the grant of immunity under the Act. Section 8542 provides the following:

§ 8542. Exceptions to governmental immunity

(a) **Liability imposed.** - A local agency shall be liable for damages on account of an injury to a person or property within the limits set forth in this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in subsection (b):

(1) The damages would be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available a defense under section 8541 (relating to governmental immunity generally) or section 8546 (relating to defense of official immunity); and

(2) The injury was caused by the **negligent acts** of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b). As used in this paragraph, "negligent acts" shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct.

42 Pa.C.S.A. § 8542 (a) (emphasis added). Under Section 8542 (b), those "negligent acts" consist of vehicle liability; care, custody or control of personal property; real property; trees, traffic controls and street lighting; utility service facilities; streets; sidewalks; and, care, custody and control of animals. 42 Pa.C.S.A. § 8542 (b). "These exceptions are strictly construed and narrowly interpreted." *Weaver v. Franklin County*, 918 A.2d 194, 200 (Pa. Cmwlth. 2007) (citation omitted).

In the case at bar, Porter alleges a claim of defamation, which is an intentional tort, not a negligent act as defined by the Act. *See*, 42 Pa.C.S.A. § 8542 (a) - (b). Furthermore, Porter's defamation claim does not fall into any of the eight enumerated acts that provide exceptions

to governmental immunity. *Id.; Alston v. P.W. Philadelphia Weekly,* 980 A.2d 215 (Pa.Cmwlth. 2009). As such, the Charter School is entitled to immunity.

Despite this law, Porter claims that the Charter School is not immune from liability for an intentional tort. In support, Porter claims that Section 8550 of the Act applies. That section provides the following:

> **8550. Willful misconduct**
>
> In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct, the provisions of sections 8545 (relating to official liability generally), 8546 (relating to defense of official immunity), 8548 (relating to indemnity) and 8549 (relating to limitation on damages) shall not apply.

42 Pa.C.S.A. § 8550.

In *Petula v. Mellody,* 631 A.2d 762 (Pa. Cmwlth. 1993), the Commonwealth Court dealt with a case similar to the one *sub judice,* i.e. defamation action. The Court noted that:

> At the outset, it is clear that the trial court was correct in its holding that the School Districts are immune from suit in a cause of action sounding in defamation. Under the Judicial Code, a school district is defined as a local agency for purposes of governmental immunity. *Goldsborough v. Department of Education,* 576 A.2d 1172 (Pa. Cmwlth. 1990) *aff'd,* 528 Pa. 588, 599 A.2d 645 (1991). Where a plaintiff has averred willful misconduct on the part of local agency employees, Section 8542 (a)(2) of the Judicial Code, 42 Pa.C.S. § 8542 (a)(2), bars recovery from the local agency because liability may be imposed on the local agency only for negligent acts. *City of Philadelphia v. Glim,* 613 A.2d 613 (Pa. Cmwlth. 1992). Furthermore, an action in defamation falls within none of the eight enumerated exceptions to local agency immunity set forth in Section 8542(b), 42 Pa.C.S. § 8542(b). *Goralski.* Moreover, Section 8550, 42 Pa.C.S. § 8550, does not create an exception to Section 8542 and as a result, does not permit the imposition of liability on a local agency for the willful conduct of its employees. *Glim.* The trial court's decision is therefore affirmed to the extent it held the School District immune from suit.

Petula, 631 A.2d at 765.

Based upon its review, this Court finds that the Charter School is immune from liability for the alleged defamatory statements made by its employee, Theo Louis Overton. *See also, Palmer v. Bartosh,* 959

A.2d 508, 512 n. 3 (Pa.Cmwlth. 2008); *Weaver, supra; Ferber v. City of Philadelphia*, 661 A.2d 470, 475 (Pa. Cmwlth. 1995). Therefore, the Charter School's motion will be granted.

ORDER

AND NOW, this 16th day of November, 2009, for the reasons set forth in the accompanying opinion, it is hereby **ORDERED** that Defendant's, Robert Benjamin Wiley Community Charter School, Motion for Judgment on the Pleadings is **GRANTED**.

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

FRANCIS DONALD NAGEL, and DOROTHY NAGEL, Administrators of the Estate of TERRANCE NAGEL, deceased, Plaintiffs,

v.

FALCON TRANSPORT, INC., Defendant,

v.

LESTER L. WARD; KUNTZMAN TRUCKING, INC.; CASSANDRA L. BARLOW; TRACY J. CASTOR; PENSKE TRUCK LEASING, CORP.; MICHAEL P. BOLINGER; STERLING EXPRESS, LTD.; JOHN W. LAMBERT; POND BROTHERS TRUCKING, LLC; ERIC E. JIMENEZ; LOGISTIC LEASING, INC.; ROBERT G. SWANTEK; EAGLE EXPRESS LINES, INC.; DICK VANDER-PLOEG; ALLIED SYSTEMS, LTD.; FRANK G. RAEDER; RONALD E. RITCHEY; ADVANTAGE TANK LINES; and the PENNSYLVANIA DEPARTMENT of TRANSPORTATION, Additional Defendants

CIVIL PROCEDURE / SUMMARY JUDGMENT

Summary judgment is appropriate when the record either demonstrates that there is no genuine issue of material fact as to a necessary element of the cause of action or defense or an adverse party, who bears the burden of proof at trial, has failed to produce evidence of facts essential to their *prima facie* cause of action or defense which would require submission to a jury.

NEGLIGENCE / CAUSATION

Causation is an element of negligence upon which plaintiff bears the burden of proof.

NEGLIGENCE / CAUSATION

Causation requires proof of both "cause-in-fact" and proximate cause.

NEGLIGENCE / CAUSATION

The Court must determine whether there is sufficient evidence of causation and, if it appears highly extraordinary that the act's conduct should have brought about the harm, the Court must refuse to find causation.

CIVIL PROCEDURE / SUMMARY JUDGMENT

In motor vehicle accident case, summary judgment in favor of some defendants was appropriate where plaintiff failed to present evidence that moving defendants were connected to motor vehicle accident at issue and record was otherwise devoid of such evidence.

CIVIL PROCEDURE / SUMMARY JUDGMENT

In motor vehicle accident cases related to interstate collision involving multiple vehicles and accidents, summary judgment was appropriate in favor of defendant driver (and defendant driver's employer) who was involved in collision which occurred behind and subsequent to collision in which plaintiff's decedent was injured when plaintiff presented no

evidence that defendant's actions contributed to plaintiff's injury and record was otherwise devoid of such evidence.

POLITICAL SUBDIVISIONS / GOVERNMENTAL IMMUNITY

PennDOT has no duty to remove snow and ice from highways or to ensure a highway's design does not facilitiate loss of viability in severe weather conditions but it may have a duty to warn travelers of known dangerous conditions affecting those highways.

SUMMARY JUDGMENT / GOVERNMENTAL IMMUNITY

Question of what constitutes a dangerous condition so as to qualify for exception to sovereign immunity is one of fact for the jury while determination of whether sovereign immunity applies to bar action is one of law to be resolved by Court.

SUMMARY JUDGMENT / GOVERNMENTAL IMMUNITY

Whether PennDOT's lack of warning regarding weather and road conditions constituted a dangerous condition was a question of fact to be determined by a jury and thus precluded entry of summary judgment in PennDOT's favor based on PennDOT's claim that action was barred by sovereign immunity.

SUMMARY JUDGMENT / GOVERNMENTAL IMMUNITY

Plaintiff's claim that PennDOT was negligent in failing to design the highway so that it was free of hazardous conditions in the snowstorm was barred by doctrine of sovereign immunity.

EVIDENCE / EXPERT TESTIMONY

When a party must prove causation through expert testimony, the expert must testify with reasonable certainty that the result in question came from the cause alleged.

SUMMARY JUDGMENT / EXPERT TESTIMONY

Where only evidence of causation was expert report and expert's only conclusion was that "it is possible" that defendant's negligence caused the injury at issue, summary judgment in favor of defendant was appropriate.

SUMMARY JUDGMENT / EXPERT TESTIMONY

Expert report that made multiple statements pertaining to defendant's role in motor vehicle accident but which made only two explicit conclusions pertaining to same, both of which conclusions were not made within a reasonable degree of certainty, was inadmissible as evidence and thus would not preclude entry of summary judgment in favor of defendant.

SUMMARY JUDGMENT / EVIDENCE

In motor vehicle case involving mutliple vehicles and impacts, Court would not consider testimony of witness offered against defendant who was operator of white flat-bed truck when witness described vehicle at issue as "a white box-type truck" and whose description otherwise differed from that of defendant's vehicle. Due to obvious discrepancies and contradictions, the Court refused to consider such evidence when

ruling on defendant's motion for summary judgment.

NEGLIGENCE / OPERATION OF MOTOR VEHICLES

Kicking up of snow and slush is an unavoidable normal hazard of winter driving and does not alone constitute negligence but must be coupled with such other actions (such as speeding) that would create a foreseeable risk of harm.

NEGLIGENCE / PROXIMATE CAUSE

Excessive speed is not negligence unless there is evidence that it was proximate cause of accident.

SUMMARY JUDGMENT / PROXIMATE CAUSE

Evidence that defendant driver was driving at excessive speed and kicked up snow and slush that impaired visibility was inadequate to meet plaintiff's burden of proving a *prima facie* case where there was no evidence that defendant's negligence played a role in the accident at issue and therefore summary judgment in favor of defendant was appropriate.

CIVIL PROCEDURE / SUMMARY JUDGMENT

Defendants who filed summary judgment motions that merely incorporated the arguments contained in motions filed on behalf of other defendants failed to provide facts, argument and law specifically pertinent to the moving parties' role in the action. Because it was apparent that these defendants' circumstances were materially different from those whose motions and argument were incorporated, said motions were denied.

CIVIL PROCEDURE / SUMMARY JUDGMENT

In case where plaintiff's decedent was in an area where multiple collisions occurred and in context of record in which it was not clear at what point decedent died, testimony to the effect that one of the impacts was caused by movant's negligence was sufficient to present genuine issue of material fact as to whether or not movant's negligence was proximate cause of plaintiff's injuries, thus precluding summary judgment.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 10700-2007

Appearances: Chad I. Michaelson, Esq., Attorney for Falcon Transport, Inc.
James M. Girman, Esq., Attorney for Eric Jimenez and Logistic Leasing, Inc.
Donna L. Burden, Esq., Attorney for John Lambert and Pond Brothers Trucking, LLC
William A. Dopierala, Esq., Attorney for the Pennsylvania Department of Transportation
Craig Murphey, Esq., Attorney for Cassandra Barlow
John B. Fessler, Esq., Attorney for Tracy Castor and Penske Truck Leasing, Corp.
Gary N. Stewart, Esq., Attorney for Michael Bolinger and Sterling Express, Ltd.
Sharon L. Bliss, Esq., Attorney for Frank Raeder

J. Eric Barchiesi, Esq., Attorney for Dick Vander-Ploeg and Allied Systems, Ltd.

Frank M. Gianola, Esq., Attorney for Ronald Ritchey and Advantage Tank Lines

James B. Cole, Esq., Attorney for Francis Donald Nagel and Dorothy Nagel

Patrick M. Carey, Esq., Attorney for Robert G. Swantek and Eagle Express Lines, Inc.

David J. Obermeier, Esq., Attorney for Lester L .Ward and Kuntzman Trucking, Inc.

OPINION

Connelly, J., September 22, 2009

This matter is before the Court of Common Pleas of Erie County, Pennsylvania (hereinafter "the Court"), pursuant to Motions for Summary Judgment filed by Cassandra L. Barlow; Tracy J. Castor and Penske Truck Leasing, Corp.; Michael P. Bolinger and Sterling Express, Ltd.; John W. Lambert and Pond Brothers Trucking, L.L.C.; Eric E. Jimenez and Logistic Leasing, Inc.; Dick Vander-Ploeg and Allied Systems Ltd.; Frank G. Raeder; Ronald E. Ritchey and Advantage Tank Lines; as well as the Pennsylvania Department of Transportation (hereinafter "Additional Defendants Barlow, Castor, Penske, Bolinger, Sterling, Lambert, Pond, Jimenez, Logistic, Vander-Ploeg, Allied, Raeder, Ritchey, Advantage, and PennDOT," respectively; "Additional Defendants," collectively).

Procedural History

Plaintiffs Francis and Dorothy Nagel, as the administrators for the estate of Terrance Nagel, filed their Complaint on April 9, 2007, naming Falcon Transport, Inc. (hereinafter "Defendant Falcon") as the defendant. *Complaint, ¶¶ 1-13.* On May 22, 2007, Defendant Falcon filed its Answer and New Matter in response, followed by its own June 11, 2007 Complaint against Additional Defendants. *Answer and New Matter, ¶¶ 1-20; Complaint to Join Additional Defendants, ¶¶ 1-161.* Between July 30, 2007, and June 10, 2008, Additional Defendants consequently filed their respective Answers with New Matters and Crossclaims against one another in response. *See, File at C.P. Erie Co. Docket 10700-2007.* On March 5, 2008, the Court ordered Erie County Docket Numbers 15000-2007 and 10700-2007 (hereinafter "Companion Case 15000-2007," and "Docket 10700-2007," respectively) consolidated for pretrial and discovery purposes only in response to a Motion requesting the same.[1] *Motion to Consolidate Actions, pp. 1-2; Order of the Court, Connelly, J., Mar. 5, 2008.*

[1] The Court finds "pretrial and discovery purposes" are limited to non-dispositive pre-trial motions and briefs, as well as the sharing of information available to the parties pursuant Pennsylvania Rules of Civil Procedure 4001 *et seq.*

All Motions for Summary Judgment before the Court at Docket 10700-2007, as well as all Briefs in Support and in Opposition thereof, were filed in between March 23, 2009, and June 22, 2009.[2] *See, File at C.P. Erie County Co. Docket 10700-2007.* On April 29, 2009, the named Plaintiff at Companion Case 15000-2007, Yakov Torchinsky, filed Motions to Strike and Briefs in support thereof in response to several Additional Defendants' Motions for Summary Judgment. *See, inter alia, Plaintiffs' Motion to Strike Tardy Expert Reports and a Tardy Motion for Summary Judgment, pp. 1-4; Plaintiffs' Brief in Support of Motion to Strike Tardy Expert Report and a Tardy Motion for Summary Judgment, pp. 1-9; Brief in Opposition to PennDOT's Motion for Summary Judgment, pp. 1-16.* The Court shall consider neither these nor any other dispositive Motions and/or Briefs filed by Mr. Torchinsky at Docket 10700-2007 when ruling on the various Motions for Summary Judgment discussed herein.[3]

Statement of Facts

The instant case stems from a motor vehicle accident, which resulted in Terrance Nagel's death (hereinafter "MVA"). *See, inter alia, Complaint to Join Additional Defendants, ¶ 38.* The MVA involved

[2] The Motions for Summary Judgment filed by Additional Defendants Lambert and Pond, Bolinger and Sterling, Vander-Ploeg and Allied, and Ritchey and Advantage, were jointly filed based upon the doctrines of vicarious liability and respondeat superior. The doctrine of respondeat superior imposes vicarious liability upon an employer for its employees' negligent acts resulting in injuries to others when such acts were committed within the "scope of employment." *Costa v. Roxborough Mem'l Hosp.*, 708 A.2d 490, 493 (Pa. Super. 1998); *Solomon v. Gibson*, 615 A.2d 367, 371 (Pa. Super. 1992). There is no dispute whether Additional Defendants Lambert, Bolinger, Vander-Ploeg, and Ritchey were acting within the scope of their employment on the date in question. *Lambert Pre-Trial Statement, p. 2; Bolinger Pre-Trial Statement, p. 1; Vander-Ploeg Pre-Trial Statement, p. 2; Ritchey Pre-Trial Statement, p. 2.* Therefore, vicarious liability may apply if summary judgment is not granted as to these parties.

[3] Civil actions "shall be prosecuted by and in the name of the real party in interest." *Pa.R.C.P. 2002(a).* Pennsylvania Courts have generally defined "real party in interest" as one who not only has the authority to discharge the claims within the lawsuit, but also the authority to control the prosecution brought to enforce those rights arising under the claims, i.e., one that does not merely have an interest in the result of the action, but one that is also in such command of the action as to be legally entitled to give a complete acquittal or a complete discharge to the other party upon performance. *Brandywine Heights Area Sch. Dist. v. Berks County Bd. of Assessment Appeals*, 821 A.2d 1262, 1267 (Pa. Cmwlth. 2003). Those not meeting the *Brandywine* definition of a "real party in interest" may, however, request leave of the Court to intervene if the entry of a judgment in the action would impose liability upon them to indemnify a real party in interest against whom judgment would be entered. *See, Pa.R.C.P. 2327(1), 2328(a), 2329.* While Mr. Torchinsky is the named plaintiff at Companion Case 15000-2007, the Court finds a simple reading of the pleadings presently before it show Mr. Torchinsky is not a named plaintiff, defendant, or additional defendant at Docket 10700-2007. As such, Mr. Torchinsky has neither the authority to discharge any of the claims under Docket 10700-2007, nor the ability to control the prosecution of such; that is, he is not a real party in interest despite the fact he may have an interest in the result of the action at Docket 10700-2007. Furthermore, though allowed by the Pennsylvania Rules of Civil Procedure, Mr. Torchinsky has not petitioned for or received leave of the Court to intervene in the present matter despite his status as a non-real party in interest at Docket 10700-2007. As such, the Court is legally bound to look upon Mr. Torchinsky's dispositive filings regarding Docket 10700-2007 Motions as if they were never filed thereunder.

vehicles owned and/or operated by Terrance Nagel, Defendant Falcon, or Additional Defendants, and occurred at approximately 12:45 p.m. on January 25, 2007, on Interstate 90 West (hereinafter "I-90W") in Harborcreek Township, Erie County, Pennsylvania. *Id.* It is generally averred the conditions on 1-90W at the time of the accident were snowy with impaired visibility. *See, inter alia, Brief in Opposition to Additional Defendant Pennsylvania Department of Transportation's Motion for Summary Judgment, p. 2.*

Analysis of Law

Any party may move for summary judgment, in whole or in part, after the relevant pleadings are closed. *See, Ertel v. The Patriot-News Co.,* 674 A.2d 1038 (Pa. 1996); *cert. denied,* 519 U.S. 1008 (1996). According to the Pennsylvania Rules of Civil Procedure (hereinafter "Civil Rule(s)"), summary judgment is appropriate when the record[4] either demonstrates: no genuine issue of material fact exists 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 their *prima facie* cause of action or defense which would require the issues be submitted to a jury.[5] *Pa.R.C.P. 1035.2.*

It is the burden of the moving party to prove summary judgment is appropriate, and all doubts as to such shall be resolved against the moving party. *Ertel,* 674 A.2d at 1041. However, this is not to say the nonmoving party may rest upon the mere allegations or denials of its pleadings, but it must set forth by affidavit, or otherwise, specific facts showing summary judgment is not appropriate. *See, Id.* at 1042; *Burger v. Owens III., Inc.,* 966 A.2d 611, 619-20 (Pa. Super. 2009).

The Court must not only examine the record in a light most favorable to the nonmoving party, but it must also accept as true all well-pled 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). The Court has viewed the record in a light most favorable to the nonmoving parties, and has weighed applicable law as it relates to the facts of this case along with the merit of the arguments presented by each of the moving and nonmoving parties in determining whether summary judgment is proper as a matter of law.

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[4] 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 Civil Rule 4003.5(a)(1), whether the reports have been produced in response to interrogatories. *Pa.R.C.P. 1035.1.*

[5] In other words, the adverse parties must come forth with evidence showing the existence of the facts essential to their cause of action in order to defeat the Motions for Summary Judgment presently before the Court. *See, Pa.R.C.P. 1035.2, Note.*

I. ADDITIONAL DEFENDANTS JIMENEZ AND LOGISTIC'S MOTION FOR SUMMARY JUDGMENT

Additional Defendants Jimenez and Logistic filed an unopposed Motion for Summary Judgment and Brief in Support thereof on March 23, 2009.[6] *Motion for Summary Judgment, ¶¶ 1-22; Brief in Support for Summary Judgment, pp. 1-10.* They state summary judgment is proper, as no evidence exists to establish Additional Defendant Jimenez negligently operated his vehicle at the time of the MVA, or that Additional Defendant Logistic is vicariously liable for such conduct.[7] *Id.*

Therefore, in order to determine whether Additional Defendants Jimenez and Logistic are entitled to summary judgment pursuant to Civil Rules 1035.1 *et seq.*, the Court must specifically address whether any adverse party (who will bear the burden of proof at trial) produced evidence of facts essential to the negligence action against Additional Defendants Jimenez and Logistic contained in Defendant Falcon's Complaint at Counts Ten and Eleven.

The Pennsylvania Supreme Court has made it clear each of the following elements of negligence must be met before an actor may be found liable for the injuries of another: (1) the actor owed a duty of care to another; (2) the actor breached that duty; (3) there was causation (i.e., a legal cause) between the actor's conduct and the other's injury; and (4) actual loss or damage to the other exists.[8] *See, R.W. v. Manzek*, 888 A.2d 740, 743-44 (Pa. 2005). While Pennsylvania Courts have had difficulty in defining exactly what constitutes causation, it is axiomatic that "causation involves two separate and distinct concepts, cause-in-fact and legal (or proximate) cause." *Summers v. Giant Food Stores, Inc.*, 743 A.2d 498 (Pa. Super. 1999); *see also, Whitner v. Lojeski*, 263 A.2d

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[6] The Erie County Local Rules of Civil Procedure provide that "within thirty (30) days of receipt of the moving party's brief, the nonmoving party shall file a brief," and if it fails to do so, the Court may "grant the requested relief where the responding party has failed to comply and where the requested relief is supported by law." *Erie L.R. 1035.2(a),(b).* Moreover, a proper grant of summary judgment depends upon an evidentiary record showing the material facts are undisputed or contains sufficient evidence of facts to make out a *prima facie* cause of action or defense. *Pa.R.C.P. 1035.2, Note.* Where a motion for summary judgment is based upon insufficient evidence of facts, the adverse party must come forward with evidence essential to preserve the cause of action. *Id.* If the nonmoving party fails to come forward with sufficient evidence to establish or contest a material issue to the case, the moving party is entitled to judgment as a matter of law. *Ertel,* 674 A.2d at 1042; *see also, McCarthy v. Dan Lepore & Sons Co., Inc.,* 724 A.2d 938, 940 (Pa. Super. 1998).

[7] Additional Defendants Jimenez and Logistic argue that at no time was Additional Defendant Jimenez acting as an agent, servant or employee of Additional Defendant Logistic. *Brief in Support of Motion for Summary Judgment, pp. 8-9.* The Court finds that whether such a relationship existed is of consequence only if it finds evidence exists that reveals Additional Defendant Jimenez may have acted negligently on the date in question. If not, the issue is of little difference, as Additional Defendant Logistic could not be held vicariously liable for the consequences arising from the Additional Defendant Jimenez's conduct, regardless of the relationship's status.

[8] Accordingly, the Court considers the failure to prove any of these elements is fatal to the overall claim of negligence.

889, 894 (Pa. 1970)(holding it is not enough that one's injury would not have occurred had the defendant not acted, but those actions must also have been a substantial factor, i.e., the proximate cause, in bringing about the harm); *Gutteridge v. A.P. Green Servs.*, 804 A.2d 643, 655 (Pa. Super. 2002)(holding "cause-in-fact" is not the same thing as "proximate cause"). As a result, an actor's conduct must be shown to not only have been the cause-in-fact of one's injuries, but must also be shown to have been the proximate cause thereof before the actor may be found liable for that injury. *Hamil, v. Bashline,* 392 A.2d 1280, 1284 (Pa. 1978); *Holt v. Navarro,* 932 A.2d 915 (Pa. Super. 2007)(holding proximate cause does not exist where one's negligence was so remote that he cannot be held legally responsible as a matter of law for the harm done). Essentially, proximate cause is established by the existence of evidence that shows the actor's conduct was a substantial factor in bringing about the other's harm. *Id.; See also, Restatement (Second) Torts § 431(a).*

For an actor's conduct to be considered a substantial factor in bringing about one's harm, the conduct must have had "such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense," and it is within the Court's purview to establish whether reasonable minds would determine such, so long as there exists no facts controverting the conduct's effect in producing the harm. *Daniel v. William R. Drach Co., Inc.,* 849 A.2d 1265 (Pa. Super. 2004); *Merritt v. City of Chester,* 496 A.2d 1220 (Pa. Super. 1985) (holding the Court must determine whether the injury would have been viewed by an ordinary person as the natural and probable outcome of the actor's conduct). In doing so, if "it appears . . . highly extraordinary the actor's conduct should have brought about the harm," the Court must refuse to find the actor's conduct was the proximate cause of the other's harm. *Brown v. Phila. College of Osteopathic Medicine,* 760 A.2d 863, 868 (Pa. Super. 2000); *quoting, Bell v. Irace,* 619 A.2d 365 (Pa. Super. 1993). Thus, proximate cause "must be established, before the question of actual cause, i.e., "cause-in-fact," may be put to the jury." *Reilly v. Tiergarten,* 633 A.2d 208, 210 (Pa. Super. 1993).

As Additional Defendants Jimenez and Logistic's Motion is unopposed, there is little evidence that has been presented before the Court. However, while the amount of evidence may be slight, it clearly exists in the form of the deposed testimony of Corporal Michael Fox (hereinafter "Cpl. Fox") of the Pennsylvania State Police (hereinafter "PSP"). According to Cpl. Fox, Additional Defendant Jimenez was involved only in an accident with Additional Defendant Lambert, which was wholly separate from the MVA. *Brief in Support of Motion for Summary Judgment, pp. 2-5.*

The Court finds Additional Defendant Jimenez's conduct could not have been the proximate cause of the MVA; therefore, the question of

actual cause need not be presented to the jury. This finding is predicated upon the fact that not only has Cpl. Fox reasonably determined Additional Defendant Jimenez was not involved (substantially or otherwise) in bringing about the MVA, but also no other party has presented facts or evidence to refute such a determination. As such, neither Additional Defendant Jimenez nor Logistic can be found negligent in causing the MVA. Additional Defendants Jimenez and Logistic's Motion is therefore granted, as no party has produced essential evidence that reveals a causal connection between their actions and the MVA.

II. ADDITIONAL DEFENDANTS LAMBERT AND POND'S MOTION FOR SUMMARY JUDGMENT

Additional Defendants Lambert and Pond also filed an unopposed Motion for Summary Judgment and Brief in Support thereof on March 30, 2009, stating summary judgment is proper as no evidence exists to establish Additional Defendant Lambert negligently operated his vehicle at the time of the MVA.[9] *Motion for Summary Judgment,* ¶¶ *1-28; Brief in Support of Motion for Summary Judgment, pp. 1-6.*

Therefore, in order to determine whether Additional Defendants Lambert and Pond are entitled to summary judgment pursuant to Civil Rules 1035.1 *et seq.,* the Court must specifically address whether any adverse party (who will bear the burden of proof at trial) produced evidence of facts essential to the negligence action against Additional Defendants Lambert and Pond contained in Defendant Falcon's Complaint at Counts Eight and Nine.

As stated, proximate cause between an actors conduct and another's injury must be established before the actor may be found liable for those injuries, and such cause is established by evidence reasonably showing the actor's conduct was a substantial factor in bringing about the injury. *See, R.W.,* 888 A.2d at 743-44; *Hamil,* 392 A.2d at 1284; *Whitner,* 263 A.2d at 894; *Daniel,* 849 A.2d 1265; *Holt,* 932 A.2d 915; *Summers,* 743 A.2d 498. As proximate cause must be established before the question of actual cause may be put to a jury, the Court (provided the record is void of facts which controvert the existence of such cause) must preliminarily determine whether reasonable minds are able to regard the actor's conduct as substantial in causing the injury, and must refuse to find the actor's conduct was the legal cause of harm if it appears highly extraordinary the actor's conduct substantially brought about the harm. *Id.; see, Daniel,* 849 A.2d 1265; *Brown,* 760 A.2d at 868; *Reilly,* 633 A.2d at 210; *Merritt,* 496 A.2d 1220.

Again, there is little evidence before the Court as Additional Defendants Lambert and Pond's Motion is also unopposed. However, while the amount of evidence is slight, it clearly exists in the form of the

[9] *See, n.6, supra.*

deposed testimony of Trooper James Kloss (hereinafter "Tpr. Kloss") of the PSP. According to Tpr. Kloss, Additional Defendant Lambert was operating a tractor-trailer in the scope of his employment with Additional Defendant Pond at the time of the MVA when the vehicle came to rest in the median of I-90W after Additional Defendant Lambert attempted an evasive maneuver to avoid the MVA, which was in front of him. *Motion for Summary Judgment, Ex. D, pp.* 142-143. Tpr. Kloss further states Additional Defendant Lambert's vehicle did not strike any vehicles, but was subsequently involved in a separate accident when his tractor-trailer was struck from behind by the one driven by Additional Defendant Jimenez. *Id. at 139-140.* Moreover, Tpr. Kloss testified that based upon his investigation, he believed no conduct on the part of Additional Defendant Lambert contributed to the fatal injuries sustained by Terrance Nagel. *Id. at 142-143.*

The Court finds such conduct could not have been the proximate cause of the MVA; therefore, the question of actual cause need not be presented to the jury. Not only has Tpr. Kloss reasonably determined Additional Defendant Lambert's conduct was not a factor (substantial or otherwise) in bringing about the MVA, but no other party has presented facts or evidence to refute such a determination. As such, neither Additional Defendant Lambert nor Pond can be found negligent in causing the MVA. Additional Defendants Lambert and Pond's Motion is therefore granted as no party has produced essential evidence that reveals a causal connection between their conduct and the MVA.

III. ADDITIONAL DEFENDANT PENNDOT'S MOTION FOR SUMMARY JUDGMENT

Additional Defendant PennDOT filed its Motion for Summary Judgment and Brief in Support thereof on March 31, 2009, stating summary judgment is proper as Defendant Falcon failed to state a cause of action that falls within the exceptions to sovereign immunity. *Motion for Summary Judgment and Proposed Order of Court, ¶¶ 1-27; Brief in Support of Motion for Summary Judgment, pp. 9-18.* Defendant Falcon filed its Brief in Opposition on April 29, 2009, claiming sovereign immunity has been waived as Additional Defendant PennDOT not only failed to warn drivers of dangerous conditions existing on its roadways, but that such a failure created a "dangerous condition" in and of itself. *Briefs in Opposition to Additional Defendant Pennsylvania Department of Transportation's Motion for Summary Judgment, pp. 1-11*. On May 1, 2009, Defendant Falcon filed a Brief in Opposition identical to its April 29, 2009 Brief. *Id.*

In order to determine whether Additional Defendant PennDOT is entitled to summary judgment pursuant to Civil Rules 1035.1 *et seq.*, the Court must specifically address if a genuine issue of material fact exists as to whether Additional Defendant PennDOT may raise the defense

of sovereign immunity to claims for damages that were caused by "a dangerous condition of Commonwealth agency real estate and sidewalks, including . . . highways under the jurisdiction of a Commonwealth agency," except [for] conditions . . . created by potholes or sinkholes or other similar conditions created by natural elements." *42 Pa.C.S. § 8522(b)(4),(5).*

Additional Defendant PennDOT has no duty to remove snow and ice from highways within the Commonwealth or to ensure a highway's design does not facilitate loss of viability in severe snow, etc., but it may have a duty to warn travelers of known dangerous conditions affecting those highways. *Kahres v. PennDOT*, 801 A.2d 650, 654 (Pa. Cmwlth. 2002)(holding an alleged failure to plow snow from road did not fall within highways exception to sovereign immunity); *Kosmack v. Jones*, 807 A.2d 927, 933 (Pa. Cmwlth. 2002)(holding allegations a road was improperly designed does not fall within the real estate exceptions to sovereign immunity as adverse weather conditions do not derive, originate from, or have as their source the road itself); *Young v. Commonwealth of Pennsylvania*, 714 A.2d 475 (Pa. Cmwlth. 1998) (holding whether the failure to place warning signs of a dangerous condition creates a dangerous condition upon a highway is a question of fact to be decided by a jury);[10] *rev'd on other grounds, Young v. Commonwealth of Pennsylvania*, 744 A.2d 1276 (Pa. 2000).

A question of what constitutes a dangerous condition is one of fact, and should be left for the jury to decide. *Bendas v. Township of White Deer*, 611 A.2d 1184, 1187 (Pa. 1992). However, the determination of whether an action is barred by sovereign immunity is entirely a matter of law. *Le-Nature's Inc. v. Latrobe Munic. Auth.*, 913 A.2d 988, 994 (Pa. Cmwlth. 2006); *citing, Taylor v. Jackson*, 643 A.2d 771 (Pa. Cmwlth. 1994). While only the Court may determine whether Defendant Falcon's action is barred by sovereign immunity - as such is a matter of law - it finds it is judicially advantageous to refrain from doing so before a jury is able to determine whether Additional Defendant PennDOT's lack of warning regarding the weather and road conditions constituted a dangerous condition on I-90W, in and of itself. Therefore, summary judgment is inappropriate as genuine issues of material fact remain as to whether Additional Defendant PennDOT may claim sovereign immunity, that is whether it failed to adequately warn motorists of the roadway's condition at the location of the MVA, i.e., Count Nineteen of Defendant Falcon's Complaint at Paragraph 158(b). *Complaint to Join Additional Defendants, ¶ 158(b).*

[10] The Commonwealth Court in *Young* reasoned because the Commonwealth does have a duty to make its highways reasonably safe for their intended purpose, and because the fact finder is to determine whether the alleged conditions are dangerous, a grant of summary judgment was not appropriate. *Young*, 714 A.2d at 479.

Defendant Falcon further alleges Additional Defendant PennDOT was negligent in "failing to properly design, inspect, and maintain [1-90W] so that it was free from hazardous conditions; failing to properly respond to the road conditions existing at the time [of the MVA]; failing to keep [I-90W] reasonably safe for travel at the time and location of the [MVA]; and failing to properly salt and maintain [I-90W]." *Id. at 158(a),(c),(d),(e).* Pursuant to *Kahres* and *Kosmack, supra,* Additional Defendant PennDOT neither had a duty to remove snow and ice from highways located within the Commonwealth, nor a duty to ensure the highway was properly designed and inspected as the snow and ice did not derive, originate from, or have its source in the highway itself. As Additional Defendant PennDOT is not bound by such a duty, no genuine issues of material fact exists as to whether Additional Defendant PennDOT may claim sovereign immunity against these claims, and summary judgment is granted as to Count Nineteen, Paragraph 158(a), (c), (d), and (e), of Defendant Falcon's Complaint.

IV. ADDITIONAL DEFENDANT BARLOW'S MOTION FOR SUMMARY JUDGMENT

Additional Defendant Barlow filed her Motion for Summary Judgment and Brief in Support thereof on April 3, 2009, stating summary judgment is proper as no party identified admissible evidence sufficient to prove the MVA was proximately caused by her conduct. *Motion for Summary Judgment on Behalf of Additional Defendant Cassandra L. Barlow, ¶¶ 1-26; Brief in Support of Motion for Summary Judgment Filed by Additional Defendant Cassandra L. Barlow, pp. 1-9.* Lester L. Ward and Kuntzman Trucking, Inc. (hereinafter "Additional Defendants Ward and Kuntzman") filed a Brief in Opposition to Additional Defendant Barlow's Motion on May 4, 2009, stating such evidence exists in the form of an accident reconstruction report filed by their expert, Sebastian van Nooten (hereinafter "Mr. van Nooten"), which sets forth compelling evidence to establish a *prima facie* case of negligence against Additional Defendant Barlow. *Brief in Opposition to Additional Defendant Cassandra L. Barlow's Motion for Summary Judgment, p. 1.* Defendant Falcon's Brief incorporates Additional Defendants Ward and Kuntzman's by reference. *Brief in Opposition to Additional Defendant Cassandra Barlow's Motion for Summary Judgment, p. 1.* Additional Defendant Barlow filed a Reply Brief on May 14, 2009, asserting the report is inadmissible and summary judgment is therefore appropriate as no party can identify admissible evidence sufficient to prove the MVA was proximately caused by her conduct. *Reply to Briefs in Opposition to Additional Defendant Cassandra L. Barlow's Motion for Summary Judgment, pp. 1-11.*

Therefore, in order to determine whether Additional Defendant Barlow is entitled to summary judgment pursuant to Civil Rules 1035.1 et seq., the Court must address whether any adverse party (who will bear

the burden of proof at trial) produced evidence of facts essential to the negligence action against Additional Defendant Barlow contained in Defendant Falcon's Complaint at Count One. Specifically, whether the sole evidence produced in an attempt to establish such a connection, i.e., Mr. van Nooten's report, is admissible.[11]

In order for testimony by an expert witness to be admissible, the expert witness must assert with reasonable certainty that the result in question came from the cause alleged. *McCrosson v. Philadelphia Rapid Transit Co.,* 129 A. 568, 569 (Pa. 1925); *Childers v. Power Line Equipment Rentals, Inc.*, 681 A.2d 201, 209 (Pa. Super. 1996), *allocatur denied,* 690 A.2d 236 (Pa. 1997). In other words, when a party must prove causation through expert testimony, the expert must testify with 'reasonable certainty' that 'in his professional opinion,' the result in question came from the cause alleged. *Cohen v. Albert Einstein Medical Center,* 592 A.2d 720, 723 (Pa.Super.1991)(citations omitted). "An expert fails this standard of certainty if he testifies that the alleged cause 'possibly,' or 'could have' led to the result, that it 'could very properly account' for the result, or even that it was 'very highly probable' that it caused the result." *Kravinsky v. Glover,* 396 A.2d 1349, 1356 (Pa. Super. 1979). An expert's failure to express an opinion with the requisite certainty makes summary judgment proper. *Gartland v. Rosenthal,* 850 A.2d 671, 677 (Pa. Super. 2004), *allocatur denied*, 936 A.2d 41 (Pa. 2007).

Additional Defendants Ward and Kuntzman claim Mr. van Nooten concluded "the front-end damage to [Additional Defendant Barlow's] vehicle was not indicative of an impact speed of fifty (50) m.p.h," which shows "[she] drove into [Additional Defendant Castor] on [her] own accord, and not pushed." *Brief in Opposition to Additional Defendant Cassandra L. Barlow's Motion for Summary Judgment, pp. 4-5.* While Additional Defendants Ward and Kuntzman state these are Mr. van Nooten's conclusions, a reading of the expert report reveals that while such statements were made, they were not conclusive in nature.

Mr. van Nooten offers the portion of the MVA involving Additional Defendants Barlow and Ward may have happened one of two ways: one, Additional Defendant Barlow struck Additional Defendant Castor and was subsequently hit by Additional Defendant Ward; or two, Additional

[11] Although the only evidence offered to refute Additional Defendant Barlow's Motion and show any negligence on her part is the expert report, Additional Defendants Ward and Kuntzman also aver that judgment is improper because she failed to produce expert reports or testimony to corroborate her argument. *Brief in Opposition to Additional Defendant Cassandra L. Barlow's Motion for Summary Judgment, pp. 5-6.* This argument is flawed. As Additional Defendant Barlow filed her Motion asserting a lack of evidence regarding negligence, the burden shifted to Additional Defendants Ward and Kuntzman, along with Defendant Falcon, to present such evidence; *See, Ertel*, 674 A.2d at 1041-42(holding while it is the burden of the moving party to prove that no genuine issue of material fact exists, it is also the burden of the nonmoving party to set forth specific facts showing there is a genuine issue for trial).

Defendant Ward hit Additional Defendant Barlow, pushing her into Additional Defendant Castor. *Id. at Ex. A, pp. 10-18.* While Mr. van Nooten makes statements in support of either course of events, he makes only one explicit conclusion throughout his entire report: "it is possible the impact between [Additional Defendant Barlow] and [Additional Defendant Castor] occurred prior to [Additional Defendant Ward] striking [Additional Defendant Barlow]." *Id. at p. 24(emphasis added).*

Determining whether statements made by an expert, such as Mr. van Nooten, are conclusions is not merely an exercise in semantics. *Childers v. Power Line Equipment Rentals, Inc.*, 681 A.2d 201, 210 (Pa. Super. 1996). As such, the Court must take statements made by an expert at their face value. Mr. van Nooten unambiguously makes one, and only one, explicit conclusion within his report regarding Additional Defendant Barlow. And, that conclusion is she may possibly be a proximate cause of the MVA. Mr. van Nooten must be able to testify within a reasonable professional certainty that Additional Defendant Barlow's alleged negligence was a proximate cause of the MVA, and he fails in this standard if he can only testify her actions "possibly" or "could have" led to that result. *Cohen,* 592 A.2d at 723; *Kravinsky,* 396 A.2d at 1356.

The Court finds that Mr. van Nooten's report is inadmissible as to Additional Defendant Barlow as he failed to testify within a legally defined degree of reasonable certainty that, in his professional opinion, her actions were a proximate cause of the MVA. Therefore, Additional Defendant Barlow's Motion is granted as no party has identified any sufficient and admissible evidence that reveals a causal connection between Additional Defendant Barlow's conduct and the MVA.

V. ADDITIONAL DEFENDANTS CASTOR AND PENSKE'S MOTION FOR SUMMARY JUDGMENT

Additional Defendants Castor and Penske filed their Motion for Summary Judgment and Brief in Support thereof on April 22, 2009, stating summary judgment is proper as no party has produced any evidence to establish any causal connection between Terrance Nagel's death and Additional Defendants Castor and Penske's conduct.[12] *Motion for Summary Judgment on Behalf of Additional Defendants, Tracy J. Castor and Penske Truck Leasing Corp., ¶¶ 1-37; Brief in Support of Motion for Summary Judgment on Behalf of Additional Defendants, Tracy J. Castor and Penske Truck Leasing Corp., pp. 1-10.* Additional Defendants Ward and Kuntzman filed a Brief in Opposition to Additional

[12] The Court finds that whether a relationship exists between Additional Defendants Castor and Penske, that would raise the issue of vicarious liability, is of consequence only if it finds evidence exists that reveals Additional Defendant Castor may have acted negligently on the date in question. If not, the issue is of little difference, as Additional Defendant Penske could not be held vicariously liable for the consequences arising from the conduct, regardless of the relationship's status.

Defendants Castor and Penske's Motion on May 22, 2009, stating such evidence exists in the form of Mr. van Nooten's expert report stating she was stopped on the highway and was a "blocking vehicle" which "triggered" the MVA.[13] *Brief in Opposition to Additional Defendant Tracy J. Castor and Penske Truck Leasing Corporation's Motion for Summary Judgment, pp. 1-7.* Defendant Falcon's Brief incorporates Additional Defendants Ward and Kuntzman's by reference. *Brief in Opposition to the Motion for Summary Judgment Filed by Additional Defendants Tracy J. Castor and Penske Truck Leasing Corporation, p. 1.* Additional Defendants Castor and Penske filed a Reply Brief on June 22, 2009, asserting the report is inadmissible and summary judgment is therefore appropriate as no party can identify admissible evidence sufficient to prove the MVA was proximately caused by their conduct. *Reply to Brief in Opposition to Motion for Summary Judgment of Additional Defendants Tracy J. Castor and Penske Truck Leasing Corp., pp. 1-11.*

Therefore, in order to determine whether Additional Defendants Castor and Penske are entitled to summary judgment pursuant to Civil Rules 1035.1 *et seq.*, the Court must address whether any adverse party (who will bear the burden of proof at trial) produced evidence of facts essential to the negligence action against Additional Defendants Castor and Penske contained in Defendant Falcon's Complaint at Counts Four and Five. Specifically, whether the sole evidence produced in an attempt to establish such a connection, i.e., Mr. van Nooten's report, is admissible.

The Court has already noted that in order for expert testimony to be admissible, the expert must clearly assert with reasonable certainty the result in question came from the cause alleged as based on his professional opinion, and the expert fails in this standard if he asserts the alleged cause possibly, could have, etc. led to the result. *See, McCrosson,* 129 A. at 569; *Childers,* 681 A.2d at 210; *Cohen,* 592 A.2d at 723; *Kravinsky,* 396 A.2d at 1356.

Additional Defendants Ward and Kuntzman claim Mr. van Nooten, opined it is "far more likely [Additional Defendant Castor] was stopped on the road when [she] was hit from behind by [Additional Defendant Barlow]." *Brief in Opposition to the Motion for Summary Judgment Filed by Additional Defendants Tracy J. Castor and Penske Truck Leasing Corporation, p. 5.* Thus, according to Additional Defendants Ward and Kuntzman, there is compelling evidence that she stopped her vehicle on the road and became a blocking vehicle for approaching traffic. *Id. at*

[13] Additional Defendants Ward and Kuntzman also aver that summary judgment is improper because Additional Defendants Castor and Penske failed to produce any expert reports or expert testimony to corroborate their version of the accident. *Brief in Opposition to Additional Defendant Tracy J. Castor and Penske Truck Leasing Corporation's Motion for Summary Judgment, pp. 5-6.* However, this argument is flawed for the reasons stated by the Court at footnote 11, *supra.*

6. Finally, Additional Defendants Ward and Kuntzman conclude, "this conduct led to the rear-end collision between [Additional Defendants Barlow and Castor] which was the trigger impact that caused the [MVA]." *Id.* However, a reading of the expert report shows Mr. van Nooten never made such statements. *See, Id. at Ex. A.* While not an exhaustive list, Mr. van Nooten's statements regarding Additional Defendant Castor include the following, and each is indicative of the whole:

> [Additional Defendant] Castor stated that she was operating a 2006 GMC Savana moving van (Unit 3) owned by [Additional Defendant] Penske. She was in the right-hand lane traveling at about 20-25 mph when she noticed a car in front of her slowing to a stop . . . She braked and slid to the right but did not impact the vehicle in front of her . . . She was impacted hard from behind and her vehicle traveled into the median.
>
> . . . .
>
> In this scenario [one of a possible two], the physical evidence cannot support that [Additional Defendant Barlow] was first impacted by [Additional Defendant Ward] and then immediately thereafter impacted the rear of [Additional Defendant Castor's] nearly stopped or stopped . . . truck.
>
> . . . .
>
> [Additional Defendant] Ward has no recollection of seeing [Additional Defendant Castor's] truck. The Large yellow rear of [Additional Defendant Castor's] truck would have been quite conspicuous, even in a snowstorm, to [Additional Defendant] Ward had it been directly in front of [Additional Defendant Barlow].
>
> . . . .
>
> [Additional Defendant Castor] testified that she was impacted when on the right shoulder, [but] she could not have been on the right shoulder when she was impacted when we consider the damage to the rear of [her vehicle] and the front of [Additional Defendant Barlow's].
>
> . . . .
>
> [Additional Defendant] Castor describes skidding to a stop and moving right to avoid the slowing car that stopped in the right lane. If [Additional Defendant] Castor had been impacted immediately after coming to rest on the right shoulder, we would expect that the unknown vehicle that she describes would have been involved in the collision with her.

Id. at pp. 5, 10, 13, 16-17.

It is apparent that a reading of the report fails to uncover any statements made by Mr. van Nooten that claim, as Additional Defendants Ward

and Kuntzman state, Additional Defendant Castor became a "blocking vehicle," (permanent or otherwise) which caused her to become a party to the "trigger impact" of the MVA. *Id.* Such an absence leads the Court to determine statements naming Additional Defendant Castor as a negligent "blocking vehicle" are not conclusions of Mr. van Nooten, but conclusions of Additional Defendants Ward and Kuntzman based on their own reading of the van Nooten Report. In fact, Mr. van Nooten makes only two explicit conclusions throughout his entire report as to Additional Defendant Castor's role in the MVA. The first is that Additional Defendant Castor "stated she was slowing for a vehicle that had stopped, [and] this vehicle is also not reported and may have been stopped for the tractor-trailer that was seen by Mr. Bolinger and Mr. Lambert." *Id. at 24.* The second conclusion states, "it is possible the impact between [Additional Defendants Barlow and Castor] occurred prior to [Additional Defendant Ward] striking [Additional Defendant Barlow]." *Id.*

The Court has already stated that determining whether statements made by an expert does not merely rest on semantics, but instead, the Court must take such statements at face value. *See, Childers, supra.* While Mr. van Nooten makes several statements regarding Additional Defendant Castor, he makes two, and only two, explicit conclusions. Neither of these conclusions indicates, in the slightest, that Mr. van Nooten found, within a reasonable degree of professional certainty that Additional Defendant Castor's conduct led to her becoming a blocking vehicle, which proximately triggered the MVA.

The Court finds that as Mr. van Nooten has not testified within a legally defined degree of reasonable certainty that, in his professional opinion, Additional Defendant Castor's actions were a proximate cause of the MVA, his report is inadmissible as to Additional Defendant Castor. Therefore, Additional Defendants Castor and Penske's Motion is granted as no party has identified any sufficient and admissible evidence that reveals a causal connection between Additional Defendants Castor and Penske's conduct and the MVA.

VI. ADDITIONAL DEFENDANTS BOLINGER AND STERLING'S MOTION FOR SUMMARY JUDGMENT

Additional Defendants Bolinger and Sterling filed their Motion for Summary Judgment and Brief in Support thereof on May 11, 2009, stating summary judgment is proper as no party can identify admissible evidence sufficient to show the MVA was proximately caused by their alleged negligence. *Motion for Summary Judgment, ¶¶ 1-41; Brief in Support of Motion for Summary Judgment, pp. 1-9.* Additional Defendants Ward and Kuntzman, along with Defendant Falcon, filed Briefs in Opposition to Additional Defendants Bolinger and Sterling's Motion on June 5, 2009, and June 8, 2009, respectively, stating there

is compelling circumstantial evidence in the record to show Additional Defendant Bolinger negligently operated one of the vehicles that triggered the MVA.[14] *Brief in Opposition to Additional Defendants Michael P. Bolinger and Sterling Express' Motion for Summary Judgment, pp. 1-7; Brief in Opposition to the Motion for Summary Judgment Filed by Additional Defendants Michael P. Bolinger and Sterling Express, Ltd., p. 1.* Additional Defendants Bolinger and Sterling filed a Reply Brief on June 16, 2009. *Reply Brief of Additional Defendant Michael Bolinger and Sterling Express, Ltd. To Additional Defendant Ward and Kuntzman Trucking's Brief in Opposition to Motion for Summary Judgment, pp. 1-6.* Therefore, in order to determine whether Additional Defendants Bolinger and Sterling are entitled to summary judgment pursuant to Civil Rules 1035.1 *et seq.*, the Court must specifically address whether any adverse party (who will bear the burden of proof at trial) produced evidence of facts essential to the negligence action against Additional Defendants Bolinger and Sterling contained in Defendant Falcon's Complaint at Counts Six and Seven.

Additional Defendant Barlow testified at her deposition that as she was driving down a hill shortly before the MVA, she was passed by a "semi truck" with a "white box trailer" on the left that was going quickly "[l]ike, maybe [fifty-five (55) m.p.h.]" *Brief in Opposition to Additional Defendants Michael P. Bolinger and Sterling Express' Motion for Summary Judgment, Ex. B, pp. 22, 25.* She also testified that the truck, after passing her, "started to, like, fishtail almost, and that's why [she] stopped." *Id.* Moreover, she indicated she thought that it was after the truck started to fishtail when Additional Defendant Castor applied her brakes, and that was the predicate for her own braking to slow her vehicle down. *Id. at p. 23.*

Additional Defendants Bolinger and Sterling assert the truck described by Additional Defendant Barlow could not possibly be the one driven by Additional Defendant Bolinger as she had first described the truck to the police as one with a dark-colored cab.[15] *Reply Brief of Additional Defendant Michael Bolinger and Sterling Express, Ltd. To Additional Defendant Ward and Kuntzman Trucking's Brief in Opposition to Motion for Summary Judgment, Ex. B.* Furthermore, Additional Defendant Barlow also stated she did not recall the color of the truck with the

[14] Unlike their opposition to Additional Defendants Castor, Penske, and Barlow's Motions, where they relied solely upon an inadmissible report of an expert to present the existence of genuine issues of material facts, Additional Defendants Ward and Kuntzman present to the Court that they are relying on statements made in depositions of Additional Defendant Barlow and Ward to support their claim that Additional Defendant Bolinger played a substantial role in causing the MVA.

[15] Additional Defendant Bolinger indicates the truck driven by him was in fact a flatbed truck with a white cab with striping down its side. *Reply Brief of Michael P. Bolinger and Sterling Express, Ltd. To Additional Defendant Ward and Kuntzman Trucking's Brief in Opposition to Motion for Summary Judgment, p. 4, Ex. D.*

white box trailer's cab. *Brief in Opposition to Additional Defendants Michael P. Bolinger and Sterling Express' Motion for Summary Judgment, Ex. B, p. 22.* Moreover, Additional Defendant Barlow also testified she saw a white box trailer fishtailing rather than a flatbed truck. *Reply Brief of Additional Defendant Michael Bolinger and Sterling Express, Ltd. To Additional Defendant Ward and Kuntzman Trucking's Brief in Opposition to Motion for Summary Judgment, p. 3.*

Here, the truck described by Additional Defendant Barlow (in a variety of ways) is quite different from the white flatbed truck driven by Additional Defendant Bolinger. On one hand, Additional Defendant Barlow testified the truck she saw was a white box-type truck rather than a flatbed truck. The Court finds this is quite a large distinction, and the difference between the two would be apparent even in a limited visibility situation. Additional Defendant Barlow also told police just after the accident (when her recollection would be the most fresh) that the truck she saw had a dark-colored cab, unlike Additional Defendant Bolinger's light-colored white truck. Because of the obvious contradictions and discrepancies amidst Additional Defendant Barlow's testimonial description of Additional Defendant Bolinger's truck, the Court cannot consider the deposition testimony of Additional Defendant Barlow as circumstantial evidence of Additional Defendant Bolinger's alleged negligence. Therefore, the only credible circumstantial evidence of Additional Defendants Bolinger and Sterling's alleged negligence is the remaining testimony of Additional Defendant Ward.

At his deposition, Additional Defendant Ward testified he saw a flatbed truck with a beige or white striped cab pass his vehicle in the left lane prior to the MVA. *Brief in Opposition to Additional Defendants Michael P. Bolinger and Sterling Express' Motion for Summary Judgment, Ex. C, p. 38.* Defendant Ward also testified that he was driving between forty-five (45) and fifty (50) m.p.h. when the semi passed him. *Id. at 39.* He further states, "just right after the other truck passed me, then it was kind of like a wall, you know, where I said he was kicking up more snow and stuff. And then it probably wasn't three seconds. Once it started clearing out a little bit, I seen the brake lights." *Id. at 40.*

Additional Defendants Bolinger and Sterling argue the mere fact that a vehicle may have kicked up snow causing visual impairment does not create any form of negligence upon that vehicle, and rely on the Pennsylvania Supreme Court case of *Metts v. Griglak* to make this argument. *Metts v. Griglak*, 264 A.2d 684 (Pa. 1970)(holding the kicking up of snow and slush is an unavoidable normal hazard of winter driving and cannot alone constitute negligence, but must be coupled with such actions, e.g., excessive speeding, that would create a foreseeable risk of harm). Therefore, in order to establish liability on the part of Additional

Defendant Bolinger it must be shown he was driving at excessive speeds and such speeds were the proximate cause of the MVA. *See, Rhoads v. Ford Motor Co.,* 514 F.2d 931 (3d. Cir. Pa. 1975)(holding speeding in excess of statutory limit is not negligence unless such speed was the proximate cause of accident).

As stated, proximate cause between an actor's conduct and another's injury must be established before the actor may be found liable for those injuries, and such cause is established by evidence reasonably showing the actor's conduct was a substantial factor in bringing about the injury. *See, R. W.,* 888 A.2d at 743-44; *Hamil,* 392 A.2d at 1284; *Whitner,* 263 A.2d at 894; *Daniel,* 849 A.2d 1265; *Holt,* 932 A.2d 915; Summers, 743 A.2d 498. As proximate cause must be established before the question of actual cause may be put to a jury, the Court (provided the record is void of facts which controvert the existence of such cause) must preliminarily determine whether reasonable minds are able to regard the actor's conduct as substantial in causing the injury, and must refuse to find the actor's conduct was the legal cause of harm if it appears highly extraordinary the actor's conduct substantially brought about the harm. *Id.; see, Daniel,* 849 A.2d 1265; *Brown,* 760 A.2d at 868; *Reilly,* 633 A.2d at 210; *Merritt,* 496 A.2d 1220.

Here, neither Additional Defendants Ward and Kuntzman, nor Defendant Falcon, have provided any evidence, except the testimony of Additional Defendant Ward to demonstrate Additional Defendant Bolinger played any role in the MVA. And, Additional Defendant Ward's testimony simply states the consequences of Additional Defendant Bolinger's actions were merely limited to the kicking up of snow, which is not considered negligence in and of itself pursuant to *Metts.* In fact, Additional Defendant Bolinger's testimony and the police report indicate that Additional Defendant Bolinger only became a part of the MVA when he swerved to avoid the other disabled vehicles already involved. *Brief in Opposition to Additional Defendants Michael P. Bolinger and Sterling Express' Motion for Summary Judgment, Ex. D, p. 62-69.* Moreover, Additional Defendant Castor testified at her deposition that the reason she applied her brakes before the MVA was because of a slower moving white car or SUV, not a passing semi. *Reply Brief of Defendants Bolinger and Sterling Express, Ex. C, pp. 22-23.*

Due to the lack of evidence showing Additional Defendant Bolinger was driving at a negligent rate of speed, it appears to the Court "highly extraordinary" that the actions of Additional Defendant Bolinger resulting in the kicking-up of snow (which does not create any form of negligence in and of itself) was the proximate cause of the MVA. Therefore, the question of actual cause need not be presented to the jury. As such, neither Additional Defendant Bolinger nor Sterling can

be found negligent in causing the MVA. Because Additional Defendant Ward and Kuntzman, along with Defendant Falcon, have failed to provide evidence (circumstantial or otherwise) sufficient to establish that Additional Defendant Bolinger's actions were the proximate cause of the MVA, Defendants Bolinger and Sterling's Motion for Summary Judgment is granted.

VII. ADDITIONAL DEFENDANTS RAEDER, VANDER-PLOEG, AND ALLIED'S MOTIONS FOR SUMMARY JUDGMENT

Additional Defendant Raeder filed his Motion for Summary Judgment on June 1, 2009, *Motion for Summary Judgment, ¶¶ 1-6.* Additional Defendants Vander-Ploeg and Allied filed their Motion for Summary Judgment on June 12, 2009. *Additional Defendants' Motion to Join Motions for Summary Judgment, ¶¶ 1-7.* Both Additional Defendant Raeder and Additional Defendants Vander-Ploeg and Allied state summary judgment is proper as the record is "devoid of any evidence to support a causal connection between [either of their] actions at the time of the [MVA] and [Terrance Nagel's subsequent) death. *Id.; Motion for Summary Judgment, ¶¶ 1-6.* Defendant Falcon filed a Brief in Opposition to Additional Defendant Raeder's Motion on June 29, 2009, stating it can establish through direct and circumstantial evidence that Additional Defendant Raeder's actions were the cause of Terrance Nagel's death. *Brief in Opposition to Additional Defendant Frank G. Raeder's' Motion for Summary Judgment, p. 5.* Defendant Falcon also filed a Brief in Opposition to Additional Defendants Vander-Ploeg and Allied's Motion on July 20, 2009, stating it can show through direct and circumstantial evidence that Additional Defendant Vander-Ploeg's failure to stop his vehicle in a safe location was the proximate cause of Terrance Nagel's death. *Brief in Opposition to Motion for Summary Judgment of Additional Defendants Dick Vander-Ploeg and Allied Systems, Ltd., pp. 4-6.*

Without providing any supportive facts unique to their alleged role in the MVA, both Additional Defendant Raeder and Additional Defendants Vander-Ploeg and Allied state the same defenses available to Co-Additional Defendants apply to them, and both incorporate the individually tailored arguments contained in the other Motions and Briefs addressed herein (which argue the absence of proximate cause between their individual conduct and the MVA). *Motion for Summary Judgment, ¶¶ 4-6; Additional Defendants' Motion to Join Motions for Summary Judgment, ¶¶ 6-7.* Such claims are erroneous as Additional Defendants Raeder, Vander-Ploeg, and Allied are not in the same position as the other Additional Defendants (i.e., the facts associating each individual Additional Defendant with the MVA and its outcomes are quite varied, with no two Additional Defendants playing exactly the same role).

For instance, it is clear the defense of sovereign immunity set forth by Additional Defendant PennDOT does not similarly apply as neither Additional Defendant Raeder nor Additional Defendants Vander-Ploeg and Allied are agencies of the Commonwealth. Likewise, Additional Defendants Castor, Penske, and Barlow's defense stating there was no evidence offered to show a causal connection between their individual conduct and the MVA (as the only evidence offered against them was Mr. van Nooten's inadmissible report) cannot apply as there is additional evidence brought forth against Additional Defendant Raeder and Additional Defendants Vander-Ploeg and Allied in the form of their deposed testimony. *See, Brief in Opposition to Additional Defendant Frank G. Raeder's' Motion for Summary Judgment, Ex. A; Brief in Opposition to Motion for Summary Judgment of Additional Defendants Dick Vander-Ploeg and Allied Systems, Ltd., Ex. A.* Also, as to any other defense incorporated by Additional Defendant Raeder or Additional Defendants Vander-Ploeg and Allied, the Court finds that a case-by-case analysis is necessary when attempting to determine the existence of proximate cause. *See, Brim v. Wertz,* 35 Pa.D.&C4th 277 (C.P. Lancaster Co. 1996). Finally, it is not the burden of each of the Co-Additional Defendants to prove summary judgment is proper as to the cases against Additional Defendants Raeder, Vander-Ploeg, and Allied, but it is the burden of Additional Defendants Raeder, Vander-Ploeg, and Allied to do so as to their own individual cases. *See, Ertel,* 674 A.2d at 1041.

The Court shall, therefore, require Additional Defendants Raeder, Vander-Ploeg, and Allied (as the moving parties) to provide facts, argument, and law offered in support of their own arguments. Such are not provided by any of the three. Therefore, their statement that "the record is devoid of any evidence to support a causal connection between [their] actions at the time of the [MVA] and [Terrance Nagel's subsequent] death," is not a defense, but rather a conclusion built upon others' individual defenses. In this, Additional Defendant Raeder and Additional Defendants Vander-Ploeg and Allied may, perhaps, share the same conclusion as the other Additional Defendants, but they cannot claim those defenses in support of that conclusion, as such defenses must be supported by individual facts specifically pertinent to the moving parties' role in the action.

In considering the evidence (more specifically, the lack thereof) provided by Additional Defendant Raeder and Additional Defendants Vander-Ploeg and Allied, the Court possesses doubt as to whether the record is, in fact, devoid of any evidence to support a causal connection between Additional Defendant Raeder and Additional Defendants Vander-Ploeg and Allied's conduct and the MVA / Terrance Nagel's death. As all doubts as to whether summary judgment is proper must

be resolved against Additional Defendant Raeder and Additional Defendants Vander-Ploeg and Allied, as the moving parties, Additional Defendant Raeder and Additional Defendants Vander-Ploeg and Allied's Motions are denied.

IX. ADDITIONAL DEFENDANTS RITCHEY AND ADVANTAGE'S MOTION FOR SUMMARY JUDGMENT

Additional Defendants Ritchey and Advantage filed their Motion for Summary Judgment and Brief in Support thereof on June 22, 2009, under both Docket 10700-2007 and Companion Case 15000-2007. *Motion for Summary Judgment, ¶¶ 1-10; Brief in Support of Motion for Summary Judgment, pp. 1-4.* Additional Defendants Ritchey and Advantage argue summary judgment is proper as "the record is devoid of any evidence establishing any negligence on [their] part," which resulted in Terrance Nagel's death.[16] *Brief in Support of Motion for Summary Judgment, p. 2.* Defendant Falcon filed its Brief in Opposition on July 20, 2009, stating judgment is not proper as Additional Defendant Ritchey's was one of three vehicles impacting Terrance Nagel's (with the others being Additional Defendant Raeder's and Mr. Torchinsky's), there is no evidence to demonstrate which of the three impacts caused Terrance Nagel's death, and therefore genuine issues exists as to the precise circumstances of Terrance Nagel's death. *Brief in Opposition to Motion for Summary Judgment of Additional Defendants Ronald Ritchey and Advantage Tank Lines, pp. 1-9.*

Therefore, in order to determine whether Additional Defendants Ritchey and Advantage are entitled to summary judgment pursuant to Civil Rules 1035.1 *et seq.*, the Court must specifically address whether any adverse party (who will bear the burden of proof at trial) produced evidence of facts essential to the negligence action against Additional Defendants Ritchey and Advantage contained in Defendant Falcon's Complaint at Counts Seventeen and Eighteen. Proximate cause between an actors conduct and another's injury must be established before the actor may be found liable for those injuries, and such cause is established by evidence reasonably showing the actor's conduct was a substantial factor in bringing about the injury. *See, R.W.,* 888 A.2d at 743-44; *Hamil,* 392 A.2d at 1284; *Whitner,* 263 A.2d at 894; *Daniel,* 849 A.2d 1265; *Holt,* 932 A.2d 915; *Summers,* 743 A.2d 498. As proximate cause must be established before the question of actual cause may be put to a jury, the

[16] Additional Defendants Ritchey and Advantage also argue summary judgment is proper as the record is devoid of "evidence suggesting. . .any of Mr. Torchinsky's injuries had anything to do with the operation of the Ritchey/Advantage Tank Lines vehicle. *Brief in Support of Motion for Summary Judgment, p. 2.* However, this argument is pertinent only to Companion Case 15000-2007 as Mr. Torchinsky is not a real party in interest at Docket 10700-2007. *See, n.2, supra.* Therefore the Court shall address any issue between Additional Defendants Ritchey and Advantage and Mr. Torchinsky in its Opinion regarding Companion Case 15000-2007.

Court (provided the record is void of facts which controvert the existence of such cause) must preliminarily determine whether reasonable minds are able to regard the actor's conduct as substantial in causing the injury, and must refuse to find the actor's conduct was the legal cause of harm if it appears highly extraordinary the actor's conduct substantially brought about the harm. *Id.; see, Daniel*, 849 A.2d 1265; *Brown*, 760 A.2d at 868; *Reilly*, 633 A.2d at 210; *Merritt*, 496 A.2d 1220.

The deposed testimony of Additional Defendant Raeder indicated he was already at the scene of the MVA when he not only witnessed Terrance Nagel outside of his cab, but also the tractor-trailer owned by Defendant Falcon approaching his location. *Brief in Opposition to Motion for Summary Judgment of Additional Defendants Ronald Ritchey and Advantage Tank Lines, Ex. B, pp. 15-18, 20.* Additional Defendant Raeder reacted by moving out of the oncoming truck's way, his vehicle was then sideswiped by another vehicle, and ultimately came to a rest underneath Terrance Nagel's vehicle. *Id.* Once Additional Defendant Raeder's vehicle was underneath Terrance Nagel's vehicle, Additional Defendant Raeder witnessed Additional Defendant Ritchey approach whereupon he saw Additional Defendant Ritchey's trailer come into contact with the rear passenger side of the trailer owned by Defendant Falcon, which had since rear-ended Terrance Nagel's tractor-trailer subsequent to its arrival. *Id. at 18-19; Motion for Summary Judgment, ¶ 5.*

Additional Defendant Raeder stated this collision shoved his, Terrance Nagel's, and Defendant Falcon's vehicles, and that he "felt the whole load shake again." *Brief in Opposition to Motion for Summary Judgment of Additional Defendants Ronald Ritchey and Advantage Tank Lines, Ex. B, pp. 19, 51, 54-55, 96, 112-13.* Additional Defendant Raeder's resultant sensations are corroborated by the report of the PSP. *Id. at Ex. C.* The PSP's report states Additional Defendant Ritchey, "was traveling in the right lane when [he] in an attempt to stop the unit, steered [the truck] toward the inner berm. The trailer of [Additional Defendant Ritchey's truck] then impacted into the left rear of [the truck owned by Defendant Falcon] causing a deeper impact between [the truck owned by Defendant Falcon] and [Terrance Nagel's vehicle]. *Id. at Ex. C.*

Additional Defendants Ritchey and Advantage rely upon the deposition testimony of Tpr. Kloss wherein he states that based upon his investigation of the accident and his interview of the witnesses, he found no evidence that Additional Defendant Ritchey bore responsibility for the death of Terrance Nagel. *Motion for Summary Judgment, Ex. A, pp. 133-34.* However, the deposition testimony of Tpr. Kloss must be tempered by not only the testimony of Additional Defendant Raeder, but also the PSP's report, which indicates to the Court that due to the complicated nature of the crash and the subsequent investigation, it was very difficult for the police to determine in which order the accident happened. *See, Brief in*

Opposition to Motion for Summary Judgment of Additional Defendants Ronald Ritchey and Advantage Tank Lines, Exs. B, C.

The Court finds the record merely reveals Terrance Nagel was alive and outside of his cab at some point after Additional Defendant Raeder's initial arrival and before the arrival of Defendant Falcon's truck. As the record contains no clear evidence as to what point Terrance Nagel subsequently died, such an absence creates questions as to which of the above-three impacts actually caused the death of Terrance Nagel. The testimony of Additional Defendant Raeder regarding his observations and sensations surrounding the three separate impacts to Terrance Nagel's vehicle, combined with the information obtained from the PSP regarding the same, prevents the Court from finding reasonable minds would not be able to regard Additional Defendant Ritchey's conduct as substantial in causing Terrance Nagel's death as such evidence creates a record that is not entirely void of facts which controvert the existence of proximate cause between Additional Defendant Ritchey's conduct and Terrance Nagel's death.

In considering the evidence provided by Additional Defendants Ritchey and Advantage, along with that provided by Defendant Falcon, the Court possess doubt as to whether the record is, in fact, devoid of any evidence to support a causal connection between Additional Defendants Ritchey and Advantage's conduct and Terrance Nagel's death. As all doubts as to whether such issues exists must be resolved against Additional Defendants Ritchey and Advantage, as the moving parties, Additional Defendants Ritchey and Advantage's Motion is denied, and the issue of causation should be decided by the jury.

ORDER

AND NOW, TO-WIT, this 22nd day of September 2009, it is hereby **ORDERED, ADJUDGED,** and **DECREED** that, for the reasons set forth in the foregoing Opinion,

I. Eric Jimenez and Logistic Leasing, Inc.'s Motion for Summary Judgment is **GRANTED.**

II. John Lambert and Pond Brothers Trucking, LLC's Motion for Summary is **GRANTED.**

III. The Pennsylvania Department of Transportation's Motion for Summary Judgment is **GRANTED** as to Count Nineteen, Paragraph 158(a), (c), (d), and (e) of Falcon Transportation, Inc.'s Complaint, and **DENIED** as to Count Nineteen, Paragraph 158(b) of Falcon Transportation, Inc.'s Complaint.

IV. Cassandra Barlow's Motion for Summary Judgment is **GRANTED.**

V. Tracy Castor and Penske Truck Leasing, Corp.'s Motion for Summary is **GRANTED.**

VI. Michael Bolinger and Sterling Express, Ltd.'s Motion for Summary Judgment is **GRANTED.**

VII. Frank Raeder's Motion for Summary Judgment is **DENIED.**

VIII. Dick Vander-Ploeg and Allied Systems, Ltd.'s Motion for Summary Judgment is **DENIED.**

IX. Ronald Ritchey and Advantage Tank Line's Motion for Summary Judgment is **DENIED.**

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

**GENE GROENENDAAL, and
ANNA GROENENDAAL, Plaintiffs,**

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, DICK CORPORATION, GAI CONSULTANTS INC., and SAFETY GROOVING AND GRINDING, INC., Defendants

BOCA CONSTRUCTION, INC., WILLIAMS & WILLMAN LINE PAINTING INC., AND URBAN ENGINEERS, INC., Additional Defendants

EVIDENCE / RELEVANCY / DEFINITION (RULE 401)

Pennsylvania Rule of Evidence 401 defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

EVIDENCE / PREJUDICE

Under Pennsylvania Rule of Evidence 403, although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

EVIDENCE / RELEVANCY

Pursuant to 75 Pa.C.S.A. §3510(c), failure to use a pedalcycle helmet is inadmissible in the trial of any civil action.

DEMONSTRATIVE EVIDENCE / AUTHENTICATION

Under Pennsylvania Rule of Evidence 901(a), the requirement of authentication or identification of demonstrative evidence as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

DEMONSTRATIVE EVIDENCE / AUTHENTICATION

Photographs may be authenticated either by the testimony of the photographer or by another person who has sufficient knowledge to state that they fairly and accurately represent the object and/or place reproduced as it existed at the time of the accident.

EVIDENCE / EXPERT TESTIMONY

Under Pennsylvania Rule of Evidence 702, if scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of opinion or otherwise.

EXPERT TESTIMONY / ULTIMATE ISSUE

Although Pennsylvania Rule of Evidence 704 states testimony in the

form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact, the trial judge has discretion to admit or exclude expert opinion on the ultimate issue depending on the helpfulness of the testimony versus its potential to cause confusion or prejudice.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 11442 of 2006

Appearances: Michael A. Agresti, Esq., Attorney for Plaintiffs, Gene and Anna Groenendaal
Joseph S. D. Christoff, II, Esq. and Brett Farrar, Esq., Attorneys for Defendant Dick Corporation
William A. Dopierala, Esq., Attorney for Defendant PennDOT
Gregory P. Zimmerman, Esq., Attorney for Defendant Williams & Willman Line Painting, Inc.
Paul J. Susko, Esq., Attorney for Defendant Urban Engineers
Donald J. McCormick, Esq., Attorney for Defendant Boca Construction, Inc.

OPINION AND ORDER

DiSantis, Ernest J., Jr., J.

This matter comes before the Court on several motions *in limine* filed on behalf of Defendants and Additional Defendants, together with Plaintiffs' Motion *In Limine.*

I. BACKGROUND OF THE CASE

This action arises from an incident that occurred on August 15, 2005, while Plaintiff, Gene Groenendaal, and his son were riding their bicycles westbound down a hill on S.R. 4034 in Erie County Pennsylvania, also known as the "Eastside Access Highway". As Plaintiff [1] traveled downhill on the westbound shoulder, he encountered rumble strips located on the shoulder, lost control of his bicycle, and careened into a guardrail. He asserts he was injured as a result.

The location of the incident is part of the A-91 Eastside Access Highway Project constructed by the Commonwealth of Pennsylvania, Department of Transportation ("PennDot") in 2002-2003. During construction, Dick Corporation ("Dick Corp.") served as general contractor and was responsible for fine grading work and asphalt placement. Boca Construction, Inc. ("Boca"), a subcontractor hired by Dick Corp., installed the rumble strips. Williams & Willman Line Painting, Inc. ("Williams"), a subcontractor hired by Dick Corp., painted

[1] Unless otherwise noted, this Court's reference to "Plaintiff" refers to Mr. Groenendaal.

the guidelines and markers.[2] Urban Engineers, Inc. ("Urban") was hired by PennDot and served as a consulting company on the Project.

Plaintiffs originally filed suit against PennDot and, thereafter, amended their complaint to include Dick Corp. as a defendant. In response, Dick Corp. joined Urban, Boca, and Williams. Following discovery, on August 13, 2007, Plaintiffs filed a Second Amended Complaint, alleging negligence and loss of consortium claims against PennDot, Dick Corp., Urban, and Boca.

In its Second Amended Complaint, Plaintiffs contend that Plaintiff's accident was caused by improper installation of the rumble strips in the shoulder of the road. As to each parties' respective negligence, Plaintiffs contend that: (1) PennDot knew or should have known of the improper installation of the rumble strips and that its "design, construction and/or maintenance of the rumble strips in this improper manner and/or its failure to correct this improper design and/or construction, was the direct and proximate cause of the injuries suffered by Plaintiff. . . " Plaintiffs' Second Amended Complaint, at ¶ 82; (2) Dick Corp, as general contractor, was negligent in allowing the rumble strips to deviate from acceptable construction standards and failed to insure and/or inspect that Boca properly installed the rumble strips *Id.* at ¶¶ 85-91; 3) Urban was negligent in its inspection of the rumble strips *Id.* at ¶¶ 94-98; and, (4) Boca was negligent in its installation of the rumble strips. *Id.* at ¶¶ 101-105.

On October 9, 2007, Dick Corp. filed a Complaint to Join Additional Defendant Williams & Willman Line Painting, Inc, alleging negligence and indemnification.

Following the close of discovery, all the defendants, with the exception of PennDot, filed their respective motions for summary, which this Court denied on September 2, 2008.

On June 29, 2009, Plaintiffs filed their Motion *in Limine*, requesting that the Court bar any and all questions, evidence, testimony of any kind relating to the use or non use of helmets by Plaintiff husband and/or Plaintiffs' son, Gene Groenendaal, II, on the day of the accident or during other bicycle rides.

Between June 25, 2009 and June 30, 2009, Defendants filed their respective motions *in limine*. Those motions are as follows: (1) PennDot's Motion *in Limine* regarding the Bachman Article and Transportation Institute Study; (2) Boca's Motion *in Limine* regarding Plaintiffs' photographs and video; (3) Dick Corp's Motions *in Limine* to partially or fully preclude the testimony of Charles D. Anderson, John F. Graham, and David L. Wagner; (4) Boca's Motions *in Limine* to preclude Plaintiffs from arguing the existence of a duty arising out of risks inherent in bicycling and criticizing the design of the rumble

[2] The rumble strips at issue were not installed under [sic] after Williams completed the line painting work.

strips; and, (5) Urban's Motion *in Limine* to preclude the testimony of John F. Graham.[3]

II. DISCUSSION

This Court's analysis is predicated upon an examination of whether the proffered evidence is relevant and admissible.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa.R.E. 401.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time

Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Pa.R.E. 403.

A. Plaintiffs' motion - use/nonuse of bicycle helmet.

Plaintiffs allege that evidence of Plaintiff's non-usage of a helmet should be barred under Pa.R.E. 403, as its probative value is outweighed by unfair prejudice. Moreover, Plaintiffs contend that pursuant to 75 Pa.C.S.A. § 3510 (c), evidence of the nonuse of a helmet by a bicyclist is inadmissible at trial.

§ 3510, *inter alia*, provides:

(a) GENERAL RULE. -- A person under 12 years of age shall not operate a pedalcycle or ride as a passenger on a pedalcycle unless the person is wearing a pedalcycle helmet meeting the standards of the American National Standards Institute, the American Society for Testing and Materials, the Snell Memorial Foundation's Standards for Protective Headgear for Use in Bicycling or any other nationally recognized standard for pedalcycle helmet approval. This subsection shall also apply to a person who rides . . .

(c) CIVIL ACTIONS. -- In no event shall a violation or alleged violation of subsection (a) be used as evidence in a trial of any civil action; nor shall any jury in a civil action be instructed that any conduct did constitute or could be interpreted by them to constitute a violation of subsection (a); nor shall failure to use a pedalcycle helmet be considered as contributory negligence nor shall failure to use a pedalcycle helmet be admissible as evidence in the trial of any civil action.

75 Pa.C.S.A. § 3510 (a) and (c) (emphasis added).

[3] Each defendant/additional defendant filed a motion to join in either all of, or some of, the remaining co-defendants' motions *in limine*. This Court granted their requests.

Upon review, this Court finds that evidence of non-usage of bicycle helmets is irrelevant to the issues in the case. Therefore, that evidence is inadmissible at time of trial.

B. *Bachman Article and Transportation Institute Study.*

PennDot requests that the Court preclude the introduction and use of the following at trial: (1) Dave Bachman, *Rumble Strips - Finding a Design for Bicycles and Motor Vehicles*, TTR News 215, July-August 2001, at 28-29[4]; and, (2) L. Elefteriadou, et. al., *Bicycle-Tolerable Shoulder Rumble Strips - Final Report*, Pa. Transp. Inst., March 2000. PennDot claims the article and the report are irrelevant evidence as they do not tend to establish a fact of consequence in Plaintiffs' case, i.e. the negligent location of the rumble strips on the shoulder of the road. Rather, PennDot argues the materials only involve the way in which rumble stripes are designed, how to determine safe rumble strips, and how bicycles tolerate variously designed rumble strips. Alternatively, PennDot claims the material would confuse and mislead the jury as to the issues involved, and be needlessly cumulative.

In response, Plaintiffs claim that the materials would demonstrate that PennDot knew or should have known of the improper location and danger of the rumble strips on the roadway in question. Plaintiffs further claim that the challenged materials specifically address the proper location of rumble strips, together with dangers posed by rumble strips.

The Court finds that the Bachman Article and Transportation Institute Report are hearsay. However, they may be admissible if Plaintiffs can establish that: (1) they were accepted by PennDot as authoritative and as a standard of construction or installation for rumble strips at the time of the occurrence; and, (2) PennDot deviated from that standard.

C. Criticisms concerning the design of the rumble strips.

Boca notes that Plaintiffs refer to materials in their Pre-Trial Statement, which address rumble strip design for bicycles/cars, and the need for bicycle tolerable rumble strips.[5] Boca further notes that during his deposition, Plaintiff referenced bicycle friendly rumble strips. Despite this, Boca claims that Plaintiffs' suit involves the location of the rumble strips, not the specific design of the rumble strips themselves. Therefore, Boca concludes that any comment/reference to the specific design would confuse and mislead the jury, and would be unfairly prejudicial.

In response, Plaintiffs claim they are not intending to criticize the design of the rumble strips, i.e., their specific dimensions. Instead, the issue centers on the location of the strips. Plaintiffs further argue that if Boca is attempting to preclude them from introducing the Bachman Report and Transportation Institute study, the motion should be denied.

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[4] Mr. Dave Bachman is PennDot's Bicycle and Pedestrian Program Manager.

[5] The Court assumes Boca is focusing on those materials cited by PennDot.

The Court finds that any evidence related to the design of the rumble strip is irrelevant and inadmissible. However, evidence regarding the placement and location of the rumble strips is admissible. In that vein, so too is the Bachman report subject to the conditions set forth above related to its admissibility.

D. Existence of a duty arising out of risks inherent in bicycling.

Boca alleges no duty was owed to Plaintiff as a matter of law and, therefore, requests the Court to preclude Plaintiffs from arguing otherwise.[6] In support, Boca cites Plaintiff's deposition testimony and argues, *inter alia*, that (1) Plaintiff was aware of the rumble strips and the need to stay to the right of the strips; (2) Plaintiff voluntarily chose to ride on the paved shoulder located between the rumble strips and the edge of the shoulder pavement; (3) Plaintiff was aware of the risks involved while riding his bicycle; (4) Plaintiff was aware of the need to watch for road conditions, such as drains, grates, road seams and joints, potholes, dirt and debris; (5) Plaintiff attempted to stay away from the rumble strips since he knew the danger of riding over them at high speeds; Plaintiff was aware that traveling at faster speeds reduces a bicyclists ability to control and/or stop; and, (6) Plaintiff was an experienced cyclist and aware of risks when encountering road conditions and the risk of falling and sustaining bodily injury. Accordingly, Boca argues that under Pennsylvania law, no duty of care is owed for risks which are common, frequent, expected and inherent in an activity.

This does not appear to be a motion *in limine.* Rather, it is akin to a premature motion for nonsuit or directed verdict (unless the defendant is requesting a limitation upon Plaintiffs' opening statement). In any event, it will be denied.

E. Photographs and videotape.

There are three basic types of evidence that are admitted into court: (1) testimonial evidence; (2) documentary evidence; and (3) demonstrative evidence. 2 McCormick on Evidence § 212 (5th ed. 1999). Presently, at issue is demonstrative evidence, which is "tendered for the purpose of rendering other evidence more comprehensible to the trier of fact." Id. As in the admission of any other evidence, a trial court may admit demonstrative evidence whose relevance outweighs any potential prejudicial effect. The offering party must authenticate such evidence. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Pa.R.E. 901(a). Demonstrative evidence may be authenticated by

[6] *See Howell v. Clyde*, 620 A.2d 1107 (Pa. 1983) (noting that whether a duty exists is a question of law).

> testimony from a witness who has knowledge "that a matter is what it is claimed to be." Pa.R.E. 901(b)(1). Demonstrative evidence such as photographs, motion pictures, diagrams, and models have long been permitted to be entered into evidence provided that the demonstrative evidence fairly and accurately represents that which it purports to depict.

Commonwealth v. Serge, 896 A.2d 1170, 1176 (Pa. 2006) (citations omitted). Photographs are verified either by the testimony of the photographer or by another person who has sufficient knowledge to state that they fairly and accurately represent the object and/or place reproduced as it existed at the time of the accident. *Tolbert v. Gillette*, 260 A.2d 463, 465 (Pa. 1970); *Puskarich v. Trustees of Zembo Temple*, 194 A.2d 208, 211 (Pa. 1963).

Boca alleges that many of Plaintiffs' photographs are inadmissible, misleading, unfairly prejudicial, and would deprive them the opportunity to cross-examine the photographer and those who staged the scene and added comments to the photos. Those photographs include: (1) 3 photographs made from a news video plus 3 photographs by Plaintiff's son (Exhibit H of Groenendaal deposition). These photographs contain comments by plaintiffs' counsel. Boca contends the photos are staged and some contain an item to memorialize opinion or testimony, including a red towel draped over the guardrail signifying opinion regarding key facts and opinions; (2) 8 photographs (O'Brien deposition Exhibit 7). The photos were taken by counsel and contain comments. They also contain close-ups of markings on a tape measure without any way of knowing what is depicted in the photo; (3) 24 photographs taken by plaintiffs' counsel of a tape measure along with tiles of the photographs include commentary and/or conclusion on what is shown and the significance of the close-up photographs of the markings on the tape measure; and, (4) 22 photographs, some containing a red towel, taken by plaintiffs son. Boca contends these are an attempt to reconstruct the accident by staging the scene with a red town placed in accordance with the son's opinion where plaintiff came in contact with the guardrail.

Boca contends that a video was taken from the passenger seat of a car and depicts the shoulder of the road leading to the area where plaintiff ended up after his accident. The video includes narration. Boca argues that the video is an attempt to recreate what the shoulder looked like when plaintiff rode his bike and, therefore, should be excluded.

The Court finds preliminarily that some of the photographs of the accident scene, together with those photographs depicting measurements of the relevant area, may be admissible at time of trial if properly authenticated and if they depict the condition of the area as it was at or around the time of the incident. However, the Court finds the following to

be inadmissible because they contain editorial comments: #1 (2 photos), #2 (2 photos), #3 (2 photos)[7].

The videotape has not been provided to the Court. Therefore, the Court will not make a determination as to its admissibility. If the parties wish the Court to do so, they must submit a copy to this Court for review no later than two weeks before jury selection

F. Expert testimony.

Rule 702. Testimony by experts

> If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

Pa.R.E. 702.

Under the Pennsylvania Rules of Evidence, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Pa.R.E. 704. "Nevertheless, 'the trial judge has discretion to admit or exclude expert opinion on the ultimate issue depending on the helpfulness of the testimony versus its potential to cause confusion or prejudice.'" *Houdeshell Ex. Rel. Bordas v. Rice*, 939 A.2d 981, 986 (Pa. Super. 2007), *quoting McManamon v. Washko*, 906 A.2d 1259, 1278-79 (Pa. Super. 2006).

1.) <u>Charles D. Anderson</u>

Mr. Anderson is being offered as a cycling expert. Anderson opines that it is legal for cyclists to ride on Pa Route 430 (the area of the accident scene). Anderson further opines, within a reasonable degree of cycling certainty, that the choice to ride this route, the lane position taken by Plaintiff and the speed at which he descended northbound Pa Route 430 were all reasonable and appropriate for the circumstances at the time of the accident.

Dick contends that Anderson gives his opinion "to a reasonable degree of cycling certainty", which is not a recognized scientific certainty. Furthermore, it argues that Anderson may not opine as to the legality of conditions, i.e. the accident site is a place where Plaintiff could legally operate his bicycle. Dick further argues that in Pennsylvania, a determination of what is reasonable under circumstances is a question of a jury when the question is within the range of ordinary experience and comprehension. Moreover, it argues that it is for a jury, not an expert, to evaluate evidence to determine credibility and

[7] References are to Exhibit 11A of Boca's motion.

weighing of evidence. As such, Anderson is precluded from testifying to the reasonableness and/or appropriateness of Plaintiff's actions and decisions to travel the accident site.

In response, Plaintiffs contend that Anderson has other specialized knowledge beyond the knowledge of a layperson. They claim the instant case involves highly experienced riders engaging in the specialized sport of cycling that is foreign to most people." Plaintiffs' response, at 36. Furthermore, Plaintiffs contend that Anderson is not precluded from interpreting rights and responsibilities under specific law. In addition, Plaintiffs argue that Dick has embraced the "bicycling expertise" of PennDot's expert, Gerald P. Bretting, and adopted his report as its own.

This Court finds that knowledge about the risks of riding a bicycle is within that possessed by a layperson. Mr. Anderson's proffered testimony is not only unnecessary, it may confuse, mislead, waste the jury's time, and overcomplicate the case. Furthermore, Mr. Anderson is not permitted to render legal opinions regarding the duties and rights of the parties. Therefore, his proffered testimony is excluded in its entirety.

2.) <u>David L. Wagner, Ph.D.</u>

In his report, Dr. Wagner opines that a change in shoulder configuration in the highway represented an inherently dangerous condition for cyclists. Wagner notes that even if Plaintiff perceived the configuration change, Plaintiff would not have been able to react in time to avoid striking the rumble strips. Wagner further opines that the abrupt configuration change of the shoulder caused Plaintiff to strike the rumble strips and lose control of his bicycle. Moreover, Wagner also opines as to the location of the accident.

Dick concludes that Wagner's opinion concerning the shoulder configuration representing an "inherently dangerous condition" should be precluded because an expert cannot opine as to the legality of conditions or circumstances, legal opinion/conclusion testimony is not admissible, and determinations of legal conclusions are within the province of the court.[8] Moreover, Dick contends Wagner's opinion that the highway was dangerous is based solely on the fact that an accident occurred.

Dick further requests the court enter an order precluding Wagner's opinion regarding the location of the accident. Dick contends that neither video news footage nor witness testimony provides an adequate foundation for Wagner's opinion as to the location of the accident. Therefore, it infers that Wagner's opinion is based upon speculation rather than an adequate factual foundation.

In response, Plaintiffs claim that Wagner's report does not attempt to render any legal conclusion, nor is the phrase a legal term of any

[8] In support, Dick cites *Brown v. Commonwealth of Pennsylvania, Department of Transportation, et. al*, 843 A.2d 429 (Pa. Cmwlth. 2004) and *Waters v. State Employees Retirement Board*, 955 A.2d 466, 471 n.7 (Pa. Cmwlth. 2008).

significance in the instant matter. Even if the phrase is an opinion on the ultimate issue, it is admissible under Pa.R.E. 704. Plaintiffs further claim that any problems with Wagner's conclusion goes to the weight of the testimony, not its admissibility.

Furthermore, Plaintiffs argue that Dick's contention with Wagner's opinions based on his understanding of where the accident occurred, it goes to the weight of his testimony, not admissibility. Moreover, Plaintiffs argue that Plaintiff and his son had first-hand knowledge where Plaintiff went over the guardrail and lay opinion as to the area where encountered the rumble strips. Although Plaintiff or his son cannot identify the exact rumble strip that he struck, Plaintiff's son can identify the location within a couple of feet or yards.

After its review, this court finds that the portions of Dr. Wagner's proffered testimony regarding perception-reaction time and causation as it relates to the purported abrupt change in the conditions of the shoulder is admissible, assuming that a factual foundation is established before he renders any opinion.

3. John F. Graham

Plaintiffs offer Mr. Graham as an engineering expert in the area of roadway construction.

Urban argues that Graham is not offering expert opinion. Graham's report discusses contract interpretation, agency principles, legal responsibilities of the parties, and project contracts being breached. Moreover, Graham did not review the contract between Urban and PennDot. Moreover, on page 13 of report, he states that "Since the rumble strip drawings were prepared by PennDot and placed into the construction documents, PennDot could have interpreted those drawings, with the assistance of Urban Engineers as their agent." - not expert opinion because lacks certainty.

Dick argues that: (a) Graham's factual assessment is not opinion - Dick contends that Graham asserts that the line painting and rumble strips were not built according to the project contract as it existed prior to any field changes directed by PennDot. This is not the subject of expert testimony and not necessary. Dick argues no expert opinion is needed on this issue because the facts regarding placement of the lines and rumble strips as constructed can be easily understood by a jury. Furthermore, Dick contends the statements are not relevant because the majority of the facts not disputed - the issue is whether the roadway was proper, not whether the field changes directed by PennDot changed the roadway from its initial design. In effect, this would be cumulative evidence.

(b) Graham's opinions regarding legal duties and conclusions should be precluded. - Dick contends that Graham should be precluded from testifying that project contracts were breached or give any opinion as to the legal responsibilities and duties of the defendants. Dick contends

that Graham's report provides legal conclusions that contracts were breached and discusses the legal duties of the parties. It notes that under Pennsylvania law, an expert cannot opine as to the legality of conditions/ circumstances and that legal opinion/testimony is not admissible. In support, Dick cites *Brown v. Commonwealth of Pennsylvania, Department of Transportation, et. al.*, 843 A.2d 429 (Pa. Cmwlth. 2004) and *Waters v. State Employees Retirement Board*, 955 A.2d 466, 471 n.7 (Pa.Cmwlth 2008).

In response, Plaintiffs contend that Graham is more than competent to testify as to contract interpretation and the responsibilities and duties imposed on the various contractors and subcontractors. Furthermore, Plaintiffs contend that Graham will only read from the contract documents, provide his observations as to conditions of the roadway and the shoulder as compared to those documents, and opine as to how the roadway should have been constructed. Plaintiffs further contend they will not elicit testimony from Graham as to whether any party's failure constituted a "breach of contract".

(c) Opinions on subjects which Graham is not qualified to testify. Dick claims that Graham is not qualified to render opinions on the design and construction of rumble strips, and whether a bicyclist would be safe to ride a bicycle under certain roadway conditions.

(d) Graham's opinions regarding causation - Dick argues that Graham did not witness the accident, nor is he an accident reconstructionist. Therefore, Graham cannot testify and provide an opinion upon causation. Moreover, it argues that this evidence goes to the ultimate issue, thereby invading the jury's role.

In response, Plaintiffs contend that Graham is well experienced in roadway construction and administration of construction projects. Moreover, Graham made observations of the scene and is qualified to testify on those subjects. Plaintiffs further contend that under, Pa.R.E. 704, testimony as to an ultimate issue to be decided by the trier of fact, (i.e. causation) is allowed, will be helpful to the jury, and will not confuse or unfairly prejudice the jury.

This Court finds that Mr. Graham's proffered testimony is limited as follows: (1) he may not render any opinion regarding the legality of the contract and/or legal relationships of the parties (until that point is established by competent evidence); (2) he may not testify about the safety of bicycle operation; (3) he may not simply summarize other witnesses' testimony; and (4) he may not testify to those other matters redacted (crossed-out) from his report. See Exhibit A of this opinion.

III. CONCLUSION

This Court will issue an order in accordance with this opinion.

ORDER

AND NOW, this 14th day of September, 2009, for the reasons and under the conditions and/or limitations set forth in the accompanying opinion, it is hereby ORDERED that: (1) evidence regarding Plaintiffs' non-usage of a biking helmet is **inadmissible;** (2) the Bachman Article and Transportation Institute Study are **admissible;** (3) evidence concerning the design of the rumble strips is **inadmissible;** (4) evidence concerning the placement and location of the rumble strips is **admissible;** (5) evidence concerning the risks inherent in bicycling (and expert testimony in that regard) is **inadmissible;** (6) photographs reflected as Exhibits # 1, 2 and 3 of the Boca Motion *In Limine* are **inadmissible;** (7) the testimony of Charles D. Anderson is **inadmissible;** (8) the testimony of David L. Wagner is **admissible;** and (9) the testimony of John F. Graham is **admissible.**

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

CAROL DANIELS, Plaintiff

v.

SANDRA BLAZEK, individually, and JOSEPH M. KNAUBER and MARK KNAUBER, as co-personal representatives of the Estate of Joyce Knauber, Defendants

MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the record demonstrates that there is either no genuine issue of material fact as to a necessary element of the cause of action or defense or that the adverse party who will bear the burden of proof has failed to produce evidence requiring the issue to be submitted to a jury. The record is reviewed in the light most favorable to the non-moving party with all doubts as to the existence of a genuine issue being resolved against the moving party. The non-moving party may not rest upon the mere allegations of its pleadings but must set forth by affidavit or otherwise specific facts showing a genuine issue for trial.

AGENCY / INDEPENDENT CONTRACTOR

As defined in Black's Law Dictionary, an independent contractor is one entrusted to undertake a specific project with freedom to do the assigned work and to choose the method for accomplishing the assignment.

AGENCY / INDEPENDENT CONTRACTOR

In making the determination of whether a relationship is that of an employer-employee or independent contractor, consideration is given to certain factors which are not controlling but serve as general guidance to the Court. These include control of the manner of work, responsibility for result only, the agreement between the parties, the nature of the work or occupation, the skill required, whether one is employed in a distinct occupation or business, which party supplies the tools, the method of payment, whether the work is part of the employer's regular business, and the right to terminate the employment at anytime.

AGENCY / INDEPENDENT CONTRACTOR

The Court determines the defendant, a state-certified appraiser, to be an independent contractor where she made all decisions relevant to a sale of personal property at the home of a decedent, no member of the family employing her was present at the time of the sale, she was paid on a commission basis, and used her own tools and supplies. This conclusion is bolstered by the failure of the plaintiff to plead evidence or to establish any facts showing that the appraiser was serving in any capacity other than that of an independent contractor.

AGENCY / INDEPENDENT CONTRACTOR / EMPLOYER LIABILITY

The employer of an independent contractor is not generally liable for physical harm caused by an act or omission of an independent contractor. Exceptions to this general rule of non-liability include negligence of the

employer in the selection, instruction, or supervision of the contractor, non-delegable duties, and work which is inherently dangerous.

AGENCY / INDEPENDENT CONTRACTOR / EMPLOYER LIABILITY

A peculiar risk or special danger which would cause liability to extend to the employer of an independent contractor is a risk which arises from the peculiar or inherent nature of the task or manner of performance, is recognizable in advance, and contemplated by the employer at the time the contract was formed. A peculiar risk or special danger does not include the contractor's collateral or casual negligence, i.e., negligence consisting wholly of the manner in which the contractor performs the work. A peculiar risk differs from the common risks to which persons are commonly subjected and must involve a special hazard resulting from the nature of the work calling for special precautions.

AGENCY / INDEPENDENT CONTRACTOR / DETERMINATION OF RISK

The determination of whether a peculiar risk or special danger is presented is a mixed question of law and fact which may be made by the trial judge as a matter of law in clear cases. As an exception to the general rule of employer non-liability, the rule allowing employer liability for a peculiar or special risk must be narrowly construed.

AGENCY / INDEPENDENT CONTRACTOR / DETERMINATION OF RISK

The appraiser's failure to block a door and attached stairwell or post warning signs is negligence in the manner in which the contractor performs the work rather than a peculiar risk and therefore the exception to the general rule of non-liability of the employer for actions of an independent contractor does not apply.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 12415-2008

Appearances: Edwin W. Smith, Esq., Attorney for Plaintiff
Craig Murphy, Esq., Attorney for Defendant Joseph and Mark Knauber, as co-personal representatives of the Estate of Joyce Knauber
William C. Wagner, Esq., Attorney for Defendant Sandra Blazek

OPINION

Connelly, J. January 14, 2010

This matter is before the Court pursuant to a Motion for Summary Judgment filed by Defendants Joseph M. Knauber and Mark Knauber, as co-personal representatives of the Estate of Joyce Knauber (hereinafter "Defendants Knauber"). Carol Daniels (hereinafter "Plaintiff") opposes.

Statement of Facts

The instant action stems from an incident in which Plaintiff allegedly tripped and fell on June 7, 2007 inside a house at 311 Nevada Drive, Erie, Pennsylvania during an estate sale administered by Defendant Sandra Blazek (hereinafter "Defendant Blazek"). The home was owned by the now deceased Joyce Knauber. Her sons ("Defendants Knauber") hired Defendant Blazek to administer the estate sale. Plaintiff filed a Complaint on May 16, 2008 alleging it was Defendant Blazek's negligence that caused her to trip and fall down some steps inside the home and sustain injury. *Complaint, ¶ 13*. Specifically, Plaintiff alleges Defendant Blazek, among other things, failed to block a door located along a narrow hallway that led directly to a set of steep basement stairs. The Complaint also alleges vicarious liability against Defendants Knauber. *Id.* On September 2, 2008, Plaintiff filed an Amended Complaint to correctly name Joyce Knauber's sons as co-personal representatives of her estate. *Amended Complaint, ¶ 14.*

At the time of the incident, Joyce Knauber owned the Nevada Drive property, but was a resident of a personal care home in Arizona. Her sons, Defendants Knauber, who live in Arizona and Georgia, hired Defendant Blazek to conduct an estate sale to sell the belongings in the residence in preparation for selling the house. *Brief in Support, p. 2.* Defendants Knauber allege after Defendant Blazek was hired, Defendant Blazek took responsibility for every decision made with regard to conducting the sale and liquidating the assets inside the home. *Id. at pp. 2-3.* Defendants Knauber contend that they cannot, as a matter of law, be held liable for Defendant Blazek's alleged negligence or Plaintiff's alleged injuries as Defendant Blazek was acting as an independent contractor and exercised complete control over the premises. *Id. at p. 3.*

Plaintiff contends that "[e]ven if the Knaubers were not present on the day of the estate sale, they owed a duty to the business invitees invited to their property on the date of the sale." *Plaintiff's Brief in Opposition, p. 3.* Plaintiff also denies that Defendant Blazek was employed as an independent contractor. *Id.*

Analysis of Law

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) *cert. denied*, 519 U.S. 1008 (1996). According to the Pennsylvania Rules of Civil Procedure, summary judgment is appropriate when the record demonstrates, either no genuine issue of material fact exists 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 be submitted to a jury.[1] *Pa.R.C.P. 1035.2.*

It is the burden of the moving party to prove that summary judgment is appropriate. *Ertel*, 674 A.2d at 1041. Therefore, the record is reviewed in the light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact are to be resolved against the moving party. The non-moving party may not rest upon the mere allegations or denials of its pleadings. *Id.* Rather, a non-moving party must set forth, either by affidavit or otherwise, specific facts showing that there is a genuine issue for trial. *Id.* at 1042; *Burger v. Owens III*, 966 A.2d 611, 619-20 (Pa.Super. 2009).

Here, Defendants Knauber assert summary judgment is appropriate because Plaintiff has failed to produce evidence essential to the claim against them. Specifically, Defendants Knauber allege they cannot be held negligent as Defendant Blazek was employed as an independent contractor and they played no role in the estate sale after Defendant Blazek was hired. Plaintiff asserts Defendants Knauber owed a duty to Plaintiff as she was a business invitee on their property. Plaintiff also argues that Defendant Blazek was not an independent contractor[2] and even if she was Plaintiff has pled facts sufficient to prove the exception to the general rule of non-liability of employers for the acts of their independent contractors. *Plaintiff's Brief in Opposition, p. 4.*

Black's Law Dictionary defines an independent contractor as:

> [o]ne who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it. ... [u]nlike an employee, an independent contractor who commits a wrong while carrying out the work usu[ally] does not create liability for the one who did the hiring."

Black's Law Dictionary, Ninth Edition (2009).

Moreover, Pennsylvania courts have applied the following test to determine whether one qualifies as an independent contractor:

> In determining whether a relationship is one of employee-employer or independent contractor, certain factors will be considered, which while not controlling, serve as general guidance to the court. The factors include: the control of the manner that work is to be done; responsibility for result only; terms of agreement between the parties; the nature of the work

[1] In other words, the record contains insufficient evidence of facts to make out a prima facie cause of action or defense and therefore, there is no issue to be submitted to a jury. To defeat this motion, the adverse party must come forth with evidence showing the existence of the facts essential to the cause of action. *Pa.R.C.P. 1035.2, Note.*

[2] Plaintiff cites no authority or any evidence to show that Defendant Blazek was not an independent contractor. Plaintiff merely states she disputes this assertion.

> or occupation; the skill required for performance; whether one employed is engaged in a distinct occupation or business; which party supplies the tools; whether payment is by the time or by the job; whether the work is part of the regular business of the employer, and the right to terminate the employment at any time.

Lynch v. WCAB, 554 A.2d 159, 160 (Pa. Cmwlth. 1989) (citations omitted).

Applying the above test, it appears that Defendant Blazek was indeed an independent contractor hired by Defendants Knauber to conduct the estate sale. Defendant Blazek, who is certified by the state to appraise goods and conduct household sales, noted at her deposition she made all the decisions relevant to the sale and no member of the Knauber family was present at the sale. *Motion for Summary Judgment, Exhibit B, pp. 73-79.* Defendant Blazek also testified that she did the estate sale on commission and used her own tools and supplies. *Id. at pp. 66-67.* Moreover, Plaintiff has failed to plead evidence sufficient to show Defendant Blazek was an employee[3] of Defendants Knauber. Plaintiff merely alleges Joyce Knauber "hired and/or retained [Defendant] Blazek as an auctioneer to conduct the auction of personal property." *Amended Complaint, ¶ 8.* Plaintiff makes no representation and asserts no facts to show that Defendant Blazek was anything but an independent contractor. Therefore, the Court finds that Defendant Blazek was indeed working as an independent contractor on the date of the accident.

"As a general rule, the employer of an independent contractor is not liable for physical harm caused by an act or omission of the contractor or his servants." *Hader v. Copley Cement Co.*, 189 A.2d 271 (Pa. 1963). Moreover, the Restatement (Second) of Torts § 403 provides the same general rule, but notes the following exceptions to the rule: (1) negligence of the employer in selecting, instructing, or supervising the contractor; (2) non-delegable duties of the employer, arising out of some relation toward the public or the particular plaintiff; and (3) work which is specially, peculiarly, or "inherently" dangerous. Plaintiff asserts that the work involved in the instant case falls within the third exception and "[c]learly the Knaubers knew or should have known that the unblocked

[3] Pennsylvania courts have applied the Workers' Compensation Act's definition of employee to determine liability based on employee status. *Valles v. Albert Einstein Med. Ctr.*, 805 A.2d 1232 (Pa. 2002). The Workers' Compensation Act defines employees as "[a]ll natural persons who perform services for another for valuable consideration, exclusive of persons whose employment is casual in character and not in the regular course of business of the employer ..." 77 P.S. § 22. Moreover, the Pennsylvania Commonwealth Court held that an employer's exercise of control over a worker's work and manner in which it is carried out is indicative of the employment relationship. *Johnson v. W.C.A.B.*, 631 A.2d 693 (Pa. Cmwlth 1993), appeal denied 641 A.2d 313 (1994).

doorway to the basement stairs, located as it was between the kitchen and the garage, presented a peculiar risk of harm to estate sale invitees who were unfamiliar with the property." *Plaintiff's Brief in Opposition, p. 4.* Specifically, Plaintiff asserts the applicable exception to the general rule can be found in Sections 416 and 427 of the Restatement (Second) Torts.[4] Section 416 states:

> [o]ne who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

Restatement (Second) Torts § 416.

Section 427 notes:

> [o]ne who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

Restatement (Second) Torts § 427.

Defendants Knauber assert the only exception to the general rule of non-liability for independent contractors is when the work performed by the independent contractor involves a "peculiar risk" or a "special danger." *Defendants' Reply Brief to Brief in Opposition, p. 3,* relying on *Drum v. Shaull Equipment and Supply Co.,* 760 A.2d 5, 13-14 (Pa.Super. 2000).[5] The Superior Court has held the terms "peculiar risk" and "special danger" are used interchangeably. *Steiner v. Bell of Pennsylvania,* 626 A.2d 584, 586 (Pa.Super. 1993). The Superior Court has also held that the key to the proper application of the two Restatement sections lies in the definition of a "peculiar risk" or a "special danger." *Mentzer v. Ognibene,* 597 A.2d 604, 610 (Pa.Super,1991), *appeal denied,* 609 A.2d 168 (Pa. 1992).

> The risk of harm must arise from the peculiar or inherent nature of the task or the manner of performance, and not the

[4] These two exceptions have been adopted by Pennsylvania Courts. *Phila. Electric Co. v. James Julian, Inc.,* 228 A.2d 669 (Pa. 1967).

[5] Defendants failed to note in their brief that the *Drum* case had been vacated and remanded by the Pennsylvania Supreme Court on other grounds. *See, Drum v. Shaull Equipt.,* 772 A.2d 414 (Pa. 2001).

> ordinary negligence which might attend the performance of any task. Liability does not ordinarily extend to so called 'collateral' or 'casual' negligence on the part of the contractor . . . in the performance of the operative details of the work. The negligence for which the employer [of a general contractor] is liable . . . must be such as is intimately connected with the work authorized and such as is reasonably likely from its nature.

Id. at 610 (*quoting, McDonough v. United States Steel Corporation*, 324 A.2d 542, 546 (Pa.Super.1974).

The *Mentzer* Court went on to note:

> stated differently, the definition of "peculiar risk" or "special danger" requires that ". . . the risk be recognizable in advance and contemplated by the employer [of the independent contractor] at the time the contract was formed . . . . [and that] it must not be a risk created solely by the contractors 'collateral negligence' . . . . [i.e.,] negligence consisting wholly of the improper manner in which the contractor performs the operative details of the work."

Mentzer, 597 A.2d at 611(citation omitted).

Finally, the Pennsylvania Superior Court has held that while the determination of whether a particular case presents a peculiar risk or special danger is a mixed question of law and fact, it may in clear cases, be made by the trial judge as a matter of law. *See, Id.; Ortiz v. Ra-El Development Corp.*, 528 A.2d 1355 (Pa. Super. 1987), *appeal denied*, 536 A.2d 1332 (Pa. 1987). The Court also noted that because this is an exception to the general rule, it must be narrowly construed. *Id. at 1359.*

The Restatement (Second) of Torts defines "peculiar risk" as "a risk differing from the common risks to which persons in general are commonly subjected to by the ordinary forms of negligence which are usual in the community. It must involve some special hazard resulting from the nature of the work done, which calls for special precautions." *Restatement (Second) Torts § 416, comment d*.

Here, Plaintiff sustained injuries due to the alleged negligence of Defendant Blazek, specifically her failure to block a basement door such that Plaintiff could fall down the stairs and her allowance of too many people into the sale. Plaintiff's Amended Complaint fails to plead facts sufficient to show that a "peculiar risk" or "special danger" existed. Moreover, Defendant Blazek's failure to block the door and attached stairwell or put up signs warning of any potential danger appears at most to be "negligence consisting wholly of the improper manner in which the contractor performs the operative details of the work" rather than a "peculiar risk." *Mentzer*, 597 A.2d at 611.

Therefore, the Court finds the exception to the general rule of non-liability for independent contractors does not apply as there was no peculiar risk or special danger present. Plaintiff has failed to plead evidence of facts to make out a vicarious liability cause of action. Therefore, Defendant Knaubers' Motion for Summary Judgment is granted and the case is hereby dismissed as to Joseph M. Knauber and Mark Knauber, as co-personal representatives of the Estate of Joyce Knauber.

ORDER

AND NOW, TO-WIT, this 14th day of January, 2010, it is hereby **ORDERED, ADJUDGED and DECREED**, Defendants, Joseph and Mark Knauber's, as co-personal representatives of the Estate of Joyce Knauber, Motion for Summary Judgment is **GRANTED.** The action is hereby dismissed as to Joseph and Mark Knauber, as co-personal representatives of the Estate of Joyce Knauber.

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

AXELL C. GARDNER and K. AUDREY GARDNER, Plaintiffs
v.
CHERYL J. MELLIN and RICHARD H. MELLIN, Defendants

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the record either demonstrates: no genuine issue of material fact exists as to a necessary element of the cause of action or defense; or an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to their prima facie cause of action or defense which would require the issues be submitted to a jury.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

On a motion for summary judgment, the court must not only examine the record in a light most favorable to the nonmoving party, but it must also accept as true all well-pled facts in the nonmoving party's pleading.

CONTRACT / CONSIDERATION

Under the Uniform Written Obligations Act, lack of consideration is removed as a ground for avoiding a contract where a statement of the parties' intent to be legally bound to it is included therein.

CONTRACT / MISTAKEN ASSUMPTION

Literate persons have a duty to read a contract before signing it, and if such persons are unable to understand the terms of the writing, so that they are aware of its contents, they are under a duty to have one who does understand it read and explain it to them; if they do not, they are bound by their signatures and bear the risk of mistake.

CONTRACT / MISREPRESENTATION

Extrinsic evidence is generally admissible to contradict the terms of an ambiguous contract when fraud and/or misrepresentation is alleged, but is not admissible if the terms of the contract are unambiguous.

CONTRACT / PROMISSORY ESTOPPEL

A party may only maintain a claim of promissory where it can show that: (1) the party against whom the claim is alleged made a promise that they should have reasonably expected would induce action or forbearance on the part of the other party; (2) the other party actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise.

CONTRACT / UNJUST ENRICHMENT

The doctrine of unjust enrichment is inapplicable where a written or express contract exists.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 14408-2007

Appearances: Joseph M. Walsh, III, Esq., Attorney for Axell C. and K. Audrey Gardner
Lori R. Miller, Esq., Attorney for Cheryl J. and Richard H. Mellin

OPINION

Connelly, J., January 20, 2010

This matter is before the Court of Common Pleas of Erie County, Pennsylvania (hereinafter "the Court"), pursuant to a Motion for Summary Judgment filed by Axell C. Gardner and K. Audrey Gardner (hereinafter "Plaintiffs Axell and Audrey Gardner," respectively; "Plaintiffs," collectively). Cheryl J. Mellin and Richard H. Mellin (hereinafter "Defendants Cheryl and Richard Mellin," respectively; "Defendants," collectively) oppose Plaintiffs' Motion. *Opposition to Motion for Summary Judgment, pp. 1-4.*

Statements of Fact

Defendants approached Plaintiffs in May of 2005, requesting an unspecified parcel of Plaintiffs' land on which they would construct a new home. *Motion for Summary Judgment, ¶¶ 4-5; Mellin Depo., pp. 10-14.* Plaintiffs ultimately decided to convey[1] a ten-acre lot (hereinafter "Subject Property") to Defendants on June 17, 2005, via quitclaim deed. *Motion for Summary Judgment, ¶¶ 6-13, Exs. C, D; Plaintiffs' Brief in Support of Motion for Summary Judgment, p. 1; Mellin Depo., pp. 14-17.* Plaintiffs and Defendants signed a Memorandum of Understanding (hereinafter "Memorandum") directly after Defendants received physical possession of the deed on June 17, 2005. *Motion for Summary Judgment, Ex. E; Mellin Depo., pp. 27-30, 81-82*. Legal counsel to both Plaintiffs and Defendants at the closing, Attorney David R. Devine (hereinafter "Attorney Devine"), drafted the Memorandum that reads, in pertinent part, as follows:

> [Plaintiffs] . . . by deed . . . have conveyed a ten (10) acre parcel of land . . . to [Defendants]. Should [Plaintiffs] have the financial need in their judgment, [Defendants] agree to re-convey eight (8) acres of land including the existing frame dwelling and frame barn to [Plaintiffs]. The parties acknowledge the re-conveyance would be conditioned upon: A. Subdivision approval ([Defendants] to pay subdivision costs). B. Securing a release of mortgage lien as [Defendants] intend to secure a construction loan for the purpose of building a residential dwelling on this property being gifted to them by [Plaintiffs].

[1] The lot was conveyed from Plaintiffs to Defendants for the consideration of $1.00. *Motion for Summary Judgment, Exhibit D.*

> The parties acknowledge their intent to make this memorandum a binding contract subject to the conditions above referenced.

Motion for Summary Judgment, Ex. E; Answer to New Matter and Counterclaim, p. 3. Defendants proceeded to build their new home and install a driveway on the Subject Property. *Id. at ¶ 19; Mellin Depo., pp. 18-19.* Defendants also made improvements to the aforementioned frame dwelling and frame barn (hereinafter "rental unit"), which sat upon the Subject Property.[2] *Mellin Depo., pp. 49-52.* On March 23, 2006, Plaintiffs notified Defendants they were exercising their rights under the Memorandum, specifically, to have Defendants reconvey eight (8) acres of the Subject Property - including the rental unit. *Motion for Summary Judgment, ¶ 21, 22.* Defendants refused to reconvey the eight (8) acres to Plaintiffs. *Id. at ¶ 23; Defendants Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pp. 2-3.*

On October 9, 2007, Plaintiff filed their Complaint which contained four counts against Defendants: Count I, Breach of Contract; Count II, Unjust Enrichment; Count III, Constructive Trust; and Count IV, Fraud. *Complaint, ¶¶ 20-51.* Defendants filed a Counterclaim on November 20, 2007 alleging at Count I, Promissory Estoppel; and Count II, Unjust Enrichment. *Counterclaim, ¶¶ 1-20.*

On August 5, 2009, Plaintiffs filed their Motion for Summary Judgment along with a Brief in Support thereof.[3] *Motion for Summary Judgment, ¶¶ 1-63; Plaintiffs' Brief in Support of Motion for Summary Judgment, pp. 1-14.* Defendants subsequently filed their Brief in Opposition on September 10, 2009, which was followed by Plaintiffs' Reply Brief on September 23, 2009. *Defendants Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pp. 1-17; Plaintiffs' Reply Brief in Response to Defendants' Brief in Opposition to Motion for Summary Judgment, pp. 1-4.*

Analysis of Law

Any party may move for summary judgment, in whole or in part, after the relevant pleadings are closed. *See, Ertel v. The Patriot-News Co.,* 674 A.2d 1038 (Pa. 1996); *cert. denied,* 519 U.S. 1008 (1996). Summary judgment is appropriate when the record either demonstrates: no genuine issue of material fact exists as to a necessary element of the cause of action or defense (that could be established by additional discovery or

[2] Plaintiffs received monthly rental income from the rental unit prior to the conveyance, and a verbal agreement was contemporaneously made with the conveyance wherein Plaintiffs would continue to receive the income from the rental unit. *Motion for Summary Judgment, ¶¶ 12, 14; Mellin Depo., pp. 15-18, 22-23*

[3] Plaintiffs claim summary judgment is appropriate not only in favor of Counts I and II of their Complaint, but also against both of Defendants' counterclaims. *Motion for Summary Judgment, p. 10.*

expert report); or an adverse party, who will bear the burden of proof at trial, has failed to produce evidence of facts essential to their *prima facie* cause of action or defense which would require the issues be submitted to a jury.[4] *Pa.R.C.P. § 1035.2.*

It is Plaintiffs' burden, as the moving party, to prove summary judgment is appropriate, and all doubts as to such shall be resolved against them. *See, Ertel,* 674 A.2d at 1041. However, this is not to say Defendants, as the nonmoving party, may rest upon the mere allegations or denials of their pleadings, but they must set forth by affidavit, or otherwise, specific facts showing summary judgment is not appropriate. *See, Id.* at 1042; *Burger v. Owens III., Inc.*, 966 A.2d 611, 619-20 (Pa. Super. 2009).

The Court must not only examine the record in a light most favorable to the nonmoving party, but it must also accept as true all well-pled 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). To that end, the Court has viewed the record in a light most favorable to Defendants, and has weighed applicable law as it relates to the facts of this case along with the merit of the arguments presented by both Plaintiffs and Defendants in determining whether summary judgment is proper. Though the general issue before the Court is whether Plaintiffs are entitled to summary judgment, the Court, in order to determine such, must specifically address several issues.

The first of these issues deals with the existence of genuine issues of material fact as to whether the Memorandum represents a valid contract between the parties. Plaintiffs must establish the existence of an actual contract, among other things, in order to maintain a cause of action in breach of contract.[5] *See, Lackner v. Glosser,* 892 A.2d 21, 30 (Pa. Super. 2006). Defendants aver there are genuine issues of material fact as to the validity of the Memorandum; specifically, Plaintiffs failed to give consideration and the Memorandum did not constitute a mutual understanding between the parties rendering it unconscionable. *Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pp. 7, 11.*

Defendants argue that, as they had already owned the Subject Property at the moment the Memorandum was signed (due to the fact that delivery of the deed was "already complete" at that time making Plaintiffs "already legally obligated to comply with the transfer"), the Memorandum lacks

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[4] 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 Civil Rule 4003.5(a)(1), whether the reports have been produced in response to interrogatories. *Pa.R.C.P. 1035.1.*

[5] "Other things," i.e., a plaintiff must also establish the contract's essential terms, a breach of a duty imposed by the contract; and resulting damages. *Lackner,* 892 A.2d at 30. As Defendants only take issue with whether Plaintiffs' have established that a contract existed, the Court shall limit its analysis accordingly.

consideration. Defendants assert a contract cannot be based on a promise to do something that Plaintiffs were already bound to do, i.e., transfer title of the Subject Property. *See, Malamed v. Sedelsky,* 80 A.2d 853, 856 (Pa. 1951)(holding delivery of a deed is sufficient to pass title to realty); *State Capital Savings & Loan Ass'n v. 221 Shady Ave.,* 420 A.2d 744, 745-46 (Pa. Super. 1980)(holding performance of an act which one is already legally bound to render is not consideration for the plain reason that there is no benefit to the entitled party nor a detriment to the one already legally obligated to perform); *Defendants' Brief in Opposition to Plaintiffs Motion for Summary Judgment, pp. 10-11.*

Parties must normally exchange consideration in order for a contract to exist. *Estate of Beck,* 414 A.2d 65, 68 (Pa. 1980); *Weaverton Transp. Leasing, Inc. v. Moran,* 834 A.2d 1169, 1172 (Pa. Super. 2003). However, under the Uniform Written Obligations Act, lack of consideration is removed as a ground for avoiding a contract where a statement of the parties' intent to be legally bound to it is included therein.[6] *33 P.S. § 6., McGuire v. Schneider, Inc.,* 534 A.2d 115, 118 (Pa. Super. 1987); *citing, Kay v. Kay,* 334 A.2d 585, 587 (Pa. 1975). The Memorandum reveals both parties acknowledged "their intent to make [the] Memorandum a binding contract subject to the conditions above referenced," i.e., the reconveyance of eight (8) acres should Plaintiffs have "financial need in their judgment" in return of the initial conveyance. *Motion for Summary Judgment, Ex. E.* Therefore, the Court finds any argument - proffered or otherwise - regarding lack of consideration to be inconsequential to Plaintiffs' Breach of Contract claim due to Defendants' written intent to be legally bound to the Memorandum's conditions pursuant to the Pennsylvania Supreme Court's interpretation and application of Title 33, Section 6 of the Pennsylvania Statutes. *See, Kay,* 334 A.2d 585.

Defendants also argue the Memorandum (to which their signatures denote they intended to be legally bound) is unconscionable as it did not constitute a mutual understanding between the parties in that they were mistaken as to its purpose because: one, the Memorandum and possible re-conveyance was never previously discussed with Defendants; two, Defendants were not involved in the drafting of the Memorandum; three, Defendants did not have any input into the Memorandum's contents; and four, Attorney Devine made several misrepresentations to Defendants regarding the Memorandum's legal effect. *Defendants' Brief in Opposition to Plaintiffs Motion for Summary Judgment, pp. 9-10.*

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[6] *Failure* of consideration, unlike Defendants' presently averred lack of consideration, goes to the heart of any claim based on an agreement, and is always an available defense to that claim. *See, M.N.C. Corp. v. Mount Lebanon Med. Ctr.,* 509 A.2d 1256, 1259 (Pa. 1986); *see also, Williams v. Katawczlk,* 53 Pa. D. & C.4th 558 (C.P. Allegheny Co. 2001)(holding 33 P.S. § 6 does not apply in an action for breach of contract in which there is a failure of consideration because the case law construes it only to remove lack of consideration as a ground for enforcing a contract).

The first three of Defendants' four arguments against the existence of mutual assent indicate Defendants believe their lack of participation in the Memorandum's drafting, coupled with their failure to have it explained to them, led to their ignorance of both its contents and legal effect, and consequentially a lack of mutual assent. Literate persons have a duty to read a contract before signing it, and if such persons are unable to understand the terms of the writing, so that they are aware of its contents, they are under a duty to have one who does understand it read and explain it to them; if they do not, they are bound by their signatures and bear the risk of mistake. *Fried v. Feola,* 129 F. Supp. 699, 704 (W.D. Pa. 1954); *Estate of Brant,* 344 A.2d 806 (Pa. 1975); *Restatement (Second) of Contracts 154(b),(c).* Not only have Defendants admitted to voluntarily signing the Memorandum without question, and with a clear appreciation of all its terms[7], but Defendants were also duty-bound to seek assistance in understanding the Memorandum if they were at all unclear as to its terms and legal effect. Their failure to do so leads the Court to find they treated their supposed limited knowledge as sufficient. Thus, Defendants' actions invalidate any claim against the existence of mutual assent based on the first three of the four arguments.

Defendants fourth argument relies on the axiom that mutual agreement cannot be realized where one party has been induced to execute a contract through misrepresentation. *See, Degenhardt v. The Dillon Co.,* 669 A.2d 946, 950 (Pa. 1996); *DeJoseph v. Zambelli,* 139 A.2d 644 (Pa. 1958); *Weaverton Transp. Leasing, Inc.,* 834 A.2d at 1172; *see also, McFadden v. American Oil Co.,* 257 A.2d 283 (Pa. Super. 1969) (holding a unilateral mistake due to the negligence of the mistaken party typically affords no basis for relief, unless there is mistake on one side and fraud or misrepresentation on the other). Defendants specifically state Attorney Devine misrepresented that Defendants were required to sign the Memorandum in order to receive the Subject Property, despite his belief that it would be unenforceable in court. *Defendants' Brief in Opposition to Plaintiffs Motion for Summary Judgment, p. 10.*

While extrinsic evidence is generally admissible to contradict the terms of an ambiguous contract when fraud and/or misrepresentation is alleged, extrinsic evidence such as Attorney Devine's alleged statement is not admissible if the terms of the Memorandum are unambiguous. *See, West Conshohocken Rest. Assoc., Inc., v. Flanigan,* 737 A.2d 1245, 1248 (Pa. Super. 1999)(holding extrinsic evidence is admissible to contradict the terms of an ambiguous contract); *McCartney v. Dunn & Conner, Inc.,* 563 A.2d 525, 530 (Pa. Super. 1989)(holding extrinsic evidence is not admissible when it regards advice of counsel that may be contrary to the terms of an unambiguous contract).

[7] *See, Mellin Depo., pp. 29-30, 81-82.*

A reading of the Memorandum itself, coupled with Defendants' own admission to understanding its terms, reveals it to be an unambiguous document.[8] Therefore, any extrinsic evidence regarding the statements of Defendants' legal counsel at closing are inadmissible for Defendants' desired purposes. Even if such alleged statements were admissible, the record before the Court supports a finding that Defendants simply misunderstood Attorney Devine's representations. The record depicts that while he denies stating the Memorandum would not hold up in Court, he is rather forthright that he made several statements to both parties noting the reconveyance, if requested, would be very difficult to obtain due to several "tough hurdles," e.g., paragraphs "A" and "B" of the Memorandum. *Devine Depo., pp. 17-18, 20-21, 31-32.* Consequentially, just as with their first three arguments, Defendants' fourth argument against the existence of mutual assent does not establish a basis for their desired relief.

The Court finds mutual assent was obtained between the parties, as any misunderstanding on Defendants' behalf was the result of a unilateral mistake born out of their own negligence. Moreover, Defendants admit that they knowingly and willingly signed the Memorandum after the transfer of land was already completed because they didn't believe Plaintiffs were going to attempt to enforce it. *Brief in Opposition to Motion for Summary Judgment, p. 10; Richard Mellin Depo., p. 28.* Therefore, it appears that Defendants understood the effect of the Memorandum when they signed it, they just assumed Plaintiffs would not ask for reconveyance.[9] This, coupled with the fact that lack of consideration is a non-issue, leads the Court to find there to be no genuine issue of fact as to the Memorandum's validity.

As the Court has also found the valid Memorandum to be unambiguous, it must enforce the plain meaning of the terms contained therein. *See, Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418, 429-30 (Pa. 2001). The Memorandum states that "should [Plaintiffs] have the financial need in their judgment, [Defendants] agree to re-convey eight (8) acres of land including the existing frame dwelling and frame barn

[8] The question of whether the Memorandum is ambiguous is a question of law left to the Court to determine. *See, Kripp v. Kripp*, 843 A.2d 1159, 1164 (Pa. 2004). Defendants' deposed admission to comprehending the Memorandum in its entirety when it was presented to them at closing, along with the Court's own reading of the one-page document, leads it to find ambiguity does not exist among the terms set forth in the Memorandum. *See, Mellin Depo., pp. 29-30, 81-82.*

[9] Defendants state the Memorandum was "[a]t most ... a subsequent agreement by the Defendants to reconvey the property to Plaintiffs, which agreement is unenforceable for lack of consideration." Brief in Opposition to Plaintiffs' Motion for Summary Judgment, p. 12. The Court agrees with Defendants, the Memorandum was a subsequent agreement between the parties following the transfer, however, because the parties' intent to be legally bound is contained in the signed Memorandum, consideration is unnecessary to make the Memorandum enforceable.

to [Plaintiffs]." *Motion for Summary Judgment, Ex. E.* Defendants' acknowledgement of Plaintiffs' financial need is unnecessary as its existence is based solely on Plaintiffs' own judgment. *Id.* Nevertheless, Plaintiffs expressed to Defendants they were struggling, and Defendants acknowledged such financial difficulties.[10] *Mellin Depo., pp. 85-86.* Therefore, the Court finds Defendants' breached the contract due to their failure to reconvey the eight (8) acres even after learning of Plaintiffs' financial hardships.

The Court must also determine whether Defendants have produced evidence of facts essential to their prima facie counterclaim of Promissory Estoppel. Defendants contend they have provided sufficient evidence to establish their promissory estoppel claim, and Plaintiffs should therefore be estopped from seeking the reconveyance of the eight (8) acres of the Subject Property. Defendants' claim relies on the alleged: representations made by Plaintiff Axell Gardner; their effect as to the building of Defendants' new home; and the injustice and costs that would arise if Defendants were required to reconvey the eight (8) acres. *Answer, New Matter, and Counterclaim, pp. 19-20; Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pp. 13-15.* Defendants specifically state Plaintiff Axell Gardner's representations consisted of his "insistence" Defendants "build their home on the rear, western portion of the Subject Property," and his "indicat[ion] that [Defendants] did not need to be concerned about the reconveyance, and that [Plaintiffs] would likely never need the eight (8) acres back."[11] *Answer, New Matter, and Counterclaim, p. 19.*

Defendants may only maintain a claim of promissory estoppel where they show each of the following three elements: (1) Plaintiffs *made a promise* they should have reasonably expected would induce action or forbearance on the part of Defendants; (2) Defendants actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise. *See, Shoemaker v. Commonwealth Bank,* 700 A.2d 1003, 1006 (Pa. Super. 1997)(*emphasis added*). By Defendants' own pleadings, Plaintiff Axell Gardner "insisted" on a location to build the home and "indicated" Plaintiffs would likely

[10] In fact, Plaintiffs' attorney at the time sent a letter to the Defendants on March 23, 2006 which stated "Although the need for reconveyance only need be in the Gardners' judgment, you should be aware that Axell is in a nursing home, their tenant is gone, and [Plaintiffs' son] won't share any of the benefits of the farms he owns with Axell. In short, the Gardners do not have the means with which to live." *Motion for Summary Judgment, Exhibit F. Defendants admit receiving this letter. Answer, ¶ 16.*

[11] Though not included in their initial counterclaim, Defendants later raise the aforementioned representations made by Attorney Devine as a basis for relief via promissory estoppel. *Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pp. 13-15.* In addition to the fact Attorney Devine is not a party to this present lawsuit, the Court finds it has already addressed such representations and need not further address them in regards to Defendants' promissory estoppel claim.

never require the reconveyance. *Answer, New Matter, and Counterclaim, p. 19.*

The Court finds a person "insisting" or "indicating" is not tantamount to one "promising." Furthermore, Defendant Cheryl Mellin stated Defendants did not place their new home on the final location due to any inducement by Plaintiff Axell Gardner and his statements, but because they deemed it the best location on the Subject Property to put their new home. *Mellin Depo., pp. 75-76.* Finally, Defendants have not provided the Court with documentation showing even an estimation as to the costs that would be imposed upon them if Defendants would be required to reconvey the eight (8) acres. As such, the Court cannot determine the severity, if any, of the alleged injustices and costs. Therefore, the Court finds Defendants have failed to provide sufficient evidence to their prima facie claim of promissory estoppel.

Finally, the Court must determine whether Defendants have produced evidence of facts essential to their prima facie claim of Unjust Enrichment. Defendants also contend they have provided sufficient evidence to establish a claim of unjust enrichment, and Plaintiffs may not accept the value of the repaired rental unit should Defendants be required to reconvey the eight (8) acres of the Subject Property. Defendants cite the Pennsylvania Superior Court's decision of *Mitchell v. Moore,* which enumerates the elements necessary to prove unjust enrichment as follows: (1) benefits conferred on defendant by plaintiff; (2) appreciation of such benefits by defendant; and (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. *Mitchell v. Moore,* 729 A.2d 1200, 1203 (Pa. Super. 1999). However, by its nature, the doctrine of unjust enrichment, is inapplicable where a written or express contract exists. *Lackner v. Glosser,* 892 A.2d 21, 34 (Pa. Super. 2006); *citing, Mitchell v. Moore,* 729 A.2d 1200 (Pa. Super. 1999). In other words, one may only recover under a quasi-contract theory of unjust enrichment provided no express contract exists between the parties. *See, Northeast Fence & Iron Works, Inc., v. Murphy Quigley Co., Inc.,* 933 A.2d 664, (Pa. Super. 2007).

The valid and unambiguous Memorandum entered into by the parties on June 17, 2005, reads "[Defendants] agree to re-convey eight (8) acres of land including the existing frame dwelling and frame barn to [Plaintiffs]. *Motion for Summary Judgment, Ex. E.* Due to the existence of the written contract between Plaintiffs and Defendants, the Court is constrained to find Defendants claim of unjust enrichment to be inapplicable. Therefore, a ruling as to whether Defendants have provided sufficient evidence to their prima facie claim of unjust enrichment is unwarranted.

In conclusion, the Court finds that Memorandum entered into on

June 17, 2005 is valid and enforceable. Moreover, Defendants have failed to provide the Court with any sufficient evidence of promises made to them by Plaintiffs that either induced their construction/placement of their new home, or that directly affected any costs that may be associated with reconveyance. The Court also notes that because the Memorandum appears to be valid, Defendant's claim of unjust enrichment is moot.

Consequently, no doubts are raised whether Plaintiffs have successfully shown that summary judgment is appropriate because the provided evidence, even when viewed in a light most favorable to Defendants, reveals the absence of genuine issues of material fact as to the Memorandum's validity, as well as the absence of evidence of facts essential to Defendants' counterclaims. Summary Judgment is therefore granted pursuant to Plaintiffs' Motion.

ORDER

AND NOW, TO-WIT, this 20th day of January 2010, it is hereby **ORDERED, ADJUDGED, and DECREED** that Plaintiffs' Motion for Summary Judgment is **GRANTED** and Defendants' counterclaims are hereby **DISMISSED** for the reasons set forth in the foregoing Opinion.

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

WENDY LEONARDOS and JOHN LEONARDOS, wife and husband, Plaintiffs,

v.

ZEGARELLI ENTERPRISES, INCORPORATED, d/b/a YORKTOWN GIANT EAGLE and, 79 REALTY CORPORATION, Defendants,

v.

GERLACH'S GARDEN and POWER EQUIPMENT CENTER, INCORPORATED, Additional Defendants

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the facts contained in the record are so clear that reasonable minds could not differ as to whether: genuine issues of material fact exist with regard to a necessary element of the cause of action or defense (that could be established by additional discovery or expert report); or whether an adverse party (who will bear the burden of proof at trial) has produced evidence of facts essential to their prima facie cause of action or defense which would require the issues be submitted to a jury.

PREMISES LIABILITY / DUTY OF LESSOR

A lessor not in possession of its leased property typically is not liable for injuries sustained upon that property.

NEGLIGENCE / CONDITION AND USE OF LAND, BUILDING AND STRUCTURES

A lessor retaining control over all, or a part of, leased property may be liable to others lawfully thereon for physical harm caused by a dangerous condition, if the lessor - by the exercise of reasonable care - could have discovered and eliminated both the condition and the unreasonable risk involved therein.

CONTRACTS / INTERPRETATION

The court, as a matter of law, has authority to interpret a lease agreement provided it finds the terms contained therein are not ambiguous. If the court finds the term of the lease agreement to be ambiguous, i.e., reasonably capable of two different interpretations, the resolution of the ambiguity is then an issue for the trier of fact.

REAL ESTATE / CONTRACTS

A sublease does not affect the legal relationship, i.e., the privity of estate and of contract, between the original landlord and the tenant.

CONTRACTS / INTERPRETATION

A party's actions following execution of a contract are indicative of that party's interpretation of the contract.

CONTRACTS / INTERPRETATION

In order for an exculpatory clause to be interpreted and construed to relieve a person of liability for his acts of negligence, it must not only be

part of a contract between persons relating entirely to their own private affairs, but also spell out the intention of the parties with the greatest of particularity and show the intent to release from liability beyond doubt by express stipulation and no words of general import can establish it.

NEGLIGENCE

In order to set forth a prima facie claim of negligence, the plaintiff must show that the defendant breached a duty of care owed to the defendant.

NEGLIGENCE / ACTS OR OMISSIONS CONSTITUTING

Whether the defendant owed the plaintiff a duty is determined by whether or not he may reasonably foresee the plaintiff might be injured as a result of his actions.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 15592-2007

Appearances: Lori R. Miller, Esq., Attorney for Wendy and John Leonardos
Stephen M. Elek, Esq., Attorney for Zegarelli Enterprises, Inc.
Terry L.M. Bashline, Esq., Attorney for 79 Realty, Corp.
Erie N. Anderson, Esq., Attorney for Gerlach's Garden, Inc.

OPINION

Connelly, J., February 3, 2010

This matter is before the Court of Common Pleas of Erie County, Pennsylvania (hereinafter "the Court"), pursuant to Motions for Summary Judgment individually filed by Zegarelli Enterprises, Incorporated, d/b/a Yorktown Giant Eagle (hereinafter "Defendant Zegarelli") and Gerlach's Garden & Power Equipment Center, Incorporated (hereinafter "Additional Defendant Gerlach"). Defendant Zegarelli's Motion is opposed by 79 Realty Corporation (hereinafter "Defendant 79"), Wendy and John Leonardos (hereinafter "Plaintiffs"),[1] and Additional Defendant Gerlach. Additional Defendant Gerlach's Motion is opposed solely by Plaintiffs.

Statements of Fact

On September 3, 1991, Defendant 79 entered into an agreement (hereinafter "Lease") whereby it would lease the property it owned at 2501 West 12th Street, Erie, Pennsylvania (hereinafter "Grocery Store"), to Giant Eagle, Incorporated (hereinafter "Giant Eagle"). *Defendant Zegarelli Motion for Summary Judgment, Ex. A.* On April 24, 1992, Giant Eagle subsequently entered into an agreement (hereinafter "Sublease") whereby it would sublease the Premises to Defendant Zegarelli. *Id.* In August of 2005, Defendant 79 and Additional Defendant Gerlach entered into a contractual agreement (hereinafter "Agreement") whereby

[1] The present litigation largely focuses on Plaintiff Wendy Leonardos. Therefore, while "Plaintiffs" refers to both Wendy and John Leonardos, "Plaintiff" shall hereinafter refer only to Wendy Leonardos unless otherwise noted, e.g., "Plaintiff John Leonardos."

Additional Defendant Gerlach was to remove ice and snow from the parking lot and sidewalk outside of the Grocery Store (hereinafter "Premises"). *79 Realty Corp. Complaint Against Additional Defendant Gerlach, ¶ 6, Ex. C.*

On December 20, 2005, Plaintiff slipped and fell on the Premises while attempting to walk up a ramped cut-out in the sidewalk. *Complaint, ¶¶ 14-15; Defendant Zegarelli Brief in Support of Motion for Summary Judgment, p. 3.* Plaintiff alleges to have sustained various injuries as a direct result of her fall, which was itself the result of the unsafe and dangerous condition of the Premises. *Complaint, ¶ 20.* Specifically, Plaintiff contends she now suffers from a dislocated and fractured right hip, which has required surgery and extensive medical treatment, and will continually call for ongoing medical care expenditures. *Id. at 21.*

Analysis of Law

Any party may move for summary judgment, in whole or in part, after the relevant pleadings are closed. *See, Ertel v. The Patriot-News Co.*, 674 A.2d 1038 (Pa. 1996); *cert. denied,* 519 U.S. 1008 (1996). Summary judgment is appropriate when the facts contained in the record[2] are so clear that reasonable minds could not differ as to whether: genuine issues of material fact exist with regard to a necessary element of the cause of action or defense (that could be established by additional discovery or expert report); or whether an adverse party (who will bear the burden of proof at trial) has produced evidence of facts essential to their prima facie cause of action or defense which would require the issues be submitted to a jury. *Pa.R.C.P. 1035.2; Stimmler v. Chestnut Hill Hosp.*, 981 A.2d 145, 153-54 (Pa. 2009); *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899 (Pa. 2007).

It is the moving party's burden to prove summary judgment is appropriate, and all doubts as to such shall be resolved against it. *See, Ertel*, 674 A.2d at 1041. However, this is not to say the nonmoving party may rest upon the mere allegations or denials of its pleadings, but must set forth by affidavit, or otherwise, specific facts showing summary judgment is not appropriate. *See, Id.* at 1042; *Burger v. Owens III., Inc.*, 966 A.2d 611, 619-20 (Pa. Super. 2009).

The Court must not only examine the record in a light most favorable to the nonmoving party, but it must also accept as true all well-pled 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). To that end, the Court has viewed the record in a light most favorable to the nonmoving parties, and has weighed applicable law as it relates to the facts of this case along with the merit

[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 Civil Rule 4003.5(a)(1), whether the reports have been produced in response to interrogatories. *Pa.R.C.P. 1035.1.*

of the arguments presented by each of the parties in determining whether summary judgment is proper as to Defendant Zegarelli and Additional Defendant Gerlach's respective Motions.

Defendant Zegarelli contends it is entitled to judgment as the Lease and Sublease show Defendant 79 retained control of the section of the Premises where Plaintiff fell, and thus was the only entity that owed her a duty. *Defendant Zegarelli Brief in Support of Motion for Summary Judgment, p. 8.* Therefore, in order to determine whether Defendant Zegarelli is entitled to its requested relief, the Court shall specifically address if genuine issues of fact exist as to whether Defendant 79 retained such control pursuant to the Lease and Sublease,[3] thus owing Plaintiff a duty of care.

A lessor not in possession of its leased property typically is not liable for injuries sustained upon that property. *See, Bleam v. Gateway Prof'l Ctr. Assocs.*, 636 A.2d 172, 174 (Pa. Super. 1993). However, a lessor retaining control over all, or a part of, leased property may be liable to others lawfully thereon[4] for physical harm caused by a dangerous condition, if the lessor - by the exercise of reasonable care - could have discovered and eliminated both the condition and the unreasonable risk involved therein. *Id.; see also, Restatement (Second) of Torts §§ 343, 360.* The leased property at issue, i.e., the Premises, is defined under the Lease and Sublease, both of which the Court, as a matter of law, has the authority to interpret provided it finds the terms contained therein are unambiguous. *See, Kripp v. Kripp,* 849 A.2d 1159, 1163 (Pa. 2004); *DeFazio v. Gregory,* 836 A.2d 935, 940 (Pa. Super. 2003). Conversely, if the Court finds the Lease and Sublease's terms to be ambiguous, i.e., reasonably capable of two different interpretations, the resolution of the ambiguity is then an issue for the trier of fact. *See, Kripp,* 849 A.2d at 1163; *Walton v. Philadelphia National Bank,* 545 A.2d 1383, 1389 (Pa. Super. 1988); *Merriam v. Cedarbrook Realty, Inc.,* 404 A.2d 398, 402 (Pa. Super. 1978).

Giant Eagle's ability to enter into the Sublease with Defendant Zegarelli is permitted under Section 25 of the Lease, which provides Giant Eagle may "sublet all or any part of the Premises without the consent of [Defendant 79]." *Defendant Zegarelli Motion for Summary Judgment, Ex. A.* Pursuant to Section 5 of the Sublease,

> [Giant Eagle] shall have no duty to perform any obligations of [Defendant 79] and shall under no circumstances be responsible or liable to [Defendant Zegarelli] for any *. . . failure . . . on the part of [Defendant 79] in the performance of any obligations*

[3] The Court shall interpret the Lease and Sublease as one for purposes of this Opinion, as the Sublease unambiguously reads the Lease was "made a part [t]hereof" and that the Lease's terms remained in "full force and effect" under the Sublease. *Defendant Zegarelli Motion for Summary Judgment, Ex. A.*

[4] "Lawfully thereon," i.e., with the consent of the lessee or a sublessee. *Restatement (Second) of Torts §360.*

> *under [the Lease],* nor shall such default of [Defendant 79] affect [Defendant Zegarelli's] obligations hereunder.

Id. (emphasis added). Defendant 79's "obligations under the Lease" include keeping the Premises clean and free from snow and ice.[5] *Id.* While such portions of the Lease and Sublease indicate Defendant 79 remains in control of the Premises via its obligations under the Lease, e.g., ice and snow removal under Section 14 of the Lease, Section 39 of the Lease provides its terms shall only "bind and inure to the benefit of [Defendant 79 and Giant Eagle], and their respective heirs, executors, administrators, successors and assigns." *Id.* Noticeably absent from this group are any respective "sublessees" of Defendant 79 or Giant Eagle. *Id.* Such an omission indicates one may interpret those duties bound to Defendant 79 under the Lease, are not consequently bound to it under the Sublease as Defendant Zegarelli is a sublessee of Giant Eagle.[6]

The Court finds the words contained in the above-noted sections of the Lease and Sublease create ambiguity wherein different interpretations may arise in regard to Defendant 79's retained control over the Premises via its duty to continue snow and ice removal therefrom. Bolstering such ambiguity, Defendant 79 and Defendant Zegarelli's actions following the execution of the Sublease indicate each party possessed differing interpretations of the Sublease and the duty arising therefrom, in that both assumed responsibility for snow and ice removal from the Premises.[7] *Response to Motion for Summary Judgment, Ex. A, C; Appendix to Additional Defendant Gerlach's Motion for Summary Judgment, Exs. 1, 6.* Thus, ambiguity (as indicated by the differing interpretations) is strongly revealed through Defendant 79 and Defendant Zegarelli's

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[5] Section 1(j) of the Lease denotes "common areas" to be considered as, "all areas exterior to the Premises . . . which are available for the joint use and benefit of [Defendant 79], [Giant Eagle], and their respective . . . licensees, customers and other invitees, including but not limited to . . . passageways, sidewalks, entrances, exits, [etc.]." *Defendant Zegarelli Motion for Summary Judgment, Ex. A.* Using the ordinary meanings of the common words: "passageways;" "sidewalks;" "entrances;" and "exits," in corroboration with the precise definition of the Premises as defined in the Lease and Sublease, the Court finds the spot where Plaintiff fell was contained within the Premises.

[6] A sublease does not affect the legal relationship, i.e., the privity of estate and of contract, between the original landlord and tenant (here, Defendant 79 and Giant Eagle). *See, Ottman v. Albert Co.*, 192 A. 897 (Pa. 1937). However, an assignment would affect the legal relationship between Defendant 79 and Giant Eagle in that it would create privity of estate and of contract, not between Defendant 79 and Giant Eagle, but between Defendant 79 and Giant Eagle's would-be assignee. *See, Id.* Thus, ignoring the previously-noted sections of the Lease and Sublease, Section 39 of the Lease indicates Defendant 79 owes no continued duty to fulfill its obligations of snow removal under the Lease to Giant Eagle's sublessee, Defendant Zegarelli.

[7] Defendant 79 continued to assume control of the Premises and maintain responsibility for ice and snow removal throughout the Sublease by employing Additional Defendant Gerlach to remove snow and ice therefrom. *See, Appendix to Additional Defendant Gerlach's Motion for Summary Judgment, Exs. 1, 6.* Defendant Zegarelli assumed the same through not only contracting with Osterberg Refrigeration for maintenance of a heated ramp on the Premises for the purposes of removing ice and snow, but also through placing deicer/salt on the location where Plaintiff fell, if and when it might need it. *Response to Motion for Summary Judgment, Exs. A, C.*

actions. *See, Merriam v. Cedarbrook Realty, Inc.*, 404 A.2d 398, 402 (Pa. Super. 1978)(holding a party's actions following execution of a contract are indicative of his interpretation thereof).

Therefore, the Court finds the resolution of the present ambiguity and the determination as to which party, if any, breached its duty to Plaintiff to remove the alleged dangerous condition through exercise of reasonable care are issues best left to a jury as the trier of fact. Consequently, Defendant Zegarelli's Motion for Summary Judgment is denied, as a genuine issue of material fact exists as to whether Defendant 79 retained sole control of the Premises in regard to the obligation of snow and ice removal, and thus the only entity that owed a duty to Plaintiff.

Defendant 79 avers Plaintiff's injuries, if proven, were the result of Additional Defendant Gerlach's negligence, i.e., failure to adequately remove all accumulations of ice and/or black ice from the Premises as outlined in the Agreement. *Complaint Against Additional Defendant Gerlach, ¶¶ 1-11.* Therefore, in order to determine whether Additional Defendant Gerlach is entitled to its requested relief of judgment in its favor, the Court shall specifically address if genuine issues of material fact exist as to whether Plaintiff's injuries were the result of any alleged negligence on behalf of Additional Defendant Gerlach.

In order to set forth a prima facie claim of negligence, it must be shown, *inter alia*, an actor breached a duty of care it owed to the plaintiff. *See, Summers v. Giant Food Stores, Inc.*, 743 A.2d 498 (Pa. Super. 1999). Whether the actor owed the plaintiff a duty is determined by whether or not he may reasonably foresee the plaintiff might be injured as a result of his actions. *See, Dahlstrom v. Shrum*, 84 A.2d 289, 290-91 (Pa. 1951) (holding the risk to another reasonably perceived defines the duty to be obeyed). Additional Defendant Gerlach contracted to remove snow and ice from the Premises pursuant to the Agreement's express terms, which stated removal was to be done by snowplowing; salting; and sidewalk cleaning/ice melting.[8] *Appendix to Additional Defendant Gerlach's*

[8] The Agreement contains an exculpatory clause that reads, "plowing or salting of [the Premises] may not clear the area to the bare pavement and that slippery conditions may continue to [naturally] prevail . . . [Defendant 79] agrees to . . . hold harmless [Additional Defendant Gerlach] for any and all . . . suits that may arise as a result of this naturally occurring condition." *Appendix to Additional Defendant Gerlach's Motion for Summary Judgment, Ex. 1.* In order for an exculpatory clause to be interpreted and construed to relieve a person of liability for his acts of negligence, it must not only be part of a contract between persons relating entirely to their own private affairs, but also spell out the intention of the parties with the greatest of particularity and show the intent to release from liability beyond doubt by express stipulation and no inference from words of general import can establish it. *See, Princeton Sportswear Corp., v. H&M Assocs.*, 507 A.2d 339, 341 (Pa. 1986). The Agreement does not relate entirely to Additional Defendant Gerlach and Defendant 79's private affairs, in that it also latently relates to possible injuries of third parties, e.g., Plaintiff. Furthermore, the clause spells out the intention of the parties to release Additional Defendant Gerlach of liability that may result from suits arising out of naturally occurring conditions, but not naturally occurring conditions that may exist due to negligence. Therefore, the Court finds that the exculpatory clause in the Agreement cannot, alone, relive [sic] Additional Defendant Gerlach of liability.

Motion for Summary Judgment, Ex. 1. Thus, it assumed a specific duty to Plaintiff, as she is a person who one may reasonably foresee might be injured by Additional Defendant Gerlach's failure to carry out the obligations under the Agreement. *See, Dahlstrom,* 84 A.2d at 290-91.

Despite the Agreement's terms that show Additional Defendant Gerlach was to clear the sidewalks on the Premises, Additional Defendant Gerlach admits it did not clear snow and ice from the spot where Plaintiff fell that day because it is "a properly-working heated sidewalk," warmed by a heating system installed to melt any snow that fell thereon, and therefore not necessary. *Additional Defendant Gerlach's Motion for Summary Judgment, ¶¶ 11-12, 25.* While the Court makes no determination as to the efficacy of this particular heating system, it does note the record nevertheless shows that a Mr. John Lorenzo[9] observed black ice at this spot, i.e., the spot of Plaintiff's fall. *Appendix to Additional Defendant Gerlach's Motion for Summary Judgment, Ex. 5.*

The record shows Additional Defendant Gerlach assumed the duty to clear the Premises of ice and snow, and - regardless of its reasons - admittedly failed to do so on the spot of Plaintiff's fall. Furthermore, Mr. Lorenzo testified to the presence of ice at this spot. While the ice's existence may very well be a natural condition, the Court finds it is a natural condition that reasonable minds may determine would not have existed provided Additional Defendant Gerlach met the duty it assumed at the signing of the Agreement. Therefore, the Court finds the provided evidence reveals reasonable minds may differ as to whether Additional Defendant Gerlach breached its duty to Plaintiff. Additional Defendant Gerlach's Motion for Summary Judgment is consequently denied as there exists genuine issues of material fact as to whether Plaintiff's injuries were the result of any alleged negligence on behalf of Additional Defendant Gerlach.

ORDER

AND NOW, TO-WIT, this 3rd day of February, 2010, it is hereby **ORDERED, ADJUDGED, and DECREED** that, for the reasons set forth in the foregoing Opinion, both Defendant Zegarelli and Additional Defendant Gerlach's respective Motions for Summary Judgment are **DENIED.**

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

[9] John Lorenzo was deposed by Additional Defendant Gerlach as he was a witness to Plaintiff's fall. *Appendix to Additional Defendant Gerlach's Motion for Summary Judgment, Ex. 5.*

COMMONWEALTH OF PENNSYLVANIA
v.
PAUL RANSFORD REID

CRIMINAL PROCEDURE / PRE-TRIAL MOTIONS / SUPPRESSION MOTIONS

At a suppression hearing, the Commonwealth bears the burden of proving that the challenged evidence was lawfully obtained. Pa.R.Crim.P. 581(H).

CONSTITUTIONAL LAW / 4TH AMENDMENT / SEARCH AND SEIZURE

A police officer may stop a vehicle whenever he has reasonable suspicion based on articulable facts to suspect that a provision of the Motor Vehicle Code has been violated.

CONSTITUTIONAL LAW / 4TH AMENDMENT / AUTOMOBILE SEARCHES / WAIVER AND CONSENT

Police may search a vehicle without a warrant or probable cause if the owner of the vehicle validly consents to the search. It is the Commonwealth's burden to prove that a defendant consented to a warrantless search.

CONSTITUTIONAL LAW / 4TH AMENDMENT / AUTOMOBILE SEARCHES / VALIDITY OF CONSENT

For consent to an otherwise illegal search to be valid, the consent must be unequivocal, specific and voluntary. The determination whether consent is voluntary is made upon an examination of the totality of the circumstances.

CONSTITUTIONAL LAW / 4TH AMENDMENT / AUTOMOBILE SEARCHES / VALIDITY OF CONSENT

Factors to be considered in determining whether consent was voluntarily given include (1) the circumstances and nature of a prior lawful detention; (2) the presence of numerous officers; (3) police conduct and demeanor in the encounter; (4) the location of the interaction; (5) the length of time of the detention; (6) whether police isolated subjects, physically touched them or directed their movement; (7) the content or manner of questions or statements; (8) the absence of an express endpoint to the detention in the form of an admonition by the officer that the defendant is free to leave; and (9) the defendant's knowledge of his right to refuse to consent.

CONSTITUTIONAL LAW / 4TH AMENDMENT / AUTOMOBILE SEARCHES / VALIDITY OF CONSENT

A two-hour roadside detention in the presence of numerous police officers coupled with the defendants refusing to sign a written consent to search and remaining silent when verbally asked for consent to search were inconsistent with a consensual search.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 1942 of 2009

Appearances: Mark W. Richmond, Esq., Attorney for the Commonwealth
Stephen E. Sebald, Esq., Attorney for the Defendant

OPINION AND ORDER

The Defendant in this matter has filed an *Omnibus* Pre-Trial Motion requesting a Suppression of evidence including contraband that was seized from him as a result of a traffic stop on June 24, 2009 by Trooper Gary Knott of the Pennsylvania State Police.

A hearing was held in this matter on April 7, 2010 in which extensive testimony was taken from the witnesses.

The factual basis for this stop was that Trooper Gary Knott, who was on patrol in a marked State Police Patrol car on Interstate 90 observed the Defendant operating a 1990 white Audi with Florida registration plates that were obscured by a dark and plastic cover. The Trooper initiated a stop with his lights; the Defendant was initially cooperative and produced proper license, registration and insurance papers. The Trooper verified that the papers and registration were correct and as the Trooper began to return the documents to the Defendant, the Trooper asked the Defendant whether or not he had any contraband, weapons, drugs, etc. in the car, to which the Defendant replied "No". The Trooper also asked the Defendant if he had ever been arrested, to which the Defendant said "No". The Trooper knew this information to be incorrect because when he was checking the registration and insurance from his computer in the car, he also checked the criminal record of the Defendant, who is a Jamaican immigrant and now a naturalized citizen. The record indicated that the Defendant had been arrested in 1998 for possession of marijuana but the charges were subsequently dismissed.

The Court also finds that Trooper Knott had told Mr. Reid that he was free to leave, but after this conversation, Trooper Knott did not believe that Mr. Reid was exhibiting signs indicative of deceptive behavior and requested from Mr. Reid permission to search the car. The Trooper claims that Mr. Reid consented; Mr. Reid testified that he did not. At the time of the request for the search and shortly there after, two additional Troopers arrived at the scene along Interstate 90. It was at this point that the Court concludes that this was no longer a traffic stop, but in fact a detention.

Trooper Knott continued to search the vehicle including removing the rear seat, opening the trunk in which he discovered what appeared to be a supplemental gas tank, that had no outlet valve. Despite this search of the car and the trunk, which also contained a suitcase, the Trooper was unable to find any contraband and continued to detain Mr. Reid for an additional two hours awaiting a drug search dog to appear with the aid of the Department of Immigration services. The dog did not arrive on the scene

until 2:40 p.m. Significantly, the Trooper asked the Defendant to sign a written form granting permission to search the vehicle and its contents. The Defendant refused. The Trooper then again asked the Defendant for oral permission to search and the Defendant remained silent. More particularly the Trooper told the Defendant that if he did not respond then the Trooper would assume that the Defendant was consenting to the search. The Defendant remained silent and the Trooper continued the search resulting in the discovery of over 12 pounds of marijuana. In order to be a valid consent to search the consent must be unambiguous and unequivocal. The Defendant by refusing to sign a written consent to search and maintaining his silence clearly did not unequivocally consent to search, in fact he refused to give permission to search.

The dog immediately alerted to the suitcase, which when opened contained 12 pounds of high-grade marijuana. Mr. Reid's vehicle was seized and he was placed under arrest. Subsequently at the barracks he signed a waiver and revealed his source of drugs in Cleveland, Ohio, another Jamaican, and that he was transporting the drugs from Ohio to New Jersey.

This case is almost identical to the factual situation found in *Commonwealth v. Powell*, 2010 WL 1226148 (March 31, 2010) Superior Court. In fact, the circumstances of the stop, the actions of the trooper and the words used are virtually identical to the aforementioned case the Superior Court held that a search and detention of more than 20 minutes was more than sufficient to require a Suppression of the Evidence, because it was no longer a traffic stop. This Court concludes, as did the Superior Court in the aforementioned case, that Mr. Reid was not free to go under the totality of the circumstances. Therefore, it is with great reluctance that the Court must GRANT the Motion to Suppress the Evidence and any subsequent statements made by Mr. Reid, as a result of this illegal detention.

It certainly does not prevent the Commonwealth from notifying Immigration and Naturalization Services of the criminal conduct of Mr. Reid, as well as a seizure of the contraband and the automobile as products of a criminal activity.

ORDER

And now this 23rd day of April, 2010, consistent with reasoning and findings in the afore mentioned Opinion, the Court grants the Motion to Suppress, the evidence and statements of the Defendant.

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

42 Pa. R.C.P. 1030 requires that all affirmative defenses be pled as "New Matter." While Rule 1030 does not itself require factual averments, neither does it relieve the pleading party from complying with Rule 1019(a), which requires that material facts supporting a defense be pled in concise and summary form.

PLEADINGS / GENERAL REQUIREMENTS

A verification does not meet the requirements of 42 Pa. R.C.P. 206.3 when signed by a person who is not identified as an authorized representative of a party.

PLEADINGS / GENERAL REQUIREMENTS

A verification does not meet the requirements of 42 Pa. R.C.P. 206.3 when it does not specify whether or not the signor has personal knowledge of the averments in the pleading.

PLEADINGS / NEW MATTER

New Matter which merely incorporates the averments of previously filed preliminary objections and supporting brief is overly broad and vague.

PLEADINGS / NEW MATTER

New Matter which asserts the statute of repose as a defense but which reveals no factual basis for the defense other than to make the assertion of defense contingent upon the revelation of a basis for the defense in discovery is insufficiently specific.

PLEADINGS / NEW MATTER

New Matter which asserts generally that agreement may limit or bar plaintiff's claims but which identifies no specific basis for the defense is overly broad and vague.

PLEADINGS / NEW MATTER

New Matter which raises objections to Complaint, which objections were previously raised in defendant's preliminary objections to Complaint and overruled by Court, is improper and will be stricken without leave to amend.

PLEADINGS / NEW MATTER / INTERVENING CAUSES

The defense of intervening or superseding is one that requires more specificity in pleading than other defenses and New Matter that merely asserts that other parties over whom defendant had no control may have caused plaintiff's injuries but which does not otherwise identify those

parties is insufficiently specific.

PLEADINGS / NEW MATTER / MITIGATION

New Matter which asserts that mitigation may bar or limit plaintiff's claims "If in fact supported by discovery yet to be conducted..." is insufficiently specific.

PLEADINGS / NEW MATTER / PRELIMINARY OBJECTIONS

New Matter that describes plaintiff's pre-existing conditions in detail asserts that plaintiff's claims are barred or limited by said pre-existing condition was sufficiently pled and preliminary objections to same would be overruled.

PLEADINGS / NEW MATTER

Mere assertion of MCARE Act and Health Care Services Malpractice Act of Pennsylvania as offering affirmative defenses without any greater specificity is insufficient even when the pleading party asserts that there has been insufficient time and opportunity to identify more specific information pertaining to such defenses.

PLEADINGS / NEW MATTER

New Matter alleging that failure to obtain Certificate of Merit is an affirmative defense "(I)n the event that discovery should determine... [that a Certificate of Merit was not obtained]" is an improper assertion of an anticipatory defense and will be stricken without leave to amend.

PLEADINGS / NEW MATTER

New Matter which purports to "reserve right to amend" later is overly broad and will be stricken.

PLEADINGS / NEW MATTER

New Matter which purports to assert defense to delay damages is improper at pleadings stage but such defense may be raised in response to claim for delay damages if and when such claim arises.

PLEADINGS / NEW MATTER

New Matter that asserts preexisting condition(s) as an affirmative defense but which does not identify the preexisting condition is impermissibly vague and overbroad, even when defendant asserts that "(A)s this matter is only in the early stages of discovery, and these Defendants have not completed their investigation of plaintiffs' claims, Defendants have not yet identified which preexisting medical conditions may have caused Decedent's claimed injuries..."

PLEADINGS / NEW MATTER

"Two Schools of Thought Doctrine" is not an affirmative defense which must be pled as New Matter.

PLEADINGS / NEW MATTER / PRELIMINARY OBJECTION

New Matter that raises defense of contractual arbitration clause, which defense was previously raised by defendant via preliminary objection and specifically rejected by Court on its merits, is improper and will be stricken without leave granted to amend.

CIVIL PROCEDURE / COMMENCEMENT OF ACTION

Personal representative of decedent is proper party to bring wrongful death action for the benefit of those persons entitled by law to recover damages for such wrongful death. 42 Pa. R.C.P. 2202.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 15969-2008

Appearances: Christina S. Nacopoulos, Esq., Attorney for Plaintiffs
Thomas M. Lent, Esq., Attorney for Defendants, Fairview Manor and HCF of Fairview, Inc.
Steven S. Forry, Esq. and Michael Dube, Esq., Attorneys for Defendants, David C. Lesseski, D.O. and Presque Isle Family Medicine, Inc.

OPINION AND ORDER

DiSantis, Ernest J., Jr., J.

This matter comes before the Court on Preliminary Objections to Defendants' Answers and Amended New Matter, filed on behalf of Plaintiffs, 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"). Argument was held before the Court on April 1, 2010.

I. BACKGROUND OF THE CASE

Plaintiffs commenced this action against Defendants, Fairview Manor, HCF of Fairview, Inc., David C. Lesseski, D.O. ("Dr. Lesseski"), and Presque Isle Family Medicine, Inc. ("PIFM"), by filing a Praecipe for Writ of Summons on December 10, 2008, pursuant to Pa.R.C.P. 1007. On May 12, 2009, Plaintiffs filed a seventy-one page Complaint, alleging wrongful death and survival actions against each Defendant. Plaintiffs further alleged causes of action for corporate liability and negligence *per se* against Fairview Manor and HCF of Fairview, Inc. Plaintiffs asserted, *inter alia*, that Defendants were negligent in their failure to provide appropriate and necessary treatment and care to Christine D. Vaughn during her stay at Fairview Manor. Moreover, they asserted that, as a result of Defendants' negligence, Ms. Vaughn suffered serious injuries, pressure ulcers, dehydration, skin breakdown and progression of c-difficile colitis. Ultimately, Ms. Vaughn died on December 20, 2006.

In June 2009, the Defendants filed their respective preliminary objections and supporting briefs. On October 6, 2009, this Court ruled on the parties' preliminary objections and ordered Defendants to file their respective Answers within thirty days.

In November 2009, the Defendants filed their respective answers and new matter, to which Plaintiffs filed Preliminary Objections to Defendants' Answers and New Matter. In response, Fairview Manor and

HCF of Fairview, Inc. filed an Answer and Amended New Matter on December 10, 2009. Dr. Lesseski and PIFM filed their Amended New Matter on December 18, 2009.

Plaintiffs filed Preliminary Objections to Defendants' Answers and Amended New Matter and a supporting brief on December 29, 2009 and January 28, 2010, respectively. On January 29, 2010, Dr. Lesseski and PIFM filed a Response and Opposition to Plaintiffs' Preliminary Objections to Defendants' Answers and Amended New Matters. On February 23, 2010, Fairview Manor and HCF of Fairview, Inc. filed a Brief in Opposition to Preliminary Objections to Defendants' New Matter.

II. DISCUSSION

A. Law

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:
>
> . . .
>
> (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;
>
> . . .

Pa.R.C.P. 1028.

In ruling on preliminary objections, this Court must accept as true all well-pleaded, material and relevant facts. *Mellon Bank v. Fabinyl*, 650 A.2d 895, 899 (Pa. Super. 1994). This Court need not accept as true "conclusions of law, unwarranted inferences from the facts, argumentative allegations or expressions of opinion." *Myers v. Ridge*, 712 A.2d 791, 794 (Pa.Cmwlth. 1998). In order to sustain preliminary objections, it must appear with certainty or be clear and free from doubt based on the facts as pleaded, that the law will not permit recovery. *Harrisburg Sch. Dist. v. Hickok*, 781 A.2d 221 (Pa. Cmwlth. 2001).

New matter is governed by Pa.R.C.P. 1030. Rule 1030 provides that a party must set forth all affirmative defenses in his responsive pleading under the heading 'New Matter'. Pa.R.C.P. 1030(a). Although Rule 1030(a) lists various affirmative defenses that must be pleaded, that list is not exhaustive and the Rule requires that other affirmative defenses not listed must still be pleaded in New Matter. Moreover, a "party may set forth as new matter any other material facts which are not merely denials of the averments of the preceding pleading." *Id.*

> New matter ignores what the adverse party has averred and adds new facts to the legal dispute on the theory that such new

> facts dispose of any claim or claims which the adverse party had asserted in his pleading. An affirmative defense is distinguished from a denial of facts which make up the plaintiff's cause of action in that a defense will require the averment of facts extrinsic to the plaintiff's claim for relief.

Coldren v. Peterman, 763 A.2d 905, 908 (Pa. Super. 2000) (internal citations omitted).

Pennsylvania Rule of Civil Procedure 1019(a) requires that "the material facts on which a cause of action or defense is based shall be stated in a concise and summary form". Pa.R.C.P. 1019 (a). The purpose of this rule is to require the pleader to disclose material facts sufficient to enable the adverse party to prepare his case. *Smith v. Allegheny County*, 155 A.2d 615 (Pa. 1959); *Landau v. W. Pennsylvania Nat'l Bank*, 282 A.2d 335, 339 (Pa. 1971). 'Material facts' are those facts essential to support a claim raised in the matter. *Baker v. Rangos*, 325 A.2d 498 (Pa. Super. 1974). "While it is true that Rule 1030 does not require factual averments, it does not relieve the pleading party from complying with Rule 1019 (a). *Allen v. Lipson*, 8 Pa. D & C 4th 390, 394 (Pa. Cmwlth. 1990).

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).

B. Motion to Strike Fairview Manor's Amended Answer for Failing to Conform to Rule of Court.

Plaintiffs assert that Fairview Manor's Answer and Amended New Matter is not properly verified, as required by Pa.R.C.P. Nos. 1024 and 206.3. In particular, Plaintiffs contend that the supplied verification of Ryan Stechschulte is not identified as an authorized representative of Fairview Manor or HCF of Fairview, Inc., such as to bind both Defendants to the averments of the Answer and Amended New Matter. Furthermore, Plaintiffs argue that Mr. Stechschulte did not assert that he had personal knowledge of the averments and did not set forth his authority to act on behalf of Defendants or his representative capacity.

Rule 206.3 of the Pennsylvania Rules of Civil Procedure provides that, "A petition or answer containing an allegation of fact which does not appear of record shall be verified." Pa.R.C.P. 206.3 Rule 1024 of the Pennsylvania Rules of Civil Procedure provides, *inter alia*, the following:

> (a) Every pleading containing an averment of fact not appearing of record in the action or containing a denial of fact shall state that the averment or denial is true upon the signer's personal knowledge or information and belief and shall be verified. The signer need not aver the source of the information

> or expectation of ability to prove the averment or denial at the trial. A pleading may be verified upon personal knowledge as to a part and upon information and belief as to the remainder.
>
> (b) If a pleading contains averments which are inconsistent in fact, the verification shall state that the signer has been unable after reasonable investigation to ascertain which of the inconsistent averments, specifying them, are true but that the signer has knowledge or information sufficient to form a belief that one of them is true.
>
> (c) The verification shall be made by one or more of the parties filing the pleading unless all the parties (1) lack sufficient knowledge or information, or (2) are outside the jurisdiction of the court and the verification of none of them can be obtained within the time allowed for filing the pleading. In such cases, the verification may be made by any person having sufficient knowledge or information and belief and shall set forth the source of the person's information as to matters not stated upon his or her own knowledge and the reason why the verification is not made by a party.

Pa.R.C.P. 1024.

This Court agrees with Plaintiffs' assertion and will sustain this preliminary objection. Defendants shall have 20 days from the date of this Order to file a verification that reflects Mr. Stechschulte's representative capacity, authority, employment status and if he has personal knowledge of those averments set forth in Defendants' Answer and Amended New Matter.

C. Motion to dismiss paragraphs 1, 8, 10-30 of Fairview Manor's Amended New Matter or in the alternative, request for a more specific pleading.

Plaintiffs claim these paragraphs contain no factual allegations to support the defenses asserted or specific material facts required by Rule 1019(a). They also assert that these paragraphs lack the specificity required by Pa.R.C.P. 1028(3). In addition, Plaintiffs also argue that Defendants have improperly raised anticipatory defenses. The paragraphs in question are:

> *1. These defendants hereby incorporate their . . . Preliminary Objections and supportive Brief as though same were fully set forth herein.*

This paragraph referencing Defendants' preliminary objections and supportive brief is overly broad and vague. As such, it shall be stricken from Defendants' Answer and Amended New Matter without leave to amend.

8. Should discovery reveal the basis for same, defendants plead the defense of statute of repose.

Defendants fail to specifically plead the defense of statute of repose. Therefore, Plaintiffs' preliminary objection to paragraph 8 will be sustained and Defendants shall have 20 days from the date of this Order to file an amended pleading.

10. To the extent that any terms of the Admission Agreement which is in the possession of the plaintiffs provide any defense or limitation of damages or liability, plaintiff's claim is therefore limited or barred by those terms.

Paragraph 10 is overbroad, vague, and fails to assert any specific defense. Therefore, Plaintiffs' preliminary objection to paragraph 10 will be sustained and Defendants shall have 20 days from the date of this Order to file an amended pleading.[1]

12. Plaintiff's Complaint alleges in a very general manner, that all of the alleged negligent conduct set forth in the Complaint was caused by agents, servants or employees of these defendants. As an example, plaintiffs have made the following allegation at ¶ 162:

> *"All of the actions, inactions, negligence, breaches of regulations and standards of care and all other activities related to the care provided Christine D. Vaughn, while she was a resident of defendant, Fairview Manor and HCF of Fairview, Inc., and the management of defendant, Fairview Manor and HCF of Fairview, Inc.'s activities as set forth herein arose within the course and scope of the employment and/or the agency of those persons, and all of the above individuals were acting within the scope and course of their employment and/or actual agency or apparent agency with defendant, Fairview Manor and HCF of Fairview, Inc. in and about their respective duties as such and acted on behalf of said defendant and within the scope of their authority at all relevant times."*

13. No portion of the Complaint provides the name or identity of any individual referenced in this paragraph or any of the other similar paragraphs in plaintiff's Complaint.

14. In the event discovery would reveal that any of the individuals referenced in the Complaint were in fact not acting "within the course and scope" of the employment and/or the agency "of these defendants", nor were acting in accordance with their "respective duties" or not acting within the "scope of their authority at all relevant

[1] Paragraph 11 of Fairview Manors' Amended New Matter is addressed *supra.*

times", defendant, Fairview Manor asserts that the plaintiff's causes of action and any and all damages claimed by plaintiff may have in fact been caused by individuals and/or entities over whom the answering defendants had no control, nor the right to control, and as may be applied to the facts disclosed in discovery.

15. These defendants incorporate by reference their preceding paragraphs in New Matter and again set forth the principles of superseding and/or intervening cause, insofar as the plaintiff's complaint fails to identify any particular individual whom is claimed cause any injury or harm to the plaintiff's decedent. Should it be determined that such an individual was not an agent, servant or employee of these defendants, then the argument will be made at trial that the injury may have been the result of a superceding and/or intervening cause as discovery may indicate.

Relative to paragraphs 12, 13, and 15, this Court previously overruled Defendants' motion to strike paragraph 162 of Plaintiffs' Complaint. *See, Opinion and Order,* 10/06/09. In addition, Defendants fail to specifically plead the defense of a superseding and/or intervening cause is not sufficient. *See, Lee v. Denner,* 76 Pa. D & C 4th 181 (2005), *citing Fitzgerald v. Kaguyutan,* 18 Pa. D & C 4th 1, 3 (1993)("Certain defenses, such as pleading intervening and superseding acts of others, require more specificity than others.") Accordingly, Plaintiffs' preliminary objections to paragraphs 12 through 15 will be sustained. As to paragraphs 14 and 15, Defendants shall have 20 days from the date of this Order to file an amended pleading.

16. If in fact supported by discovery yet to be conducted, Plaintiff's Complaint and all causes of action are barred by Plaintiff's failure to mitigate her damages by promptly and properly following the physician's orders and directives regarding care and treatment.

The defendants have failed to specifically plead the defense of failure to mitigate damages. Therefore, Plaintiffs' preliminary objection to paragraph 16 will be sustained and Defendants shall have 20 days from the date of this Order to file an amended pleading asserting the material facts on which allegation is based.

17. Plaintiff's Complaint at ¶ 21 asserts that Christine D. Vaughn was admitted to Fairview Manor with the "expectation that the level of care she would receive would be commensurate with her rights in the state of Pennsylvania as a nursing home resident."

18. Paragraph 22 of plaintiff's Complaint asserts that at the time of her admission to Fairview Manor, plaintiff's decedent suffered from "ambulatory dysfunction secondary to degenerative joint disease of the knee, hypertension, dementia, hypothyroidism and Vitamin B-12 deficiency" and further asserts that she was taking many medications.

19. Paragraph 23 of plaintiff's Complaint asserts that plaintiff's decedent was able to ambulate only with a walker and that she required a "skilled level of nursing care."

20. Plaintiff's Complaint at ¶ 24 also asserts that plaintiff's decedent suffered from "anemia, ambulatory dysfunction, osteoarthritis, limited mobility and incontinence," and she was noted to be "at risk for impaired skin integrity and pressure ulcers, and due to this risk, several interventions were to be implemented."

21. Plaintiff's Complaint and all causes of action are therefore barred and/or mitigated by the fact that plaintiff's injuries and damages were the result of a pre-existing condition and/or injury which are referenced above and which resulted in plaintiff's decedent being admitted to Fairview Manor in the first place.

The Court concludes these paragraphs are sufficiently pled and will overrule Plaintiffs' objections to paragraphs 17-21.

22. To the extent that the Medical Care and Availability and Reduction of Error Act, 40 P.S. §1301.101, as amended by the Act of March 20, 2002, and all of the provisions therein provide legal requirements and parameters for recovery in the within case, defendant pleads any and all applicable sections and defenses set forth therein.

This paragraph does not specifically plead an affirmative defense. Therefore, Plaintiffs' preliminary objection to paragraph 22 will be sustained and Defendants shall have 20 days from the date of this Order to file an amended pleading.

23. In the event discovery should determine and/or it should be determined at any time thereafter, that plaintiff's counsel has failed to obtain the required Certificate of Merit, these defendants request dismissal of the case as well as reimbursement of any monies paid to the plaintiffs as a result of any such insufficient or non-existent documentation supporting the required Certificate of Merit.

Paragraph 23, is anticipatory and does not specifically plead an affirmative defense under Pa.R.C.P. 1030. Therefore, this paragraph is stricken without leave to amend.

24. Answering Defendants reserve the right to amend their New Matter defenses to include those defenses enumerated in Pennsylvania Rules of Civil Procedure 1030, should discovery reveal a factual basis for same and any other affirmative defenses upon completion of discovery in this matter consistent with the Pennsylvania law allowing liberality in the amendment of pleadings.

25. Any claim the plaintiffs may make regarding entitlement for delay damages is barred on the grounds of such a claim, or its source of authorization, violates the due process requirements of the United States and Pennsylvania Constitution.

Paragraphs 24 and 25 are overbroad, vague and shall be stricken. This issue of delay damages is not extant at this point in the case. Defendants may raise defenses to a delay damage claim if and when it arises.

D. Motion to dismiss paragraphs 210, 212-214, 216, 217, 219, 220 and 222 of Dr. Lesseski's New Matter or in the alternative, request for a more specific pleading.

Plaintiffs claim these paragraphs do not contain any factual allegations to support the defenses asserted as required by Rule 1019(a) and Pa.R.C.P 1028 (3). In addition, Plaintiffs claim that Defendants impermissibly raise anticipatory defenses. The challenged paragraphs are:

210. These Defendants incorporate Paragraphs 1 through 209 of their Answer to Plaintiff's Complaint as if fully set forth herein.

This Court finds this paragraph is sufficiently pled.

212. These Defendants raise all affirmative defenses set forth in or available as a result of the provisions of the Health Care Services Malpractice Act of Pennsylvania, 40 P.S. § 1301, et. seq. As this matter is only in the early stages of discovery, and these defendants have not completed their investigation of the Plaintiffs' claims, the Defendants cannot yet identify with greater specificity which affirmative defenses may be applicable here. However, these Defendants will provide support for any and all applicable affirmative defenses in accordance with the Pennsylvania Rules of Civil Procedure or any Order by this Court.

213. These Defendants raise all affirmative defenses set forth in or available as a result of the provisions of the Medical Care Availability and Reduction of Error Act, 40 P.S. § 1303, et. seq. As this matter is only in the early stages of discovery, and these Defendants have not completed their investigation of the Plaintiffs' claims, Defendants cannot yet identify with greater specificity which affirmative defenses may be applicable here. However, these Defendant will provide support for any and all applicable affirmative defenses in accordance with the Pennsylvania Rules of Civil Procedure or any Order by this Court.

214. Without limiting the generality of the foregoing averment, the Plaintiffs' request for punitive damages against these Defendants is barred by 40 Pa. C.S.A. § 1303.505.

As to paragraphs 212 and 213, the Court finds that Defendants are attempting to raise anticipatory defenses. The paragraphs lack specificity. Accordingly, Plaintiffs' preliminary objections to paragraphs 212 and 213 will be sustained and Defendants shall have 20 days from the date of this Order to file amended pleadings as to paragraphs.

Paragraph 214 is sufficiently pled.

216. These Defendants hereby incorporate their Preliminary Objections in this matter as if set forth fully herein. Specifically, Defendants maintain that Plaintiffs' Complaint fails to conform to the pleading requirements of Pa.R.C.P. 1019(a) in that Plaintiffs' 161 - paragraph statement of facts contains numerous immaterial and impertinent facts. Further, Defendants maintain that Paragraphs 101 and 192 (bb) of Plaintiffs' Complaint are legally insufficient in that Pennsylvania law does not recognize a duty to notify a patient's "entire family" of the nature, extent, and severity of a condition. Paragraph 192 (vv) is also legally insufficient, as a claim for lack of informed consent sounds in battery rather than negligence, and because [h]olding out expertise which induced decedent and her family to believe that adequate and proper care would be provided" is not a recognized claim under Pennsylvania law.

This paragraph's reference to Defendants' previous preliminary objections is overly broad and vague. Plaintiffs preliminary objection to paragraph 216 of Defendants' new matter will be sustained because: (1) this Court previously struck paragraph 192(vv) of Plaintiffs Complaint as part of its ruling on the Defendants' preliminary objections; and, (2) Defendants' challenges to paragraphs 101 and 192 (bb) of Plaintiffs Complaint, along with their motion to strike for failure to conform to rule of court, were previously overruled by this Court as part of its ruling on the Defendants' preliminary objections.

217. These Defendants plead the doctrine of intervening and superseding causes as an affirmative defense. As this matter is only in the early stages of discovery, and these Defendants have not completed their investigation of Plaintiffs' claims, Defendants cannot yet identify which intervening or superseding causes of the Decedent's injury will be applicable as affirmative defenses here. However, these Defendants will provide support for any and all applicable affirmative defenses in accordance with the Pennsylvania Rules of Civil Procedure and/or any Order by this Court.

Defendants have failed to sufficiently plead the defense of intervening and superseding cause. *See, Lee v. Denner,* 76 Pa. D & C 4th 181 (2005), *citing Fitzgerald v. Kaguyutan,* 18 Pa. D & C 4th 1, 3 (1993)("Certain defenses, such as pleading intervening and superseding acts of others, require more specificity than others.") Therefore, Plaintiffs' preliminary objection to paragraph 217 will be sustained and Defendants shall have 20 days from the date of this Order to file an amended pleading.

219. These Defendants are not liable for any preexisting medical conditions which caused the claimed injuries and/or damages. As this matter is only in the early stages of discovery, and these Defendants have not completed their investigation of Plaintiffs' claims, Defendants have not yet identified which preexisting medical conditions may have

caused Decedent's claimed injuries. However, these Defendants will provide support for any and all applicable affirmative defenses in accordance with the Pennsylvania Rules of Civil Procedure or any Order by this Court.

This Court finds that paragraph 219 is essentially a general denial of causation and belongs in Defendants' Answer, not New Matter. To the extent that it reflects the Defendants' hope that other defenses may be disclosed during discovery, it is vague and overbroad. They may amend their pleading accordingly within 20 days.

220. To the extent that the evidence developed during discovery demonstrates the application of the "two schools of thought doctrine," these Defendants plead that doctrine as providing a complete defense to any alleged negligence and/or malpractice. These Defendants will timely produce experts in accordance with the Pennsylvania Rules of Civil Procedure and/or any Scheduling Order entered by this Court.

Paragraph 220 is superfluous because Defendants do not have to raise the theory of "two schools of thought as a defense." *See, Colangeli v. Pallone,* 63 Pa D & C 4th 386, 392 (2003), *citing Voorhees v. Trustees of the University of Pennsylvania,* 33 Phila. 302, 331 (1997), affirmed, 718 A.2d 869 (Pa. Super. 1998 (unpublished memorandum) (recognizing that the two schools of thought doctrine is not an affirmative defense but is a label as to a type of evidence offered in a case when a medical practitioner is alleged to have deviated from a standard of care).

222. Any claim that the Plaintiffs may make regarding entitlement for damages for delay is barred on the ground that such a claim, or its source of authorization, violates the due process requirements of the United States Constitution and the Pennsylvania Constitution.

This paragraph is overbroad, vague and shall be stricken. Furthermore, the issue of delay damages is not extant at this point in the case.

E. Motion to dismiss paragraphs 26 and 27 of Fairview Manor's New Matter with prejudice.

Fairview Manor attempts to raise the defense of arbitration. This Court previously ruled that the wrongful death and survival actions were consolidated for trial and, therefore, the case was not subject to arbitration. *See,* Opinion and Order, 10/06/09, at 9-12. Therefore, Counts 26 and 27 of Fairview Manor's New Matter shall be stricken without leave to amend.

F. Motion to dismiss paragraphs 28-30 of Fairview Manor's Amended New Matter.

These paragraphs assert that Plaintiffs have failed to join wrongful death complainants as indispensable parties. A wrongful death action "shall be brought only by the personal representative of the decedent

for the benefit of those persons entitled by law to recover damages for such wrongful death." Pa.R.C.P. 2202 As such, paragraphs 28 through 30 shall be stricken from Defendants' Answer and Amended New Matter without leave to amend.

G. Motion to dismiss with prejudice paragraphs 10 and 11 of Fairview Manor's Amended New Matter and paragraph 223 of Dr. Lesseski's Amended New Matter.

Fairview Manor alleges in paragraph 11 that the Admission Agreement may provide the defense of release of liability.[2] In paragraph 11, they allege the defense of release of liability. Specifically, they allege:

11. Should discovery reveal any portion of the Admission Agreement is deemed a release of liability, then defendants plead the terms of any such release.

Dr. Lesseski alleges in allegation the defense of release in paragraph 223 of his amended new matter. As it states:

The Plaintiffs may have entered into a release having the effect of discharging one or more Defendants from liability in this matter. If, so, these Defendants plead the benefits of said release. As this matter is only in the early stages of discovery, and these Defendants have not completed their investigation of Plaintiffs' claims, Defendants have yet to determine whether any such writing or release discharges one or more of these Defendants from liability in this matter. However, any such writing or release will be provided in the course of discovery in accordance with the Pennsylvania Rules of Civil Procedure and/or any Scheduling Order entered by this Court.

Paragraph 11 of Fairview Manor's Amended New Matter and paragraph 223 of Dr. Lesseski's Amended New Matter are bald assertions of an anticipatory defense that lack specificity.[3] Therefore, the preliminary objections to paragraphs 11 of Fairview Manor's Amended New Matter and paragraph 223 of Dr. Lesseski's Amended New Matter will be sustained and they will not be allowed to amend.

III. Conclusion

In many instances, Defendants have raised anticipatory defenses without factual support. They have done so, they say, because discovery has not been completed. This Court does not find that appropriate. Assuming Defendants cannot amend their pleadings within the 20 day period provided by the Court, they may seek leave to amend their pleadings to include additional defenses if those defenses are disclosed

[2] Paragraph 11 was addressed *infra*.

[3] 28 Pa.Code § 201.24(b) provides that, "[a] facility may not obtain from or on behalf of residents a release from liabilities or duties imposed by law or this subpart except as part of formal settlement in litigation."

during discovery or, in the alternative, file a motion *in limine* to seek permission to raise the defenses at trial. This Court will consider those requests at the appropriate time.

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

ORDER

AND NOW, this 13th day of May, 2010, for the reasons set forth in the accompanying opinion, Plaintiffs' Preliminary Objections to Defendants' Answers and Amended New Matter are sustained as follows:

(1) Plaintiffs' motion to strike Fairview Manor's Amended Answer for failing to conform to rule of court is sustained and Defendants shall have 20 days from the date of this Order to file a proper verification;

(2) Paragraphs 1, 11 through 13, and 23 through 30 of Defendants', Fairview Manor and HCF of Fairview Inc., Amended New Matter are stricken without leave to amend;

(3) Paragraphs 8, 10, 14 through 16 and 22 of Defendants', Fairview Manor and HCF of Fairview, Inc., Amended New Matter are stricken and Defendants shall have 20 days from the date of this Order to file an amended pleading;

(4) Paragraphs 216, 220, 222 and 223 of Defendants', David C. Lesseski, D.O. and Presque Isle Family Medicine, Inc., Amended New Matter are stricken without leave to amend;

(5) Paragraphs 212, 213, 217 and 219 of Defendants', David C. Lesseski, D.O. and Presque Isle Family Medicine, Inc., Amended New Matter are stricken and Defendants shall have 20 days from the date of this Order to file an amended pleading; and,

(6) In all other respects, Plaintiffs' Preliminary Objections are overruled.

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

DARIUS STOVALL, Plaintiff

v.

BRITTANY FRISCO, Defendant

FAMILY LAW / CHILD CUSTODY

The paramount concern in child custody cases is the best interests of the child. With this paramount concern in mind, "traditional burdens or presumptions such as; substantial change in circumstances or the fitness of one parent over another, or the tender years doctrine, must all give way."

FAMILY LAW / CHILD CUSTODY / MODIFICATION

A custody order is modifiable without proof of substantial change in circumstances where modification is in the best interest of the child. The "best interests" standard, decided on a case-by-case-basis, considers all factors which legitimately have an effect upon the child's physical, intellectual, moral and spiritual well-being.

FAMILY LAW / CHILD CUSTODY / RELOCATION

Where a custodial parent seeks to relocate out-of-state with a child over the objection of a non-custodial parent, in ascertaining the best interest of the child, the trial court must consider the following three factors enunciated by the Pennsylvania Superior Court in *Gruber.* (1) the potential advantages of the proposed move and the likelihood that the move would substantially improve the quality of life for the custodial parent and the children and is not the result of a momentary whim on the part of the custodial parent; (2) the integrity of the motives of both the custodial and non-custodial parent in either seeking the move or seeking to prevent it; and (3) the availability of realistic, substitute visitation arrangements which will adequately foster an ongoing relationship between the child and the non-custodial parent.

FAMILY LAW / CHILD CUSTODY / RELOCATION

The "polestar" of the analysis in custody relocation cases remains the "best interests of the child."

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
FAMILY DIVISION - CUSTODY NO. 12774-2007

Appearances: Raquel L. Taylor, Esq., on behalf of the Plaintiff, Darius Stovall
Brittany Frisco, the Defendant, *pro se*

MEMORANDUM OPINION

Brabender, J., March 10, 2010

This matter is before the Court on a Request for Adversarial Hearing filed by the mother, Brittany Frisco, *pro se*. The matter involves the custody of the parties' minor child, Amaria Stovall (d.o.b. November 27,

2006). The mother is requesting permission to relocate with the child to Cleveland, Ohio.

After a custody hearing held on February 11, 2010, the Court finds it is in the best interests of the child to deny the mother's request to relocate.

FACTUAL AND PROCEDURAL BACKGROUND

The mother and father were never married and have no other children together. This case began in July of 2007 with the father's Complaint for Custody of the child, Amaria Stovall. By Order of August 10, 2007, filed August 14, 2007, the physical and legal custody of the child was shared by mutual agreement.[1]

On October 26, 2009 the father filed a Complaint for modification of the existing custody order to a 50/50 shared custody arrangement. Because of a Protection from Abuse ("PFA") Order,[2] the father indicated he was no longer permitted to contact the mother and wanted equal time with his daughter. A custody conciliation was held on November 24, 2009. On December 2, 2009, the Court entered a custody Order directing that shared physical and legal custody was to continue, with the mother to have primary physical custody of the child and the father to have partial custody of the child every weekend from Friday at 10:30 a.m. to Sunday at 7:00 p.m.[3] The Order directed custody arrangements were to be made through the maternal grandmother, Wanda Blakely.

The mother filed a Request for Adversarial Hearing on December 3, 2009 requesting permission to relocate to Cleveland, Ohio and to modify the visitation Order. The mother wants to relocate to Cleveland, Ohio to attend Cleveland State University to further her education. The father opposes the mother's request as the child has special needs and attends pre-school at the Barber National Institute in Erie, Pennsylvania.

DISCUSSION

The paramount concern in child custody cases is the best interests of the child. *McMillen v. McMillen,* 529 Pa. 198, 202, 602 A.2d 845, 846-7 (1992); *Commonwealth ex rel. Pierce v. Pierce,* 493 Pa. 292, 295, 426

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[1] Key features of the original Custody Order include: the mother to have primary physical custody and the father to have partial custody every weekend from Friday at 10:30 a.m. to Sunday at 7:00 p.m.; "non- festive" holidays of Memorial Day, July Fourth and Labor Day to be shared by mutual agreement; the holidays of Easter, Thanksgiving and Christmas to be shared by mutual agreement with each parent having one-half of the day; the child to spend Mother's and Father's day with the respective parent for specified times unless otherwise agreed upon and each parent to plan a birthday celebration for the child on a regularly scheduled partial custody day near the child's birthday.

[2] See Protection From Abuse Final Order of Court entered October 20, 2009 at Docket No. 16627-09, Court of Common Pleas of Erie County, Pennsylvania.

[3] Under the Custody Order entered on December 2, 2009, the custody schedule for festive and non-festive holidays and for celebrating the child's birthday also remained the same, except that visitation with the father over the 2009 Thanksgiving holiday weekend was extended.

A.2d 555, 557 (1981). With this paramount concern in mind, "traditional burdens or presumptions such as; substantial change in circumstances; or the fitness of one parent over another; or the tender years doctrine, must all give way." *Moore v. Moore*, 535 Pa. 18, 31, 634 A.2d 163, 169 (1993). A custody order is modifiable without proof of substantial change in circumstances where modification is in the best interests of the child. *McMillen*, 529 Pa. at 202, 602 A.2d at 847.

"The 'best interests' standard, decided on a case-by-case-basis, considers all factors which legitimately have an effect upon the child's physical, intellectual, moral and spiritual well-being." *Sawko v. Sawko*, 425 Pa. Super, 450, 454, 625 A.2d 692, 693 (1993). *See also, Lee v. Fontaine*, 406 Pa. Super. 487, 488, 594 A.2d 724, 725 (1991). All factors which may affect the determination of what is in the best interests of the child are admissible, including the character and fitness of the respective parties, their respective homes; their ability to adequately care for the child and their ability to financially provide for the child. *In re Lewis (Shoemaker Appeal)*, 396 Pa. 378, 381, 152 A.2d 666, 668 (1959); *Gerald G. v. Theresa G.*, 284 Pa. Super. 498, 502, 426 A.2d 157, 159 (1981).

In custody cases involving the relocation of a parent, the ultimate objective remains the best interests of the children. *Lambert v. Lambert*, 409 Pa. Super. 552, 562, 598 A.2d 561, 565 (1991). Where a custodial parent seeks to relocate out-of-state with a child over the objection of a non-custodial parent, (an "interstate relocation" case), in ascertaining the best interests of the child, the trial court must consider the following three factors enunciated by the Pennsylvania Superior Court in the case of *Gruber v. Gruber*, 400 Pa. Super. 174, 184-5, 583 A.2d 434, 439 (1990):

(1) the potential advantages of the proposed move and the likelihood that the move would substantially improve the quality of life for the custodial parent and the children and is not the result of a momentary whim on the part of the custodial parent;

(2) the integrity of the motives of both the custodial and non-custodial parent in either seeking the move or seeking to prevent it; and

(3) the availability of realistic, substitute visitation arrangements which will adequately foster an ongoing relationship between the child and the non-custodial parent.

Id.

With regard to the first *Gruber* factor, "the custodial parent has the initial burden of showing that the move is likely to significantly improve the quality of life for that parent and the children." *Id.* at 186, 583 A.2d at 400. Regarding the second *Gruber* factor, "each parent has the burden of establishing the integrity of his or her motives in either desiring to move or seeking to prevent it." *Id.* The Court must then consider the

third factor. *Id.*

In *Gruber,* the Superior Court emphasized that the best interests of the child are more closely allied with the interests and quality of life of the custodial parent and cannot be determined without reference to them. *Id.* at 183, 583 A.2d at 438. In the context of relocation cases, this means that, "when relocation is likely to result in a substantially enhanced quality of life for a custodial parent, often the child's best interests will be indirectly but genuinely served." *Id.* By the same token, the Superior Court in *Gruber* recognized the competing factor of "the mutual interest of the child and non-custodial parent in maintaining as healthy and loving a relationship as possible." *Id.*

The refinements of the "best interests of the child" analysis set out by the Superior Court in *Gruber* do not create a new standard: the "polestar" of the analysis in custody relocation cases remains the "best interests of the child." *Lee v. Fontaine,* 406 Pa. Super. 487, 489-90, 594 A.2d 724, 725-6 (1991).

Under *Gruber,* the mother's burden of proof is to present the potential advantages of the move and to show that the move is likely to substantially improve the quality of life for her and the child and is not the result of a momentary whim. *Gruber,* at 184-5, 583 A.2d at 439. In the instant case, the Court concludes that the mother has not met this burden.

The mother testified she is 22 years old and resides at 203 East 16th Street, Erie, Pennsylvania with the parties' three-year old child, Amaria Stovall. The child is her only child. She testified the child has special needs, having Down's Syndrome; epilepsy; diuretic issues; eye problems; ear, nose and throat problems and acute asthma. She testified the child has been involved with early intervention services since she was born.

The mother testified she is originally from Cleveland, Ohio. She is a sophomore at Gannon University in Erie, Pennsylvania and scheduled to graduate in 2012. She requests the Court's permission to relocate to Cleveland, Ohio, with her daughter, so that she can attend Cleveland State University where she intends to major in film and digital media. She testified her dream is to become a writer and a producer.

At Gannon she switched her major to journalism and communication, but this program is not as directly related to her career goals as the program offered at Cleveland State. She testified obtaining a degree from Cleveland State University in her field of interest will lead to increased employment opportunities upon graduation, and that employment prospects for her in Cleveland will be significantly greater than in Erie. She posits this will be conducive to a better quality of life for her and her daughter.

The mother testified she has a job waiting for her at a Hilton Hotel in Cleveland at the rate of pay of $10.00 per hour. The mother testified her uncle would allow her to live in one of the properties he has in Cleveland. Her current income consists of child support payments and

the SSI benefits she receives for her daughter.

The mother testified she and her child would receive family support from extended family members, all of whom live in Cleveland. She testified the only relatives she has in Erie are her mother and brother. She testified her brother will be leaving Erie shortly and her mother intends to relocate to Cleveland.

The child has received medical treatment from pediatric specialists in Pittsburgh, Pennsylvania. Sometimes the father has traveled with her and the child to medical appointments in Pittsburgh. The mother testified the father is chronically late and makes her pay for gas. The mother testified there are quality medical facilities in Cleveland, Ohio specializing in treatment of children, and named the Rainbow Babies and Children's Hospital as one such example. She testified it would be easier for her to obtain medical treatment for the child if they lived in closer proximity to such facilities. However, the mother failed to offer testimony about specific ongoing medical treatment needs of the child and what, if any, arrangements she has made with medical providers in Cleveland for her child's continuing medical care.

Regarding the educational and developmental needs of the child, the mother testified the child received therapy services through the Achievement Center from January of 2009 to November of 2009. Currently, the child attends daycare in the morning; then pre-school at the Dr. Gertrude A. Barber National Institute, ("the Barber Center"); then returns to daycare.

The mother testified she has researched schools for her daughter to attend in Cleveland and believes there are schools in Cleveland of the same caliber as the Barber Center in Erie. The mother testified about the general availability of educational programs/services in Cleveland for children with special needs. She testified about a conversation she had with a woman in Ohio about a "bi-inclusive" program for both typical and atypical children. The mother credibly testified she learned that each district has "center based" learning, with programs similar to those at the Barber Center. She named some of the schools she researched and the programs they offer. She testified she does not yet have a school in place in Cleveland for the child, and that she wasn't planning on moving until the summer.

The mother presented the testimony of Jeanne Downey, speech pathologist with the Achievement Center. Ms. Downey testified she worked with the child from October 2008 to November 2009 on communication skills and signing.[4] Ms. Downey testified the mother

[4] Counsel for the father questioned Ms. Downey extensively about the reasons the child missed 46 out of approximately 147 scheduled therapy sessions with the Achievement Center. Ms. Downey testified, essentially, that the number of missed appointments was not unusual in an Early Intervention case and under the circumstances of this case did not reflect poorly on this mother. The Court finds this testimony credible and accepts it as fact.

talked about relocating to Cleveland and what she wanted to do with her professional career. Downey opined that placing the child in an integrated program or "inclusive setting" is a good move for the child. She testified that the best thing would be to treat this child like any other child and to offer support.

Ms. Downey testified credibly about her favorable impressions of the mother. She testified the mother participated in the child's therapy; was cooperative and very attentive to the child's needs. She testified the mother had high expectations for her daughter and was not prone to "giving in" to her daughter. In her words, the mother was very positive and "impressive." She testified the father never contacted her regarding the child.

Counsel for the father presented the testimony of Pamela Tywalk, a teacher at the Barber Center, and Bridgett Barber, Director of External Affairs and Privacy Officer of the Barber Center. Ms. Tywalk testified the Barber Center is a school to help children and adults with special needs. She testified she met with the mother when she wrote the child's "I.E.P." at the end of November or December of 2009, and does not recall the mother wanting to relocate with the child.

Ms. Barber testified to put this in perspective, the Barber Center had only served the child for 14 days. When asked by the Court about the availability of similar facilities in Cleveland, Ms. Barber testified she was not familiar with this.

The mother also presented the testimony of Wanda Blakely, the maternal grandmother. Ms. Blakely testified she resides at 410 East 21st Street, Erie, Pennsylvania with her husband, and a 17 year-old son. Ms. Blakely testified that she is originally from Cleveland, Ohio; she has lived in Erie, Pennsylvania for 15 years and she frequently travels to Cleveland. She testified she would see her daughter and granddaughter often if they were permitted to relocate to Cleveland. The child's father contacts her for visitation per the terms of the PFA Order. She testified the father has asked for his daughter approximately twice since entry of the PFA Order.

Ms. Blakely testified her daughter has lived in Erie since she was seven years old and moving to Cleveland has always been her daughter's dream. She believes better opportunities exist in Cleveland for her daughter. She testified her daughter had plans to move to Cleveland before the birth of the child and about her reasons for not moving afterward.

Regarding the first *Gruber* requirement, the Court finds the mother has presented evidence that the proposed relocation to Cleveland is likely to substantially improve the mother's educational and employment opportunities, given the mother's career interests and goals. The Court also finds the mother's desire to relocate to Cleveland is not a whim on her part and has been contemplated for some time. Further, the Court

believes that, on the maternal side, there would be a strong family support system in place for the mother and child in Cleveland.

In the absence of evidence of arrangements for the child's educational and developmental needs, this Court finds the mother has not satisfactorily shown the likelihood that the proposed move would be in the best interests of her child. The child has Down's Syndrome and requires special educational and developmental programs. With the best interests of this child as the Court's paramount concern, the Court must be assured those needs will be addressed. In addition, in the absence of evidence of any concrete plans for the child's medical treatment in Cleveland, this Court finds that the mother has not satisfactorily shown the likelihood that the move would substantially improve the quality of life of the child. This child has special medical needs. The Court must be assured those needs will be adequately addressed. The Court is also concerned about plans for child care while the mother is in school or at work, and notes that no evidence was presented about who will care for the child after school when the mother is working or attending classes. This Court recognizes that, "when relocation is likely to result in a substantially enhanced quality of life for a custodial parent, often the child's best interests will be indirectly but genuinely served." *Gruber, Id.* at 183, 438. However, under the first prong of *Gruber* and a best interests analysis, due to the unknown variables referenced above, this Court concludes the mother has not sufficiently shown at this time the likelihood the proposed move would substantially improve the quality of life of this child.

The Court must analyze the second *Gruber* factor: the integrity of the motives of both the custodial and non-custodial parent in either seeking the move or seeking to prevent it. *Gruber, Id.* Each parent has the burden of establishing the integrity of his or her motives in this regard. *Id.*

The Court accepts as credible the mother's testimony about her educational and career goals; her desire to be closer to relatives; her belief about enhanced employment opportunities in Cleveland upon graduation and her belief that this would lead to a better quality of life for her and the child. The mother credibly testified she did not want to remove the child from the father or his family; all she wants is to improve the quality of life for herself and her child. Based on this credible evidence, the Court concludes that the mother's desire to move is not motivated simply by a desire to frustrate the father's visitation rights or to impede the development of a healthy, loving relationship between the child and her father.

Regarding the father's motives in resisting the mother's efforts to relocate with the child, the mother testified the father is not agreeable to the relocation because she put a PFA on him.

The child's father testified he is 22 years old and lives with his parents;

his sister, Shaquay, who is 16 years old, and an individual named Dasean. The father is a junior at Edinboro State University and expects to graduate in May of 2011. He underwent basic training in the military, and one weekend each month he is scheduled to report to Niagara Falls, New York. He testified he was in a relationship with the Defendant since he was about 12 years old. From the time their daughter was born to the present, he has seen the child weekly except while he was in military training. He testified the same held true for his parents and also his sister who watched the child while he works. He testified his relationship with the child's mother ended in June of 2009, before he left for basic training. While in basic training, the mother kept him updated about the child. His parents and sister had contact with the child. After he returned from basic training in October of 2009, there were issues regarding child support and his request for increased visitation. He testified the child's mother was adverse to a 50/50 custody arrangement because that would result in discontinuance of the father's child support obligation.

The father testified he has contacted the Barber Center for updates on the child's progress. When the child was enrolled in the Achievement Center, he would get reports from the child's mother. He does not think that the child should be away from her father. He testified he took the child for surgery in Pittsburgh and that the child is doing good now as far as he knows.

Sean Stovall, the child's paternal grandfather, testified to his son's efforts to see his child. Before the PFA, when the child's mother would get mad at his son, she would not let his son see the child. He testified that, in the last three years, his son has done everything he can.

Shaquay Stovall, the child's paternal aunt, testified her brother, the child's father, has a good relationship with the child and takes her everywhere she wants to go. She enjoys a good relationship with the child and baby-sits her. She has seen the child weekly since she was born.

Based on the testimony of the father, the paternal grandfather and the paternal aunt, the Court concludes that there is a relationship between the child and the father and that the father wants to be involved in his child's life. No evidence was produced in support of the mother's assertion the father objects to the relocation out of spite for the mother's filing of the PFA Complaint. It is also clear from the procedural history of the case and from the testimony that the father sought to obtain increased custody/visitation of his daughter *before* the mother procedurally raised the issue of relocation.[5] Based on the record presented, the Court concludes that the father's motives in objecting to relocation are genuine.

[5] On October 26, 2009 the father sought modification of the existing custody order to a 50/50 arrangement. It was after the Court entered an Order on December 2, 2009 continuing the status quo that the mother raised the issue of relocation in her Request for Adversarial Hearing filed on December 3, 2009.

The third and last *Gruber* factor for the Court to consider is the availability of realistic, substitute visitation arrangements which will adequately foster an ongoing relationship between the child and the non-custodial parent. *Id.*

The mother's proposed visitation arrangement, should the Court approve of her relocation plan, is that the child's father would have reduced visitation/custody at the rate of two weekends per month, as opposed to the current visitation schedule. Currently, the father has visitation each weekend from Friday at 10:30 a.m. until Sunday at 7:00 p.m.[6] The mother testified that visitation with the father during the week would be too disruptive of the child's established routine. The mother proposed she would transport the child to Erie when she visits her own mother. The mother believes the father is also capable of traveling to Cleveland for visitation. The mother proposes the child's maternal grandfather, who lives in Cleveland, would be the "go-between" for the child.

There is no doubt difficulties would be presented in shifting the parties' current visitation arrangements to account for the geographical distance between Erie and Cleveland and to account for this child's special needs. The father's former weekly visitation may well need to give way to an altered schedule that allows for less frequent but more extended contact between parent and child. *See Gruber,* at 185, 439. "[T]he necessity of shifting visitation arrangements to account for geographical distances will not defeat a move which has been shown to offer real advantages to the custodial parent and the children." *Id.*

However, shifting visitation arrangements, at least during the school year, may not be ideal from the perspective of the child's needs. The mother testified that, in her view, visitation with the father during the week would be too disruptive for the child. Without more information concerning how the child's educational and developmental needs would be met in Cleveland, the Court is unable to make a determination as to whether the schedule for school and other programming can or should be disrupted for visitation during the week.

On the other hand, continuation of the present visitation schedule if the mother were granted permission to relocate to Cleveland may be disruptive. The proposed relocation raised issues of hardship to the parties and the child in traveling and questions about whether the parties could maintain the father's current weekly visitation rights. The practicalities of the situation may require a reduction in the number of weekends the father is awarded visitation. However, without evidence of where in Cleveland the mother intends to live, where she plans to

[6] The mother testified the father does not exercise his visitation rights one weekend per month due to his commitment to the military. As additional rationale for reducing the father's weekend visitation, the mother testified she would like to see the child on weekends.

send the child to school and the time requirements to address this child's special developmental and educational needs, the Court is unable to fashion a meaningful, realistic, long-distance visitation schedule. For the foregoing reasons, the Court finds that, under the third and last *Gruber* factor, it is not in this child's best interests for the Court to grant the mother's relocation request at this time.

CONCLUSION

The Petitioner has failed to meet her burden of proof in showing that the move is likely to significantly improve the quality of life for the child and is in the best interests of the child. The mother and father have met their respective burdens in establishing the integrity of their motives in seeking to relocate and in opposing the relocation request. Due to unknown variables pertaining to the meeting of the child's special needs in Cleveland, Ohio, the Court is presently unable to address the availability of realistic, substitute visitation arrangements which will adequately foster an ongoing relationship between the child and her father. Therefore, the Petitioner's request to relocate is denied. The Petitioner is not precluded from presenting a petition to relocate in the future.

An Order will follow consistent with the above.

ORDER

AND NOW, to-wit, this 10th day of March, 2010, after a hearing on February 11, 2010 on the Request for Adversarial Hearing of the Defendant, Brittany Frisco, and in consideration of the best interests of the child, Amaria Stovall, it is hereby **Ordered** that the request for relocation and change in time/length/number of visits is **Denied.**

BY THE COURT:
/s/ **Daniel J. Brabender, Jr., Judge**

IN THE MATTER OF AUDREY C. HIRT TRUST

CONSTITUTIONAL LAW / CIVIL RIGHTS

In Pennsylvania, there are two methods for analyzing requests for closure of judicial proceedings, each of which begins with a presumption of openness - a constitutional analysis and a common law analysis.

CONSTITUTIONAL LAW / CIVIL RIGHTS

Under the constitutional analysis, "the party seeking closure may rebut the presumption of openness by showing that closure serves an important governmental interest and there is no less restrictive way to serve that interest." A party in interest must present credible evidence that an important governmental interest exists to justify closure of the proceedings; the court will not permit the party in interest to rely on mere speculation.

CONSTITUTIONAL LAW / CIVIL RIGHTS

Under the common law analysis, the party seeking closure must show that his or her interest in secrecy outweighs the presumption of openness. To make this determination the court engages in a balancing test, weighing on the one hand the factors in favor of access, and, on the other, those against it.

CONSTITUTIONAL LAW / CIVIL RIGHTS

The intent or desire of a party in interest to keep the proceedings closed does not alone overcome the constitutional or common law presumption of openness of judicial proceedings.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION
No. 223 & 225 of 2009

Appearances: Thomas J. Buseck, Esq., and Daniel J. Pastore, Esq., on behalf of Laurel A. Hirt, Petitioner
Dorothy A. Davis, Esq. and S.E. Riley, Jr., Esq., on behalf of Elizabeth A. Vorsheck, Respondent
Robert G. Dwyer, Esq., Gary P. Hunt, Esq., and Neal R. Devlin, Esq., on behalf of PNC Bank, successor in interest to National City Bank, Respondent
Craig A. Markham, Esq., on behalf of Times Publishing Company, Respondent
Eugene J. Herne, Esq., Senior Deputy Attorney General, on behalf of The Commonwealth of Pennsylvania, Respondent

OPINION

Domitrovich, J., January 19, 2010

This matter is currently before the Court on Laurel A. Hirt's Petition To Seal Record originally presented to this Court in Motion Court on August 13, 2009. Due to the injunctive nature of a motion to seal record, and the potential harm of not sealing the record in this matter until a hearing could be held, on August 13, 2009, this Court entered an Order temporarily granting Laurel A. Hirt's Petition To Seal Record until a full hearing on the matter could be held. On December 11, 2009, a full hearing was held before this Court on Laurel A. Hirt's Petition To Seal Record in the matter of the Audrey C. Hirt Trust.

The parties and their positions in this matter are as follows. Petitioner, Laurel A. Hirt, is a Co-Trustee and beneficiary of the Audrey C. Hirt Trust. Elizabeth A. Vorsheck is a beneficiary of the Audrey C. Hirt Trust, and she opposes Laurel A. Hirt's Petition To Seal Record. The Times Publishing Company was granted permission to intervene in this matter, and opposes Laurel A. Hirt's Petition to Seal Record. The Pennsylvania Attorney General's Office in its capacity as *parens patriae* for the Commonwealth of Pennsylvania opposes Laurel A. Hirt's Petition To Seal Record. National City Bank (hereinafter "National City"), is a Co-Trustee of the Audrey C. Hirt Trust, and does not oppose nor consent to Laurel A. Hirt's Petition To Seal Record.[1]

The relevant factual and procedural history of this matter is as follows. On March 13, 2009, Audrey C. Hirt, a resident of Erie County, passed away. Prior to her demise, Audrey C. Hirt established a trust by written document dated July 30, 2008. At the time of Audrey C. Hirt's death, this trust was known as the Sixth Complete Restatement of the Audrey C. Hirt Revocable Trust (hereinafter "Audrey C. Hirt Trust"), and upon the Settlor, Audrey C. Hirt's demise, said trust became irrevocable. According to the terms of the trust, upon Audrey C. Hirt's death, Laurel A. Hirt, National City, and Louis S. Harrison, Esq. were appointed as Co-Trustees of the Audrey C. Hirt Trust. However, Louis S. Harrison, Esq. subsequently resigned his position as Co-Trustee; thereby leaving Laurel A. Hirt and National City as Co-Trustees of the Audrey C. Hirt Trust. Due to Attorney Harrison's resignation as Co-Trustee, on August 12, 2009, National City filed a First and Partial Account in the Register of Wills Office of Erie County. With its First and Partial Account, National City filed a redacted copy of the Trust Document of the Audrey C. Hirt Trust.[2] Thereafter, on August 13, 2009, counsel for

[1] The Court notes that PNC Bank has recently acquired National City Bank, and is now its successor in interest.

[2] Apparently, counsel for National City had contacted counsel for Petitioner, Laurel A. Hirt, prior to the filing of the First and Partial Account, and had informed counsel for Laurel A. Hirt that National City would be filing a copy of the Trust Document, and the parties agreed that National City would initially file a redacted copy of the Trust Document.

Laurel A. Hirt presented the instant Petition To Seal Record to this Court in Motion Court. National City was the only other represented party, which appeared in Motion Court, and National City did not oppose nor consent to the entry of the Petition To Seal Record. As stated previously, this Court temporarily granted the Petition To Seal Record.

In her Petition To Seal Record and related briefs, Petitioner argued four reasons to seal the record in this matter. First, Petitioner argues that this matter should be sealed because the First and Partial Account of National City and the un-redacted version of the Trust Document filed in this matter contain "sensitive information," which would not otherwise be made available for public inspection. The "sensitive information" is alleged to be information identifying the value of Trust assets, the holdings of the Trust, and the selling price of a substantial number of publicly traded stock. Petitioner argues that the identification in the Trust Document of the number of shares of publicly traded stock held by the Trust, the identification in the Trust Document of the sale and purchase rights in those shares, and the identification in the First and Partial Account of the sale price of shares of that stock sold will adversely affect the valuation of the stock for Federal estate tax valuation purposes, and these identifications will adversely affect the market price of the stock.

Second, Petitioner argues that this matter should be sealed because Article Six of the Trust Document provides for the distribution of substantial sums from the Trust to charitable organizations, and that the Trust Document specifically provides that "the Trustee shall make every effort to obtain each donee organization's agreement to treat all distributions under this Article as having been received from an anonymous donor." Thus, Petitioner argues that if this matter is unsealed and the Trust Document is made available for public inspection, then the intentions of the Settlor, Audrey C. Hirt, will be frustrated and the distributions will no longer be anonymous.

Petitioner also argues that if the identity of the donee charitable organizations is made public, these organizations will experience a decrease in the receipt of charitable donations.

Finally, Petitioner argues that if this matter is unsealed, then the identity of the beneficiaries of the Trust will be made available to the public. Petitioner argues that many of the beneficiaries of the Trust are elderly, and if their identity is made public, they could possibly be taken advantage of or put at risk by designing persons.

Pennsylvania courts possess an inherent power to control access to their proceedings and may deny access when appropriate. *In the Interest of M.B.*, 819 A.2d 59, 60 (Pa. Super. Ct. 2003). However, it is clear that in Pennsylvania, the common law, the First Amendment to the United States Constitution, and the Pennsylvania Constitution, all support the principle of openness of all judicial proceedings. *Pa. ChildCare, LLC v.*

Flood, 887 A.2d 309, 312 (Pa. Super. Ct. 2005). Once an interested party, such as the press, seeks access to judicial proceedings, the party seeking to keep the proceedings closed must rebut the presumption of openness. *Pa. ChildCare, LLC, supra* at 312; *M.B., supra* at 60. There are two methods for analyzing requests for closure of judicial proceedings, each of which begins with a presumption of openness - a constitutional analysis and a common law analysis. *M.B., supra* at 62 n.2.

Under the constitutional approach, which is based on the First Amendment of the United States Constitution and Pa. Const. art. I, § 11, the party seeking closure may rebut the presumption of openness by showing that closure serves an important governmental interest and there is no less restrictive way to serve that interest. *Id.* The party seeking closure must demonstrate that the material is the kind of information that the courts will protect and that there is good cause for the order to issue. *Pa ChildCare, LLC, supra* at 312. A party establishes good cause by showing that opening the proceedings will work a clearly defined and serious injury to the party seeking closure. *Id.* Only a compelling government interest justifies closure and then only by a means narrowly tailored to serve that interest. *Id.*

Under the common law approach, the party seeking closure must show that his or her interest in secrecy outweighs the presumption of openness. *M.B., supra* at 62 n.2. While the existence of a common law right of access to judicial proceedings and inspection of judicial records is beyond dispute, this rule has its limitations. *In re Estate of duPont*, 966 A.2d 636 (Pa. Super. Ct. 2009). As the Pennsylvania Superior Court has stated:

> [T]he public may be excluded, temporarily or permanently, from court proceedings or the records of court proceedings to protect private as well as public interests: to protect trade secrets, or the privacy and reputations of innocent parties, as well as to guard against risks to national security interests and to minimize the danger of an unfair trial by adverse publicity. These are not necessarily the only situations where public access can properly be denied. A bright line test has yet to be formulated. Meanwhile, the decision as to public access must rest in the sound discretion of the trial court.

Id. (citations omitted). Ultimately, "in deciding whether to grant the motion of the party who seeks to seal records or proceedings under the common law approach, the court engages in a balancing test, weighing on the one hand the factors in favor of access, and, on the other, those against it." *Hutchinson v. Luddy*, 581 A.2d 578, 582 (Pa. Super. Ct. 1990) *rev 'd on other grounds*, 594 A.2d 301 (Pa. 1991).

In order for Petitioner to be successful, it is necessary for her to

overcome the presumption of openness through a constitutional analysis and a common law analysis. The Court notes that trusts are normally private matters performed outside of judicial proceedings; and therefore, not made available to the public. The Court further notes the matter currently at issue has only transpired because the trustees were required by statute to file an accounting upon Louis S. Harrison, Esq. resigning his position as Co-Trustee. *See* 20 Pa. C.S. § 7792; 20 Pa. C.S. § 3184. Thus, the Court is fully aware that but for National City filing the contested documents as mandated by operation of law, this matter would not be before the Court. However, since National City has filed these documents, the Court cannot seal them unless Petitioner overcomes her burden to demonstrate that sealing these documents outweighs the presumption that these documents should be open. Although Petitioner has presented some valid concerns regarding why certain documents should be sealed, Petitioner has failed to rebut the presumption that these judicial proceedings should be open to the public, which is one of the cornerstone principles of the American judicial system. None of Petitioner's arguments or a combination thereof, rebut the constitutional and common law presumptions that all of these judicial proceedings should be open to the public. Furthermore, this Court agrees with the position of the Office of the Attorney General of Pennsylvania that sealing the documents in this matter goes against the government interest of transparency in charitable organizations and public trust in these organizations.

In regard to Petitioner's first argument that this matter should be sealed because the First and Partial Account of National City and the un-redacted version of the Trust Document filed in this matter contain "sensitive information," which would not otherwise be made available for public inspection, there was absolutely no evidence presented at the December 11, 2009 hearing, which would support Petitioner's assertion. In fact, Brian DiLucente testified as an expert witness at the December 11, 2009 hearing, and Mr. DiLucente, who did not have access to the un-redacted copy of the Trust Document, credibly stated and gave specific examples of how the value of certain stocks held by the Trust may be determined. This Court concludes there is no "sensitive information" contained in the Trust Document or First and Partial Account, other than the names and addresses of the beneficiaries and the specific gifts contained in the Trust, which would otherwise not be available to the public. Specifically, there is no "sensitive information" regarding the Erie Indemnity Company, which needs protection.

Therefore, Petitioner's first argument does not overcome the presumption that this proceeding should be open through either a constitutional or common law analysis. Under a constitutional analysis of Petitioner's first argument, no important government interest exists in

keeping this information closed, when the information is not sensitive in nature. Additionally, under a common law analysis of Petitioner's first argument, since no "sensitive information" is contained in the Trust Document and First and Partial Account, the need to keep the information in these documents sealed does not outweigh the presumption that these proceedings should be open.

In regard to Petitioner's second argument that the Settlor's intent will be frustrated if the anonymous donations are made public by unsealing the record, this Court concludes that the Settlor's intent to keep proceedings closed does not overcome the presumption that the proceedings should be open, in as much that any other litigant's desire to have proceedings closed would not overcome the presumption of open proceedings. A party's desire to have closed proceedings is not enough to close the proceedings. Moreover, the Court notes Petitioner's argument that the Settlor would want these proceedings closed is not an absolute, determinative conclusion. The Trust Document merely provides that the Trustee shall make every effort to obtain each donee organization's agreement to treat all distributions as having been received from an anonymous donor. The Trust Document does not absolutely require the gifts to be anonymous. However, assuming *arguendo* it would be the Settlor's intent to close these proceedings, there is not a legitimate government interest to protect in regard to this argument, and the Settlor's intent, by itself, does not overcome the presumption of openness either under a constitutional or common law approach.

In regard to Petitioner's third argument that if the identity of the donee charitable organizations is made public, these organizations will experience a decrease in the receipt of charitable donations, this Court concludes that any argument in this regard is mere speculation. It is absolutely impossible to make the conclusion that charitable organizations will see a decrease in donations if this matter is unsealed. At the December 11, 2009 hearing, Petitioner presented Mark Amendola as an expert witness on charitable giving in the Erie area. Mr. Amendola is the Executive Director of Perseus House, Inc., a local non-profit organization in Erie, and Mr. Amendola testified that in his opinion the public disclosure of the identity of anonymous charitable beneficiaries will cause those charitable organizations to experience a decrease in donations, which would otherwise have been made to those organizations. While Mr. Amendola is indeed well respected in the Erie community, there is absolutely no concrete evidence, studies, treatises, or experience in which Mr. Amendola based his opinion. As previously stated, Petitioner's argument in this regard is equivocal and speculative, and this Court cannot give Mr. Amendola's opinion much, if any, weight. While this Court concludes that protecting charitable organizations from a decrease in donations may be a legitimate government interest, this

Court cannot conclude that opening these proceedings will result in any charitable organizations realizing a decrease in donations. There was absolutely no credible, definitive evidence offered to support Petitioner's argument that charitable organizations will realize a decrease in donations if this matter is unsealed.

In regard to Petitioner's final argument that if the identities of the beneficiaries of the Trust are made public, these beneficiaries may be placed at risk, this Court concludes that this argument does not overcome the presumption that these proceedings should be open under a constitutional analysis. Petitioner argues that there is a legitimate government interest in protecting people from being targeted and placed at risk. However, this Court cannot conclude that any beneficiary will be harmed if this record is unsealed in its entirety. There was absolutely no credible, definitive evidence offered to support Petitioner's argument that any beneficiary will be harmed if this matter is unsealed; and therefore, there is no legitimate government interest that needs protecting in this regard. While protecting persons from designing individuals may be a legitimate government interest, there was absolutely no evidence presented which would support that this government interest needs protecting in this matter. Petitioner cannot identify a clearly defined, specific injury that will result from opening the proceedings; and therefore, Petitioner has not demonstrated good cause to close this matter.

Moreover, Petitioner's argument that the beneficiaries may be placed at risk if the information contained in the Trust Document, First and Partial Account, and Petition For Adjudication is made public does not overcome the presumption of openness through a common law analysis either. As stated previously, "in deciding whether to grant the motion of the party who seeks to seal records or proceedings under the common law approach, the court engages in a balancing test, weighing on the one hand the factors in favor of access, and, on the other, those against it." *Hutchinson, supra* at 582. In balancing the interests regarding this particular argument for sealing these documents against the presumption of openness, this Court concludes that Petitioner has failed to rebut this presumption. Petitioner has failed to prove that any beneficiary will be harmed if the information contained in any document in this matter is made available to the public. Any judgment concluding otherwise would be mere speculation, and this Court will not override the fundamental presumption of openness merely upon speculation. Thus, under a constitutional and common law analysis, Petitioner's argument fails to rebut the presumption that these entire proceedings should be open.

Having addressed all of Petitioner's arguments, this Court concludes that Petitioner has not overcome the presumption that the instant matter should be open. The presumption that judicial proceedings are open

is an essential aspect of our judicial system, and Petitioner has not demonstrated a legitimate government interest or any other reason, which would outweigh this presumption of openness; and therefore, Petitioner's Petition To Seal Record is hereby denied. Furthermore, the Court notes Elizabeth. A. Vorsheck has asked for a protective order redacting the names and addresses of the beneficiaries in this matter. Although this may be a less restrictive means of protecting the beneficiaries than sealing the entire documents, the Court cannot grant the requested relief, since the Court has concluded there is not a legitimate government interest in protecting this information, and the need to protect the information does not outweigh the presumption of openness. To grant Ms. Vorsheck's petition would result in a contradiction; and therefore, for all of the reasons, which denied the Petition To Seal Record, the Court hereby denies Elizabeth A. Vorsheck's Motion For Protective Order To Protect The Identity And Addresses Of The Individual Beneficiaries. However, the Court notes that all of the parties, as stated on the record, agreed and stipulated to this Court granting Michelle Conrad's Motion For Protective Order Related To The First And Partial Accounting filed in this matter. Michelle Conrad is a beneficiary of the Trust, as are her minor children. The parties have agreed to redact Michelle Conrad's address from the record since beneficiaries, who are also minors, live there. Additionally, since there is a custom used by the Pennsylvania appellate courts and Orphans' courts of using only the initials of minor children, this Court will grant Michelle Conrad's request to redact the names of her minor children and use only their initials. This Court notes that there was no request to appoint a Guardian Ad Litem to represent the interests of these minor children in this matter. However, in order to ensure this matter is resolved in a timely manner, the Court will protect the identity of beneficiaries who are minors, by redacting their names and addresses and replacing their names with their initials. Furthermore, the Court will allow any other beneficiary, who may be a minor, the opportunity to file for a protective order, as well.

Thus for all of the foregoing reasons stated, the Court enters the following Order:

ORDER

AND NOW, to wit, this 19th day of January, 2010, after a full hearing and for all of the reasons stated in the foregoing Opinion, it is hereby **ORDERED, ADJUDGED AND DECREED** that Laurel A. Hirt's Petition To Seal Record is hereby **DENIED** and the record in this matter shall be unsealed.

Additionally, it is **ORDERED** that Elizabeth A. Vorsheck's Motion For Protective Order To Protect The Identity And Addresses Of The Individual Beneficiaries is also hereby **DENIED.**

It is further **ORDERED** that Michelle Conrad's Motion For Protective Order Related To The First And Partial Accounting is hereby **GRANTED.** The Register of Wills of Erie County shall redact Michelle Conrad's home address from the Petition To Seal Record, and Answers or Objections thereto. All parties-in-interest shall redact her home address from any filings they have received. The parties-in-interest shall not use Michelle Conrad's home address in future filings, and the parties-in-interest shall not disclose Michelle Conrad's home address in other pleadings or otherwise in matters related to the Trust. Furthermore, the names of Michelle Conrad's children shall be redacted from all documents and replaced with their initials.

However, in order to allow any party to appeal this Order, without being prejudiced in that appeal, and in order to allow any other beneficiaries, who are minor children, the opportunity to file protective orders, it is further **ORDERED** that this Court will wait thirty (30) days from entering an Order unsealing the record.

Furthermore, in the event that this Order is perceived as an interlocutory Order, pursuant to Pa. R.A.P. 312, the Court hereby permits any party to file an appeal of this Order within thirty (30) days of the date of this Order to address the merits contained herein.

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

ERIE RENEWABLE ENERGY, LLC., Appellant,
v.
ZONING HEARING BOARD OF THE CITY OF ERIE, ERIE COUNTY, PENNSYLVANIA, Appellee

ROBERT PETROFF and SUSAN TYMOCZKO, Appellant,
v.
THE CITY OF ERIE ZONING HEARING BOARD, Appellee

ZONING / VARIANCE

Where the Court does not take additional evidence, the Court is limited to determining whether the board abused its discretion or committed legal error.

ZONING / VARIANCE

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.

ZONING / VARIANCE

The fact that there may be a significant amount of testimony or evidence contrary to the Zoning Board's finds does not mean, in and of itself, the Board's findings are unsupported. A single witness or piece of evidence, if credible and substantial, may be sufficient to carry the day.

ZONING / VARIANCE

A zoning hearing board's interpretation of its own zoning ordinance is entitled to great deference and weight.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION 12547-2009

Appearances: Clifford B. Levine, Esq., Attorney for Erie Renewable Energy
Donald L. Wagner, Esq., Attorney for the City of Erie
Edward J. Betza, Esq., Attorney for Robert Petroff and Susan Tymoczko

OPINION

Garhart, J., March 24, 2010

Before the Court are several appeals from rulings (set forth below) made by the City of Erie Zoning Hearing Board ("Board") with regards to Erie Renewable Energy, LLC's ("ERE") proposed 'tires-to-energy' power plant. For the reasons stated herein, all rulings of the Board are hereby affirmed.

I. BACKGROUND

On February 24, 26, and March 24, 2009, the Board conducted hearings with regards to various requests for relief filed by both ERE and Robert Petroff. On February 24, 2009, the Board issued the following decisions: 1) by a 5-0 vote, the Board denied ERE's appeal from the Zoning Officer's denial of ERE's second proposed site plan; and 2) by a 3-2 vote, the Board denied ERE's application for a dimensional variance. On February 26, 2009, the Board issued the following decisions: 1) by a 4-1 vote, the Board denied ERE's motion to quash Mr. Petroff's appeal from the Zoning Officer's approval of ERE's third proposed site plan; and 2) by a 4-1 vote, the Board granted Mr. Petroff's appeal and overturned the Zoning Officer's approval of the third site plan. On March, 24, 2009, by a 3-2 vote, the Board granted ERE's exclusionary challenge to Erie's Zoning Ordinance ("Ordinance").

II. DISCUSSION

A. Standard of Review

Not in dispute in this case is the Court's standard for review of decisions by zoning boards. Where the Court does not take additional evidence, the Court is limited to determining whether the board abused its discretion or committed legal error. *Twp. of Exeter v. Zoning Hearing Bd. of Exeter,* 962 A.2d 653, 659 (Pa. 2009). An abuse of discretion occurs when the board's findings are not supported by substantial evidence in the record. *Id.* Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

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. 2005), *appeal denied,* 897 A.2d 461 (Pa. 2006). The fact that there may be a significant amount of testimony or evidence contrary to the Zoning Board's findings does not mean, in and of itself, the Board's findings are unsupported. A single witness or piece of evidence, if credible and substantial, may be sufficient to carry the day. *Taliaferro v. Darby Twp. Zoning Hearing Bd.*, 873 A.2d 807 (Pa. Cmwlth. 2005), *appeal denied,* 887 A.2d 1243 (Pa. 2005).

B. Exclusionary Challenge

ERE's argument before the Board was that the 100-foot height restriction contained in Section 205 of the Ordinance constitutes a *de facto* exclusion of power plants, which are a permitted use in M-2 districts pursuant to Section 204.20 of the Ordinance. As such, ERE claims it is entitled to 'site-specific relief,' thus allowing them to build its proposed plant on the site in question. *See Twp. of Exeter,* 962 A.2d at 657. By 3 to 2 decision, the Board granted ERE's request, and found "the

ordinance, as written, was invalid in that it excluded the applicants from building the proposed tires-to-energy power plant in the city." (Written Decision, 5/6/09, 6.)

On appeal to this Court, Mr. Petroff and Susan Tymoczko, property owners near the site in question, argue the Board erred as a matter of law when it invalidated the Ordinance based upon the finding that only ERE's proposed plant is excluded. According to the property owners, the legal standard in exclusion challenges requires the Board to find *all* power plants excluded before invalidating the Ordinance. They argue ERE's experts only had experience with combustion power plants, and there is no credible evidence regarding the viability of non-combustion power plants such as wind, solar, or hydro-electric power plants. (Reply Mem. 4-5).

Zoning ordinances that exclude uses fall into two categories - *de jure* or *de facto. Twp. of Exeter*, 962 A.2d at 659. All parties agree *de facto* exclusion is at issue in the present matter. In a *de facto* exclusion case, the challenger alleges that an ordinance appears to permit a use, but under such conditions that the use cannot in fact be accomplished. *Id.* In this case, power plants are a permitted use, pursuant to the Ordinance, in M-2 districts. The 100-foot height restriction is alleged to be one of those conditions whereby the use cannot, in fact, be accomplished.

In *Exeter,* a provision in a township's zoning ordinance, titled "Signs Permitted in Commercial and Industrial Zoning Districts," allowed for the erection of signs in commercial and industrial zoning districts. *Id.* at 655. However, pursuant to the same section, "advertising signs" were not permitted to exceed 25-square-feet. *Id.* An advertising company, specializing in billboards, brought an exclusionary challenge before the township's zoning hearing board, claiming the ordinance operated as a de facto exclusion of billboards. *Id.* at 656. The company's proposed billboards were 300-square-feet and above, clearly in violation of the ordinance's size restriction. *Id.* at 654. After an evidentiary hearing, the board found the ordinance excluded billboards as a permitted use. *Id.* at 656. Without taking additional evidence, the trial court affirmed the board. *Id.* at 658. In reversing the trial court, the Commonwealth Court noted the record included several photographs of advertising signs in the township that met the 25-square-foot restriction. *Id.* In the majority's view, the fact that such signs existed demonstrated the ordinance did not exclude billboards. *Id.*

On appeal to our Supreme Court, the advertising company argued the Commonwealth Court erroneously grouped all off-site advertising together and failed to focus on the narrower subject of billboards. *Id.* In reversing the Commonwealth Court and affirming the board and the trial court, the Supreme Court found the board's finding of *de facto* exclusion of billboards was supported by substantial evidence. *Id.* at 662.

In responding to the Commonwealth Court's reliance on the existence of 25-square-foot signs in the township, the Supreme Court stated the evidence revealed "these signs did not function as billboards." *Id.* at 663.

Based on this Court's reading of *Exeter,* a zoning hearing board can sustain an exclusionary challenge based on the finding that a subcategory of a permitted use is excluded due to restrictions within a zoning ordinance. Therefore, the Board's finding that the Ordinance is invalid for excluding ERE's proposed tires-to-energy plant can be sustained if there is substantial evidence in the record establishing that tire-derived-fuel combustion power plants cannot be constructed to comply with the 100-foot height restriction.

Based upon the record, such substantial evidence existed, and the Court affirms the Board's ruling. Ned Popovic and Joseph Pezze provided testimony with regards to combustion power plants. Both agree the necessary components of a combustion power plant must be built in excess of 100-feet. Therefore, the Board could conclude that, pursuant to the height restriction in the Ordinance, no combustion power plant, including ERE's proposed tires-to-energy power plant, can be built in the City of Erie.

C. Variance Request

As a backup to its exclusionary challenge, ERE requested the Board grant it a dimensional variance[1] so it could build the necessary components of its power plant in excess of 100 feet. By a 3-2 decision, the Board denied ERE's request, stating ERE did not provide "proof of hardship as expressed in the Municipalities Planning Code." (Written Decision, 5/6/09, 5.) ERE appeals the decision to this Court, claiming the Board denied the variances without reference to specific evidence or use of the correct legal standard for dimensional variances[2].

Under the Municipalities Planning Code, where an ordinance inflicts unnecessary hardship upon a property owner, a board may grant a

[1] When seeking a dimensional variance within a permitted use, the owner is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulation. A use variance, on the other hand, involves a proposal to use the property in a manner that is wholly outside the zoning regulation. *Hertzberg v. Zoning Bd. of Adjustment of the City of Pittsburgh,* 721 A.2d 43, 47 (Pa. 1998).

[2] ERE points out the rationales of the different Board members forming the majority in favor of denial. Mr. Sal Parco asserted it was the duty of the Board to maintain the integrity of the Ordinance, and that the Board did not have the authority to overrule a height restriction. Mr. Richard Wagner believed ERE created its own hardship. Ms. Lisa Austin stated, "architects, urban planners and other professionals drafted the [Ordinance], and they limited structures in M-2 districts to 100'. The M-2 site in question is adjacent to commercial and residential zoning districts. Property owners [from the area] testified in opposition to the variance request. The Board, comprised of non-architects, non-engineers, and non-urban planners, must embrace a conservative interpretation of the ordinance, leaving it to the ordinance writers or the courts to make revisions." (Written Decision, 5/6/09, 5-6).

variance if the following findings, among others, are made:

> (1) That there are unique physical conditions peculiar to the particular property and that the unnecessary hardship is due to those conditions;
>
> (2) That because of the physical conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that a variance is needed to enable reasonable use of the property;
>
> (3) That unnecessary hardship has not been created by the appellant;

Hertzberg, 721 A.2d at 46, *citing* 53 P.S. § 10910.2.

ERE calls to the Court's attention the difference between the quantum of proof needed in 'dimensional variance' cases as opposed to 'use variance' cases. In *Hertzberg*, our Supreme Court held "the quantum of proof required to establish unnecessary hardship is indeed lesser when a dimensional variance, as opposed to a use variance, is sought." 721 A.2d at 48. ERE claims it has provided substantial evidence demonstrating it is impracticable and economically impossible for a power plant to comply with both the 100-foot height limitation and the extensive federal and state regulations governing power plants. (Mem. of Law 16.)

Although ERE is correct as to the burden of proof, based upon the record, ERE has merely demonstrated that the application of the ordinance has rendered the property unsuitable for its proposed use. See *Commonwealth v. Zoning Hearing Bd. of Susquehanna Twp.*, 677 A.2d 853, 857 (Pa.Cmwlth. 1996). Thus, the Board was correct in finding that ERE has not provided proof of unnecessary hardship, and the Court affirms the Board's ruling.

D. Site Plan 2, Site Plan 3, and Motion to Quash Petroff Appeal

1. Background

In order to effectively render a decision with these particular appeals, some background information is necessary. ERE's proposed tires-to-energy power plant includes: an 85-foot turbine, two 165-foot boilers, a 180-foot cooling tower, and a 300-foot smoke stack. On May 8, 2008, the Zoning Officer issued a preliminary approval of ERE's first proposed site plan, which depicted only the turbine as being enclosed within a building. On appeal, the Board reversed the Zoning Officer's approval, concluding the boilers were not "appurtenances" within the meaning of 205.15[3] of the Ordinance because "the renderings show the

[3] § 205.15: Appurtenances to buildings, chimneys, stacks, elevator bulkheads, penthouses, gas or water towers, cooling towers, stage towers or scenery lofts, electric signs, wireless towers, and other necessary mechanical appurtenances, where permitted by Building Code and Use Regulations, *and erected upon and as an integral part of the building*, or a monument, shaft, spire, dome, tower, if erected for ornamental purposes only, may be erected or extended above the height limit of the district... (emphasis added).

boilers to be free-standing of the turbine building so that the requirement that they be 'erected upon and as an integral part of the building' is not met." (Board's Minutes, 7/22/08, 3.) Had the Board found the boilers to be appurtenances, ERE could extend the boilers above the 100-foot height limit. ERE filed an appeal to Court of Common Pleas, and on December 12, 2008, the Honorable Shad Connelly affirmed the Board's decision. See No. 14767-2008, Opinion, 12/12/08.

After the Board denied the first site plan, ERE submitted a second site plan to the Zoning Officer. ERE's second plan integrated the two 165-foot boilers with the existing 85-foot turbine building. On October 14, 2008, the Zoning Officer denied ERE's second plan because the 300-foot smoke stack and 180-foot cooling and filtering equipment, did not meet the definition of "appurtenance" as defined by the Board previously. (Written Decision, 5/6/09, 2; Zoning Officer's Letter, October 14, 2008.) ERE appealed this decision to the Board.

After the Zoning Officer denied the second site plan, ERE submitted a third proposed site plan to the Zoning Officer. The third site plan depicted an enclosure around all the various components of the power plants in an effort to comply with the Board's interpretation of § 205.15. On December 23, 2008, the Zoning Officer approved the third plan. (Zoning Officer's Letter, 12/23/08.) On January 16, 2009, the Zoning Officer received an appeal from his approval of the third plan. The appeal, written on behalf of Mr. Petroff by his agent, Randy Barnes, stated, "Please be advised that I wish to appeal the decision that approved the plan for the ERE tire plant on 12/23/08." (Appeal Letter, 1/16/09.)

In response, the Board wrote a letter to Mr. Petroff, which stated,

> You recently filed an appeal to the Erie Zoning Office regarding their decision on the proposed ERE plant. A hearing on this matter is scheduled before the Board on February 24th, 2009. The Zoning Hearing Board has rejected to hear your appeal as written. [Line omitted.] In order to have your appeal heard, you must submit another appeal that is more specific. There was nothing in your appeal that indicates the reason for your appeal or the harm that would result if your appeal is denied. You may consider having your attorney draft the appeal.

(Hearing, 2/26/09, 237).[4] The letter also indicates Mr. Petroff had until February 9, 2009 to file his "revised appeal" with Zoning Office. *Id.* On February 6, 2009, Mr. Petroff submitted his revised appeal to the Board. In response, ERE requested the Board quash the appeal as untimely.

[4] After review of the record, the Court could not locate the Board's letter to Mr. Petroff. ERE indicates, in its Brief, that it is Exhibit 30. The Court cites to the transcript as the letter was read verbatim into the hearing record. Regardless, if any exhibits, considered by the Board, have not been made part of this record, ERE or the Board is advised to file them promptly.

2. Second Site Plan

At the February 24, 2009, hearing, the Board unanimously voted to uphold the Zoning Officer's denial of the second site plan. In its written decision, the Board stated, "Constructing buildings around the base of such industrial structures does not satisfy the requirement of being 'erected upon and as an integral part of a building' [section 205.15]. The stacks, boilers and filtering system are not appurtenances, and may not exceed the 100' maximum height limit." (Written Decision, 5/6/09, 5).

Pursuant to 53 P.S. § 10603.1,

> In interpreting the language of a zoning ordinance to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.

However, the Court also notes it is well settled law that a zoning hearing board's interpretation of its own zoning ordinance is entitled to great deference and weight. *Arter v. Philadelphia Zoning Board of Adjustment*, 916 A.2d 1222, 1229 (Pa.Cmwlth. 2007).

In rendering its decision, the Board considered the proposed site plan, the language of the zoning ordinance, the testimony of the Zoning Officer, and the testimony of Ned Popovic. The Board found the components at issue did not meet § 205.15's requirement that they be "erected upon and as an integral part of the building," regardless of whether or not such component was enclosed by a building. Based upon the evidence the Board considered, and the deference given to the Board when it interprets its own ordinance, this Court cannot conclude the Board committed an abuse of discretion or an error of law. Therefore, the ruling of the Board is affirmed.

3. Motion to Quash Petroff Appeal: Site Plan 3

In its motion to quash, ERE argued Mr. Petroff s original appeal was not accepted by the Board due to lack of specificity. Therefore, the subsequent appeal, filed on February 6, 2009, was untimely pursuant to 53 P.S. § 10914.1(a)[5]. Mr. Petroff s counterargument is that he filed a timely appeal on January 16, 2009, and that he was given an extension of time to clarify the reasons for his appeal. (Hearing, 2/26/09, 240.) At the February 26, 2009, hearing, the Board denied ERE's motion to quash by a 4-1 vote, agreeing with the argument proffered by Mr. Petroff.

The Court holds Mr. Petroff filed a timely appeal to the Board on January 16, 2009, and that the "revised appeal," filed on February 6,

[5] Pursuant to this section, an appellant has a thirty-day window in which to file an appeal to a zoning hearing board.

2009, acted as a supplement to the existing appeal. The Court finds the Board did not reject the January 16, 2009 appeal, but only rejected *to hear* the appeal *as written*. The Board's letter to Mr. Petroff evidences the fact the Board accepted the appeal and scheduled a hearing with regards to the matter. The Board merely requested more specifics in order for the appeal to be heard. Therefore, Mr. Petroff was fully compliant with the statute, and the ruling of the Board is affirmed.

After denying the motion to quash, the Board took up the substantive issue of Mr. Petroff s appeal - the Zoning Officer's approval of the third site plan. Mr. Petroff argued that merely placing a building around all of the separate components of the power plant does not make the separate components appurtenances, as defined in the Ordinance. (Hearing, 2/26/09, 258-261.) By a 4-1 vote, the Board granted Mr. Petroff's appeal, ruling the components were not appurtenances.

The Court hereby affirms the ruling of the Board with respect to the grant of Mr. Petroff's appeal. The Court applies the same reasoning employed in affirming the Board's ruling with respect to the second site plan.

III. CONCLUSION

For the reasons stated above, all rulings of the Board are hereby affirmed. An appropriate order follows this Opinion.

ORDER

AND NOW, this 24th day of March, 2010, upon consideration of the appeals consolidated at docket number 12547-2009, the briefs of the parties, and the arguments of counsel, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. The Board's decision to deny ERE's appeal from the Zoning Officer's denial of the second proposed site plan is AFFIRMED.

2. The Board's decision to deny ERE's application for a dimensional variance is AFFIRMED.

3. The Board's decision to deny ERE's Motion to Quash the appeal of Robert Petroff is AFFIRMED.

4. The Board's decision to grant Mr. Petroff's appeal and overturn the Zoning Officer's approval of the third site plan is AFFIRMED.

5. The Board's decision to grant ERE's exclusionary challenge is AFFIRMED.

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

CHRISTOPHER M. SLAWSON and ASLAN SLAWSON, his wife, Plaintiffs

v.

RYAN WILSON; RYAN TITUS; JUSTIN BINNEY; and CABURN'S INC., t/d/b/a THE CAB BAR & GRILL, Defendants

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

In a motion for summary judgment, the nonmoving party may not rest upon the mere allegations or denials of its pleadings, but must set forth by affidavit, or otherwise, specific facts showing summary judgment is not appropriate.

ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE / OTHER NEGLIGENCE ACTS OR OMISSIONS

A tavern is in violation of the Pennsylvania Dram Shop Act if it (or any of its employees, servants, or agents) sells any alcoholic beverages to a visibly intoxicated defendant; such a violation, in addition to being unlawful, is negligence per se.

OTHER NEGLIGENCE ACTS OR OMISSIONS / CRITERIA FOR PROXIMATE CAUSE

In order to succeed on a theory of dram shop liability, a plaintiff injured by a visibly intoxicated defendant must show: (1) The tavern served alcoholic beverages to the visibly intoxicated defendant and (2) such service was the proximate cause of plaintiff's injuries.

NEGLIGENCE / EVIDENCE ADMISSIBLE AS TO NEGLIGENCE

Eyewitness evidence that an individual was served alcohol when they were visibly intoxicated is not necessary to prove dram shop liability. Circumstantial evidence of a defendant's intoxication before, during, and immediately after his stay at a bar along with the defendant's admission of purchasing alcohol therein is such that reasonable minds may differ whether the defendant was visibly intoxicated when he paid for and received drinks from a bartender at the bar.

NEGLIGENCE / ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE

A possessor of land who holds it open to the public for his business purposes is subject to liability for physical harm caused by the accidental, negligent or intentionally harmful acts of third persons by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise protect them against it.

NEGLIGENCE / DUTY

A possessor of land who holds it open to the public is not an insurer of a visitor's safety unless and until he has reason to know that the acts of a third person are about to occur, and his ability to know, or have reason to

know, such acts are about to occur may be based on his past experience that such acts may occur, even if he has no reason to expect it on the part of any particular individual, especially if the place or character of his business is such that he should reasonably anticipate the act.

CIVIL PROCEDURE / MOTION FOR JUDGMENT ON PLEADINGS

The moving party shall file a motion for judgment on the pleadings, together with a supporting brief, with the Prothonotary and a copy of the motion and brief shall be contemporaneously served by the moving party upon all counsel of record and upon the assigned judge. If the brief of the moving party is not filed within the time periods above stated, unless the time shall be extended by the Court or by stipulation, the Court may then dismiss the motion where the moving party has failed to comply.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 12967-2007

Appearances: William J. Kelly, Jr., Esq., Attorney for Christopher and Aslan Slawson
Eric J. Purchase, Esq., Attorney for Justin Binney
Mark E. Mioduszewski, Esq., Attorney for Caburn's Inc.
S.E. Riley Jr., Esq., Attorney for Ryan Wilson

OPINION

Connelly, J., April 29, 2010

This matter is before the Court pursuant to a Motion for Summary Judgment filed by Caburn's Incorporated, t/d/b/a The Cab Bar and Grill (hereinafter "Defendant Caburn") and two separate Motions for Judgment on the Pleadings filed by Defendant Caburn and Ryan Wilson (hereinafter "Defendant Wilson"). Christopher and Aslan Slawson (hereinafter "Plaintiffs")[1] oppose Defendant Caburn's Motion for Summary Judgment, while Justin Binney (hereinafter "Defendant Binney") opposes Defendant Caburn's Motion for Judgment on the Pleadings.[2] Defendant Wilson's Motion is unopposed.

Statements of Fact

Plaintiff and Martin Lepkowski attended a party hosted at Defendant Caburn's property, the Cab Bar and Grill (hereinafter "The Cab"), on August 13, 2005, which they left at some point to investigate a plane crash that had occurred east of the Erie Airport. *Plaintiffs' Response to Defendant Caburn's Motion for Summary Judgment, p. 2*. After their

[1] As the present litigation largely focuses on Christopher Slawson, "Plaintiff" shall hereinafter refer only to him unless otherwise noted, e.g., "Plaintiff Aslan Slawson."

[2] Though entitled as a brief in opposition to Defendant Caburn's Motion for Summary Judgment, reading the document reveals it to be an opposition brief to Defendant Caburn's Motion for Judgment on the Pleadings. *See, Brief of Justin Binney in Opposition to Motion for Summary Judgment Filed on Behalf of Defendant, Caburn's Inc., pp. 1-4.*

"investigation," Plaintiff and Mr. Lepkowski picked up a subjectively upset, agitated, and "pretty intoxicated" Defendant Binney,[3] who had been fighting with his father prior to consuming "a couple" of alcoholic drinks: to-wit, Jack and Cokes. *Id. at 3, Ex. 2; Brief of Defendant Caburn's Inc., t/d/b/a/ the Cab Bar and Grill, in Support of Motion for Summary Judgment, p. 23.* Plaintiff, Mr. Lepkowski, and Defendant Binney returned to The Cab sometime in between 11:30 p.m. and 12:30 a.m., and remained there until roughly 2:00 a.m. *Plaintiffs' Response to Defendant Caburn's Motion for Summary Judgment, p. 3.* It was during this time that Defendant Binney admitted to paying for, and consuming, approximately five (5) more Jack and Cokes and two (2) shots composed of Jaegermeister and Red Bull energy drink before exiting The Cab with Plaintiff. *Id. at 3-4.*

Also attending The Cab that evening from 10:00 or 11:00 p.m. until 2:00 a.m., were Defendant Wilson, Ryan Titus (hereinafter "Defendant Titus"),[4] and Dane Mong. *Id. at 5, 7.* Mr. Mong, Defendant Wilson, and Defendant Titus collectively consumed at least five (5) pitchers of beer at The Cab throughout their four (4) to five (5) hour stay. *Id. at 7.* Defendants Wilson and Titus were outside The Cab at 2:00 a.m. in the parking lot allegedly talking about a game of pool they had just played, when (as mentioned above) Defendant Binney and Plaintiff emerged from inside the bar. *Id. at 5-6; Complaint, ¶ 29.*

Defendants Wilson and Titus each believed Defendant Binney was intoxicated, acting like a "typical drunk." *Plaintiffs' Response to Defendant Caburn's Motion for Summary Judgment, p. 6.* At that moment, or shortly thereafter, a derogatory comment was made by either Defendant Wilson or Titus, which Defendant Binney believed was directed towards him. *Plaintiffs' Response to Defendant Caburn's Motion for Summary Judgment, p. 5; Complaint, ¶ 28.* Defendant Binney challenged both Defendants Wilson and Titus to a "martial arts" fight despite the difference of four (4) and seven (7) inches in height and an aggregate two hundred eighty-nine (289) pounds in weight between him and Defendants Wilson and Titus. *Plaintiffs' Response to Defendant Caburn's Motion for Summary Judgment, p. 6; Complaint, ¶ 35.* After Defendant Binney attempted an errant swing at Defendant Wilson, Defendant Titus stepped in and knocked out Defendant Binney with one punch. Defendant Wilson did the same thereafter to Plaintiff. *Id.* Defendants Wilson and Titus left the scene, were later questioned by Millcreek Township Police Officers, and ultimately admitted their complicity in the conflict outside of The Cab. *Id. at 7.*

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[3] Defendant Binney is 5'8" tall and weighs approximately 141 lbs. *Plaintiffs' Response to Defendant Caburn's Motion for Summary Judgment, fn. 3.*

[4] Defendant Wilson is 6'3" tall and weights approximately 230 pounds. *Id.* Defendant Titus is 6'0" tall and weighs approximately 200 pounds. *Id.*

Analysis of Law

I. DEFENDANT CABURN'S MOTION FOR SUMMARY JUDGMENT

Any party may move for summary judgment, in whole or in part, after the relevant pleadings are closed. *See, Ertel v. The Patriot-News Co.*, 674 A.2d 1038 (Pa. 1996); *cert. denied*, 519 U.S. 1008 (1996). Summary judgment is appropriate when the facts contained in the record[5] are so clear that reasonable minds could not differ as to whether: genuine issues of material fact exist with regard to a necessary element of the cause of action or defense (that could be established by additional discovery or expert report); or whether an adverse party (who will bear the burden of proof at trial) has produced evidence of facts essential to their prima facie cause of action or defense which would require the issues be submitted to a jury. *Pa.R.C.P. 1035.2; Stimmler v. Chestnut Hill Hosp.*, 981 A.2d 145, 153-54 (Pa. 2009); *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899 (Pa. 2007).

It is the moving party's burden to prove summary judgment is appropriate, and all doubts as to such shall be resolved against it. *See, Ertel*, 674 A.2d at 1041. However, this is not to say the nonmoving party may rest upon the mere allegations or denials of its pleadings, but must set forth by affidavit, or otherwise, specific facts showing summary judgment is not appropriate. *See, Id.* at 1042; *Burger v. Owens III., Inc.*, 966 A.2d 611, 619-20 (Pa. Super. 2009).

The Court must not only examine the record in a light most favorable to the nonmoving party, but it must also accept as true all well-pled 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). To that end, the Court has viewed the record in a light most favorable to the nonmoving parties, and has weighed applicable law as it relates to the facts of this case along with the merit of the arguments presented by each of the parties in determining whether summary judgment is proper as to Defendant Caburn's Motion for Summary Judgment.

Defendant Caburn contends it is entitled to judgment, not only because it did not serve alcohol to a visibly intoxicated Defendant Binney, but also because it did not owe Plaintiff a duty to protect him against injury from its other patrons. *Motion for Summary Judgment, ¶ 5; see, Brief of Defendant, Caburn's Inc., t/d/b/a the Cab Bar and Grill, in Support of Motion for Summary Judgment, pp. 4, 19; Reply Brief of Defendant, Caburn's Inc., in Support of Motion for Summary Judgment, pp. 2.*

[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 Civil Rule 4003.5(a)(1), whether the reports have been produced in response to interrogatories. *Pa.R.C.P. 1035.1.*

Therefore, in order to determine whether Defendant Caburn is entitled to its requested relief, the Court shall specifically address if genuine issues of fact exist as to whether Defendant Binney was visibly intoxicated, and whether Defendant Caburn owed Plaintiff a duty to protect him against injury from other patrons of The Cab.

The Cab is in violation of the Pennsylvania Dram Shop Act if it (or any of its employees, servants, or agents) sold any alcoholic beverages to a visibly intoxicated Defendant Binney. *See, 47 P.S. § 4-493(1)*. Such a violation, in addition to being unlawful, is negligence *per se. Id.; see, Johnson v. Harris*, 615 A.2d 771, 775 (Pa. Super. 1992). Therefore, in order to succeed on a theory of Dram Shop Liability, Plaintiff must ultimately show: (1) The Cab served alcoholic beverages to a visibly intoxicated Defendant Binney and (2) such service was the proximate cause of Plaintiff's injuries. *See, Holpp v. Fez, Inc.*, 656 A.2d 147, 151 (Pa. Super. 1995)(finding a plaintiff may be a third party proximately injured as a result of the visibly intoxicated patron's actions); *McDonald v. Marriott Corp.*, 564 A.2d 1296, 1298 (Pa. Super. 1989).

Defendant Caburn, itself, notes in its Supporting Brief that at least three people - Plaintiff, Defendant Wilson, and Defendant Titus - observed Defendant Binney to be intoxicated at various stages throughout the evening, i.e., before, during, and/or after his presence inside of The Cab. Corroborating such observations, the record also reflects Defendant Binney had been drinking alcoholic beverages prior to entering The Cab. Furthermore, Defendant Binney continued to imbibe therein, admitting to purchasing even more drinks for himself. The record also shows Defendant Binney was quick to engage two men (each much larger than he) in "martial arts" fisticuffs almost immediately after exiting The Cab without ascertaining whether the alleged derogatory comment was actually directed towards him.

Although Defendant Binney claims The Cab served him his drinks, the record does not directly reflect that an eyewitness saw a bartender at The Cab serve him. However, such a witness is not presently necessary for the Court to render a decision on Defendant Caburn's Motion. *See, Fandozzi v. Kelly Hotel, Inc.*, 711 A.2d 527, 527 (Pa. Super. 1998)(holding eyewitness evidence that an individual was served alcohol while they were visibly intoxicated is not necessary to prove dram shop liability). The circumstantial evidence of Defendant Binney's possible intoxication before, during, and immediately after his stay at Defendant Caburn's establishment along with his admission of purchasing alcohol therein, is such that reasonable minds may differ whether Defendant Binney was visibly intoxicated while he paid for and received his drinks from a bartender at the Cab. Thus, genuine issues of material fact exist in this regard.

As previously noted, a violation of the Pennsylvania Dram Shop Act is negligence *per se. Johnson v. Harris*, 615 A.2d at 775. Further,

Restatement (Second) of Torts, § 344 has been adopted as law by Pennsylvania Courts, and reads as follows:

> A possessor of land who holds it open to the public . . . for his business purposes is subject to liability . . . for physical harm caused by the accidental, negligent or intentionally harmful acts of third persons . . . by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise protect them against it.

Moran v. Valley Forge Drive-In Theater, Inc., 246 A.2d 875, 878 (Pa. 1968). Such a possessor, however, is not an insurer of a visitors safety unless and until he has reason to know that the acts of a third person are about to occur. *Restatement (Second) of Torts § 344, cmt. f.* His ability to know, or have reason to know, such acts are about to occur may be based on his past experience that such acts may occur, even if he has no reason to expect it on the part of any particular individual. *Id.* This is especially true if the place or character of his business is such that he should reasonably anticipate the act, which led to the injury. *Id.*

In addition to, and anchored in, the above analysis regarding visible intoxication, the Court finds that reasonable minds may also differ whether Defendant Caburn, as an operator of a drinking establishment (possessing implicit experience in the actions of intoxicated patrons), should reasonably anticipate the actions and consequences that may arise out of serving a questionably irate and visibly intoxicated Defendant Binney. Thus, a genuine issue of material fact also exists regarding Defendant Caburn's duty to protect Plaintiff from its patrons.

II. DEFENDANTS CABURN'S and WILSON'S MOTIONS FOR JUDGMENT ON THE PLEADINGS

The Erie County Local Rules of Civil Procedure provide the following in regard to motions for judgment on the pleadings:

> The moving party shall file a motion for judgment on the pleadings, together with a supporting brief, with the Prothonotary and a copy of the motion and brief shall be contemporaneously served by the moving party upon all counsel of record and . . . upon the assigned judge.
>
> . . . .
>
> If the brief of . . . the moving party . . . is not filed within the time periods above stated, unless the time shall be extended by the Court or by stipulation, the Court may then . . . Dismiss the motion where the moving party has failed to comply.

Erie L.R. 1034(a)(1),(4)(A). Though opposed by Defendant Binney, Defendant Caburn's Motion for Judgment on the Pleadings was not

accompanied by a brief in support thereof that was either filed with the Prothonotary, or contemporaneously served upon the Court. The Court, neither extending the time period for filing of the brief nor receiving a stipulation thereto, shall dismiss Defendant Caburn's Motion for Judgment on the Pleadings, as a supporting brief was not contemporaneously filed together with the Motion as required by the Erie County Local Rules of Civil Procedure.

Defendant Wilson's Motion for Judgment on the Pleadings requests that the Court grant in his favor by dismissing Defendant Binney's crossclaim. *See, Binney Answer, New Matter and Cross-Claim, ¶¶ 96-97.* Defendant Wilson's Motion is grounded in the notion that Defendant Binney's crossclaim contains a request for recovery of damages for his injuries that resulted from the fight between the parties, and that such a claim is barred by the applicable statute of limitations. *Wilson Motion for Judgment on the Pleadings, ¶ 3; Wilson Brief in Support for Motion for Judgment on the Pleadings, pp. 1-2; citing, 42 Pa.C.S.A. § 5524.* While Defendant Wilson may possibly be correct that Defendant Binney is not entitled to recovery of damages for his injuries, Defendant Binney's crossclaim makes no such contention. Instead, the crossclaim pertains to Plaintiffs' injuries. Defendant Binney alleges Defendant Wilson "is solely and directly liable to [Plaintiffs] for and on account of any and all injuries, losses or damages allegedly sustained by them," or in the alternative "liable to [Defendant Binney] for contribution and/or indemnity" as to damages relating to Plaintiffs' injuries. *Binney Answer, New Matter and Cross-Claim, ¶¶ 96-97.*

Defendant Wilson has constructed an argument against a non-existent request, which he alleges is contained in Defendant Binney's crossclaim. Therefore, whether a party may recover damages for injuries outside of the applicable statute of limitations pursuant to 42 Pa.C.S.A. § 5524 is immaterial as to Defendant Binney's crossclaim. As a result, the Motion is dismissed.

ORDER

AND NOW, TO-WIT, this 29th day of April, 2010, it is hereby **ORDERED, ADJUDGED, AND DECREED** that, for the reasons set forth in the foregoing Opinion, Defendant Caburn's Motions for Summary Judgment and Judgment on the Pleadings, along with Defendant Wilson's Motion for Judgment on the Pleadings are **DENIED.**

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

EUGENE WARREN, Appellant,

v.

BARRY THOMAS, Appellee

CIVIL PROCEDURE / TRIAL

The standard of review for an appellate court examining jury instructions given by a trial court is a clear abuse of discretion or an error of law controlling the outcome of the case.

CIVIL PROCEDURE / TRIAL

When an appellate court reviews jury instructions, an error in a charge renders the charge inadequate and therefore sufficient ground for a new trial if the charge in its entirety misleads or confuses rather than clarifies a material issue, or there is a fundamental omission in the charge and such omission proves prejudicial.

ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE / OPERATION OF VEHICLES

The assured clear distance ahead rule requires a driver to control a vehicle so that it can stop within the distance of whatever may reasonably be expected to be within the driver's path.

ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE / OPERATION OF VEHICLES

The sudden emergency doctrine provides a defense to a driver whom is not careless or reckless but suddenly and unexpectedly finds him or herself in a dangerous situation with little or no opportunity to gain control, and while unable to use his or her best judgment, does use an honest exercise of judgment in such circumstances.

CIVIL PROCEDURE / POINTS FOR CHARGE

A trial court may charge on both the assured clear distance ahead rule and the sudden emergency doctrine where the facts in a case do not render the rules mutually exclusive and where evidence could lead reasonable minds to differ as to the existence of a sudden emergency.

CIVIL PROCEDURE / TRIAL

When an appellate court reviews a refusal to give a specific jury instruction, the court must determine only whether the factual record supports the trial court's decision not to charge on a particular principle of law.

CIVIL PROCEDURE / POST-TRIAL MOTIONS

When reviewing a motion for Judgment Notwithstanding Verdict on appeal, the appellate court must consider the evidence through the sieve of the jury's deliberations and in the light most favorable to the verdict winner, affording him or her the benefit of every reasonable inference of fact, and with any conflict or doubt resolved in his or her favor.

CIVIL PROCEDURE / POST-TRIAL MOTIONS

A court may enter a Judgment Notwithstanding Verdict in two circumstances: one, all factual inferences decided adverse to the movant still require a verdict in his favor; and two, no two reasonable minds could disagree the outcome should have been rendered in the favor of the movant.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 10771 of 2007

Appearances: Michael J. Koehler, Esq., Attorney for Appellant
Stephen J. Magley, Esq., Attorney for Appellee

MEMORANDUM OPINION[1]

DiSantis, Ernest J., Jr., J. Feb. 18, 2010

Appellant, Eugene Warren, appeals from the judgment entered in the Court of Common Pleas of Erie County in favor of Appellee, Barry Thomas, following the denial of Appellant's Motion for Post-Trial Relief. Based upon the following analysis, this Court respectfully requests that the judgment be affirmed.

I. Background of the Case[2]

This matter involves a rear-end motor vehicle accident, which occurred on March 2, 2005, at the intersection of East 38th and Wallace streets, in the City of Erie. On that date, Appellee was traveling westbound on East 38th Street. Due to the snowy conditions resulting from a lake effect snowstorm, Appellee and other vehicles were traveling at a slow rate of speed and maintaining distance between each vehicle. N.T. Trial (Day Two), 10/19/09, at 8. When Appellee approached the intersection of East 38th and Wallace Streets, the traffic signal turned yellow and the Appellant, who was traveling in front of Appellee, activated his brake lights to stop his vehicle. *Id.*, at 9. In response, the Appellee, who was traveling eight or ten miles per hour, started to brake but began sliding due to the slick roads. *Id.*, at 9, 11. As he was pumping his brakes, he slid into the rear of Appellant's vehicle. *Id.* Up until that point, Appellee had no problem stopping or slowing his vehicle, in spite of the weather conditions. *Id.*[3]

Appellant instituted suit by filing a Writ of Summons on February 26, 2007. On July 17, 2007, Appellant filed a Complaint, alleging that while

[1] This Memorandum Opinion is submitted pursuant to Pa.R.A.P. 1925 (a).

[2] The Court's factual background is derived from the transcribed "excerpts" of the jury trial. The Appellant did not order the entire trial transcript.

[3] At trial, Appellant testified he was stopped at the light when he was struck by Appellee. N.T. Trial (Day Two), 10/19/09, at 15.

he was stopped in the westbound lane at a red light at the intersection of 38th and Wallace Streets, Appellee's vehicle struck him from behind. Complaint, 07/17/07, at ¶¶ 3-4. Appellant claimed Appellee was negligent, careless, and reckless in the following respects: (1) Appellee collided with the rear of Appellant's vehicle; (2) Appellee was driving at an excessive rate of speed under the circumstances; (3) Appellee did not have his vehicle under proper and reasonable control; (4) Appellee was inattentive to other vehicles when he proceeded into the intersection; (5) Appellee was incompetent to drive; (6) Appellee was inattentive and failed to keep a proper lookout; and, (7) Appellee failed to comply with the Pennsylvania Motor Vehicle Code, specifically 75 Pa.C.S.A. § 3361 (driving vehicle at safe speed). *Id.*, at 5 (a)-(g). On August 10, 2007, Appellee filed an Answer and New Matter. Appellant filed a Reply to New Matter on July 11, 2008.

On October 16, 2009, a jury trial commenced and both parties testified as to their versions of events.[4] On October 20, 2009, the jury found that Appellee was not negligent. On October 30, 2009, Appellant filed Motions for Post-Trial Relief, which this Court denied on November 30, 2009.

On December 21, 2009, Appellant filed a Notice of Appeal. On December 22, 2009, the Court ordered Appellant to file concise statement of the matters complained of on appeal, pursuant to Pa.R.A.P. 1925. On January 8, 2010 Appellant filed his Concise Statement of Matters Complained pursuant to Pa.R.A.P. 1925 (b). In his 1925 (b) statement, Appellant claims the Court erred by: (1) instructing the jury on the sudden emergency doctrine; (2) failing to instruct the jury as to Appellant's supplemental jury instructions; and, (3) denying Appellant's Motion for Judgment Notwithstanding the Verdict. Appellant's Concise Statement of Matters Complained, 01/08/10, at 1-3.

II. Legal Discussion

A. Whether the trial court erred in instructing the jury on the Sudden Emergency Doctrine?

An appellate court's standard of review regarding jury instructions is as follows:

> In examining these instructions, our scope of review is to determine whether the trial court committed clear abuse of discretion or error of law controlling the outcome of the case. Error in a charge is sufficient ground for a new trial, if the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue. A charge

[4] The Appellant's treating chiropractor testified by video deposition, as did the Appellee's expert physician.

> will be found adequate unless the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to fundamental error. A reviewing court will not grant a new trial on the ground of inadequacy of the charge unless there is a prejudicial omission of something basic or fundamental. In reviewing a trial court's charge to the jury, we must not take the challenged words or passage out of context of the whole of the charge, but must look to the charge in its entirety.

Stewart v. Motts, 539 Pa. 596, 654 A.2d 535, 540 (1995) (internal citations and quotation marks omitted).

Appellant argues that Appellee failed to request the sudden emergency doctrine in writing, and made the request after final argument by the parties on their submitted points for charge. Moreover, Appellant claims that Appellee failed to argue in his closing that a sudden emergency existed.[5] He asserts that there was no evidence of a sudden emergency, and the Court should not have given the instruction which, he asserts, prejudiced him. Furthermore, Appellant claims that the parties indicated in their respective pre-trial narrative statements that liability was conceded and a formal stipulation would be offered at time of trial.[6]

> One of the primary duties of a trial judge is to clarify the issues so that the jury may understand the questions to be resolved. *Smith v. Clark*, [411 Pa. 142, 147, 190 A.2d 441 (1963)]. A trial judge is charged with the responsibility of defining all pertinent questions of law. All issues which are relevant to the pleadings and proof may become the subject of a jury instruction. Although a certain burden rests on the litigants to submit written points for charge to the court requesting instructions on their theories of the case, it is the duty of the trial judge fully to instruct the jury as to the law applicable to the facts even in the absence of a request by the parties. *Perigo v. Deegan*, 431 A.2d 303, 306 (Pa. Super. 1981). While we recognize that a trial judge should not take on the responsibilities of an advocate and introduce theories not raised by the parties, *Hrivnak v. Perrone*, 472 Pa. 348, 372 A.2d 730 (1977), in certain instances it is correct for the court to charge on questions of law not specifically requested

[5] The Appellant did not request that the closing arguments be transcribed.

[6] The transcribed excerpts from the trial do not indicate that Appellee stipulated to negligence. Appellant appears to be referring to a settlement discussion that took place at the status/settlement conference. This was not recorded and is not part of the record. Furthermore, settlement statements are not admissions. In addition, at trial, Appellee conceded only that his vehicle struck the Appellant's vehicle and Appellant was injured. However, he denied liability given the circumstances.

> by the parties. *Rosato v. Nationwide Insurance Co.,* 397 A.2d 1238 (Pa. Super. 1979).

Berry v. Friday, 472 A.2d 191, 193-94 (Pa. Super. 1984) (internal footnotes and quotation marks omitted).

In *Lockhart v. List*, 542 Pa. 141, 665 A.2d 1176 (Pa. 1995), the Pennsylvania Supreme Court discussed the principles of both the sudden emergency doctrine and assured clear distance ahead rule. It found that:

> . . . In short, the assured clear distance ahead rule simply requires a driver to control the speed of his or her vehicle so that he or she will be able to stop within the distance of whatever *may reasonably be expected* to be within the driver's path.
>
> The sudden emergency doctrine, on the other hand, is available as a defense to a party who suddenly and unexpectedly finds him or herself confronted with a perilous situation which permits little or no opportunity to apprehend the situation and act accordingly. The sudden emergency doctrine is frequently employed in motor vehicle accident cases wherein a driver was confronted with a perilous situation requiring a quick response in order to avoid a collision. The rule provides generally, that an individual will not be held to the "usual degree of care" or be required to exercise his or her "best judgment" when confronted with a sudden and unexpected position of peril created in whole or in part by someone other than the person claiming protection under the doctrine. The rule recognizes that a driver who, although driving in a prudent manner, is confronted with a sudden or unexpected event which leaves little or no time to apprehend a situation and act accordingly should not be subject to liability simply because another perhaps more prudent course of action was available. Rather, under such circumstances, a person is required to exhibit only an honest exercise of judgment. The purpose behind the rule is clear: a person confronted with a sudden and unforeseeable occurrence, because of the shortness of time in which to react, should not be held to the same standard of care as someone confronted with a foreseeable occurrence. It is important to recognize, however, that a person cannot avail himself of the protection of this doctrine if that person was himself driving carelessly or recklessly.

Lockhart, 665 A.2d at 1180 (citations and footnotes omitted).

As to whether a trial court may charge on both doctrines, the *List* Court concluded that, ". . . while it may be that given the particular facts presented, the doctrine of sudden emergency and that of assured

clear distance ahead would be mutually exclusive, the facts in another case may not conclusively demonstrate that exclusivity, rendering a charge on both doctrines appropriate." *Id.*, at 1183. In addition, "where the evidence is such that reasonable minds could differ as to whether a sudden emergency existed, both charges should be given." *Id. See also*, *Levey v. DeNardo*, 555 Pa. 514, 725 A.2d 733 (Pa. 1999).

Here, the evidence reflected that prior to the accident, Appellee did not experience problems either stopping or driving on the roadway. Although he was aware of Appellant's vehicle and was operating his vehicle in a prudent manner, the Appellee was confronted with a situation in which he could not avoid impact with the Appellant's vehicle. Because reasonable minds could differ as to whether Appellee was negligent or if a sudden emergency was present, this Court instructed the jury on both the sudden emergency doctrine and assured clear distance ahead rule.

Although the jury asked to be re-instructed on the sudden emergency doctrine and negligence, it is not possible to divine the basis of its decision. It may have ignored the sudden emergency doctrine and based its verdict upon the theory that the incident occurred in Erie County, a snowy locale, and that the Appellee simply was, not negligent given the conditions at the time. Appellant's claim is based solely upon his supposition of the basis of the verdict.[7]

B. Whether the trial court erred in refusing to instruct the jury on Appellant's proposed supplemental jury instructions?

> [I]n reviewing a claim regarding the refusal of a court to give a specific instruction, it is the function of this Court to determine whether the record supports the trial court's decision. The law is clear that a trial court is bound to charge only on that law for which there is some factual support in the record. We note further that it is not the function of the trial court in charging a jury to advocate, but rather to explain the principles of law which are fairly raised under the facts of a particular case so as to enable the jury to comprehend the questions it must decide.

Lockhart, 665 A.2d at 1179 (internal citations omitted).

Here, the Appellant's proposed supplemental jury instructions were as follows:

[7] To the extent Appellant is asserting that this Court acted as an advocate by giving the instruction, his claim is meritless *See Rosato*, *supra.* at 1240-41. Moreover, by requesting that this Court charge on the assured clear distance rule, Appellant invited the sudden emergency charge.

Negligence:

1. Under the Assured Clear Distance rule in the Motor Vehicle Code, 75 Pa.C.S.A§ 3361 (Driving Vehicle at Safe Speed) a driver must take into account weather conditions that affect his ability to stop, such as wet, icy or slippery road surfaces. Fish v. Gosnell, 463 A.2d 1042 (Pa. Super, 1983)

Accepted:____ Rejected:____

2. Motorist driving on a slippery street is bound to consider the condition of the street and reduce his speed to the point where he can control his automobile. Matzasoszki v. Jacobson 186 A. 227 (Pa. Super. 1936)

Accepted:____ Rejected:____

3. Sudden slowing or stopping of vehicle ahead must be anticipated by driver. Bohner v. Stine, 463 A.2d 438 (Pa, Super. 1983)

Accepted:____ Rejected:____

Plaintiff's Proposed Supplemental Jury Instructions.

At trial, the Court instructed the jury as to Sections 3310 and 3361 of the Motor Vehicle Code (following too closely and driving vehicle at safe speed). This covered the first request. As to the remaining requests, this Court's instruction adequately covered the relevant legal principles that the jury was bound to consider.

C. Whether the Court erred in denying Appellant's Motion for Judgment Notwithstanding Verdict?

On appeal, the standard by which the appellate court reviews the denial of a post-trial motion for, JNOV and/or a new trial is as follows:

> In reviewing a motion for [JNOV], the evidence must be considered in the light most favorable to the verdict winner, and he must be given the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his favor. Moreover, a [JNOV] should only be entered in a clear case and any doubts must be resolved in favor of the verdict winner. Further, a judge's appraisement of evidence is not to be based on how he would have voted had he been a member of the jury, but on the facts as they come through the sieve of the jury's deliberations.
>
> There are two bases upon which a [JNOV] can be entered: one, the movant is entitled to judgment as a matter of law, and/or two, the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant. With the first a court reviews the record and concludes that even with all factual inferences decided adverse to the movant the law nonetheless requires a verdict in his favor, whereas with the second the court reviews the evidentiary

> record and concludes that the evidence was such that a verdict for the movant was beyond peradventure.
>
> Similarly, when reviewing the denial of a motion for new trial, we must determine if the trial court committed an abuse of discretion or error of law that controlled the outcome of the case.

Estate of Hicks v. Dana Companies, LLC, 984 A.2d 943,950-51 (Pa. Super. 2009)*(en banc)* (internal citations omitted).

Appellant argues the verdict was improper, against the weight of the evidence, and "no reasonable person could fail to agree that the verdict was improper and [Appellee] was negligent." Appellant's 1925 (b) statement, at 3. It was not for this court to substitute its judgment for that of the jury on questions of credibility and weight accorded evidence at trial. Therefore, reviewing the record in the light most favorable to the verdict winner, a grant of JNOV would not have been appropriate.

III. CONCLUSION

Based upon the above, this Court respectfully requests that judgment be affirmed.

Respectfully submitted,
/s/ **Ernest J. DiSantis, Jr., Judge**

CITY OF ERIE, Petitioner,

v.

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 293, AFL-CIO, Respondent

LABOR AND EMPLOYMENT

"Interest Arbitration" occurs when an employer and employee are unable to agree on the terms of a collective bargaining agreement.

LABOR AND EMPLOYMENT

The Court may not question the reasonableness of an Arbitrator's interpretation of a collective bargaining agreement.

LABOR AND EMPLOYMENT

In matters arising under the Act authorizing collective bargaining between policemen and firemen and their public employers, the preliminary question of arbitrationability is itself a question to be determined by the Arbitration. 43 P.S. §§ 217.7-217.10.

LABOR RELATIONS

In dispute between public employer and its police officers and firemen, the Board of Arbitrators:

1 May not order employer to perform illegal acts;
2. Is limited to requiring that employer do that which it could do voluntarily; and
3. Must craft award that only encompasses terms and conditions of employment.

43 P.S. § 217.1 et seq.

MUNICIPAL CORPORATIONS

While Municipal Pension Plan Funding Standard and Recovery Act does not extend a certain amount of latitude to municipalities by allowing benefit plan modification, it mandates that such change be preceded by a cost estimate describing the impact upon the Plan.
53 P.S. §§ 895.101 - 895.803.

MUNICIPAL CORPORATIONS

Municipal Pension Plan Funding Standard and Recovery Act requires an actuarial report that the pension plan is actuarially sound when a pension plan is modified.
53 P.S. § 895.302.

LABOR RELATIONS

Arbitration panel exceeded its authority when it awarded a Deferred Retirement Option Program (DROP) for firefighters' pension plan and arbitration between City and Firefighters Union pursuant to statute governing disputes between a public employer and its police and firefighters, where a record did not contain an actuarial report that pension plan would be actuarially sound when pension plan was so modified, as required by a Municipal Pension Plan Funding Standard and Recovery Act.
43 P.S. §§ 217.1 - 217.10; 53 P.S. § 895.302.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION No. 10777-2009

Appearances: Richard W. Perhacs, Esq., Attorney for City of Erie
Richard G. Poulson, Esq., Attorney for International Association of Firefighters

OPINION

Connelly, J., December 8, 2009

This matter is before the Court pursuant to a Petition to Review Arbitration Award filed by City of Erie (hereinafter "Petitioner"). International Association of Firefighters, Local 293, AFL-CIO (hereinafter "Respondent") opposes.

Procedural History

On February 20, 2009, Petitioner filed a Petition to Review Arbitration Award asking that the Court review an Arbitration Award entered January 24, 2009. Respondent filed an Answer to the Petition to Review Arbitration Award on March 23, 2009, which included Affirmative Defenses. On April 2, 2009, Petitioner filed a Reply to Affirmative Defenses. The case was first assigned to the Honorable John Garhart. Judge Garhart issued an Order March 20, 2009, recusing himself from the case. *Order, Garhart, J., March 20, 2009.* The case was next assigned to the Honorable Michael E. Dunlavey. Judge Dunlavey issued an Order on April 9, 2009, recusing himself from the case. *Order, Dunlavey, J., April 9, 2009.* The matter was subsequently assigned to this Court. An oral argument was held on July 28, 2009 before this Court. Finally, on August 19, 2009, Petitioner filed a supplemental brief in support of its Petition.[1]

Statement of Facts

The instant dispute stems from an Act 111[2] Arbitration Award issued January 24, 2009 following a dispute between Petitioner and Respondent. *Petition to Review Arbitration Award, ¶¶ 4-8.* The Award established the terms of a new Collective Bargaining Agreement (hereinafter "CBA") to be effective from January 1, 2008 through December 31, 2011. Petitioner and Respondent were parties to a Collective Bargaining Agreement (hereinafter "CBA") that expired on December 31, 2007. *Id. at ¶ 4.* Pursuant to Act 111, the parties engaged in collective bargaining to resolve the terms of a successive CBA. When resolution could not be

[1] Petitioner failed to file this supplemental brief with the Prothonotary's office and therefore it does not appear on the instant docket.

[2] Act 111 is codified at 43 P.S. §§217.1 *et. seq.* and is also known as the Policemen and Firemen Collective Bargaining Act.

attained, Respondent invoked the arbitration provisions of Act 111. *Id.*

A panel of Arbitrators was subsequently selected and hearings were conducted on April 7 and 8 and May 21, 2008. Petitioner argues the Court should vacate portions of the Arbitration Award because the Arbitrators exceeded their jurisdiction and authority. Specifically, Petitioner asks that Paragraphs 5(A), 5(B) and 10(A) of the Arbitration Award be vacated. *Brief in Support, p. 29.*

The disputed provisions of the arbitration award read as follows:

> 5. **Safety and Staffing:** In order to ensure the safety of all bargaining unit members, amend the Agreement to provide the following provisions:
>
> A: Dual Companies: The City will discontinue the utilization of dual companies effective January 1, 2010.
>
> B. Minimum Safe Deployment:
>
> 1. Six Fire Companies. Effective January 1, 2010, in the event the City elects to deploy six (6) or fewer engine and/or tower companies, each fire company will operate subject to a 5-fire-fighter apparatus minimum.
>
> 2. More Than Six Companies. Effective January 1, 2010, in the event the City elects to deploy more than six (6) engine and/or tower fire companies, each company will operate subject to a 4-firefighter apparatus minimum.
>
> . . .
>
> **10. Pension:**
>
> A: Deferred Retirement.
>
> Article 11 of the Agreement will be amended to require immediate restoration of the Partial Lump Sum Distribution Option that was eliminated by the City in December 2006.

Arbitration Award, ¶¶ 5(A), 5(B), and 10.

Petitioner makes three main arguments in support of its Petition to review. First, Petitioner asserts Paragraphs 5(A) and 5(B) involve matters of fundamental managerial prerogative over which the Arbitrators lacked jurisdiction and authority to render an award. Second, Petitioner asserts the issue of staffing levels was never presented as an issue in dispute by Respondent prior to arbitration. Third, Petitioner argues the Arbitrators exceeded their authority by requiring Petitioner to implement the pension plan in Paragraph 10(A) in violation of Act 205. Finally, Petitioner asserts the provisions in Paragraph 10A were never proposed by Respondent or identified as an issue in dispute before Arbitration and therefore were not within the jurisdiction of the Panel.

Respondent asserts Petitioner failed to state a claim upon which relief can be granted, has failed to exhaust its remedies pursuant to the Award and Petitioner's claims are barred because the Award is consistent with longstanding Commonwealth judicial precedents and labor policy. *Respondent's Answer to Petition, Affirmative Defenses, ¶¶ 1-3.*

The Court shall consider these arguments in light of the applicable Pennsylvania law.

Findings of Law

There is no statutory right of appeal for an interest arbitration award. Although Section 7(a) of Act 111, 43 P.S. § 217.7(a), states that no appeal shall be allowed to any court from the determination of a board of arbitration, courts have limited jurisdiction, in the form of narrow *certiorari,* to review arbitration awards. *City of Scranton v. Fire Fighters Local Union No.* 60, 923 A.2d 545 (Pa. Cmwlth. 2007). Thus, a court's review is limited to questions concerning: (1) the arbitrators' jurisdiction; (2) the regularity of the proceedings; (3) an excess of the arbitrators' powers; and (4) deprivation of constitutional rights. *Id.* An arbitrator who mandates that an illegal act be carried out exceeds his or her powers. *Id. See also, City of Scranton v. E.B. Jermyn Lodge No. 2 of the F.O.P.,* 965 A.2d 359 (Pa. Cmwlth. 2009) (affirming a trial court's order vacating a provision of an interest arbitration award between the city and the union because the award violated the city's 2002 Recovery Plan from designation as a financially distressed city).

Therefore, an arbitrator: (1) may not order the employer to perform an illegal act; (2) is limited to requiring that a public employer do that which it could do voluntarily; and (3) must craft an award that only encompasses the terms and conditions of employment. *City of Butler v. Fraternal Order of Police, Lodge # 32,* 780 A.2d 847 (Pa. Cmwlth. 2001), *appeal denied,* 792 A.2d 1255 (Pa. 2001). An error of law alone is not sufficient to reverse an award under this narrow standard of review. *Id.*

A dual standard of review applies in Act 111 appeals. *Pennsylvania State Police v. Pennsylvania State Troopers' Association,* 840 A.2d 1059 (Pa. Cmwlth. 2004) *appeal denied,* 853 A.2d 363 (Pa. 2004). Where resolution of an issue turns on a pure question of law, or the application of law to undisputed facts, the court's review is plenary. However, where it depends upon fact-finding or upon interpretation of the collective bargaining agreement, reviewing courts apply the extreme standard of deference applicable to Act 111 awards; that is, they are bound by the arbitrator's determination of these matters even though the reviewing court may find them to be incorrect. *Id.*

As a result of these cases, courts are required to give great deference to an arbitrator's award. In 2006, the Pennsylvania Supreme Court noted

the very limited judicial review available in interest arbitration awards furthers the legislative intent of not bogging awards down in litigation. *Town of McCandless v. McCandless Police Officers Association,* 901 A.2d 991, 998 (Pa. 2006).

I. Paragraphs 5(A) and 5(B) of the Arbitration Award

Petitioner's first argument asserts that because Paragraphs 5(A) and 5(B) of the Arbitration Award involve matters of fundamental managerial prerogative, the Arbitrators lacked jurisdiction and authority to render an award. *Brief in Support, p. 6.* Specifically, Petitioner argues eliminating the use of dual fire companies and mandating different staffing and deployment touch on matters of inherent managerial policy that bear no rational relationship to working conditions or safety of the firefighters. Petitioner contends under Act 111, a topic traditionally reserved as a matter of managerial policy or action is bargainable only where the union is able to establish that it bears a "rational relationship" to the working conditions of the employees. *Id.* at p. 7, *relying on, City of Clairton v. Commonwealth of Pennsylvania,* 528 A.2d 1048, 1049 (Pa. Cmwlth. 1987).

Respondent asserts that safety is indisputably a working condition and Act 111 mandates collective bargaining over all matters affecting the wages, hours and working conditions of fire fighters. *Brief in Opposition, p. 25.* Petitioner asserts because Respondent's proposal with respect to staffing and deployment requested that Petitioner "deploy fire fighters in compliance with National Fire Protection Association ("NFPA") Standard 1710" and the arbitration panel did not comply with NFPA 1710, Paragraph 5(B) bears no rational relationship to fire fighter safety and touches, instead, on matters reserved for the discretion of management. *Brief in Support, p. 8.*

An arbitrator cannot exceed his authority and render decisions on matters specifically relegated to the city. However, Act 111 does not expressly provide for the reservation of management rights. In cases arising under Act 111 a management decision or "action is deemed bargainable where it bears a rational relationship to employees' duties." *City of Clairton,* 528 A.2d at 1049-50. The Commonwealth Court held in *Philadelphia Fire Fighters Union, Local 22 v. City of Philadelphia,* "Essentially, if the acts the arbitrator mandates the employer to perform are legal and relate to the terms and conditions of employment, then the arbitrator did not exceed her authority." *Phila. Fire Fighters Union, Local 22 v. City of Philadelphia,* 901 A.2d 560, 566 (Pa. Cmwlth. 2006).

Petitioner asserts "[I]f the Union agreed that the NFPA Standard was one which the City should be made to comply with, it can not now argue that the Arbitrators' Award mandating an increase to *five* fire fighters, depending on the number of fire companies, is necessary or even rationally related to preserving the safety of the firefighters which they

represent." *Brief in Support, p. 8.* NFPA Standard 1710 notes that both engine and ladder companies shall be staffed with a minimum of four on-duty personnel. The standard also notes that in jurisdictions with tactical hazards, high hazard occupancies, high incident frequencies, geographical restrictions, or other pertinent factors ... these companies shall be staffed with a minimum of five or six on-duty members. *NFPAS 1710, 5.2.2 - 5.2.2.4.* The Court finds that NFPA 1710 does not limit the number of firefighters deployed to four, but rather sets four as the minimum permissible. Therefore, the arbitrators were not in violation of NFPA Standard 1710 as Petitioner avers.

Petitioner also contends Paragraph 5 unlawfully attempts to control the overall size and operation of Petitioner's fire department, matters fundamentally reserved to the discretion of management. *Brief in Support, p. 9.* The Commonwealth Court held in *City of Erie v. IAFF Local 293,* an interest arbitration panel properly awarded fire company minimum staffing levels, because they were directly related to fire fighter safety. *City of Erie v. IAFF Local 293,* 459 A.2d 1320 (Pa. Cmwlth. 1983). The Commonwealth Court reasoned courts that have dealt with the issue have drawn a very fine line in distinguishing between the total number of persons on the force (not arbitrable), and the number of persons on duty at a station, or assigned to a piece of equipment, or to be deployed to a fire (all arbitrable because they are rationally related to the safety of the firefighters). "The safety of a fire fighter is far more rationally related to the number of individuals fighting a fire with him, or operating an important piece of equipment at a fire, than it is to the number of members of the entire force." *Id.* at 1321.

Petitioner contends the instant case is easily distinguishable from the earlier *City of Erie* case. Petitioner asserts that "even a brief, cursory review of the Award" reveals the Arbitrators' intent and the effect of the Award is to control and mandate the number of employees Petitioner maintains on its force, *Brief in Support, p. 10.* "The net effect of these provisions is not to guarantee fire fighter safety by setting a fixed number of fire fighters to be deployed with equipment in response to a call. Instead, these provisions have the effect of mandating the City to increase the size of its fire department workforce." *Id. at p. 11.* Petitioner argues if the five fire fighter minimum per apparatus was awarded on the basis of fire fighter safety when responding to a call, it should make no difference how many fire companies the City is running. *Id.*

Respondent notes the arbitration panel was presented with nearly two full days of testimony regarding the direct relationship between fire deployment and fire fighter safety. *Brief in Opposition, p. 31.* Respondent also notes it presented expert testimony and evidence at the arbitration hearing indicating that staffing the fire department with fewer than eight (8) fire companies and consequently deploying fewer fire fighters to fire

scenes was unsafe. *Id. at p. 36.* The arbitrators heard testimony from two former City of Erie fire chiefs that increasing the number of fire companies would help with fire fighter safety. *Id.*

The Arbitration Panel, by increasing apparatus minimums in the event the City chose to operate six (6) or fewer fire stations, appears to have simply insured an adequate number of fire fighters were available to respond to fire calls. Simply because the arbitration panel chose to frame the Award in such a way does not automatically imply the Panel was attempting to encroach on Petitioner's managerial prerogative. Here, the conditions attached to Paragraph 5(A) and 5(B) do not appear, as Petitioner avers, a way to force the City to hire more firefighters, but rather are directly related to the safety of the fire fighters.

The Arbitration Panel did not mandate that the city hire more firefighters nor tell them how many fire fighters to assign to a department. Instead, the Arbitration Award sought to increase fire fighter safety by insuring that an adequate number of fire fighters were deployed to a call. In doing so, the Award presented Petitioner with a choice as to how to fulfill that goal. This choice does not negate the intent of the Arbitration Panel to insure that a sufficient number of fire fighters responds to any given call to enhance safety. The Court does not find Paragraph 5(B) of the Award constitutes a minimum staffing requirement or a backdoor attempt to meet minimum staffing requirements as Petitioner avers. Rather, the Court finds Paragraph 5(B) is a permissible means of establishing how many firefighters respond to a fire call. Such issues are arbitrable as they are rationally related to fire fighter safety. *See*, *City of Erie*, 459 A.2d at 1321.

Petitioner's final argument that Paragraph 5(B) of the Arbitration Award should be vacated asserts the issue was not presented as an issue for consideration and therefore the Arbitrators had no authority to include it with the award. Petitioner avers that in the "Specification of the Issues in Dispute" submitted by Respondent prior to the Arbitration, Respondent specified only two issues with respect to staffing: (1) the deployment of fire fighters in compliance with NFPA Standards and (2) the staffing and maintaining of not less than eight full time fire companies, not less than two which must be tower or ladder companies. *Brief on Behalf of Petitioner, p. 15.* Petitioner argues that because neither party gave notice that it wished to have the apparatus deployment issue resolved, it was not within the Arbitrator's authority to craft an Award referencing this. *Id.*

An Act 111 interest arbitration panel may award provisions only as to those issues that the parties themselves have placed in dispute. *City of Wilkes-Barre v. City of Wilkes-Barre Police Benevolent Association,* 814 A.2d 285, 291 (Pa. Cmwlth. 2002). "Once the parties surrender control over the bargaining to the arbitrators, they empower the arbitrators to craft a fair resolution of the submitted issues within the total context of the

award. The arbitrators are not restricted to selecting specific proposals; rather they may award any fair resolution on issues submitted." *Id*. at 291.

Here, Respondent submitted a proposal prior to the arbitration stating "[t]he City will deploy fire fighters in compliance with NFPA Standard 1710 and will be permitted to vary from this standard only with the consent of the Union." *Exhibit B, Brief on Behalf of Petitioner.* The Respondent's proposal put at issue safe deployment levels. While neither party's pre-arbitration proposal requested the exact outcome contained in Paragraph 5(B) of the Award, the matter was most definitely put before the Panel for consideration. Moreover, Petitioner was on notice of this issue when Respondent submitted its "Specification of Issues in Dispute."

Therefore, because the Arbitrators merely crafted a fair resolution of the issues before them based upon the proposals of the parties, the panel properly exercised authority over the issues before it and Paragraph 5(B) of the Arbitration Award should not be vacated.

Petitioner asserts Paragraph 5(A) falls outside the scope of the arbitrator's authority as a matter of managerial discretion not within the scope of collective bargaining. Petitioner argues that while there is no case law to support its argument, the right to control the number and structure of fire companies can be clearly compared to other matters inherently reserved to management. *Brief of Petitioner, p. 13.* Specifically, Petitioner argues the utilization of dual fire companies by the City is the result of the City's decisions with respect to the method and level of offering fire protection and the decision came as the result of consolidating four of its previously separate engine and ladder companies into two consolidated, dual companies to save money. *Id. at p. 14.*

Respondent asserts it generated overwhelming testimony and documentary evidence at the arbitration hearing on the safety risks posed by the dangerous dual-company formation utilized by Petitioner. Specifically, Chief Robert Giorgio testified that his similarly sized department discontinued the use of dual companies because they posed significant safety risks for firefighters. *Brief in Opposition, Exhibit C, pp. 167-68.* He also testified that Erie's continued use of dual fire companies increased the likelihood of firefighter injury or death. *Id. at p. 182.* "It is not a safe way to use a fire-force. ... It places people in jeopardy longer and raises risk." *Id.* Former Erie Fire Chief Russell Smith also noted that the utilization of dual companies was dangerous because there were fire fighters who were forced to use equipment they were not comfortable operating (i.e. when a crew of trained ladder company firemen are required to utilize equipment designed specifically for engine companies). *Id. at p. 233.*

The Arbitration Award notes "[i]n rendering this Award, the Panel has carefully balanced the two primary considerations raised by the

parties in this proceeding - [Petitioner's] desire to continue the progress already made in stabilizing and improving the City's fiscal condition and [Respondent's] desire to secure reasonably safe working conditions for all bargaining unit members." *Arbitration Award, p. 2, Exhibit F, Petition to Review Arbitration Award.* The Award also states "the Panel has concluded the City's current fire deployment, particularly the use of dual companies, poses significant safety risks for fire fighters." *Id at p. 5.*

Petitioner relies on *City of Philadelphia v. PLRB* to make its point. *City of Philadelphia v. PLRB,* 588 A.2d 67 (Pa. Cmwlth. 1991) (holding the implementation of a first responder program was a matter of managerial prerogative not subject to collective bargaining, but the city had a duty to bargain over the effects of the implementation of the first responder program). Petitioner argues that similar to *City of Philadelphia,* the utilization of dual companies by the City of Erie is the result of the City's decisions with respect to the method and level of offering fire protection to the City. However, the instant case is easily distinguishable from *City of Philadelphia.* First, Petitioner fails to note that in the *City of Philadelphia,* the union failed to establish a rational relationship between the program and firefighter safety. *City of Philadelphia,* 588 A.2d at 70. Here, Respondent presented a substantial amount of evidence regarding the rational relationship between fire fighter safety and the dual company program. Moreover, in *City of Philadelphia,* the Commonwealth Court upheld the implementation of the program, however the court held the city did have an obligation to bargain with the union under Section 1 of Act 111 as to the effects of the implementation of the first responder program on the fire fighters' wages, hours and working conditions. *Id.*

As the Commonwealth Court held in *City of Scranton,*

> The courts that have dealt with this issue have drawn a *very* fine line in distinguishing between the total number of persons on the force (not arbitrable), and the number of persons on duty at a station, or assigned to a piece of equipment, or to be deployed to a fire (all arbitrable because they are rationally related to the safety of the fire fighters). However, this Court finds merit in that distinction, because the result still leaves in the municipality the ultimate decision concerning what level of fire protection it wishes, or can afford, to provide to the citizens. If it finds that the arbitrable situations cause an imbalance in certain areas of the force, it retains the authority to decide whether to hire more employees, close stations, revamp the force, or take some other managerial action. Since the method of resolving the imbalance may have far-reaching political and economic implications, especially if taxes must be raised, it should remain within the purview of those who were elected and/or appointed to make such decisions.

IAFF, Local 669 v. City of Scranton, 429 A.2d 779, 781 (Pa. Cmwlth. 1981).

The Court, being mindful of the fine line drawn by the Commonwealth Court in City of Scranton and its brethren and the deference given to an arbitration award, finds that the Arbitration Panel did not exceed its authority when it called for the discontinuation of the dual company system. The Panel was presented with ample evidence indicating Petitioners use of the dual company system was dangerous.

The Court finds that the issue of dual companies is directly related to firefighter safety and therefore within the authority of the Arbitrators. Therefore, for the reasons stated above, the Petition to Vacate Paragraphs 5(A) and 5(B) of the Arbitration Award is denied.

II. Paragraph 10(A) of the Arbitration Award

Petitioner asserts the Arbitrators exceeded their authority by requiring the City to implement the pension plan in Paragraph 10(A) of the Award in violation of Act 205[3] at 53 P.S. §895.305. *Brief on Behalf of Petitioner, p. 21.* Paragraph 10(A) provides for immediate restoration of the Partial Lump Sum Distribution Option (hereinafter "PLSDO"). Petitioner argues, first, that because the PLSDO was never proposed to the panel, it was not within the jurisdiction of the arbitrators to award the PLSDO. Petitioner also avers based on 53 P.S. §895.305 any change in the adoption or formulation of a pension fund, including the reinstatement of a previously used plan, requires the consideration of a cost estimate by the municipality and here the report presented by Respondent fails to satisfy the statute. Therefore, Petitioner argues Paragraph 10(A) requires Petitioner to unlawfully modify its pension plan. *Brief on Behalf of Petitioner, p. 22.*

53 P.S. § 895.305 provides, in relevant part:

> (a) Presentation of cost estimate - Prior to the adoption of any benefit plan modification by the governing body of the municipality, the chief administrative officer of each pension plan shall provide to the governing body of the municipality a cost estimate of the effect of the proposed benefit plan modification.
>
> ***
>
> (e) Contents of cost estimate - Any cost estimate of the effect of the proposed benefit plan modification shall be complete and accurate and shall be presented in a way reasonably calculated to disclose to the average person compromising the membership of the governing body of the municipality, the impact of the proposed benefit plan, the modification

[3] Act 205 is codified at 53 P.S. §895.305.

> on the future financial requirements of the pension plan and the future minimum obligation of the municipality with respect to the pension plan.

53 P.S. § 895.305 (a), (e).

Petitioner relies on two earlier cases involving the City of Erie to make its point. Petitioner contends that in *City of Erie v. IAFF, Local 293,* the Commonwealth Court held the arbitration panel had exceeded its authority by awarding a Deferred Retirement Option Program (hereinafter "DROP") because the arbitration award mandated the institution of a pension program for which no actuarial or statistical data was presented. *City of Erie v. IAFF, Local 293,* 836 A.2d 1047, 1051 (Pa. Cmwlth. 2003). Petitioner also relies on *City of Erie v. Hass Memorial Lodge #7, F.O.P.,* which held an Act 111 arbitration panel exceeded its authority by mandating enhancements to a municipal pension plan for police officers without first considering a cost estimate and an actuarial report regarding the impact of the changes. *City of Erie v. Hass Memorial Lodge # 7, F.O.P.,* 811 A.2d 1071, 1075 (Pa. Cmwlth. 2002), *appeal denied,* 825 A.2d 640 (Pa. 2003).

Respondent counters it presented the Panel with reasonably calculated evidence from an approved actuary of their proposed deferred retirement benefit's impact on the pension plan which included references to the changes in the plan's financial requirement and the City's minimum municipal obligation (hereinafter "MMO"). *Brief in Opposition, p. 44.* Respondent did in fact present a January 2007 valuation that set forth the DROP plan's financial requirements and MMO for 2008. Respondent also presented testimony from Joseph Duda, an actuary, who estimated the proposed deferred retirement benefits would increase the City's MMO by between $356,000 and $903,000 and would result in increases in the plan's overall liabilities. *Brief in Opposition, p. 45, Exhibit C, pp. 404-405.*

Petitioner presented testimony from its own actuary, Donald Boetger, who gave the panel another estimate of the deferred retirement benefit's impact on the pension plan. Mr. Boetger also testified that there was no real economic difference between the proposed DROP plan and the Partial Lump Sum Distribution Option or reverse DROP (hereinafter "PLSDO"). *Brief in Opposition, Exhibit C, p. 428.*

Respondent asserts it presented the Panel with reasonably calculated evidence from an approved actuary of its proposed deferred retirement benefit's impact on the pension plan that included reference to the changes in the plan's financial requirements and the City's MMO. *Brief in Opposition, p. 44.* Respondent also avers "the degree of thoroughness in the proofs submitted to the Act 111 Panel here was present in none of the cases cited by [Petitioner] in its challenge." *Id. at p. 47.* The Court notes Respondent did present ample evidence to the Panel of the

implications of its proposed pension plan (DROP), however, the plan ultimately awarded by the panel was the PLSDO, which had different financial implications.

Alternatively, Respondent argued at the oral argument there is nothing stopping the City from performing an Act 205 actuarial study before adopting the pension change awarded by the Arbitration Panel. However, the Commonwealth Court has held that an arbitrator may not order an employer to perform an illegal act. *City of Butler,* 780 A.2d at 850. Moreover, a grievance arbitrator who awards a modification of a pension plan in the absence of an Act 205 cost estimate requires an illegal act necessitating vacation. *Upper Merion Township v. Upper Merion Township Police Officers*, 915 A.2d 174, 175 (Pa Cmwlth, 2006), *appeal denied*, 929 A.2d 647 (Pa. 2007). In *City of Erie v. Haas Memorial Lodge #7,* the Commonwealth Court held there needed to be clear record evidence that the provisions of Act 205 were followed. *City of Erie v. Haas Memorial Lodge #7,* 811 A.2d 1071 (Pa. Cmwlth. 2002), *appeal denied*, 825 A.2d 640 (Pa. 2003).

Here, the cost estimate presented to the Arbitration Panel for review was an estimate for the DROP plan proposed by Respondent. Just as Petitioner avers, the Panel was never presented with an estimate of the cost or MMO of the PLSDO, which they awarded. All of the implications were prepared with the proposed DROP plan in mind. However, the Arbitration Panel awarded the PLSDO.[4] Because the Panel awarded a pension plan in the absence of an Act 205 cost estimate, the Court is constrained to find the Arbitrators mandated that the City perform an illegal act and as such Paragraph 10(A) of the Award must be vacated.

ORDER

AND NOW, TO-WIT, this 8th day of December, it is hereby **ORDERED, ADJUDGED, and DECREED,** the City of Erie's Petition to Review Arbitration Award is **GRANTED** in part and **DENIED** in part for the reasons stated in the foregoing opinion.

The City of Erie's Petition to Review Arbitration Award as to Paragraphs 5(A) and 5(B) of the Award is **DENIED.** The Petition to Review Arbitration Award is **GRANTED** as to Paragraph 10(A) and Paragraph 10(A) of the Award is hereby **VACATED.**

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

[4] Respondent asserts the Arbitration Panel had enough information to infer what the costs of the PLSDO would be, however, this is not sufficient pursuant to Act 205.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee, in trust for the registered holders of Ameriquest Mortgage Securities Inc., Asset-Backed Pass-Through Certificates, Series 2004-R11, Plaintiff,

v.

ALEXANDER R.M. BRUTON a/k/a REVEREND FATHER ALEXANDER R.M. BRUTON and CARINA BRUTON, Defendants

PLEADING / PRELIMINARY OBJECTION

The grounds on which preliminary objections may be relied upon are limited to the grounds enumerated in Pa.R.C.P. 1028(a)(1)-(8).

PLEADING / PRELIMINARY OBJECTION

Two or more preliminary objections may be raised in one pleading, shall be raised at one time, shall specifically state the ground(s) relied upon, may be inconsistent and may be filed by any party to any pleading. Pa.R.C.P. 1028(a)(b).

PLEADING / PRELIMINARY OBJECTION

The court shall consider as true all well-pled material facts set forth in the pleadings 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.

PLEADINGS

If all parties lack sufficient knowledge or information to sign a verification, any person having sufficient knowledge or information and belief may sign the verification if that person further states the reason the verification was not made by a party.

PLEADINGS

The general rule that a pleading signed by an attorney, rather than by the party filing the pleading, does not ordinarily comply with Pa.R.C.P. 1024(c) extends to corporations.

PLEADINGS

An attorney may sign a verification on behalf of a corporation if the corporation authorizes the attorney to sign the verification; authorized agents are unable to sign the verification; and the attorney has personal knowledge of the alleged facts.

DAMAGES

Attorney fees are not recoverable unless by specific agreement or statute.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 15914-2008

Appearances: M. Troy Freedman, Esq., Attorney for Deutsche Bank National Trust Company
Walter E. Deacon, III, Esq., Attorney for Alexander and Carina Bruton

OPINION

Connelly, J., April 26, 2010

This matter is before the Court of Common Pleas of Erie County, Pennsylvania (hereinafter "the Court"), pursuant to two individual Preliminary Objections: one, filed by Alexander and Carina Bruton (hereinafter "Defendants") against Deutsche Bank National Trust Company's (hereinafter "Plaintiff") Complaint; and the other, filed by Plaintiff against Defendants' own Preliminary Objections.

Statements of Fact

Service of Plaintiff's Complaint was initially, and unsuccessfully, attempted at 507 West 7th Street, Erie, Pennsylvania (hereinafter "Subject Property").[1] *Sheriff's Return-Not Served, Dec. 8, 2008.* However, service was perfected as to Defendant Alexander Bruton on December 13, 2008, when it was attempted via certified mail at 11719 Bell Avenue in Harrison County, Mississippi (hereinafter "Defendants' Domicile").[2] *Certification of Service, Feb. 23, 2009, pp. 1-3.* On June 16, 2009, Defendant Carina Bruton also received notification via substituted service when a Harrison County Deputy Sheriff handed a copy of the Complaint to Defendant Alexander Bruton at Defendants' Domicile.[3] *Plaintiff's Preliminary Objections to Defendants' Preliminary Objections, Ex. B.*

Analysis of Law

The Pennsylvania Rules of Civil Procedure (hereinafter "Civil Rule(s)") provide 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,[4] and may

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[1] The following is a comprehensive list of the documents that were affixed to the Complaint: a verification signed by Plaintiff's attorney; a portion of the Subject Property's Mortgage executed by Defendants as security in consideration of a loan; the assignment of the Mortgage from Ameriquest Mortgage Company to Plaintiff; a legal description of the Subject Property; and the Notice of Intention to Foreclose on the Subject Property. *Complaint in Mortgage Foreclosure, ¶¶ 1-11, p. 5, Exs. A-D.*

[2] Two pieces of Certified Mail were issued to Defendants' Domicile: one to Defendant Alexander Bruton, and one to Defendant Carina Bruton. *Certification of Service, Feb. 23, 2009, p. 2.* Defendant Alexander Bruton signed for his, whereas Defendant Carina Bruton's piece went unclaimed. *Id. at p. 3; Defendants' Motion to Strike/Set Aside Default Judgment and Cancel Sheriff's Sale, Ex. B.*

[3] The copy of the Complaint that was served by the Harrison County Deputy Sheriff, was a copy of the Reinstated Complaint filed by Plaintiff on June 1, 2009, which resulted from the Court's setting aside of a default judgment previously awarded in Plaintiff's favor. *Praecipe for Judgment for Failure to Answer and Assessment of Damages; Praecipe for Writ of Execution; Writ of Execution; Motion to Strike/Set Aside Default Judgment and Cancel Sheriff's Sale, ¶¶ 1-35; Order of Court, May 26, 2009, Connelly, Shad, J.*

[4] 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).

be inconsistent. *Pa.R.C.P. 1028(a), (b).* Preliminary objections should be filed within twenty (20) days after service of the preceding pleading. *See, Pa.R.C.P. 1026, 1017(a)(4).* The moving 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.[5] *Pa.R.C.P. 1028(c)(1); Erie L.R. 1028(c)(2).*

If the Court overrules the preliminary objections, "the [moving] 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 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 Court shall consider as true all of the well-pled material facts set forth in the pleadings 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, Bower v. Bower,* 611 A.2d 181, 182 (Pa. 1992). In determining whether the Preliminary Objections should be sustained or overruled, the Court has weighed applicable law as it relates to the facts of this case as well as the merit of the arguments presented by both Plaintiff and Defendants.

Defendants' Requested Dismissal of the Complaint Pursuant to Civil Rule 404(2)

Defendants state Plaintiff's Complaint should be dismissed in its entirety pursuant to Civil Rule 1028(a)(2) for its alleged failure to conform to Civil Rule 404(2). *Preliminary Objections to Plaintiff's Complaint in Mortgage Foreclosure, ¶ 12.* Civil Rule 404(2) states, "process shall be served outside the Commonwealth within ninety [90] days of the . . . filing of the complaint or . . . reinstatement thereof . . . by mail in the manner provided by [Civil] Rule 403," which states as follows:

> . . . process shall be mailed to the defendant by . . . mail

[5] 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).

> requiring a receipt signed by the defendant or his authorized agent. Service is complete upon delivery of the mail. If the mail is returned with notation . . . that the defendant refused to accept the mail, the plaintiff shall have the right of service by mailing a copy to the defendant at the same address by ordinary mail with the return address of the sender appearing thereon. Service by ordinary mail is complete if the mail is not returned to the sender within fifteen days after mailing. If the mail is returned with notation by the postal authorities that it was unclaimed, the plaintiff shall make service by another means pursuant to these rules.

Pa.R.C.P. 404(2), 403. Though Defendants initially claimed neither of them received proper service of the Complaint, they later conceded to such reception, and stated the issue moot as a result. *See, Preliminary Objections to Plaintiff's Complaint in Mortgage Foreclosure, ¶¶ 14-16; Defendants' Brief in Opposition to Plaintiff's Preliminary Objections to Defendants' Preliminary Objections, p. 5.* The Court finds Defendants' relinquishment of their service argument is appropriate, and all statements regarding the argument are hereby rendered moot.[6] As both of the arguments contained in Plaintiff's Preliminary Objections involve the Complaint's previously disputed service, the Court finds it suitable to briefly address these arguments before returning to its analysis of Defendants' Preliminary Objections.

Plaintiff's Requested Dismissal of Defendants' Preliminary Objections Pursuant to Civil Rules 1024(a) and 1026

Plaintiff first states Defendants' Preliminary Objections should be dismissed pursuant to Civil Rule 1028(a)(2) for its alleged failure to conform to Civil Rule 1024(a), which states "[e]very pleading containing an averment of fact not appearing of record in the action or containing a denial of fact shall state that the averment or denial is true upon the signer's personal knowledge or information and belief and

[6] Notwithstanding Defendants' admission to receiving service of the Complaint, the Court would be remiss if it failed to show the service, as received, was done so pursuant to the Civil Rules. The Civil Rules provide for the service of process outside the Commonwealth by handing a copy at the residence of the defendant to an adult member of the family with whom he or she resides, e.g., his or her adult spouse. *Pa.R.C.P. 402(a)(2)(i); Engler v. City of Philadelphia,* 34 Pa. D. & C.3d 30 (C.P. Philadelphia Co. 1984)(finding service of process by certified mail made at a defendant's home that is outside of the Commonwealth and accepted by the defendant's spouse is valid, as it is presumed the spouse is authorized to receive mail on the defendant's behalf). Furthermore, service by certified mail on one spouse and codefendant will be deemed to have been made when the other spouse and codefendant accepts service at their mutual home. *Continental Bank v. Rapp,* 485 A.2d 480, 484 (Pa. Super. 1984)(holding that it would be "absurd" to permit husband-wife mortgagors/defendants to evade judgment simply by alleging that the one accepting the service never told the other of the service). The record reveals Defendant Alexander Bruton received service of the Complaint five (5) days after Plaintiff filed it via Certified Mail, i.e., a form of mail requiring signed receipt pursuant to Civil Rule 403, and Defendant Carina Bruton subsequently received service of the Reinstated Complaint within fifteen (15) days after its filing via substituted service allowed under Civil Rule 402(a)(2)(i). Therefore, the Court would have nevertheless found Defendants were properly served as required by Civil Rule 404(2), *et seq.*, even if they had never stated their service argument was moot.

shall be verified." *Pa.R.C.P. 1024(a); Plaintiff's Preliminary Objections to Defendants' Preliminary Objections, ¶¶ 15-19.* Plaintiff argues its Preliminary Objections should be sustained, as a verification does not accompany Defendants' Preliminary Objections although they contain an alleged denial of fact, specifically, that Defendant Carina Bruton has "never been served with [either] the reinstated Complaint [or] the original." *Plaintiff's Preliminary Objections to Defendants' Preliminary Objections, ¶¶ 15-19; Plaintiff's Memorandum of Law, p. 4; Preliminary Objections to Plaintiff's Complaint in Mortgage Foreclosure, ¶ 14.*

The Court finds that even if this statement were determined to be an averment of fact, it would have no substantial bearing on Defendants' Preliminary Objections due to their relinquishment of their service argument. Thus, Plaintiff's argument of an alleged failure to conform to Civil Rule 1024(a) is immaterial. Furthermore, even if Defendants had never admitted to receiving proper service, the Court would nevertheless find that the statement is not an averment of fact, but a statement that merely generates a question of law regarding the failure of Plaintiff to satisfy its duty to serve the Complaint upon Defendant Carina Bruton pursuant to the Civil Rules. Thus, a verification would not be necessary as to Defendants' Preliminary Objection under either analysis. *See, Pa.R.C.P. 76* (verification relates only to statements of fact, not questions of law).

Plaintiff also states Defendants' Preliminary Objections should be dismissed pursuant to Civil Rule 1028(a)(2) for its alleged failure to conform to Civil Rule 1026. *Plaintiff's Preliminary Objections to Defendants' Preliminary Objections, ¶¶ 5-14.* As previously stated herein, Civil Rule 1026 states preliminary objections are to be filed within twenty (20) days after service of the preceding pleading. *Pa.R.C.P. 1026; see also, Pa.R.C.P. 1017(a)(4).* Plaintiff argues its Preliminary Objections should be sustained, as Defendants' Preliminary Objections were not timely filed. *Plaintiff's Preliminary Objections to Defendants' Preliminary Objections, ¶¶ 5-14; Plaintiff's Memorandum of Law, pp. 3-4.* Defendants have implicitly stated through their admission that service was effectuated on June 16, 2009, upon the Harrison County Sheriff Deputy's substituted service of Defendant Carina Bruton. Defendants filed their Preliminary Objections on July 15, 2009, outside of twenty (20) days of June 16, 2009. As the parties currently possess one another's respective pleadings, and in light of the fact the Court has abstained from addressing Plaintiff's compliance of Civil Rule 405,[7] the Court finds this nine (9) day gap does not warrant dismissal of Defendants' Preliminary Objections.

[7] Prior to stating their argument regarding proper service to be moot, Defendants set forth the notion that, as Plaintiff failed to file its proof of service with the Prothonotary as required by Civil Rule 405, Defendants had no way to verify service of the Complaint, and thusly had no ability to file the proper response within twenty days. *See, Defendants' Brief in Opposition to Plaintiff's Preliminary Objections to Defendants' Preliminary Objections, p. 5.* The Court withholds a ruling regarding Plaintiff's abidance of Civil Rule 405 due to Defendants' concession of their service argument.

Defendants' Requested Dismissal of the Complaint Pursuant to Civil Rule 1019(i)

Defendants state Plaintiff's Complaint should be dismissed in its entirety pursuant to Civil Rule 1028(a)(2) for its alleged failure to conform to Civil Rule 1019(i). *Preliminary Objections to Plaintiff's Complaint in Mortgage Foreclosure, ¶¶ 22-25.* Civil Rule 1019(i) states, "when any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof . . . ." *Pa.R.C.P. 1019(i).* Defendants argue their Preliminary Objections should be sustained, as Plaintiff failed to attach the promissory note to the Complaint that was referenced in paragraph three (3) therein (hereinafter "Referenced Note"), which lays out Defendants' obligations in regard to the Subject Property's Mortgage. *Defendants' Brief in Support of Preliminary Objections to Plaintiff's Complaint in Mortgage Foreclosure, pp. 5-6.* However, Plaintiff attached a note as Exhibit 1 to its Opposition to Defendants' Motion to Set Aside the Default Judgment (hereinafter "Exhibit Note"). *Plaintiff's Answer in Opposition to Defendants Petition/ Motion to Strike/Set Aside Default Judgment and Cancel Sheriff's Sale, Ex. 1.* Provided the Exhibit Note and the Referenced Note are one and the same, the Referenced Note is now in Defendants' possession, and the Court finds Plaintiff need not file yet another Complaint.[8] If it is not, the Court orders Plaintiff to file an Amended Complaint within twenty (20) days after notice of the Court's Order with the Referenced Note affixed thereto pursuant to Civil Rule 1019(i).

Defendants' Requested Dismissal of the Complaint Pursuant to Civil Rule 1024(c)

Defendants state Plaintiff's Complaint should be dismissed pursuant to Civil Rule 1028(a)(2) for its alleged failure to conform to Civil Rule 1024(c). *Preliminary Objections to Plaintiff's Complaint in Mortgage Foreclosure, ¶¶ 17-21.* Civil Rule 1024(c) states, "[t]he verification shall be made by one or more of the parties filing the pleading . . . unless all the parties lack sufficient knowledge or information." *Pa.R.C.P. 1024(c).* In such instances, any person having sufficient knowledge or information and belief may sign the verification, and they must further state the reason the verification was not made by a party. *Id.* Defendants argue their Preliminary Objections should be sustained, as the Verification to the Complaint (hereinafter "Verification") was not signed by an authorized individual, but by Plaintiff's Attorney. *Defendants' Brief in Support of Preliminary Objections to Plaintiff's Complaint in Mortgage Foreclosure, pp. 4-5.* A pleading signed by an attorney, rather than by

[8] The Court has latitude in its interpretation and application of the Civil Rules in certain instances. *See, Pa.R.C.P. 126.* Thus, provided the Referenced Note is already contained in the record as the Exhibit Note, the Court finds Defendants' substantial rights would not be affected by Plaintiff's failure to affix it to the Complaint, and it would be advantageous to forgo the filing of yet another Complaint that would further prolong the efficient determination of the present action.

the party filing the pleading, does not ordinarily comply with Civil Rule 1024(c). *See, Atlantic Credit & Finance, Inc. v. Giuliana,* 829 A.2d 340, 344 (Pa. Super. 2003)(wherein a verification was signed by an attorney's paralegal); *allocatur denied,* 843 A.2d 1236 (Pa. 2004): This prohibition extends to the verification of pleadings by a corporation, where an authorized officer of the corporation should sign the verification, unless: the corporation authorizes the attorney to sign the verification; authorized agents are unable to sign the verification; and the attorney has personal knowledge of the alleged facts. *See, Tremont Twp. Sch. Dist. v. Western Anthracite Coal Co.,* 75 Pa. D. & C. 225 (C.P. Schuylkill Co. 1951); *see also, Standard Pennsylvania Practice* 2d §§ 1002:1.1; 1024(c):(3) (West 2001).

The Verification reveals Plaintiff's Attorney was not only authorized and able to sign the Verification, but also had personal knowledge of the alleged facts. Furthermore, the Verification shows why an authorized agent of Plaintiff did not sign it, i.e., Plaintiff would have been required to verify much of the information through multiple agents. The Court finds the Verification, as signed by Plaintiff's Attorney subject to the penalties imposed upon him by the Pennsylvania Consolidated Statutes for falsification to authorities, is not in direct violation of Civil Rule 1024(c).

Defendants' Requested Dismissal of Paragraph Nine of the Complaint

Defendants further contend Plaintiff's request for attorney's fees at paragraph nine (9) of the Complaint should be dismissed. *Preliminary Objections to Plaintiff's Complaint in Mortgage Foreclosure, ¶¶ 26-29.* Attorney fees are not recoverable unless by specific agreement or statute. *See, Madden Contracting & Material Co., Inc. v. Lastooka,* 18 Pa. D. & C.3d 495 (C.P. Westmoreland Co. 1980). The Court finds Plaintiff is not entitled to attorney fees if judgment were entered in its favor, as it has failed to support its request by citing any statute, case law, or agreement between it and Defendants stating such entitlement.

ORDER

AND NOW, TO-WIT, this 26th day of April, 2010, it is hereby **ORDERED, ADJUDGED, and DECREED** that, for the reasons set forth in the foregoing Opinion, Defendants' Preliminary Objections are **OVERRULED** as to dismissal of the entire Complaint, but **SUSTAINED** as to dismissal of paragraph nine (9) of the Complaint. Plaintiff's Preliminary Objections are **OVERRULED.**

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

COMMONWEALTH OF PENNSYLVANIA
v.
LARRY S. LEMON, DEFENDANT

CRIMINAL PROCEDURE / STANDARD FOR DECERTIFICATION

In determining whether to transfer a case from the Criminal Division to the Juvenile Division, the child shall be required to establish by a preponderance of the evidence that the transfer will serve the public interest.

CRIMINAL PROCEDURE / FACTORS FOR DECERTIFICATION

The factors to be considered in determining a transfer to Juvenile Court are the impact on the victim, impact of the offense on the community, the threat to the safety of the public by the child, nature of the offense, degree of child's culpability, the adequacy and duration of dispositional alternatives available as a juvenile and adult and finally whether the child is amenable to treatment.

DECERTIFICATION

Hardness of heart, lack of remorse and a mind without regard for social consequences precludes decertification.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 552 OF 2010

Appearances: Elizabeth Hirz, Esq., Attorney for Commonwealth
John Mead, Esq., Attorney for Larry S. Lemon

OPINION

Cunningham, William R., J. Aug. 13, 2010

The presenting matter is the Defendant's request to transfer this case to the Juvenile Court pursuant to 42 Pa.C.S.A. §§6322 and 6355(a)(4)(iii). After a hearing held on July 28, 2010, the Defendant has not satisfied the evidentiary burden of proof for decertification.

The Commonwealth has charged the Defendant as an adult with Criminal Homicide, Aggravated Assault, Recklessly Endangering Another Person, Firearms not to be Carried Without a License, Possession of a Firearm by a Minor and Possession of a Weapon.[1]

The charges are alleged to have arisen during the early evening hours of January 5, 2010, when the Defendant allegedly shot Steven Arrington multiple times with a nine millimeter semi-automatic handgun in front of Henry Lee's Market on Buffalo Road in the City of Erie. *Criminal Information, March 15, 2010; Defendant's Videotaped Statement to Police, January 5, 2010 (Commonwealth Exhibit "B," 4/19/10).* According to

[1] 18 Pa.C.S.A. §2501(a); 18 Pa.C.S.A. §2702(a)(1); 18 Pa.C.S.A. §2705; 18 Pa.C.S.A. §6106(a)(1); 18 Pa.C.S.A. §6110.1(a), 18 Pa.C.S.A. §907(b), respectively.

the grocery store clerk, Arrington was in the market shopping when the Defendant opened the door, looked inside and saw Arrington in the store. The Defendant was wearing all black. The Defendant waited outside for the victim to emerge from the store. The shooting occurred immediately after the victim exited the store. Steven Arrington did not die at the scene, but was pronounced dead a short time later at the hospital.

The Defendant fled the scene on foot and went to the home of Jessica Burrows, an acquaintance with a baby in the home. *Defendant's Videotaped Statement to Police, January 5, 2010.* The Defendant left the gun with Burrows as it belonged to the father of the baby. *Id.* The Defendant changed his clothing at the Burrows' residence. *Id.*

Subsequently, the Defendant heard the police were looking for him. *Id.* Accompanied by his mother, the Defendant went to the Erie Police Station the evening of January 5, 2010. After the Defendant and his mother signed a waiver of Miranda rights, the Defendant gave a videotaped statement recounting his version of the events of the shooting.

On April 19, 2010, an evidentiary hearing was held on the Defendant's Motion to Suppress the videotaped statement. The Defendant's videotaped statement was entered into evidence as Commonwealth Exhibit "B" at the suppression hearing and is incorporated herein by reference. Findings of Fact and Conclusions of Law were filed April 21, 2010, denying the Defendant's Motion to Suppress. The Findings of Fact and Conclusions of Law are incorporated herein by reference.

The Defendant bases his request for decertification on his purported compliance with the terms of supervision while under the jurisdiction of the Juvenile Court. The Defendant claims he is amenable to treatment in the juvenile system. In support of this contention, the Defendant entered into evidence his juvenile records from 2003 through 2009 as Defense Exhibit "1." The Defendant argues he has the mental capacity and maturity to accept rehabilitation in the juvenile system.

The Commonwealth opposes the request for decertification due to the serious nature of the charges, the effect on the victim and the community and the inadequacy of dispositional alternatives under the juvenile court system. The Commonwealth argues the Defendant was non-compliant with juvenile probation, incurred several revocations from community supervision, was repeatedly placed at residential treatment facilities, increased his level of criminal sophistication, has exhausted treatment programs in the juvenile system and is not amenable to treatment in the juvenile system.

DEFENDANT'S JUVENILE DELINQUENCY BACKGROUND

The Defendant was born on January 24, 1992. On the day of the alleged homicide, January 5, 2010, the Defendant was nineteen days shy of his eighteenth birthday. The Defendant's juvenile delinquency history

was gleaned from Defense Exhibit "1."

Allegations of delinquency were first filed in December of 2003, when the Defendant was eleven years old. The sustained delinquency allegations were for Theft by Unlawful Taking and Receiving Stolen Property for the theft of money ($200.00) from a teacher's purse at McKinley Elementary School. The Defendant was adjudicated delinquent and placed on electronic monitoring with a deferred placement to a residential treatment facility.

While on electronic monitoring, the Defendant did not comply with school rules and the rules of juvenile probation. Separately, the Defendant was adjudicated delinquent for Failure to Comply with a Lawful Sentence. The Defendant was revoked from formal probation on November 2, 2004, and placed at Beacon Light Residential Treatment Facility. On January 28, 2005, the Defendant was released from Beacon Light, returned home and discharged from the jurisdiction of the Juvenile Court.

By June of 2005, allegations of delinquency were filed for Theft by Unlawful Taking and Receiving Stolen Property for the theft of a laptop computer from Wilson Middle School in May of 2005. In November of 2005, the Defendant was placed on Formal Probation with a deferred placement to Beacon Light Residential Treatment Program.

The Defendant was charged with Loitering and Prowling at Night on December 3, 2005, when he was found hiding in someone's backyard, and Failure to Comply With a Lawful Sentence, after he was found guilty of Harassment by the Magisterial District Court on October 24, 2005.

In December of 2005, the Defendant became a fugitive and a warrant for his arrest was issued on January 3, 2006. The Defendant was arrested in Cleveland, Ohio on February 24, 2006, where he had been residing in violation of the terms of his probation.

The allegations of delinquency were sustained at a Revocation/ Adjudication Hearing on March 8, 2006.

The Defendant was again placed at Beacon Light Residential Treatment Facility. On October 26, 2006, the Defendant was released to the care of his mother. The Defendant was closed from the supervision of the Juvenile Court in February of 2007.

The Defendant's return to the community was short-lived. On December 11, 2007, the Defendant was arrested by the Erie Police and charged with Aggravated Assault, Possessing an Instrument of Crime, Simple Assault and Recklessly Endangering Another Person for striking the victim on the back of the head with a wooden board at the victim's home. The charges of Simple Assault and Possessing an Instrument of Crime were sustained.

During this time, the Defendant was also charged with Terroristic Threats, Disorderly Conduct and Harassment for threats he made at

Central High School. The charge of Terroristic Threats was sustained. At a Dispositional hearing on January 16, 2008, the Defendant was placed at Cresson Secure Treatment Unit. In September of 2008, the Defendant was released from Cresson and placed on Conditional Release in the care of his aunt.

In less than one month of his release, the Defendant incurred additional allegations of delinquency. In October of 2008, the Defendant was driving a stolen car and charged with Theft by Receiving Stolen Property, Criminal Conspiracy and Drivers Required to be Licensed. The allegation of delinquency of Criminal Conspiracy (to steal a car) was sustained. The other two charges were withdrawn.

In November of 2008, after a Revocation from Probation/Dispositional hearing, the Defendant was placed at George Junior Republic, Special Needs Unit, a staff-secure unit. The Defendant was released on June 9, 2009, to the care of his aunt. The Defendant was closed from the supervision of the Juvenile Court in August of 2009.

Within five months, the Defendant was charged with this homicide.

STATUTORY FACTORS

In determining whether to transfer this case from the criminal division to the juvenile division, "the child shall be required to establish by a preponderance of the evidence that the transfer will serve the public interest." 42 Pa.C.S.A. §6322(a); *Com. v. Aziz,* 724 A.2d 371, 373 (Pa. Super. 1999); *Com. v. Sanders,* 814 A.2d 1248, 1250 (Pa. Super. 2003).

The factors contained in 42 Pa.C.S.A. §6355(a)(4)(iii) must be considered in determining whether the child has established the transfer will serve the public interest. Each of these statutory factors will now be discussed seriatim.

(A) IMPACT ON THE VICTIM

These crimes had the worst possible impact on the victim. Steven Arrington is dead. He has been permanently deprived of his life.

The circle of victims is wider. Steven Arrington was a son and a father. His parents have lost a son. His infant daughter has lost a father. They have been deprived of the victim's love, support and companionship.

(B) IMPACT OF OFFENSE ON THE COMMUNITY

The record is devoid of any evidence as to how the public interest would be served by decertification. To the contrary, the public would be put at risk by the Defendant's proven ability to commit serious crimes despite a plethora of resources devoted to his rehabilitation. Erie County taxpayers have spent a significant sum trying to help the Defendant since his first involvement in the juvenile justice system at the age of eleven. Extensive efforts were made to work with the Defendant within a community setting, yet he had to be removed from the community on

four separate occasions and placed in three different residential facilities. Each of these facilities offered rehabilitative services to address any educational, substance abuse, mental health, vocational or any other need by the Defendant that would enable him to live a crime-free life.

After providing the Defendant all of these comprehensive resources, the community has a right to expect that the Defendant would not be in possession of a handgun and shooting someone at point-blank range in a parking lot outside of a grocery store.

(C) THE THREAT TO THE SAFETY OF THE PUBLIC OR ANY INDIVIDUAL POSED BY THE DEFENDANT

All of the crimes committed by the Defendant have had a victim. Some of these victims were for property offenses, including the theft of a teacher's purse in 2003, the theft of a laptop computer from a school in 2005 and driving a stolen car in 2008. The Defendant has been adjudicated delinquent for loitering and prowling when he was found hiding in someone's backyard in 2005.

The Defendant also has a history of violent behavior. In December 2007, the Defendant was adjudicated delinquent for Simple Assault and Possessing an Instrument of Crime for striking someone on the back of the head with a board at the victim's home.

Likewise in December 2007, the Defendant was adjudicated delinquent for Terroristic Threats committed at Central High School.

The Defendant's criminal behavior has escalated from property crimes to crimes against the physical safety of the victims. Ultimately, the Defendant was charged with the most serious crime against a person, homicide. The Defendant has demonstrated that he consistently poses a threat to the property and safety of citizens of this community.

(D) THE NATURE AND CIRCUMSTANCES OF THE OFFENSE ALLEGEDLY COMMITTED BY THE CHILD

The Defendant was not an innocent bystander in this incident. To the contrary, the Defendant created the immediate circumstances for this killing to occur.

If the Commonwealth's evidence is accepted at trial, the jury could find the Defendant was the sole actor who used a nine-millimeter semi-automatic handgun to shoot the victim multiple times, without provocation, at point-blank range. The Defendant waited to ambush Arrington outside of a grocery store. The Defendant could have easily chosen to leave once he knew the victim was inside the store. Instead, the Defendant chose to wait outside the store with a loaded gun. All other choices that were available to the Defendant were less lethal than the option he chose.

The Defendant claims there had been a long-standing feud between him and the victim. The Defendant contends Arrington and Arrington's

friends engaged in a pattern of harassment and threats directed toward the Defendant since the summer of 2009. The Defendant alleges he was threatened by Arrington in the parking lot of Henry Lee's Market on January 5, 2010, just prior to the victim entering the market. The Defendant stated he waited in the parking lot for the victim to emerge from the store. *Defendant's Videotaped Statement, Commonwealth Exhibit "B", 4/19/10.*

If in fact the Defendant felt threatened by Steven Arrington on January 5, 2010 in the parking lot of Henry Lee's Market prior to the victim entering the store, the Defendant had a host of other legal options available, including reporting any threats to the police department. Instead, the Defendant chose to be the aggressor and waited outside of the market. The jury could find the Defendant then gunned down Arrington in a premeditated manner with malice. The Defendant fled the scene and stashed the gun at a friend's house and changed his clothes.

All of these were not the acts of an individual concerned with the safety of others in this community. The nature and circumstances of the offense allegedly committed by the Defendant are extremely alarming.

(E) THE DEGREE OF THE CHILD'S CULPABILITY

By his videotaped statement, the Defendant admits he fired the shots that killed Steven Arrington. Hence, this is not a case of ascertaining who fired the fatal shots.

If the jury accepts the Commonwealth's version of the events, the Defendant was the sole actor who created the circumstances for this deadly encounter to occur. The Defendant was not a happenstance participant who was in the wrong place at the wrong time. The Defendant could have easily avoided this killing.

The Defendant acted alone without the prodding or prompting of any co-conspirator. The Defendant cannot say he was a follower of any person more culpable in this killing. The Defendant was the principal actor who demonstrated his ability to commit the most heinous act known to mankind. Accordingly, the degree of the child's culpability works against his request for decertification.

(F) THE ADEQUACY AND DURATION OF DISPOSITIONAL ALTERNATIVES AVAILABLE AS A JUVENILE OR ADULT

By his behavior, the Defendant has demonstrated he is not amenable to treatment within the juvenile system. The Defendant has had ample opportunities and sufficient time to be rehabilitated given the resources devoted to him in the juvenile system. The Defendant was placed on four separate occasions in three different residential treatment settings. Each of these placements would have given him every educational, vocational and personal skill he would have needed to succeed in life.

Instead, this shooting occurred within five months of the Defendant's release from the jurisdiction of the juvenile court and within seven months of his release from George Junior Republic, Special Needs Unit, in June of 2009. *See Com. v. Smith,* 950 A.2d 327 (Pa. Super. 2008) (decertification denied; crimes committed within six months of defendant's release from juvenile facility.)

The Defendant is now over eighteen and one-half years old. The juvenile system has worked with the Defendant since he was age eleven. The Defendant has been offered a variety of resources and has exhausted any further treatment options.

This Court finds credible the testimony of Robert Blakely, Chief Juvenile Probation Officer for Erie County. This case was staffed by the Juvenile Probation Office, including Chief Blakely. It was determined the Defendant has exhausted all resources available within the juvenile justice system. The Defendant's juvenile record supports this contention.

The Defendant presents with several possible rehabilitative issues. It is likely the Defendant needs treatment for anger, impulse control and aggressive behavior. The Defendant also tested positive on two separate occasions for marijuana. All of these issues can be addressed in the adult system. There is nothing unique about the Defendant's issues that only the juvenile system could address.

(G) WHETHER THE CHILD IS AMENABLE TO TREATMENT, SUPERVISION OR REHABILITATION WITHIN THE JUVENILE SYSTEM

If the Defendant's case were transferred to Juvenile Court, there is now less than two and one half years to work with the Defendant. It is unrealistic to expect that in those two and one half years, the Defendant could be rehabilitated when the Defendant's previous six years within the juvenile system were unsuccessful.

At the Defendant's age, there is insufficient time to work with the Defendant within the juvenile justice system given his personal history. It is noteworthy that in 2006, the Defendant fled the jurisdiction and was found living in Cleveland, Ohio. Hence, there is no guarantee the Defendant would make himself available for rehabilitation in Pennsylvania before reaching the age of twenty-one.

Another factor considered was the Defendant's lack of remorse demonstrated during his videotaped statement with the Erie Police Department. At the beginning of the interview, the victim was still alive. Midway through the interview, the Defendant was informed of the victim's death. The Defendant did not exhibit any concern for the victim, instead the Defendant engaged in a detailed justification for the killing. As the Defendant was confronted with the evidence mounting against him, the Defendant then began to set up a self-defense claim

as justification for the killing. In so doing, the Defendant manifested a degree of savvy and/or sophistication in attempting to extricate himself from what he knew was a serious situation. His behavior under these circumstances demonstrated a hardness of heart and a mind without regard for social consequences that preclude decertification. *See Com. v. Smith*, 950 A.2d 327 (Pa. Super. 2008). *See also Com. v. Archer*, 722 A.2d 203 (Pa. Super. 1998)(motion for decertification denied based on the defendant's lack of remorse and the defendant was not a passive participant in the killing.)

The Defendant's cognitive functioning is lower than average. According to counsel for the Defendant, the Defendant has an IQ between 59 and 69 and is competent to stand trial as an adult. *See Hearing Record, 7/30/10.* As evidenced in the Defendant's videotaped statement, the Defendant has the ability to understand his culpability and try to minimize his responsibility. The Defendant possesses sufficient intelligence to understand the illegality of his behaviors. In most of the Defendant's crimes, he acted alone.

As his history demonstrates, there is nothing about the Defendant's age, mental capacity, maturity, degree of criminal sophistication or any other factor that would warrant the transfer of this case to Juvenile Court.

CONCLUSION

After consideration of the applicable statutory factors at 42 Pa.C.S.A. §§6322 and 6355(a)(4)(iii), the Defendant is not amenable to treatment, supervision or rehabilitation in the juvenile system. The Defendant did not establish the public interest would be served by decertification. The Motion for Decertification must be denied.

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

IN RE: 1969 RED FORD MUSTANG

PLEADINGS / PRELIMINARY OBJECTIONS

Where the Court lacks jurisdiction over a party, the Complaint should be dismissed. However, where an individual was present in the Commonwealth when process was served, was domiciled within the Commonwealth when process was served, or has implicitly consented to jurisdiction, the Complaint should not be dismissed for lack of jurisdiction over a party.

PLEADINGS / PRELIMINARY OBJECTIONS

The fact that Defendant's name is not listed in the caption does not remove jurisdiction over the Defendant from the Court. More particularly, in a replevin action, the Defendant/Respondent's name need not be included in the body or caption of the Complaint. Further, the Court must liberally construe the Rules of Civil Procedure in an effort to secure just, speedy, and inexpensive determination of an action.

PLEADINGS / PRELIMINARY OBJECTIONS

A demurrer should be granted only where the law says with certainty that no recovery is possible. Thus, where the law reveals that a recovery is possible, a demurrer should be dismissed.

PLEADINGS / PRELIMINARY OBJECTIONS

Absent a statutory allowance, established case law, or clear agreement of the parties, an award of counsel fees is not warranted.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 13559-2009

Appearances: L.C. TeWinkle, Esq., Attorney for Linda Straub Bruce
Philip B. Friedman, Esq., Attorney for Gary J. Curtis

OPINION

Connelly, J., March 3, 2010

This matter is before the Court of Common Pleas of Erie County, Pennsylvania (hereinafter "the Court"), pursuant to Preliminary Objections filed by Gary J. Curtis (hereinafter "Respondent") in response to a Complaint in Replevin filed by Linda Straub Bruce (hereinafter "Petitioner"). Petitioner opposes Respondent's Pleading.

Statements of Fact

In December of 2008, a foreclosure was commenced on the property located at 2937 Reilly Road, Erie, Pennsylvania (hereinafter "Property"), which was then owned by Petitioner's estranged spouse, Loren Bruce (hereinafter "Petitioner's Spouse"). *Complaint*, ¶¶ *3-4*. Respondent acquired the Property via the foreclosure in early March of 2009, and subsequently removed a 1969 Ford Mustang (hereinafter "Mustang")

therefrom. *Id. at 5, 7.* Petitioner learned of the Mustang's removal on March 24, 2009, and has continued to demand its return ever since. *Id. at 6.* Respondent asserts he now owns the Mustang, and refuses to return it. *Id. at 9-10.* Petitioner requests the Court issue an Order whereby Respondent must return the Mustang, pay attorney fees, and pay costs of the present action. *Id. at p. 2.*

Analysis of Law

The Pennsylvania Rules of Civil Procedure (hereinafter "Civil Rule(s)") provide 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. *Pa.R.C.P. 1028(a), (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 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 [moving] 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

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[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 (6) full, complete and adequate non-statutory remedy at law.

Pa.R.C.P. 1028(a)(1)-(8).

[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).

Court's Order or within such other time as the Court shall fix." *Pa.R.C.P. 1028(e).* Objections that are made to any of these amended pleadings shall be done by the filing of new preliminary objections within twenty (20) days after service of the amended pleading. *Pa.R.C.P. 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 or overruled, 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 Petitioner and Respondent.

Respondent avers the Complaint should be dismissed pursuant to Civil Rule 1028(a)(1), as the Court lacks jurisdiction; Civil Rule 1028(a)(2) for failure of a pleading to conform to rules of court; and Civil Rule 1028(a)(4) for legal insufficiency of a pleading (demurrer). *Preliminary Objections, ¶¶ 2-3, 5; Brief in Support of Preliminary Objections, pp. 2-3.* Respondent further argues that, in the alternative, paragraph eleven (11) of the Complaint should be dismissed as there is not a provision in the law or a rule of court that permits the imposition of counsel fees in a replevin action - such as the one presently before the Court. *Preliminary Objections, ¶ 4; Brief in Support of Preliminary Objections, pp. 3-4.*

I. DISMISSAL OF THE COMPLAINT PURSUANT TO CIVIL RULE 1028(a)(1)

Respondent avers the Complaint should be dismissed as the Court lacks jurisdiction over him, in that he is not a named defendant in the present action. *Preliminary Objections, ¶ 3; Brief in Support of Preliminary Objections, p. 3.* The Court may exercise jurisdiction over any individual who: was present in the Commonwealth when process was served, was domiciled within the Commonwealth when process was served, or has implicitly consented to such jurisdiction. *See, 42 Pa.C.S. § 5301(a)(1)(i)-(a)(1)(iii).* Furthermore, a defendant/respondent's name is not required in the body or caption of a complaint in replevin. *See, Pa.R.C.P. 1073.1*(revealing a defendant/respondent's name need not be included in the body or caption of a complaint in replevin); *Petitioner's Memorandum in Support of Motion to Reconsider, Ex. B* (i.e., the Court's Involuntary Transfer for Vehicle Ownership procedures, which reveal a defendant/respondent need not be named in the caption of a petitioner's action regarding involuntary transfer of vehicle ownership).

Respondent not only lived within the Commonwealth, at 2204

Zimmerly Road, Erie, Pennsylvania, when he was served with Petitioner's initial request for the return of the Mustang, but also lived at this address when his attorney was served a copy of the subsequent Complaint requesting the same. *Sheriff's Return-Regular, Aug. 24, 2009; Complaint-Replevin, pp. 1, 11*. Therefore, Respondent's presence and domiciliation within the Commonwealth when process was served, alone, subjects him to this Court's personal jurisdiction, notwithstanding the fact his name is not required to appear in the body or caption of the Complaint pursuant Civil Rule 1073.1 and the Court's suggested procedures regarding such present matters as established by the Honorable Ernest J. DiSantis, Jr., President Judge, and attached to Petitioner's Memorandum in Support of Motion to Reconsider as Exhibit "B."

II. DISMISSAL OF THE COMPLAINT PURSUANT TO CIVIL RULE 1028(a)(2)

Respondent further avers the Complaint should be dismissed for failure to conform to Civil Rule 1018, which provides a general complaint should set forth the names of the parties in its caption, and Civil Rule 1073.1(a)(2) and (b), which provides a complaint in replevin shall set forth both the value of the property to be replevied and verification by the plaintiff. *Preliminary Objections, ¶¶ 2, 5; Brief in Support of Preliminary Objections, pp. 2-3.* While the Civil Rules read, "the caption of a complaint shall set forth . . . the names of all the parties," the Civil Rules also provide they are to be "liberally construed to secure the just, speedy, and inexpensive determination of [the present action]," and the Court may "disregard any error or defect of procedure which does not affect the substantial rights of the parties." *Pa.R.C.P. 1018, 126.* The Court finds the fact that Petitioner and Respondent's names were not included in the Complaint's caption does not tread on the substantial rights of either party; particularly in light of the facts that: (as previously addressed) complaints in replevin, specifically, do not require such information, and the omission is mitigated by the presence of the parties' names and address within the Complaint's first two paragraphs. Therefore, as a result of the Court's application of Civil Rule 126, the Complaint shall not be dismissed pursuant to Civil Rule 1028(a)(2) for failure of a pleading to conform to Civil Rule 1018.

Civil Rule 1073.1 provides that in regard to an action in replevin, the Complaint was to include the Mustang's value and was to be verified by Petitioner upon personal knowledge or information and belief. *Pa.R.C.P. 1073.1(a)(2), (b).* Petitioner filed a verification to the Complaint on December 9, 2009. Thus, the Court considers her obligation under Civil Rule 1073.1(b) fulfilled, in that it finds requiring Petitioner to file an amended complaint for the purpose of filing the verification would

unnecessarily delay the resolution of the present matter. Likewise, regarding her obligation under Civil Rule 1073.1(a)(2), the Court finds that in the interests of judicial efficacy pursuant to Civil Rule 126, Petitioner need not file an amended complaint, but shall simply submit (and file with the Prothonotary) the value of the Mustang to both the Court and Respondent within fourteen (14) days in order for the present matter to proceed with all due and hastened diligence.

III. DISMISSAL OF THE COMPLAINT PURSUANT TO CIVIL RULE 1028(a)(4)

Respondent contends that the Complaint should be dismissed for legal insufficiency of a pleading (demurrer). *Preliminary Objections, ¶ 2; Brief in Support of Preliminary Objections, pp. 2-3.* The question presented by a demurrer is whether, on the facts, averred, the law says with certainty that no recovery is possible, i.e., Petitioner has clearly failed to state a claim on which relief may be granted. *See, Eckell v. Wilson*, 597 A.2d 696, 698 (Pa. Super. 1991). The averred facts state: Petitioner's estranged spouse was storing the Mustang on the Property, which was acquired by Respondent via a March 2009 foreclosure; and Respondent subsequently removed the Mustang from the Property and is now asserting his ownership thereof, despite the fact Petitioner holds title. As previously stated, procedures exist whereby a party that believes it is entitled to ownership of a motor vehicle may file a Motion for Involuntary Transfer of Vehicle Ownership. *Petitioner's Memorandum in Support of Motion to Reconsider, Ex. B.* Therefore, the law reveals that Petitioner's recovery of the Mustang may be possible, i.e., she has stated a claim on which her desired relief may possibly be granted.

IV. DISMISSAL OF PARAGRAPH ELEVEN PURSUANT TO CIVIL RULE 1018

Respondent further contends paragraph eleven (11) of the Complaint should be dismissed, as there is no provision in the law or rule of court that permits the imposition of counsel fees in a replevin action. *Preliminary Objections, ¶ 4; Brief in Support of Preliminary Objections, pp. 3-4.* If judgment would be entered for Petitioner, it shall only determine her right to recover possession of the Mustang; its value; and the amount of any special damages sustained. *Pa.R.C.P. 1084(b)(1)-(3); 1085(b)(1)-(3).* Thus, an award of counsel fees is not warranted, in absence of statutory allowance, established case law, or clear agreement by the parties. *See, Madden Contracting & Material Co., Inc. v. Lastooka*, 18 Pa. D & C.3d 495 (C.P. Westmoreland Co. 1980). The Court finds Petitioner is not presently entitled to attorney fees if judgment was entered in her favor, as she has failed to support her request by citing any statute, case law, or agreement between her and Respondent stating she is entitled to such.

In conclusion, Respondent's argument that he is outside of the Court's jurisdiction is statutory erroneous. Any failure of the Complaint to conform to the rules of court is inconsequential, as any procedural nonconformity therewith has not affected the substantial rights of either party, and shall be promptly ameliorated by Petitioner as previously instructed. While the law (as outlined above) does not guarantee her success, it does not state with certainty that Petitioner may not obtain ownership of the Mustang. However, it does provide that if Petitioner is successful, she is not entitled to the payment of her attorney fees. Therefore, the Court finds the Complaint need not be dismissed but for paragraph eleven.

ORDER

AND NOW, TO-WIT, this 3rd day of March, 2010, it is hereby **ORDERED, ADJUDGED, and DECREED** that, for the reasons set forth in the foregoing Opinion, the following Order is made. Respondent's Preliminary Objections are **OVERRULED** as to dismissal of the entire Complaint, but **SUSTAINED** as to dismissal of paragraph eleven (11) of the Complaint. Petitioner shall provide the value of the Mustang to the Prothonotary within fourteen (14) days, a copy of which shall be served to the Court.

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

ELAINE M. KOLSKI AND JAMES S. KOLSKI, Plaintiffs
v.
THE ERIE COUNTY CONVENTION CENTER AUTHORITY, Defendant

POLITICAL SUBDIVISIONS / GOVERNMENTAL IMMUNITY

In order to state a cause of action under the real estate exception to the Political Subdivision Tort Claim's Act, 42 Pa.C.S. § 8542(b)(3), a plaintiff need not allege that the property itself is defective where negligence in the care, custody or control of the property is alleged to have caused the plaintiff's injuries.

POLITICAL SUBDIVISIONS / GOVERNMENTAL IMMUNITY

A municipality's liability under the real property exception to governmental immunity is broader than that of the sovereign because it includes property under its care, custody or control.

POLITICAL SUBDIVISIONS / GOVERNMENTAL IMMUNITY

For purposes of the real estate exception to governmental immunity, a chattel physically connected to real estate in such a manner that it can be removed without materially injuring the chattel or the property to which it is annexed, may become part of the realty or remain personalty, depending on the intention of the parties at the time of the annexation.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 15121-2006

Appearances: Christina S. Nacopoulos, Esquire for the Plaintiffs
Brad D. Trust, Esquire for the Defendant

OPINION and ORDER

Dunlavey, M., J.

AND NOW to-wit, this 14th day of July 2010, upon consideration of Defendant's Motion for Summary Judgment, argument before the Court and review of briefs, the Court makes the following findings:

Plaintiffs Elaine Kolski, and her husband, James, seek damages for injuries allegedly suffered from a fall occurring inside the South Entrance to the Erie Civic Center (hereinafter Civic Center) on January 7, 2005. Plaintiff, at the time the incident occurred, had entered the Civic Center for the purpose of buying tickets for the Ice Capades, an event scheduled to take place at the Civic Center. It was when Plaintiff was exiting the building she allegedly fell on a "hump" in a rug in front of the doorways allowing entrance and exit to the Civic Center. It was from said fall Plaintiff suffered the injuries alleged here. Complaint and Answer have been filed, with the present Motion for Summary Judgment having come before this Court. Briefs were filed and argument held, making this Motion ripe for ruling.

DISCUSSION

The standard for Summary Judgment is well settled in the Commonwealth of Pennsylvania. *See Toy v. Metropolitan Life Ins. Co.*, 928 A.2d 186, 193 (Pa.Super., 2007). Defendant, Erie County Convention Center Authority (Authority), eloquently argues this Court must apply a two-step analysis to determine whether the Authority could be held liable for Plaintiff's injuries under the Political Subdivision Tort Claim Act's real estate exception (42 Pa.C.S. § 8542(b)(3)). Defendant first implores the Court to decide whether the rug, upon which Plaintiff claims she fell and therefore suffered the injuries precipitating this lawsuit, in the South entrance/exit of the Civic Center, was "of" the realty or "on" the realty. Defendant argues the Court must make the "of/on" ruling prior to reaching the second step, where the Court must then determine whether Plaintiff can reach the realty exception under the Political Subdivision Torts Claims Act, 42 Pa.C.S.A. § 8541 (b)(3).

What Defendant failed to do, however, is recognize or acknowledge that the Pennsylvania Supreme Court disposed of the first step of Defendant's proposed analysis in *Jones v. SEPTA*, 772 A.2d 435 (2001). In *Jones*, the Court clarified its own previous holding in *Grieff v. Reisinger*, 693 A.2d 195 (1997) (Visitor at a volunteer fire company was burned when paint thinner the fire chief was using to remove paint from the floor was accidentally ignited), that a Plaintiff does not have to allege that the real property itself is defective where negligence in the care, custody or control of the property is alleged to have caused injuries. *Jones* explicitly removed the "on/off distinction" from Pennsylvania law. *See Jones*, 772 A.2d at 443. This treatment distinguishes itself from *Blocker v. Philadelphia*, 763 A.2d 373 (2000) (Bleacher in school gymnasium causes injury to student Plaintiff.), the case Defendant prays the Court follows. In *Blocker*, the Court held the defective condition of the bleacher, which caused injury to the plaintiff, was personalty and not part of the realty itself, thereby precluding the City of Philadelphia from being held liable under the real property exception to immunity. The Court in *Blocker* continued its use of the "on/of" distinction *Jones* has since done away with. This Court finds the holding in *Grieff*, and the support found in *Jones*, instructive, and more importantly, controlling.

Under *Jones*, the controlling law of Pennsylvania, Defendant's argument that this Court must follow a two-step process to determine liability must fail. It is of no consequence whether the condition causing Plaintiff's injuries was *on* or *of* the Civic Center realty itself. Analysis here centers on the "care, custody, or control of real property" leading to injuries alleged by the Plaintiff. *See Williams v. Philadelphia Housing Authority*, 873 A.2d 81 (Pa. Commw. Ct. 2005) (a municipality's liability under the real property exception to governmental immunity is broader than that of the sovereign because it includes property under its care,

custody, or control) This Court finds the alleged factual situation here to be similar to that in *Grieff*. The Authority effectively exercised the care, custody and control of the real property that is the entry/exit to the Civic Center lobby by placing the rug where it did. It was impossible, at the time the incident occurred, to ingress and egress the south end of the structure other than to pass over the rug. The defect, or hump as it has been termed, in the rug is analogous to the paint thinner causing the accident in *Grieff* in that the Authority cared for the realty of the Civic Center by placing the rug where it did, just as the paint thinner was used by in *Geiff* to care for the floor in the fire station.

In anticipation of any further argument Defendant may offer regarding the personalty/realty distinction it argues would have an effect on the outcome of this matter, the Court finds, as a matter of law, the rug/mat to have been personalty. Defendant, conveniently for the Court, and inconveniently for itself, exhibits in its Brief in Support of Summary Judgment when it quotes Blocker's analysis of how chattels are classified in connection with real estate. In relevant part, *Blocker* states:

> Third, those which, although physically connected to the real estate, are so affixed as to be removed without destroying or materially injuring the chattels themselves, or the property to which they are annexed; these become part of the realty or remain personalty, depending on the intention of the parties at the time of annexation...

Blocker, 763 A.2d at 375; *See also Repko v. Chichester School Dist.*, 904 A.2d 1036, 1041 (Pa.Cmwlth., 2006). This Court finds, as a matter of law, the rug involved here was originally personalty, as defined by the Court in *Blocker*. Further, as is contemplated by *Blocker*, but Defendant fails to address, the intention of the party using the implement at the time of the annexation is the true determinative factor in the analysis. Here, the rug was placed in such a position, and was treated in such a way, that the Authority exhibited intent to make the rug a part of the realty itself, as every person who traveled in and out of the south entrance must have crossed over this rug. Therefore, this Court finds, as a matter of law, that the Authority intended the personalty of the rug to become a part of the realty itself. *See Wells v. Harrisburg Area School Dist.*, 884 A.2d 946, 950 (Pa.Cmwlth., 2005) ("In determining intent, it is what intended use of the property was manifested by the conduct of the party that must be considered.") *See also Cureton ex rel. Cannon v. Philadelphia School Dist.*, 798 A.2d 279 (Pa.Cmwlth.,2002)

Therefore, it is the **ORDER** of this Court that Defendant's Motion for Summary Judgment is **DENIED**.

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

TIFFANY R. PATTERSON, Plaintiff

v.

WAYNE E. PATTERSON, Defendant

CIVIL PROCEDURE / PETITION / GENERAL REQUIREMENTS

In this case, the Court considered the issue of relocation of a child, even though both parties were still residing in the marital residence, where there was no objection by either of the parties.

CHILD CUSTODY / RELOCATION

Interstate relocation cases focus on the best interests of the child. The Gruber analysis is applied, which consists of three prongs: (1) the potential advantages of the proposed move and the likelihood the move would substantially improve the quality of life for the custodial parent and the children and is not the result of a momentary whim on the part of the custodial parent; (2) the integrity of the motives of both the custodial and non-custodial parent in either seeking the move or seeking to prevent it; and (3) the availability of realistic, substitute visitation arrangements which will adequately foster an ongoing relationship between the child and the non-custodial parent.

CHILD CUSTODY / INTRA-STATE RELOCATION

Whether or not to apply the Gruber analysis in an intra-state relocation case lies within the discretion of the trial court. Where the relocation is significant enough to alter the relationship between the non-custodial parent and the children, the Gruber analysis applies. Gruber analysis applied in relocation to Mercer County with distance of 1.5 hours.

CHILD CUSTODY / APPLICATION OF GRUBER FACTORS

Relocation of child not in child's best interests where move is not shown to significantly improve quality of life for the child and child would experience disadvantage in being uprooted from school where she is doing well.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA FAMILY DIVISION - CUSTODY
NO. 11907-2010

Appearances: Damon C. Hopkins, Esq., Attorney for Plaintiff
Joseph P. Martone, Esq., Attorney for Defendant

MEMORANDUM OPINION

Brabender, J., September 22, 2010

This matter is before the Court on a Request for Adversarial Hearing filed by the Plaintiff, Tiffany R. Patterson. The issue involves the relocation of the parties' minor child, M. P. (d.o.b. June 21, 2001), with the Plaintiff to Farrell, Pennsylvania.

After a hearing held on September 9, 2010, the Court finds it is in the best interests of the child to deny the Plaintiff's request to relocate with the child.

FACTUAL AND PROCEDURAL BACKGROUND

The parties are married and have three daughters: nine-year old M. P., and 18-year old twins, M. P. and M. P. The parties reside together with the child, M. P., in Erie, Pennsylvania. The twins attend college at Edinboro University.

The case began in April, 2010, with a Complaint In Divorce. At Count II of the Complaint the Plaintiff sought primary physical custody of the child. A custody conciliation conference was held on June 4, 2010. By Order dated June 8, 2010, and filed June 9, 2010, the physical and legal custody of the child was shared. On June 9, 2010, the Plaintiff filed a Request for Adversarial Hearing on the issue of the relocation of the child with the Plaintiff to Farrell, Pennsylvania.

A hearing was held on September 9, 2010 on Plaintiff's petition to relocate to Farrell, Pennsylvania where her parents and other family members live. The Defendant opposes the Plaintiff's request to relocate with the child.

The child has lived in Erie her entire life. She attends Harding Elementary School in Erie. She plays soccer and is in a summer league. She has no special needs and does well in school. She socializes well with children her own age and has a good relationship with her sisters. Her sister, M. P., credibly testified the child is good, respectful and plays with neighbors. The child has a good relationship with her maternal and paternal relatives.

The parties established residence in Erie in 2001. The twin daughters attended public grade school. They graduated from Collegiate Academy in Erie. The twins currently attend Edinboro University in Edinboro, Pennsylvania. The Defendant is employed at Edinboro University as an assistant director of human resources. The Plaintiff is employed as a case manager at GECAC in Erie. The child's paternal grandmother and paternal aunts, uncles and cousins reside in Erie. After school, the child stays with the paternal grandmother for approximately two hours until the Plaintiff picks her up.

Both parents have played positive roles in the upbringing of their three children. Each parent has been involved in disciplining them and in encouraging them in their academic and athletic endeavors.

The Plaintiff's Position

In sum, the basis for the Plaintiff's petition to relocate is that she would be happier, feel better and be more comfortable living with her family in Farrell than if she were to remain in the Erie area.

The Plaintiff has a mental health condition characterized as depression. The Plaintiff testified she had a period of major depression which began in approximately 2002. Her current treatment for this condition consists of medication prescribed by a physician. Prior to 2008, the Plaintiff regularly visited her family in Farrell, approximately every six to eight weeks. The Plaintiff testified she realized in 2008 the marriage with the Defendant was not going to work out. By this time, the Plaintiff was traveling to Farrell

more frequently, approximately once or twice each month. The Plaintiff testified she traveled to Farrell to leave her mental anguish behind. The child, M. P., has accompanied the Plaintiff on many of the visits to Farrell.

The Plaintiff testified she is a happier person when she is with her family in Farrell. The Plaintiff denied currently feeling depressed and testified she is taking her medication.

The Plaintiff testified her activities with the child include monitoring her homework and play activities; cooking; and talking with her. She testified the child likes Erie. She testified the child's sisters live closer to Erie than Farrell.

The Plaintiff testified, with the exception of the child's paternal grandmother, she presently does not have a good relationship with members of the Defendant's family.

If her request to relocate to Farrell with the child is granted, the Plaintiff and the child would move into her parents' residence. There is a bedroom for her and a bedroom for the child there. The Plaintiff has a nursing degree. She identified the pursuit of a nursing license as a goal if she were permitted to relocate with the child. The child would attend St. Joseph School in Sharon, Pennsylvania. The child has close relationships with her cousins in Farrell. The Plaintiff testified the child's relationships with Plaintiff's family members in Farrell can be maintained on the same visitation schedule (every other weekend) as that proposed by the Plaintiff for the Defendant.

The Plaintiff has not secured employment in Farrell. She testified she was offered two positions but did not accept them because she will not commit to relocating unless the child is permitted to relocate with her. The positions for which the Plaintiff has applied have not been associated with nursing. The Plaintiff is uncertain if she could obtain employment in Farrell at a salary comparable to her current salary.

The Plaintiff credibly testified the reason for the proposed move with the child is not directly related to the child's happiness, success or growth. The Plaintiff presently is unable to determine whether living in Farrell would change the quality of the child's life based on the relationships the child has with Plaintiff's family members, the school the Plaintiff selected for the child or housing opportunities.

In the event her request to relocate with the child is denied, the Plaintiff intends to remain in the Erie, Pennsylvania area.

The Defendant's Position

The Defendant opposes the Plaintiff's request to relocate with the child because the child has lived in Erie all her life; Erie is the child's home; the child is doing well in school and the child is established athletically in local sports programs. He testified he has a close relationship with the child. His activities with the child include coaching her soccer team; shooting hoops with her and taking her to the driving range. He has

taken the child shopping for clothes. The Defendant testified his side of the family is also involved in the child's life. The child has regularly gone to the paternal grandmother's house after school since the child was in first grade. He testified Erie has more to offer the child than Farrell from an economic, educational and athletic standpoint. He would have more time with the child during the summer, but his work schedule can be flexible during the academic year.

The Defendant testified the child is happy when she is in Farrell. The Defendant testified the child could be happy if she did not live with the Defendant. He is willing to work with the Plaintiff on custody issues no matter where the Plaintiff lives.

The Defendant intends to continue to reside at the parties' Liberty Street home. He testified the Plaintiff has discussed moving to Farrell for two years or more. The Defendant would prefer a shared custody arrangement with the Plaintiff. However, he has no objection if the Plaintiff chooses to relocate, provided the child remains with him at the Liberty Street address.

DISCUSSION

In custody cases involving the relocation of a parent, the ultimate objective remains the best interests of the children. *Lambert v. Lambert*, 598 A.2d 561, 565 (Pa. Super. 1991). Where a custodial parent seeks to relocate out-of-state with a child over the objection of a non-custodial parent (an "interstate relocation" case), in ascertaining the best interests of the child, the trial court must consider the following three factors enunciated by the Pennsylvania Superior Court in the case of *Gruber v. Gruber,* 583 A.2d 434, 440 (Pa. Super. 1990):

> (1) the potential advantages of the proposed move and the likelihood that the move would substantially improve the quality of life for the custodial parent and the children and is not the result of a momentary whim on the part of the custodial parent;
>
> (2) the integrity of the motives of both the custodial and non-custodial parent in either seeking the move or seeking to prevent it; and
>
> (3) the availability of realistic, substitute visitation arrangements which will adequately foster an ongoing relationship between the child and the non-custodial parent.

Id.

In cases involving intra-state relocations, the determination whether to use a *Gruber* analysis lies within the discretion of the trial court. *B.K. v. J.K.*, 823 A.2d 987, 991, n.6 (Pa. Super. 2003); *Bednarek v. Velazquez*, 830 A.2d 1267, 1271 (Pa. Super. 2003). The trial court should be "mindful of geographic distance and whether that distance is significant enough to

alter the relationship between the non-custodial parent and the child(ren), as well as whether the relocation entails different educational, cultural and religious facilities, and whether or not the same trial court would retain jurisdiction over the children." *B.K. v. J.K.*, 823 A.2d at 991, n.6.

The Plaintiff seeks to move with the child to Farrell in Mercer County, approximately 1.5 hours away. This distance is significant enough to alter the relationship between the child and the Defendant, who would become the non-custodial parent if the request to relocate with the child was granted. The proposed relocation would require the child to attend a different school and would involve great change in the routine of the father-daughter relationship. It is appropriate to apply the Gruber analysis to the relocation request under these facts.

With regard to the first Gruber factor, "the custodial parent has the initial burden of showing that the move is likely to significantly improve the quality of life for that parent and the children." *Gruber, Id.* at 441. Regarding the second Gruber factor, "each parent has the burden of establishing the integrity of his or her motives in either desiring to move or seeking to prevent it." *Id.* The Court must then consider the third factor, the feasibility of creating substitute visitation arrangements to assure a continuing and meaningful relationship between the child and the non-custodial parent. *Id.*

In Gruber, the Superior Court emphasized the best interests of the child are more closely allied with the interests and quality of life of the custodial parent and cannot be determined without reference to them. *Id.* at 439. In the context of relocation cases, this means that, "when relocation is likely to result in a substantially enhanced quality of life for a custodial parent, often the child's best interests will be indirectly but genuinely served." *Id.* By the same token, the Superior Court in Gruber recognized the competing factor of "the mutual interest of the child and non-custodial parent in maintaining as healthy and loving a relationship as possible." *Id.*

The refinements of the "best interests of the child" analysis set out by the Superior Court in Gruber do not create a new standard: the "polestar" of the analysis in custody relocation cases remains the "best interests of the child." *Lee v. Fontaine,* 594 A.2d 724, 725-6 (Pa. Super. 1991).

Under Gruber, the petitioning party has the burden to show the potential advantages of the move and to show that the move is likely to substantially improve the quality of petitioner's life and the child's life and is not the result of a momentary whim. *Gruber* at 440.

In the instant case, the Court concludes the Plaintiff has not met this burden. The Plaintiff has identified the advantages of a greater sense of personal happiness and well-being from a move to Farrell where members of her family live. However, the Plaintiff has not shown these advantages are likely to *substantially* improve her quality of life. The Plaintiff testified she no longer felt depressed, is taking her medication

and is regularly visiting her family in Farrell. In light of these factors, the improvement in Plaintiff's happiness and sense of well-being from the move may not be as great as once anticipated.

Also, the Plaintiff testified a primary goal, if relocation with the child was permitted, was for her to pursue a nursing license while living in Farrell. However, no advantage to the Plaintiff in pursuing the goal from Farrell rather than Erie was identified. Additionally, the Plaintiff has not secured employment in Farrell and testified she is uncertain if she could obtain employment in Farrell at a salary comparable to her current salary.

However, even assuming the Plaintiff had shown the move to Farrell is likely to substantially improve her quality of life, the Plaintiff has not shown the move is likely to *substantially* improve the quality of her child's life.

First, the credible evidence established the child is already happy and doing well living in Erie. She has a routine which includes attending a school where she is an honor student. She in involved in extracurricular sports activities. The child is social and plays with the neighbors. She has a good relationship with her twin sisters who attend Edinboro University. They visit her and help her with her homework when they come home. A variety of educational opportunities exist for the child in Erie. The child's father and his family reside in Erie. The child has a good relationship with her father and his family. The paternal grandmother cares for the child after school until the Plaintiff picks the child up.

Next, while the child might benefit from any increase the Plaintiff may experience in her level of happiness or sense of well-being from living in Farrell with maternal relatives, there is no evidence this will *substantially* improve the child's quality of life. The Plaintiff testified she is unable to determine whether living in Farrell would change the quality of the child's life. No other potential advantages of the move to the Plaintiff from which the child might gain were identified.

Lastly, the Plaintiff has not shown any direct benefits to the child from living in Farrell that would significantly improve the child's quality of life. The child already has ongoing relationships with maternal relatives in Farrell. The relationships have been fostered by regular contact with maternal family members. The Plaintiff is unable to determine whether living in Farrell would change the quality of the child's life based on the relationships the child has with Plaintiff's family members.

The Plaintiff presently is unable to determine whether living in Farrell would change the quality of the child's life based on the school the Plaintiff selected for the child or housing opportunities. There is no indication the child would receive a better education there or her school performance would improve if she relocated to Farrell. Also, the child has no special needs which would require help only available in Farrell.

The Plaintiff's reasons for the proposed move with the child are not directly related to the child's happiness, success or growth. The Plaintiff

has not shown any derivative benefit to the child from a potential increase in the mother's happiness from living in the same city as maternal relatives. The Plaintiff is unable to determine whether living in Farrell would change the quality of the child's life based on the child's relationships with maternal relatives in Farrell, the proposed school for the child in Sharon or housing opportunities. Thus, the Plaintiff has not established the first Gruber factor.

The Court must analyze the second Gruber factor: the integrity of the motives of both the custodial and non-custodial parent in either seeking the move or seeking to prevent it. *Gruber* at 440. Each parent has the burden of establishing the integrity of his or her motives in this regard. *Id.*

The credible evidence establishes each parents' motives are genuine. The evidence establishes each parent loves the child and wants the best for her. The Plaintiff wants to relocate to Farrell because she genuinely believes her happiness will increase if she lives in the same city as her family. The evidence suggests the Plaintiff believes the child's well-being is directly related to her own sense of well-being and therefore, the child will be happier living with her in Farrell.

The Defendant wants the child to remain in Erie, regardless whether the Plaintiff relocates to Farrell, because he loves the child and has her best interests at heart. The Defendant believes it is in the child's best interest to continue her education at Harding Elementary School and to continue her involvement in her athletic activities in Erie.

The credible evidence establishes each parents' motives are genuine. The Plaintiff's motive in seeking the move is to directly promote her interests. Further, the Plaintiff believes the child will indirectly benefit from the promotion of Plaintiff's interests. Thus, the integrity of the Defendant's motives is intact.

The third and last Gruber factor is the availability of realistic, substitute visitation arrangements which will adequately foster an ongoing relationship between the child and the non-custodial parent. *Gruber, Id.*

The Plaintiff proposes the Defendant would have visitation with the child in Erie every other weekend during the school year. The weekend visitation schedule would be from approximately 5:30 or 6:00 p.m. on Friday to approximately 5:30 or 6:00 p.m. on Sunday. The Plaintiff proposes a reversed schedule during the summer, with the Plaintiff having weekend visitation every other weekend. The child would spend the following holidays with the Defendant and his family: Labor Day, Thanksgiving and Memorial Day. The child would spend the following holidays with the Plaintiff: the Fourth of July. The child would spend part of Christmas holiday up to and including Christmas Eve with one parent, and the balance of the Christmas holiday with the other parent, on a schedule that would alternate yearly. The Plaintiff would assist with transportation, and is willing to be flexible with requests for changes in the Defendant's weekend visitation schedule.

There is no doubt difficulties would be presented in accommodating any proposed visitation schedule by the Plaintiff's request to relocate. Such a schedule would involve uprooting the child's established life. This is not warranted. The Plaintiff has not shown the move is likely to substantially improve the quality of the Plaintiff's life. She has not shown the move is likely to substantially improve the quality of the child's life.

Apart from the analysis required by Gruber, under a best interest analysis, the Court finds it is in the best interests of the child to deny the Plaintiff's request to relocate the child to Farrell, Pennsylvania.

The Plaintiff has identified no direct advantage to the child in relocation except for the potential opportunity for more contact with relatives who live in Farrell. The indirect benefit the child may experience from a possible increase in Plaintiff's happiness arising from living in the same city as maternal relatives is speculative and has not been shown to be substantial. Any indirect benefit to the child would be outweighed by the disadvantages to the child in uprooting the child from Erie where she is performing well in school; is involved in athletic extracurricular activities, is well-adjusted and happy and experiences a relationship with her father and paternal relatives.

CONCLUSION

The Plaintiff has not met her burden of proof in demonstrating a move to Farrell, Pennsylvania is likely to significantly improve the quality of life for her and the child. The Plaintiff and Defendant have met their respective burdens in establishing the integrity of their motives in seeking to relocate and in opposing the relocation request. Since the move is not likely to significantly improve the quality of life for the child, the proposed visitation schedule is disruptive to the child's current routine. The Plaintiff's request to relocate the child to Farrell, Pennsylvania, is denied.[1]

An Order will follow consistent with the above.

ORDER

AND NOW, to-wit, this 22nd day of September, 2010, after a hearing on September 9, 2010, on the Request for Adversarial Hearing of the Plaintiff, Tiffany R. Patterson, and in consideration of the best interests of the child, M. P., it is hereby **ORDERED** the request for relocation with the child is **DENIED.**

BY THE COURT:
/s/ **Daniel J. Brabender, Jr., Judge**

[1] The Plaintiff may relocate to Farrell, Pennsylvania, or elsewhere. She is not permitted to relocate with the child. The child is to remain in Erie, Pennsylvania.

ATLANTIC CREDIT & FINANCE INC., ASSIGNEE FROM CAPITAL ONE, Plaintiff

v.

TIMOTHY W. SMITH, Defendant

PLEADINGS / PRELIMINARY OBJECTIONS

The Court shall consider as true all of the well-pled materials facts set forth in the pleadings 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; in determining whether the preliminary objections should be sustained or overruled, the Court must weigh applicable law as it relates to the facts of this case as well as consider the merit of the arguments by each of the parties.

PLEADINGS / PRELIMINARY OBJECTIONS

If the Court sustains preliminary objections and allows for the filing of an amended or new pleading, the amended or new pleading must, pursuant to Pennsylvania Rule of Civil Procedure 1028(d), be filed within twenty (20) days after notice of the Court's order or within such other time as the Court shall fix.

PLEADINGS / PRELIMINARY OBJECTIONS

The mere fact that a contract has not been attached to a complaint is not fatal to the plaintiff's cause of action; Pennsylvania Rule of Civil Procedure 1019 provides that the non-attachment of such a writing may be explained so long as the writing is not accessible to the plaintiff.

PLEADINGS / PRELIMINARY OBJECTIONS

A statement by the plaintiff that "a copy of [the Contract is] not accessible to Plaintiff at this time" is insufficient to meet the requirement of inaccessible writings under Pennsylvania Rule of Civil Procedure 1019, as it does not provide any substantive reason as to why the contract is not accessible; it is merely a masked restatement of the rule itself.

PLEADINGS / PRELIMINARY OBJECTIONS

When the contract is at the very heart of the plaintiff's cause of action, the contract must either be provided or the plaintiff must provide the court an actual and sufficient reason why it has not been presented.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 10739-2010

Appearances: Benjamin J. Cavallaro, Esq., for the Plaintiff
David E. Holland, Esq., for the Defendant

OPINION

Connelly, J., August 10, 2010

This matter is before the Court pursuant to Timothy W. Smith's (hereinafter "Defendant") Preliminary Objections to Atlantic Credit &

Finance's (hereinafter "Plaintiff") Second Amended Complaint. Plaintiff opposes Defendant's Preliminary Objections.

Statements of Fact

Defendant and Capital One entered into a Contract (hereinafter "Contract") whereby Defendant would receive and use a credit account (hereinafter "Account") issued by Capital One in return for a promise to timely pay the outstanding balance plus costs. *Second Amended Complaint, ¶¶ 3, 6, 8.* Defendant ceased to make such payments after May 27, 2008. *Id. at ¶ 9.* On October 17, 2008, Plaintiff purchased the Account. *Id. at ¶ 12.* Plaintiff now alleges in its Second Amended Complaint[1] that Defendant is in breach of the Contract due to his failure to continue making timely payments on the Account. *Id. at ¶¶ 12-13.*

Analysis of Law

The Pennsylvania Rules of Civil Procedure (hereinafter "Civil Rule(s)") provide 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,[2] and may be inconsistent. *Pa.R.C.P. 1028(a), (b).* Preliminary objections should be filed within twenty (20) days after service of the preceding pleading. *See, Pa.R.C.P. 1026, 1017(a)(4).* The moving 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.[3] *Pa.R.C.P. 1028(c)(1); Erie L.R. 1028(c)(2).*

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[1] Plaintiff previously filed Complaints to which Preliminary Objections were filed in response arguing for their dismissal for failure to attach the Contract thereto. The following documents are attached to Plaintiff's Second Amended Complaint: a copy of the original $10,000.00 check issued to, and cashed by, Defendant; a monthly statement for the Account, dated September 29, 2008; a Bill of Sale of the Account between Capital One and Plaintiff; and an Affidavit of Debt for the Account that is signed by "Cameron Gray, Authorized Representative." *Second Amended Complaint, Ex. A.*

[2] The grounds on which preliminary objections may be relied upon are enumerated at Civil Rule 1028. *See, Pa.R.C.P. 1028(a)(1)-(8).*

[3] The Erie County Local Rules of Civil Procedure provide:

> If the brief of either . . . party is not filed within the time periods above stated . . . the Court may then: (A) overrule the objections where the objecting party has failed to comply; (B) grant the requested relief where the responding party has failed to comply and where the requested relief is supported by law, or (C) prohibit the noncomplying party from participating in oral argument although all parties will be given notice of oral argument and shall be permitted to be present at oral argument; and/or (D) impose such other legally appropriate sanction upon a noncomplying party as the Court shall deem proper including the award of reasonable costs and attorney's fees incurred as a result of the noncompliance.

Erie L.R. 1028(c)(4)(A)-(D).

If the Court overrules the preliminary objections, "the [moving] 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 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 Court shall consider as true all of the well-pled material facts set forth in the pleadings 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, Bower v. Bower,* 611 A.2d 181, 182 (Pa. 1992). In determining whether the Preliminary Objections should be sustained or overruled, the Court must weigh applicable law as it relates to the facts of this case as well as consider the merit of the arguments presented by each of the parties in determining whether Defendant's Preliminary Objections should be sustained.

Defendant requests Plaintiff's Second Amended Complaint should be dismissed in its entirety pursuant to Civil Rule 1028(a)(2)[4] for its alleged failure to conform to Civil Rule 1019(i). *Preliminary Objections on Behalf of Defendant to Second Amended Complaint, ¶¶ 1-3.* Civil Rule 1019(i) states, "when any claim . . . is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof," however, "if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing." *Pa.R.C.P. 1019(i).* Defendant specifically argues the Second Amended Complaint violates Civil Rule 1019(i), in that Plaintiff failed to attach copies of the Contract and assignment of the Account thereto.[5] *Preliminary Objections on Behalf of Defendant to Second Amended*

[4] The grounds on which preliminary objections may be based are enumerated at Civil Rule 1028(a), and Defendant provides no citation of these grounds in support of his Preliminary Objections. *See, Preliminary Objections on Behalf of Defendant to Second Amended Complaint, ¶¶ 1-3.* The Court has, therefore, extrapolated from Defendant's Pleading and Brief which of the delineated grounds at Civil Rule 1028(a) he bases his argument on. As Defendant seeks to dismiss the Complaint for failure to attach certain documentation thereto, the Court is left to infer paragraphs one (1) through three (3) of Defendant's Preliminary Objections are based on failure of a pleading to conform to rule of court pursuant to Civil Rule 1028(a)(2), i.e., a violation of Civil Rule 1019(i).

[5] A document entitled "Bill of Sale" is attached to the Second Amended Complaint. *Amended Complaint, Ex. A.* This document reveals that on October 17, 2008, "Capital One . . . in consideration of a Purchase Price . . . and other valuable consideration . . . assign[ed] . . . title and interest in [the Account] . . to [Plaintiff]." *Id.* The Court finds this "Bill of Sale" fulfills the attachment requirement of Civil Rule 1019(i) in regard to the assignment of the Account, and shall narrow its focus on Plaintiff's failure to attach the Contract to the Second Amended Complaint.

Complaint, ¶¶ 1-2.

Plaintiff failed to attach the Contract despite the fact that it has based its entire claim on Defendant being in breach thereof by failing to make payments on the Account. *See, Amended Complaint, ¶¶ 6-7*. However, the mere fact the Contract has not been attached to the Second Amended Complaint is not fatal to Plaintiff's cause of action. Civil Rule 1019 provides the non-attachment of such a writing may be explained so long as the writing is not accessible to Plaintiff. Plaintiff makes an attempt at complying to Civil Rule 1019(i) by stating, "a copy of [the Contract is] not accessible to Plaintiff at this time." *Id. at ¶ 4.* The Court finds this statement is insufficient to meet the requirement for inaccessible writings under Civil Rule 1019, as it does not provide any substantive reason as to *why* the Contract is not accessible; it is merely a masked restatement of the Rule itself.

As the Contract is at the very heart of Plaintiff's cause of action, it must either be provided or Plaintiff must provide the Court an actual and sufficient reason why it has not been presented. Though the Court finds it unnecessary to dismiss Plaintiff's Second Amended Complaint at this time, Plaintiff's action shall be dismissed if it does not meet the requirements of Civil Rule 1019(i) regarding the Contract in its subsequent amendment. The Court shall allow Plaintiff twenty (20) days to file an Amended Complaint, which meets the requirements of Civil Rule 1019(i) as addressed herein.

ORDER

AND NOW, TO-WIT, this 10th day of August, 2010, it is hereby **ORDERED, ADJUDGED, and DECREED** that, for the reasons set forth in the foregoing Opinion, Defendant's Preliminary Objections are **SUSTAINED.** Plaintiff shall have twenty (20) days in which to file an amended complaint.

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

ELIZABETH A. KNIGHT, Plaintiff
v.
DON M. OESTERLE, Defendant

FAMILY LAW / PROTECTION FROM ABUSE

Allegations that an ex-spouse has abused the legal process and/or abused his position as a police officer, without some evidence that plaintiff was placed in reasonable fear of imminent bodily injury, were insufficient to meet the definition of "abuse" as it is set forth in the Protection From Abuse Act, 23 Pa.C.S. § 6102.

FAMILY LAW / PROTECTION FROM ABUSE

Allegations that an ex-spouse is using the legal system to harass the petitioner may give rise to a claim for abuse of process or a grievance against a police officer, but such allegations are insufficient to create a right to relief under the Protection From Abuse Act.

FAMILY LAW / PROTECTION FROM ABUSE

Allegations of trial court error, if not raised at the time of the hearing, are waived for purposes of appeal.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 16220-2010

Appearances: Elizabeth A. Knight, Appellant, *pro se*[1]
Don M. Oesterle, Appellee, *pro se*

OPINION

Domitrovich, J., August 31, 2010

This matter is currently before the Pennsylvania Superior Court on the appeal of Elizabeth A. Knight from the Order entered by this Trial Court on June 3, 2010, in which after a full hearing, this Trial Court denied Elizabeth A. Knight's Petition For Final Protection From Abuse (hereinafter referred to as "PFA") against Mr. Oesterle, since Ms. Knight's testimony and Petition spoke only to alleged misuse of the legal system by Mr. Oesterle and therefore did not present sufficient evidence to establish her case for a PFA Order. The issue before this Lower Court is the sufficiency of the evidence in this case.

On May 26, 2010, Elizabeth A. Knight (Appellant) sought a Temporary PFA Order against Don M. Oesterle (Appellee) who had a brief relationship with Ms. Knight in the year 2000 or 2001. (N.T. Final

[1] At the time of the final PFA hearing both parties were represented by counsel. This Lower Court received a letter from Attorney Raquel Taylor, who represented Mr. Oesterle at the time of the final PFA hearing, indicating she did not represent Mr. Oesterle in the appeal of the Order denying Appellant's PFA petition. Attorney Larry Meredith represented Ms. Knight at the time of the final PFA hearing. Ms. Knight filed her appeal paperwork *pro se*. Both attorneys entered appearances in this matter on June 3, 2010. Neither attorney has withdrawn his or her appearance.

PFA Hearing, 6/3/2010, p. 2). Mr. Oesterle is a police officer with the Allegheny County Police Department. *Id.* at 2. On May 26, 2010 Judge Daniel Brabender, Jr. denied Appellant's Petition for a Temporary PFA Order. Appellant, as she is permitted to do, chose to pursue a final hearing on her PFA Petition despite the denial of her temporary PFA Petition. On June 3, 2010, the parties appeared before this Lower Court in regard to Appellant's request for a final PFA Order to be entered against Appellee.

At the temporary PFA hearing[2], when asked to explain why she was seeking a PFA Order, Appellant stated Appellee "has a pattern of conduct of abuse for the past - -." (N.T. Temporary PFA Hearing, 5/26/10, p. 3). The temporary PFA Court Judge, who had seen Appellant in PFA Court a few months earlier and therefore was familiar with the parties, questioned why Appellant had any relationship with Appellee since she lives in Erie, PA and he lives in Pittsburgh, PA. *Id.* at 3. When asked if Appellee was traveling to Erie and inflicting abuse upon Appellant, Appellant stated "he's doing all this from Pittsburgh. He had me falsely arrested from Pittsburgh. Everything that he's did he's done through the legal system from Pittsburgh." *Id.* at 3. When asked what Appellee had done to Appellant since the time of the previous PFA hearing, which was in February, Appellant again described the alleged false arrest and stated Appellee filed a fraudulent protection from abuse order, attempted to have her "rearrested" and was continuously harassing her. *Id.* at 4. The temporary PFA Court Judge said, "I don't see where you have a case that you are in immediate danger of physical abuse from him. I mean you are talking about legal maneuvers that he has made for you, but it has no place in PFA Court." *Id.* at 4-5. After the temporary PFA Court Judge found that the evidence had not been set forth to grant a temporary PFA, Appellant accused him of bias. *Id.* at 5-6. The temporary PFA Court Judge explained that he needed evidence to grant a temporary PFA and that Appellant was only "talking about legal maneuvers that [Appellee] may be making." *Id.* at 6. He went on to explain that Appellant "may have recourse in some other forum but not temporary PFA Court." *Id.* at 6.

Similarly, at her final PFA hearing, Appellant, although represented by counsel, provided no evidence to indicate she suffered any abuse, as defined by the PFA Act, from Appellee. In fact, Appellant focused solely on her claim that Appellee had misused his position as a police officer to "threaten and harass" her. (N.T. Final PFA Hearing, 6/3/2010, p. 6).

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[2] This Lower Court notes it did not review the transcript from the temporary PFA hearing, held May 26, 2010, until after the final PFA hearing. Details from said hearing are only provided as background information for the Superior Court and were not considered by this Lower Court prior to making the decision to deny Appellant's PFA Petition on June 3, 2010. Additionally, this Lower Court notes Appellant filed two previous temporary PFA petitions in Erie County, which were both denied by two different judges, on February 4, 2010 and February 12, 2010.

This Lower Court repeatedly asked Appellant to describe how she was in reasonable fear of imminent bodily injury, as required by the PFA Act,[3] but Appellant spoke only of her concerns relating to Appellee's alleged abuse of process. This Lower Court gave Appellant numerous chances to explain herself and attempted to elicit relevant information from Appellant. Appellant, despite being prodded and given several chances, did not present any evidence or testimony that could sustain a claim for a PFA Order.

The purpose of the Protection From Abuse Act (23 Pa. C.S. § 6101 *et. seq.*) (hereinafter referred to as "PFA Act") is to protect victims of domestic violence. In order for a plaintiff to qualify for relief under the PFA Act, the defendant's action must fall within at least one category of abuse as defined in the statute. Under Section 6102 of the PFA Act "abuse" is defined as one or more of the following acts between family or household members, current or former sexual or intimate partners, or persons who share biological parenthood:

> (1) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury, serious bodily injury, rape, involuntary deviate sexual intercourse, sexual assault, statutory sexual assault, aggravated indecent assault, indecent assault or incest with or without a deadly weapon.
>
> (2) Placing another in reasonable fear of imminent serious bodily injury.
>
> (3) The infliction of false imprisonment pursuant to 18 Pa. C.S. § 2903 (relating to false imprisonment).
>
> (4) Physically or sexually abusing minor children, including such terms as defined in Chapter 63 (relating to child protective services).
>
> (5) Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following the person, without proper authority, under circumstances which place the person in reasonable fear of bodily injury. The definition of this paragraph applies only to proceedings commenced under this title and is inapplicable to any criminal prosecutions commenced under Title 18 (relating to crimes and offenses).

Additionally, Section 6107(a) of the PFA Act provides that the plaintiff must prove the allegation of abuse by a preponderance of the evidence. This Lower Court heard Appellant's testimony and attempted to decipher in what way she had suffered from abuse as defined by the

[3] Definitions of abuse as provided for in 23 Pa. C.S. § 6102(1), (3), and (4), which do not incorporate the "reasonable fear of imminent serious bodily injury" standard described in 23 Pa. C.S. § 6102 (2) and (5) are not at issue in this case.

PFA Act. However, Appellant's testimony did not substantiate a PFA Order. Specifically, Appellant spoke of an attempt by Appellee, who is a police officer, to have her falsely arrested. *Id.* at 11-12. Attorney Larry Meredith, who represented Appellant at the time of the final PFA hearing, asserted that Appellee misused his position as a police officer to "destroy her...." *Id.* at 14. When asked on direct examination to state the allegations she alleged in her PFA Petition, Appellant responded, "In the past he falsely accused me of damaging his vehicle." *Id.* at 11. This Lower Court explained to Appellant and her attorney that what she was "talking about is abuse of process of a police officer." *Id.* at 12. In order to make sure no abuse for purposes of a PFA Order had taken place, this Lower Court asked Appellant's attorney for any additional information or for clarification of the matter. Attorney Meredith provided no such information. *Id.* at 13.

All of Appellant's testimony related to Appellee's alleged misuse of his position as a police officer. Appellant stated Appellee threatened her "with a denied copy of the PFA" by producing a denied copy of the PFA order at the Magistrate District Judge's office in Pittsburgh. *Id.* at 5-6. When asked how this put Appellant in reasonable fear of imminent serious bodily injury, Appellant responded, "[b]ecause it had nothing to do with the charges, and the intention was to threaten and harass me." *Id.* at 6. In the circumstances of this case, as described by Appellant, Appellee handing Appellant a copy of a denied PFA order, even if that denied Order does not present relevant or accurate information, does not constitute an action that would elicit reasonable fear of imminent serious bodily injury. Appellant's other testimony was also insufficient to warrant a PFA Order, When asked about the specific allegations that led to the filing of the PFA Petition, Appellant stated, "[i]n the past he falsely accused me of damaging his vehicle." *Id.* at 11. False accusations related to damage to a vehicle are not grounds for reasonable fear of imminent serious bodily injury. "The purpose of the PFA Act is to protect victims of domestic violence from those who perpetrate such abuse, with the primary goal of advance prevention of physical and sexual abuse," *Custer v. Cochran*, 933 A.2d 1050, 1054 (Pa.Super.2007) (en banc) (citation omitted). Here, Ms. Knight's concerns are not in the realm of what the PFA Act is intended to protect. False accusations concerning car damage have nothing to do with serious bodily injury. Appellant provided no evidence to establish that she suffered abuse, as defined by the PFA Act, at the hands of Appellee. After repeatedly giving Appellant additional time to explain how she was in reasonable fear of imminent bodily injury after she and her attorney consistently and rigidly spoke only of Appelee's alleged misuse of his position as a police officer, this Lower Court determined that no grounds for a PFA existed. This Lower Court concluded Appellant did not meet her burden of proof and

therefore denied Appellant's PFA Petition.

In her Pa. R.A.P. 1925(b) Concise Statement Of Matters Complained Of On Appeal, Appellant raises the following issues: 1) whether the Lower Court erred or abused its discretion by finding that Appellant was not in "reasonable fear of imminent serious bodily injury." 2) whether the Lower Court erred or abused its discretion by not providing unlimited time for Appellant to testify and asking Appellant to provide details pertaining to the last thirty days before the final PFA hearing and 3) whether the Lower Court demonstrated any inappropriate bias against the Plaintiff by denying her final PFA Petition where she failed to meet her burden of proof, which was the same determination made by another judge who presided over the temporary PFA hearing.

With respect to Appellant's first issue, Appellant claims this Lower Court erred/and or abused its discretion by ruling that the evidence presented did not support the conclusion that Appellant has a reasonable fear of imminent serious bodily injury and therefore is entitled to an order granting protection from abuse. Appellant did not provide testimony or evidence to sustain her burden of proof since she did not establish by a preponderance of the evidence that abuse, as defined in 23 Pa. C.S. § 6102, took place. After hearing Appellant's testimony and reviewing her PFA Petition, this Lower Court determined Appellant did not suffer abuse as defined by the PFA Act and therefore, her PFA Petition could not be granted. As described above, all of Appellant's testimony related to Appellee's alleged misuse of his position as a police officer and did not establish grounds of reasonable fear of imminent serious bodily injury. Therefore, this Lower Court did not err or abuse its discretion by determining that Appellant did not meet her burden of proof and by denying Appellant's PFA Petition. Accordingly, this claim lacks merit.

With respect to Appellant's next concern, Appellant claims that this Lower Court erred by not providing her unlimited time to testify. However, during the hearing, neither Ms. Knight nor her counsel objected to the amount of time provided. "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a), Therefore, this claim should be denied.

Even if Appellant properly preserved the issue at the time of the final PFA hearing, this Lower Court did not err or abuse its discretion by not providing unlimited time for Appellant's hearing. Appellant was given an opportunity to be heard and is not entitled to unlimited time before the Court. The final PFA hearing lasted from 10:57 a.m. to 11:10 a.m. on July 3, 2010. This Court heard Appellant's testimony and attempted to decipher in what way she had suffered from abuse as defined by the PFA Act. Appellant spoke of an attempt by Appellee, who is a police officer, to have her falsely arrested. *Id.* at 11-12. Attorney Larry Meredith, who represented Ms. Knight, asserted that Appellee misused his position

as a police officer to "destroy her...." *Id.* at 14. When asked on direct examination to state the allegations she alleged in her PFA Petition, Appellant responded, "In the past he falsely accused me of damaging his vehicle." *Id.* at 11. This Lower Court explained to Ms. Knight and her attorney that what she was "talking about is abuse of process of a police officer." *Id.* at 12. The Court instructed counsel that Ms. Knight needed to address her PFA case and stated to Ms. Knight:

> [t]ell me, where did he contact you that placed you in reasonable fear of imminent bodily injury, If he abused the process, then you can go after him on a grievance through the police department. This is not the police department. I'm not the executive branch. I'm the judicial branch. What has he done to place you in reasonable fear of imminent serious bodily injury?

Id. at 12. In response to this direct inquiry as to how she had been placed in reasonable fear of imminent bodily injury, Appellant responded, "[m]y premise is that all the automatic favorable action that he has been receiving as a police officer, I think that, you know, puts that up for, you know, if he does anything." *Id.* at 12-13. Again Appellant spoke about abuse of process and would not provide the Court with information that could lead to a PFA. After Appellant's response, this Lower Court stated, "I don't know ma'am. And you haven't established your case. She has five more minutes. She needs to get to her case." *Id.* at 13. This Lower Court was giving Appellant more time and another chance to explain herself after stating solely irrelevant testimony. This Lower Court informed Attorney Meredith that there was no relevant evidence presented and explained that it would not listen to an abuse of process case. This Lower Court stated, "I told her that and she still goes back to it." *Id.* at 13. This Lower Court asked Attorney Meredith to elucidate the Court on his client's PFA. Attorney Meredith stated, "Because I can't make it make sense for the record. I agree with what the Court is saying." *Id.* at 13. The Court later explained again that any claims related to abuse of process by a police officer do not constitute reasonable fear of imminent serious bodily injury. *Id.* at 14. Attorney Meredith then immediately stated, "All right. I agree." *Id.* at 14. Appellant's own counsel put an end to the proceeding.

Furthermore, this Lower Court gave Appellant ample opportunity to explain her basis for a PFA. Appellant continued to dwell on alleged facts relating to how Appellee misused his position as a police officer and did not address how she was in reasonable fear of imminent bodily injury. After this Court heard Appellant's testimony and recognized Appellant had no information that would support a PFA claim, this Lower Court stated Appellant would have five more minutes to get to her case. Appellant was given an opportunity to be heard and was repeatedly asked to talk about instances relating to reasonable fear of imminent bodily injury. Yet, she provided no pertinent information. This Lower

Court did not prevent Appellant from testifying or presenting her case in support of her PFA claim. Therefore, this issue raised on appeal lacks merit.

Appellant also alleges that she was not permitted to provide testimony "of acts of abuse prior to 30 days of PFA dated petition." Appellant's Concise Statement of the Matters Complained of on the Appeal. During the Lower Court's questioning of Appellant, which took place at the beginning of the hearing and before direct examination by her counsel began, the Lower Court asked Appellant to speak to what had taken place within the last thirty days because the Lower Court could not decipher Appellant's PFA Petition.[4] *Id.* at 5-7. The parties in this case have a long history of legal battles and this Lower Court asked Appellant to provide information regarding the most recent incidents in order to get a flavor for what had spurred the filing of this PFA, considering it was not clear from the PFA Petition.

This Lower Court is permitted to question witnesses. Pa. R.E. 614. Here, while this Lower Court was questioning Appellant, this Lower Court asked Appellant to describe what had taken place within the past thirty days. However, this Lower Court did not forbid Appellant from testifying at her hearing about events beyond the thirty (30) day period. During direct examination by her counsel, this Lower Court asked that Appellant provide specific testimony beginning with the most recent events, but did not limit the time frame of the testimony. *Id.* at 11. In fact, the first incident to which Appellant testified during direct examination by her counsel took place, as she stated, on January 26, 2010, which was over three (3) months before the date of the hearing, well beyond the thirty (30) day limitation Appellant alleges this Lower Court put in place. *Id.* at 11-12. This Lower Court did not limit Appellant's testimony to events that took place within thirty (30) days of the hearing held on June 3, 2010; this Lower Court did not abuse its discretion or err by asking Appellant what incidents took place within the last thirty (30) days. Therefore, this claim lacks merit.

Next, Appellant claims this Lower Court erred and/or abused its discretion by referencing Appellee's alleged conduct as "abuse of process" but nonetheless determining that Appellant had not suffered from "abuse" for purposes of the PFA Act. This Lower Court informed Appellant and her counsel that the actions they described, involving a police officer who misuses his position, would be characterized as

[4] Instead of filling out several of the portions of the PFA petition form, Ms. Knight attached a numbered list, which she refers to as a "statement." In this statement she does not always use complete sentences and does not provide pertinent context. Additionally, with respect to certain phrases in her statement, it is difficult to determine what she is trying to express. For example, Ms. Knight writes, "Per a transparency of 'upset' Pittsburgh Family Court dismissed ICC charge above...." Appellant's Petition for Protection From Abuse. This Lower Court has no idea what Ms. Knight means by "per a transparency of 'upset.'"

abuse of process, but are not grounds for a PFA. The term "abuse," as it pertains to the PFA Act has a specific definition, listed in 23 Pa. C.S. § 6101, and set forth above. Abuse of process, as it relates to the actions described by Appellant and allegedly perpetrated by Appellee, does not meet the statutory definition of "abuse" for purposes of a PFA order. This Lower Court did not err or abuse its discretion by referring to the alleged conduct of Appellee as abuse of process but determining that Appellant had not suffered "abuse" as defined by the PFA Act and therefore was not eligible for an order granting her PFA Petition. Therefore, this claim lacks merit.

Appellant also claims this Lower Court abused its discretion and/or erred by "demonstrating a prejudicial, pre-trial Court bias/disposition towards the Plaintiff...." Appellant's Concise Statement of the Matters Complained of on the Appeal. Appellant alleges this Lower Court demonstrated bias against her by stating, "And I can't understand your paperwork. So I'm sure that I would have denied your PFA too." (N.T. Final PFA Hearing, 6/03/10, p. 5). The issue of the Lower Court's alleged bias was never raised before the trial judge. Neither Appellant nor her counsel presented an oral motion for recusal. Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). Therefore, this claim should be dismissed.

Even if this issue was properly preserved for appeal, Appellant has not demonstrated bias on the part of this Lower Court. "The party who asserts a trial judge must be disqualified bears the burden of producing evidence establishing bias, prejudice, or unfairness necessitating recusal...." *Commonwealth v. Druce*, 577 Pa. 581, 848 A.2d 104, 108 (2004). Here, Appellant has not met her burden of producing evidence establishing bias, prejudice or unfairness on the part of the trial judge. Appellant refers to the fact that the Trial Judge mentioned she did not understand Appellant's paperwork. As described above, the Trial Judge did not understand Appellant's PFA Petition. The Trial Judge stated this fact in order to gather additional information and to let the parties know that the premise of the petition was not self-explanatory based on the document itself. In conjunction with the comment concerning the paperwork, the Trial Judge mentioned that she also would have denied Appellant's temporary PFA, as another judge had already done, based on the lack of information and obfuscated nature of the PFA Petition. This comment does not indicate bias or prejudice. Rather, this Lower Court was indicating to the parties that the Petition, on its face, did not state grounds for a temporary PFA order and based on the information provided, this Trial Judge would have also denied the temporary PFA. This Lower Court went on to hear Appellant's testimony and gave Appellant ample opportunity to explain how she was entitled to relief in the form of a PFA, but Appellant never presented any testimony

to that effect. This Lower Court did not err or abuse its discretion by commenting that it could not understand Appellant's paperwork and that it would have also denied Appellant's temporary PFA. Furthermore, this Lower Court did not demonstrate bias against Appellant. Therefore, this claim lacks merit.

Thus, for all of the foregoing reasons, Appellant's issues raised on appeal are without merit.

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

ANTHONY RAY THOMPSON, Plaintiff
v.
DEPT. OF CORRECTIONS P.H.S. [Agency],
***et. al.* as JANE DOE, Defendants**

PLEADING / PRELIMINARY OBJECTIONS

Generally, preliminary objections in the form of demurrers should be sustained when the facts averred are clearly insufficient to establish the pleaser's right to relief.

PLEADING / COMPLAINT

The Prison Litigation Reform Act requires that no action be brought with respect to prison conditions until available administrative remedies are exhausted. This exhaustion requirement is mandatory because no adjudicative system can function effectively without imposing some orderly structure on the course of its pleadings.

PLEADING / COMPLAINT

To establish a conspiracy under 42 U.S.C.A. 1985, a plaintiff must plead and ultimately prove one (1) a conspiracy; two (2) for the purpose of depriving, either directly or indirectly, any person or class of person of the equal protection of the laws, or of equal privileges and immunities under the law, and three (3) an act in furtherance of the conspiracy; four (4) whereby a person is either injured in his person or property or deprived or any right or privilege of a citizen of the United States.

PLEADING / COMPLAINT

Claims of negligence of medical malpractice do not rise to the level of deliberate indifference required under 42 U.S.C.A 1985.

PLEADING / COMPLAINT

Although claim sounds in medical malpractice, because it is expressly based upon an alleged violation of 42 U.S.C.A. 1985, no Certificate of Merit is required.

Appearances: Anthony Ray Thompson, *Pro se* Plaintiff
Michael V. Primis, Esq., Attorney for Defendants

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 11839-2010

OPINION AND ORDER

DiSantis, E., J. October 6, 2010

This case comes before the Court on the defendants' Preliminary Objections, defendants' Motion To Strike Plaintiff's Certificate of Merit For Entry of Judgment of Non Pros and plaintiff's responses. What follows is this Court's analysis.

I. BACKGROUND OF THE CASE

On or about April 28, 2010, the plaintiff, an inmate in the custody of the Commonwealth of Pennsylvania Department of Corrections,

filed this action in this Court alleging violations of 42 U.S.C.A. § 1985 (conspiracy to interfere with civil rights). He alleges that in and around December 2009, he suffered an injury to his hand. As a result, he was sent to the medical department at his institution and examined by an individual (Jane Doe). According to plaintiff's complaint, Doe wrapped his hand and returned him to his unit. On or about December 21, 2009, an x-ray of his hand disclosed that it was broken. The hand was placed in a cast for three days. The cast was subsequently removed and he was transferred to a hospital in Erie, Pennsylvania. At page 2 of his Complaint he specifically asserts that:

> The aforesaid result of indifference by Jane Doe in question of the P.H.S. but medical malpractice of responsibility of its employee, has caused Plaintiff's hand's finger to heal abnormally and left Plaintiff with a deformed knuckle; shortened finger and unable to work within accordance to D.O.C. Policy 816 and 820.

Plaintiff alleges that as a result of the above, he was deprived a proper medical treatment and seeks damages in excess of $1,000,000.00. See Complaint, p. 1.

Defendants filed preliminary objections that will be discussed below seriatim.

II. DISCUSSION

A. Preliminary Objections

The Standard

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. lns. 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.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.").

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

Pennsylvania is a fact-pleading state. See, *McShea v. City of Philadelphia*, 995 A.2d 334, 339 (Pa. 2010). As our Supreme Court stated in that case:

> "As a minimum, a pleader must set forth concisely the facts upon which his cause of action is based."...The complaint must not only apprise the defendant of the claim being asserted, but it must also summarize the essential facts to support the claim....("The purpose of [Rule 1019] is to require the pleader

> to disclose the 'material facts' sufficient to enable the adverse party to prepare his case."). (citations omitted).

Id.

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).

The Specific Preliminary Objections

1. Whether the plaintiff's claim should be dismissed for failure of the plaintiff to exhaust his administrative remedies as required by 42 U.S.C.A. § 1997c(a)?

The Prison Litigation Reform Act requires that no action can be brought with respect to prison conditions under § 1983 or any other federal law by a prisoner confined in jail or similar institution until available administrative remedies are exhausted. U.S.C.A. § 1997e(a). This exhaustion requirement is mandatory. See, *Booth v. Chumer*, 532 U.S. 731 (2001). The exhaustion requirement is necessary "because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Woodford v. Ngo*, 548 U.S. 81, 90 - 91 (2006).

In his complaint plaintiff admits that he filed his grievance (# 314326) on April 12, 2010, more than fifteen days after the alleged incident. However, in his response to the defendants' preliminary objections, plaintiff asserts that he filed the grievance at that time because it was not until March/April 2010 that he learned that Jane Doe was allegedly supposed to send him for a cast. See plaintiff's response, p. 1, ¶ 1.

Plaintiff's response does not allege facts that would demonstrate that his grievance was timely. He can only estimate a general period (March/April 2010) when he learned of the alleged incident upon which he predicates his claim. Therefore, it is clear from the pleadings that the exhaustion requirement was not satisfied.

2. Whether plaintiff has stated a claim upon which relief can be granted pursuant to 42 U.S.C.A. § 1985?

To the extent that plaintiff has attempted to allege a conspiracy, his complaint is deficient.

To establish a U.S.C.A. §1985 conspiracy, a plaintiff must plead and ultimately prove: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of person of the equal protection of the laws, or of equal privileges and immunities under the law, and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. *United Brotherhood of Carpenters v. Scott*, 463 U.S. 825, 829 (1983). As the defendants correctly point out, the essence of a conspiracy is the agreement. *Young v. Kann*, 926 F.2d

1396, 1405 n. 16 (3d. Cir. 1991).

A review of the plaintiff's complaint discloses that he has not alleged facts that, if proven, would establish a conspiracy.

3. Whether plaintiff has failed to properly plead a claim for deliberate indifference to a serious medical need?

To maintain his action, the plaintiff must allege that a defendant had personal involvement in the alleged wrongdoing. The defendant must be either personally involved or it must be shown that the defendant had actual knowledge and acquiesced in the alleged unlawful conduct. *Rode v. Dellarciprete,* 845 F.2d 1995, 1207 (3d.Cir. 1988); *McKeithan v. Beard,* 2010 U.S. Dist. LEXIS 50666 (2010).

In this case, plaintiff has not set forth facts that would indicate that there was deliberate indifference by P.H.S. (or the Department of Corrections) to a serious medical need. This is a requirement to sustain his suit. See *Estelle v. Gamble,* 429 U.S. 97 (1976). Rather, his complaint asserts that he was treated by Doe in less than a professional competent manner. The complaint is defective because claims of negligence or medical malpractice do not rise to the level of deliberate indifference. *Rouse v. Plantier,* 182 F.3d 192, 197 (3d.Cir. 1999). Therefore, he has failed to properly allege a §1985 action.

4. Whether the plaintiff's complaint should be dismissed with prejudice for failure to bring a cause of action against a competent, legal entity?

Defendants argue that the plaintiff has not properly brought a cause of action because the Department of Corrections' P.H.S. [Agency] is not a legal entity. Plaintiff has an obligation to clearly identify the parties he is suing. See, Pa.R.Civ.P. 1018. His caption and complaint do not satisfy that obligation. He mixes entities and names captioned parties that do not exist. Therefore, the complaint is defective.

5. Whether plaintiff's allegations with respect to unnamed agents, servants, etc., failed to properly plead the specificity requirements required by Pa.R.Civ.P. 1019?

Defendants' argument is that the plaintiff has failed to provide information so as to disclose the actual identity of Jane Doe. Continuing, they argue that even if he has, Jane Doe is an independent contractor and is not responsible for her contractor's actions.

First, for pleading purposes, the complaint is sufficient as to Doe's identity. Second, whether Doe is an independent contractor or an employee is a factual question that is not appropriate for disposition at the preliminary objection stage.

B. Defendants' Petition To Strike Certificates Of Merit

In a petition filed September 13, 2010, the defendants moved to strike plaintiff's certificates of merit. They argue that the plaintiff has actually brought a medical malpractice action that requires a certificate of merit. See Pa.R.Civ.P. 1042.3.

Although one might interpret the complaint as a medical malpractice claim, this Court will address the complaint within the context in which it is brought, i.e., a § 1985 action. Therefore, the defendants' Motion To Strike Plaintiff's Certificate of Merit For Entry of Judgment of Non Pros will be denied.

ORDER

AND NOW this 6th day of October 2010, it is hereby ORDERED that, for the reasons set forth in the accompanying opinion the defendants' Preliminary Objections are SUSTAINED IN PART and OVERRULED IN PART. It is hereby ORDERED that given the fact that the plaintiff did not exhaust his administrative remedies as well as the defects in the complaint specifically noted in the opinion, the complaint is DISMISSED. It is further ORDERED that defendants' Motion to Strike Plaintiff's Certificate of Merit For Entry of Judgment of Non Pros is DENIED.

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

COMMONWEALTH OF PENNSYLVANIA
v.
JOSEPH ALAN SUMMERS

CRIMINAL / CONSTITUTIONAL LAW / SEARCH & SEIZURE - VEHICLE STOPS

Prior to stopping a vehicle, an officer must have a reasonable suspicion that the Motor Vehicle Code has been violated and this reasonable basis must be linked with his observations.

CRIMINAL / CONSTITUTIONAL LAW / SEARCH & SEIZURE - VEHICLE STOPS

75 Pa.C.S.A. 3309 of the Motor Vehicle Code requires drivers to drive "as nearly as practicable" within a single lane of traffic until the driver has ascertained that movement can be made safely.

CRIMINAL / CONSTITUTIONAL LAW / SEARCH & SEIZURE - VEHICLE STOPS

Given the early morning hour, the fact that there was no other traffic on the roadway and the natural progression of the defendant's vehicle observed over a distance of 4.5 - 6.5 miles, the officer did not have reasonable suspicion to stop the defendant.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION No. 1795-2010

Appearances: Matthew D. Cullen, Esq. for the Commonwealth
J. Timothy George, Esq. for the Defendant

OPINION

Garhart, J., November 8, 2010

A. BACKGROUND

Mr. Summers is charged with DUI[1], Possession of Drug Paraphernalia[2], and a summary violation of Driving on Roadways Laned for Traffic[3]. We are here on Mr. Summers's Omnibus Pre-trial Motion, wherein he asks for the suppression of evidence based on (1) an unlawful traffic stop, and (2) the troopers' failure to give *Miranda* warnings prior to a custodial interrogation. A hearing was held on November 1, 2010.

B. FINDINGS OF FACT

On April 9, 2010, at approximately 2:30 a.m., Pennsylvania State Police Trooper Kyle Tobin and his partner were conducting a routine patrol on Route 5 in Fairview Township. It was a somewhat windy morning, with wind speeds between eleven (11) and thirteen (13) m.p.h., and wind gusts between twenty-two (22) and twenty-five (25)

[1] 75 Pa.C.S, § 3802(d)(1)(i); § 3802(d)(1)(iii); § 3802(d)(2)
[2] 35 Pa.C.S. § 780-113(a)(32)
[3] 75 Pa.C.S. § 3309(1)

m.p.h. While driving eastbound on Route 5, the troopers observed Mr. Summers's 2008 Toyota Yaris driving westbound in the opposite lane. At that time (approximately 2:33 a.m.), Mr. Summers was driving at a lawful speed, and in a safe manner. For no reason, other than to observe Mr. Summers's driving, the troopers performed a U-turn and began to follow Mr. Summers.

For approximately 6 minutes, and covering a distance of four and one half (4 ½) to six and one half (6 ½) miles, the troopers followed closely behind Mr. Summers before eventually turning on their lights and initiating a traffic stop[4] at approximately 2:39 a.m. While being followed, Mr. Summers drove at, or just slightly above (1-2 mph), the posted speed limit of 45 m.p.h. Mr. Summers did not drive in an erratic manner, make any quick jerking movements as if overcorrecting, or operate his vehicle in an unsafe manner. In addition, the only two vehicles on the two-lane roadway belonged to Mr. Summers and the troopers. There was no oncoming traffic traveling in the eastbound lane.

At the hearing, Trooper Tobin testified that during the time he and his partner were following Mr. Summers, he observed Mr. Summers cross over the centerline or the fog line on three (3) to four (4), separate occasions. According to Trooper Tobin, on each, separate crossing of the line, Mr. Summers's rear tire was seen to be anywhere from one (1) to six (6) inches over the line, thus placing Mr. Summers in the eastbound lane or the berm. In addition, Trooper Tobin testified that Mr. Summers's driving could be described as weaving within his own lane, in that, sometimes Mr. Summers's vehicle alternated between right-of-center and left-of-center. (By center, the Court means the center of the lane.) Based on these observations, Trooper Tobin believed that he and his partner had reasonable suspicion to pull over Mr. Summers for violating 3309(1,) and § 3802 of the Motor Vehicle Code.

A review of the dashboard camera, which Trooper Tobin testified is an accurate account of what he observed with his own eyes, reveals as follows:

1. 2:34:13 Mr. Summers's vehicle is positioned on the left portion of the lane, near, but not appearing to be touching, the broken, yellow centerline. This lasted approximately two (2) seconds.
2. 2:36:19 Mr. Summers's vehicle is positioned on the right portion of the lane, near, and possibly touching the fog line. This lasted approximately two (2) seconds.
3. 2:37:05 Mr. Summers's vehicle is positioned on the left portion of the lane for a brief moment. Mr. Summers does not

[4] Mr. Summers was not pulled over on Route 5. Mr. Summers negotiated a lawful left-hand turn on to Route 18, and was pulled over shortly thereafter.

appear to cross, or even touch, the broken, yellow centerline.

4. 2:37:52 Mr. Summers's vehicle is positioned on the left portion of the lane, apparently touching the double yellow centerline, but not crossing it. This lasted approximately 5 seconds. The Court notes that, during this stretch, the centerline contains heavy, black patchwork.

C. DISCUSSION

The Motor Vehicle Code provides that anytime a police officer has "reasonable suspicion" to believe a violation of the Motor Vehicle Code is occurring or has occurred, the officer may initiate an investigatory stop. 75 Pa.C.S. § 6308(b).[5] Reasonable suspicion exists when an officer is able to articulate specific observations which, when considered with reasonable inferences derived there from, lead to a reasonable conclusion, in light of the officer's experience, that criminal activity is afoot and the person seized was engaged in the criminal activity. *Commonwealth v. Fulton*, 921 A.2d 1239, 1243 (Pa.Super. 2007).[6] Moreover, the Court must consider the totality of the circumstances in determining whether reasonable suspicion existed to justify an investigatory stop. *Id.*

On the unique facts of this case, the Court concludes that Trooper Tobin and his partner did not have reasonable suspicion to believe that either § 3309(1), or § 3802 of the Motor Vehicle Code had been violated. Thus, the Troopers conducted an unconstitutional stop of Mr. Summers, and all the evidence obtained as a result of that stop must be suppressed.

First, § 3309(1)[7] does not require perfect adherence to driving entirely within a single marked lane on all occasions. *Commonwealth v. Malone*, 19 Pa. D. & C. 4th 41, 44 (Cumberland Co. 1993). It only requires that a vehicle be driven entirely within a single marked lane 'as nearly as practicable.' *Id.* The requirement to drive entirely within a single marked lane as nearly as practicable is further subject to the exception, 'until the driver has first ascertained that the movement can be made with safety.' *Id.* Based upon the Court's viewing of the video, Mr. Summers does not appear to have crossed into the other lane of traffic or the berm such that a violation of § 3309(1) occurred. Even assuming that he did, based

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[5] **75 Pa.C.S. 6308(b) Authority of police officer. --** Whenever a police officer is engaged in a systematic program of checking vehicles or drivers, or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

[6] Defendant's swerving out of lane three times in 30 seconds, in dense fog, and in the face of oncoming traffic gave rise to reasonable suspicion of DUI and violation of § 3309(1).

[7] **75 Pa.C.S. 3309(1) Driving within single lane. --** A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety.

upon Trooper Tobin's observations, such crossing would be considered *de minimus*, and did not constitute a safety hazard. There were no other vehicles on Route 5 during the entire 6 minutes the Troopers followed Mr. Summers, and Mr. Summers's driving was otherwise safe. *See supra footnote 6.*

Next, with regards to suspicion of DUI, while Trooper Tobin's testimony of Mr. Summers's driving on certain sides of his lane comports with the video evidence, under the totality of the circumstances test, the Troopers' conclusion that Mr. Summers was driving under the influence is not a reasonable conclusion. Mr. Summers was not weaving, as one customarily defines weaving - side to side motions that are close in time and space. Mr. Summers was simply following the natural path of Route 5, which contains bends, dips, rises, and patchwork. In the first instance, Mr. Summers naturally progressed to the left side of his lane, and then naturally returned to the center. A little over two minutes later, he gradually and naturally progressed to the right side of his lane, and then naturally returned to the center. The next two instances repeat in the same fashion. Under the totality of the circumstances, Mr. Summers's conduct was nothing more than ordinary driving.

4. CONCLUSION

As the initial stop was unconstitutional, the Court need not take up the remaining issue as to the legality of the questioning in conjunction with the level of the encounter. For the reasons stated above, Mr. Summers's Motion to Suppress is GRANTED. An Order granting the Motion shall be filed contemporaneously with this Opinion.

ORDER

AND NOW, this 8th day of November 2010, it is hereby ORDERED, ADJUDGED and DECREED that Defendant's Omnibus Pretrial Motion for Relief shall be GRANTED.

It is FURTHER ORDERED that all physical items seized from the vehicle, all statements attributed to Defendant, all observations made by law enforcement after initiating the motor vehicle stop, all physical evidence, including any alleged contraband, and any and all results from any scientific tests, including blood tests, which were obtained as a result of the illegal motor vehicle stop, shall be excluded from evidence at the time of trial.

BY THE COURT:
/s/ **Honorable John Garhart**