ERIE COUNTY
LEGAL JOURNAL

(Published by the Committee on Publications of the
Erie County Legal Journal and the
Erie County Bar Association)

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Reports of Cases Decided in the Several Courts of

Erie County for the Year

2011

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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
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HONORABLE ELIZABETH K. KELLY---------------------------- Judge
HONORABLE JOHN J. TRUCILLA -------------------------------- Judge
HONORABLE JOHN GARHART ---------------------------------- Judge
HONORABLE DANIEL J. BRABENDER, JR., ------------------- Judge

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COMMONWEALTH OF PENNSYLVANIA
v.
CORRINE BREON

DRIVING UNDER THE INFLUENCE / AUTHORITY TO STOP

Agents of the United States Border Patrol do not have the authority to seize Commonwealth citizens for traffic offenses or misdemeanor crimes.

DRIVING UNDER THE INFLUENCE / IMPERMISSIBLE STATE ACTION

The Court must look at all circumstances to determine whether that individual's conduct 1.) could fairly be attributed to the State and 2.) whether that individual must be regarded as having acted as an instrument of the state.

CRIMINAL PROCEDURE / EXCLUSIONARY RULE

When the unlawful actions of an individual are deemed to be state action, the exclusionary rule applies and any evidence obtained as a result of those actions must be suppressed.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION No. 1440-2010

Appearances: Roger M. Bauer, Esq. for the Commonwealth
Stephen E. Sebald, Esq. for the Defendant

OPINION

Garhart, J., January 6, 2011

A. BACKGROUND

Ms. Breon is charged with DUI - Highest Rate[1], and Reckless Driving[2]. We are here on her Omnibus Pre-Trial Motion, wherein she argues that evidence must be suppressed as it was obtained as the result of an illegal stop. A hearing was held on December 14, 2010.

B. FINDINGS OF FACT

On January 16, 2010, U.S. Border Patrol Agent Gregory was driving eastbound on West 8th Street, in Erie, Pennsylvania, when a westbound vehicle, driven by Ms. Breon, crossed the centerline and forced Agent Gregory off the road. Without turning on his patrol vehicle's flashing lights, Agent Gregory turned around and followed Ms. Breon. After a period of time, Ms. Breon left the roadway and pulled into a random driveway. Still following, Agent Gregory pulled in behind Ms. Breon, turned on his flashing lights, and ordered Ms. Breon to stay in her vehicle. For reasons unknown, Ms. Breon's vehicle slowly coasted backwards

[1] 75 Pa.C.S. § 3802(c)
[2] 75 Pa.C.S. § 3736(a)

and came to a rest on Agent Gregory's vehicle, At this time, Ms. Breon's egress from the driveway was totally impeded by Agent Gregory, who admitted that Ms. Breon was not free to leave the scene.

After calling the City of Erie Police Department ("EPD"), Agent Gregory, clothed in a full Border Patrol uniform approached Ms. Breon, who was still in her vehicle. Agent Gregory observed that Ms. Breon's speech was incoherent, and that she smelled like alcohol. Within 10 minutes of placing the call, EPD's Sgt. Nolan arrived on the scene. After failing Sgt. Nolan's field sobriety tests, Ms. Breon was arrested and taken to St. Vincent's Hospital, where it was reported her blood-alcohol-content ("BAC") was .259.

Finally, as an agent of the United States Border Patrol, Agent Gregory is charged with preventing aliens from entering the United States illegally, as well as preventing the entry of weapons of mass destruction. By his own admission, Agent Gregory has not received any training on conducting DUI stops.

C. DISCUSSION

In support of her Motion to Suppress, Ms. Breon argues that agents of the U.S. Border Patrol do not have the authority to conduct traffic stops of citizens of Pennsylvania for suspected DUI. Further, but for this illegal interference, Ms. Breon's interaction with Erie Police would never have happened.

In *Commonwealth v. Price,* 672 A.2d 280 (Pa. 1996), an FBI agent observed the defendant ignore a stop sign and swerve into the oncoming lane, nearly hitting the agent's vehicle. *Id.* at 281. The agent followed the defendant, activated his lights and siren, and eventually stopped the defendant's vehicle. *Id.* Upon approaching the defendant and identifying himself as an FBI agent, the agent smelled alcohol emanating from the defendant. *Id.* In response, the agent asked a bystander to call the local police. *Id.* The agent then told the defendant not to move and to remain seated in the vehicle,[3] *Id.* Soon after, the local police arrived, received the agent's written report, and then arrested the defendant and charged him with DUI. *Id.*

Prior to trial, the *Price* defendant's motion to suppress was denied, and he was ultimately convicted. *Id.* On appeal, the Superior Court reversed, concluding that because the arrest by the agent was illegal, the subsequent arrest by the local police was tainted. *Id.* The Superior Court further held that the exclusionary rule was applicable and required all evidence obtained as a result of the illegal arrest to be suppressed. *Id.*

In affirming the Superior Court, the Supreme Court first took up the issue of whether the agent's conduct constituted a permissible citizen's

[3] The Court stated that the agent never told the defendant he was under arrest.

arrest[4] or whether such conduct classified as 'state action.' Citing *Lugar v. Edmondson Oil Co., Inc.,* 457 U.S. 922 (1982)[5] and *Commonwealth v. Corley,* 491 A.2d 829 (Pa. 1985)[6], the Court held that the agent's conduct could fairly be attributed to the state, and that the agent must be regarded as an instrument of the state when he stopped the defendant. *Price,* 672 A.2d at 284. The Court specifically noted the agent's use of the lights and sirens on his unmarked government vehicle, together with the displaying of his badge, was determinative of their conclusion that the case involved state action. *Id.* The Court further stated that the agent's "obvious display of authority...imbued his actions with an official aura" and that no subsequent action could erase the taint of the agent's conduct[7]. *Id.*

Finally, in finding the exclusionary rule applicable, the Court, again citing its prior decision in *Corley*, enunciated the following standard:

> [W]here the unlawful actions of the individual are deemed to be state action, the exclusionary rule applies and any evidence obtained as a result of those actions must be suppressed. The good or bad faith of the individual acting under color of state authority is simply irrelevant. This is so since the Fourth Amendment operates where, as here, there exists a relationship between a citizen and the state. In other words, since [defendant] was unlawfully arrested by [the agent] whom, as determined herein was acting as an "instrument of the state," the requisite relationship between [defendant] and the state here exists so as to invoke the protections of Fourth Amendment. This is the same under Article I, Section 8 of our Pennsylvania Constitution.

Price, 672 A.2d at 284.

The parties agree, and a review of state and federal law shows, that agents of the United States Border Patrol do not have the authority to seize Commonwealth citizens for traffic offenses or misdemeanor crimes. *See* 8 U.S.C.A. § 1357. The Commonwealth contends that the instant matter

[4] The Court stated that the agent was not authorized to effectuate arrests for traffic offenses or misdemeanors. *Price,* 672 A.2d at 282. Rather, he was only authorized to make warrantless arrests where he had reasonable grounds to believe that the person had committed or was committing any felony cognizable under the laws of the United States. *Id. Citing* 18 U.S.C. § 3052.

[5] In *Lugar,* the United States Supreme Court held that the conduct allegedly causing the deprivation must be fairly attributable to the state. In explaining the fair attribution test, the nation's highest court stated; "First the deprivation must be caused by the exercise of some right or privilege created by the state . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because his conduct is otherwise chargeable to the state." 457 U.S. at 937.

[6] In *Corley,* the Pennsylvania Supreme Court, citing *Coolidge v. New Hampshire,* 403 U.S. 443 (1971), identified the critical factor for purposes of determining whether state action is involved is whether the private individual, in light of all the circumstances, must be regarded as having acted as an instrument or agent of the state. 491 A.2d at 832.

[7] The Court went on to note that because the agent's stop of the defendant was effected under the color of state action, the stop was clearly a 'seizure' for purposes of the Fourth Amendment. 672 A.2d at 284.

is distinguishable from *Price,* in that Agent Gregory did not effectuate a traffic stop, per se. That is to say, Agent Gregory did not turn on his lights while in pursuit and then immediately order Ms. Breon to the side of the road. Here, Ms. Breon pulled into another's driveway of her own free will. The Commonwealth further argues that Sgt. Nolan's actions in arriving on the scene and performing the field sobriety tests, as well as his own personal observations, provided a basis for his arrest that was independent of any possible illegal action on the part of Agent Gregory.

The Court disagrees with both of the Commonwealth's arguments. First, although Agent Gregory did not initiate a traffic stop in the customary sense, his actions rose to the level of a Fourth Amendment "seizure" of Ms. Breon's person when he: 1) pulled in behind her vehicle, 2) activated the lights on his patrol vehicle, 3) ordered Ms. Breon to stay in her car, and 4) questioned her in full uniform. Applying the principles in *Corley* and *Price*, it is clear that Agent Gregory displayed conduct which can fairly be attributable to the state and that Agent Gregory must be regarded as having acted as an instrument or agent of the state. As in *Price,* it simply cannot be denied that Agent Gregory's obvious display of authority in seizing Ms. Breon imbued his actions with an official aura.

Based on *Corley* and *Price,* a finding that unlawful actions of an individual rise to the level of state actions compels this Court to find the exclusionary rule applies to suppress any evidence obtained as a result of those unlawful actions. The Commonwealth's argument suggests that the evidence obtained by Sgt. Nolan did not result from Agent Gregory's illegal state action, but from Sgt. Nolan's independent investigation. However, it was Agent Gregory who unlawfully seized Ms. Breon and prevented her from leaving the scene until EPD arrived. As such, common sense dictates that the evidence was obtained as a result of Agent Gregory's actions, and therefore must be suppressed.

D. CONCLUSION

As Agent Gregory's illegal seizure of Ms. Breon's person is considered a state action, and as the exclusionary rule applies, Defendant's Motion to Suppress is GRANTED, and any and all evidence obtained by the EPD as a result of that illegal seizure is SUPPRESSED. An Order to this effect follows this Opinion.

In closing, the Court would like to take the opportunity to note that it finds Agent Gregory acted in good faith. He was nearly hit by Ms. Breon and was clearly concerned, not only with her welfare, but that of the other citizens of this Commonwealth. He acted both reasonably and responsibly, but since he is not authorized to enforce Pennsylvania law as it relates to misdemeanors, and since his actions in uniform are unavoidably cloaked with state action, the evidence gathered must be suppressed.

ORDER

AND NOW, this 6th day of January 2011, upon consideration of Defendant's Motion to Suppress, and after having held an evidentiary hearing, it is hereby ORDERED, ADJUDGED, and DECREED that Defendant's Motion is GRANTED, and any and all evidence obtained by the Erie Police Department as a result of the U.S. Border Patrol's illegal seizure of Defendant is SUPPRESSED.

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

KAREN FRITTS, Plaintiff
v.
McBRIER REALTY COMPANY; JAMES P. McBRIER, t/a McBRIER REALTY COMPANY; ELIZABETH CHILCOTT, t/a McBRIER REALTY COMPANY; KLYDE, LLC.; KELLY A. POWELL; LARRY M. POWELL; and DIANNE E. POWELL, individually and d/b/a KLYDE, d/b/a CURVES FOR WOMEN, Defendants
v.
GERLACH'S GARDEN & POWER EQUIPMENT CENTER, INC., Additional Defendants

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Rule 1035.2 of the Pennsylvania Rules of Civil Procedure provides that a party may move for summary judgment when: 1.) there is no genuine issue of any material fact; or 2.) after completion of discovery relevant to the motion an adverse party who will bear the burden of proof has failed to produce evidence of facts essential to the cause of action.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

In determining whether the moving party is entitled to relief, the Court must review the record in a light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party.

NEGLIGENCE / ACTS OR OMISSIONS CONSTITUTING

The elements of negligence are whether, 1.) the defendant had a duty to conform to a certain standard of conduct; 2.) the defendant breached the duty; 3.) the breach caused the injury in question; and 4.) the plaintiff incurred actual loss or damage.

EVIDENCE / PRESUMPTIONS

The duty of care owed to a business invitee is the highest duty owed to any entrant upon land. The landowner must protect an invitee not only against known dangers but also against those which might be discovered with reasonable care.

EVIDENCE / PRESUMPTIONS

An invitee must prove either that the proprietor of the land had a hand in creating the harmful condition or he had actual or constructive notice of the condition.

EVIDENCE / PRESUMPTIONS

The proprietor of the land however is not an insurer of its patrons. Neither the mere existence of a harmful condition nor the mere happening of an accident evidence a breach of the proprietor's duty of care or raises a presumption of negligence.

EVIDENCE / PRESUMPTIONS

A dangerous condition is obvious when both the condition and risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising normal perception, intelligence and judgment.

NEGLIGENCE / CONDITION OF LAND, BUILDINGS AND STRUCTURES

In this case, the plaintiff testified that when exiting the defendant's premises, she did not look to see if there was ice or water on the sidewalk. The plaintiff, however, provided an affidavit of a witness who observed an isolated patch of clear ice next to the plaintiff. Upon reviewing the entire record, the Court found that there were genuine issues of material fact which should be left for a jury review.

CIVIL PROCEDURE / PLEADINGS / COMPLAINT

The pleading of the plaintiff was sufficiently broad so as to cover both the "hills and ridges" claim and an "isolated patch of ice" claim. No material deviation between allegations of the complaint and the evidence developed existed.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 10157-2009

Appearances: Robert C. LeSuer, Esq., Attorney for Plaintiff
Mark E. Mioduszewski, Esq., Attorney for Defendants McBrier Realty Company, James P. McBrier, t/a McBrier Realty Company; and Elizabeth Chilcott, t/a McBrier Realty Company
Thomas Geroulo, Esq., Attorney for Defendants, Klyde, LLC; Kelly A. Powell; Larry M. Powell; and Diane E. Powell, individually and d/b/a Klyde, d/b/a Curves for Women
Eric N. Anderson, Esq., Attorney for Additional Defendant, Gerlach's Garden & Power Equipment Center, Inc.

OPINION

DiSantis, Ernest J., Jr., J. October 25, 2010

This matter comes before the Court on Defendants' respective motions for summary judgment.[1] On September 8, 2010, argument was held before this Court.

---

[1] On June 9, 2010, Defendants, McBrier Realty Company; James P. McBrier, t/a McBrier Realty Company; and Elizabeth Chilcott, t/a McBrier Realty Company, filed their Motion for Summary Judgment, supporting brief, and appendix (entitled, "Appendix in Support of Motions of Defendants and Additional Defendant for Summary Judgment.) On June 15, continued...

I. BACKGROUND OF THE CASE

This action arises out of an incident that occurred on February 19, 2007, when the Plaintiff, Karen Fritts, fell while a patron of Curves for Women ("Curves"), located in the Village West shopping center, Erie, PA. Plaintiff alleges that after she exited the front door of Curves and as she attempted to traverse the sidewalk to her vehicle, she encountered an area of ice on the sidewalk, causing her to fall to the ground and sustain injuries. Complaint, at ¶ 18. Plaintiff alleges the accumulation of ice that caused her fall was a defective and dangerous condition. *Id.,* at ¶ 19 .

On January 14, 2009, the Plaintiff filed her Complaint, alleging negligence as follows:

> a.) Failing to exercise reasonable care to make the sidewalk of the Subject Premises safe and free from dangerous accumulations of ice;
> b.) Failing to take adequate and reasonable steps to remove the dangerous accumulations of ice from the sidewalk of the Subject Premises such as shoveling, chipping, applying anti-skid materials and applying de-icing materials;
> c.) Failing to exercise reasonable care to inspect, discover and correct the dangerous conditions created by the accumulation of ice on the sidewalk of the Subject Premises;
> d.) Failing to exercise reasonable care to inspect, discover and correct and/or causing the dangerous condition created by the piling of snow around the light pole situated in the pavement of the sidewalk of the Subject Premises;
> e.) Failing to exercise reasonable care to warn, advise and inform Ms. Fritts of the presence of dangerous conditions on the Subject Premises;
> f.) Failing to anticipate that their invitees would not discover or realize the danger caused by the accumulation of ice on the sidewalk of the Subject Premises or that they would fail to protect themselves against it;
> g.) Failing to take the necessary steps to prevent the slip and fall incident which caused the serious and debilitating injuries suffered by Ms. Fritts.

Complaint, at ¶ 22 (a) - (g).

---

[1] continued

2010, Additional Defendant, Gerlach's Garden and Power Equipment Center, Inc., filed its Motion for Summary Judgment and supporting brief. On June 24, 2010, Defendants, Klyde, LLC, Kelly A. Powell, Larry M. Powell, Dianne E. Powell Individually and d/b/a Klyde, d/b/a Curves for Women filed their Motion for Summary Judgment and supporting brief. Plaintiff has filed individual responses to each motion.

On February 19, 2009, Defendants, McBrier Realty Company, James P. McBrier, t/a McBrier Realty Company, and Elizabeth Chilcott, t/a McBrier Realty Company (collectively, "McBrier"), filed a praceipe for issuance of a writ to join Gerlach's Garden & Power Equipment Center, Inc. ("Gerlach's"), as an additional defendant. On March 25, 2009, McBrier filed its Complaint to Join Additional Defendant.

Following discovery, the Defendants filed their respective motions for summary judgment. In its motion and supporting brief, McBrier argues that: (1) Plaintiff has failed to establish a duty or breach of duty in that a dangerous condition existed and because any dangerous condition which allegedly existed was open and obvious (no duty or breach); (2) Plaintiff cannot identify how/why she fell or the condition that caused her fall (causation); and, (3) Plaintiff cannot recover on the basis for the condition of the land that differs from the condition alleged in the Complaint. In particular, McBrier notes that in the Complaint, Plaintiff alleged a "dangerous accumulation of ice". However, she testified to the contrary during her deposition.

Defendants, Klyde LLC, Kelly A. Powell, Larry M. Powell, Dianne E. Powell individually and d/b/a Klyde d/b/a Curves for Women (collectively, "Curves") argue that Plaintiff has failed to establish a dangerous condition existed or that they were responsible for generally icy conditions of which they had no notice.

Defendant Gerlach argues there is no evidence that it owed a duty to Plaintiff or breached any duty. It claims that the condition, which allegedly caused Plaintiff's fall, was open and obvious.

As noted *supra,* Plaintiff filed responses to each motion. In support, Plaintiff has provided the following: (1) Affidavit of Elizabeth Skladanowski; (2) Plaintiff's deposition transcript; (3) February 19, 2007 incident report completed by Stacey Kabasinski; and, (4) excerpts from February 19, 2007 Hamot Medical Center record of treatment of Plaintiff.

II. DISCUSSION

A. Summary Judgment Standard

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

> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> (2) if, after the completion of discovery relevant to the motion including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense

> which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. 1035.2.

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

> Where the non-moving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment. Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law.

Shepard v. Temple University, 948 A.2d 852, 856 (Pa. Super. 2008), *quoting Murphy v. Duquesne University,* 565 Pa. 571, 777 A.2d 418, 429 (2001) (citations omitted) (emphasis added).

B. WHETHER GENUINE ISSUES OF MATERIAL FACT EXIST AS THE ELEMENTS OF PLAINTIFF'S NEGLIGENCE CLAIM?

The elements of a negligence cause of action are: "(1) the defendant had a duty to conform to a certain standard of conduct; (2) the defendant breached that duty; (3) such breach caused the injury in question; and (4) the plaintiff incurred actual loss or damage." *Krentz v. Conrail,* 589 Pa. 576, 588, 910 A.2d 20 (2006) (citation omitted).

Here, it is undisputed that Ms. Fritts was a business invitee. "The duty of care owed to a business invitee (or business visitor) is the highest duty owed to any entrant upon land. The landowner must protect an invitee not only against known dangers, but also against those which might be discovered with reasonable care." *Gutteridge, supra.* at 656 (citations

omitted). The Restatement (Second) of Torts § 343 defines the duty that a possessor of property owes to a business invitee as follows:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts § 343. An invitee must prove either the proprietor of the land had a hand in creating the harmful condition, or he had actual or constructive notice of such condition. *Moultrey v. Great Atlantic & Pacific Tea Co.,* 422 A.2d 593, 598 (Pa. Super. 1980).[2]

"It does not follow from § 343, however; that the proprietor of a store is an insurer of its patrons." *Neve v. lsalaco's,* 771 A.2d 786, 790 (Pa. Super. 2001) (citation omitted). "Neither the mere existence of a harmful condition in a store nor the mere happening of an accident due to such a condition evidence a breach of the proprietor's duty of care or raises a presumption of negligence." *Campisi v. Acme Markets, Inc.,* 915 A.2d 117, 220 (Pa. Super. 2006) (citations omitted).

Restatement (Second) of Torts § 343A provides that:

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
>
> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or the facilities of public land, or the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

Restatement (Second) of Torts, § 343A. Comment f to section 243A states:

> f. There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause

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[2] The question whether a landowner had constructive notice of a dangerous condition and thus should have known of the defect, i.e., the defect was apparent upon reasonable inspection, is a question of fact. As such, it is a question for the jury, and may be decided by the court only when reasonable minds could not differ as to the conclusion. *PennDot v. Patton,* 546 Pa. 562, 686 A.2d 1302, 1305 (1997), *citing Carrender v. Fitterer,* 503 Pa. 178, 185, 469 A.2d 120, 124 (1983).

> physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.
>
> Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, whether the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. (See §§ 466 and 496D). It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.

A dangerous condition is obvious when "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising normal perception, intelligence, and judgment." *Carrender v. Fitterer,* 469 A.2d 120, 123 (Pa. 1983), *quoting* Restatement, *supra,* § 343A comment b. "For a danger to be known', it must 'not only be known to exist, but . . . also be recognized that it is dangerous and the probability and gravity of the threatened harm must be appreciated." *Id.* Normally, the question of whether a danger was known or obvious is a question of fact for the jury. *Id.,* at 124. However, the court may decide this question where reasonable minds cannot differ as to the condition. *Id.*; Restatement, supra, § 328B comments c and d.

> . . . When an invitee enters business premises, discovers dangerous conditions which are both obvious and avoidable, and nevertheless proceeds voluntarily to encounter them, the doctrine of assumption of risk operates merely as a counterpart to the possessors lack of duty to protect the invitee from those risks. See Harper & James, The Law of Torts, Vol. 2 § 21.1 (1956); Prosser, Law of Torts § 68 at 440-446 (4th ed. 1971); Restatement, supra, § 496A comment c & § 496C comments b, d, & e. By voluntarily proceeding to encounter a known or obvious danger, the invitee is deemed to have agreed to

> accept the risk and to undertake to look out for himself. See *Joyce v. Quinn,* 204 Pa. Super. 580, 885-86, 205 A.2d 611, 613 (1964); *Smith v. Seven Springs Farms, Inc.,* 716 F.2d 1002 (3d Cir.1983). See generally Bohlen, *Voluntary Assumption of Risk,* 20 Harv.L.Rev. 14 (1906). It is precisely because the invitee assumes the risk of injury from obvious and avoidable dangers that the possessor owes the invitee no duty to take measures to alleviate those dangers. Thus, to say that the invitee assumed the risk of injury from a known and avoidable danger is simply another way of expressing the lack of any duty on the part of the possessor to protect the invitee against such dangers. See *Jones v. Three Rivers Management Corp.,* 483 Pa. 75, 394 A.2d 546 (1978)(operator of baseball park owes no duty to guard against common, frequent, and expected risks of baseball; duty extends only to foreseeable risks not inherent in baseball activity).

Carrender, supra. at 125.

During her deposition, Plaintiff testified that when she arrived at Village West on the morning of her fall, she parked her vehicle in the handicapped parking space directly in front of Curves. Fritts Deposition, 08/18/09, at 58, 61-62. She described the weather was sunny and cold. She observed some snow in the parking lot and in the perimeter of the front of the building. *Id.,* at 51-52, 63.

Plaintiff exited her vehicle and walked up the concrete path leading to the entrance of Curves. *Id.,* at 62. As she walked toward the entrance, Plaintiff walked to the left of a lamppost. She did not observe any obstructions, ice, or snow in her path. *Id.,* at 62, 64. However, she noticed ice on the sidewalk on the <u>other side of the lamp post</u> so she avoided it. *Id.,* at 52, 64-65.

Approximately 45 minutes later, Plaintiff exited Curves to retrieve her purse. As she exited, she walked the same path she took earlier. *Id.* at 63-64. When she reached the area next to the lamppost, she fell. *Id.* at 98-99. She did not see any salt on the sidewalk where she fell. *Id.* at 71. While on the ground, she didn't look to see if there was any ice or water. *Id.* at 66-67. As to the presence of ice, she testified as follows:

> Q. . . . do you recall today if, in fact, there was any moisture on the ground where you fell?
> A. I didn't see it.
> Q. Okay. And do you recall today if there was any ice or snow at the place where you fell?
> A. I think I feel really obviously if there was ice I wouldn't have walked there, or if I'd seen ice. And I don't recall seeing anything until I fell.
> Q. And then after you fell I think you told us that you were in

pain and possibly also in shock?

A. I was.

Q. And so you didn't really look around to see what might have caused you to fall because you were interested in finding someone to help you out?

A. Right. I mean, It was so cold I can remember one of those ladies saying we've got to get her inside, it's bitter out here.

Plaintiff's Deposition, at 101-102.

In the affidavit of Elizabeth Skladanowski, Ms. Skladanowski stated that she helped Plaintiff after her fall. Furthermore, she observed the existence of an isolated patch of clear ice next to the Plaintiff. Plaintiff told her she slipped on ice. Ms. Skladanowski observed ice on the sidewalk in front of Curves to the right of the light pole (as one looks out the Curves door toward the parking lot) which was not obvious. When they assisted Plaintiff back into Curves, they had to be careful because the area was slippery.[3]

Upon review of the entire record, this Court finds there are genuine issues of material fact as to whether a dangerous condition existed and whether this condition was open and obvious. In addition, this Court finds a genuine issue of material fact exists as to the actual cause of Plaintiff's fall.[4]

C. Whether the condition differed in character from the condition alleged in Plaintiff's Complaint?

In her Complaint Plaintiff alleged that her fall was caused by an "area of ice" or "dangerous and unsafe accumulation of ice." According to McBrier, "regardless of what caused [Plaintiff's] accident, she cannot alter the basic factual premise of her case in an effort to impose liability upon the defendants." McBrier Brief, at 17. *See generally, Hrivnak v.*

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[3] Plaintiff provided this Court with a Curves incident report. This report described Plaintiff's injury as "member slipped on ice on sidewalk outside club".

[4] Plaintiff now argues that her injury was caused by an "isolated patch of ice" and not generally slippery conditions. She has abandoned any theory of liability based upon "hills and ridges" doctrine. *See,* Plaintiff's Brief in Opposition to Motion for Summary Judgment Filed by [Curves], at 10, 14-15. This Court notes that under the "hills and ridges" doctrine, an owner/occupier of land is not liable for falls occurring on his/her property where generally slippery conditions exist, unless the owner has "permitted the ice and snow to unreasonably accumulate in ridges or elevations." *Morin v. Traveler's Rest Motel Inc.,* 704 A.2d 1085, 1087 (Pa. Super. 1997). The "hills and ridges" doctrine applies only where there is a generally slippery condition at the time of an accident. *Harmotta v. Bender,* 601 A.2d 837, 841 (Pa. Super. 1992). Proof of "hills and ridges" is not necessary when the hazard is not the result of a generally slippery condition, but originates from a localized patch of ice. *Id., citing Tonik v. Apex Garages Inc.,* 275 A.2d 296 (Pa. Super. 1971). As such, a genuine issue of material fact exists as to whether Plaintiff's fall was due to an isolated patch of ice and whether it was open and obvious. Likewise, there is an issue as to whether Curves had actual or constructive notice of this patch of ice.

Perrone, 472 Pa. 348, 372 A.2d 730 (1977). This appears to be an assertion by McBrier that Plaintiff materially deviated from the liability theory originally posited. However, Plaintiff's original allegations are broad enough to cover both a hills and ridges claim and an isolated patch of ice claim. As noted in footnote 4, the former claim has been abandoned by Plaintiff. However, the latter claim remains and was cognate within the original pleading. Also, based upon the Plaintiff's deposition testimony and affidavit of Elizabeth Skladanowski, there is sufficient evidence that Plaintiff fell on a patch of ice. There is no material deviation between the allegations contained in the Complaint and the evidence developed so far.

III. CONCLUSION

Based upon the above, this Court will issue an appropriate order.

ORDER

And now, this 25th day of October 2010, for the reasons set forth in the accompanying opinion, it is hereby **ORDERED** that: (1) Defendants', McBrier Realty Company; James P. McBrier, t/a McBrier Realty Company; and Elizabeth Chilcott, t/a McBrier Realty Company Motion for Summary Judgment is **DENIED;** (2) Additional Defendant's, Gerlach's Garden and Power Equipment Center, Inc., Motion for Summary Judgment is **DENIED;** and, (3) Defendants', Klyde, LLC, Kelly A. Powell, Larry M. Powell, Dianne E. Powell Individually and d/b/a Klyde, d/b/a Curves for Women Motion for Summary Judgment is **DENIED.**

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

JERRY A. FULLMER, Plaintiff
v.
LION'S OAR, STEPHEN C. BECKMAN, and HOWARD NADWORNY, Defendants
v.
JERRY A. FULLMER and MARY FULLMER, Additional Defendants

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary judgment may be granted after the pleadings are closed when the moving party demonstrates that there is no genuine issue of material fact as to a necessary element of a cause of action or defense.

CONTRACTS / CAPACITY TO CONTRACT

A promissory note will be deemed to be the obligation of an unincorporated association where the document shows the name of the association on its face and individual officers of the association sign the note.

CONTRACTS / CAPACITY TO CONTRACT

A promissory note will be deemed an obligation of an unincorporated association if the person signing the document acted or purported to act as a representative of the association.

CIVIL PROCEDURE / SUMMARY JUDGMENT

Where promissory note was signed September 1, 2002 and Articles of Association and Board of Directors were not implemented until November 8, 2002, summary judgment will be denied because a genuine issue of material fact exists as to whether the signer of the note acted as a representative of the unincorporated association.

CONTRACTS / RATIFICATION

Members of an unincorporated association are not individually liable for obligations of the association unless they have actually authorized, assented to or ratified the obligation.

CIVIL PROCEDURE / SUMMARY JUDGMENT

Where parties did not sign a promissory note on behalf of an unincorporated association and did not participate in any discussion to initially approve or ratify the execution of a promissory note, a genuine issue of material fact exists as to whether they ratified the note, and summary judgment will be denied.

CONTRACTS / UNIFORM COMMERCIAL CODE

Where plaintiff claims a charitable deduction on his federal income tax return of a portion of the obligation he claims is owed by defendant, this constitutes a discharge of the debt to the extent of the deduction claimed, applying 13 Pa. C.S. §3604(a).

CIVIL PROCEDURE / SUMMARY JUDGMENT

Where defendant filed a motion for summary judgment and supporting brief and plaintiff failed to respond, the Court may grant summary judgment to the moving party if the relief is supported by law.

CIVIL PROCEDURE / SUMMARY JUDGMENT

Where plaintiff fails to present any facts that defendant authorized, assented to or ratified alleged obligation of unincorporated association, summary judgment will be granted in favor of defendant.

CIVIL PROCEDURE / SUMMARY JUDGMENT

When a party files a brief but fails to file a motion for summary judgment, there is no motion before the court, *Erie L.R. 1035.2(a)(1)*.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 13153 OF 2007

Appearances: Stephen H. Hutzelman, Esq., Attorney for Plaintiff
Philip B. Friedman, Esq., Attorney for Defendant Howard Nadworny
Steven C. Beckman, Esq., Attorney for Defendant Steven C. Beckman
Gregory P. Sesler, Esq. Attorney for Defendant Lion's Oar

OPINION

Connelly, J. December 10, 2010

This matter is before the Court pursuant to a Motion for Summary Judgment filed by Jerry A. Fullmer (hereinafter "Plaintiff"). Howard Nadworny (hereinafter "Defendant Nadworny") and Stephen C. Beckman (hereinafter "Defendant Beckman") oppose Plaintiff's motion and individually file their own Motions for Summary Judgment. Plaintiff opposes Defendant Nadworny's motion.

Statement of Facts

The instant action pertains to monetary support provided by Plaintiff to Defendant Lion's Oar, an unincorporated association. Plaintiff purportedly executed a Promissory Note dated September 1, 2002 on behalf of Defendant Lion's Oar. *Plaintiff's Motion for Summary Judgment, p. 2.* Plaintiff signed the Promissory Note in favor of himself. *Id.* On November 8, 2002, Defendant Lion's Oar established its initial Board of Directors, including Plaintiff and Additional Defendant Mary Fullmer. *Defendant Nadworny's Motion for Summary Judgment, Exhibit 1 - Deposition of Jerry A. Fullmer, p. 4.* Neither Defendant Nadworny nor Defendant Beckman were members of the original Board. *Id. at p. 3.*

Defendant Beckman became President of Defendant Lion's Oar in 2004. *Defendant Beckman's Motion for Summary Judgment, p. 2.* In

2005, Defendant Nadworny succeeded Defendant Beckman as President. *Defendant Nadworny's Motion, p. 2*.

During their terms, Defendant Nadworny and Defendant Beckman made numerous efforts to raise money to reimburse Plaintiff. *Plaintiff's Motion, p. 2*. Defendant Lion's Oar made several payments to Plaintiff during the course of Defendant Beckman and Defendant Nadworny's terms as president. *Plaintiff's Motion, Exhibit 22(a) - Deposition of Howard Nadworny, Deposition Exhibit A*. The alleged remaining balance on the Promissory Note is $18,060.25. *Plaintiff's Complaint, p. 2*.

Plaintiff deducted $13,896.00 of the remaining balance as a charitable contribution on his 2005 federal income tax return. *Plaintiff's Motion, pp. 3-4*. Plaintiff reported no subsequent payments from Defendant Lion's Oar as income on future tax returns. *Fullmer Deposition, pp. 39-40*.

Plaintiff seeks damages in the amount of $18,060.25. *Plaintiff's Complaint, p. 2*. On June 22, 2010, Plaintiff filed a Motion for Summary Judgment and supporting brief.[1] Plaintiff avers he and Defendant Lion's Oar executed a valid Promissory Note on September 1, 2002. *Plaintiff's Motion, p. 2*. Additionally, Plaintiff asserts Defendant Nadworny and Defendant Beckman, as former Presidents, are personally liable for the debts of Defendant Lion's Oar.[2] *Id. at p. 6*.

On July 7, 2010, Defendant Nadworny filed opposition to Plaintiff's Motion for Summary Judgment. *Defendant Nadworny's Motion, p. 3*. Additionally, Defendant Nadworny submitted his own Motion for Summary Judgment against Plaintiff. In his motion, Defendant Nadworny challenges whether the money was made as a charitable contribution to Defendant Lion's Oar according to Plaintiff's 2005 federal tax return. *Id. at p. 2*. Additionally, Defendant Nadworny contends he cannot be held personally liable for the debts of Defendant Lion's Oar because he did not assent to the obligation. *Id.*

On July 16, 2010, Defendant Beckman also filed opposition to Plaintiff's motion and submitted his own Motion for Summary Judgment asserting the same reasoning set forth by Defendant Nadworny. *Defendant Beckman's Motion, pp. 1-3*. On the same day, Defendant Lion's Oar filed a Brief in Support of Defendant Lion's Oar's Motion for Summary Judgment and Reply to Plaintiff's Motion for Summary Judgment. No motion accompanied Defendant Lion's Oar's brief.

Plaintiff filed a reply in opposition to Defendant Nadworny's Motion for Summary Judgment. *Answer to Defendant Howard Nadworny's*

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[1] Plaintiff's Motion for Summary Judgment was filed against Defendant Nadworny and Defendant Beckman. The motion was not filed against Defendant Lion's Oar.

[2] Where an action is brought against an individual member of an unincorporated association for acts the member individually committed, the association itself is not an indispensable party. *Underwood v. Maloney,* 256 F.2d 334, 339 (3rd Cir. 1958).

Motion for Summary Judgment, p. 2. Plaintiff failed to respond to Defendant Beckman's motion.

Analysis of Law

According to the Pennsylvania Rules of Civil Procedure, summary judgment may be granted when: the record[3] demonstrates there exists "no genuine issue of material fact as to a necessary element of the cause of action or defense that could be established by additional discovery or expert report;" or "an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense in which a jury trial would require the issues be submitted to a jury." *Pa.R.C.P. 1035.2.*

Any party may move for summary judgment 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). The moving party has the burden of demonstrating that no genuine issue of material fact exists. *Id.* Consequently, the Court must consider the record in the light most favorable to the non-moving party. *Borden, Inc. v. Advent Ink Co.,* 701 A.2d 255, 258 (Pa.Super. 1997). All doubts as to the existence of a genuine issue of material fact are to be resolved against the moving party. *Id.*

The non-moving party may not rest upon the mere allegations or denials of its pleadings. *Ertel,* 674 A.2d at 1041. The non-moving party must set forth, either by affidavit or otherwise, specific facts showing there is a genuine issue for trial. *Id. at 1042.* After assessing the relevant facts, the non-moving party is entitled to judgment as a matter of law if it is clear to the Court that no reasonable jury could find in favor of the moving party. *Washington v. Baxter,* 719 A.2d 733, 737 (Pa. 1998).

I. Plaintiff's Motion for Summary Judgment

Plaintiff first alleges the Promissory Note was validly executed between Plaintiff and Defendant Lion's Oar. An entity cannot be held liable on an instrument unless the person signed the instrument; or the person is represented by an agent or representative who signed the instrument and the signature is binding on the person under 13 Pa.C.S.A § 3402. *13 Pa.C.S.A § 3401.* Pursuant to 13 Pa.C.S.A § 3402(a), "[I]f a person **acting, or purporting to act,** as a representative signs an instrument by signing either the name of the represented person or the name of the signer, the represented person is bound by the signature to the same extent the represented person would be bound if the signature

[3] The record, for purposes of a summary judgment, includes: pleadings, depositions, answers to interrogatories, admissions, affidavits, and reports signed by an expert witness that would, if filed, comply with Pennsylvania Rule of Civil Procedure 4003.5(a)(1), whether or not the reports have been produced in response to interrogatories. *Pa.R.C.P. 1035.1.*

were on a simple contract." *13 Pa.C.S.A § 3402(a)* (emphasis added). A promissory note will be deemed to be an obligation of an association where the document shows the name of the association on its face and individual officers of the association sign the note. *Chatham Nat'l Bank v. Gardner,* 35 Pa. Super. 135, 139 (1906). Thus, the promissory note will be the obligation of Defendant Lion's Oar if Plaintiff signed the document while acting or purporting to act as a representative of the unincorporated association.

On September 1, 2002, Plaintiff signed the Promissory Note purportedly on behalf of Defendant Lion's Oar as President. *Defendant Beckham's Response to Plaintiff's Motion for Summary Judgment, p. 1.* However, the Articles of Association and Board of Directors of Defendant Lion's Oar were not implemented until November 8, 2002. *Fullmer Deposition, pp. 11, 14.*

The Court finds that a genuine issue of material fact exists as to whether Plaintiff signed the Promissory Note while acting as a representative for Defendant Lion's Oar. Therefore, Summary Judgment on this issue is denied.

Plaintiff also contends Defendant Nadworny and Defendant Beckman are personally liable for Defendant Lion's Oar's obligations. Members of an unincorporated association are not individually liable for the obligations of the association unless those members provide "actual authorization, assent, or ratification" of the obligation.[4] *Duquesne Litho, Inc. v. Roberts & Jaworski, Inc.,* 661 A.2d 9, 11 (Pa.Super. 1995). In *Rove & Co. v. Thornburgh,* the Court stated:

> To manifest tacit assent to a contract through conduct, one must "intend to engage in the conduct and know[ ] or ha[ve] reason to know that the other party may infer from his conduct that he assents. A person has reason to know a fact... if he has information from which a person of ordinary intelligence would infer that the fact in question does or will exist. Absent more, however, a member's mere knowledge that his association entered into a contract is insufficient to establish that he tacitly assented to the contract. **Whether a principal assented to a transaction is a question of fact,** a finding of which will be reversed only if clearly erroneous.

Rove & Co. v. Thornburgh, 39 F.3d 1273, 1291 (5th Cir. 1994) (emphasis added).

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[4] No case law supports a limitation on the *Duquesne Litho* standard to purely political unincorporated associations as suggested in Plaintiff's Brief. Courts have applied the standard to non-political organizations in the past. *See, e.g., Ash v. Guie,* 97 Pa. 493 (1881) (Masonic Lodge members); *Ridgely v. Dobson,* 1842 WL 4672 (Pa. 1842) (reading room members). Thus, Plaintiff's attempt to distinguish political unincorporated associations from application of the *Duquesne Litho* standard is flawed.

Defendant Nadworny and Defendant Beckman did not sign the Promissory Note. *Defendant Nadworny's Motion, p. 2.* Additionally, neither Defendant Nadworny nor Defendant Beckman participated in any discussion to initially approve or ratify the execution of the Promissory Note. *Id.*

The Court finds a genuine issue of material fact exists as to whether Defendant Nadworny or Defendant Beckman assented to Defendant Lion's Oar's obligation. Thus, the question of whether Defendant Nadworny or Defendant Beckman assented to the obligation is a question of fact in dispute that must be presented to a jury. Plaintiff's Motion for Summary Judgment is denied.

II. <u>Defendant Nadworny's Motion for Summary Judgment</u>

Defendant first asserts Plaintiff made a charitable contribution to Defendant Lion's Oar upon submission of his 2005 federal tax return because the return listed a charitable contribution to Erie School Foundation of $13,896.00. *Defendant Nadworny's Motion at p. 2.* Defendant avers the contribution would act as forgiveness of Defendant Lion's Oar's debt for the amount deducted by Plaintiff. *Id. at p. 2.* According to the Uniform Commercial Code (hereinafter "UCC"):

> (a) Methods of Discharge. - A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument:
>
> > (1) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation or cancellation of the instrument, cancellation or striking out of the party's signature or the addition of words to the instrument indicating discharge...

13 Pa.C.S. § 3604(a). Thus, an individual must intentionally and voluntarily act to discharge a valid obligation. The UCC lists examples of what qualifies as an intentional voluntary act to forgive an obligation. The filing of a tax return does not fit within one of the intentional voluntary act examples listed in the UCC. However, the UCC does not suggest the listed examples are exhaustive. Accordingly, the Court must focus on whether Plaintiff made an intentional and voluntary act to forgive Defendant Lion's Oar's obligation.

Plaintiff took a deduction on his 2005 federal tax return in the amount of $13,896.00 as a charitable contribution to Erie School Foundation. *Plaintiff's Motion, pp. 3-4.* Plaintiff sent a letter on April 22, 2006 to Defendant Nadworny stating he did not want to "absolve [Defendant] Lion's Oar from what I consider a moral duty to repay." *Fullmer Deposition, Exhibit 7.* Plaintiff further explained he would amend his 2005 federal tax return to reflect future payments from Defendant Lion's Oar on the loan. *Id.* Plaintiff has failed to amend his 2005 federal tax

return despite receiving payments from Defendant Lion's Oar and has stated he has no future plans to do so. *Fullmer Deposition, pp. 39-40.*

By providing Plaintiff's 2005 federal tax return and Fullmer's deposition testimony, the Court is satisfied Defendant Nadworny has shown Plaintiff acted voluntarily and with the requisite intent to discharge the debt of Defendant Lion's Oar as a matter of law. The Court is not concerned with the "moral duty" of repayment by Defendant Lion's Oar to Plaintiff. Therefore, the Court grants Defendant Nadworny's Motion for Summary Judgment and finds Plaintiff discharged $13,896.00 of the purported loan. After discharge, Defendant Nadworny still faces possible liability on $4,164.25, the remaining balance of the Promissory Note.

Additionally, Defendant Nadworny contends he did not personally acknowledge or assent to Defendant Lion's Oar's obligation and, accordingly, cannot be held personally liable for the loan. *Defendant Nadworny's Motion at p. 3.* Individual members are not personally liable for the obligations of an unincorporated association, unless the individual authorizes, assents to, or ratifies the obligation. *Duquesne Litho,* 661 A.2d at 11. The question of assent to a transaction is a question of fact that must be presented to a jury. *Rove & Co.,* 39 F.3d at 1291.

Defendant Nadworny was not a member of the Board when Plaintiff and Defendant Lion's Oar executed the Promissory Note. *Plaintiff's Answer, p. 1.* Defendant Nadworny became President of Defendant Lion's Oar in 2005. *Id. at p. 2.* During his term, Defendant Nadworny acknowledged the validity of the Promissory Note in writing and made numerous attempts to raise money for the repayment of Plaintiff. *Nadworny Deposition, Exhibits 8-13.* Plaintiff also received a number of payments from Defendant Lion's Oar during Defendant Nadworny's presidency. *Plaintiff's Motion, Exhibit 22(c)-4.*

The Court finds a genuine issue of material fact exists as to whether Defendant Nadworny assented to Defendant Lion's Oar's obligation. Therefore, Defendant Nadworny's Motion for Summary Judgment on this issue is denied.

III. Defendant Beckman's Motion for Summary Judgment

The Local Rules of the Court of Common Pleas of Erie County control the filing procedure for summary judgment and appropriate responses to the Court. *Pa.R.C.P. 239.* Specifically, Local Rule 1035.2(a)(1)(B) states:

> (B) If the brief of either the moving party or non-moving party is not filed within the periods stated above, [...] the Court may then, or any time subsequent thereto:
>
> > (ii) 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)(1)(B). The Rules provide the non-moving party with 30 days from receipt of the moving party's supporting brief to file their own brief and deliver a copy to the assigned judge. *Erie L.R. 1035.2(a)(1)(A).*

Defendant Beckman filed a Motion for Summary Judgment on July 16, 2010. *Defendant Beckman's Motion, p. 1.* Plaintiff had 30 days to respond to Defendant Beckman's motion, but failed to do so. Therefore, the Court may grant Defendant Beckman's Motion for Summary Judgment if the requested relief is supported by law.

Duquesne Litho holds individual members are not personally liable for the obligations of an unincorporated association, unless they personally authorize, assent to, or ratify the obligation. *Duquesne Litho,* 661 A.2d at 11. Here, Plaintiff failed to present any facts or evidence to dispute Defendant Beckman's contention that he did not authorize, assent to, or ratify the obligation as required by law. Therefore, Defendant Beckman cannot be found personally liable for the debts of Defendant Lion's Oar.

Defendant Beckman's Motion for Summary Judgment is granted.

IV. Defendant Lion's Oar's Supporting Brief

Erie County Local Rule of Civil Procedure 1035.2(a)(1) states "[t]he moving party **shall** file a Motion for Summary Judgment, together with a supporting brief, with the Prothonotary[...]." *Erie L.R. 1035.2(a)(1)* (emphasis added). Accordingly, a party must file both a motion and a supporting brief to obtain a summary judgment from the Court.

In the instant action, Defendant Lion's Oar filed a supporting brief with the Court, but failed to file a Motion for Summary Judgment. Thus, pursuant to Erie County Local Rules of Civil Procedure 1035.2(a)(1), there is no Motion for Summary Judgment before the court on behalf of Defendant Lion's Oar.

ORDER

AND NOW, TO-WIT, this 10th day of December, 2010, for the reasons set forth in the foregoing OPINION, it is hereby **ORDERED, ADJUDGED and DECREED** that:

1.) Plaintiff Fullmer's Motion for Summary Judgment is **DENIED;** and

2.) Defendant Nadworny's Motion for Summary Judgment is **GRANTED IN PART,** as to Plaintiff's charitable contribution of $13,896 to Defendant Lion's Oar, and **DENIED IN PART,** as to the ratification of the Promissory Note; and

3.) Defendant Beckman's Motion for Summary Judgment is **GRANTED.**

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

DARLENE M. DEETER, now by Marriage DARLENE M. OMARK, Plaintiff v. RICHARD W. DEETER, Defendant

MARITAL SETTLEMENT AGREEMENT / STATUTE OF LIMITATIONS

Four-year statute of limitations period, 42 Pa. C.S. §5525, for an action in contract is inapplicable where the duties of the parties are ongoing under a valid marital settlement agreement. With continuing obligations, the statute of limitations runs from either the time of the breach or termination of the contract.

MARITAL SETTLEMENT AGREEMENT / DOCTRINE OF LACHES

Wife's claims, raised six (6) years after an alleged breach of a valid marital settlement agreement, were not barred by the doctrine of laches as the obligations under the contract were continuing.

MARITAL SETTLEMENT AGREEMENT / CONTRACT PRINCIPLES / IMPRACTICAB1LITY

Since Pennsylvania law provides that when a contracting party's performance is made impracticable without his or her fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his or her duty to render that performance is discharged, husband's obligation to pay child support to wife was impracticable and thus discharged because the basic assumption of the marital settlement agreement, that wife would remain the children's primary custodian, was no longer applicable.

MARITAL SETTLEMENT AGREEMENT / CONTRACT PRINCIPLES / BREACH

Because a material breach of a contract relieves the non-breaching party from the duty to perform and the breaching party may not insist upon the contract's performance, wife's actions in direct violation of the clear terms of the marital settlement agreement precluded recovery and husband was excused from performance.

MARITAL SETTLEMENT AGREEMENT / CONTRACT PRINCIPLES / INTERPRETATION

Since a Court is obligated to construe a contract as written and is not at liberty to read terms into it under the guise of interpretation, husband was obligated to pay parochial school tuition and related costs as per the express language of marital settlement agreement because payment was not premised upon the children's wishes.

CHILD SUPPORT / HEALTH INSURANCE / DERIVATIVE BENEFITS

Because the derivative benefits a dependent child is entitled to under 42 U.S.C.A. §402(d)(1) of the Social Security Act which are the result of a parent's retirement and paid to a representative payee are to be used for the use and benefit of the beneficiary for current maintenance as per

20 C.F.R. §§ 416.640, 404.2010, and 404.2040(a), husband's obligation under marital settlement agreement to pay health insurance for minor child was satisfied.

MARITAL SETTLEMENT AGREEMENT / CONTRACT PRINCIPLES / ENFORCEMENT

Wife's claim for reimbursement for medical insurance costs was time-barred since claim was filed after husband's obligation had ended under marital settlement agreement and husband's obligation to provide health insurance was discharged due to wife's denial of coverage by subsequent health insurance carrier.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11033-2000

Appearances: James H. Richardson, Jr., Esq., Attorney for Plaintiff
Stephen E. Sebald, Esq., Attorney for Defendant

OPINION

Kelly, E., J. December 17, 2010

This divorce matter is before the Court on Darlene M. Omark's (hereinafter "Wife") Motion for Contempt Citation and Motion to Enforce Marital Settlement Agreement.

BACKGROUND

Richard W. Deeter (hereinafter "Husband") and Wife married in 1985. *See* N.T. at 9. Two children, Richard Ryan Deeter, born January 16, 1987 and Brett Joseph Deeter, born in July of 1991, were born of their marriage. *See* N.T. at 10. The parties divorced by an April 19, 2001 decree. *See* Plaintiff's Exhibit A; N.T. at 10-11.

On March 13, 2001, Husband and Wife entered into a Marital Settlement Agreement. *See* Plaintiff's Exhibit A; *see also* N.T. at 11. Said Agreement was incorporated into the Divorce Decree. *See* Plaintiff's Exhibit A; *see also* N.T. at 11. Among other things, the Marital Settlement Agreement provided for Husband to pay to wife $350 per week in child support, pay to Wife $1,000 annually for gifts for the children, pay all parochial school tuition for both children, provide for the children's medical insurance, and provide for Wife's medical insurance.

Husband did not make any child support payments to Wife from September 1, 2004 through April 13, 2010, the date that Wife filed her Petition. *See* N.T. at 52. For the same time period, Husband failed to pay to Wife the annual thousand-dollar payment for gifts for the children. *See* N.T. at 52. Moreover, he did not make any direct payments of Brett's health insurance in 2010. *See* N.T. at 45. Furthermore, he failed to pay Brett's parochial school tuition in 2004 and, in the same year, he stopped providing Mother with health insurance. *See* N.T. at 20 and 49-50.

On April 13, 2010, Wife, noting that Husband was about to receive income from the sale of his home, filed her Motion seeking recovery for Husband's alleged breaches of the Marital Settlement Agreement. *See* N.T. at 30. Husband filed an Answer to Petitioner's Motion for Contempt Citation and Motion to Enforce Marital Settlement Agreement alleging that his duty to pay child support was discharged as the Agreement made it a condition that Wife remain the children's custodial parent, which she did not. Husband's Answer further asserts that Wife's claims for the years 2004, 2005 and 2006 were time barred pursuant to the statute of limitations for contract claims. Moreover, Husband alleges that Wife's claims, filed six years after the alleged breach, should be barred by the doctrine of laches.

DISCUSSION

First, Husband contends that Wife's claims are barred by a four-year statute of limitations.

The statute of limitations on Wife's claims is four years. *See* 42 Pa.C.S. 5525. Nevertheless, "where the duties of the parties are ongoing, the statute of limitations generally does not run." *Miller v. Miller,* 983 A.2d 736, 743 (Pa. Super. 2009)(citations omitted). With continuing obligations, the statute of limitations runs from either the time of the breach or termination of the contract. *Id.*

With regard to child support, the parties' Agreement provides: "The Husband's obligation to provide support shall terminate when each child becomes 18 years of age or graduates from high school, whichever event occurs later." Plaintiff's Exhibit A. As Brett remained in high school at the time when Wife filed her Motion, the child support obligation was continuing. Accordingly, Wife's claims related to child support are not barred by the statute of limitations. Moreover, Husband's attempt to bar Wife's claims via the doctrine of laches must fail as the obligations under the contract were continuing obligations. *See Lipschutz v. Lipschutz,* 571 A.2d 1046, 1051 (Pa. Super. 1990).

With regard to health insurance for Wife, the Agreement provides: "[][Husband's] obligation to provide such insurance for Wife shall terminate on his death, her death, or her remarriage, or on the expiration of five (5) years from the entry of this Agreement, whichever event occurs first." The parties entered into the Marital Settlement Agreement on March 13, 2001. Accordingly, Husband's obligation to provide insurance for Wife expired on March 13, 2006. Wife, however, did not file her Motion for Contempt Citation and Motion to Enforce Marital Settlement Agreement until April 13, 2010. In that respect, Wife's claim for enforcement of the health insurance provisions is time-barred.

With regard to the remaining claims, the general rules of contract apply. *See Stamerro v. Stamerro,* 889 A.2d 1251 (Pa. Super. 2005);

Tuthill v. Tuthill, 763 A.2d 417, 419 (Pa.Super. 2000); *Reif v. Reif,* 626 A.2d 169, 173 (Pa.Super. 1993). Accordingly, the parties' intent governs the interpretation of the agreement. *See Krizovensky v. Krizovensky,* 624 A.2d 638, 642 (Pa.Super. 1993). The intent of parties is found in the express language of the writing itself. *See Tuthill,* 763 A.2d at 419; *Krizovensky,* 624 A.2d at 642; *McMahon v. McMahon,* 612 A.2d 1360, 1364 (Pa.Super. 1992). The Court is obligated to construe the contract as written and may not modify its plain meaning under the guise of interpretation. *See Tuthill,* 763 A.2d at 420. The court is only free to receive extrinsic evidence, i.e. parol evidence, to resolve an ambiguity. *Id.* at 419; *Krizovensky,* 624 A.2d at 642. A contract is only ambiguous if it is fairly susceptible of different constructions and capable of being understood in more than one sense. *See Tuthill,* 763 A.2d at 419. A contract is not ambiguous merely because the parties have different interpretations of its terms. *See id.*

I. CHILD SUPPORT

First, Wife seeks payment of $105,933.00, plus interest, for child support from 2004 through May of 2010[1].

Article 18 of the parties' Marital Settlement Agreement provides:

> **18. CHILD SUPPORT**
>
> There are two children born of the marriage, Ryan Deeter born 01/16/87 and Brett Deeter born 07/09/91 who remain eligible to receive child support. The Husband shall pay to the Wife for the benefit of the two children the sum of $350 per week in child support. In addition, he shall continue to insure both children with his medical insurance policy provided through his employment at Deeter Tool & Manufacturing, Inc. The Husband shall also be responsible for payment of 100% of all uninsured medical, dental, eye care and pharmaceutical expenses. The Husband shall also pay to the Wife, the sum of $1,000 on or about October 15 of each year to assist her in providing gifts for the children. The Husband shall also be responsible for the payment of all parochial school tuition for both children until each child graduates from the twelfth grade. In addition to the tuition obligation, the Husband shall pay all costs for school uniforms, all activities fees and sports fees related to school activities and all outside sports fees and activities fees for each child through the twelfth grade. The Husband's obligation to provide support shall terminate when each child becomes 18 years of age or graduates from high school, whichever event

[1] Brett, the parties' youngest child, graduated from high school in 2010. *See* N.T. at 10.

> occurs later. The parties acknowledge that the child support obligation is modifiable by the filing of a complaint for support with the Erie County Domestic Relations Office at any time.
>
> The parties hereby agree that the Husband as the noncustodial parent shall be entitled to claim dependency exemptions for Ryan and Brett... .

Plaintiffs Exhibit A.

Through June of 2004, Husband made the child support payments in accordance with the Agreement. *See* N.T. at 12-13. In July and August of 2004, Husband paid $175.00 in child support to Wife. *See* N.T. at 13 and 42. Thereafter, Husband made no further child support payments to Wife, including cessation of payment of the $1,000 gift sum. *See* N.T. at 13-14 and 52.

Pennsylvania law provides:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate to the contrary.

Luber v. Luber, 614 A.2d 771 (Pa. Super. 1992); *see also Hart v. Arnold,* 884 A.2d 316 (Pa. Super. 2005); *Ellwood City Forge Corp. v. Fort Worth Heat Treating Co.,* 636 A.2d 219 (Pa. Super. 1994).

The parties agree that the intent of the child support provision was to provide Wife with child support because she was the children's primary custodian. *See* N.T. at 32 and 43. In other words, it was a basic assumption of the contract that Wife would remain the children's primary custodian. The children did not, however, remain in Mother's custody. To the contrary, in June of 2004, Brett started living in Husband's home where he remained until December 20, 2009.[2] *See* N.T at 41-42 and 45. Ryan moved into Husband's home in August of 2004. *See* N.T. at 4. Because Husband, rather than Wife, was the children's primary custodian, Husband stopped paying child support to Wife. Husband's obligation to pay child support to Wife was discharged as it became

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[2] Wife testified that Brett lived with her 80-100% of the time from 2006 through 2010. *See* N.T. at 25. Wife's current husband testified that Brett was in Wife's custody at least seventy-five percent of the time from 2006-09 and almost a hundred percent of the time from 2009 to the date of testimony. *See* N.T. at 37. Wife's testimony was not credible. Wife often looked to her attorney prior to answering questions before this Court. Moreover, without her counsel asking leading questions, she wasn't able to correctly answer simple questions such as whether she filed a complaint for child support or when Husband stopped paying her medical insurance. *See* N.T. at 19-20 and 32-33. Furthermore, the Husband's action of reducing child support by one half for the months of July and August of 2004 and then ceasing payment in September of 2004 supports his position that one child moved in with him in June of 2004 with the second one following in August of 2004.

impracticable for him to pay child support to Wife once he was the party in the position of providing for the children. To hold otherwise would be unduly burdensome for Husband who would be providing for the care of the children while in his home as well as paying for their care in a home in which they did not live. Moreover, such a concept frustrates the basic premise of child support. Specifically, the Court fails to see how, under the facts of this case, it could possibly be in the children's best interests to take money away from the household in which they live.[3] It is reprehensible that Wife seeks to recover money that would have been paid to her at her children's detriment had she pursued it when it was allegedly due.

Accordingly, Husband's performance was discharged on the basis of impracticability.

II. $1,000.00 ANNUAL GIFT PAYMENT

Wife further seeks recovery of $6,000.00, plus interest, for Husband's failure to pay the $1,000.00 gift sum from 2004 through 2009.

In relevant part, Article 18 of the parties' Marital Settlement Agreement provides that "The Husband shall also pay to the Wife, the sum of $1,000 on or about October 15 of each year to assist her in providing gifts for the children."

Commencing with 2004, Husband did not pay Wife $1,000 annually for gifts for the children. *See* N.T. at 52. Husband discovered that Wife was using the $1,000 payment to buy gifts for her family, rather than for the children. *See* N.T. at 47. Accordingly, Husband began using the money to take the children on vacations, rather than paying it to Wife. *See* N.T. at 47-48.

It is well-established that a material breach of a contract relieves the non-breaching party from the duty to perform under the contract. *LJL Transp., Inc. v. Pilot Air Freight Corp.,* 962 A.2d 639 (Pa 2009). Similarly, when a party to a contract is guilty of a material breach, that party may not insist upon the contract's performance. *See id.*

Clearly, Wife, who was spending the children's gift money on individuals other than the children, was in direct violation of the clear terms of the Agreement. Accordingly, Husband was excused from the obligation to provide Wife with the $1,000 annual sum and Wife is precluded from insisting that he do so.

III. PAROCHIAL SCHOOL TUITION

Wife, via check dated August 28, 2004, paid $2,700.00 in parochial school tuition. *See* Plaintiff's Exhibit B; *see also* N.T. at 15. She seeks

[3] Certainly, there may be cases in which child support is warranted for a non-custodial parent. There is no record evidence, however, that this is such a case. To the contrary, Husband was in a poor situation financially. *See* N.T. at 43.

reimbursement of said payment, plus interest.

Article 18 of the parties' Marital Settlement Agreement further provides, in relevant part:

> The Husband shall also be responsible for the payment of all parochial school tuition for both children until each child graduates from the twelfth grade. In addition to the tuition obligation, the Husband shall pay all costs for school uniforms, all activities fees and sports fees related to school activities and all outside sports fees and activities fees for each child through the twelfth grade.

Plaintiff's Exhibit A.

With regard to the parochial school tuition, Husband indicated that he didn't make the payment because Wife, rather than the children wanted the children to attend parochial school. *See* N.T. at 48 and 55. The Agreement, however, does not premise the payment of parochial school tuition on the children's wishes. As the Court is not at liberty to read terms into the contract, Husband is obligated to repay Wife.

IV. BRETT'S HEALTH INSURANCE

Wife further claims that she paid $1,196.45 in medical insurance for Brett during 2010 and she seeks reimbursement for the same. *See* Plaintiff's Exhibit C; *see also* N.T. at 16-18.

In 2006, when Husband turned sixty-two years of age, he began receiving social security benefits for Brett. *See* N.T. at 45 and 53-54. Husband used these payments to pay for Brett's health insurance. *See* N.T. at 45-46. In lieu of paying the insurance, Husband turned over the social security checks, with the instruction that money was to be taken from the $962 monthly payment for Brett's health insurance. *See* N.T. at 45 and 49.

There is a presumption in PA case law that an obligor's child support obligation will be reduced by the amount of retirement benefits paid directly to the child. As the Pennsylvania Superior Court recently explained:

> Pursuant to the Social Security Act, derivative benefits are available to dependent children of an individual entitled to Social Security retirement benefits. 42 U.S.C.A. § 402(d)(1). The benefits are made to the minor's "representative payee" who must use them "for the use and benefit of the beneficiary." 20 C.F.R. §§ 416.640, 404.2010. Benefits are distributed "for the use and benefit of the beneficiary if they are used for the beneficiary's current maintenance," including costs associated with obtaining "food, shelter, clothing, medical care and personal comfort items." 20 C.F.R. § 404.2040(a).

Silver v. Pinskey, 981 A.2d 284, 292-293 (Pa. Super. 2009).

Husband paid for Brett's health insurance via the child's derivative benefits. Accordingly, Wife's claim is without merit.

V. WIFE'S HEALTH INSURANCE

Wife further claims that Husband failed to provide her with medical insurance from October of 2004 through March 12, 2006 (the end of the five-year term under the Agreement) and, therefore, she incurred costs of $4,091.40, for which she should be reimbursed, plus interest.

Article 16 of the Marital Settlement Agreement provides, in relevant part:

> Husband shall continue to provide a medical, dental and pharmaceutical insurance policy covering Wife. His obligation to provide such insurance for Wife shall terminate on his death, her death, or her remarriage, or on the expiration of five (5) years from the entry of this Agreement, whichever event occurs first. Husband's obligation to provide such insurance for the Wife shall terminate if as a result of an insurance audit performed by his health insurance carrier, she is disqualified by the insurance carrier from being covered by the Husband's medical, dental and pharmaceutical insurance policy. The parties specifically agree that this obligation shall not be deemed to be alimony.

Plaintiffs Exhibit A.

The obligation to provide Wife with insurance ended on March 13, 2006. Wife, however, did not file her Motion until April 13, 2010. Accordingly, Wife's claim is time barred.

Regardless, Husband's obligation to provide health insurance to Wife was discharged. Specifically, the Agreement provides that "Husband's obligation to provide such insurance for the Wife shall terminate if as a result of an insurance audit performed by his health insurance carrier, she is disqualified by the insurance carrier from being covered." The company providing coverage for Wife went out of business in 2004 and the company that took over coverage denied coverage to Wife because Husband and Wife were divorced. *See* N.T. at 49-50. Accordingly, Husband's obligation to Wife ceased.

An appropriate Order will follow.

ORDER

AND NOW, to-wit, this 17th day of December, 2010, upon consideration of Darlene M. Omark's Motion for Contempt Citation and Motion to Enforce Marital Settlement Agreement, it is hereby **ORDERED, ADJUDGED and DECREED** that said Motion is **GRANTED in part.** Specifically, Richard W. Deeter shall pay to Darlene M. Omark $2,700 for the children's 2004-2005 school tuition. Ms. Omark's remaining claims are **DENIED.**

Each party shall be responsible for his/her own attorney's fees.

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

COMMONWEALTH OF PENNSYLVANIA
v.
ROBERT WILLIAM WHITE

CRIMINAL / SEARCH & SEIZURE / INSPECTION OF VESSELS

Under 30 Pa.C.S. § 901(a)(10), a waterways conservation officer has the power to stop and board any boat for the purpose of conducting a safety and compliance inspection.

CRIMINAL / SEARCH & SEIZURE / INSPECTION OF VESSELS

Water conservation officers must have reasonable suspicion, if not probable cause, of criminal activity before an officer is permitted to stop and board a boat for purposes other than safety and compliance inspections.

CRIMINAL / VESSELS / LIGHTING REQUIREMENTS

The lighting regulations adopted by the Fish and Boat Commission [58 Pa. Code § 95.3], which require boats at night to carry and exhibit lights prescribed by the federal Inland Navigational Rules Act of 1980 (33 §§ USCA 2001 -- 2073), do not prohibit the concurrent use of a spotlight and navigation lights.

CRIMINAL / PROBABLE CAUSE / VESSELS / LIGHTING REQUIREMENTS

The waterways conservation officer did not have probable cause or reasonable suspicion to stop the defendant's boat for failure to exhibit navigation lights where the officer saw the boat's navigation lights were working properly upon his approach to the boat and could have advised the defendant of his concern that the operation of the vessel's spotlight obscured the boat's navigation lights without boarding the boat to conduct an investigation.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA No. 2455-2010

Appearances: Nathaniel E. Strasser, Esq., Attorney for Commonwealth
J. Timothy George, Esq., Attorney for Defendant

OPINION

Connelly, J., January 27, 2011

This matter is before the Court pursuant to Robert William White's (hereinafter "Defendant") Omnibus Pretrial Motion for Relief. A hearing was held after which both Defendant and the Commonwealth submitted briefs.

Statement of Facts

At 9:50 p.m. on July 3, 2010, Defendant was operating a watercraft near Gull Point in Lake Erie when Water Conservation Officer James M.

Smolko (hereinafter "WCO Smolko") observed, approached, followed and then ultimately boarded Defendant's boat. WCO Smolko, who was operating a marked Patrol Boat, testified that he activated his light and tapped the airhorn to initiate the stop after he observed that Defendant's boat was not displaying the proper navigation lights. *N.T., Preliminary Hearing, p. 6.* At the time of the stop, WCO Smolko was approaching the port side of Defendant's boat. *Id.*

WCO Smolko testified Defendant's boat was utilizing a spotlight on the bow and he could not see any other lighting on the vessel. *Id. at pp. 6-7.* WCO Smolko testified this was the sole reason for boarding Defendant's boat and he did not observe any unsafe maneuvering. *Id. at pp. 13, 14, 18.* He stated that because Defendant's 'spotlight washed out Defendant's boat's navigation lights it restricted Defendant's visibility and every other vessel's ability to navigate at night.

WCO Smolko said he could not see Defendant's boat's red and green navigational lights until he was right alongside the craft and Defendant shut the spotlight off. *Id. at p. 16.* In fact, all of the required navigational lights were on and working at the time of the stop. *Id. at p. 17.*

WCO Smolko testified that he did not know if there were other boats around Defendant's boat at the time of the stop, but he received no complaints from other boaters in regards to Defendant's boat. *Id. at pp. 14-15.*

After boarding Defendant's boat, WCO Smolko conducted an inspection and noticed open containers at the helm and an alleged odor of alcohol about Defendant's person. *Id. at p. 8.* After identifying Defendant as the operator, WCO Smolko asked Defendant whether he consumed any alcohol, administered sobriety tests and ultimately asked Defendant to submit to chemical testing. *Id. at p. 9.*

Defendant was transported to Lampe Marina where his blood was drawn by Emergycare. Defendant's blood alcohol was determined to be 0.124 percent. *Id. at p. 10.*

Defendant was charged with Boating Under the Influence[1], Reckless Operation of Watercraft[2], Negligent Operation of Watercraft[3] and a violation of General Boating Regulations[4]. Defendant filed an Omnibus Pretrial Motion alleging that because Defendant's operation of the watercraft violated no law, the stop was unconstitutional and therefore all evidence obtained as a result of the unlawful boarding of Defendant's boat should be suppressed.

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[1] 30 P.S. 5502(A.1) and 30 P.S. 5502(A)(1)

[2] 30 P.S. 5501(A)

[3] 30 P.S. 5501(B)

[4] 30 P.S. 5123 (A)(5)

Analysis of Law

I. Motion to Suppress

The Commonwealth contends Officer Smolko did not need reasonable suspicion or probable cause to stop Defendant's boat for the purpose of determining whether the Defendant's boat complied with the general boating regulations. The Commonwealth cites *30 Pa.C.S.A. § 901(a)(10)* which provides "Every waterways conservation office shall have the power and duty to stop and board any boat ... for the purpose of inspection for compliance." *30 Pa.C.S.A. § 901(a)(10).*

WCO Smolko testified that the only reason he stopped Defendant's boat was because the spotlight washed out the vessel's red and green navigational lights. *N.T., Preliminary Hearing, pp. 17-18.* Defendant asserts because WCO Smolko never testified or made note of the fact that he stopped the boat to conduct a safety inspection, the Commonwealth improperly relies on 30 Pa.C.S.A. §901(a)(10). Defendant avers WCO Smolko stopped the boat because he erroneously believed that using a forward-mounted spotlight coincident with navigation lights violated Pennsylvania law. *Defendant's Supplement, p. 3.*

There is no evidence in the record that suggests WCO Smolko was conducting a safety or compliance inspection of Defendant's boat.[5] The Court finds the Commonwealth's reliance on 30 Pa.C.S.A. § 901(a)(10) to be unsupported by the record. There is no indication in the criminal complaint that he stopped the boat for a compliance inspection. *N.T., Preliminary Hearing, p. 18.* The record indicates that as WCO Smolko pulled up alongside Defendant's boat, he saw that all of the navigational lights on Defendant's boat were working correctly. However, he continued with the stop. *Id. at p. 16.*

Moreover, the Commonwealth's contention that reasonable suspicion is unnecessary is contrary to the Superior Court's Opinion in *Commonwealth v. Lehman.* The Superior Court held water conservation officers must have reasonable suspicion, if not probable cause, of criminal activity before an officer is permitted to stop and board a boat. *Commonwealth v. Lehman,* 857 A.2d 686, 687 (Pa.Super. 2004), *appeal granted,* 871 A.2d 790 (Pa. 2005), *appeal dismissed,* 886 A.2d 1137 (Pa. 2005).

Alternatively, the Commonwealth argues that WCO Smolko did have probable cause to stop Defendant's boat because he could not see the navigation lights on Defendant's boat. *Commonwealth's Brief in*

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[5] The Commonwealth argues in its brief "[s]ince Officer Smolko stopped Defendant's boat to inspect navigation lights pursuant to Section 5123, which is contained in Part III of the Fish and Boat Code; Officer Smolko did not need probable cause nor reasonable suspicion to stop Defendant's boat.." *Commonwealth's Brief in Opposition, p. 3.* However, WCO Smolko's testimony indicates the sole reason he stopped Defendant's boat was his belief that using the mounted spotlight while the boat is under way violates Pennsylvania law. *N.T. Preliminary Hearing, p. 18.* A review of the record and the boating regulations shows the cited reasons are inconsistent.

Opposition, p. 3. The Commonwealth argues that in order to comply with 58 Pa.C.S.A. §95.3, a boat's navigation lights must be visible to other boaters.[6] *Id. at p. 4.*

58 Pa.C.S.A. §95.3 provides

> Lights for boats
>
> (a) *General rule.* A boat from sunset to sunrise and during periods of restricted visibility shall carry and exhibit the lights prescribed by the Inland Navigation Rules Act of 1980 (33 U.S.C.A. §§ 2001 -- 2073). A boat owner may elect to carry and exhibit the lights prescribed by the International Rules in lieu of the Inland Rules but, in that event, the boat owner shall comply in all respects with those standards. See Appendix A. ...
>
> (f) *Locations of lights.* Lights shall be located and have the characteristics as shown in Appendix A.
>
> (1) The masthead light (forward white light in Appendix A, Figures 1, 2 and 7D) shall be at least 1 meter (3 feet 3.4 inches) higher than the colored lights on a boat less than 12 meters (39 feet 4.4 inches) and at least 2.5 meters (8 feet 2.4 inches) above the gunwale on a boat 12 meters (39 feet 4.4 inches) in length but less than 20 meters (65 feet 7.4 inches) in length. The after masthead light (Appendix A, Figure 1 only), if used, shall be higher than the forward masthead light so as to be seen as a separate, distinct light at a distance of 1,000 meters (1,093 yards 1.8 feet) ahead of the boat.

58 Pa.C.S.A. §95.3

The statute is silent about the manner in which the prescribed lights are to be utilized. In fact, Pennsylvania law only requires is that a watercraft operator carry and exhibit the lights prescribed by the Inland Navigational Rules Act. *58 Pa.C.S.A. § 95.3, et seq. See also Commonwealth v. Martin,* 10 Pa. D. & C.5th 129, 133 (Crawford 2010).

In *Martin,* the Crawford County Court of Common Pleas held the use of docking lights concurrent with the use of navigation lights is not illegal in the Commonwealth. *Martin at 137.* The *Martin* Court held that because the officers knew before boarding the boat that Martin's navigation lights were functional and there was no evidence of unsafe boating, the officers lacked an articulable reason to board Martin's boat and "should have waived him off after recommending that he turn his docking lights off once they were satisfied that the navigation lights were functioning properly." *Id. at p. 136.* Finding the officers did not have

[6] The only support the Commonwealth provides for this interpretation is the American Heritage Dictionary's definition of the word "exhibit". *Commonwealth's Brief in Opposition, p. 4.*

probable cause to stop defendant's vessel and charge him with boating under the influence, the Martin court suppressed the evidence obtained following the illegal stop. *Id. at p. 139*.

Here, just as in Martin, once WCO Smolko approached Defendant's boat and saw that his navigation lights were working properly, he could have advised Defendant of his concern with the operation of his spotlight rather than board Defendant's boat and conduct an investigation. Instead, WCO Smolko boarded Defendant's boat and began the investigation which subsequently led to Defendant's arrest.

The Court finds that WCO Smolko needed probable cause or reasonable suspicion of criminal activity to stop and board Defendant's boat and instantly, the Commonwealth has failed to show such cause existed. Therefore, all of the evidence obtained as a result of the unlawful search and investigation must be suppressed.

II. Writ of Habeas Corpus

Defendant's Petition for Writ of Habeas Corpus is denied. *See Commonwealth v. Keller,* 823 A.2d, 1004,1011-12 (Pa.Super. 2003) (holding the remedy for illegally obtained evidence is suppression of the evidence and its exclusion at trial, not dismissal of the case).

ORDER

AND NOW, TO-WIT, this 27th day of January, 2011, it is hereby **ORDERED, ADJUDGED and DECREED** that for the reasons stated in the foregoing Opinion Defendant's Motion to Suppress Evidence is **GRANTED.** Defendant's Petition for Habeas Corpus is **DENIED.**

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

COMMONWEALTH OF PENNSYLVANIA
v.
BRENT KEENO, Defendant

COMMONWEALTH OF PENNSYLVANIA
v.
SCOTT KEENO, Defendant

CRIMINAL PROCEDURE / SEARCH AND SEIZURE

A time lapse of one year and three months between an unknown purchase at a hydroponics store and a "knock and talk" encounter renders the information obtained until that point stale so as not to support probable cause to obtain a search warrant.

CRIMINAL PROCEDURE / SEARCH AND SEIZURE

The "faint" odor of raw marijuana allegedly detected during a "knock and talk" does not establish probable cause to obtain a search warrant of a person's home. Rather, law enforcement must "demonstrate a nexus" between his/her experience and the search or seizure of evidence since the ends do not justify the means.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION
No.'s 2508-2010 and 2506-2010 respectively

Appearances: Justin D. Panighetti, Esq. for the Commonwealth
Julia E. Bagnoni, Esq. for Defendant Brent Keeno
Dennis V. Williams, Esq. for Defendant Scott Keeno

OPINION

Dunlavey, Michael E., J. April 18, 2011

Procedural History

Defendants are both charged with one count each of Possession of marijuana, Possession with Intent to Deliver marijuana, and Possession of Drug Paraphernalia. Defendant Scott Keeno filed an Ominbus Pretrial Motion to Suppress on January 7, 2011, and Defendant Brent Keeno filed an Omnibus Pretrial Motion for Relief on February 10, 2011, both seeking to suppress the evidence against them.

This Court held a joint hearing on the motions on March 9, 2011, hearing both testimony and oral argument. At the conclusion of the hearing, the Court requested briefs from counsel on the sole issue of whether the odor of raw (unburnt) marijuana was sufficient probable cause for a search of the Defendants' trailer. Briefs were received in a timely fashion from all counsel.

Findings of Facts

The Court gleaned the following facts from the testimony given at the March 9, 2011 hearing and the Search Warrant (Commonwealth's Exhibit 1).

On December 23, 2008, Pennsylvania State Trooper Jeff Brautigam followed a white Jeep from a hydroponics store in Cranberry, Pennsylvania (Butler County) to Millcreek Township, Erie County, Pennsylvania. The Jeep stopped at a trailer located at 1422 Wana Drive in Millcreek. Trooper Brautigam testified that the Jeep was believed to be involved in a marijuana grow operation. The Jeep parked next to a purple PT Cruiser. Trooper Brautigam testified that he did not know what, if anything, was purchased by the Jeep driver at the hydroponics store.

Pennsylvania State Trooper Edward Walker, the affiant in this case, testified the State Police made one "trash pull" from 1422 Wana Drive on January 8, 2009, but found no evidence of a marijuana grow operation. Commonwealth Exhibit 1, p. 5. The State Police attempted to make more trash pulls from 1422 Wana Drive for the "next few months." *Id.* Trooper Walker testified the trash pulls were unsuccessful because no trash was put out for collection at the residence.

Fourteen (14) months later, on March 18, 2010, Trooper Walker, Trooper Brautigam, and Trooper Eric Wagner, all from the Cranberry Pennsylvania State Police barracks, decided to try a "knock and talk" encounter with the residents of 1422 Wana Drive. A "knock and talk" was described by Trooper Walker as walking up to the residence, knocking on the door, and asking to speak with the residents about a marijuana grow operation, and hoping to obtain consent to search the residence.[1]

Trooper Walker described the outside of the trailer located at 1422 Wana Drive as having one window with closed blinds, one window covered with brown cardboard, and another window with condensation. Trooper Walker also indicated that there was a brand-new roof vent on the trailer. See Commonwealth Exhibit 1, p. 5. In the search warrant, Trooper Walker maintained that these observations were indicative of an indoor marijuana grow operation. *Id.*

At 12:25 p.m., Trooper Wagner approached the trailer door and knocked on it. *Id.* Trooper Brautigam stood to the left side of the door (to the occupant's right). He testified that Trooper Wagner stood several feet back from the door area.

Defendant Scott Keeno (hereinafter Mr. Keeno) answered the door. Trooper Walker identified himself as State Police and showed Mr. Keeno his badge. Trooper Walker asked Mr. Keeno if the Troopers could come in and speak with him. Mr. Keeno said no and stated he had dogs

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[1] The Court is slightly mystified as to the effectiveness of this technique, wondering how often those approached in a walk and talk actually confess to running an illegal enterprise.

inside. Trooper Walker testified that Mr. Keeno appeared surprised and nervous at the Troopers' presence that his legs were trembling and he was breathing heavily. Trooper Walker also asked Mr. Keeno to show him some identification. Mr. Keeno went back inside the trailer, shutting and locking the door behind him, to obtain his identification.

When Mr. Keeno returned, he opened the door and handed the requested identification to Trooper Walker. Mr. Keeno was still "trembling" according to Trooper Walker. Trooper Brautigam testified that he detected the "faint odor" of raw marijuana when the door opened a second time. Neither Trooper Walker nor Trooper Wagner detected the odor of marijuana.

Trooper Walker asked again to come in, and again, Mr. Keeno declined. When Mr. Keeno attempted to go back inside, Trooper Walker stuck his foot in the door to prevent the door from closing. He informed Mr. Keeno that the police would be obtaining a search warrant for the residence and gave Mr. Keeno the option of letting the police in or waiting outside with them. Mr. Keeno chose to wait outside with Troopers Brautigam and Wagner while Trooper Walker obtained the warrant. Commonwealth Exhibit 2.

While they waited, two more State Police Troopers and a Millcreek Township police cruiser arrived as backup, and/or support for the search warrant. Defendant Brent Keeno, Scott Keeno's brother, also arrived around 1:15 p.m., driving the purple PT Cruiser. *See* Commonwealth Exhibit 1, p. 6. Troopers stopped him from entering 1422 Wana Drive. The Keeno brothers waited with the Troopers until the search warrant was executed. *See* Commonwealth Exhibit 2.

Trooper Walker obtained the search warrant at 2:45 p.m. After the search warrant was executed, four baggies of marijuana (431 grams), $4,000.00 in cash, a grow light and plant nutrients, a marijuana horticulture book, and marijuana paraphernalia were found in the trailer's back bedrooms. Some baggies of the marijuana were found inside false-bottomed coffee cans, packaged for sale. No smoked or burnt marijuana was located during the search warrant's execution. Neither Defendant spoke to the State Police.

Conclusions of Law

The sole issue here before the Court is whether the odor of raw marijuana allegedly detected by Trooper Brautigam was sufficient probable cause for the search of Defendants' home.

First, the Court cannot overlook the time lapse involved in this case. *See Commonwealth v. Ryerson,* 817 A.2d 510 (2003) where false or stale information will not invalidate a warrant <u>if</u> there is other reliable information to support warrant.

Based on the testimony presented, one year and three months passed

from the time Trooper Brautigam followed the white Jeep to 1422 Wana Drive until Trooper Walker decided to do a "knock and talk" at 1422 Wana Drive. Testimony also revealed that the State Police did not know what was purchased at the hydroponics store and did not make any successful trash pulls revealing evidence of a marijuana grow operation. *Compare* CW Ex 1, p. 6, paragraph 5. The Court finds that the information received up until this point was stale, and that the State Police were fishing for further evidence. The alleged detection of a "faint" odor of raw marijuana by Trooper Brautigam revived the possibility of criminal conduct.

The odor of burnt marijuana detected by a police officer establishes probable cause to conduct a stop, search, and/or arrest on the basis of the "plain smell" doctrine. *See Commonwealth v. Pullano,* 295 Pa. Super. 68, 440 A.2d. 1226 (1982) and *Commonwealth v. Stoner,* 344 A.2d 633 (1975). The odor of marijuana must be strong, not faint, to establish probable cause. *Commonwealth v. White,* 20 Pa. D.&C.4th 208 (1992, Crawford County Court of Common Pleas), Courts cannot simply conclude that probable cause exists on "nothing more than the number of years that an officer has spent on the force. Rather, the officer must demonstrate a nexus between his experience and the search, arrest, and seizure of evidence." *Commonwealth v. Dunlap,* 941 A.2d 671, at 677, *citing Commonwealth v. Lawson,* 309 A.2d 392. Misstatements of fact will invalidate a search and require suppression only if they are deliberate and material. *Commonwealth v. Bonasorte,* 486 A.2d 1361 (1984), citing *Commonwealth v. Tucker,* 384 A.2d 938 (1978).

Trooper Brautigam testified to a "faint" smell of raw marijuana in one instance, lasting a few seconds when Scott Keeno opened the trailer door. After the search warrant was obtained, no marijuana grow operation or materials, as listed in the search warrant, were found near the door of the trailer. Compare *Pullano, supra,* where the marijuana grow operation was located just inside the front door. Here, all the marijuana that was recovered was found dried, cut, bagged and hidden in back bedrooms inside another container. There was no raw or fresh marijuana recovered in the trailer. Also, despite materials found, there was no growing operation underway. Thus, the Court finds, in spite of his professed years of training, Trooper Brautigam's observations here are unrealistic and not credible. This Court is not accusing Trooper Brautigam of deliberately misstating the facts, rather believes he succumbed to what defense counsel calls the "over-zealous mind set of law enforcement officers". Defendant Brent Keeno's Brief at 4.

Based on the Court's own research, no case law distinguishes between the odor of burnt and raw marijuana. While probable cause has been recognized in cases where there was burnt marijuana, those are not the facts here. No evidence or testimony was presented by the parties as to

the strength of different types of marijuana odors, or the discovery of burnt or smoking joints, blunts, or pipes at the scene. Trooper Brautigam's testimony was that it was only a "faint" odor. The Court finds that innocent facts were stretched in order to obtain a search warrant and search this residence and question these Defendants on no more than a mere suspicion of a marijuana grow operation.

Further, the burden on proof is on the Commonwealth, not the Defendants. The ends do not justify the means here. The Commonwealth's suggestion that Defendant Scott Keeno could have "hunkered down" inside the trailer is speculative at best. Mr. Keeno could have turned the dogs he allegedly had on the police as well. Instead, he came outside and sat and waited with the police until the search warrant was obtained. There was no testimony that he was argumentative or combative or tried to flee. His nervousness was understandable given the fact that three State Troopers showed up at his door asking if he was running an illegal drug operation and threatened to obtain a search warrant.

Thus, the Court must suppress the evidence as the fruits of an illegal search and seizure.

ORDER

AND NOW, to-wit, this 18th day of April 2011, upon consideration of Defendants' Motions to Suppress, it is hereby **ORDERED and DECREED** that Defendants' Motions are **GRANTED**.

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

TRUSTED & RELIABLE HEALTHCARE INC. d/b/a BRIGHTSTAR HEALTHCARE, a New York business corporation, Plaintiff
v.
EPEOPLE HEALTH CARE, INC. d/b/a EKIDZ CARE, a Delaware corporation, SHARON M. YOST, an individual, SARAH L. TRUJILLO, an individual, and KATHERINE GUSTAFSON, an individual, Defendants

EQUITY / INJUNCTIONS

A preliminary injunction is a most extraordinary form of relief that will be granted only in the most compelling of cases.

EQUITY / INJUNCTIONS

A preliminary injunction should be granted only if all of the following four "essential prerequisites" are proven: (1) a strong likelihood of success on the merits; (2) a showing of immediate and irreparable harm that cannot be compensated by monetary damages; (3) a showing that greater harm will result if preliminary injunction relief is denied than if such relief is granted; and (4) a showing that a preliminary injunction would restore the *status quo*.

LABOR AND EMPLOYMENT / NONCOMPETES

In order to be enforceable, a restrictive covenant must satisfy three requirements: (1) the covenant must relate to either a contract for the sale of good will or other subject property or to a contract for employment; (2) the covenant must be supported by adequate consideration; and (3) the application of the covenant must be reasonably limited in both time and territory.

LABOR AND EMPLOYMENT / NONCOMPETES

Pennsylvania law permits equitable enforcement of employee covenants not to compete only so far as reasonably necessary for the protection of the employer.

LABOR AND EMPLOYMENT / NONCOMPETES

Restrictive covenants are not favored in Pennsylvania, and have historically been viewed as a trade restraint that prevents a former employee from earning a living.

LABOR AND EMPLOYMENT / NONCOMPETES

Whether a non-compete agreement should be enforced requires a balancing test wherein the court balances the employer's protectible business interests against the interest of the employee in earning a living in his or her chosen profession, trade or occupation, and then balances the result against the interest of the public.

LABOR AND EMPLOYMENT / NONCOMPETES

A restrictive covenant precluding health care employees from competing within a twenty-mile radius of the employer's office for a period of one year is not unreasonable, especially where that radius is limited to an area less than that of the employer's service area.

EQUITY / PRINCIPLES OF EQUITY / UNCLEAN HANDS

The unclean hands doctrine is applicable when the court, in its discretion, finds that the party seeking affirmative relief is guilty of fraud, unconscionable conduct or bad faith directly related to the matter at issue that injures the other party and affects the balance of equities between the litigants.

EQUITY / PRINCIPLES OF EQUITY / UNCLEAN HANDS

The doctrine of unclean hands does not bar relief to a party merely because his conduct in general has been shown not to be blameless.

EQUITY / PRINCIPLES OF EQUITY / UNCLEAN HANDS

The doctrine of unclean hands only applies where the wrongdoing directly affects the relationship subsisting between the parties and is directly connected to the matter in controversy.

EQUITY / INJUNCTIONS

In the preliminary injunction context, irreparable harm occurs in two situations: (1) where the subject matter of the contract is of such special nature or particular value that damages are inadequate; or (2) where, because of some special and practical features of the contract, it is impossible to ascertain the legal measure of loss so that money damages are impracticable.

EQUITY / INJUNCTIONS

Irreparable harm has been found in the commercial context where there is an impending loss of a business opportunity or market advantage.

EQUITY / INJUNCTIONS

It is not the initial breach of the covenant which necessarily establishes the existence of irreparable harm, but rather the threat of unbridled continuation of the violation and the resultant incalculable damage to the former employer's business that constitutes the jurisdiction for equitable intervention.

EQUITY / INJUNCTIONS

Harm to the public is an additional consideration in the issuance or denial of a preliminary injunction.

EQUITY / INJUNCTIONS

The status quo to be maintained by a preliminary injunction is the last actual, peaceable and lawful noncontested status which preceded the pending controversy.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - EQUITY
NO. 10098 of 2011

Appearances: Arthur D. Martinucci, Esquire, Attorney for Plaintiff
Richard T. Ruth, Esquire, Attorney for Defendants

OPINION

Connelly, J., May 2, 2011

This matter is before the Court pursuant to Trusted and Reliable Healthcare, Inc.'s (hereinafter "Plaintiff") Complaint in Equity and Petition for Preliminary Injunction. ePeople Health Care, Inc. d/b/a eKidz Care, Sharon Yost, Sarah Trujillo[1] and Katherine Gustafson (hereinafter "Defendants") oppose. A hearing was held at which the Court took testimony.

Statement of Facts

Defendants Yost and Gustafson began working for Plaintiff on March 8, 2010. Defendant Yost, who was acting as the Plaintiff's Director of Clinical Operations, resigned from Plaintiff's employ on October 10, 2010. Defendant Gustafson was employed as Plaintiff's Director of Nursing from March 8, 2010 to September 23, 2010 - the date she resigned from her position. Defendants Yost and Gustafson signed a restrictive covenant during their employment with Plaintiff.

Defendant Yost testified she began working for Defendant eKidz on October 10, 2010. Defendant Gustafson began working for Defendant eKidz after Defendant Yost, but no later than November of 2010. *Petition for Preliminary Injunction*, ¶ *13*.

Plaintiff filed a Petition for Preliminary Injunction seeking to enjoin Defendants Yost and Gustafson from working at Defendant eKidz as Plaintiffs allege such work is in violation of the restrictive covenants.

Analysis of Law

A preliminary injunction is a most extraordinary form of relief that will be granted only in the most compelling cases. *Goodies Olde Fashion Fudge Co. v. Kuiros,* 597 A.2d 141 (Pa.Super. 1991). A preliminary injunction should be granted only if all of the following four "essential prerequisites" are proven: (i) a strong likelihood of success on the merits; (ii) a showing of immediate and irreparable harm that cannot be compensated by money damages; (iii) a showing that greater injury will result if preliminary injunctive relief is denied than if such injunctive relief is granted; and (iv) a showing that a preliminary injunction would restore the status quo. *Allegheny Anesthesiology Assocs. v. Allegheny*

[1] At the hearing, Plaintiff's counsel, Arthur Martinucci, Esquire, informed the Court he was not seeking an injunction against Defendant Sarah L. Trujillo.

Gen. Hosp., 826 A.2d 886, 891 (Pa.Super. 2003), *appeal denied,* 844 A.2d 550 (Pa. 2004).

I. A strong likelihood of success on the merits

In order to determine whether Plaintiff has a strong likelihood of success on the merits, the Court must first ascertain whether the restrictive covenants are in fact valid and enforceable and if so whether Defendants violated the terms of the covenants. The standard for which the validity of a restrictive covenant not to compete is considered has been set forth by the Pennsylvania Supreme Court.

> The law in this [C]ommonwealth for more than a century has been that in order to be enforceable, a restrictive covenant must satisfy three requirements: (1) the covenant must relate to either a contract for the sale of good will or other subject property or to a contract for employment; (2) the covenant must be supported by adequate consideration; and (3) the application of the covenant must be reasonably limited in both time and territory.

Maintenance Specialties v. Gottus, 314 A.2d 279 (Pa. 1974). *See also, Quaker City Engine Rebuild v. Toscano,* 535 A.2d 1083 (Pa.Super. 1987).

Pennsylvania law permits equitable enforcement of employee covenants not to compete only so far as reasonably necessary for the protection of the employer. However, restrictive covenants are not favored in Pennsylvania and have been historically viewed as a trade restraint that prevents a former employee from earning a living, *Hess v. Gebhard & Co.,* 808 A.2d 912 (Pa. 2002). In other words, a determination of whether a non-compete agreement should be enforced "requires the application of a balancing test whereby the court balances the employer's protectible business interests against the interest of the employee in earning a living in his or her chosen profession, trade or occupation, and then balances the result against the interest of the public." *Id.* at 920.

Instantly, the hearing testimony indicates the non-compete agreements were signed as a condition to both Defendants Yost and Gustafson's employment. Steven O'Dell, Plaintiff's President and Owner, testified he is required by his franchise agreement to obtain signed restrictive covenants from any employee who will have access to email. Moreover, O'Dell testified neither Defendants Yost nor Gustafson would have been employees of BrightStar had they not signed the agreement. Plaintiff presented screenshots of the emails sending the signed restrictive covenants to its franchisor. *See, Exhibits F and I-K.* The exhibits verify Defendant Yost's signed non-compete agreement was sent on March 4, 2010 and Defendant Gustafson's signed non-compete was emailed on March 8, 2010.

Defendants assert there are substantial questions about when the non-competes were signed and what induced Defendants Yost and Gustafson to sign. *Defendants' Closing Brief, p. 8.* However, there is no credible evidence of these alleged questions. Defendant Yost testified that she did not believe she was required to sign the agreement[2], but her letter of resignation acknowledged the agreement was something she was required to sign as a condition of her employment. *See, Exhibit B.* Defendant Gustafson testified she hastily signed the agreement while on the phone, but did not learn of the agreement until weeks later. Both Defendants allege O'Dell told them the agreement was only used so they could obtain e-mail and software usage privileges. However, the plain language in the covenant and the statement made by Defendant Yost in her letter of resignation defies Defendants' contention.

The Court concludes the covenant related to a contract for employment and was supported by adequate consideration and was related to Defendants' employment.

It must next be determined whether the application of the covenant was reasonably limited in both time and space. The restrictive covenant precludes employees from engaging in competition with Plaintiff within a twenty-mile radius of Plaintiff's office for a period of one year. *Exhibit B.* Defendants make no argument that such restraints are unreasonable. Moreover, as the application is limited to an area less than that of Plaintiff's service area, the geographic limitation does not appear to be unreasonable.

It is undisputed that Defendant Yost left Plaintiff's employ in October of 2010 and immediately began working for Defendant eKidz. Similarly, Defendant Gustafson left Plaintiff's employ in September 2010 and subsequently began working for Defendant eKidz. Defendant eKidz is a competitor of Plaintiff and with the help of Defendant Yost opened an Erie office. Therefore, the Court finds both Defendants Yost and Gustafson are in violation of the non-compete agreement.

Defendants argue Plaintiff's conduct forced Defendants Yost and Gustafson to resign so they could preserve their licenses and reputations.

The unclean hands doctrine is applicable when the court, within its discretion, finds the party seeking affirmative relief is guilty of fraud, unconscionable conduct or bad faith directly related to the matter at issue that injures the other party and affects the balance of equities between the litigants. The doctrine does not bar relief to a party merely because his conduct in general has been shown not to be blameless. *Equibank v. Adle, Inc.,* 595 A.2d 1284 (Pa.Super. 1991). "The doctrine only applies where the wrongdoing directly affects the relationship subsisting between

[2] The testimony demonstrated that Defendant Yost attempted to, under false pretenses, obtain a release from the restrictive covenant prior to leaving Plaintiff's employ. *See, Testimony of Yost and O'Dell.*

the parties and is directly connected to the matter in controversy." *In re Estate of Pedrick,* 482 A.2d 215, 223 (Pa. 1984).

Instantly, Defendants Yost and Gustafson indicate they left BrightStar because of its allegedly questionable business practices. Both Defendants Yost and Gustafson mentioned concerns with their reputations should they continue to work at BrightStar. *See, Exhibits B, L.* Defendant Yost testified Plaintiff improperly paid its employees[3] and participated in Medicare fraud. Defendants presented no credible evidence of Medicare fraud and offered absolutely no documentary evidence of such.

In fact, neither Defendant Yost nor Gustafson made any attempt to report any alleged fraud to the authorities. Defendant Yost merely used her knowledge of the alleged fraud to threaten Plaintiff through his attorney to stop the litigation. *Plaintiff's Supplemental Brief in Support, p. 6.* Had the offenses committed by Plaintiff been so egregious as to force two employees out of the business, it seems unlikely that the Defendants never felt the need to report such activities.

Here, the Court finds there is not sufficient evidence to show Plaintiff had unclean hands. Because the restrictive covenants appear to be valid and Defendants Yost and Gustafson are in violation of them, Plaintiff has shown a strong likelihood of success on the merits.

II. A showing of immediate and irreparable harm that cannot be compensated by money damages.

In the preliminary injunction context, irreparable harm results in two situations: (1) where the subject matter of the contract is of such a special nature or peculiar value that damages are inadequate; or (2) where because of some special and practical features of the contract, it is impossible to ascertain the legal measure of loss so that money damages are impracticable. *ECRI v. McGraw-Hill, Inc.,* 809 F.2d 223, 226, 227 (3d. Cir. 1987). Irreparable harm has been found in the commercial context where there is an impending loss of a business opportunity or market advantage. *Sovereign Bank v. Harper,* 674 A.2d 1085,1093 (Pa. Super. 1996).

Plaintiff asserts Defendants' activities have caused great harm to its relationships with referral sources and potential clients and will continue to do so. *Plaintiff's Supplemental Brief in Support, p. 15.* Defendants argue that because Plaintiff is in virtually the same financial position as it was in early 2010, there is no immediate and irreparable harm. Defendant asserts "this is not a situation where ePeople has 'stolen' clients or taken customer lists" as referral sources are available to anyone in the business. *Defendants' Closing Brief, p. 5.*

[3] O'Dell acknowledged that there had been payroll problems in the past, but the issue was corrected during Defendant Yost's tenure.

Plaintiff provides medical and non-medical home healthcare and medical staffing services to pediatric, adult and senior citizens in Erie County and the surrounding area. *Plaintiff's Brief in Support of Petition, p. 1*. Defendant eKidz's Website listed services such as 24/7 care, geriatric care management, homecare aide/personal care, housekeeping, pediatric care and meals. *Plaintiff's Exhibit B*. The Website also noted eKidz was Medicare certified. *Id.* However, Defendant Yost testified eKidz was not Medicare certified and at the time of hearing had not yet "made a dime", but it was in the process of becoming Medicare certified.[4] Moreover, the Website lists the location of eKidz at 4960 Pittsburgh Avenue, Erie, PA. *Id.*

O'Dell testified Plaintiff provides all of the listed services on the eKidz Website with the exception of maternal care. O'Dell also testified eKidz was competing for the same clients and referrals as Plaintiff.

The evidence demonstrates Plaintiff and Defendant eKidz are indeed competitors as they offer the same or similar services and are competing for the same patients and referral sources. Defendant argues referral sources are available to anyone in the business and neither Plaintiff nor Defendants have any proprietary referral source relationships. *Defendants' Closing Brief, p. 5.*

In *Bryant v. Sling Testing Repair,* the Pennsylvania Supreme Court upheld the trial court's grant of preliminary injunction even though the employer proved only $427 in damages noting:

> It is not the initial breach of the covenant which necessarily establishes the existence of irreparable harm but rather the threat of unbridled continuation of the violation and the resultant incalculable damage to the former employer's business the constitutes the jurisdiction for equitable intervention. ...The covenant seeks to prevent more than just the sales that might result by the prohibited contact but also the covenant is designed to prevent a disturbance in the relationship that has been established between appellees and their accounts through prior dealings. It is the possible consequences of this unwarranted interference with customer relationships that is unascertainable and not capable of being fully compensated by money damages.

John G. Bryant Co. v. Sling Testing & Repair, Inc., 369 A.2d 1164,1167 (Pa. 1977).

Defendants rely on *Rollins Protective Services Co v. Shaffer* in which the Superior Court upheld the trial court's decision to deny a preliminary

[4] Such certification is a necessary step to prepare Defendant eKidz to perform the pediatric work that Defendants Yost and Gustafson had helped to allow Plaintiff to provide.

injunction because the record indicated the employees did not take any of the employer's customers, they did not solicit any former customers and did not take any customer lists with them when they departed and went to work for a competitor. *Rollins Protective Services Co. v. Shaffer,* 557 A.2d 413 (Pa.Super. 1989). The court opined the former employees posed no greater risk to the employer than any other similarly situated employee that had never worked for the employer. However, *Rollins* is easily distinguishable from the case at bar.

Instantly, Plaintiff presented evidence demonstrating that both Defendants Yost and Gustafson were privy to client and referral sources, Defendants Yost and Gustafson interfered in the relationship with a referral source, Defendant Yost attempted to persuade BrightStar employee Tracy Kraft to leave Plaintiff's employ and join Defendant eKidz, and Defendant Yost solicited information from Kraft regarding the findings of a Medicare audit of Plaintiff that is relevant to the Medicare certification process Defendant eKidz is currently undergoing.[5] *See, Testimony of Tracy Kraft and Defendant Yost.*

Therefore, the Court finds Plaintiff presented evidence sufficient to demonstrate a showing of immediate and irreparable harm to its business contacts and relationships.

III. A showing that greater injury will result if injunctive relief is denied.

Plaintiff asserts Defendants Yost and Gustafson's "activities have already caused great harm to - or even ended - [Plaintiff's] relationship with referral sources ... and will continue to cause further harm." *Plaintiff's Supplemental Brief in Support, p. 15.* Plaintiff alleges Defendants Yost and Gustafson have deprived Plaintiff of goodwill and interfered with established and prospective business relationships. *Id.* at p. 16. Moreover, as Defendant eKidz becomes Medicare certified, it will be able to offer all of the same services as Plaintiff.

The Court finds Plaintiff established Defendants Yost and Gustafson's actions have and will continue to harm Plaintiff, should they be allowed to continue working at eKidz in violation of their restrictive covenant. Therefore, Plaintiffs have shown greater injury will result if injunctive relief is denied.

Harm to the public is an additional consideration in the issuance or denial of a preliminary injunction. V*alley Forge Historical Society v. Washington Memorial Chapel,* 426 A.2d 1123, 1129 (Pa. 1981). Instantly, there is no harm to the public in the issuance or denial of the preliminary injunction.

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[5] Plaintiff also submitted limited evidence that Defendant Yost interfered in its relationship with client H.T., however, Plaintiff presented very little testimony and no documentary evidence regarding the alleged interference.

IV. A showing that a preliminary injunction will restore status quo.

The status quo to be maintained by a preliminary injunction is the last actual, peaceable and lawful noncontested status which preceded the pending controversy. *Id.* at 1129.

Defendants Yost and Gustafson are in breach of the restrictive covenant they signed when they began working for Plaintiff. The covenant was executed in order to protect Plaintiff's legitimate business interests. The grant of the preliminary injunction will halt Defendants' breach of the covenant and will allow Plaintiff to continue to operate just as it did prior to the breach and prevent further harm to Plaintiff. Therefore, the Court finds the granting of the preliminary injunction will restore status quo.

ORDER

AND NOW, to-wit, this 2nd day of May, 2011, it is hereby **ORDERED, ADJUDGED and DECREED,** Plaintiff's Petition for Preliminary Injunction as to Defendants Sharon M. Yost and Katherine Gustafson is **GRANTED.** Plaintiffs request for counsel fees is **DENIED.**

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

ALAN FRANK, Plaintiff
v.
LAURIE C. TeWINKLE and ANTHONY SCIARRINO, Defendants

ALAN FRANK, Plaintiff
v.
JAMES J. STUCZYNSKI and BRUCE W. BERNARD, Defendants

PLEADINGS / PRELIMINARY OBJECTIONS

Demurrers should be sustained only where Plaintiff has clearly failed to state a claim upon which relief might be granted.

PLEADINGS / PRELIMINARY OBJECTIONS

Demurrers should not be sustained if there is any doubt as to whether a complaint adequately states a claim of relief under any theory.

PLEADINGS / PRELIMINARY OBJECTIONS

Only factual allegations in a complaint, and not legal conclusions, are to be considered to be true for purposes of ruling on a demurrer.

CHAMPERTY AND MAINTENANCE

Champerty is an agreement between a litigant and a party unrelated to the litigation, in which the unrelated party helps pursue the claim in consideration for part of the proceeds of the litigation.

CHAMPERTY AND MAINTENANCE

There are three (3) elements to a champertous claim: (1) the unrelated party has no legitimate interest in the suit; (2) the unrelated party must expend its own resources in pursuit of the claim; and (3) the unrelated party must be entitled to share in the proceeds of the suit.

CHAMPERTY AND MAINTENANCE

Champertous agreements are repugnant to public policy.

CHAMPERTY AND MAINTENANCE

The common law prohibition against champerty continues to be a viable doctrine in Pennsylvania.

CIVIL PROCEDURE / STANDING

A plaintiff who sues on the basis of a champertous agreement is not a "real party in interest" and lacks standing to maintain such an action. Pa.R.C.P. 2002.

CHAMPERTY AND MAINTENANCE

Where a plaintiff comes to litigation on the basis of the assignment of a claim in which the assignor continues to maintain a contingent interest, the underlying assignment is champertous. The assignee is not a real party in interest and lacks standing to maintain the action.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW
Nos. 13524-2010 and 13585-2010 respectively

Appearances: Alan Frank, *Pro Se* Plaintiff
Patrick M. Carey, Esq., Attorney for Defendants Sciarrino and Tewinkle
James R. Schadel, Esq. and Gregory J. Norton, Esq., Attorneys for Defendants Stuczynski and Bernard

OPINION

Connelly, J., June 21, 2011

This matter is before the Court pursuant to Preliminary Objections filed by Bruce W. Bernard and James J. Stuczynski (hereinafter "Defendants Bernard and Stuczynski"). Alan Frank (hereinafter "Plaintiff") opposes. Also before the Court are Preliminary Objections filed by Laurie C. Tewinkle and Anthony Sciarrino (hereinafter "Defendants Tewinkle and Sciarrino"). Plaintiff opposes.[1] Finally, before the Court is Plaintiff's Motion Seeking a Determination as to the Necessity of Filing a Certificate of Merit.

Statement of the Facts

The instant matter stems from two separate lawsuits filed by Plaintiff, both alleging breach of contract. Plaintiff admits to being a former Pennsylvania attorney whose license has been suspended since July 15, 1988. *Plaintiff's Reply to Defendants Tewinkle and Sciarrino's Preliminary Objections,* ¶10. Through an advertisement for Overcharge Recovery Co., Plaintiff solicited the assignment of the claims of Arthur Voorhis (13524-2010) and Kenneth and Alexis Plonski (13585-2010). Following the assignments, Plaintiff initiated these lawsuits alleging Defendant Attorneys breached their contract with their clients by making unauthorized disbursements from settlements for attorney fees. *See Amended Complaints.*

Defendants allege Plaintiff is engaged in the unauthorized practice of law as evidenced by the advertisement and the "Assignment of Claims and Choses in Action" in which Plaintiff agrees to pay the assignors a percentage of the net proceeds recovered in the instant matters.

Defendants Sciarrino and Tewinkle filed Preliminary Objections alleging Plaintiff's failure to attach a copy of the Assignment and the settlement disbursement documents is in violation of Pa.R.C.P. No. 1019(i). *Defendants Sciarrino and Tewinkle, Preliminary Objections,* ¶13. Defendants Sciarrino and Tewinkle also allege Plaintiff has a lack of capacity to sue and the claims filed by Plaintiff constitute champerty and as such must be dismissed. *Defendants Sciarrino and Tewinkle's Preliminary Objections,* ¶¶1-29.

[1] The Court notes the above cases are related cases and have not been consolidated. However, as the parties present nearly identical arguments as to the Preliminary Objections, the Court will address both cases in one single Opinion.

Defendants Bernard and Stuczynski filed Preliminary Objections alleging Plaintiff failed to attach a copy of the Assignment, the written contract and the disbursement agreements. Defendants also allege Plaintiff cannot establish a breach of contract, Plaintiffs claim is champertous and void as against public policy, Pennsylvania law does not support this type of assignment and Plaintiff is not entitled to punitive damages. *Defendants Bernard and Stuczynski's of Preliminary Objections,* ¶¶ *1-21*.

Plaintiff filed replies to the Preliminary Objections and Briefs in Support thereof. However, he did not file the Briefs with the Prothonotary, therefore, they are not included on the docket. Because the Briefs were filed with the Court and were served upon Defendants, the Court will still consider Plaintiff's arguments despite the fact the Briefs are not officially part of the record.

The Court will address the issues in light of the relevant Pennsylvania Law.

Analysis of Law

I. Legal Insufficiency of a Pleading (Demurrer) - Champerty

The question presented by a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. *Eckell v. Wilson,* 597 A.2d 696, 698 (Pa. Super. 1991), *appeal denied,* 607 A.2d 253 (Pa. 1992). A demurrer should be sustained only in cases where the plaintiff has clearly failed to state a claim on which relief may be granted. *Id.* A demurrer should not be sustained if there is any doubt as to whether the complaint adequately states a claim for relief under any theory. *Id.* Only the factual allegations in a complaint are considered to be true for the purposes of a demurrer, not the pleader's conclusions of law. *Id.*

Defendants Sciarrino and Tewinkle and Defendants Bernard and Stuczynski both allege because Plaintiff "bought" litigation he had no interest in, is paying the fees associated with the litigation, and is retaining a percentage interest in the litigation, the purported assignment is a champertous contract that is not enforceable. *Defendants Bernard and Stuczynski Preliminary Objections,* ¶*19*; *See also Defendants Sciarrino and Tewinkle's Preliminary Objections,* ¶*22*. Defendants also allege public policy prohibits such an assignment as it constitutes the unauthorized practice of law. *Id.*

Plaintiff argues by assignment he became the exclusive owner of 100% of the proceeds of the suits. He avers the clients, Mr. Voorhis and Mr. and Mrs. Plonski have no interest in the instant litigation. Plaintiff contends he is merely a factor, not a champertor. *Plaintiff's Brief in Opposition to Defendants Tewinkle and Sciarrino's Preliminary Objections, pp. 3-4.*

Champerty is "an agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the

litigant's claim as a consideration for receiving part of the judgment proceeds." *Black's Law Dictionary, Ninth Edition (2009).* An assignment of a cause of action is not champertous in fact unless the agreement of assignment includes the proviso that the assignee will pay the assignor a share of the proceeds of the litigated matter. *See generally 15-83 Corbin on Contracts § 83.10 (2010).*

There are three distinct elements contained in the definition of champerty. *Belfonte v. Miller,* 243 A.2d 150, 152 (Pa.Super. 1968). The party involved must be one who has no legitimate interest in the suit; he must expend his own money in prosecuting the suit; and, finally, he must be entitled by the bargain to a share in the proceeds of the suit. *Id.* "A champertous agreement is one in which a person having otherwise no interest in the subject matter of an action undertakes to carry on the suit at his own expense in consideration of receiving a share of what is recovered." *Richette v. Pennsylvania R.R.,* 187 A.2d 910, 920 (Pa. 1963).

Instantly, Plaintiff acquired an assignment of the clients' interests by paying cash for them. Absent these assignments, Plaintiff has no legitimate interest in the suits. Second, Plaintiff is spending his own money in prosecuting the suits as he is the *pro se* Plaintiff and as such is responsible for the filing fees and the costs associated with the pursuit of the instant cases. Finally, the assignments give Plaintiff an interest in the proceeds of the suits.[2] Both of the Assignments state in Paragraph Two "[a]s consideration for, and in full payment of said sale, transfer and assignment of all of said claims, causes and choses in action, [Plaintiff] hereby transfers to [clients] the sum of [redacted] ... [Plaintiff] hereby agrees to pay [clients] for said cooperation services an amount equal to [redacted] of the net proceeds [Plaintiff] recovers." *Defendants Bernard and Stuczynski's Preliminary Objections, Attachment; Defendants' Sciarrino and Tewinkle's Preliminary Objections, Exhibit 5.*

Plaintiff avers that in a champertous transaction, the champertor acquires a partial or non-exclusive interest in the litigation of another, thereby exposing the defending litigant to the risk of duplicitous liability to both the champertor and his assignor. Plaintiff argues that by virtue of the assignments, Plaintiff became the owner of 100% of the proceeds of the instant suit and no other persons have interest in the suit. *Plaintiff's Reply to Defendants Bernard and Stuczynski's Preliminary Objections, p. 2.*

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[2] The Assignment at Docket 13585-2010 signed on July 29, 2010 by Plaintiff and Alexis and Kenneth Plonski states in Paragraph One the Plonskis "sell, assign and transfer all of their right, title and interest in any and all claims, causes or choses in action that [they] might have against any person, firm or corporation that received any portion of the proceeds of said verdict and settlement." Such a transfer was made for a sum of money, which Plaintiff has redacted in the assignment documents provided to the Court. The Assignment at Docket 13524-2010 signed on July 22, 2010 by Plaintiff and Arthur Voorhis includes the same language at Paragraph One.

However, a careful reading of the assignments reveals that each assignment provides in Paragraph Six[3] "[Plaintiff] hereby agrees to pay Victim for said cooperation services an amount equal to [redacted] of the net proceeds [Plaintiff] recovers." *Defendants Tewinkle and Sciarrino's Preliminary Objections, Exhibit 5.* In spite of Paragraph Six, Plaintiff still avers that pursuant to Paragraphs One and Two (above) he is the owner of 100% of the proceeds of the instant actions.

Defendants Bernard and Stuczynski assert Plaintiff has not received an assignment, rather, he has agreed to "buy a claim" and retain only a percentage of that claim. *Defendants Bernard and Stuczynski's Brief in Support of Preliminary Objection, p. 4.* Defendants allege that such a deal is void as against public policy. *Id.*

> A bargain to endeavor to enforce a claim in consideration of a promise of a share of the proceeds, or any other fee contingent on success, is illegal, if it is also part of the bargain that the party seeking to enforce the claim shall pay the expenses incident thereto unless such party already has or reasonably believes he has an interest recognized by law in the claim.

Belfonte v. Miller, 243 A.2d 150, 152 (Pa.Super. 1968).

The Commonwealth Court held in *Clark v. Cambria County Board of Assessment Appeals* the activity of champerty has long been considered repugnant to public policy against profiteering and speculating in litigation and grounds for denying the aid of the court. *Clark v. Cambria County Bd. of Assessment Appeals,* 747 A.2d 1242, 1245-46 (Pa. Cmwlth. 2000), *appeal denied,* 598 A.2d 1292 (Pa. 2002). The common law doctrine against champerty and maintenance continues to be a viable doctrine in Pennsylvania and can be raised as a defense. *Kenrich Corp. v. Miller,* 377 F.2d 312, 314 (3d Cir. 1967); *Westmoreland County v. Rodgers,* 693 A.2d 996 (Pa. Cmwlth. 1997). Moreover, a plaintiff who sues on what would be another's claim except for such champertous agreement will not be permitted to maintain an action as such a plaintiff is not a "real party in interest" as required by Pa. R.C.P. No. 2002 and would not have standing to maintain the action. *Clark,* 747 A.2d at 1246.

Pa.R.C.P. No. 2002 provides:

> (a) Except as otherwise provided in clauses (b), (c) and (d) of this rule, all actions shall be prosecuted by and in the name of the real party in interest, without distinction between contracts under seal and parol contracts.

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[3] The Assignment at Docket 13585-2010 appears to be misnumbered, therefore the above statement begins at Paragraph Five and ends at Paragraph Six. *See Defendants Bernard and Stuczynski's Preliminary Objections, Attachment.*

> (b) A plaintiff may sue in his or her own name without joining as plaintiff or use-plaintiff any person beneficially interested when such plaintiff
>
> > 1. is acting in a fiduciary or representative capacity, which capacity is disclosed in the caption and in the plaintiff's initial pleading.; or
> >
> > 2. is a person with whom or in whose name a contract has been made for the benefit of another.

Pa.R.C.P No. 2002. To be a real party in interest one must not merely have an interest in the result of the action, but must be in such command of the action as to be legally entitled to give a complete acquittal or discharge to the other party upon performance. *Clark,* 747 A.2d 1242. A person cannot invoke the jurisdiction of a court to enforce private rights, or to maintain a civil action for the enforcement of such rights, unless that person has some real interest in the cause of action, or a legal right, title, or interest in the subject matter of the controversy. *Sierra Club v. Hartman,* 605 A.2d 309 (Pa. 1992).

In *Clark,* the Commonwealth Court held agreements between a non-interested third-party who solicited property owners for the purposes of providing services in the preparation and filing of tax assessment appeals and the property owners were champertous. *Clark,* 747 A.2d 1247. The Court agreed with the trial court's determination that the agreements were champertous because the third-party was not a person aggrieved by the assessments involved and therefore had no legitimate interest in the suit; the litigations were entirely financed by the third-party and not by the property owners; and that the third-party shared in the benefits of the appeals as the third-party received a portion (usually 100%) of the tax reduction for the first year. *Id.* The Court held because the agreements were champertous, the uninterested third-party was not the real party in interest and the trial court was without jurisdiction to hear the appeals. *Id.*

Similarly, Plaintiff is a third-party who was not aggrieved by the alleged wrongs of Defendants and therefore has no legitimate interest in the suit. Plaintiff is financing the litigation[4] and should he prevail, Plaintiff will get a portion of the proceeds of the suits. Therefore, because the Assignments between Plaintiff and Arthur Voorhis and Kenneth and Alexis Plonski are champertous, they are void as against public policy.

Plaintiff is not the real party in interest and is without standing to pursue the instant matters. Therefore, the suits must be dismissed.

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[4] A close look at the dockets reveals Plaintiff paid all of the filing fees associated with Erie County Dockets 13585-2010 and 13524-2010.

The Court need not discuss the merits of Defendants' other Preliminary Objections nor the merits of the Necessity of Filing a Certificate of Merit as they have been rendered moot by instant cases' dismissal.

ORDER

AND NOW, TO-WIT, this 21st day of June, 2011, it is hereby **ORDERED, ADJUDGED and DECREED**:

1. Defendants Sciarrino and Tewinkle's Preliminary Objection in the Nature of a Demurrer is **GRANTED.** The action at Docket 13524-2010 is **DISMISSED.**
2. Defendants Stuczynski and Bernard's Preliminary Objection in the Nature of a Demurrer is **GRANTED.** The action at Docket 13585-2010 is **DISMISSED.**

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

FREDERICK KARASH
v.
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION

CRIMINAL PROCEDURE / DRIVING UNDER THE INFLUENCE

A police officer has properly asked a licensed driver to submit to a chemical test as required by the second prong of the four-part *Martinovic* test for suspending a licensee's operating privilege for failure to submit to a chemical test when the officer reads the *O'Connell* warning contained in PennDOT form DL-26 to the driver on two occasions, despite the fact that the licensee claims not to understand the warnings.

CRIMINAL PROCEDURE / DRIVING UNDER THE INFLUENCE

Stalling behavior on the part of a licensed driver after being asked to submit to a chemical test is sufficient to demonstrate a refusal to submit to the test since a licensee's overall conduct can demonstrate a refusal and anything less than an unqualified, unequivocal assent constitutes a refusal under 75 Pa.C.S. § 1547.

CRIMINAL PROCEDURE / DRIVING UNDER THE INFLUENCE

When a licensed driver claims to be confused over the meaning of the *O'Connell* warning contained in PennDOT form DL-26 and repeatedly asks questions about the meaning of the form, whether this conduct constitutes a refusal of a chemical test is a question of fact to be determined based on whether the factfinder finds the driver or the police officer more credible.

CRIMINAL PROCEDURE / DRIVING UNDER THE INFLUENCE

Once a motorist has been read the *O'Connell* warning contained in PennDOT form DL-26, his refusal to submit to chemical testing under the terms of the Implied Consent Law will not be excused as unknowing on the basis of the motorist's subjective beliefs regarding his legal rights.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 13948-2010

Appearances: Dennis Williams, Esq., on behalf of Frederick Karash, Appellant[1]
Chester J. Karas, Jr., Esq., on behalf of the Department of Transportation, Appellee

[1] At the time of the hearing before this Lower Court, Appellant was represented by Douglas G. McCormick, Esq.

OPINION

Domitrovich, J., February 7, 2011

This matter is currently before the Commonwealth Court of Pennsylvania on the appeal of Frederick Karash (Appellant/Licensee) from this Trial Court's Order of November 23, 2010, in which after a full hearing, this Trial Court denied Appellant's appeal from the Pennsylvania Department of Transportation's (PennDOT's) suspension of his driving privileges for a period of one (1) year, due to a Chemical Test Refusal, pursuant to 75 Pa.C.S. § 1547(b)(l)(ii).

With regard to the factual and procedural history of this case, on July 10, 2010, Officers Craig Gourley and Michael Sliker of the North East Police Department were attending to a traffic stop. During that traffic stop, Officer Sliker informed Officer Gourley that a green GMC vehicle was en route with one of its headlights out. Officer Gourley followed the green GMC vehicle and performed a traffic stop on the green GMC vehicle. Officer Gourley ran the registration of the vehicle and Dispatch advised him that the vehicle was under Appellant, Frederick Karash's, name. When Officer Gourley approached the vehicle and began speaking to Appellant, he detected the odor of an alcoholic beverage emanating from inside the cabin of the vehicle. Appellant was seated in the driver's seat of the vehicle. While Officer Gourley was speaking with Appellant, Appellant exhibited slurred speech and his breath smelled of alcohol. When Officer Gourley asked Appellant to exit the vehicle, Officer Gourley noticed that Appellant needed to use both of his arms to keep himself up while exiting the vehicle and that Appellant was unsteady on his feet. Officer Gourley advised Appellant that a series of field sobriety tests would be conducted and radioed Officer Sliker for back up assistance.

When Officer Sliker arrived, Officer Sliker conducted the walk and turn test and the one leg stand test. Officer Sliker also offered Appellant the horizontal gaze nystagmus (HGN) test and the portable breath test (PBT). Officer Sliker explained and demonstrated the walk and turn test to Appellant. Officer Sliker credibly stated that Appellant performed poorly on the test in that he continuously raised his arms from his side, lost his balance, raised his arms above his head, was heavy footed and stopped and questioned the procedure while making the turn. With respect to the one leg stand test, Officer Sliker credibly stated Appellant was off balance. Officer Sliker began performing the HGN test on Appellant, but Appellant refused to follow the pen and stated he would not take the test. Officer Sliker also offered Appellant the PBT, and Appellant refused to take it. Appellant then requested a blood test. While interacting with Appellant, Officer Sliker observed that Appellant had watery and bloodshot eyes, spoke with slurred speech, swayed when standing straight, was unstable while walking, and the odor of an

alcoholic beverage was emanating from his breath and person. Based on Officer Sliker's observations and Appellant's performance on the field sobriety tests, Officer Sliker determined Appellant was intoxicated. Officer Sliker placed Appellant under arrest for Driving Under the Influence and informed Appellant that he would be transported for the blood test. Specifically, Officer Sliker handcuffed Appellant and placed him in the rear of Officer Gourley's vehicle.

When they arrived at the police station, Appellant was placed in a holding cell until the paramedic who could perform the blood test arrived. When the paramedic was ready, Officer Sliker advised Appellant that the paramedic was available for the blood draw and took him to the room where the paramedic performs the blood draws. While there, Officer Sliker read Appellant PennDOT's DL-26 Form, titled "Chemical Testing Warnings and Report of Refusal Submit to Chemical Testing as Authorized by Section 1547 of the Vehicle Code in Violation Section 3802." See Commonwealth's Exhibit 1, document 2. The DL-26 Form includes the chemical testing warnings commonly referred to as the O'Connell[2] warning. Appellant expressed that he did not understand the warnings that Officer Sliker read to him. Officer Sliker read the DL-26 Form again. Appellant again stated he did not understand. Appellant was then given two minutes to read the Form to himself. Appellant asked if he could refer to the Vehicle Code. At that point, because Appellant was stalling, Officer Sliker considered Appellant's conduct to constitute a refusal to submit to the blood test.

On August 6, 2010, PennDOT sent a letter to Appellant notifying Appellant of the suspension of his driving privilege for one year, which would take effect September 10, 2010. Commonwealth's Exhibit 1. Appellant appealed the suspension of his driving privilege and a hearing on the matter was held before this Lower Court on November 23, 2010. Following the hearing, this Lower Court determined PennDOT met its burden of proof and denied Appellant's Petition for Appeal. Appellant then filed the instant appeal.

In his Pa. R.A.P. 1925(b) Concise Statement Of Matters Complained Of On Appeal, Appellant raises six issues, which this Lower Court properly combined into the following two issues: (1) Whether this Lower Court erred and/or abused its discretion in finding that PennDOT met its burden with respect to each of the prongs of the four part test PennDOT must satisfy in order to issue a one year license suspension; and (2) Whether this Lower Court erred and/or abused its discretion in finding that Appellant did not meet his burden to prove that his refusal to submit to chemical testing was not knowing and conscious.

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[2] *See Commonwealth Dept of Transp., Bureau of Traffic Safety v. O'Connell,* 521 Pa 242, 555 A.2d 873 (1989).

Appellant's first issue raised on appeal concerns whether PennDOT has met its burden of proof. "Pennsylvania's 'Implied Consent Law,' 75 Pa. C.S. §1547(b), provides generally that when a licensee is placed under arrest for driving under the influence (DUI) and is asked to submit to a chemical test, a refusal to submit to the test will result in a 12-month license suspension." *Martinovic v. Dep't of Transp., Bureau of Driver Licensing,* 881 A.2d 30, 31 (Pa. Comwlth. 2005). In order for the Department of Transportation to issue a one-year license suspension, it must satisfy a four-part test, which was explained by the Commonwealth Court of Pennsylvania in *Martinovic*:

> To issue a one-year suspension of Licensee's operating privilege under Section 1547(b)(1) of the Vehicle Code, the Department has the burden of proving that (1) Licensee was arrested by a police officer who had 'reasonable grounds to believe' that Licensee was operating or was in actual physical control of the movement of a vehicle while in violation of Section 3802 (i.e. while driving under the influence); (2) Licensee was asked to submit to a chemical test; (3) Licensee refused to do so; and (4) Licensee was specifically warned that a refusal would result in suspension of his operating privileges and would result in enhanced penalties if he was later convicted of violating Section 3802(a)(1).

Martinovic v. Dep't of Transp., Bureau of Driver Licensing, 881 A.2d 30, 34 (Pa. Comwlth, 2005).

The first element requires that Appellant be arrested by a police officer who had reasonable grounds to believe that Appellant was operating or was in actual physical control of the movement of a vehicle while in violation of Section 3802. *Id.* "Reasonable grounds exist when a person in the position of the police officer, viewing the facts and circumstances as they appeared at the time, could have concluded that the motorist was operating the vehicle while under the influence of intoxicating liquor." *Banner v. Dep't of Transp., Bureau of Driver Licensing,* 558 Pa. 439, 446, 737 A.2d 1203, 1207 (1999)(citing *Dipaolo v. Dep't of Transp., Bureau of Driver Licensing,* 700 A.2d 569 (Pa. Cmwlth. 1997).

In the instant matter, Officer Gourley of the North East Police Department performed a traffic stop on Appellant's vehicle, which had a malfunctioning headlight. When Officer Gourley approached Appellant's vehicle to speak to Appellant, he smelled the odor of an alcoholic beverage emanating from inside the cabin of the Appellant's vehicle. Appellant was seated in the driver's seat of the vehicle at the time. Officer Gourley noticed slurred speech, the odor of alcohol on Appellant's breath, that Appellant was unsteady on his feet and that Appellant needed to use both arms to steady himself as he exited the vehicle. Appellant also

participated in a series of field sobriety tests conducted by Officer Sliker, whom Officer Gourley had radioed for back up.

Officer Sliker explained that Appellant participated in the walk and turn test and the one-leg stand test. Appellant performed poorly on both tests. Officer Sliker then began to conduct the horizontal gaze nystagmus test (HGN), but Appellant would not follow the pen. At that point, based on Appellant's performance on the tests and Officer Sliker's observations, including that Appellant had watery, bloodshot eyes, spoke with slurred speech, swayed when standing straight, was unstable when walking, and smelled of alcohol, Officer Sliker determined Appellant was intoxicated. Furthermore, Appellant was behind the wheel of the vehicle. Considering all of the observations made by both Officers and Appellant's performance on the field sobriety tests, "a person in the position of the police officer, viewing the facts and circumstances as they appeared at the time, could have concluded that the motorist was operating the vehicle while under the influence of intoxicating liquor." *See Banner* at 446. Therefore, the Officers had reasonable grounds to believe that Appellant was operating or was in actual physical control of the movement of a vehicle while in violation of Section 3802. *See Martinovic* at 34.

Following the field sobriety tests and after Officer Sliker made his determination that Appellant was intoxicated, Officer Sliker took Appellant into custody and placed him under arrest. Specifically, Officer Sliker handcuffed Appellant and placed him in Officer Gourley's vehicle to be transported to the police station. "To constitute an arrest under section 1547(b), the licensee must be under the custody and control of the arresting officer." *Welcome v. Dep't of Transp., Bureau of Driver Licensing,* 167 Pa.Cmwlth. 245, 250 647 A.2d 971, 974 (1994). Considering that Appellant was placed in handcuffs and put into the back of a police vehicle, he was under the custody and control of the arresting officer. Therefore, an arrest took place for purposes of 75 Pa. C.S. § 1547(b). Furthermore, at the time of the hearing, Appellant admitted he was placed under arrest. *See* (N.T. License Suspension Hearing, 11/23/2010, p. 45).

Appellant was arrested by a police officer who had reasonable grounds to believe that Appellant was operating or was in actual physical control of the movement of a vehicle while in violation of Section 3802. See *Martinovic* at 34. Therefore, PennDOT satisfied its burden with respect to the first prong of the test.

The second prong of the test requires that the licensee was asked to submit to a chemical test. Prior to his arrest, Officer Sliker offered Appellant the opportunity to take a Portable Breath Test (PBT). Appellant refused to take the PBT, but requested a blood test. Officer Sliker explained to Appellant at that time that he would be placed under

arrest and transported for a blood test. After arriving at the police station, Officer Sliker let Appellant know that the paramedic was available to draw blood and asked Appellant if he would give blood. Appellant did not indicate that he would submit to a blood draw. Then, Officer Sliker read him the DL-26 Form. At numbered paragraph 2, The DL-26 Form specifically states, "I am requesting that you submit to a chemical test of blood." *See* Commonwealth's Exhibit 1, document 2. After reading the form to Appellant, Officer Sliker again asked Appellant if he was going to give blood. Officer Sliker also read Appellant the DL-26 Form a second time, which, as mentioned above, includes the language, "I am requesting that you submit to a chemical test of blood." *See* Commonwealth's Exhibit 1, document 2. Therefore, Officer Sliker asked Appellant to submit to a chemical test. Hence, PennDOT has also satisfied its burden with respect to the second prong of the test.

The third prong of the test requires that the Licensee refused to submit to the chemical test. According to the Supreme Court of Pennsylvania, "anything less than an unqualified, unequivocal assent constitutes a refusal under § 1547." *Com., Dept. of Transp. v. Renwick,* 543 Pa. 122, 131, 669 A.2d 934, 939 (1996), Here, Officer Sliker specifically asked Appellant if he would submit to a blood test. Appellant consistently responded that he did not understand the warnings that were read to him. Officer Sliker read the DL-26 Form to Appellant and Appellant stated he did not understand the warnings described in the Form. Officer Sliker read the DL-26 Form again. Appellant again stated he did not understand the Form. The Officers then gave Appellant the DL-26 Form to read over for himself for two minutes. Appellant then asked if he could refer to the Vehicle Code. Officer Sliker took the Form away from Appellant at this point and considered Appellant's conduct as an indication of his refusal to submit to the blood test. *See McCloskey v. Dep't of Transp., Bureau of Driver Licensing,* 722 A.2d 1159, 1163 (Pa. Cmwlth. 1999)(stating "[a] licensee's overall conduct can demonstrate a refusal.") This Lower Court found Officer Sliker's belief that Appellant was merely stalling when he inquired about the Vehicle Code was credible.

In *McCloskey v. Dep't of Transp., Bureau of Driver Licensing,* 722 A.2d 1159 (Pa. Cmwlth. 1999), the police officer requested that the licensee submit to a blood test after reciting the implied consent law. *McCloskey* at 1161. The police officer repeated the chemical testing warnings again and the licensee asked that the police officer repeat the warnings again. *Id.* At that point, the police officer gave the licensee the DL-26 form for him to review on his own. *Id.* The police officer read the warnings again and asked licensee whether he would submit to the blood test. *Id.* The licensee in that case did not affirmatively consent to take the blood test. *Id.* After about eight minutes from the first reading of the DL-26 form, the police officer recorded that the licensee refused to

submit to a blood test. *Id.* The trial court in that case determined that the licensee was not really confused by the warnings, but that he was "more likely than not stalling for time." *Id.* The trial court in that case denied the licensee's appeal and the Commonwealth Court affirmed the trial court's ruling. Similarly, in the instant matter, this Lower Court found Officer Sliker's statement that Appellant was stalling was credible and denied the licensee's appeal.

At the time of the Lower Court hearing, Appellant's Counsel brought up the case of *McDonald v. Dep't of Transp., Bureau of Driver Licensing,* 708 A.2d 154 (Pa. Cmwlth 1998), in which the Commonwealth Court of Pennsylvania "recognized that it is not a refusal for purposes of section 1547 of the Vehicle Code, when a licensee reasonably delays a decision because of confusion as to his or her right and then assents to submit to a chemical test when those rights are made clear." *McCloskey* at 1162. In *McDonald,* the licensee was confused regarding the warnings contained in the DL-26 form and asked the officer several questions. *McDonald* at 155. According to the officer, the exchange lasted approximately ten to fifteen minutes. *Id.* at 155. The officer in that case testified that he took the form away from the licensee because she was toying with him. *Id.* at 155. The licensee denied that she was toying with the officer and explained that she only wanted to comprehend the contents of the form before signing it. *Id.* at 155. In that case, the trial court found the testimony of the licensee was credible over that of the officer. *Id.* at 155. The Commonwealth Court agreed that ten to fifteen minutes of questioning when confused about the licensee's rights did not constitute a refusal in that case. *Id.* at 156-57. However, the Commonwealth Court "recognized that the officer's testimony presented a different picture of the licensee's behavior and seriousness than that presented by the licensee, and if accepted as credible could have supported a legal determination that the licensee refused to submit to the blood test." *McCloskey* at 1163.

The instant case resembles *McCloskey* more closely than *McDonald* in that this Lower Court found the testimony of Officer Sliker was credible. Specifically, this Lower Court found Officer Sliker's opinion that Appellant was merely stalling when he inquired about the Vehicle Code was credible. This Lower Court found that Appellant refused to submit to the blood test. Therefore, PennDOT has also satisfied its burden with respect to the third prong.

The fourth prong of the test requires that the licensee "was specifically warned that a refusal would result in suspension of his operating privileges and would result in enhanced penalties if he was later convicted of violating Section 3802(a)(1)." Officer Sliker read the DL-26 Form to Appellant twice and permitted Appellant to read over the document himself. Numbered paragraph 3 of the DL-26 Form specifically states, "If you refuse to submit to the chemical test,

your operating privilege will be suspended for at least 12 months." Commonwealth's Exhibit 1, document 2. Numbered paragraph 3 then explains enhanced penalties. *Id.* Officer Sliker specifically warned Appellant that his refusal to submit to chemical testing would result in suspension of Appellant's operating privileges and would result in enhanced penalties if Appellant was convicted under Section 3802(a)(1). This Lower Court determined that PennDOT established that Appellant was specifically warned that a refusal would result in suspension of his operating privileges and would result in enhanced penalties if he was later convicted of violating Section 3802(a)(1). Therefore, PennDOT also satisfied its burden with respect to the fourth prong of the test. *See also Yourick v. Dep't of Transp., Bureau of Driver Licensing,* 965 A.2d 341, 345 (Pa. Cmwlth. 2009)(stating, "[w]e hold therefore that the DL-26 Form is sufficient as a matter of law to meet the warning requirement under Vehicle Code Section 1547(b)....").

The second issue Appellant raises on appeal concerns whether Appellant satisfied his burden of proof. PennDOT has met its burden with respect to the four-part test. "Once that burden is met, the licensee has the burden to prove that (1) he was physically incapable of completing the [chemical] test or (2) his refusal was not knowing and conscious." *Martinovic v. Dep't of Transp., Bureau of Driver Licensing,* 881 A.2d 30, 34 (Pa. Comwlth. 2005)(citing *Dep't of Transp., Bureau of Driver Licensing v. Boucher,* 547 Pa. 440, 691 A.2d 450 (1997)). In the instant matter, Appellant claims this Lower Court erred by determining that Appellant did not prove that his refusal was not knowing and conscious. According to the Supreme Court of Pennsylvania, "a motorist is incapable of making a knowing and conscious refusal when he is unaware that his right to remain silent and his right to consult with an attorney are not applicable to the provisions of the Implied Consent Law." *Commonwealth Dep't of Transp., Bureau of Driver Licensing v. Scott,* 546 Pa 241, 249, 684 A.2d 539, 543 (1996)(citing *O'Connell,* 521 Pa. at 252, 555 A.2d at 877).

In the instant matter, Officer Sliker read the DL-26 Form, which includes the requisite warnings informing Appellant that he does not have the right to remain silent, nor the right to an attorney, to Appellant not once, but twice. Additionally, Officers Sliker and Gourley gave Appellant an opportunity to read the Form to himself. In *Scott,* the licensee, after being given the necessary warnings, refused to submit to a blood test and continued to request to talk to his attorney. In that case, the Pennsylvania Supreme Court concluded,

> once a motorist has been properly advised of his O'Connell warnings, a refusal to submit to chemical testing under the terms of the Implied Consent Law will not be excused as unknowing on the basis of the motorist's subjective beliefs regarding the

> interplay between the Implied Consent Law and his Miranda rights.

Scott at 255. In the instant matter, Appellant claims he was confused by the fact that he was being told that he would not receive the same protections that would come into effect in a criminal case. At the time of the Lower Court hearing Appellant maintained, "everybody always has rights . . . ." (N.T. License Suspension Hearing, 11/23/2010, p. 45). This Lower Court found that Appellant was not genuinely confused, but rather, was stalling. Even if Appellant subjectively did believe he had the rights afforded a criminal Defendant, pursuant to *Scott,* such confusion does not excuse a refusal to submit to chemical testing as unknowing. *Scott* at 255. Appellant provided no additional evidence to support a theory that his refusal was not knowing and conscious. Therefore, Appellant did not meet his burden, and this Lower Court did not err in finding the same.

For all of the foregoing reasons, Appellant's claims are without merit.

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

COMMONWEALTH OF PENNSYLVANIA, Plaintiff
v.
UNICREDIT AMERICA, INC., a Pennsylvania corporation, Defendant

CIVIL PROCEDURE / APPELLATE PROCEDURE

[T]his Court still has not been served with the Notice of Appeal by Defendant. See Pa. R.A.P. 906(a)(2) and Pa.R.C.P. 121(b). Filing with the Prothonotary alone is insufficient. A copy must be served upon the Court for its consideration pursuant to Pa. R.A.P. 1925.

CIVIL PROCEDURE / APPELLATE PROCEDURE

The Court notes that a Statement of Matters was filed with the Prothonotary on January 10, 2011. But, as previously stated, filing a copy with the Prothonotary is insufficient and not in compliance with the Rules of Appellate Procedure, and accordingly, this Court cannot address any allegations of errors raised by Defendant.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA No. 14914-2010

Appearances: Leslie M. Grey, Esq., Deputy Attorney General
Krista A. Ott, Esq., Attorney for Defendant

OPINION and ORDER

Procedural History

Plaintiff filed a Complaint and Petition for Special and Preliminary Injunction and Freezing of Assets on October 29, 2010. A hearing was initially scheduled for December 13, 2010, but upon discovery that the case involved injunctive relief, the Court rescheduled the hearing for November 2, 2010 in accordance with local procedure. See Erie County Local Rule 1531(b).

The parties reached an agreement during the November 2, 2010 hearing, which was accepted by the Court. *N.T.* Preliminary Injunction Hearing, 11/2/10, pp. 86-91. The Plaintiff also presented substantial written evidence and testimony in support of its Petition. *Id.* at 7-8. The Defendant did not object to this presentation and the Court admitted the evidence. Defendant had the opportunity to cross-examine every witness presented by Plaintiff. Defendant affirmatively chose not to present any testimony or evidence on its behalf and did not request additional time to submit its own evidence and testimony.

After review of the evidence submitted by Plaintiff, and in light of comments made to the media by Attorney Lawrence D'Ambrosio, an agent and employee of the Defendant, the Court, *sua sponte*, issued a Rule to Show Cause on November 4, 2010 as to why the settlement agreement should not be rescinded, and why Defendant's officers, employees, and

counsel should not be held in Contempt of Court. *See* November 4, 2010 Rule to Show Cause Order and November 8, 2010 Order.

The Rule to Show Cause hearing was held on November 10, 2010. The Court took testimony from Lawrence D'Ambrosio and heard argument from the parties. The Court issued a revised Order, granting the Preliminary Injunction and freezing Defendant's assets. *See* November 10, 2010 Order. The Court, although questioning Attorney D'Ambrosio's comments, did not find any person or party in contempt of court. The Court also gave Defendant time to make arrangements with Plaintiff regarding its payroll in a Clarification Order issued on November 24, 2010.

Defendant filed a Motion for Reconsideration and Post-Trial Relief on November 22, 2010. Defendant also filed a Motion for Recusal on December 7, 2010. The Court scheduled argument on the Motions for December 21, 2010. Neither Motion included Verifications from the Defendant as required by the Pennsylvania Rules of Civil Procedure, despite the inclusion of facts and allegations not contained in the record.

Defendant submitted another Motion for Reconsideration, Motion for Incorporation of Affidavits Into the Record and for Post-Trial Relief on December 17, 2010. The Motion reiterated almost verbatim the allegations from the prior Motion for Reconsideration and Post-Trial Relief, and also included affidavits from Gary H. Nash, Esq., a local attorney; Michael Covatto, President of Unicredit America, Inc.; and Larry Sapienza, a Pennsylvania State Constable. Again, Defendant did not attach any Verification to the Motion, nor did Defendant ask for leave of Court to supplement the record with the affidavits.

On December 10, 2010, Defendant filed a Notice of Appeal to the Court's November 10, 2010 Order. The Defendant failed to serve a copy of the Notice of Appeal upon the Court or the Plaintiff. The Court discovered the Notice during a routine review of the case docket prior to the December 21, 2010 hearing. To date, the Defendant has not served a copy of the Notice of Appeal to the Court.

At the December 21, 2010 hearing, the Court questioned defense counsel about the missing Verifications, the affidavits, and the Notice of Appeal. Counsel promised to immediately submit the proper Verifications after the hearing and the Court granted leave to do so. The failure of defense counsel to submit the Verifications despite promising to do so compels the Court to conclude that Counsel's inaction is willful. The Court declined to admit the affidavits, noting that Attorney Nash and Mr. Covatto were present at all prior proceedings and could have been called to testify for the defense at any point.

Plaintiff's counsel also informed the Court that Plaintiff had not been served with a copy of the Motion for Recusal, the Motion for Reconsideration and Post-Trial Relief or the Notice of Appeal. Plaintiff

obtained its own copies of the Motions and prepared Preliminary Objections for the December 21, 2010 hearing. The Court permitted oral argument on the Motions at the hearing.

Regarding the Notice of Appeal, defense counsel stated that a copy had been delivered to the Court. Despite the missing Notice, and in the interest of judicial economy, the Court issued a 1925(b) Order on December 23, 2010, directing Defendant to file a Statement of Matters Complained of on Appeal. To date, the Court has not received the following: Defendant's Notice of Appeal, Defendant's Statement of Matters, or any of the missing Verifications to Defendant's pleadings.

Conclusions of Law

Based on the above record, the Court now turns to Defendant's Motion to Recuse, Motions for Reconsideration and Post-Trial Relief, and Plaintiff's responses thereto, as well as Defendant's Preliminary Objections to the Complaint filed by Plaintiff.

1) Defendant's Motion for Recusal is DENIED.

The fact that a trial judge has ruled adversely on a party's petition is not a *per se* indication of partiality. *Chadwick v. Caulfield,* 834 A.2d 562, 2003 Pa.Super. 330, at 571. Further, credibility determinations are solely for the trial court to decide in its role as factfinder. *Crawford v. Crawford,* 429 Pa.Super. 540, at 550-551, 633 A.2d 155, at 160-161(1993). Since this case is an equity action, the Court has the power to assess the fairness of a particular matter as well.

Here, defense counsel provided no accurate citations to the record demonstrating this Court's alleged bias and/or partiality. While Defendant's pleadings repeatedly refer to the term "kickback," there is no mention of the term in either of the November 2nd or the November 10th proceedings, nor does the Court ever state or imply that there was a "kickback" scheme between the Defendant and the Magisterial District Judge in which District most of the complained actions were filed. The Court acknowledges discussing the events that occurred in Luzerne County at the November 10th hearing, but taken in context, it was clear that the Court's comments were not referring to kickbacks to Judges, but rather the failure of the judicial system to address a systemic problem. In this case, the Court was clearly referring to improper filings and assignments, not "kickbacks." The Court will not allow Defendant and its counsel to misconstrue the record by making false, unverified allegations in an attempt to intimidate the Court from presiding over this case.

2) This Court lacks the authority to render a decision on Defendant's Motion for Reconsideration and Post-Trial Relief.

Since Defendant filed a Notice of Appeal on December 10, 2010, the Pennsylvania Commonwealth Court currently has jurisdiction over this

matter. The Defendant is asking the trial Court to reconsider and rehear the very same matters that it has appealed to the Commonwealth Court. The Rules were not established to allow such an absurdity to occur. To date, this Court still has not been served with the Notice of Appeal by Defendant. *See* Pa. R.A.P. 906(a)(2) and Pa.R.C.P. 121(b). Filing with the Prothonotary alone is insufficient. A copy must be served upon the Court for its consideration pursuant to Pa. R.A.P. 1925.

When the Court became aware that a Notice of Appeal had been filed, it promptly issued a 1925(b) Order upon Defendant on December 23, 2010, directing it to file a Statement of Matters Complained of on Appeal. However, since the 1925(b) Order was issued, the Court has yet to receive a copy from Defendant of Defendant's Statement of Matters Complained of on Appeal. The Court notes that a Statement of Matters was filed with the Prothonotary on January 10, 2011. But, as previously stated, filing a copy with the Prothonotary is insufficient and not in compliance with the Rules of Appellate Procedure, and accordingly, this Court cannot address any allegations of errors raised by Defendant.

3) The Court's ruling on Plaintiff's Preliminary Objections in response to Defendant's Motion for Reconsideration and Post-Trial Relief are held IN ABEYANCE pending a final decision from the Pennsylvania Commonwealth Court.

While the Court is inclined to grant Plaintiff's Preliminary Objections, it cannot do so because of Defendant's Appeal, and in light of the fact that Defendant's Motion remains unverified. Further, the Court stands on the record and the transcripts of the November 2nd, 10th and December 21st 2010 hearings.

4) Defendant failed to file the necessary Verifications to its Motion for Reconsideration and Post-Trial Relief and its Preliminary Objections to Plaintiff's Complaint. Therefore, those pleadings are STRICKEN.

At the December 21, 2010 hearing, the Court observed that Defendant had failed to file Verifications with its pleadings in violation of Pa.R.C.P. 206.3 and Pa.R.C.P. 1024(c). The Court gave defense counsel courtesy leave to file the Verifications. The Court was concerned with the Verifications given the pejorative allegations made by Defendant in its pleadings. *See* this Order's Paragraph No. 1, Motion for Recusal, *supra* at 4-5.

To date, more than thirty (30) days after defense counsel's promise to file the Verifications, the Court still has not received any notice that the Verifications were filed. Therefore, the pleadings filed by Defendant without Verifications are hereby stricken and the pleadings are considered to be a legal nullity.

5) Defendant's Preliminary Objections to Plaintiff's Complaint are hereby OVERRULED.

The Court finds that the Plaintiff sufficiently pled fraud as a cause of action in its Complaint. *See Commonwealth v. Percudani,* 825 A.2d 743 (2003).

The Court also declines to add Lawrence D'Ambrosio, Esq. as a necessary party to this case for the reasons stated on the record at the December 21, 2010 hearing. *See also* N.T. 11/10/10 Rule to Show Cause Hearing, pp. 4-5, testimony of Lawrence D'Ambrosio, Esq.

ORDER

AND NOW, to-wit, this 4th day of February 2011, after a hearing was held in the above-captioned matter on December 21, 2010, it is hereby **ORDERED, ADJUDGED, and DECREED** that:

1) Defendant's Motion for Recusal is **DENIED.**

2) The Court cannot decide Defendant's Motion for Reconsideration and Post-Trial Relief since the matter is currently on appeal before the Pennsylvania Commonwealth Court.

3) Plaintiff's Preliminary Objections in response to Defendant's Motion for Reconsideration and Post-Trial Relief are **GRANTED,** but that decision is hereby held **IN ABEYANCE** pending a decision from the Pennsylvania Commonwealth Court.

4) Defendant's Motions for Reconsideration and Post-Trial Relief and its Preliminary Objections to Plaintiff's Complaint are **STRICKEN** because they lack verification as required by the Pennsylvania Rules of Civil Procedure.

5) Defendant's Preliminary Objections to Plaintiff's Complaint are hereby **OVERRULED.**

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

MONTESSORI REGIONAL CHARTER SCHOOL, Plaintiff
v.
MILLCREEK TOWNSHIP SCHOOL DISTRICT and SCHOOL DISTRICT FOR THE CITY OF ERIE, Defendant

JURISDICTION

A Court of Common Pleas has jurisdiction over Defendants' decisions on a charter school renewal or amendment application in the absence of another avenue for appeal and in absence of a stay from the Commonwealth Court.

SCHOOLS / CHARTER SCHOOL LAW

The purpose of the charter school law is to improve learning, increase learning opportunities, encourage use of different and innovative teaching methods, create new professional opportunities for teachers, provide parents and students with expanded educational choices, and hold schools accountable.

SCHOOLS / CHARTER SCHOOL LAW

The purpose of the charter school law through the Public School Law is to establish a thorough and efficient system of public education, to which every child has a right.

SCHOOLS / CHARTER SCHOOL LAW

Where a charter school proposes to expand into another facility, it is not requesting a new charter, but rather a mere amendment to the original charter.

SCHOOLS / CHARTER SCHOOL LAW

The Charter School Law provides for expansion of the charter school into certain described types of facilities.

SCHOOLS / CHARTER SCHOOLS

A school district cannot apply different standards and requirements to one charter school organization over another simply because one entity is more "cooperative" than the other.

CIVIL PROCEDURE / BURDEN OF PROOF

The term "arbitrary and capricious" means a decision or action taken by administrative agency or inferior court without consideration or in disregard of facts or law without determining principle.

SCHOOLS / CHARTER SCHOOL LAW

Under the Charter School Law, school board policy decisions are entitled to substantial deference unless it is apparent that the conduct of the board is arbitrary, capricious and prejudicial to the public interest.

CIVIL PROCEDURE / STANDARD OF REVIEW

Mere failure to effectuate a policy of the most effective or most efficient manner is not arbitrary or capricious, but "some rational basis" is required.

SCHOOLS / CHARTER SCHOOL LAW

The school board Defendants unreasonably refused to approve the charter school's expansion proposal in light of the charter school's demonstration of the appropriateness of the proposed building and demonstrated an arbitrary preference for one charter school over another.

SCHOOLS / CHARTER SCHOOLS

Defendants' argument that their obligation was to tax payers and constituents, and not charter schools is absurd.

SCHOOLS / CHARTER SCHOOLS

Disparate treatment of charter schools is evidence of arbitrary and capricious actions.

LOCAL AGENCY LAW

A school board's refusal to act by deferring its vote on a charter school's proposal and a school board's vote rejecting an amendment to a charter school's application are "adjudications" subject to appeal.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 13329-2009

Appearances: Thomas A. Pendleton, Esq., Attorney for Plaintiff
Timothy Wachter, Esq., and Timothy Sennett, Esq., Attorneys for Defendants

OPINION

Procedural History

This matter commenced on July 24, 2009, when the Montessori Regional Charter School (hereinafter Plaintiff) filed an appeal of the Millcreek Township and City of Erie School Districts' (hereinafter Defendants) decisions denying the renewal of Plaintiff's school charter. Plaintiff also appealed Defendants' denial of its request for expansion into another building.

On July 13, 2010, the Court overruled Defendants' Preliminary Objections and granted Plaintiff's Preliminary Objections. In the same Order, the Court encouraged the parties to try and settle the matter before the next school year.

The Court heard nothing further from the parties until September 2010 when Plaintiff requested a briefing schedule. Briefs were submitted on or about October 20, 2010. After review of those briefs, the Court scheduled a status/settlement conference for January 5, 2011 with the hope that the parties could resolve their differences before the end of another school year.

On January 10, 2011, Plaintiff indicated to the Court that settlement appeared unlikely, and requested that the Court render a decision in this matter.

Findings of Fact

Montessori's Charters

1) On February 11, 2004, Plaintiff Montessori Regional Charter School (MRCS) was granted a charter to operate a school at 2910 Sterrettania Road, Millcreek. The charter was in effect from July 1, 2004 through June 30, 2009.
2) The charter was granted after the Pennsylvania Commonwealth Court reversed Defendants' denial of Plaintiff's initial charter school application. *See Montessori Regional Charter School v. Millcreek Township School District and City of Erie School District,* 810 A.2d 718 (2002).
3) On September 17, 2008, Plaintiff MRCS submitted its request for renewal of the 2004 charter.
4) On September 19, 2008, Defendants requested documentation from Plaintiff, including financial statements, test scores, special education reports, goal achievement, etc. Plaintiff complied with the request on November 21, 2008 and supplemented the information on December 2, 2008. See Millcreek Township School District's Supplemental Certification of the Record Volume I and II.
5) On January 23, 2009, Defendants notified Plaintiff that a hearing on the charter renewal would be held on March 25, 2009.
6) On January 30, 2009, a site visit was conducted at MRCS by Defendants' architects.
7) The Erie School District's architect, Roth Marz Partnership, submitted a report to Erie on February 2, 2009. Millcreek School District's architect, Hallgren Restifo Loop & Coughlin, submitted a report to Millcreek on February 5, 2009. The architects reported some accessibility problems with the building, but nothing that violated the law.
8) On March 23, 2009, Defendants requested more information from Plaintiff, including responses to complaints, copies of attendance policies, etc.
9) The same day, Plaintiff informed Defendants of its intent to open a second K-6 school at the former parochial St. Andrew's School (hereinafter SAS), located at 606 Raspberry Street, Erie.
10) Plaintiff entered into a lease for the SAS building with the Roman Catholic Diocese of Erie. *Id.* at 277-283.
11) Defendant Erie School District had previously used SAS to house students from J.S. Wilson Middle School while that building underwent renovation.
12) Perseus House Charter School once signed a lease for SAS with the Roman Catholic Diocese of Erie, but chose not to use the location. *Id.* at 106.

13) The joint hearing on MRCS's renewal was held on March 25, 2009. *Id.* at 24-141.
14) At the joint hearing, the Defendant School Boards heard argument from the parties' counsel, Montessori CEO Anthony Pirrello, and several members of the public.
15) Members of the public were limited to three minutes of speaking time. *Id.* at 37.
16) Four people who spoke out against Montessori were parents with special needs children, who were also signatories to a letter of complaint sent to the Defendants from the Local Right to Education Task Force (LTF). *Id* at 141, 251-253. *See also* LTF's letter to Anthony Pirrello, pp. 307-308.
17) Two people spoke in favor of Montessori. One was part of the "founding families" who supported MRCS's first charter. The other person was a parent of a special needs Montessori student.
18) Mr. Pirrello was questioned at length by defense counsel and Erie and Millcreek school board members about many MRCS details, including its current location and the proposed SAS expansion.
19) Defendants requested more information from Plaintiff and agreed to issue a decision before June 30, 2009, when the charter would expire. *Id.* at 137.
20) On April 30, 2009, Plaintiff provided further information to Defendants in response to questions raised at the hearing. Plaintiff also provided additional details on the proposed expansion at SAS, including a Power Point presentation. *Id.* at 324-331.
21) On June 29, 2009, the Defendant Erie granted renewal of the charter, but deferred decision on the SAS proposal and requested more documentation. The same day, Defendant Millcreek granted the charter renewal in a 4-3 vote, and denied the SAS proposal, 7-0. Defendant Millcreek Solicitor, Timothy Sennett, advised that the vote was not enough to approve the charter renewal.
22) Defendants issued a written decision on June 29, 2009, claiming several violations of the Charter School Law by MRCS, and interpreting the SAS proposal as a new charter. The decision concluded that MRCS had proposed expansion to SAS "as a tactic to qualify for financing for a new building through the Reinvestment Fund." *Id.* at 11-23 (Decision, pp. 10-12).
23) Defendants later referred to the SAS proposal as a "scheme by MRCS to qualify for financing for a new building through a financial program known as the Reinvestment Fund." Defendant's Brief in Support, p. 5, ¶ 23.
24) Despite extensive questioning of MRCS representatives, the joint hearing transcript does not support Defendants' contentions that MRCS is deliberately proposing the SAS expansion as some kind

of financial tactic or scheme.

25) On July 24, 2009, Plaintiff appealed Defendants' decisions denying the renewal of charter and the proposed expansion into SAS.
26) On November 23, 2009, after consultation with its Solicitor, Defendant Millcreek reconsidered its denial of the charter and reversed its decision. See July 13, 2010 Order, p. 1, n. 1. Millcreek granted charter renewal but still denied the SAS proposal.
27) Preliminary Objections were filed by the Defendants on September 21, 2009.
28) Plaintiff responded with Preliminary Objections on October 12, 2009.
29) An evidentiary hearing was held before this Court on October 26, 2009 where the parties filed supplemental certifications of the record for the Court's consideration. No additional testimony was taken at the evidentiary hearing.
30) The matter was also appealed to the State Charter School Appeal Board (hereinafter CAB). On November 24, 2009, the CAB denied Plaintiff's appeal, ruling that it had no jurisdiction over charter amendments. Plaintiff subsequently appealed the CAB decision. That matter is still pending on appeal.
31) On January 20, 2010, Defendants sent a new charter to Plaintiff that applied retroactively from July 9, 2009 to June 30, 2014. To date, MRCS has not returned a signed charter.
32) After the CAB decision, this Court held a Status Conference on February 17, 2010. At that time, the parties agreed they were awaiting the Court's decision on the Preliminary Objections.
33) On July 13, 2010, the Court overruled Defendants' Preliminary Objections and granted Plaintiff's Preliminary Objections. In that same Order, the Court encouraged the parties to try and settle the matter before the next school year.
34) Plaintiff requested a briefing schedule in September 2010, which the Court granted. *See* September 30, 2010 Order.
35) Defendants objected to the briefing schedule on October 1, 2010, stating it was contrary to ongoing settlement negotiations between "the professional educators" and requested another status conference with the Court. *See* Appellees Motion to Reconsider Establishing Filing Schedule and Request for Status Conference, p. 1.
36) Briefs were submitted by the parties on October 20, 2010. Reply briefs were filed on November 4, 2010.
37) After review of those briefs, the Court scheduled another status/ settlement conference for January 5, 2011, almost 18 months after litigation first commenced.

38) On January 10, 2011, less than a week after the status/settlement conference, the parties asked the Court issue a decision in this matter.

Perseus House Charters

39) Defendant Erie granted a charter to the Perseus House Charter School of Excellence (hereinafter Perseus House) on February 12, 2003.
40) Perseus House leased the Hamilton Center located at 2931 Harvard Road, Erie. The Hamilton Center offers programming for high school students.[1]
41) On April 30, 2004, Perseus House entered into an agreement with Erie to amend the charter to allow Perseus House to operate a second school.
42) Erie approved a sublease agreement between Perseus House and the Bayfront Center for Maritime Studies (BCMS). The Maritime Center, located at 426 Eagle Point Blvd., Erie, offers programming for middle school students.[2]
43) In September 2005, Perseus House began operating a third facility called the Leadership Center, located at 1511 Peach Street in Erie. The Leadership Center also offers programming for high school students.[3]
44) On November 15, 2005, Perseus House submitted a charter renewal to the Erie School District for the Leadership Center. A hearing was held on January 10, 2006. *Id.* at 759-777.
45) At the January 10, 2006 hearing, school board members and Perseus House representatives were jovial, often laughing and joking around.
46) No time limitations were placed on speakers addressing the school board regarding Perseus House.
47) Only one board member had questions about the funding of special education at Perseus House. *Id.* at 768. No one appeared on behalf of LTF.
48) One member of the public spoke in support of Perseus House. *Id.* at 777.
49) The Perseus House representatives were not questioned by the Board's solicitor. Some board members had questions as well as positive comments and thanks for the efforts made by Perseus House's representatives. *Id.* at 776.

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[1] http://www.charterschoolofexcellence.org/category/hamilton

[2] http://www.charterschoolofexcellence.org/category/maritime

[3] http://www.charterschoolofexcellence.org/category/leadership

50) The Erie School District granted Perseus House's charter renewal for the Leadership Center on February 8, 2006. The five-year renewal formally approved operation at the Maritime Center and Leadership Center locations.[4] Erie and Perseus House also entered into financing and cooperative services agreement.

Conclusions of Law

Jurisdiction

Since this Court is only determining the propriety of the Defendants' denials, not the extent of the CAB's authority, Defendants' continued argument that this Court lacks jurisdiction is without merit. Further, by its own decision, the CAB has declined to exercise jurisdiction over a charter school's amendment, which is the only issue left to decide herein.[5] As the local Court of Common Pleas, this Court has jurisdiction over Defendant's actions/decisions because there are no other ways for Plaintiff to proceed. Plaintiff's counsel informed the Court that the Pennsylvania Commonwealth Court was proceeding with the case without prompting by either of the parties. To date, this Court has not received instruction from the Pennsylvania Commonwealth Court to stay its actions, thus the Court shall proceed accordingly.

Charter School Law [6]

Under §17-1702-A, the express legislative intent of the Charter School Law is to improve pupil learning, increase learning opportunities, encourage use of different and innovative teaching methods, create new professional opportunities for teachers, provide parents and students with expanded educational choices, and hold schools accountable. The Pennsylvania legislature went to great lengths to establish the Charter School Law. *See Mosaica Academy Charter School v. Commonwealth of Pennsylvania Department of Education, et al. v. Bensalem Township School District, et al.,* 572 Pa. 191, at 200, 813 A.2d 813 (2002). In *Mosaica,* the Pennsylvania Supreme Court held that the school district improperly refused to provide transportation for charter school students. The Court reasoned that the Charter School Law should provide what the Public School Law provides since the Charter School Law is a part of Public School Law.

The purpose of the Charter School Law, through the Public School

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[4] In its research, the Court discovered that Perseus House also operates The Skills Center, located at 1309 French Street. It is unknown to the Court whether this facility is also a charter school. http://www.charterschoolofexcellence.org/category/skills-center

[5] Defendants have conceded that charter renewal is moot given their approval of MRCS's renewed charter. *See also Bucks County Montessori School,* CAB Docket 2003-4 (2004) where amendments to an existing charter do not establish a new charter.

[6] 24 P.S. §§17-1701-A, *et seq.*

Law, is intended to establish a thorough and efficient system of public education, to which every child has a right. *Zager v. Chester Community Charter School,* 934 A.2d 1227, 594 Pa. 166 (2007). A charter's school distinction/difference from a public school satisfies the requirements of the Charter School Law. *See Montour School District v. Propel Charter School-Montour,* 889 A.2d 682 (Pa.Cmwlth. 2006) where charter school's unique curriculum and learning environment consisted of 190 school days, small classes, reading blocks, etc.

After review of the extensive records submitted in this matter, the Court finds that MRCS has more than satisfied the basic requirements and legislative intent of the Charter School Law. Defendants requested information from Plaintiff on at least three different occasions and Plaintiff complied, providing sufficient answers to the concerns raised at the joint hearing and beyond. The SAS proposal is merely an amendment to the charter, requesting permission to expand into another facility. Plaintiff is not requesting a whole new charter as Defendants have tried to suggest. The next question is whether Plaintiff's SAS proposal was improperly denied by Defendants.

St. Andrew's School Proposal

The Charter School Law also provides for the expansion of a charter school into certain types of facilities pursuant to Charter School Law 17-1722-A, which reads in full:

> **Facilities**
> (a) A charter school may be located in an existing public school building, in a part of an existing public school building, in space provided on a privately owned site, in a public building or in any other suitable location.
> (b) The charter school facility shall be exempt from public school facility regulations except those pertaining to the health or safety of the pupils.
> (c) [Repealed]
> (d) Notwithstanding any other provision of this act, a school district of the first class may, in its discretion, *permit a charter school to operate its school at more than one location.* [emphasis added].

Here, Plaintiff entered into a lease agreement with the Erie Diocese for the SAS building. While Defendant maintains that Plaintiff has no property stake in the litigation, clearly under property law, a lease is "any agreement which gives rise to relationship of landlord and tenant (real property) or lessor and lessee (real or personal property).[7] However, the

[7] Black's Law Dictionary, p. 889, 6th edition, 1990.

Charter School Law does not require that a charter applicant actually secure the proposed property or provide the school district with a lease or sales agreement, site development plan, etc. *See Central Dauphin School Dist. v. Founding Coalition of the Infinity Charter School,* 847 A.2d 195, at 203 (Pa.Cmwlth., 2004) (Description of the physical facility planned for charter school is enough under the Charter School Law.)

Based on the Court's review of the record, SAS appears to be an acceptable facility for the proposed MRCS expansion. Evidently, it was acceptable to the Erie School District when it temporarily housed students from J.S. Wilson Middle School. Presumably it was also acceptable when Perseus House contemplated leasing the facility as another charter school location.

While Defendants take issue with the submission of the SAS proposal just days before the March 25, 2009 hearing, the Court notes that there has been more than sufficient time (i.e. during the course of this litigation) for Defendants to visit SAS and determine its suitability for MRCS. At this time, it appears that Defendants have not done so.

Relevance of Perseus House Charter Schools

Plaintiff argues that Defendant Erie's treatment of the Perseus House Charter School is highly relevant to its claim of arbitrary and capricious behavior by Defendants given Perseus House's three charter school locations in the City of Erie. This Court is inclined to agree given the record here.

Defendant Erie describes its relationship with Perseus House as "cooperative" and that they "enjoy a unique working relationship". Defendant's Brief In Support, pp. 10-12. Perseus House leased its first facility, the Hamilton Center, from Erie School District. Perseus House accommodated almost every request made by Erie regarding the Maritime Center. Erie allowed Perseus House to operate the Leadership Center before the charter renewal application was filed and a public hearing was held on it.

Defendant Erie's preferential attitude toward Perseus House is plainly shown by the minutes of the January 10, 2006 meeting. Rather than a quasi-adversarial proceeding like the March 25, 2009 joint meeting with MRCS, the January 10, 2006 meeting was hospitable and cordial. It demonstrated that it is possible for school districts to maintain cooperative relationships with charter schools. However, the Court finds that Erie School District cannot apply different standards/requirements to Perseus House and MRCS simply because one entity is more "cooperative" than the other.[8] The question now becomes whether Defendants' treatment of

[8] Unfortunately, the situation here reminds the Court of a parent (the Erie School District) trying to raise two very different children (Perseus House and MRCS) where Erie asks MRCS, "Why can't you be more like Perseus House?" The Court notes that while Perseus House and MRCS may act very differently, Erie should apply the same rules to both or risk cries of "That's not fair!" and "You like them better than me!" (a/k/a litigation).

MRCS has been arbitrary and capricious.

Arbitrary and Capricious

For purposes of clarity, the Court shall first define the terms. "Arbitrary and Capricious" is defined by Black's Law Dictionary as the "characterization of a decision or action taken by an administrative agency or inferior court meaning willful and unreasonable action without consideration or in disregard of facts or law or without determining principle."[9]

Merriam-Webster's Dictionary defines "Arbitrary" as "based on or determined by individual preference or convenience rather than by necessity or the intrinsic nature of something.[10] Merriam-Webster's Dictionary, defines "Capricious" as "governed or characterized by caprice; impulsive, unpredictable." The term "caprice" is defined as "a sudden, impulsive, and seemingly unmotivated notion or action; a sudden usually unpredictable condition, change, or series of changes."[11]

Under the Charter School Law, school board policy decisions are entitled to substantial deference, free from court interference, unless it is apparent that the conduct of the board is arbitrary, capricious, and prejudicial to the public interest. *Mosaica, supra*. An administrative action will be "found to be arbitrary and capricious where it is unsupportable on any rational basis because there is no evidence upon which the action may be logically based." *Adams County Interfaith Housing Corp. v. Prevailing Wage Appeals Board,* 981 A.2d 352, 358 (Pa.Cmwlth., 2009) citing *Lynch v. Urban Redevelopment Authority of Pittsburgh,* 91 Pa.Cmwlth. 260, 496 A.2d 1331, 1335 (1985). Mere failure to effectuate a policy in the most effective or efficient manner is not arbitrary and capricious, but "some rational basis" is required. *Adams, supra,* citing *Board of Public Education of School District of Pittsburgh v. Thomas,* 41 Pa.Cmwlth. 490, 399 A.2d 1148, 1150 (1979).

Here, the Court can find no rational basis for Defendants' denial of the charter amendment. Defendants have unreasonably refused to approve the SAS proposal despite the fact that the SAS building is appropriate for students, that MRCS has enough students for enrollment, that MRCS has had a successful academic record, and is in compliance with the Charter School Law. Defendants raised no objections to Perseus House leasing SAS, showing an arbitrary preference for Perseus House over MRCS.

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[9] Black's Law Dictionary, p. 105, 6th edition, 1990.

[10] http://www.merriam-webster.com/dictionary/arbitrary, definition 3.

[11] http://www.merriam-webster.com/dictionary/capricious and http://www.merriam-webster.com/dictionary/caprice

Defendant Millcreek's argument that its actions were not arbitrary and capricious because it has an obligation to its taxpayers and constituents implies that MRCS is not part of that obligation. The Court finds this argument to be absurd because surely some MRCS employees, parents of students, etc. live, pay taxes, and vote in Millcreek.

Defendants' arbitrary and capricious actions are most conspicuously demonstrated by the disparate treatment of the Perseus House and MRCS charter application/renewal hearings. In this case, only one public hearing was held, and that hearing was attended by several members of the public (i.e. the LTF) with an agenda unrelated to the issue of charter renewal/expansion. Excluding legal counsel, only one MRCS administrator, Mr. Pirrello, was questioned about the charter renewal and SAS proposal. There were no follow-up meetings to further address the alleged concerns Defendants had about MRCS. The charter renewal and amendments were simply denied. *Compare Telly v. Pennridge School District Board of School Directors,* 995 A.2d 898 (Pa.Cmwlth. 2010) where the school district's reduction of tax collector compensation was not arbitrary and capricious because the district held five public meetings and received considerable analysis and input from the public, business administrators, and tax collectors. As previously stated, Defendants cannot, and should not, apply different requirements to area charter schools based on preference, convenience, or impulse. It is impermissible under the Charter School Law.

Deferral by Defendant Erie

Contrary to Defendants' arguments, Defendant Erie's refusal to act by deferring its vote on the SAS proposal, and Defendant Millcreek's vote rejecting the amendment are adjudications.

Turning to Merriam-Webster's Dictionary again, "adjudicate" is defined as "to give an opinion about (something at issue or in dispute)."[12] Synonyms for "defer" are "to postpone, suspend, stay, mean to delay an action or proceeding... a deliberate putting off to a later time."[13]

Here, Defendants undoubtedly gave their opinion of Plaintiff's SAS proposal. Millcreek denied it outright and Erie effectively issued a denial because their non-decision prevents MRCS from going forward with the expansion.[14] Erie's deferral has further postponed, suspended, and delayed this case contrary to the interests of justice.

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[12] http://www.merriam-webster.com/thesaurus/adjudicate

[13] http://www.merriam-webster.com/dictionary/defer

[14] For example, under the Pennsylvania Rules of Criminal Procedure, the Court can decline to take action on a post-sentence motion for up to 120 days. Then the motion is deemed denied. Pa.R.Crim.P. 720(B)(3)(a). This Court fails to see the difference between that Rule and the inaction of Defendant Erie.

Continued Delays

Sadly, delay has been prevalent in this matter. It is apparent that Defendants do not want to allow Plaintiff to expand its school. The reasons why Defendants have denied the expansion are far less clear.[15] Defendants' continued denial of every request made by Montessori is a deplorable pattern that appears to serve no legitimate purpose.

This Court is not oblivious to the history of this case. *See Montessori Regional Charter School v. Millcreek Township School District and City of Erie School District, supra,* where Defendants' denial of the initial charter school application was reversed. The record clearly shows that Montessori has had to engage in litigation from its very inception. Montessori's attempts to move this process along are recognized by the Court as valid efforts to maintain its hard fought existence. Coincidently, the record does not reflect any such effort by Perseus House.

Further, the parties' failure to effectively communicate throughout the duration of this case is simply appalling. As much as both Defendants would like to pretend that the fault here is entirely Montessori's, the Court cannot overlook their role in this case. For example, Defendants' contended at the January 5, 2011 conference that Plaintiff had failed to send <u>any</u> settlement proposals to Defendants. That claim was completely refuted by Plaintiff. (See multiple letters and e-mails exchanged between Montessori CEO Anthony Pirrello and Erie Superintendent Jay Badams and Millcreek Superintendent Michael Golde.)

The Court was not exaggerating when it strongly suggested to counsel at the January 5, 2011 conference to "do everyone a favor and settle this". Continued delays have done a disservice to potential students, and contradict the very intent of the Charter School Law. Thus, this Court is compelled to grant Plaintiff's request and overrule Defendants' denial of Plaintiff's proposed expansion into the St. Andrew's School.

<u>ORDER</u>

AND NOW to-wit, this 14th day of February 2011, upon consideration of the foregoing Opinion and the arguments of counsel, it is hereby **ORDERED, ADJUDGED, and DECREED** that the Montessori Regional Charter School's request to amend its charter to open a second location at the former St. Andrew's parochial school is **GRANTED.** The parties shall endeavor to facilitate the expansion <u>with all due haste</u> so that Plaintiff will be ready and able to operate two locations for the 2011-2012 school year.

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

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[15] If the mysterious reasons are financial in nature, those are not permitted in making a charter school determination. *See In re: Sugar Valley Charter School,* CAB Docket 1999-4.

COMMONWEALTH OF PENNSYLVANIA
v.
VICTOR COLLIER

ADMISSIBILITY OF EVIDENCE / WARRANTLESS SEARCH OF HOME

Where 2 and 4 year old children were discovered alone in home and no exigent circumstances existed, officer's warrantless excursion into upstairs bedroom in search of parent was without legal justification.

WARRANTLESS SEARCH OF HOME / PLAIN VIEW

Officer exceeded scope of search for parent by going upstairs, entering a bedroom and peeking into open dresser drawer.

SUPPRESSION OF EVIDENCE / SEARCH WARRANT

Because search warrant was premised on illegal search of upstairs bedroom, all evidence found pursuant to warrant must be suppressed.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION No. 687 of 2011

Appearances: Justin Panighetti, Esq., Attorney for the Commonwealth
Anthony A. Logue, Esq., Attorney for Defendant

OPINION

Connelly, J., August 18, 2011

On November 17, 2010 Officer Oborski of the Erie Police Department was on patrol when he was dispatched to 2702 Van Buren Street at a little after 1:00 p.m. as to two (2) children unattended. At the location, the officer knocked at the door, and a two-year-old answered. The other child, a four-year-old, was on the phone with the Office of Children & Youth (OCY) who was attempting to find a parent for a third child who was sick at school. The officer asked if any parents were at home, and the four-year-old told him her father was upstairs. He asked her to get him. She went upstairs, then returned saying that he wasn't there. The officer then went upstairs to look for an adult and finding no one began to look for identifying information. As he moved toward a dresser with an open top drawer, he smelled the odor of marijuana, shined his flashlight into the drawer and observed what he believed to be marijuana. He called vice unit officers who arrived, viewed the drugs and obtained a search warrant, executed it, and found other drugs and paraphernalia. Before the vice unit arrived, OCY arrived to care for the children and shortly thereafter Mrs. Collier, the child's mother, came home and then the father after the mother had called him.

Neither Defendant contests the fact that the officer had a right to enter the home without a warrant based on the exigencies of the two (2) young children being left in the home alone. Such being the case, the officer, for the safety and protection of the children, entered legally without a warrant. Once the officer ascertained the children were safe with him, was informed that the father was not upstairs,[1] and that OCY was on the phone and would be arriving there shortly to care for the children, and had no information that the children were in any specific danger from anyone inside or outside of the house, there were no exigent circumstances to justify a warrantless search of the upstairs bedroom. Under the circumstances, the officer had ample time to obtain a search warrant, the children were secure and cared for, no evidence needed to be secured or was in danger of being destroyed, and no one was in danger. Simply put the officer's warrantless excursion into the upstairs bedroom was without legal justification. *Commonwealth v. Lee,* 972 A.2d 1 (Pa.Super. 2009). And the further intrusion into the dresser drawer in the Defendant's bedroom after smelling marijuana in that room is not compatible with a plain view exception to a warrantless search under the circumstances.[2] As stated above the Officer should not have been there without a warrant, but the smell of contraband should have put him on notice he needed a search warrant to go any farther. Additionally, peeking into the open dresser drawer was in excess of his scope of searching for a person or his unnecessary quest for identification, *Commonwealth v. Perez,* 595 A.2d 1315 (Pa. 1991). The officer did not have a legal prior justification which provided lawful right of access to the upstairs bedroom or to the items in the dresser drawer. *Commonwealth v. Norris,* 446 A.2d 246 (Pa. 1982).

Further, because the illegal search of the bedroom dresser formed the basis of the subsequent search warrant, the search and all drugs, paraphernalia, and evidence found pursuant thereto are the fruits of the prohibited conduct and also subject to suppression. *Wong Sun v. U.S.,* 371 U.S. 471 (1963); *Commonwealth McEnany,* 667 A.2d 1143 (Pa. Super. 1995).

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[1] Indeed the child, specifically at the officer's request, had gone upstairs and reported that the father was not there. The officer had no information or evidence to indicate otherwise.

[2] Obviously the name of the parent could have been ascertained from a neighbor, from the children, an OCY inquiry, local records, the third child's school or a search of the premises pursuant to a warrant. Indeed in all likelihood OCY had the names of the parents from school authorities who had called them and OCY called the residence and was speaking to the four-year-old when the officer arrived.

ORDER

AND NOW, to-wit, this 18th day of August, 2011 it is hereby **ORDERED** that Defendant's Omnibus Pre-Trial Motion For Relief, I: Motion For Suppression of Evidence is **GRANTED**; II: Motion to Dismiss - Double Jeopardy is hereby **DENIED**.

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

JAMES A. NADOLNY, Plaintiff
v.
HAMOT MEDICAL CENTER OF THE CITY OF ERIE, PENNSYLVANIA, a corporation, Defendant

CIVIL PROCEDURE / DISCOVERY / SANCTIONS
DISCOVERY / SANCTIONS

Discovery sanction of dismissal of action should be imposed only in most extreme circumstances and only after the court considers: 1) the nature and severity of the discovery violation; 2) the defaulting party's willfulness or bad faith; 3) prejudice to the opposing party; 4) the ability to cure the prejudice; and 5) the importance of precluded evidence in light of failure to comply.

CIVIL PROCEDURE / DISCOVERY / SANCTIONS
DISCOVERY / SANCTIONS

Dismissal of action is a proper sanction for violation of discovery order where Plaintiff's counsel's delay has been considerable and recurrent and where counsel's failure to respond in a timely manner, to appear at hearings and to comply with court orders are demonstrative of bad faith and willfulness.

CIVIL PROCEDURE / DISCOVERY / SANCTIONS
DISCOVERY / SANCTIONS

Dismissal of action is a proper sanction where the prejudice to opposing party arising from the failure to produce records as required by court order cannot be cured because the records requested are no longer available; although prejudice is somewhat speculative due to the fact that it is unknown what the lost records would have revealed, Plaintiff should not be rewarded for obstructive and uncooperative actions.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 11357-2005

Appearances: Brendan Lupetin, Esq., Attorney for Plaintiff
Peter W. Yoars, Jr., Esq., Attorney for Defendant

OPINION AND ORDER

Dunlavey, Michael E., J. September 9, 2011

Procedural History

This Court has presided over this case since the Honorable John A. Bozza retired in 2009. Plaintiff's alleged injury occurred in April 2003, more than eight (8) years ago. Plaintiff's Complaint was filed in July 2005, over six (6) years ago. A review of the docket also revealed a 21-month period of inactivity (October 2007 to July 2009) where only one Notice of Deposition was docketed on September 11, 2008. Defendant revived the matter in July 2009 by filing a Praecipe for a Status Conference, which was held on November 24, 2010. Plaintiff's counsel failed to appear for the conference.

On November 24, 2010, the Court ordered Plaintiff's counsel to

"immediately send copies of all requests for Medicare records including liens, Blue Cross Blue Shield records, and Social Security and/or disability records to the Court and defense counsel" within seven (7) days, and produce the records within sixty (60) days or face sanctions. On December 9, 2010, upon receipt of a letter from Plaintiff's counsel, the Court granted Plaintiff an additional seven (7) days to comply with the November 24th Order.

Plaintiff failed to comply. Subsequently, Defendant filed a Motion for Sanctions, which the Court scheduled for March 10, 2011. Plaintiff's counsel failed to appear at the hearing. The Court granted Defendant's Motion for Sanctions and dismissed the action. Judgment was entered for the Defendant on March 31, 2011.

However, the Court's March 10, 2011 Order also granted Plaintiff's counsel ten (10) days to provide an explanation for his continuing absence. Plaintiff filed a Motion For Reconsideration on March 18, 2011. A Rule to Show Cause hearing was scheduled and held on April 4, 2011. On June 1, 2011, the Court granted Plaintiff's Motion for Reconsideration, specifically stating in part:

> The Court recognizes the severity of dismissal as a discovery sanction and shall afford Plaintiff's counsel one further opportunity to correct his willful disregard of multiple orders... *Plaintiff is cautioned that failure to produce these records shall result in the dismissal of this action with all defense costs incurred...* to be borne by Plaintiff or Plaintiff's counsel."
> [Emphasis added.]

On June 21, 2011, the Court awarded attorney fees in the amount of $2,545.00 to Defendant as sanctions for Plaintiff's noncompliance. Judgment for Defendant was entered on June 28, 2011.

Defendant filed a Motion to Dismiss Plaintiff's Amended Complaint on July 18, 2011, again arguing that Plaintiff's counsel had failed to comply with the Court's June 1, 2011 Order. Oral argument was held on August 15, 2011.

Conclusions of Law

Pursuant to Pa.R.C.P. 4019, the trial court may enter a default judgment against a noncompliant party. *See Luszczynski v. Bradley,* 1999 Pa. Super. 85, 729 A.2d 83. The entry of discovery sanctions that terminate litigation receives stringent appellate review. *Cove Centre v. Westhafer Construction,* 965 A.2d 259 (Pa.Super. 2009). Dismissal should be imposed only in most extreme circumstances and only after the trial court considers: 1) the nature and severity of the discovery violation; 2) the defaulting party's willfulness or bad faith; 3) prejudice to the opposing party; 4) the ability to cure the prejudice; and 5) the importance of precluded evidence in light of failure to comply.

Here, Plaintiff's counsel's delay in this matter has been considerable

and recurrent. The repeated delays and noncompliance with the Court's directives and discovery requests from opposing counsel were not one-time occurrences, as reflected by the record, but multiple instances. Plaintiff''s counsel's failure to respond in a timely manner, appear at hearings, and comply with court orders are demonstrative of bad faith and willfulness.

Further, the prejudice to Defendant cannot be cured because the records are gone and Plaintiff essentially squandered every opportunity to obtain those records. The prejudice to the Defendant, while somewhat speculative because it is unknown what the lost records would have revealed, the Court notes that the prejudice was entirely preventable by Plaintiff's counsel. The importance of the precluded evidence is unknown solely because of Plaintiff's counsel's failure to act as directed. *See Sahutsky v. Mychak,* 902 A.2d 866 (Pa. Super. 2006) (showing of actual prejudice not required for non-pros).

The docket reflects that since July 2009, Defendant, *not Plaintiff,* has been the primary moving party in this matter. Defendant's counsel requested the status conference, issued subpoenas, filed a pre-trial narrative, filed the Motion for Sanctions, and continued to pursue the records requested from Plaintiff. The burden of prosecution of a civil action typically rests on Plaintiff, yet it has been the Defendant who attempted to move this case towards resolution.

Apparently, Plaintiff's counsel expects this Court to overlook its dilatory actions and allow the case to proceed to trial despite the fact Defendant lacks information that may be vital to its defense. At the August 15, 2011 hearing, Plaintiff's counsel argued that Defendant "has all the records" it needs. The Court finds this statement to be untrue since multiple records have been destroyed due to the passage of time. Defendant will never know if evidence key to its defense existed in the destroyed records that Plaintiff failed to provide. It is the opinion of this Court that Plaintiff should not be rewarded for obstructive and uncooperative actions and proceed with a civil trial against Defendant, whose ability to defend has been compromised by the delays of Plaintiff's counsel. To do so would not be in the interests of justice and fair civil practice.

ORDER

Upon hearing the arguments of counsel and review of the record in this matter, it is hereby **ORDERED, ADJUDGED, and DECREED** that Defendant's Motion to Dismiss is **GRANTED**. Based upon Plaintiff's failure to comply with court orders, Plaintiff's action is hereby **DISMISSED WITH PREJUDICE**. Defendant is hereby granted a default judgment against the Plaintiff.

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

J.S., Plaintiff
v.
S.M., Defendant

FAMILY LAW / CHILD CUSTODY

Under the new statute, the court's primary consideration in child custody matters remains the best interest of the child. 23 Pa.C.S.A. §§ 5328, 5323(a).

FAMILY LAW / CHILD CUSTODY

The new custody act requires the court to determine the best interest of the child utilizing the "best interest factors" as set forth at § 5328(a)(1 through 16) in ordering any form of custody. 23 Pa.C.S.A. §§ 5323(a); 5328. "Weighted consideration" is to be given to those factors affecting the safety of the child. 23 Pa.C.S.A. § 5328(a).

FAMILY LAW / CHILD CUSTODY

Under the new custody statute, the Court must also consider ten "relocation factors" in determining whether to grant a proposed relocation. 23 Pa.C.S.A. § 5337(h)(1 through 10). "Weighted consideration" is to be given to those factors which affect the safety of the child. 23 Pa.C.S.A. § 5337(h).

FAMILY LAW / CHILD CUSTODY

The party proposing the relocation has the burden of establishing that the relocation will serve the best interest of the child as shown under the relocation factors at 23 Pa.C.S.A. § 5337(h). 23 Pa.C.S.A. § 5337(i)(1). Each party has the burden of establishing the integrity of that party's motives in either seeking the relocation or seeking to prevent the relocation. 23 Pa.C.S.A. § 5337(i)(2).

FAMILY LAW / CHILD CUSTODY

Moreover, in determining the best interest of a child in a custody matter, "no party shall receive preference based upon gender." 23 Pa.C.S.A. § 5328(b).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA FAMILY DIVISION - CUSTODY
NO. 11296-2011

Appearances: Tina M. Frying, Esq., for Plaintiff
Karen L. Klapsinos, Esq., for Defendant

MEMORANDUM OPINION

Brabender, J., August 3, 2011

This matter is before the Court on the mother, J.S.'s, request to relocate with the child (DOB: 10/21/05) to North Carolina. The father, S.M., opposes the relocation request.

No custody order existed prior to a Complaint for Custody and a Notice

of Intent to Relocate. The parties were sharing physical custody of the child by mutual agreement. A custody order was entered maintaining the parties' status quo pending a hearing on July 15, 2011, on the relocation issue.

For the following reasons it is in the best interest of the child that the mother's request to relocate with the child be denied.

PROCEDURAL AND FACTUAL BACKGROUND

On April 5, 2011, the mother filed a Complaint for Custody, seeking custody and permission to relocate from Erie, Pennsylvania to North Carolina where her fiancé resides. On April 28, 2011, the father filed a Counter Affidavit Regarding Relocation, objecting to the mother's request. On May 12, 2011, the parties attended a Custody Intake Conference. On May 19, 2011, a temporary Custody Order was entered providing for shared legal and physical custody of the child pending the relocation hearing. The Court directed the child to primarily reside with the mother. The father's periods of physical custody were by mutual agreement. These provisions were consistent with the parties' past practice.

The mother wants to move with the child to Rougemont, North Carolina[1] to be with her fiancé, J.T. The mother proposes the child will attend Pathways Elementary School in Hillsborough, North Carolina. The mother proposes visitation with the father as follows: when the mother and child return to Erie to visit with the mother's family; on holidays according to a schedule; the child's spring break from school; other breaks from school lasting a week or more and for the month of July. The mother agreed to pay for the child's transportation to Erie for visitation. The maternal grandparents, who reside in Erie, would assist the father with child care during his periods of visitation.

The father and the mother have a good relationship and communicate well regarding the child. They cooperate regarding child care issues. By opposing the relocation request, the father does not want to hurt the mother. He does not want the child taken from him and does not want to lose his relationship with the child. In wanting to relocate, the mother does not want to harm the father or his relationship with the child. She wants to live with the child and the mother's fiance. See, relocation factors at 23 Pa.C.S.A. §5337(h).

The Mother: Current Situation and Current Caregiving Environment

The parties were never married. The mother is 30 years old and has no other children. The mother has resided with the child in Erie, Pennsylvania, in the home of child's maternal grandparents, since

[1] The Court takes judicial notice that Rougemont, North Carolina, is approximately ten (10) hours driving time from Erie, Pennsylvania.

the child's birth. Two maternal aunts and a cousin also reside in the household. The mother is employed part-time at Wegman's, a grocery store in Erie.

The child loves his mother and is bonded with her. He has close relationships with extended maternal family members in Erie.

The Child

The child is nearly six (6) years old, born on October 21, 2005.

The child had problems learning to walk until he was 18 months old. After physical therapy, the problems resolved. Since the father's life has stabilized, the father has broached with the child the topic of overnight visitation. However, the child has demonstrated anxiety about being separated from his mother for overnight visitation. The child has no other physical or developmental problems.

The child attended pre-kindergarten in the Belle Valley School District in Erie. The child has made friends through school and has several best friends in Erie.

The Father: Current Situation and Caregiving Environment

The father is 32 years old. He resides in a two-bedroom apartment in Erie with his son, the child's stepbrother, E.M., who is 16 months old. The father is employed by the John V. Schultz Company, a furniture store in Erie. His hours are Thursdays, Fridays and Saturdays from 9:00 a.m. to 9:00 p.m.; Sunday from noon to 6:00 p.m. He is off work on Mondays and Wednesdays. Most of his contact with the child occurs on the days he does not work.

The child has never had overnight visitation with the father, due to the father's prior instability with housing and employment. However, the father has played a significant role in the child's life.

The father cares for the child during the day on Mondays and Wednesdays. He has visitation with the child at other times, as well. The child has a strong, positive bond with the father. The father prepares meals for the child and the step-brother; they read together; they have music time, play time and sing. They also go to the park together.

The child has a loving relationship with his stepbrother and enjoys playing with him when visiting the father.

Although the father has achieved stable housing, he does not believe the child would do well with overnight visitation. At the mention of an overnight visit with the father, the child becomes anxious and inconsolable and wants to return to the mother's residence. The father has recommended therapy to assist the child with the issues concerning separation from the mother.

Members of the child's paternal extended family reside in Erie. The child has close relationships with these extended family members.

The Mother's Fiancé and the Proposed Relocation Environment:

J.T., 26 years of age, is the mother's fiancé. He has a B.A. in Engineering and has been employed by I.B.M. for three years as a computer engineer in North Carolina.

The mother and J.T. met at a wedding in September of 2010 and have been in a long-distance relationship since that time. Over the entire course of their relationship, they have resided separately in different states. They have not made wedding plans.

J.T. has traveled to Erie for long weekends and holidays. The mother has traveled to North Carolina on a few occasions for visits. The child accompanied the mother on at least one occasion. During a two-week visit at J.T.'s residence in March of 2011, the child telephoned the father every day.

J.T.'s residence is neat and clean. There is a bedroom in the residence for the child.

The child initially got along well with J.T. However, the child no longer shows J.T. signs of affection.

The child has no family in North Carolina. J.T.'s neighbors have offered to assist with child care in emergencies. The child has become close with a child who lives across the street from J.T.'s residence.

The mother has casually searched for employment in North Carolina, applying for work with a few bakeries in North Carolina. The mother believes employment opportunities may exist for her in North Carolina in the insurance field. Otherwise, the mother has not actively searched for employment in North Carolina nor does she have a firm job offer at this point.

LEGAL STANDARDS

Effective January 24, 2011, the Pennsylvania General Assembly enacted 23 Pa.C.S.A. §§5321-5340 (hereinafter, the "custody act" or the "new custody act"). The former child custody statute, 23 Pa.C.S.A. §§5301-5315, was repealed in its entirety.[2] Pursuant to the former custody statute, and "a legion of custody cases", the polestar of the analysis in child custody matters was the best interest of the child. See 23 Pa.C.S.A. §5303(a)[3]; *Saintz v. Rinker,* 902 A.2d 509, 512 (Pa.Super. 2006). Under the new statute, the court's primary consideration in child custody matters remains the best interest of the child. 23 Pa.C.S.A. §§5328, 5323(a).

This relocation case involves a temporary custody Order entered pending the hearing on the relocation request. No prior custody Order

[2] 2010, November 23, P.L. 1106, No. 112, §1.

[3] Repealed by 2010, November 23, P.L. 1106, No. 112, §1

had been entered. In cases such as this initiated prior to the effective date of the new custody act, the standard for resolution was the best interest of the child, incorporating the factors identified by the Superior Court in *Gruber v. Gruber,* 583 A.2d 434 (Pa.Super. 1990). *Collins v. Collins,* 897 A.2d 466, 471-473 (Pa.Super. 2006). In those cases, "the relocating parent [did] not have a greater burden of proof with regard to establishing the best interest of the child than [did] the parent who [did] not intend to move." *Id.* at 472-73. The court was required to evaluate the custodial environments offered by both parents, without imposing a selective burden of proof on the relocating parent. *Id.* at 473.

In *Collins v. Collins, supra,* the Superior Court addressed a relocation case matter where no prior custody order existed. The Superior Court noted the trial court first decided the issue of relocation and then decided the issue of custody.

The Superior Court disagreed with this procedure and stated:

> Nothing in our case law suggests that in cases such as this, where primary custody must be decided in the context of a relocation request, relocation should take a place of prominence and be the subject of an initial decision, which then leads inexorably to the custody decision. The trial court failed to scrutinize equally the custodial environment offered by the Mother in Utah, and that offered by the Father in Pennsylvania, without favoring one over the other. . . . By disassociating the issue of primary custody from the issue of relocation, rather than keeping both inquiries under a single umbrella of best interests of the children, the trial court committed an error of law.

Id at 473. The Superior Court determined the error was not harmless, since the error appeared to have led the trial court to draw unreasonable conclusions and inferences. *Id.*

Therefore, the issue of primary custody will be addressed prior to resolving the relocation petition.

The new custody act requires the court to determine the best interest of the child utilizing the "best interest factors" set forth at §5328(a)(1 through 16) in ordering <u>any</u> form of custody. 23 Pa.C.S.A. §§5323(a); 5328. "Weighted consideration" is to be given to those factors affecting the safety of the child. 23 Pa.C.S.A. § 5328(a).

Under the new custody statute, the Court must also consider ten "relocation factors" in determining whether to grant a proposed relocation. 23 Pa.C.S.A. §5337(h)(1 through 10). "Weighted consideration" is to be given to those factors which affect the safety of the child. 23 Pa.C.S.A. §5337(h). An additional factor the Court may consider in determining a relocation request is the failure of a party to give reasonable notice of a

proposed relocation. 23 Pa.C.S.A. §5337(j)(l).

"The party proposing the relocation has the burden of establishing that the relocation will serve the best interest of the child as shown under the relocation factors" at 23 Pa.C.S.A. §5337(h). 23 Pa.C.S.A. §5337(i)(1). "Each party has the burden of establishing the integrity of that party's motives in either seeking the relocation or seeking to prevent the relocation." 23 Pa. C.S.A. §5337(i)(2).

In any custody action between parents, "there shall be no presumption that custody should be awarded to a particular parent." 23 Pa.C.S.A. § 5327(a). Moreover, in determining the best interest of a child in a custody matter, "no party shall receive preference based upon gender." 23 Pa.C.S.A. § 5328(b).

DISCUSSION

Utilizing the relevant best interest factors at 23 Pa.C.S.A. §5328(a) (1 through 16) to evaluate the custodial environments offered by both parents, without imposing a selective burden of proof the relocating parent, the Court finds it is in the child's best interest to deny the relocation request.

The parents have demonstrated equal levels of encouraging and permitting frequent and continuing contact between the child and the other party. When the child is in the custody of either parent, each parent appropriately performs parental duties, including attending to the child's essential needs. The child's needs for stability and continuity in his education, family life and community life require the child to remain in Erie, Pennsylvania.

After considering and applying the relevant "relocation factors" at 23 Pa.C.S.A. § 5337(h)(1 through 10), the Court finds the mother has failed to satisfy her burden of proof.

The distance between Erie, Pennsylvania and North Carolina is too great for the child to maintain a meaningful relationship with the child's father, step-brother and extended family members, all of whom reside in Erie. The mother has failed to establish the proposed move is in the mother's best interest or that it will enhance the general quality of the mother's life. The mother has been in a long-distance relationship which is not firmly established. The outcome of the relationship, and the mother's employment prospects, are uncertain. The mother has failed to establish the proposed move is in the child's best interest or will enhance the general quality of the child's life. Visitation with the child in Erie while the mother remained in North Carolina would be emotionally traumatic for the child, who is unaccustomed to sleeping overnight apart from the mother. Currently, mother's financial security in North Carolina will hinge on the employment of the fiancé, who owes no duty of support to the mother or the child. The child's ties in Erie are too strong, and the

mother's situation in North Carolina is too tenuous, for the Court to grant the mother's relocation request.

CONCLUSION

It is in the child's best interest to deny the mother's relocation request. The child shall remain in Erie in accordance with the accompanying Order.

ORDER

AND NOW, to-wit, this 3rd day of August, 2011, after a hearing on July 15, 2011, on the request of the mother to relocate with the child to North Carolina, and in consideration of the best interest of the child, G.M., it is hereby **ORDERED** the relocation request is **DENIED**. The child shall remain in Erie, Pennsylvania. The temporary Custody Order entered May 19, 2011 shall become final, and shall remain in effect until further Order. In the event the mother decides to relocate without the child, and the parties are unable to reach agreement regarding custody issues, the matter shall be referred to the Office of Custody Conciliation for a Conciliation Conference.

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

LEWIS WELDING SERVICES, INC., d/b/a LEWIS BAWOL WELDING, Plaintiff,
v.
O.R. LASERTECHNOLOGY, INC., d/b/a OR LASER, Defendant

PLEADING / PRELIMINARY OBJECTIONS

Preliminary objections may be filed by any party to any pleading for failure to of a pleading to conform to law or rule of court and when ruling on preliminary objection, the court must determine whether the complaint is sufficiently clear to enable the defendant to prepare his defense.

PLEADING / PRELIMINARY OBJECTIONS

When a claim is premised on an alleged agreement the pleading shall state specifically if the agreement is oral or written and if the claim is based upon a written agreement either the agreement or a copy must be attached to the pleading.

CONTRACTS / LEGALITY

A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

CONTRACTS / WARRANTY

An express warranty is created by an affirmation of fact or promise that the goods shall conform to the seller's affirmation or promise and warranties that goods are fit for their ordinary use are implied when the seller is a merchant with respect to goods of that kind.

CONTRACTS / WARRANTY

Warranties that goods are fit for a particular use are implied at the time of sale when the seller has reason to know, any particular use for which the goods are required, and that the buyer is relying on the skill or judgment of the seller.

CONTRACTS / REPUDIATION

A revocation becomes effective when the buyer notifies the seller within a reasonable time after the buyer discovers or should have discovered the grounds for revocation and a contract need not contain a revocation provision for the buyer to use that remedy so long as it abides by the statute.

PLEADINGS / GENERAL REQUIREMENTS

In suitable circumstances any person having sufficient knowledge or information and belief may verify a petition.

PLEADINGS / PRELIMINARY OBJECTIONS

A demurrer requires the Court to determine the legal sufficiency of the complaint by admitting as true all material facts in the pleading and all inferences reasonably deductible therefrom.

CONTRACTS / BREACH

An action for breach of contract is established by pleading, (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages, and each element is specifically pleaded.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 10665-2011

Appearances: Richard A. Lanzillo, Esq., Attorney for Plaintiff
Jason A. Checque, Esq., Attorney for Defendant

OPINION

Connelly, J., September 23, 2011

The matter before the Court is pursuant to Preliminary Objections filed by O.R. Lasertechnology, Inc., d/b/a OR Laser (hereinafter "Defendant") to the Complaint filed by Lewis Welding Services, Inc., d/b/a Lewis Bawol Welding (hereinafter "Plaintiff").

Statement of Facts

Plaintiff avers on August 24, 2009 Defendant issued a proposal whereby Defendant would sell to Plaintiff a laser welding system and analog joy stick ("System") for $84,380. *Plaintiff's Complaint,* ¶ 2. Plaintiff alleges the proposal contained a guarantee the System would operate "properly and without defects or deficiencies for one year or two thousand operational hours." *Id.* On August 27, 2009 Plaintiff responded to the proposal with a purchase order for the System plus additional features and services for a total price of $95,849. *Id.*

On September 1, 2009 Plaintiff tendered $47,924.50 to Defendant. *Plaintiff's Complaint,* ¶ 2. The System was delivered to Plaintiff in the spring of 2010. *Id.* Plaintiff avers "immediately upon delivery" the System was defective. *Id.* Plaintiff returned the System to Defendant to cure the defects. *Plaintiff's Complaint,* ¶ 3. Upon redelivery of the System in September of 2010, Plaintiff alleges the System "failed to operate properly and within guaranteed specifications...". *Id.* The System is in Plaintiff's possession. *Plaintiff's Complaint,* ¶¶ 3-4. Plaintiff seeks damages for loss of production and incidental damages, the return of its initial payment and interest, the costs of suit, and other authorized relief. *Plaintiff's Complaint,* ¶ 5.

Defendant avers through its Preliminary Objections that Plaintiff's Complaint fails to establish whether the alleged contract was written or oral. *Defendant's Preliminary Objections,* ¶ 1. Defendant also alleges Plaintiff failed to attach necessary documents to the Complaint and that Plaintiff has not pled sufficient facts. *Defendant's Preliminary Objections,* ¶¶ 1-3.

Analysis of Law

"Preliminary objections may be filed by any party to any pleading... [for] failure of a pleading to conform to law or rule of court." *Pa.R.C.P. No.1028(a)(2).* When ruling on preliminary objections, the court must determine "whether the complaint is sufficiently clear to enable the defendant to prepare his defense,..". *Rambo v. Greene,* 906 A.2d 1232, 1236 (Pa.Super. 2006) *quoting Ammlung v. City of Chester,* 302 A.2d 491, 498 n.36 (Pa.Super. 1973).

Defendant avers Plaintiff's Complaint fails to establish whether the alleged contract was written or oral, and if written, Plaintiff failed to attach a valid copy. *Defendant's Preliminary Objections,* ¶ 1. Defendant asserts Plaintiff's Complaint does not contain signed warranty or revocation agreements. *Defendant's Preliminary Objections*, ¶ 2. Defendant's first and second Preliminary Objections are similar and will be addressed together.

When a claim is premised on an alleged agreement, "the pleading shall state specifically if the agreement is oral or written." *Pa.R.C.P. No.1019(h).* If the claim is based upon a written agreement either the agreement or a copy must be attached to the pleading. *Pa.R.C.P. No.1019(i).*

Defendant asserts Plaintiff did not state whether the alleged contract was written or oral. *Defendant's Preliminary Objections,* ¶¶ 1-2. However, Plaintiff averred "on or about August 24, 2009, Defendant issued a written proposal...to sell Plaintiff a laser welding system..." *Plaintiff's Complaint,* ¶ 2. Defendant's proposal refers to the document as "our offer." *Plaintiff's Complaint, Exhibit A,* ¶ 2. In response to the "written proposal", Plaintiff issued a "Purchase Order" to buy the System. *Plaintiff's Complaint* ¶ 2.

Defendant sent Plaintiff a written offer to sell the System for $84,380. *Plaintiff's Complaint, Exhibit A*, ¶ 1. The Purchase Order lists the System, optional features, and the corresponding increase in price ($95,849). *Plaintiff's Complaint, Exhibit B,* ¶ 1. Therefore, Plaintiff is in compliance with Rule 1019(h).

Defendant also avers Plaintiff failed to attach a valid, signed contract to its Complaint. A review of the record shows that on March 3, 2011, Proof of Service of Complaint was filed with the Prothonotary in the Erie County Court of Common Pleas, *Plaintiff's Proof of Service,* ¶ 1. Included in the record is a certified mail receipt delivered to Defendant's place of business on February 28, 2011. *Plaintiff's Proof of Service, Exhibit A,* ¶ 1. Plaintiff's Complaint, including Exhibits "A" and "B", was filed and is of record.

"A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." *13 Pa.C.S.A. § 2204*. Plaintiff stated

the alleged contract was based on two written documents and has attached copies of both to the Complaint. The Purchase Order was also signed by Plaintiff's "purchasing agent."[1] *Plaintiff's Complaint, Exhibit B,* ¶ 1. Additionally, Plaintiff and Defendant behaved as though they had a contract by tendering fifty percent of the payment and the delivery of the System. Exhibits "A" and "B" to the Complaint are copies of the contract at issue. As Plaintiff is in compliance with Pa.R.C.P. No.1019(h) and (i), Defendant's first and second Preliminary Objections are overruled.[2]

Defendant next asserts Plaintiff's Complaint violates Pennsylvania law because it did not contain signed warranty or revocation agreements. *Defendant's Preliminary Objections,* ¶ 2. An express warranty is created by an "affirmation of fact or promise... that the goods shall conform to the [sellers] affirmation or promise." *13. Pa.C.S.A. § 2313(a)(1).* Warranties that goods are fit for their ordinary use are implied when "the seller is a merchant with respect to goods of that kind." *13 Pa.C.S.A. § 2314(b)(3)* and *13 Pa.C.S.A. § 2314 (a).* Additionally, warranties that goods are fit for a particular use are implied at the time of sale when the seller has reason to know, "any particular use for which the goods are required; and that the buyer is relying on the skill or judgment of the seller..." *13 Pa.C.S.A. § 2315(1)-(2).*

Pennsylvania law does not require warranties to be signed. Defendant's Proposal contained a "guarantee" of "one year or two thousand operational hours..."[3] *Plaintiff's Complaint, Exhibit A,* ¶ 2. Plaintiff averred it understood this provision to mean the System "would function properly and without defects or deficiencies for one year or two thousand operational hours." *Plaintiff's Brief in Opposition to Defendant's Preliminary Objections*, ¶ 2. Therefore, accepting all well pled facts are true, a valid warranty was created.[4] Defendant's third Preliminary Objection is overruled.

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[1] A valid contract existed despite missing the signatures of two party members on the final document when the parties' signatures were not required by statute and Plaintiff purchased a store in anticipation of Defendant's merchandise delivery. *Shovel Transfer v. Pennsylvania Liquor Control Board,* 739 A.2d 133, 135-139 (Pa. 1999) (citations omitted).

[2] In its Brief, Defendant states Plaintiff was not an original party to the contract and lacked capacity to sue. *Defendant's Brief in Support of Preliminary Objections,* ¶ 5. However, this assertion was not raised in the Preliminary Objections therefore it will not be considered by the Court.

[3] Defendant's Proposal states: "Guarantee: 1 year or 2000 operational hours (whichever occurs first)." *Plaintiff's Complaint, Exhibit A,* ¶ 2.

[4] A seller creates an express warranty when "the terms of the warranty" are communicated to the buyer "in such a manner that the buyer understands those terms and accepts them." *Goodman v. PPG Industries, Inc.* 849 A.2d 1239, 1243 (PaSuper. 2004).

The Pennsylvania Commercial Code provides in part:

> The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it: on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured...

13 Pa.C.S.A. § 2608(a). The revocation becomes effective when the buyer notifies the seller "within a reasonable time after the buyer discovers or should have discovered the ground for it...". *13 Pa.C.S.A. § 2608(b).* A contract need not contain a revocation provision for the buyer to use that remedy so long as it abides by the statute. Plaintiff avers it notified Defendant of the defects and returned the system "shortly after the initial delivery...". *Plaintiff's Complaint,* ¶ 3. Plaintiff's Complaint need not contain an alleged contract with terms explaining the right to revoke for Plaintiff to have the right to do so. Therefore, Defendant's fourth Preliminary Objective is overruled.

Defendant's fifth Preliminary Objection avers Plaintiff's Complaint lacks a verification of personal knowledge, violating Pa.R.C.P. No.1024. The rule states in relevant part:

> 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 verification shall be made by one or more of the parties filing the pleading...

Pa.R.C.P. No.1024(a),(c).

A review of the record shows the Verification of Personal Knowledge was part of the pleading served on Defendant on February 28, 2011. Jeff Lewis, identified as the Secretary/Treasurer of Plaintiff, averred "the facts set forth in the foregoing Complaint are true and correct to the best of his knowledge..." and signed the Verification. *Plaintiff's Complaint, Verification* ¶ 1. "In suitable circumstances... 'any person having sufficient knowledge or information and belief may verify a petition." *Monroe Contract Corp. v. Harrison Square, Inc.,* 405 A.2d 954, 958 (Pa. Super. 1979) (holding a party's attorney may sign a verification if the conditions of Pa.R.C.P. No.1024 are met); *see also Desiree Mines, Ltd. v. Provident National Bank,* 7 Pa.D.&C.3d 163, 167 (Philadelphia, 1978) (finding a business corporation "can act only through its agents, officers, and employees"). Here, the signature is that of Plaintiff's secretary/ treasurer. *Plaintiff's Complaint, Verification ¶* 1. The Court notes that the secretary/treasurer's signature also appears on the "purchase order." *Plaintiff's Complaint, Exhibit B, ¶* 1. Therefore, the person who signed

the document had personal knowledge of the information and the Verification is part of the record. Defendant's fifth Preliminary Objection is overruled.

Finally, Defendant avers Plaintiff's Complaint violates Pa.R.C.P. No. 1028(a)(4) by failing to plead "sufficient facts to constitute and/or support the elements for a civil action under breach of contract." *Defendant's Preliminary Objections,* ¶ 3. Preliminary objections may be in the form of a demurrer for "legal insufficiency of a pleading." *Pa.R.C.P. No.1028(a)(4)*. A demurrer requires the Court to determine the legal sufficiency of the complaint by admitting as true all material facts in the pleading and "all inferences reasonably deductible therefrom." *Cardenas v. Schober,* 783 A.2d 317, 321 (Pa.Super. 2001); *see also Corestates Bank, N.A. v. Cutillo,* 723 A.2d 1053, 1057 (Pa.Super. 1999). Any doubt as to the sufficiency of the pleading should be "resolved in favor of overruling" the demurrer. *Cardenas,* 783 A.2d at 321.

An action for breach of contract is established by pleading, "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." *Corestates Bank,* 723 A.2d 1058; *see also Gen. State Auth. v. Coleman Cable & Wire Co.,* 365 A.2d 1347, 1349 (Pa.Cmwlth. 1976). Each element "must be specifically pleaded." *Corestates,* 723 A.2d 1058; *see also Snaith v. Snaith,* 422 A.2d 1379, 1382 (Pa.Super. 1980).

Here, Plaintiff has specifically pled that a contract existed between it and Defendant and has stated the "essential terms" in its Complaint. Plaintiff has specifically pled Defendant's alleged breach of duty and the damages (loss of production, shipping and storage of the System) Plaintiff has incurred as a result. *Plaintiff's Complaint,* ¶¶ 4-5. Therefore, accepting as true all material facts in the pleading, Plaintiff has pled sufficient facts to overrule a demurrer. Defendant's sixth Preliminary Objection is overruled.

ORDER

AND NOW, TO WIT, this 23rd day of September, 2011, it is hereby **ORDERED, ADJUDGED and DECREED** for the reasons set forth in the foregoing Opinion Defendant's Preliminary Objections are **OVERRULED.**

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

KEN BORRERO and NANCY BORRERO, as parents and natural guardians of J.E.B., a minor, Plaintiffs
v.
LAKE ERIE WOMEN'S CENTER, P.C. and PEG BOYD, Certified Nurse Midwife, Defendants
v.
PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, Intervenor

CIVIL PROCEDURE / DISCOVERY / SCOPE

The general rule defining the scope of discovery is set forth in Pa. R. C. P. 4003.1. Information is generally discoverable if it appears reasonably calculated to lead to admissible evidence. A request for information is not objectionable on the basis that the information sought would be inadmissible at trial.

CIVIL PROCEDURE / DISCOVERY / SCOPE

The purposes of discovery are: 1) to narrow the issues; 2) to obtain and preserve evidence; and 3) to elicit information as to the existence of evidence.

CIVIL PROCEDURE / DISCOVERY / DUTY TO RESPOND

It is axiomatic that a party responding to discovery is under an obligation to respond truthfully.

CIVIL PROCEDURE / DISCOVERY / DUTY TO RESPOND

The defendant hospital committed a discovery violation when, in response to a request for written policies, the hospital responded that it had none but, in fact, it actually did have in its possession a protocol relating to the complication (shoulder dystocia) at issue in the litigation. The hospital cannot avoid its obligation to disclose the existence of the protocol on the grounds that the policy was not its policy but that of a codefendant which happened to be in the hospital’s possession solely for credentialing purposes. Sanctions will be determined by the Court after argument.

CIVIL PROCEDURE / DISCOVERY / DUTY TO RESPOND

The defendant mid-wife and the medical practice employing the mid-wife failed to fulfill their obligation to respond truthfully when they objected to the relevancy of a request for policies relating to shoulder dystocia and stated that the request was not applicable but, in actuality, the mid-wife and her employer were aware of the protocol and did not disclose its existence. Sanctions will be determined by the Court after argument.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 12060-2004

Appearances: Patrick Loughren, Esq., Attorney for Plaintiffs
Francis J. Klemensic, Esq., Attorney for Defendant Lake Erie Women's Center, P.C.
Tyler J. Smith, Esq., Attorney for Defendant Peg Boyd
Marcia H. Haller, Esq., Attorney for Hamot Medical Center
James P. McGraw, Esq., Attorney for Pennsylvania Department of Public Welfare

OPINION AND ORDER

DiSantis, Ernest J. Jr., J. October 24, 2011

The case comes before this Court on the plaintiffs' Petition To Show Cause Why Sanctions Pursuant to Pa.R.C.P, 4019 and 42 Pa.C.S. § 2503(7) Should Not Be Awarded filed against the defendants on July 20, 2010. After affording the parties a lengthy discovery period, this Court conducted a hearing on July 27, 2011.

BACKGROUND OF THE CASE

The plaintiffs, Ken and Nancy Borrero are the parents and natural guardians of the minor-plaintiff, J.B. She was born on March 12, 2003 at Hamot Medical Center in the City of Erie. Defendant Peg Boyd, a nurse-midwife performed the delivery. Ms. Boyd was employed with Defendant Lake Erie Women's Center (LEWC) from 2001 to 2009. Plaintiffs allege that as a result of the defendants' negligence, the child's delivery was complicated by a condition known as "shoulder dystocia" that resulted with an injury to her brachial plexus leaving her with limited use of her left upper arm.

On June 1, 2001, LEWC was created by a merger of Levinson & Townsend, Inc. d/b/a Contemporary Women's Healthcare (CWH) and Lakeside Obstetricians and Gynecologists (Lakeside). Respondent Mark Townsend, M.D. is not a party to this action but was a shareholder of LEWC.

During the course of this lawsuit, plaintiffs served Hamot and LEWC with discovery requests including a request for production of any "written policies in place in 2000 that pertain to or relate to... shoulder dystocia". See Answers and Objections To First Set Of Interrogatories and Request For Production Of Documents directed to Defendant Lake Erie Women's Center, P.C., interrogatories ## 26 and 27. Diane Zenewicz, the corporate designee of LEWC, objected to the relevancy of the request and responded "not applicable". *Id.* Paul Huckno, Hamot's corporate designee responded, "None". *Id.* During Boyd's January 13, 2005 deposition, when asked if there were any guidelines that dictated the maneuver she used as part of the delivery, her only specific reference was to Varney's Midwifery. She could not think of any other guidelines "off the top of her head". See Boyd

1/13/05 Deposition at 51-52. Dr. Townsend's position is that LEWC did not have an approved shoulder dystocia protocol. 7/27/11 Hearing Transcript at 125, 146-147. Furthermore, if asked, he would not have referred anyone to any specific policies/procedures. *Id.* at 155-156.

Plaintiffs voluntarily discontinued their claim against Hamot. In August 2007, a jury trial commenced before the Honorable Shad Connelly. It resulted in a mistrial. This Court attempted to try the case a second time. However, on October 16, 2007, it declared a mistrial. The reasons for the mistrials are not relevant to the instant inquiry.

In and around April 2010, plaintiffs' counsel became involved in the unrelated case of *Decker v. Hamot, Lake Erie Women's Center, P.C.*, et al., No. 10589 - 2002. He learned that as part of the discovery process in *Decker,* Hamot produced 56 pages of policies and procedures that included a protocol for shoulder dystocia.[1] They were titled "Contemporary Women's Healthcare"; with the names of doctors Levinson and Townsend preprinted at the top. They were signed by Dr. Townsend. (See, Petition For Sanctions, Exhibit 1). Armed with this information, and believing that material information had not been disclosed during the course of the Borrero case, petitioners filed the instant petition on July 20, 2010.

In defense, Boyd, Townsend and LEWC assert that LEWC was not in existence in 2000 and that the 56 pages of policies and procedures were developed by CWH and had not been formally approved by LEWC after the merger. Hamot argues that it did not violate the discovery rules because the policies and procedures were not its policies, but were those of CWH which were obtained solely for credentialing purposes. Boyd claims that she truthfully answered the discovery inquiry concerning guidelines for the management of shoulder dystocia. However, she has admitted that she was aware of the 56 pages of policies and did refer to them from time-to-time after she was hired by CWH. She also admitted that during her employment with LEWC she undertook to update the policies in cooperation with the other midwives and physicians, but that the revisions were abandoned in favor of protocols recommended by the American College of Nurse-Midwives. Dr. Townsend claims that no protocols existed for LEWC.

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[1] In *Decker,* Hamot and Dr. Townsend were asked whether on June 21, 2000 it had in effect any written or oral internal procedures, policies, guidelines, rules,...protocols, manuals and/or directives of any sort, whether maintained in documentary form or by computer, applicable to or governing any of the following areas of concern?:

(a) the conduct and scope of midwifery and the procedures to be followed by nurse-midwives in the office and/or the hospital generally.

Plaintiff Decker's Interrogatory 1 and 2. See also, Hamot's Answers, Responses, Objections To First Set Of Interrogatories And Request For Production of Documents..., Interrogatory # 26, 7127/11 Hearing Exhibit 5.

DISCUSSION

There are two issues before this Court. First, whether the defendants intentionally or negligently failed to disclose material evidence regarding the existence of the shoulder dystocia protocol during the discovery process? Second, if so, what is the remedy?

Generally,

> A party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Pa.R.Civ.P. 4003.1. It is not objectionable that the information sought would be inadmissible at trial. Rather, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence, it is generally discoverable. *Id.* at (b). As one author has stated:

> Discovery has a three-fold purpose:
> 1. To narrow the issues to a point at which it is necessary for the court to consider only such evidence as concerns matters actually disputed and controverted;
> 2. To obtain and preserve evidence for subsequent use at trial;
> 3. To elicit information as to the existence of evidence for possible use at trial, from whom and by what method it may be elicited — such information as, for example, the names and addresses of persons who might reasonably be expected to have knowledge of relevant facts, or the existence, location and custody of pertinent documents or other things.

Charles B. Gibbons, Discovery Practice, West's Pennsylvania Practice, Vol. 5 § 1.2 at 2. It is axiomatic that the one from whom discovery is sought is under an obligation to respond to the discovery request truthfully.

At the July 27, 2011 evidentiary hearing, Hamot's Mr. Huckno admitted that the 56 page policies/practices were in Hamot's possession and used by Hamot to credential midwives, including Boyd. Furthermore, they, or a portion of them, were available to any credentialing agency which asked Hamot to provide substantiation for the credentialing process. See, 7/27/11 Hearing Transcript at 59, 64 - 66, 85 - 86.

As to Boyd, the evidence established her (and LEWC's) knowledge and the effect of the policies/practices. *Id.* at 162 - 164. See also, Boyd 1/18/11 Deposition at 37, 39 - 40. She oriented new midwives/

employees and referred them to the LEWC library that included the protocols among its publications. 7/27/11 Hearing transcript at 173, 178. Furthermore, she undertook their revision. *Id.* at 165; Boyd 1/18/11 Deposition at 20, 40, 81 and 97. Irrespective of Dr. Townsend's position that LEWC never approved the protocols, it is clear that he was aware of the protocols and had acknowledged their existence as early as the discovery phase *Decker* case when he co-referenced the co-defendant's (Dr. Levinson) discovery responses in his own response. In brief, he knew that the protocols existed after the merger between CWH and LEWC and had no reason to believe that they had been withdrawn or suspended. Townsend 10/31/05 Deposition at 110. He also knew that the protocols were part of the information relied upon by Hamot as part of the credentialing hospital. Townsend 1/19/11 Deposition at 61. Therefore, Boyd, LEWC, Townsend and Hamot each had knowledge of the policies/practices at the time of plaintiffs' discovery request and pretrial depositions. As to Townsend, Boyd and LEWC, the fact that the policies/practices were not formally adopted by the corporation after the merger is not dispositive. They were *de facto* protocols that were clearly available to anyone working for LEWC. Townsend, Boyd and LEWC should have disclosed their existence during the course of discovery. As to Hamot, although the documents were utilized for a different reason (credentialing), they were within Hamot's possession and knowledge and should have been disclosed.

The policies/practices were of particular significance to the plaintiffs as they attempted to establish their burden that those involved in the child's delivery violated the relevant standard of care. Absent disclosure, plaintiffs' ability to fully develop its case was impaired. Although the impact of Townsend's and Hamot's failure to disclose the evidence may be problematical as to their potential liability,[2] their failure to disclose foreclosed an avenue of discovery that would have assisted the plaintiffs in developing their case against Boyd and LEWC.

Townsend's, Boyd's and LEWC's discovery responses were made with knowledge that the policies/practices existed. Given the facts, the assertion that LEWC had not adopted them is a hyper-technical argument, better raised in a motion for protective order or motion *in limine*. It does not excuse their duty to disclose.

Hamot was charged with the knowledge of the protocols because they were within its possession. It had a duty to ascertain and disclose

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[2] Plaintiffs assert that Hamot failed to disclose the protocols in order to protect its employee, Nurse Paula Petroff, from liability (as well as itself). Petroff acted as the "birth assistant". See, Plaintiffs' Proposed Findings Of Facts And Conclusions Of Law at ¶ 261.

information located within its files. By comparison, Hamot's and Townsend's handling of the discovery request in the *Decker* case is noteworthy. In that case they disclosed the existence of the information (even though they questioned whether they had a duty to do so). That was the appropriate discovery response.

CONCLUSION

Based upon the above, the Court finds that defendants LEWC and Boyd, as well as Dr. Townsend and Hamot failed to properly respond to plaintiffs' discovery requests. Sanctions shall be determined by the Court after argument.

ORDER

AND NOW, this 24th day of October, 2011, for the reasons set forth in the accompanying opinion, this Court finds that the defendants, as well as, Dr. Mark Townsend and Hamot Medical Center committed discovery violations in this case. It is ORDERED that argument to determine the nature of sanctions shall be conducted by this Court on the **3rd day of November, 2011 at 1:30 p.m.**

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

MARK D. BOYD, individually, and as parent and natural guardian of KORY L. BOYD, a minor, Plaintiffs
v.
DEVIN JOHN MILLER and MICHAELA LOBENTHAL, Defendants

PRELIMINARY OBJECTIONS / DEMURRER, Pa.R.C.P. No. 1028(a)(4)

The question presented by a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. When addressing a demurrer, the court must accept as true all well-pled facts set forth in the complaint as well as all reasonable inferences deducible therefrom. The only time a demurrer should be sustained is when the plaintiff has clearly failed to state a claim on which relief may be granted.

CONTENT OF PLEADING, Pa.R.C.P. No. 1019(a)

Allegations will withstand challenge under Rule 1019(a) if (1) they contain averments of all facts the pleader will eventually have to prove in order to recover, and (2) they are sufficiently specific so as to enable the defendants to prepare his defense. A trial court has broad discretion in determining the amount of detail that must be averred.

NEGLIGENCE / CAUSE OF ACTION

To set forth a negligence cause of action, a plaintiff must aver facts establishing a duty, a breach of that duty, a causal relationship between the breach and the resulting injury, and actual loss.

NEGLIGENCE / MINOR SOCIAL HOST LIABILITY

Pennsylvania case law precluding minor social host liability for alcohol-related injuries does not address such liability regarding controlled substances, including marijuana. Pennsylvania's underage drinking laws and controlled substance laws treat the dangers of alcohol and controlled substances differently.

NEGLIGENCE / CONTROLLED SUBSTANCES

Alcohol is not interchangeable with controlled substances in a minor social host liability context. While a minor serving alcohol to another minor cannot be liable for injuries caused by the intoxicated minor to a third person, a minor furnishing controlled substances to another minor can be liable for injuries caused by the impaired minor to a third person.

NEGLIGENCE / CONCERTED TORTIOUS CONDUCT

To state a cause of action for concerted tortious conduct pursuant to Restatement (Second) of Torts § 876 (1977), a plaintiff must aver that the defendant: (a) committed a tortious act in concert with another person or pursuant to a common design with him, or (b) knew that the other person's conduct constituted a breach of duty and gave substantial assistance or encouragement to him to so conduct himself, or (c) gave

substantial assistance to another person in accomplishing a tortious result and the defendant's own conduct, separately considered, constituted a breach of duty to the third person.

PLEADINGS / CONCERTED TORTIOUS CONDUCT

A complaint will survive preliminary objections on a theory of concerted tortious conduct where it contains allegations of fact indicating that: (1) both defendant and another person intended to consume controlled substances, (2) defendant furnished controlled substances to the other person, and (3) defendant substantially assisted or encouraged the other person in his consumption of the controlled substances which rendered the other person incapable of operating his motor vehicle, resulting in injury to the plaintiff. The complaint need not identify evidence supporting these factual assertions.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 11321-2011

Appearances: Arthur D. Martinucci, Esq. and John W. McCandless, Esq., Attorneys for Plaintiffs
Marcia H. Haller, Esq., Attorney for Defendant Michaela Lobenthal
Mark E. Mioduszewski, Esq., Attorney for Defendant Devin John Miller

OPINION

Connelly, J. October 28, 2011

This matter is before the Court pursuant to Preliminary Objections filed by Michaela Lobenthal (hereinafter "Defendant") to Plaintiffs' Complaint in Civil Action. Mark D. Boyd and Kory L. Boyd (hereinafter "Plaintiff" and "Minor Plaintiff" respectively, "Plaintiffs" collectively) oppose.

Statement of Facts

Plaintiffs filed this Complaint against Defendant seeking to recover for injuries sustained by Minor Plaintiff in a motor vehicle accident. Plaintiffs are seeking compensatory and punitive damages in excess of fifty thousand dollars ($50,000.00).

The weekend of September 18 and 19, 2010, Plaintiffs allege Defendant "agreed to host a party" at a property owned by her parents (hereinafter "the Property"). *Plaintiffs' Complaint, ¶ 6.* Plaintiffs assert Devin John Miller[1] (hereinafter "Miller") was in attendance at this party. *Id. at ¶ 8.* Plaintiffs allege Defendant smoked marijuana with Miller that

[1] Miller has also been named as a defendant in this case.

night and actually "paid [Miller] money to acquire" that marijuana. *Id. at ¶ 9.* Plaintiffs also allege Defendant "had seen [Miller] consume vodka, rum, marijuana, cocaine, OxyContin, and was of the belief that he was 'out of control' with respect to his use of drugs, and had partied with him on previous occasions." *Id. at ¶ 11.*

Plaintiffs assert Defendant hosted another party at the Property the following weekend, on the evening of September 25 and into the morning of September 26, 2010. *Id. at ¶¶ 12, 15, 20.* Plaintiffs assert Minor Plaintiff, Miller, and others attended this party. *Id at ¶ 14.* Plaintiffs assert Defendant met Minor Plaintiff, Miller, and the other attendees at a gas station and drove one vehicle to the Property, with Miller following behind in another vehicle. *Id.*

Plaintiffs allege Defendant, Miller, and the other attendees "openly brought vodka, rum, marijuana, Klonopin, Xanax or other controlled substances" to the party. *Id. at ¶ 17.* Plaintiffs assert Defendant "knew that [Miller] intended to consume alcohol and drugs" at the party, and that Miller did, in fact, "with the knowledge and encouragement of the Defendant . . ., openly possess[ ] and smoke[ ] marijuana, consume [ ] vodka, rum, Klonopin, Xanax, and/or other controlled substances at the party." *Id. at ¶¶ 18, 20.* Plaintiffs also allege Defendant "smoked marijuana and consumed alcohol with [Miller]" at the party. *Id. at ¶ 21.* Plaintiffs further allege that Defendant "provided to, and smoked with, . . . Miller marijuana that she had left over from the preceding weekend's party." *Id. at ¶ 22.*

On the morning of September 26, 2010, Plaintiffs assert all the attendees left the Property together, with Defendant "operating the lead vehicle, . . . [and Miller] operating his 2000 Pontiac Grand Am and following her." *Id. at ¶ 24.* Plaintiffs assert Minor Plaintiff "was a front seat passenger in [Millers] vehicle." *Id.* Plaintiffs allege Minor Plaintiff's injuries were sustained when Miller "attempted to pass [a] third vehicle at a high rate of speed," lost control of his car, and "impacted a wooden fence and a utility pole." *Id. at ¶¶ 26, 28.* Plaintiffs allege a blood test was performed on Miller, and "it was determined that his alcohol content was .026 percent and his drug screen was positive for the presence of illegal drugs." *Id. at ¶ 29.*

As the result of this motor vehicle accident, Plaintiffs allege Minor Plaintiff has suffered "serious and severe injuries," as well as "serious and severe damages." *Id. at ¶¶ 30-31.* These injuries, Plaintiffs assert, are "a direct and proximate result of the negligence, carelessness, recklessness, outrageous, willful and wanton conduct of" Miller and Defendant. *Id. at ¶¶ 30-32.* More specifically, Count II of Plaintiffs' Complaint sets out a negligence claim against Defendant and Count III sets forth a claim for concerted tortious conduct against Defendant and Miller. *Plaintiffs' Complaint.*

Count II alleges Minor Plaintiff's "injuries and damages are the direct and proximate result of the negligence" of Defendant because Defendant: (a) knowingly permitted and allowed Miller to possess and consume marijuana or other controlled substances at the party; (b) knowingly possessed, "alone or with [Miller] or others," marijuana or other controlled substances that were not lawfully obtained through a valid prescription or practitioner; (c) possessed, "alone or with [Miller] or others," marijuana or other controlled substances and intended to deliver those controlled substances to Miller; (d) possessed, "alone or with [Miller] or others, a quantity of marijuana with the intent to distribute it to [Miller]"; and (e) permitted and allowed Miller to consume controlled substances when Defendant knew or should have known that he was also consuming so much alcohol that "his faculties would be impaired and he would be unable to safely operate his vehicle." *Id. at ¶ 38.*

Count III alleges Defendant acted in concerted tortious conduct with Miller by "agree[ing] to party with him, and provide him access to" the Property. *Id. at ¶ 40.* Count III alleges Defendant acted in concert with Miller by "knowingly possess[ing], permit[ting] and allow[ing] the possession and use of alcohol, marijuana, . . . or other controlled substances at the party." *Id. at ¶ 41.* Count III also alleges Defendant and Miller acted in concert because Defendant herself "consumed alcohol and marijuana at the party." *Id. at ¶ 43.* Additionally, Count III alleges Defendant "substantial[ly] assist[ed] or encourage[d Miller] in his consumption of alcohol, marijuana, . . . or other controlled substances at the party," and Defendant's "encouragement or assistance . . . was a substantial factor in causing [Miller's] tortious conduct." *Id. at ¶ 42, 44.* Count III asserts Defendant is therefore jointly and severally liable for the conduct of Miller. *Id. at ¶ 45.*

Defendant contends Plaintiffs' Complaint alleges facts insufficient to support a cause of action against Defendant. *Preliminary Objections of Defendant Michaela Lobenthal, ¶ 14.* Defendant argues Plaintiffs have not alleged facts that establish a recognized duty owed by Defendant to Minor Plaintiff, nor do the facts alleged establish that Defendant's actions were the direct and proximate cause of Minor Plaintiff's injuries and damages, *Id. at ¶¶ 8-9.* Additionally, Defendant argues "the facts as alleged in the Complaint do not support a claim for 'Concerted Tortious Conduct' as a matter of law." *Id. at ¶ 13.*

The Court must address these arguments in light of the applicable Pennsylvania law.

Findings of Law

Rule 1028 of the Pennsylvania Rules of Civil Procedure allows "any party to any pleading" to file preliminary objections. *Pa.R.C.P. 1028(a).* "All preliminary objections shall be raised at one time. . . . [and] shall state specifically the grounds relied upon and may be inconsistent."

PaR.C.P. 1028(b). In ruling on preliminary objections, a court must accept as true all well-pled facts which are relevant and material, as well as all inferences reasonably deducible therefrom. *Bower v. Bower,* 611 A.2d 181, 182 (Pa. 1992). 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 pleader will be unable to prove facts legally sufficient to establish his right to relief." *Id.*

In the present case, Defendant has raised preliminary objections arguing Plaintiffs' Complaint "fails to state a legally recognizable cause of action against" Defendant. *Preliminary Objections of Defendant Michaela Lobenthal, ¶ 14.* Because Defendant is challenging the legal sufficiency of Plaintiffs' facts, her preliminary objections are in the nature of a demurrer. *See Pa.R.C.P. 1028(a)(4)* ("Preliminary objections . . . are limited to the following grounds: . . . (4) legal insufficiency of a pleading (demurrer)").

"The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible." *Eckell v. Wilson,* 597 A.2d 696, 698 (Pa. Super. 1991) (internal citations omitted). Only the factual allegations in a complaint are considered to be true for the purposes of a demurrer, not the pleader's conclusions of law. *Id.* Testing the sufficiency of the facts requires that "all material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true for the purposes of review." *Id.* The only time a demurrer should be sustained is when "the plaintiff has clearly failed to state a claim on which relief may be granted." *Id.* If there is any doubt as to the adequacy of the plaintiff's complaint, a demurrer should not be sustained. *Id.*

Defendant contends the facts alleged in Plaintiffs' Complaint are insufficient as a matter of law to support causes of action against Defendant for negligence or concerted tortious conduct. *Pennsylvania Rule of Civil Procedure 1019(a)* provides 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).* This rule is meant "to enable the adverse party to prepare his case." *Smith v. Wagner,* 588 A.2d 1308, 1310 (Pa. Super. 1991) (citations and brackets omitted). It requires a complaint "do more than give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. [The complaint] should formulate the issues by fully summarizing the material facts . . . ., i.e., those facts essential to support the claim." *Id.*

Allegations will withstand challenge under Rule 1019(a) if (1) they contain averments of all the facts the pleader will eventually have to prove in order to recover, and (2) they are sufficiently specific so as to enable the defendant to prepare his defense. *Id.* Moreover, in *Yacoub v. Lehigh Medical Center, P.C.,* the Superior Court held, "to determine if a

paragraph contains the appropriate specificity, the court looks not only to the particular paragraph at issue, but also to that paragraph in the context of the other allegations in the complaint." 805 A.2d 579, 588 (Pa. Super. 2002). A trial court has "broad discretion in determining the amount of detail that must be averred," because the standard of pleadings set forth in Rule 1019 does not lend itself to precise measurement. *United Refrigerator Co. v. Applebaum,* 189 A.2d 253, 255 (Pa. 1963).

The question at issue in the case before this Court is whether Plaintiffs have alleged facts sufficient to support Counts II and III against Defendant for negligence and concerted tortious conduct. Each Count will be addressed in turn.

Count II: Negligence

"It is axiomatic that the elements of a negligence-based cause of action are a duty, a breach of that duty, a causal relationship between the breach and the resulting injury, and actual loss." *Campo v. St. Luke's Hospital,* 755 A.2d 20, 23-24 (Pa. Super. 2000). Defendant challenges Plaintiffs' ability to satisfy both the duty and causation elements of negligence on the facts alleged in the Complaint. *Preliminary Objections of Defendant Michaele Lobenthal, ¶¶ 3, 8, 9.*

With regards to duty, Pennsylvania requires a plaintiff demonstrate "the defendant breached a duty of obligation recognized by the law which required him to conform to a certain standard of conduct for protection of persons such as the plaintiff." *Brandjord v. Hopper,* 688 A.2d 721, 723 (Pa, Super, 1997) (quoting *Merritt v. City of Chester,* 496 A.2d 1220, 1221 (Pa. Super. 1985)), Additionally, though "each person may be said to have a relationship with the world at large that creates a duty to act where his own conduct places others in peril, . . . mere knowledge of a dangerous situation, even by one who has the ability to intervene, is not sufficient" to support a finding that a duty to act exists. *Brandjord,* 688 A.2d at 723. Thus, "[w]hether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk and the public interest in the proposed solution." *Id.* The Pennsylvania Superior Court has advised that "[d]uty, as a concept, is a flexible notion." *Campo,* 755 A.2d at 24. Moreover, duty is merely "a word with which we state our conclusion that there is or is not to be liability . . . . To give it any greater mystique would unduly hamper our system of jurisprudence in adjusting to the changing times." *Campo,* at 24 (quoting *Troxel v. A.I. Dupont Inst.,* 675 A.2d 314, 319 (Pa. Super. 1996)).

Defendant argues "Pennsylvania does not recognize any legal theory by which one person has a duty to prevent another from engaging in either negligent or illegal activity." *Brief in Support of Preliminary Objections of Defendant Michaela Lobenthal, p. 6*. However, this is not

simply a case of Defendant failing to prevent Miller from engaging in negligent behavior, as Defendant contends. Plaintiffs' facts allege that Defendant furnished marijuana and/or controlled substances. *Plaintiffs' Complaint, ¶¶ 17, 22, 38(c), 38(d).* Accepting these allegations as true for purposes of review, such conduct amounts to much more than a failure to prevent Miller from engaging in negligent behavior or illegal activity.

Defendant also argues the allegations, even if true, "do not form the basis for a legally recognizable course of action against her in connection with the motor vehicle accident." *Preliminary Objections of Defendant Michaela Lobenthal, ¶ 9*. In support of this argument, Defendant relies on a series of cases from the Pennsylvania Supreme Court dealing with social host liability.[2] *Brief in Support of Preliminary Objections of Defendant Michaela Lobenthal, pp. 6-7.* In *Klein v. Raysinger,* the Supreme Court held "that there can be no liability on the part of a[n adult] social host who serves alcoholic beverages to his or her adult guests." 470 A.2d 507, 511 (Pa. 1983). In *Kapres v. Heller,* this holding was extended to minors: "one minor does not owe a duty to another minor regarding the furnishing or consumption of alcohol." 640 A.2d 888, 891 (Pa. 1994). And in *Sperando v. Commonwealth Dep't of Transp.,* the Supreme Court determined that a minor serving alcohol to another minor could not be liable for injuries caused by the intoxicated minor to a third party. 643 A.2d 1079 (Pa. 1994).

These cases, Defendant argues, shield her from liability for negligence. Defendant argues the rationale applied to the social host cases "applies whether the matter being supplied is alcohol, marijuana, and/or other controlled substances." *Brief in Support of Preliminary Objections of Defendant Michaela Lobenthal, p. 9.* Defendant is correct in her assertion that she, a minor, cannot be liable for providing alcohol to Miller, another minor, However, Defendant provides no support for her contention that alcohol, marijuana and/or controlled substances are interchangeable in a social host liability analysis, and for the following reasons, this Court is not inclined to treat them as such.

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[2] Additionally, Defendant cites to a number of passenger liability cases holding "the passenger of a vehicle does not, owe a duty to a third person where the driver of the vehicle is intoxicated, even when the passenger and the driver jointly procured and ingested the alcohol." *Brief in Support of Preliminary Objections of Defendant Michaela Lobenthal, pp. 7-8* (emphasis in original). *See Brandjord*, 688 A.2d 721 (holding adult passengers owe no duty to third parties to keep an adult driver from driving, even when the passengers and driver procured and drank the alcohol together and the passengers knew the driver was intoxicated) and *Welc v. Porter,* 675 A.2d 334 (Pa. Super. 1996) (holding a minor passenger owed no duty to third parties injured by an intoxicated minor driver, even when passenger and driver obtained and drank the alcohol together). These cases, however, are irrelevant to the question at hand, as they involve only alcohol and do not address social host liability for furnishing controlled substances.

Pennsylvania's underage drinking laws[3] and drug laws[4] reveal the legislature does not consider the dangers of alcohol and controlled substances to be equal. With regards to alcohol, a person under the age of twenty-one is considered a minor. If a minor "attempts to purchase, purchases, consumes, possesses or knowingly and intentionally transports any liquor or malt or brewed beverages," he commits a summary offense. *18 Pa.C.S. § 6308(a).* The penalty for the first offense of this nature is a ninety day suspension of the minor's motor vehicle operating privileges.[5] *18 Pa.C.S. § 6310.4(a), (b)(1).* For any second or subsequent offense, the statute provides the minor "may be sentenced to pay a fine of not more than $500 for the second and each subsequent violation." *18 Pa.C.S. § 6308(b)* (emphasis added).

A person providing alcohol to minors faces harsher consequences. If a person "intentionally and knowingly sells or intentionally and knowingly furnishes, or purchases with the intent to sell or furnish" alcohol to a minor, he commits a misdemeanor of the third degree. *18 Pa.C.S. § 6310.1(a).* The minimum penalty that can be imposed in such a scenario requires the person "be sentenced to pay a fine of not less than $ 1,000 for the first violation and a fine of $ 2,500 for each subsequent violation." *18 Pa.C.S. § 6310.1(c).*

These underage drinking laws aim to protect minors because the "legislature has made a legislative judgment that persons under twenty-one years of age are incompetent to handle alcohol." *Congini v. Portersville Valve Co.,* 470 A.2d 515, 517 (Pa. 1983). Adults, however, are generally not deemed incompetent to handle alcohol, and it is not usually a tort or crime to sell or provide alcohol to adults. Controlled substances, on the other hand, are a different matter entirely. With very limited exceptions for those with valid prescriptions or working in the medical profession, it is a crime for *any person*,[6] not just minors, to possess, purchase, or deliver controlled substances. Such violations of the Controlled Substance Act expose the person committing the violations to more severe penalties.

Possession of a controlled substance is a misdemeanor, and the person "shall . . . be sentenced to imprisonment not exceeding one year or to pay a fine not exceeding five thousand dollars ($5,000), or both." *35 P.S. § 780-113(a)(16), (b).* Any person who purchases or "recei[ves] in commerce" a controlled substance is also guilty of a misdemeanor, but this violation carries a sentence of "imprisonment not exceeding three

[3] Found in the Pennsylvania Crimes Code, *18 Pa.C.S. § 6307-6310.7.*

[4] The Controlled Substance, Drug, Device and Cosmetic Act ("the Controlled Substance Act"), *35 P.S. § 780-101 et seq.*

[5] For a second offense, the duration of suspension is one year. For third and subsequent offenses, the duration is two years. *18 Pa.C.S. § 6310.4(b)(2)-(3).*

[6] The penalties provisions of the Controlled Substance Act apply to *"any person"* who violates the Act. *See 35 P.S. § 780-113(b)-(g), (i-l), (n)-(p)* (emphasis added).

years or . . . a fine not exceeding five thousand dollars ($5,000), or both." *35 P.S. § 780-113(a)(19), (b).* Delivery of or possession with intent to deliver a Schedule I, II, III, or IV controlled substance is a felony, while a Schedule V drug is a misdemeanor. *35 P.S. § 780-113(a)(30), (f)(1)-(4).* The penalties for such a violation vary depending on the schedule of the controlled substance involved, but the minimum penalty for delivering a Schedule IV controlled substance is a sentence of "Imprisonment not exceeding three years, or . . . a fine not exceeding ten thousand dollars ($10,000) or both."[7] *35 P.S. § 780-113(f)(3).* It is also a violation, "notwithstanding other subsections of this section," to: "(i) possess[ ] a small amount of marihuana only for personal use; (ii) possess[ ] a small amount of marihuana with the intent to distribute it but not to sell it; or (iii) distribut[e] a small amount of marihuana but not [sell it]." *35 P.S. § 780-113(a)(31).* Such a violation is a misdemeanor with a sentence of "imprisonment not exceeding thirty days, or. . . a fine not exceeding five hundred dollars ($500), or both." *35 P.S. § 780-113(g).*

Given that most violations of the Controlled Substance Act contemplate some jail time while the underage drinking laws do not, it is apparent the legislature considered the possession, consumption, and delivery of controlled substances more offensive than alcohol. Additionally, in the Controlled Substance Act, the legislature specifically addresses its concern with regards to controlled substances. Schedule I controlled substances, for example, have "a high potential for abuse, no currently accepted medical use in the United States, and a lack of accepted safety for use under medical supervision." *35 P.S. § 780-104(1).* The Pennsylvania Superior Court, expounding on this legislative determination, has also said Schedule I controlled substances are illegal because they are "inherent[ly] harm[ful]," referring "not only [to] the harm caused to society in terms of costs and quality of life, but [also to] the real and devastating harm done to the user."[8] *Minnesota Fire and Casualty Co. v. Greenfield,* 855 A.2d 854, 865 (Pa. 2004) (quoting with approval *Minnesota Fire and Casualty Co. v. Greenfield,* 805 A.2d 622, 627 (Pa. Super. 2002)).

Clearly, then, violations of the Controlled Substance Act are considered more egregious than violations of the underage drinking laws. Despite these differences, Defendant urges this Court to treat alcohol the same

[7] Delivery of a Schedule I or II substance also classified as a narcotic drug comes with "imprisonment not exceeding fifteen years, or . . . a fine not exceeding two hundred fifty thousand dollars ($250,000), or both or such larger amount as is sufficient to exhaust the assets utilized in and the profits obtained from the illegal activity." *35 P.S. § 780-113(f)(1).*

[8] The Superior Court was discussing heroin, which, like marijuana, is a Schedule I controlled substance. *See 35 P.S. § 780-104(1)(II)(10)* (listing heroin as a Schedule I controlled substance) and 35 P.S. § 780-104(1)(iv) (listing "marihuana" as a Schedule I controlled substance).

as marijuana and/or controlled substances for purposes of civil liability. Defendant relies on the rationale employed in the social host liability cases to support her position, but a further exploration of these cases demonstrates why such an argument falls flat.

In *Klein v. Raysinger*, an adult social host served alcohol to a visibly intoxicated adult guest, and the guest was later involved in a motor vehicle accident. The Pennsylvania Supreme Court was asked to "recognize a new cause of action in negligence, against a social host who serves alcohol to a visibly intoxicated person, whom the host knows, or should know, intends to drive a motor vehicle."[9] 470 A.2d 507, 508 (Pa. 1983). The court declined to attach liability in such a case. Because it was neither a tort nor a crime to serve alcohol to the guest, the court favored "the view that in the case of an ordinary able bodied man it is the consumption of the alcohol, rather than the furnishing of the alcohol, which is the proximate cause of any subsequent occurrence." *Id, at 510.* The court preferred to make the adult consuming the alcohol responsible for his actions, as opposed to the host who had committed neither a crime nor a tort in serving the adult.

The same day the *Klein* decision was issued, the Supreme Court decided a companion case, *Congini v. Portersville Valve Company.* 470 A.2d 515 (Pa. 1983). In *Congini,* an adult social host served alcohol to a minor, who was later involved in a motor vehicle accident. The court determined that the "legislature had made a legislative judgment that persons under twenty-one years of age are incompetent to handle alcohol." *Id. at 517.* This legislative judgment prompted the court to reason, "here we are not dealing with ordinary able bodied men. Rather, we are confronted with persons who are, at least in the eyes of the law, incompetent to handle the affects of alcohol." *Id.* Thus, the adult social host, who was legally allowed to possess and consume alcohol, had a duty "to protect both minors and the public at large from the perceived deleterious effects of serving alcohol to persons under twenty-one years of age," and the host was negligent *per se* for failing to do so. *Id. at 518.*

The Supreme Court returned to this issue of social host liability in *Kapres v. Heller* when a minor guest sought to impose liability on a minor social host for providing alcohol to the minor guest. 640 A.2d 888 (Pa. 1994). The minor guest urged the court to hold the minor social host to the standard imposed on adults in *Congini. Id. at 891*. The minor guest seemed to be making the argument that, because the minor guest was deemed incompetent to handle the effects of alcohol, the minor host

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[9] The plaintiffs in *Klein* argued that such a cause of action existed at common law because the Supreme Court had already determined the Liquor Code did not create a negligence *per se* cause of action, as the Liquor Code only applied to licensed persons selling alcohol. *See Manning v. Andy,* 310 A.2d 75 (Pa. 1973).

should be liable for serving him. However, the court noted the illogic of the idea that minor hosts should be held "to the standard required of adults in *Congini,* while providing to [minor guests] the protections specially afforded minors under the same principle." *Id.* The court reasoned that "[b]oth the [minor guest] and the [minor host] are considered under the law incompetent to handle alcohol," so they should be treated similarly. *Id.* It would be inconsistent to hold the minor host responsible for furnishing the alcohol while not holding the minor guest responsible for consuming the alcohol. The court therefore held that "it is more logical and consistent with the prevailing view on social host liability in this Commonwealth to find that one minor does not owe a duty to another minor regarding the furnishing or consumption of alcohol."[10] *Id.*

Unlike the underage drinking laws meant to protect minors from their inability to handle the effects of alcohol, the Controlled Substance Act does not provide special protection to a particular class of persons.[11] Presumptively, then, the legislature has deemed *everyone*[12] incompetent to handle the effects of controlled substances. In the present case, if this Court accepts as true Defendant's assertion that "the rationale employed by the Pennsylvania Supreme Court in [*Kapres* and *Sperando*] applies whether the matter being supplied is alcohol, marijuana and/or other controlled substances," then this Court would have to find that no one can ever be held civilly liable for furnishing marijuana and/or other controlled substances. *Reply to Plaintiffs' Brief in Opposition to Defendant's Preliminary Objections, p. 7.* If everyone is considered incompetent under the law to handle controlled substances and should therefore be treated similarly, then everyone should either be responsible or not responsible for their part in furnishing controlled substances. Defendant's argument therefore clearly falls short when the result Defendant wants would serve to grant civil immunity to anyone

[10] This holding was extended in *Sperando* to find no minor social host liability for third party injuries inflicted by an Intoxicated minor guest. *Sperando v. Commonwealth Dep't. of Transp.,* 643 A.2d 1079 (Pa. 1994).

[11] *35 P.S. § 780-114* does provide for harsher penalties if a person over twenty-one years of age provides a controlled substance to a person who is at least four years younger and under eighteen years of age. However, this statute is one of a general nature meant to protect the well being of minors. It does not demonstrate that the Controlled Substance Act deems only minors incompetent to handle the effects of controlled substances.

[12] Schedule II-V controlled substances can be used medically by people with valid prescriptions. *35 P.S. § 780-104(2)-(5).* Schedule I controlled substances, however, have no accepted medical use and cannot be possessed or used by anyone. *35 P.S. § 780-104(1).*

[13] It is worth noting that the Controlled Substance Act does not provide for such civil immunity. In fact, the Controlled Substance Act provides that "[a]ny penalty imposed for violation of this act shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law." *35 P.S. § 780- 113(h). See also, e.g., Minnesota Fire and Casualty Co. v. Greenfield,* 855 A.2d 854 (Pa. 2004) (demonstrating courts allow civil actions against those who furnish controlled substances by holding an insurance company was not required to defend and indemnify an insured in a wrongful death action when the insured provided the heroin that caused the death).

furnishing controlled substances.[13] This Court is unwilling to sanction such a result.

In the present case, Plaintiffs have alleged Defendant and others "openly brought . . . marijuana, Klonopin, Xanax or other controlled substances to the [P]roperty." *Plaintiffs' Complaint, ¶ 17.* Plaintiffs also allege "[Defendant] provided to . . . [Miller] marijuana that she had left over from the preceding weekend's party." *Id. at ¶ 22.* Finally, Plaintiffs allege Defendant was negligent in "possessing, alone or with [Miller] or others, marijuana, Klonpin, Xanax or other controlled substances, with the intent to deliver" and "with the intent to distribute" them to Miller. *Id. at 38(c)-(d).* Based on these allegations, dismissal at this stage is inappropriate. Because Defendant's liability is tied to whether she did, in fact, furnish controlled substances to Miller, such a factual determination is best left to a jury to decide.

Defendant also argues "Miller's consumption of alcohol and/or controlled substances, as well as his reckless driving, was the proximate cause of Minor Plaintiff's injuries. *Reply to Plaintiffs' Brief in Opposition to Defendant's Preliminary Objections, p. 5.* In support of her argument, Defendant quotes the Pennsylvania Supreme Court's explanation in *Klein* that "it is the consumption of alcohol, rather than the furnishing of alcohol, which is the proximate cause of any subsequent occurrence." *Id.* (quoting *Klein,* 470 A.2d at 510). Again, however, Defendant urges this Court to "apply[ ] that same rationale to the instant facts" without providing any support for her contention that alcohol and marijuana or other controlled substances are interchangeable in the Supreme Court's analysis. *Reply to Plaintiffs' Brief in Opposition to Defendant's Preliminary Objections, p. 5.* As explained above, the Supreme Court's rationale applies to alcohol and was based on the fact that it is usually neither a crime nor a tort to provide adults with alcohol. Because Plaintiffs allege Defendant furnished controlled substances, which is a crime and potentially opens the Defendant to liability for a tort, causation in this case is a question better suited to a jury.

Based on the facts alleged by Plaintiffs, it cannot be said "with certainty that no recovery is possible." *Eckell v. Wilson,* 597 A.2d 696, 698 (Pa. Super. 1991). It is therefore inappropriate for this Court to dismiss Plaintiffs' negligence cause of action against Defendant at this stage. Defendant's Preliminary Objections as to Count II are OVERRULED.[14]

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[14] For purposes of clarity, this Court reiterates that it is well settled in Pennsylvania that Defendant cannot be liable to Plaintiffs for providing *alcohol* to Miller, nor will she be liable for merely "partying" with Miller. Any finding of liability relies on a determination that Defendant furnished controlled substances to Miller and that furnishing these substances was the proximate cause of Minor Plaintiff's Injuries.

Count III: Concerted Tortious Conduct

In order to be liable for concerted tortious conduct to Plaintiffs under Restatement (Second) of Torts section 876, Defendant must have

> (a) [done] a tortious act in concert with [Miller] or pursuant to a common design with him,[15] or
> (b) know[n] that [Miller's] conduct constitute[d] a breach of duty and give[n] substantial assistance or encouragement to [Miller] so to conduct himself,[16] or
> (c) give[n] substantial assistance to [Miller] in accomplishing a tortious result and [her] own conduct, separately considered, constitute[d] a breach of duty to the third person.[17]

Restatement (Second) of Torts § 876.

Defendant argues the facts presented in the Complaint cannot support liability under any clause of section 876. Defendant relies on a number of passenger liability cases holding recovery under section 876 is inappropriate when the passenger only procured and drank alcohol with the driver and did nothing more to "substantially encourage or assist" the driver's tortious conduct. *Brief in Support of Preliminary Objections of Defendant Michaela Lobenthal, pp. 12-13.* However, Defendant again

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[15] Comment (a) on clause (a) explains:

> Parties are acting in concert when they act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result. The agreement need not be expressed in words and may be implied and understood to exist from the conduct itself. Whenever two or more persons commit tortious acts in concert, each becomes subject to liability for the acts of the others, as well as for his own acts.

Restatement (Second) Torts § 876 comment (a). Additionally, in order for liability to attach pursuant to clause (a), "it is essential that the conduct of the actor be in itself tortious. One who innocently, rightfully and carefully does an act that has the effect of furthering the tortious conduct or cooperating in the tortious design of another is not for that reason subject to liability." *Restatement (Second) Torts § 876 comment (c).*

[16] Under clause (b), "if the act encouraged is known to be tortious it has the same effect upon liability of the adviser as participation or physical assistance." *Restatement (Second) Torts § 876 comment (d).* Additionally, it "likewise applies to a person who knowingly gives substantial aid to another who, as he knows, intends to do a tortious act." *Id.* Thus, "[i]f the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act." *Id.*

However, "[t]he assistance of or participation by the defendant may be so slight that he is not liable for the act of the other." *Id.* This determination considers "the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other and his state of mind." *Id.* The comment goes on to explain that, "although a person who encourages another to commit a tortious act may be responsible for other acts by the other, ordinarily he is not liable for other acts that, although done in connection with the intended tortious act, were not foreseeable by him." *Id.* When determining liability under this clause, "the factors are the same as those used in determining the existence of legal causation when there has been negligence." *Id.*

[17] Comment (e) explains, "When one personally participates in causing a particular result in accordance with an agreement with another, he is responsible for the result of the united effort if his act, considered by itself, constitutes a breach of duty and is a substantial factor in causing the result . . . ." *Restatement (Second) Torts § 876 comment (e).* It does not matter whether the person knew his actions or the actions of the other were tortious. *Id.*

relies on a series of cases dealing only with passenger liability and the consumption of *alcohol*, but Plaintiffs' Complaint alleges Defendant provided marijuana and/or controlled substances to Miller.

The cases cited by Defendant deal with passengers who procured and drank alcohol with the driver and were passively riding in the driver's vehicle when a motor vehicle accident ensued. *See Brandjord,* 688 A.2d 721; *Welc,* 675 A.2d 334. The courts determined that such conduct was insufficient to constitute "act[ing] in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result." *Restatement (Second) Torts § 876 comment (a). See Brandjord,* 688 A.2d at 724-25; *Welc,* 675 A.2d at 339-40. The facts alleged by Plaintiffs, however, allege Defendant played a more active role, and that the course of conduct of Defendant and Miller was more involved. On the facts alleged by Plaintiffs, Defendant and Miller operated the only two vehicles transporting guests to and from the Property; Defendant and Miller went to the Property with the intent to consume controlled substances; Defendant actually furnished the marijuana and/or other controlled substances consumed at the party; these controlled substances rendered Miller incapable of operating his vehicle; and Minor Plaintiff was severely injured as a result. *Plaintiffs' Complaint, ¶¶ 14-15, 17-18, 20, 22-24, 28, 30-31, 34, 38, 40-42, 44.*

Defendant next contends the Complaint fails to allege "how [Defendant] Lobenthal 'encouraged' or otherwise assisted [Miller] in his consumption of marijuana and/or alcohol." *Brief in Support of Preliminary Objections of Defendant Michaela Lobenthal, p. 14* (emphasis in original). However, Defendants contention overlooks the fact that pleadings need only "fully summariz[e] the material facts. 'Material facts' are 'ultimate facts,' *i.e.,* those facts essential to support the claim. Evidence from which such facts may be inferred not only need not but should not be alleged." *Smith v. Wagner,* 588 A.2d 1308, 1310 (Pa. Super. 1991) (quoting *Baker v. Rangos,* 324 A.2d 498, 505-06 (Pa. Super. 1974)). Plaintiffs' Complaint need not spell out the evidence regarding their factual assertions that Defendant "substantial[ly] assist[ed] or encourage[d Miller] in his consumption of alcohol, marijuana, or other controlled substances at the party." *Plaintiffs' Complaint, ¶¶ 20, 42.* Moreover, whether Defendant's conduct was, in fact, "substantial assistance or encouragement" contemplated by section 876 is a question better left to the trier of fact.

Finally, Defendant contends clause (c) of the Restatement cannot be satisfied on the facts alleged because "the Complaint simply does not set forth any facts as to how . . . [Defendant's] own conduct, separately considered, constituted a breach of some recognized duty owed to" Minor Plaintiff. *Brief Support of Preliminary Objections of Defendant Michaela Lobenthal, p. 15.* Defendant's argument relies on her assumption that she cannot be held liable for furnishing controlled substances to Miller. As

discussed above, this assumption is erroneous, rendering this particular argument moot. Defendant's Preliminary Objections as to Count III are OVERRULED.

ORDER

AND NOW, TO-WIT, this 28th day of October, 2011, for the reasons set forth in the foregoing **OPINION,** it is hereby **ORDERED, ADJUDGED, and DECREED** that the Preliminary Objections of Defendant Michaela Lobenthal as to Counts II and III of Plaintiffs' Complaint are OVERRULED.

Defendant correctly states that she "does not owe a duty to [Miller] regarding the furnishing or consumption of alcohol," nor is Defendant liable to Minor Plaintiff for Minor Plaintiff's injuries resulting from Miller's consumption of alcohol. *Kapres*, 640 A.2d at 891; *see Sperando,* 643 A.2d 1079. Defendant had no duty to prevent others from using and consuming controlled substances, nor can Defendant be held liable for simply participating in consuming controlled substances. A determination of Defendant's liability in Counts II and III turns *solely* on whether she furnished controlled substances to Miller. Without a factual determination that Defendant did, in fact, furnish the controlled substances, Defendant cannot be held liable to Plaintiffs. However, such a determination is the province of the jury.

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

EMERGYCARE, INC., a Pennsylvania Non-profit Corporation; GARY CALABRESE, an individual; and MARY JACKSON, an individual, Plaintiffs
v.
MILLCREEK TOWNSHIP, a Pennsylvania Municipal Corporation, Defendants

EQUITY / INJUNCTION

A trial court has reasonable grounds to deny a preliminary injunction if any one of the essential prerequisites is not satisfied.

EQUITY / INJUNCTION

The essential prerequisites for a preliminary injunction are (1) an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) greater injury would result from refusing an injunction then from granting it, and, concomitantly, issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the activity to be restrained is actionable, the right to release is clear, and the wrong is manifest, or, in other words, the party seeking the injunction is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and (6) a preliminary injunction will not adversely affect the public interest.

EQUITY / INJUNCTION

Under an injunction analysis, possible, perhaps unintended, collateral damage that might occur due to the actions of the party against whom an injunction is sought must be considered.

CONSTITUTIONAL LAW

The specter of criminal penalties has a chilling effect on free expression.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA DOCKET NO. 11939-2010

Appearances: Joel Snavely, Esq., Attorney for Plaintiffs
Evan Adair, Esq., Attorney for Defendant

OPINION

Dunlavey, Michael E., J. October 24, 2011

Procedural History

Plaintiff EmergyCare, Inc. (hereinafter EmergyCare) and two Millcreek residents, Plaintiffs Gary Calabrese and Mary Jackson seek to permanently enjoin Defendant Millcreek Township's enforcement of its Ordinance No. 2010-3 that requires 911 for all emergency calls.

On May 3, 2010, Plaintiffs obtained an *ex parte* temporary injunction

against Defendant Township. Plaintiffs filed a Complaint in Equity on May 3, 2010, alleging that the Ordinance jeopardized EmergyCare's licensure and constituted tortious interference with contracts, unconstitutional impairment of contracts, and infringement on the individual choice of emergency medical care services.

Millcreek Township responded that the Ordinance was constitutional, that it had the authority to act, and there is no constitutional right to choose emergency medical care services.

A hearing was held before this Court on May 6, 2010. On June 21, 2010, Erie County's Petition to Intervene in this matter was denied by this Court for failure to comply with the Pennsylvania Rules of Civil Procedure.

Findings of Facts

The Court makes the following findings of fact based on the testimony presented at the May 6, 2010 hearing and the briefs of the parties.

1) Plaintiff EmergyCare is a Pennsylvania 501(c)(3) non-profit corporation and licensed provider of emergency medical services. *See* Plaintiff Exhibit A.
2) Plaintiffs Mary Jackson and Gary Calabrese both have current subscription agreements with EmergyCare.
3) Plaintiff Mary Jackson, is employed at the Wegman's supermarket in Millcreek Township as "the sample lady." She testified that she is happy with EmergyCare.
4) In her personal experience, Ms. Jackson found that EmergyCare provided her with better services than Millcreek Paramedic Services while she was in a wheelchair.
5) Plaintiff Gary Calabrese has been a Millcreek Township resident for 20 years and testified that he is "very happy" with EmergyCare.
6) Defendant Millcreek Township is a Second Class municipal corporation.
7) Millcreek Township Ordinance 2010-3 became effective on May 3, 2010. *See* Plaintiff Exhibit K.
8) Ordinance 2010-3 requires the use of 911 for all emergency calls. *See* Plaintiff's Exhibit K and Defendants Exhibit 3. *See* §1.03.1 and 1.05.
9) Ordinance 2010-3 criminalizes calling any other telephone number than 911 to summon emergency medical assistance. *See* §1.07.
10) EmergyCare's ambulance service number is 870-1000. *See* Plaintiff Exhibit C.
11) Criminal penalties include fines ranging from $250.00 to $1,000.00 for each violation of the Ordinance. *See* § 1.08.[1]

[1] Defendant's Solicitor objected to the use of the term "criminal ordinance" at the hearing, but it is clear to the Court that criminal penalties are involved here, *See* N.T. Preliminary Injunction, 5/6/10, pp. 12-13.

12) Ordinance 2010-3 makes Millcreek Paramedic Services the sole and exclusive provider of emergency medical services in Millcreek Township. *See* §§ 1.02, 1.06, 1.07.
13) Millcreek Paramedic Services (hereinafter MPS) is a not-for-profit corporation owned and controlled by the Millcreek Township volunteer fire department.
14) Ordinance 2010-3 bars the advertisement of emergency medical services in Millcreek Township, including all existing advertisements. *See* §1.07.
15) Plaintiff EmergyCare advertises its services via mail, television, public events, and brochures available in many Millcreek area facilities such as St. Mary's West/Asbury Ridge.
16) Plaintiffs argue that Ordinance 2010-3 would effectively exclude EmergyCare from providing emergency medical services and transportation in Millcreek Township and advertising such services.
17) EmergyCare supports Millcreek 911 Choice, where Millcreek Township residents can call 911 for a medical emergency and request an ambulance company of their choice. *See* Defendant's Exhibit 3.
18) Millcreek Township argues that there is no basis in law for one's "choice" of an emergency medical services provider. Post-Hearing Brief Brief, pp. 9-12.
19) EmergyCare has been in the emergency medical services business for more than 25 years in Erie County, Pennsylvania.
20) William Haggerty, Executive Director of EmergyCare, testified that since Ordinance 2010-3 was proposed, EmergyCare has received 75 to 100 calls from confused and/or concerned customers.
21) Haggerty testified that an EmergyCare Station is located in Millcreek Township at West 23rd Street and Peninsula Drive. *See also* Plaintiff's Exhibit A.
22) EmergyCare provides basic life support, emergency transport, and advanced life support. *See* Plaintiff Exhibits F and G.
23) EmergyCare also provides non-emergency transport, which is scheduled ahead of time. *See* Plaintiff Exhibits F and G.
24) EmergyCare has used 870-1000 as its primary emergency contact number for more than ten years. *See* Plaintiff Exhibit C.
25) EmergyCare individual memberships cost $27.00 to $47.00 per subscription for EmergyCare to provide transport throughout most of Erie County. *See* Plaintiff Exhibit C.
26) EmergyCare has approximately 2,200 existing contracts with subscribers, which include Millcreek Township residents and businesses.

27) Abby Johnson, EmergyCare Director of Finance, testified that revenue comes from the EmergyCare membership contracts. EmergyCare made approximately one million dollars in 2009.
28) Dick Shaw, EmergyCare Director of Marketing, testified that EmergyCare does community outreach in Erie County, including contracts with sporting agencies, colleges, nursing homes, etc. *See* Plaintiff Exhibit B.
29) Shaw also testified that EmergyCare provides promotional materials and events in Erie County, including CPR training, standby service at sporting events, participating in charity events, etc. Some of these events are held in Millcreek Township. *See* Plaintiff Exhibits B and L.
30) Haggerty testified that in an emergency situation, EmergyCare does not distinguish between EmergyCare members and non-members. EmergyCare, by law, cannot refuse calls or stop emergency services. Haggerty testified that doing so would negatively impact EmergyCare's licensure.
31) Glen Brown, EmergyCare Director of Support Services, testified that EmergyCare treats non-members' calls as regular calls.
32) Nicole Simms, EmergyCare Community Development Coordinator, testified that EmergyCare provides complimentary memberships to volunteer fire departments, police, and EmergyCare volunteers.
33) EmergyCare had a mutual aid agreement with MPS in 1999 where EmergyCare provided backup emergency services to MPS. *See* Plaintiff Exhibit 6. For reasons unknown to the Court, this agreement was later terminated.
34) Todd Steel, Regional Division Manager for EmergyCare, testified that both 911 and 870-1000 calls come into the Erie County 911 Call Center (hereinafter Call Center) and then are routed to EmergyCare with the caller's information. The Call Center will call EmergyCare if MPS is at another call or the call is on the Erie/ Millcreek border.
36) In Steel's experience, no one has seemed confused by the two different numbers (911 and 870-1000).
36) Steel testified that information is forwarded to the local police dispatch if police are needed.
37) Steel also testified that the Call Center's dispatch does not ask about EmergyCare membership.
38) EmergyCare has several contracts with Erie County nursing homes, including St. Mary's, the Veterans Administration and Hospital, and Independence Court.
39) Audrey Urban, Administrator of St. Mary's West/Asbury Ridge (hereinafter St. Mary's West), testified that St. Mary's West has

a dedicated line to EmergyCare (# # 11) and can also call 911, if necessary.

40) EmergyCare provides resident transport and emergency transport for St. Mary's West, *See* Plaintiff Exhibit H.
41) According to Ms. Urban, St. Mary's West residents are given their choice for transport, whether it is EmergyCare, MPS, or their local emergency medical services provider.
42) Ms. Urban testified that the St. Mary's Carriage Homes have ADT security alarms.
43) On October 30, 2009, Ms. Urban received a letter from Millcreek Fire Inspector Robert Vitron noting St. Mary's West had passed its fire inspection.
44) In the same letter, Mr. Vitron expressed concern that St. Mary's West was "dialing an alternate number... not endorsed by Erie County 911" and stressed the importance of using 911 for emergencies.
45) Mr. Vitron did not testify at the hearing.
46) On May 5, 2010, Ms. Urban received a letter from Millcreek Township Supervisors about the new Ordinance 2010-3.
47) Millcreek Township Supervisor Joseph Kujawa testified that the letter was sent to St. Mary's West and seven or eight other nursing homes. *See* Plaintiff's Exhibit I.
48) Supervisor Kujawa testified that no letters were sent to security agencies like ADT or Brinks, or Lake Erie College of Medicine (LECOM) security.
49) Supervisor Kujawa stated that the Ordinance merely reinforces calling 911, just like children are taught to do in school.[2]
50) Supervisor Kujawa did not testify as to any specific problems or emergency cases in Millcreek Township where 911 was not called.
51) Supervisor Kujawa testified that he has been the liaison to Millcreek Paramedic Services for 11 years and is also an honorary Millcreek volunteer fire department member. *See* N.T. Preliminary Injunction, 5/6/10, pp. 37-38.
52) Supervisor Kujawa testified that he is concerned that EmergyCare eliminates volunteer fire departments, but provided no supporting evidence for his opinion.
53) Brian McGrath, Millcreek Township Supervisor for 17 years, testified that in the mid-1990's volunteer fire departments were contracting with EmergyCare for emergency medical services.

[2] This echoes the concerns raised by Fire Inspector Vitron in his October 19, 2009 letter to Audrey Urban.

Millcreek Township hired a consultant who suggested the creation of Millcreek Paramedic Services.

54) Supervisor McGrath testified that no consultant was hired regarding the Ordinance, nor was EmergyCare consulted prior to its enactment.
55) Supervisor McGrath testified that he is concerned about "advocating the bypass of the 911 system", but provided nothing more than anecdotal evidence from MPS to support this.
56) Richard Figaski, Millcreek Township Supervisor for less than a year, testified that the Ordinance is within Millcreek Township's discretion based on its authority under Township Code. He stated that the 911 usage is mandatory under the Ordinance.
57) Supervisor Figaski believes that people are swayed by EmergyCare's advertising and use the 870-1000 phone number instead of 911. He provided no supporting evidence for this belief.
58) Supervisor Figaski, a Millcreek Township police officer for 31 years, testified that is "unlikely" Millcreek Township residents will be fined under the Ordinance, but that it is subject to "discretion". He also testified that those who commit multiple violations of the Ordinance would be arrested.
59) Supervisor Figaski admitted to a perception of "competition" between EmergyCare and MPS, and Millcreek Township's desire for MPS to be the "exclusive" emergency medical services provider.
60) The Court raised concerns about the Ordinance's applicability to home security systems such as ADT and Brinks. None of the Millcreek Township Supervisors adequately answered the Court's questions.
61) No one from MPS, the Millcreek volunteer fire department, or the Millcreek police department testified at the hearing regarding the mandatory 911 Ordinance.

Conclusions of Law

A trial court has reasonable grounds to deny a preliminary injunction if **one** of the following essential prerequisites is **not** satisfied:

(1) an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages;
(2) greater injury would result from refusing an injunction than from granting it, and, concomitantly, issuance of an injunction will not substantially harm other interested parties in the proceedings;
(3) a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct;
(4) the activity to be restrained is actionable, the right to relief is clear,

and the wrong is manifest, or, in other words, the party seeking the injunction is likely to prevail on the merits;

(5) the injunction is reasonably suited to abate the offending activity; and

(6) a preliminary injunction will not adversely affect the public interest.

Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc., 573 Pa. 637, 828 A.2d 995 Pa., 2003. 646-647, *citations omitted*. The Court will address each of these in turn:

1) An injunction would prevent immediate and irreparable harm that cannot be adequately compensated by damages.

The Court notes from the record in this case that immediately after the Ordinance was passed, 75 to 100 confused EmergyCare customers called EmergyCare with questions about their service. Mr. Haggerty and Ms. Urban both testified about their concerns that the Ordinance contained criminal sanctions that might penalize them for doing regular daily business. Millcreek Fire Inspector Vitron also cautioned Ms. Urban about using an "alternate number" for medical services. The testimony of Township Supervisor Figaski was quite clear that criminal penalties were intended for violating the Ordinance, subject to "discretion." It remains unclear whom would exercise that discretion.

In the case at bar, the damages alleged by EmergyCare are not measurable, tangible damages, but potential damages to its ability to do business and its local reputation. While criminal penalties are more calculable (costs and fines), their impact would reach beyond mere sanction. Further, the specter of criminal penalties arguably has a chilling effect on free expression. *Golden Triangle News, Inc. v. Corbett,* 689 A.2d 974 (Pa.Cmwlth. 1997). The Ordinance would affect the public's choice of emergency medical services, limiting it to an illegal entity or MPS. Thus, the Court concludes that an injunction is necessary to guard against such harm.

2) Greater injury would result from refusing an injunction than from granting it, and, will not substantially harm other interested parties.

If the Ordinance were to continue, it would affect EmergyCare's business in Millcreek Township as well as the business of home security firms like ADT, Brooks, etc. *See* testimony of William Haggerty and Abby Johnson. Further, Millcreek Township's Ordinance impedes EmergyCare's contracts with entities such as St. Mary's West, and with regular subscribers. *See* testimony of Audrey Urban, Dick Shaw, Mary Jackson, and Gary Calabrese.

All three Millcreek Township Supervisors claim they did not consider the interests of home security firms when the Ordinance was proposed. However, the Township cannot overlook possible, perhaps unintended,

collateral damage that might occur due to the enforcement of the Ordinance. *See Lewis v. City of Harrisburg,* 158 Pa.Cmwlth. 318, 631 A.2d 807 (Pa.Cmwlth.,1993) where the District Attorney filed equity action against city, county, and sheriff for temporary and declaratory relief, after city notified county officials that it intended to stop its practice of transporting certain prisoners to and from preliminary arraignments and preliminary hearings. In *Lewis,* the Commonwealth Court held that the denial of injunction would result in greater injury than granting it.

Further, the concerns expressed by all three Millcreek Township Supervisors amounted to nothing more than vague, anecdotal stories and unsubstantiated beliefs that EmergyCare was confusing Millcreek residents, competing with MPS and eliminating volunteer fire departments. Yet, no one from MPS, the Millcreek volunteer fire or police departments testified at the hearing in support of the Supervisors' opinions. Thus, the Court is inclined to grant the injunction to protect against greater, though possibly unintentional or uninformed, injury to EmergyCare.

<u>3) A preliminary injunction will properly restore the parties to status quo.</u>

Millcreek Township and Millcreek Paramedic Services and EmergyCare co-existed relatively peacefully before this litigation. Each had their own emergency numbers (911 and 870-1000) without reported problems, confusion, or interference. The Court finds no reason not to return to the status quo. *Lewis, supra. See also* Nos. 21, 29, and 33, *infra.*

<u>4) The party seeking the injunction is likely to prevail on the merits.</u>

Plaintiff relies on *Mars Emergency Medical Services v. Township of Adams*, 559 Pa. 309, 748 A.2d 193 (1999). In *Mars,* an emergency medical services provider (Mars) sought a declaratory judgment to declare that township (Adams) chose another emergency medical services provider (Quality) in violation of Emergency Medical Services Act, Township and Borough Codes. The local 911 center dispatched Quality ambulances over Mars ambulances. The Pennsylvania Supreme Court held that the Emergency Medical Services Act did not preempt local legislation, and that the township had the authority to choose its ambulance provider.

Mars is distinguishable from case at bar because *Mars* did not ban certain emergency numbers or require mandatory 911 calls. It also did not prohibit the advertising of emergency medical services. The Mars ambulance service was not banned from providing services secondary to the Quality ambulance services.

Here, Millcreek Township's authority is not in question. The question is whether Millcreek may criminalize calling any emergency number other than 911, the use of emergency medical services other than MPS, and the advertisement of any other emergency medical services.

The Court agrees with the arguments of EmergyCare that Millcreek Township's Ordinance violates state and federal constitutional law. The Ordinance forces Millcreek residents and businesses to choose MPS or break the law and call EmergyCare. This is not a choice by any definition. The Ordinance also interferes with the longstanding contracts EmergyCare has had with its subscribers and entities like St. Mary's West, as well as future prospective clients. The Ordinance even goes so far as to ban advertising of an alternate phone number that EmergyCare has used for more than ten years in Millcreek Township and Erie County. The Ordinance blatantly attempts to eliminate any competition with MPS in providing emergency services without any regard for its impact on Millcreek residents and businesses, the very same people who MPS is meant to serve. It is clear to the Court that EmergyCare will most likely prevail on the merits here given that Millcreek Township's Ordinance could create legally actionable situations with Erie County and Millcreek Township residents, businesses, and visitors.

<u>5) The injunction is reasonably suited to abate the offending activity.</u>

Here, the injunction would allow EmergyCare and Millcreek Township business to continue as usual and avoid most potential conflicts and confusion with emergency calls. *See* testimony of Glen Brown and Todd Steel. *See also Williams Township Board Of Supervisors and Township Of Williams v. Williams Township Emergency Company, Inc.* 986 A.2d 914 (Pa.Cmwlth. 2009) where the trial court granted injunctive relief against nonprofit corporation that provided emergency ambulance service by setting up a constructive trust for corporation until it consolidated with a new ambulance company. Millcreek Township has not shown how enjoining the Ordinance would impact its residents, businesses, or MPS's daily functions.

<u>6) A preliminary injunction will not adversely affect the public interest.</u>

Millcreek Township residents will continue to receive emergency medical services, and will not be confused or worried about those receiving services in violation of law. Compare *Sacred Heart Medical Center, Inc. v. Delaware County,* 124 Pa.Cmwlth. 548, 556 A.2d 940 (Pa. Cmwlth.,1989) where ambulance service provider brought suit to enjoin the County from approving change of ambulance service provider, and against other provider from interfering with plaintiff's contractual relationships. The Commonwealth Court denied injunction because the County did not lose ambulance service.

In the case at bar, if the Ordinance is permitted to remain in effect, EmergyCare would not be allowed to assist or provide backup to MPS in cases of multiple emergencies, such as a sudden snowstorm, a common occurrence in Erie County. Millcreek residents and businesses could be literally stranded without emergency medical services if MPS

was completely dispatched and EmergyCare was prohibited, or even discouraged, from providing emergency medical services in Millcreek Township. The Court finds that this would adversely affect the public's interest in having prompt and efficient emergency medical services when they are most needed.

Conclusion

In light of the several factors above, and the arguments of counsel, the Court finds that an injunction is warranted here. However, the Court hopes that the parties will not continue to battle over which emergency number to call.[3]

ORDER

AND NOW, to-wit, this 24th day of October 2011, upon consideration of the arguments and briefs of counsel and the testimony taken by the Court, it is hereby **ORDERED, ADJUDGED, and DECREED** that Defendant Millcreek Township Ordinance No. 2010-3 violates both the Pennsylvania and United States Constitutions, and is thus **UNCONSTITUTIONAL.** Therefore, Defendant Millcreek Township is permanently **ENJOINED** from enforcing Ordinance No. 2010-3 against Plaintiff EmergyCare and/or any other Millcreek Township resident.

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

[3] *See* "Firefighters face new threat: private 911 service", Dan Levine and Marth Graybow, April 17, 2011, http://www.msnbc.msn.com/id/42609378/ns/business-tax_tactics/ where American Medical Response, the biggest private ambulance provider in the United States was sued by the Las Vegas chapter of the International Association of Fire Fighters Union and the case degenerated into name calling and threats between the parties.

GARY N. WILEY, Plaintiff
v.
TIMES PUBLISHING COMPANY, d/b/a ERIE TIMES-NEWS, Defendant

CIVIL PROCEDURE / PLEADINGS / PRELIMINARY OBJECTIONS

Rule 1028 of the Pennsylvania Rules of Civil Procedure allows any party to any pleading to file preliminary objections.

CIVIL PROCEDURE / PLEADINGS / PRELIMINARY OBJECTIONS

In ruling on preliminary objections, the court must accept as true all well pled facts set forth in the complaint which are relevant and material, and give the plaintiff the benefit of all reasonable inferences from those facts.

CIVIL PROCEDURE / PLEADINGS / PRELIMINARY OBJECTIONS

In order for the court to sustain preliminary objections, it must appear with certainty, or be clear and free from doubt based on the facts as pleaded, that the plaintiff will be unable to prove facts legally sufficient to establish a right to relief.

CIVIL PROCEDURE / PLEADINGS / GENERAL REQUIREMENTS

Rule 1019(a) of the Pennsylvania Rules of Civil Procedure provides that material facts on which a cause of action or defense is based shall be stated in concise and summary form.

CIVIL PROCEDURE / PLEADINGS / GENERAL REQUIREMENTS

Allegations will withstand challenge under Rule 1019(a) if (1) they contain averments of all the facts the pleader will eventually have to prove in order to recover, and (2) they are sufficiently specific so as to enable the defendant to prepare his defense.

DAMAGES / PUNITIVE DAMAGES

Sufficient facts to support a demand for punitive damages in a defamation claim require proof of actual malice.

TORTS / DEFAMATION

To show actual malice in a defamation claim, the plaintiff must prove the defendant published an untrue statement with knowledge that it was false or with reckless disregard of whether it was false or not; recklessness generally and in the context of actual malice is not easily shown.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 11392 - 2011

Appearances: Paul J. Susko, Esq., Attorney for Plaintiff
Craig A. Markham, Esq., and Denise C. Pekelnicky, Esq., Attorneys for Defendant

OPINION

Connelly, J. October 14, 2011

This matter is before the Court pursuant to Preliminary Objections filed by Times Publishing Company, d/b/a Erie Times-News (hereinafter "Defendant") to Plaintiff's Complaint in Civil Action. Gary N. Wiley (hereinafter "Plaintiff") opposes.

Statement of Facts

Plaintiff filed this Complaint asserting a defamation claim against Defendant, and Plaintiff has demanded punitive damages be levied against Defendant. On April 15, 2010, Defendant published a news article reporting that Gary C. Wiley had been arrested on charges of "robbery, terroristic threats and theft by unlawful taking and connected to 2 slayings and major crimes [sic]." *Plaintiff's Complaint, ¶ 7*. The news article was published on both the front page of Defendant's print newspaper and Defendant's online version of the newspaper. *Id. at ¶¶ 3, 9.* Beside the article, Defendant published a mug shot of an individual, and the caption read: "Gary C. Wiley: charged with robbery." *Plaintiff's Complaint, Exhibit A*. Plaintiff alleges the picture was not actually a picture of the named criminal, Gary C. Wiley, but was in fact a picture of Plaintiff himself. *Plaintiff's Complaint, ¶ 7.* Plaintiff asserts that "Defendant's publication of the news article in both the newspaper and in the online version with Plaintiff's photograph was negligent and constitutes defamation per se." *Id. at ¶ 9.*

Plaintiff avers the reporter "who wrote the news article in question[ ] obtained the wrong photograph." *Id. at ¶ 11*. More specifically, Plaintiff alleges the photograph "was published without adequate investigation and/or due to unreasonable reliance on sources." *Id. at ¶ 8.* Plaintiff contends Defendant ran the photograph beside the article "in order to grab their readers' attention and to sell more newspapers." *Id. at ¶ 17.* Plaintiff therefore argues Defendant's conduct was "outrageous and in reckless disregard to the rights of the Plaintiff." *Id. at ¶ 15.* Furthermore, Plaintiff alleges Defendant "failed to appropriately correct the enormous mistake" Defendant had made by publishing the wrong photograph. *Id. at ¶ 17.* Such conduct, Plaintiff argues, exposes Defendant to liability for punitive damages. *Id. at ¶ 18.*

Defendant objects to Plaintiff's demand for punitive damages. *Defendant's Preliminary Objections to Plaintiff's Complaint, ¶ 1.* Defendant contends actual malice must be proven in order to support an award of punitive damages in a private individual's defamation action. *Id. at ¶ 9.* Defendant argues Plaintiff's Complaint does not allege facts sufficient to support a finding of actual malice, and, therefore, punitive damages may not be awarded. *Id. at ¶ 14*.

The Court must address these arguments in light of the applicable Pennsylvania law.

Findings of Law

Rule 1028 of the Pennsylvania Rules of Civil Procedure allows "any party to any pleading" to file preliminary objections. *Pa.R.C.P. 1028(a).* "All preliminary objections shall be raised at one time. . . . [and] shall state specifically the grounds relied upon and may be inconsistent." *Pa.R.C.P. 1028(b).* In ruling on preliminary objections, a court must accept as true all well-pled facts which are relevant and material, as well as all inferences reasonably deducible therefrom. *Bower v. Bower,* 611 A.2d 181, 182 (Pa. 1992). 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 pleader will be unable to prove facts legally sufficient to establish his right to relief." *Id.*

In the present case, Defendant has raised preliminary objections in the nature of a demurrer, challenging the legal sufficiency of the facts pled by Plaintiff to support an award of punitive damages. *Defendant's Preliminary Objections to Plaintiff's Complaint, ¶ 1.* "The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible." *Eckell v. Wilson*, 597 A.2d 696, 698 (Pa. Super. 1991) (internal citations omitted). Only the factual allegations in a complaint are considered to be true for the purposes of a demurrer, not the pleader's conclusions of law. *Id.* Testing the sufficiency of the facts requires that "all material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true for the purposes of review." *Id.* The only time a demurrer should be sustained is when "the plaintiff has clearly failed to state a claim on which relief may be granted." *Id.* If there is any doubt as to the adequacy of the plaintiff's complaint, a demurrer should not be sustained. *Id.*

Defendant contends Plaintiff's Complaint violates Rule 1019(a) of the Pennsylvania Rules of Civil Procedure because "Plaintiff's Complaint fails to state any actions of Defendant which allegedly constitute actual malice. Therefore, the Complaint fails to assert a claim upon which punitive damages may be awarded." *Defendant's Preliminary Objections to Plaintiff's Complaint, ¶ 14.* Pennsylvania Rule of Civil Procedure 1019(a) provides that "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).* This rule is meant "to enable the adverse party to prepare his case." *Smith v. Wagner,* 588 A.2d 1308, 1310 (Pa. Super. 1991) (citations and brackets omitted). It requires a complaint "do more than give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. [The complaint] should formulate the issues by fully summarizing the material facts. . . ., i.e., those facts essential to support the claim." *Id.*

Allegations will withstand challenge under Rule 1019(a) if (1) they contain averments of all the facts the pleader will eventually have to

prove in order to recover, and (2) they are sufficiently specific so as to enable the defendant to prepare his defense. *Id.* Moreover, in *Yacoub v. Lehigh Medical Center, P.C.,* the Superior Court held, "to determine if a paragraph contains the appropriate specificity, the court looks not only to the particular paragraph at issue, but also to that paragraph in the context of the other allegations in the complaint." 805 A.2d 579, 588 (Pa. Super. 2002). A trial court has "broad discretion in determining the amount of detail that must be averred," because the standard of pleadings set forth in Rule 1019 does not lend itself to precise measurement. *United Refrigerator Co. v. Applebaum,* 189 A.2d 253, 255 (Pa. 1963).

The question at issue in the case before this Court is whether Plaintiff has alleged facts sufficient to support a demand for punitive damages in his defamation claim against Defendant. In *Gertz v. Welch,* the Supreme Court of the United States required a private individual in a defamation case to prove actual malice in order to recover punitive damages. 418 U.S. 323, 349 (1974). Plaintiff must therefore prove Defendant published an untrue statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Am. Future Sys., Inc. v. Better Bus. Bureau,* 872 A.2d 1202, 1211 (Pa. Super. 2005) (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 280 (1964)). Plaintiff must "demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." *Oweida v. Tribune-Review Publ'g Co.,* 599. A.2d 230, 242 (Pa. Super. 1991) (quoting *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 511 n.30 (1985)). "Publishing with such [serious] doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968). The Pennsylvania Supreme Court has cautioned that "[r]ecklessness generally and in the context of actual malice is not easily shown." *Tucker v. Philadelphia Daily News,* 848 A.2d 113, 135 (2004).

In the present case, Plaintiff argues the facts alleged in his Complaint are sufficient to demonstrate Defendant's actions were "outrageous and in reckless disregard to [sic] the rights of the Plaintiff . . . ." *Plaintiff's Brief in Opposition to Defendant's Preliminary Objections, p. 3.* First, Plaintiff alleges "Defendant's publication of this news article with the Plaintiff's photograph was negligent and was published without adequate investigation and/or due to unreasonable reliance on sources." *Plaintiff's Complaint, ¶ 8.* Courts have repeatedly held, however, that negligence and a failure to check facts or sources is not enough to satisfy the actual malice standard. *See Gertz,* 418 U.S. at 332 ("[M]ere proof of failure to investigate, without more, cannot establish reckless disregard for the truth."); *Tucker,* 848 A.2d at 135 ("Failure to check sources, or negligence alone, is simply insufficient."); *Oweida,* 599. A.2d at 243

("Mere negligence or carelessness is *not* evidence of actual malice. A defendant's failure to verify his facts may constitute negligence, but does not rise to the level of actual malice.") (internal citations and quotations omitted). Even accepting as true Plaintiff's allegations that Defendant was negligent, did not conduct an adequate investigation, and unreasonably relied on its sources; these facts alone are not sufficient to find actual malice.

Next, Plaintiff avers he was implicated in the criminal activity described in the article because the reporter responsible for the article "obtained the wrong photograph . . ." *Plaintiff's Complaint, ¶ 11.* Although recklessness "may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports," the Pennsylvania Supreme Court has held that it simply cannot be concluded that a defendant entertained the requisite doubt as to the veracity of the challenged publication *where the publication was based on information a defendant could reasonably believe to be accurate.*" *Tucker,* 848 A.2d at 135-36 (quoting *Curran v. Philadelphia Newspapers, Inc.,* 439 A.2d 652, 660 (Pa. 1981)) (emphasis added); accord *Smith V. Pocono,* 686 F.Supp. 1053, 1062 (M.D. Pa. 1987) (where plaintiff alleged publishers knew the false nature of the defamatory statement prior to publishing it, the court held that "recklessness may be found where there are obvious reasons to doubt the veracity of the information or the accuracy of the reports"). Defendant's reporter thought he was using a picture of Gary C. Wiley when it was actually a photograph of Plaintiff, Gary N. Wiley. Plaintiff alleges no facts to suggest this was anything but a reasonable mistake on the part of Defendant, and certainly no facts have been averred to suggest Defendant had a "high degree of awareness of . . . [the] probable falsity" of the identity of the man in the photograph. *Reiter v. Manna,* 647 A.2d 562, 567 (Pa. Super. 1994) (quoting *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 666-67 (1989)). The fact that Defendant obtained the wrong photograph does not rise to the level of actual malice.

Plaintiff argues Defendant "failed to appropriately correct the enormous mistake" it made by implicating Plaintiff in the criminal activity described in the article. *Plaintiff's Complaint, ¶ 17.* However, as Defendant correctly argues, a finding of actual malice probes the publisher's awareness of falsity at the time of publication. Actual malice is not concerned with the allegedly defamatory material post-publication.

It is instructive that public officials and public figures claiming defamation cannot prove actual malice by a newspaper's deficient correction or retraction of defamatory material. See *Curran v. Philadelphia Newspapers, Inc.,* 546 A.2d 639, 647-48 (Pa. Super. 1988) (finding that an inadequate correction or retraction did not demonstrate actual malice, as editors are given "wide deference" with regards to

what to print in the limited space of their newspapers). Though Plaintiff has argued that cases involving public officials and public figures are irrelevant to the case at hand,[1] this argument overlooks the fact that the actual malice standard applied to private individuals seeking punitive damages in *Gertz* is the same actual malice standard imposed on public officials and public figures who allege defamation. See *Gertz,* 418 U.S. at 349-50 (referencing the actual malice standard defined in *New York Times,* 376 U.S. at 280). Since public officials and public figures cannot prove actual malice by arguing inadequate retraction, it stands to reason the actual malice standard cannot be satisfied by private individuals making the same argument. Defendant's failure to "appropriately correct" its mistake is therefore not enough to constitute actual malice.

Additionally, Plaintiff contends Defendant ran the photograph beside the article "in order to grab their readers' attention and to sell more newspapers." *Plaintiff's Complaint, ¶ 17.* Profit motive is not sufficient to prove actual malice: "Nor can the fact that the defendant published the defamatory material in order to increase its profits suffice to prove actual malice." *Reiter,* 647 A.2d at 567 (quoting *Harte-Hanks Communications,* 491 U.S. at 667). Alleging Defendant published the picture to increase its profits does not demonstrate actual malice.

Plaintiff also contends he has provided sufficient factual averments to find actual malice by alleging "the Defendant published Plaintiff's photograph on the front page of the newspaper and over the Internet identifying him as the individual arrested by the Pennsylvania State Police and charged with crimes of violence, which is outrageous because the Defendant labeled an innocent man who was not the subject of the 'news' article." *Plaintiff's Brief in Opposition to Defendant's Preliminary Objections, p. 3.* However, the only factual allegation here is that Defendant published the wrong picture. As has been discussed, recklessness requires much more than a showing of untruthfulness. Falsity in and of itself is insufficient to show actual malice. *Curran v. Philadelphia Newspapers, Inc.,* 546 A.2d 639, 642 (Pa. Super. 1988). Plaintiff cannot simply rely on the fact that the wrong photograph was published to prove actual malice.

Similarly, Plaintiff alleges there are enough facts to support a punitive damages award because the Complaint contends "Defendant's actions were outrageous and in reckless disregard to the rights of the Plaintiff and that the conduct of the Defendant constitutes libel per se." *Plaintiff's Brief in Opposition to Defendant's Preliminary Objections, p. 3.* Such conclusory statements, however, are not factual averments; they are conclusions of law. When ruling on preliminary objections in the nature

[1] *Plainiff's Brief in Opposition to Defendant's Preliminary Objections, pp. 4-5.*

of a demurrer, a court accepts as true only the factual allegations in a complaint, not the complainant's conclusions of law. *Eckell v. Wilson,* 597 A.2d 696, 698 (Pa, Super. 1991). These statements are therefore irrelevant to a consideration of whether Defendant acted with actual malice.

Procedurally, Plaintiff contends it is improper for this Court to dismiss his demand for punitive damages at the pleading stage. *Plaintiff's Brief in Opposition to Defendant's Preliminary Objections, p. 3.* Plaintiff argues that satisfying the subjective standard of actual malice requires "discovery and the ability to assess the state of mind of Defendant's agents and to explore the Defendant's actions." *Id. at 3.* Plaintiff is correct that an actual malice determination is a subjective one. *See Curran v. Philadelphia Newspapers, Inc.,* 439 A.2d 652, 662 (Pa. 1981) ("The proof of 'actual malice' calls a defendant's state of mind into question and does not readily lend itself to summary disposition.") (quoting *Hutchinson v. Proxmire,* 443 U.S. 111, 120 n.9 (1979)). However, Plaintiff is incorrect in his assertion that "this subjective standard cannot be tested at the pleading stage." *Plaintiff's Brief in Opposition to Defendant's Preliminary Objections, p. 3.*

In *Tucker v. Philadelphia Daily News,* the Pennsylvania Supreme Court specifically stated "the requirement that the plaintiff be able to show actual malice by clear and convincing evidence is initially a matter of law." 848 A.2d 113, 130 (Pa. 2004). In *Tucker,* plaintiffs were public figures asserting a defamation claim against numerous media defendants. *Id. at 117, 119-120.* The defendants filed preliminary objections with the Philadelphia Court of Common Pleas seeking dismissal of the case, arguing that the pleadings contained no evidence supporting a finding of actual malice.[2] *Id. at 122.* The trial court sustained the preliminary objections and the complaint was dismissed. *Id.* On appeal, the Superior Court of Pennsylvania reversed the trial court, finding that the plaintiffs "were not required to prove actual malice at the pleading stage." *Id. at 123* (citing *Tucker v. Philadelphia Newspapers,* 757 A.2d 938 (Pa. Super. 2000)). The Superior Court held that determining whether the defendants' actions constituted actual malice "require[d] an analysis of the state of mind of the authors and publishers, which the Superior Court agreed should not occur at the pleading stage." *Id.* The Pennsylvania Supreme Court ultimately reversed this holding, finding that the plaintiffs' complaint was impermissibly vague and did not support an allegation of actual malice, and the complaint was dismissed. *Id.* at 135. Thus, in the present case, Defendant's preliminary objections to Plaintiff's allegations

[2] Defendants also argued that the articles were not defamatory and, even if defamatory, the articles were protected under the fair report privilege. *Tucker,* 848 A.2d at 122. However, these arguments are irrelevant to the discussion here.

of actual malice may be considered by this Court.

A private individual seeking punitive damages in a defamation case must prove actual malice, i.e. the defamatory statement must have been published despite the publisher realizing the statement was false or subjectively entertaining serious doubts as to its truthfulness. Considering together all of Plaintiff's factual allegations and accepting them as true for the purposes of this review, Plaintiff has failed to allege facts sufficient to support a finding of actual malice. At best, these facts demonstrate nothing more than negligence, and certainly nothing to suggest Defendant acted in reckless disregard for the rights of Plaintiff. Defendant's preliminary objections are sustained.

ORDER

AND NOW, TO-WIT, this 14th day of October, 2011, for the reasons set forth in the foregoing **OPINION,** it is hereby **ORDERED, ADJUDGED, and DECREED** that Defendant's Preliminary Objections to Plaintiff's Complaint as to punitive damages are **SUSTAINED.**

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