# ERIE COUNTY LEGAL JOURNAL

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Reports of Cases Decided in the Several Courts of Erie County for the Year 2013

XCVI

**ERIE, PA**

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

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## SUBJECT MATTER INDEX

**GARY N. WILEY, Plaintiff**

**v.**

**TIMES PUBLISHING COMPANY, d/b/a ERIE TIMES-NEWS, Defendant**

*CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT*

Any party may move for summary judgment in such time as not to unreasonably delay trial. Summary judgment is appropriate when there is no genuine issue of material fact as to a necessary element of the cause of action or defense. The non-moving party may not rest upon pleadings but must identify issues of fact or evidence establishing facts the motion cites as not having been produced. The Court must examine the record in the light most favorable to the non-moving party and all doubts as to the existence of an issue of material fact must be resolved against the moving party. It is not the function of the Court to decide issues of fact but solely to determine if there is an issue of fact.

*TORTS / DEFAMATION / FAIR REPORT PRIVILEGE*

The fair report privilege as delineated in the Restatement (Second) of Torts, § 611, is the controlling law in Pennsylvania. The fair report privilege is a conditional defense shielding the publisher of defamatory matter which is contained in a report of official action or proceeding of a meeting open to the public that deals with a matter of public concern and the report is accurate and complete or a fair abridgment of the occurrence.

*TORTS / DEFAMATION / BURDEN OF PROOF*

The fair report privilege is a conditional privilege which triggers a shifting burden of proof. The plaintiff initially bears the burden of establishing the defamatory nature of the publication. The burden then shifts to the defendant to establish the privilege. If the fair report privilege applies, the burden reverts to the plaintiff to prove abuse of the privilege. Applicability of the privilege is a question for determination by the Court.

*TORTS / DEFAMATION / FAIR REPORT PRIVILEGE*

The fair report privilege applies to an arrest or the charge of crime made and to the publication of mug shots. Restatement (Second) of Torts § 611, Comment h. The application of the fair report privilege to a mug shot is not defeated where the mug shot is issued by a prison rather than the arresting police agency. The prison qualifies as sufficiently official and/or an agency which sufficient authority to release the mug shot. Further, the fair report privilege applies where the information is released by a high ranking official with responsibility for handling media requests and the mug shot was released through the prison's established policy.

The fair report privilege is not rendered inapplicable either because the official release was a matter of courtesy or because the request of the reporter was generic in nature.

*TORTS / DEFAMATION / ABUSE OF PRIVILEGE*

The fair report privilege is abused if the report is not accurate and complete or a fair abridgement. Exaggerated additions or embellishments abuse the privilege. The publisher must take steps to reasonably insure the report is accurate and a complete or fair abridgment of the official action.

*TORTS / DEFAMATION / ABUSE OF PRIVILEGE*

Where a newspaper reporter requested the mug shot of "Gary Wiley" without specifying the middle initial, and the prison provided the only mug shot it had in its computer records,

which was the mug shot of the plaintiff, the publication of the mug shot in conjunction with a story about the arrest of a different Gary Wiley may constitute abuse of the fair report privilege because of the failure of the defendant to verify the accuracy of its own report. A question of material fact as to the manner in which the reporter requested the mug shot must therefore be submitted to a jury.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION No. 11392-2011

Appearances: Paul J. Susko, Esquire, Attorney for Plaintiff
Craig A. Markham, Esquire, Attorney for Defendant

**OPINION**

Connelly, J. October 30, 2012

This matter is before the Court pursuant to a Motion for Summary Judgment filed by Times Publishing Company, d/b/a Erie Times-News ("Defendant"). Gary N. Wiley ("Plaintiff') opposes.

**Statement of Facts**

On April 13, 2010, late in the evening, Gary C. Wiley was arrested for robbing a pharmacy earlier in the month. *Mot. for Summ. J. ¶ 2.* The morning of April 14, 2010, Tim Hahn, a reporter working for Defendant, learned of Wiley's[1] arrest and visited the Crawford County Prison, where Wiley was housed following his arraignment. *Id. at ¶¶ 2-3.* Hahn requested a mug shot of Wiley from Deputy Warden Kenneth Saulsbery, who was the warden's designee and the person in charge at the prison since the warden was on vacation. *Id. at ¶ 4, Ex. 3, Lewis Dep. 5:11-12, Mar. 22, 2012.*

At his deposition, Saulsbery testified that the written Crawford County Correctional Facility Policy and Procedure relating to News Media/Public Information in effect in April of 2010 mandated: "Any Crawford County staff member approached or contacted by news media agencies shall politely refer all questions to the warden or his designee." *Id. at Ex. 2, Saulsbery Dep. 19:5-20:20, Mar. 22, 2012* [hereinafter "Ex. 2"]. More specifically, when a request for a mug shot was referred to the warden or his designee, the practice or custom back in April of 2010 was for the warden or his designee to then make a case-by-case determination as to whether the photograph would be provided. *Id. at Ex. 2, 15:10-19, 17:20-22.* As long as the media outlet requesting the photograph was a "good media outlet that [the warden or his designee] knew of, then [the warden or his designee] would . . . give them that photo as a courtesy." *Id. at Ex. 2, 17:17-25.* However, the media did not have an "absolute right" to obtain the photograph, and the prison was under no obligation to provide it. *Id. at Ex. 2, 18:1-4, 20:24-21:3.*

Saulsbery also explained the photographing process utilized by the prison. Inmates brought to the prison are photographed, and these photographs are stored electronically and can then be accessed and searched from any of the prison's computers. *Id. at Ex. 2, 8:24-9:3, 14:4-13, 32:25-33:4.* However, this process is not instantaneous, as the photographs

[1] The Court uses "Wiley" to refer to Gary C. Wiley, and "Plaintiff" to refer to Gary N. Wiley.

must first be downloaded to the electronic database before they can be accessed from the prison's computers. *Id. at Ex. 2, 39:13-16.*

Saulsbery testified that, on the morning of April 14, 2010, Hahn requested a photograph of Gary Wiley, not Gary C. Wiley, specifically, and did not request any other information except the mug shot. *Id. at Ex. 2, 26:12-15, 36:11-12.* Saulsbery used the computer in his office to search the photograph database for "Wiley." *Id. at Ex. 2, 23:14-18.* If more than one Gary Wiley had existed in the system, multiple search results would have popped up, but when Saulsbery conducted his search, only one Gary Wiley came up. *Id. at Ex. 2, 37:3-6, 11-16.* Unbeknownst to Hahn or Saulsbery, Wiley's mug shot had not yet been "downloaded" into the system when Saulsbery conducted his search, so the photograph returned by the search was not, in fact, a photograph of Wiley but instead one of Plaintiff. *Id. at Ex. 2, 39:9-18; Br. in Opp'n 2.* It was this photograph Saulsbery emailed to Hahn. *Mot. for Summ. J. Ex. 2, 37: 17-21.*

Thereafter, on April 15, 2010, Defendant published an article reporting that Wiley had been arrested "on charges of robbery, theft by unlawful taking and terroristic threats." *Pl.'s App. In Supp. of Br. in Opp'n to Mot. for Summ. J. Ex. 1.* The article also reported the police believed there might be a link between the robbery and a double homicide that had been committed on April 11, 2010. *Id.; Mot. for Summ. J. ¶ 2.* Accompanying the article was the incorrect photograph of Plaintiff that Hahn had obtained from Saulsbery, and the caption read: "Gary C. Wiley: Charged with robbery." *Br. in Opp'n 2.* Defendant published the article on both the front page of its print newspaper and its online version of the newspaper. *Id.*

Plaintiff filed a complaint alleging defamation for the publication of his photograph in connection with the article. Defendant's Motion for Summary Judgment asserts that the publication is protected by the fair report privilege. *Mot. for Summ. J. ¶ 1.* Plaintiff argues the fair report privilege does not apply to the instant case. *Br. in Opp'n 7.*

## Findings of Law

Per the Pennsylvania Rules of Civil Procedure, "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law . . . ." *Pa. R.C.P. No. 1035.2.* Summary judgment is appropriate "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." *Id. at 1035.2(1).* Once a motion for judgment is properly made, the nonmoving party "may not rest upon the mere allegations or denials of its pleadings" but must identify "(1) one or more issues of fact arising from evidence in the record . . . or (2) evidence in the record establishing facts essential to the cause of action or defense which the motion cites as not having been produced." *Id. at 1035.3(a).*

When considering a motion for summary judgment, the "court must examine the entire record in the light most favorable to the nonmoving party and resolve all doubts against the moving party." *Donegal Mut. Ins. Co. v. Fackler,* 835 A.2d 712, 715 (Pa. Super. 2003) (quoting *Sebelin v. Yamaha Motor Corp.,* 705 A.2d 904, 905 (Pa. Super. 1998)). "It is not part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried." *Samarin v. GAF Corp.,* 571 A.2d 398, 402 (Pa. Super. 1989)

(quoting *Wash. Fed. Say. and Loan Ass'n v. Stein*, 515 A.2d 980, 981 (Pa. Super. 1986)). "All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." *Manzetti v. Mercy Hosp. of Pittsburgh*, 776 A.2d 938, 945 (Pa. 2001).

Defendant offers the conditional fair report privilege as a defense in support its Motion for Summary Judgment, arguing this privilege "protects the media from defamation claims when they republish defamatory statements or information originating with or released by public officials." *Mot. for Summ. J. ¶ 10.* Defendant argues the fair report privilege shields it from liability for publishing Plaintiff's photograph in the instant case because Defendant

> received the mugshot from the Crawford County Prison, the facility where Gary C. Wiley had been incarcerated following his arraignment. The prison was a known source of reliable information concerning inmates, including mugshots of inmates. [Hahn] submitted his request to a veteran and high ranking official at the prison, Deputy Warden Saulsbery. The reporter had no reason to suspect that Deputy Warden Saulsbery had released the incorrect mugshot. . . . [Hahn] was entitled to rely upon the accuracy of the information released by the prison.

*Br. in Supp. 17.*

Plaintiff, on the other hand, argues the fair report privilege does not apply because: 1) "[t]he photograph was provided as a courtesy, not as an official action by the correctional facility," 2) the photograph was provided "by the correctional facility, which was not a designated source of official information for the Pennsylvania State Police who arrested and filed charges against Gary C. Wiley," and 3) Hahn made a "generic request for a photograph of a Gary Wiley" instead of specifically asking for one of Gary C. Wiley. *Br. in Opp'n 7, 9.*

**The Fair Report Privilege**

The fair report privilege is a conditional defense to a defamation claim. *See Medico v. Time, Inc.*, 643 F.2d 134, 137-38 (3d Cir. 1981) (explaining the origins of the privilege as an "exception to the common law rule that the republisher of a defamation was subject to liability similar to that risked by the original defamer"). Though the fair report privilege has never been codified in Pennsylvania, the Pennsylvania Supreme Court in *Sciandra v. Lynett*, 187 A.2d 586, 588-89 (Pa. 1963), adopted the definition of the fair report privilege as set forth in section 611 of the first Restatement of Torts:

> The publication of a report of judicial proceedings, or proceedings of a legislative or administrative body or an executive officer of the United States, a State or Territory thereof, or a municipal corporation or of a body empowered by law to perform a public duty is privileged, although it contains matter which is false and defamatory, if it is
>
> (a) accurate and complete or a fair abridgment of such proceedings, and
>
> (b) not made solely for the purpose of causing harm to the person defamed.

*Restatement (First) of Torts § 611.*

Since *Sciandra*, however, the second Restatement has broadened section 611's definition of the fair report privilege. The second Restatement provides: "[t]he publication of defamatory matter concerning another in a report of an official action or proceeding or

of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported." *Restatement (Second) of Torts § 611.* Thus, under the second Restatement, the fair report privilege now protects reports on any "official action[s] or proceeding[s]" and "meeting[s] open to the public that deal[ ] with a matter of public concern."[2]

Plaintiff correctly notes that Pennsylvania has not expressly adopted the second Restatement's formulation of the fair report privilege. However, the prevailing opinion seems to be that section 611 of the second Restatement is controlling in Pennsylvania, despite the lack of an explicit pronouncement.[3] The Court will therefore apply the fair report privilege as defined in section 611 of the second Restatement.[4]

Because the fair report privilege is a conditional one, claiming this defense triggers a shifting burden of proof. Though the plaintiff initially bears the burden of establishing the defamatory nature of the publication, the burden then shifts to the defendant to establish that "the occasion upon which the defendant published the defamatory matter gives rise to a privilege." *Oweida v. Tribune-Review Pub'g Co.,* 599 A.2d 230, 235 (Pa. Super. 1991) (quoting *Restatement (Second) of Torts § 619(1)); see also 42 Pa. C.S. § 8343(a)-(b)* (setting forth the respective burdens on plaintiff and defendant in a defamation case). If the defendant can establish that the fair report privilege applies, the burden reverts back to the plaintiff to prove the privilege was abused. *Oweida,* 599 A.2d at 235.

In the instant case, Defendant does not challenge Plaintiff's contention that Defendant's publication defamed him. The relevant inquiry, then, is whether the fair report privilege applies to the publication, and Defendant bears the burden on this point. Whether the privilege applies is a question for the Court to determine. *Id.*

**Application of the Fair Report Privilege**

When determining what constitutes an "official action or proceeding," comment d to section 611 of the Restatement explains:

> The privilege covered in this Section extends to the report of any official proceeding, or any action taken by any officer or agency of the government of the United States, or of any State or of any of its subdivisions. . . . The filing of a report by an officer or agency of the government is an action bringing a reporting of the governmental report within the scope of the privilege.

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[2] It has also been noted that the second Restatement "eliminated the requirement that the publication not be made solely for the purpose of causing harm." *Norton v. Glenn,* 860 A.2d 48, 62 (Pa. 2004) (Castille, J., concurring). However, it seems that this type of common law malice is still relevant in Pennsylvania to a question of whether the fair report privilege has been abused. See note 13, *infra.*

[3] *See, e.g., Curran v. Phila. Newspapers, Inc.,* 439 A.2d 652, 661 (Pa. 1981) (concluding section 611 of the second Restatement *would have* applied if the newspaper had fairly and accurately reported on comments made at a press conference); *First Lehigh Bank v. Cowen,* 700 A.2d 498 (Pa. Super. 1997) (adopting trial court's analysis, which relied on section 611 of the second Restatement); *Grund v. Bethlehem Globe Pub'g Co.,* 23 Pa. D. & C. 3d 371, 378-79 (C.P. Northumberland 1982) (applying section 611 of the second Restatement because "our Supreme Court 'has not hesitated to adopt' sections of the [second] Restatement" (quoting *Gilbert v. Korvette's, Inc.,* 327 A.2d 94, 100 n. 25 (Pa. 1974))); see also *Williams v. WCAU-TV,* 555 F. Supp. 198, 201 (E.D. Pa. 1983) (concluding it was "apparent" the Supreme Court would adopt section 611 of the second Restatement because "Pennsylvania courts follow the [second] Restatement on most matters, and have endorsed the substantially similar formulation of the privilege set forth in the first *Restatement*").

[4] Thus, any reference to "the Restatement" means the second Restatement.

*Restatement (Second) of Torts § 611 cmt. d.* Additionally, comment h to the Restatement provides the further clarification that "[a]n arrest by an officer is an official action, and a report of the fact of the arrest or of the charge of crime made by the officer in making or returning the arrest is therefore within the conditional privilege covered by this Section." *Id. § 611 cmt. h.*

Many jurisdictions therefore apply section 611 in a broad fashion.[5] Even courts applying the more restrictive first Restatement[6] or utilizing a definition of the fair report privilege which is similar, though not identical, to the one in the Restatement[7] have applied it in a flexible manner. In addition, the fair report privilege has been specifically applied to the publication of mug shots.[8]

The Court therefore finds the fair report privilege applies to Defendant's publication of Plaintiff's mug shot. In addition to the numerous cases cited above which support a broad application of privilege, the Court also finds the privilege applies to the instant case because a mug shot is part of an individual's arrest record.[9] Since the Restatement

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[5] *See, e.g., Hudak v. Times Publ'g Co., Inc.*, 534 F. Supp. 2d 546 (W.D. Pa. 2008) (applying Pennsylvania law) (statements made by District Attorney in one-on-one interview with reporter privileged); *Howell v. Enter. Publ'g Co.*, 920 N.E.2d 1 (Mass. 2010) (anonymous sources' summary of sewer commission's closed-door executive sessions privileged); *Lami v. Pulitzer Publ'g Co.*, 723 S.W.2d 458 (Mo. App. 1986) (print-out from Missouri Department of Revenue containing information on license suspensions, which was based on incorrect information received from clerk of court, privileged); *Thomas v. Telegraph Publ'g Co.*, 929 A.2d 991 (N.H. 2007) (presentence investigation report privileged); *First Lehigh Bank v. Cowen*, 700 A.2d 498 (Pa. Super. 1997) (initial pleading, even in the absence of any judicial action on the pleading, privileged). *See also Myers v. Telegraph.* 773 N.E.2d 192, 198 (Ill. App. 3d 2002) ("Although the literal language of the Restatement limits the privilege to reports of 'proceedings,' it has been extended to the statement of law enforcement officials in their official capacities.").

[6] *See, e.g., Fairbanks Publ'g Co. v. Francisco*, 390 P.2d 784 (Alaska 1964) (fire chief's letter to city manager privileged); *Doss v. Field Enterprises, Inc.*, 332 N.E.2d 497 (Ill. App.3d 1975) (statements made by Executive Director of the Illinois Crime Investigating Commission acting in his official capacity in interview with reporter privileged); *Binder v. Triangle Publ'ns, Inc.*, 275 A.2d 53 (Pa. 1971) (summary of court proceeding supplied to reporter via telephone conversation with prosecutor privileged).

[7] *See, e.g., McCracken v. Evening News Ass'n*, 141 N.W.2d 694 (Mich. App. 1966) (informal statements made prior to the issuance of a warrant and made by assistant prosecutor not involved with the prosecution privileged); *Molnar v. Star-Ledger*, 471 A.2d 1209 (N.J. Super. 1984) (statements made by deputy fire chief privileged); *Komarov v. Advance Magazine Publishers, Inc.*, 691 N.Y.S.2d 298 (1999) (FBI wiretap application affidavit and confidential FBI report privileged).

[8] *See McDonald v. Raycom TV Broad., Inc.*, 665 F. Supp. 2d 688, 691 (S.D. Miss. 2009); *Mathis v. Phila. Newspapers, Inc.*, 455 F. Supp. 406, 416 (E.D. Pa. 1978); *Martinez v. WTVG*, 2008 Ohio 1789 (Ohio App. 6d Apr. 11, 2008); *Freedom Commc'ns, Inc. v. Sotelo*, 2006 Tex. App. LEXIS 5132 (Tex. App. June 15, 2006).

[9] Per Pennsylvania statute, "[i]t shall be the duty of every criminal justice agency within the commonwealth to maintain complete and accurate criminal history record information . . . ." *18 Pa.C.S. § 9111.* The Crawford County Prison is a criminal justice agency subject to this mandate. *See id. § 9102* (including "local detention facilities [and] county, regional and State correctional facilities" in the definition of "criminal justice agency"). "Criminal history record information" consists of "[i]nformation collected by criminal justice agencies concerning individuals, and arising from the initiation of a criminal proceeding, consisting of identifiable descriptions dates and notations of arrests, indictments, informations or other formal criminal charges and any dispositions arising therefrom." *Id.* When ordering an individual's criminal history record information expunged, photographs are explicitly identified as part of this information. *See, e.g., Commonwealth v. J.H.*,759 A.2d 1269, 1270 (Pa. 2000) (reviewing lower court's grant of petition to expunge petitioner's criminal record per the Criminal History Record Information Act and reinstating lower court's order, which provided: "The Lower Merion Township Police Department, Pennsylvania State Police, County of Montgomery, District Court 38-1-07 and any other agency with records regarding the said arrest are hereby directed to remove, destroy and purge any and all records, fingerprint cards, photographs, incident reports, docket entries and computer entries in any way related to or concerning the aforementioned arrest, hearing and disposition of [petitioner]"); *Sammons v. Pa. State Police*, 931 A.2d 784, 789 (Pa. Commw. 2007) (ordering expunged petitioner's criminal history record information, which included "all criminal records, fingerprints, photographic plates and photographs pertaining to [petitioner's] arrest"). *See also Commonwealth v. Armstrong*, 434 A.2d 1205, 1206 n.3 (Pa. 1981) (noting that an appellant seeking to "expunge her arrest record . . . . thus sought to remove her name, photograph, fingerprints, and fact of her arrest from the records").

specifically applies the privilege to reports of arrests, the publication of a mug shot is no less privileged than publishing the details of a person's arrest. *See Restatement (Second) of Torts § 611 cmt. h.*

The Court would note that Plaintiff does not contest the application of the fair report privilege to a mug shot in general; his argument relates specifically to the inapplicability of the privilege based on the manner in which the mug shot was acquired. *Br. in Opp'n at 8-9.* However, the Court is not convinced by Plaintiff's argument that the privilege does not apply because the prison and not the Pennsylvania State Police provided the photograph.[10] The Restatement does not dictate from which source information about an official action, like an arrest, must be received; so long as the source from which the information *was* received was sufficiently official or had sufficient authority to release it, it does not matter whether the information could or should have been received from a different source.[11]

Furthermore, this is not a situation in which Defendant received Plaintiff's mug shot from an anonymous source or lower-level official not authorized to release it.[12] Saulsbery was the Deputy Warden, a high-ranking official within the Crawford County Prison, as well as the warden's designee, responsible for handling media requests like the one Defendant made for Wiley's photograph. As such, Saulsbery was specifically authorized to provide Wiley's photograph to Defendant.[13]

Hahn also requested the photograph through the prison's established channel, i.e. from the warden or the warden's designee, as required by the written Crawford County Correctional Facility Policy and Procedure relating to News Media/Public Information in effect in April of 2010. Thus, by requesting Wiley's mug shot from Saulsbery, Hahn was

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[10] The Court notes that Plaintiff provides no legal support for this argument. Furthermore, though the police detained Wiley, the prison from which Hahn received the mug shot housed Wiley. The prison knows who is confined within its walls and for what reason the inmates are there. *See Mot. for Summ. J. Ex. 2, 9:19-25* (explaining the prison's booking system, which gathers "any[ information] that relates to that commitment or that person coming in, bond information, whatever it might be"). Thus, the Court is not convinced by the implication that only the police who arrested Wiley were qualified to release information about his arrest.

[11] *See, e.g., Binder v. Triangle Publ'ns, Inc.*, 275 A.2d 53 (Pa. 1971) (summary of court proceeding supplied to reporter via telephone conversation with prosecutor privileged). *See also Mathis v. Phila. Newspapers, Inc.*, 455 F. Supp. 406, 416 (E.D. Pa. 1978) (denying summary judgment as to a media defendant not because the defendant obtained photographs from the FBI instead of the police but because there was a question as to whether the FBI did, in fact, supply the photographs); *Thomas v. Telegraph Pub'g Co.*, 929 A.2d 991, 1010 (N.H. 2007) (denying application of the fair report privilege because there was "no evidence that the officers were given the official imprimatur of their departments to function as spokesmen or even to speak with [the reporter]").

[12] *See, e.g., Bufalino v. Associated Press*, 692 F.2d 266, 272 (2d Cir. 1982) (applying Pa. law) ("Only reports of official statements or records made or released by a public agency are protected by the § 611 privilege. Statements made by lower-level employees that do not reflect official agency action cannot support the privilege.") (emphasis in original); *Lewis v. Newschannel 5 Network*, 238 S.W.3d 270 (Tenn. App. 2007) ("[The fair report privilege] should be applied only to reports of official actions or proceedings involving responsible, authoritative decision-makers who assume legal and political responsibility for their actions. Unofficial, off-the-record statements, especially when the source remains confidential, lack the dignity and authoritative weight of official actions and proceedings . . . .")

[13] *See Hudak v. Times Publ'g Co., Inc.*, 534 F. Supp. 2d 546, 572 (W.D. Pa. 2008) (district attorney's statements made in interview privileged because the district attorney was "the chief law enforcement officer of the county and [was] the official voice with respect to matters pending before his office") (emphasis in original); *Molnar v. Star-Ledger,* 471 A.2d 1209 (N.J. Super. 1984) (deputy fire chief's statement privileged because he had a duty to investigate fires and "[a]lthough the communication of information to the news media may not be specifically designated as a duty of public officials, it is increasingly recognized that if this communication pertains to matters which are within the scope of an official's responsibilities, such statements should be regarded as being within the outer perimeter of the officials' line of duty") (internal quotations and citations omitted).

identifying information, Saulsbery could not possibly have made any representation that the photograph was one of the recently-arrested Gary Wiley; he would have had no indication Hahn wanted that specific information. Without such a representation, Defendant was not entitled to rely on the accuracy of the prison's report because the prison was not making any such report as to the likeness of a particular criminal suspect.[20]

Defendant argues it accurately published the information reported by the prison and that "[t]he point here is that the information that was released [by the prison] was not accurate." *Reply Br. in Supp. 7 n.2.* Defendant is correct that, when a law enforcement agency reports on an official action, like an arrest, a publisher is entitled to rely on that report without needing to independently verify the accuracy of the report issued by the agency.[21] Had Saulsbery been representing that the photograph he released was one of Gary C. Wiley, specifically, Defendant would have been entitled to rely on the accuracy of that report.[22]

However, if Hahn requested no other identifying information, as Plaintiff contends, the prison was not releasing the mug shot as a representation that the man depicted was the Gary Wiley who had just been arrested. Instead, all the prison was representing was that the photograph was one of Gary Wiley - which it was. In such a case, the prison issued no report, and inaccurately linking Plaintiff to Wiley's arrest was not the prison's mistake but

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[20] This disputed question of fact distinguishes the instant case from the other mug shot cases on which Defendant relies, as it was determined in those cases that the law enforcement agencies made specific representations about the identities of the individuals in the photographs. *See McDonald v. Raycom TV Broad., Inc.*, 665 F. Supp. 2d 688, 689 (S.D. Miss. 2009) (media specifically "requested a photograph of the Paul McDonald who was wanted by the Jackson Police Department"); *Mathis v. Phila. Newspapers, Inc.*, 455 F. Supp. 406, 416 (E.D. Pa. 1978) (finding the police department represented that the photographs provided to the media were "photographs of the two men taken into custody); *Martinez v. WTVG*, 2008 Ohio 1789, P4 (Ohio App. 6d Apr. 11, 2008) (reporter requested the mug shots "by stating the name of each suspect and by mentioning the rape indictments"); *Freedom Commc'ns, Inc. v. Sotelo*, 2006 Tex. App. LEXIS 5132, 4 (Tex. App. June 15, 2006) (photographs provided were declared to be "two mug shots to match Odessa Police Dept's press release re: Sec [O]ffenders Compliance").

[21] *See Yohe v. Nugent*, 321 F.3d 35, 43-44 (1st Cir. 2003) (dismissing plaintiff's claim that defendant newspapers were "negligent and failed to conduct an independent investigation . . . [because] accuracy for fair report purposes refers only to the factual correctness of the events reported and not to the truth about the events that actually transpired.") (internal quotations omitted); *Lami v. Pulitzer Publishing Co.*, 723 S.W.2d 458, 460 (Mo. App. 1986) ("[T]he privilege which the defendant enjoyed was to report the information from the computer printout compiled by the Department [of Revenue]. . . . [D]efendant's obligation was to publish a fair and accurate account of the record. There was no concomitant duty to investigate the truth or the falsity of the information contained in the record."); *Goss v. Houston Cmty. Newspapers*, 252 S.W.3d 652, 656 (Tex. App. 2008) ("[The plaintiff] argues the privilege does not apply here because by relying solely on the press release instead of conducting an independent investigation, the story was biased and inaccurate . . . . However, in reporting on this police action, [the defendants] had no duty to investigate.")

[22] This is true despite Plaintiff's argument that Hahn had never before met Saulsbery. Plaintiff does not dispute that Hahn had received photographs from the prison many times before, always following the same protocol and requesting the photographs from the warden or the warden's designees, who were usually lieutenants Hahn had never met before either. *Mot. for Summ. J. Ex. 1, Hahn Dep.* 22:2-15, 23:22-24:21, 25:2-4 [hereinafter "Ex. 1"]. Plaintiff also does not dispute that these photographs had always been accurate in the past. *Id. at Ex. 1, 22:6-8.* Given his prior dealings with the prison, then, Hahn would have had no reason to doubt the accuracy of the photograph Saulsbery provided when Hahn was doing what he had always done and requesting the photograph from the warden or, in this case, the warden's designee. The question is

> whether, under the facts and circumstances existing at the time the reporter receives his information, the reporter is made aware or placed on guard as to possible error. That is, the reporter should not rely on information from a source which he knows, or which he should reasonably believe, is suspect or unreliable.

*Bates v. Times-Picayune Pub'g Corp.*, 527 So. 2d 407, 411 (La. App. 1988). *See also Binder v. Triangle Publ'ns, Inc.*, 275 A.2d 53, 58 (Pa. 1971) ("[Reporter] did not act unreasonably [in relying on prosecutor's summary], for he had found [the prosecutor] to be a reliable source in the past."). Thus, because Hahn was following protocol and doing what he had always done, it is irrelevant whether he had ever met Saulsbery before.

Defendant's, as Defendant's use of the mug shot was an embellishment or addition to its own report about Wiley's arrest.

If a publisher is reporting on an official action based solely on its own information and not relying on a law enforcement agency's report of the official action, the publisher must "do what is reasonably necessary to insure that [its] report is accurate and complete or a fair abridgment" of the official action. *Restatement (Second) of Torts § 611 cmt. b.* There exists a question of material fact relating to the manner in which Hahn requested Wiley's mug shot, and this issue must be submitted to a jury for resolution.[23] Furthermore, if a jury determines Hahn issued a generic request for a photograph of "Gary Wiley," in which case the prison would not have been issuing a report on Wiley's arrest, the Court concludes a jury could reasonably conclude that Defendant abused the fair report privilege by not verifying the accuracy of its own report of Wiley's arrest.[24] *See First Lehigh Bank v. Cowen,* 700 A.2d 498, 503 (Pa. Super. 1997) (noting that whether the fair report privilege has been abused is a question of fact for the jury unless "the evidence is so clear no reasonable person would determine the issue before the court in any way but one"); *Oweida v. Tribune-Review Pub'g Co.*, 599 A.2d 230, 238 (Pa. Super. 1991) ("[T]he issue for the determination of the jury was whether the privilege had been forfeited as a result of defamatory embellishments. This was clearly an issue to be resolved by the jury."). Defendant's Motion for Summary Judgment is therefore DENIED.

**ORDER**

**AND NOW, TO-WIT,** this 30th day of October, 2012, for the reasons set forth in the foregoing **OPINION**, it is hereby **ORDERED, ADJUDGED, and DECREED** that Defendant's Motion for Summary Judgment is **DENIED.**

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

[23] Plaintiff also contends that a question of material fact exists regarding why Defendant published the wrong mug shot on the same day that another newspaper published the correct one. *Br. in Opp'n 11*. However, there is no requirement that news media must gather information in a uniform manner. Thus, only Defendant's actions are relevant to the instant case.

[24] If, however, a jury determines Saulsbery was aware Hahn was interested in Gary C. Wiley, specifically, Saulsbery's release of Plaintiff's mug shot was the prison's own report on Wiley's arrest and specifically represented that the photograph was one of Gary C. Wiley. Defendant therefore would not have been obligated to verify the accuracy of the prison's report, and Defendant would not have abused the privilege.

**CAROLYN CAMPBELL GILL, Plaintiff**

**v.**

**ERIE INSURANCE EXCHANGE, Defendant**

*JUDGMENTS / SUMMARY*

Summary judgment may be granted when there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law; court must examine record in the light most favorable to the non-moving party and resolve all doubt against the moving party.

*JUDGMENTS / SUMMARY*

Party moving for summary judgment has the burden of proving that no genuine issue of material fact exists.

*JUDGMENTS / SUMMARY*

Where non-moving party has failed to produce sufficient evidence to establish the existence of an element essential to the case on which the party bears the burden of proof, moving party is entitled to judgment as a matter of law.

*INSURANCE / INTERPRETATION OF POLICIES*

Insurance policies are contracts, to which the rules of contract interpretation apply.

*INSURANCE / EXCLUSIONS / AUTO INSURANCE*

UM/UIM coverage exclusion for injury sustained while using a non-owned motor vehicle which is regularly used, but not insured for UM/UIM coverage under the policy, applies to use that is regular, habitual, or principal, rather than casual or incidental.

*INSURANCE / EXCLUSIONS / AUTO INSURANCE*

Plaintiff, who was insured as a listed driver under her future spouse's policy, and who in the course of her employment regularly used vehicles from among a fleet of vehicles owned by her employer, was excluded from UM/UIM coverage pursuant to the policy's "regular use exclusion" for injuries sustained by her when the employer-owned vehicle she was driving was struck by an uninsured motorist.

*INSURANCE / EXCLUSIONS / AUTO INSURANCE*

An employee "regularly uses" a fleet vehicle of the employer for purposes of the regular use exclusion if he or she regularly has access to vehicles in the fleet generally; regular use of any particular vehicle in the fleet is not required.

*INSURANCE / INTERPRETATION OF POLICIES / EXCLUSIONS / AUTO INSURANCE*

Any reasonable expectation of UM/UIM coverage that Plaintiff may have had would not prevail over the clear and unambiguous terms of the regular use exclusion.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION NO. 12113-2012

Appearances: Richard T. Ruth, Esq., Attorney for Plaintiff
William C. Wagner, Esq., Attorney for Defendant

**OPINION AND ORDER**

DiSantis, Ernest, J. Jr., Judge May 17, 2013

This matter comes before the Court on cross motions for summary judgment related to

the plaintiff's action for declaratory judgment filed pursuant to 42 Pa.C.S.A. § 7531 *et seq.* Argument was conducted on May 1, 2013.

BACKGROUND OF THE CASE

This case arises out of a motor vehicle collision that occurred on May 10, 2005. It is alleged that on that day, plaintiff was operating a vehicle owned by her employer, Lake Shore Community Services ("Lake Shore"), when it was struck from behind by another vehicle. Lake Shore is engaged in the business of medical monitoring and operating a self-independent living program.

As part of her employment, plaintiff was required to visit clients and provide the necessary services, which included client transports to medical appointments, personal errands, etc. As the situation demanded, she used Lake Shore's vehicles.

At the time of the collision, plaintiff was living with, but not married to, Kenneth E. Gill, Jr. They married on September 24, 2005.

On May 10, 2005, Mr. Gill had an automobile insurance policy with Erie Insurance Exchange. He was the sole named insured in that policy. He alleges that he took steps to add plaintiff to the policy as a listed driver and before their marriage and paid an additional premium amount to do so. For purposes of this proceeding, plaintiff shall be treated as a listed driver.

Both parties have moved for summary judgment. The issue that this Court must determine is whether the plaintiff may seek recovery under the uninsured/underinsured motorist provisions of the policy ("UIM").

LEGAL 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. The purpose of the summary judgment rule "is to eliminate cases prior to trial where a party cannot make out a claim or defense". *Miller v. Sacred Heart Hospital*, 753 A.2d 829, 833 (Pa. Super. 2000) (citation omitted). The Court must examine the record in the light most favorable to the non-moving party and resolve all doubt against the moving party. *Aetna Casualty and Surety Company v. Roe*, 650 A.2d 94, 97 (Pa. Super. 2004).

A moving party has the burden of proving that no genuine issue of material fact exists. *Gutteridge v. A.P. Green Services, Inc.*, 804 A.2d 643, 651 (Pa. Super. 2002) (citation

omitted). 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).

> [P]ursuant to *Nanty-Glo Borough v. American Surety Co.*, 309 Pa. 236, 163 A. 523 (1932), summary judgment may not be entered where the moving party relies exclusively on oral testimony, either through testimonial affidavits or deposition testimony, to establish the absence of a genuine issue of material fact except where the moving party supports the motion by using admissions of the opposing party or the opposing party's own witness.

*First Philson Bank, N.A. v. Hartford Fire Ins. Co.*, 727 A.2d 584, 587 (Pa. Super. 1999) (citation omitted).

Pa.R.Civ.P. 1035.3 provides, in part:

> (a) the adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty (30) days after service of the motion identifying
>
> > (1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or
> >
> > (2) evidence in the record establishing the facts essential to the cause of action or defense which the motions cite as not having been produced.

The Pennsylvania Supreme Court has stated that:

> Where the non-moving party has failed to produce sufficient evidence to establish the existence of an element essential to the case, in which he bears the burden of proof, the moving party is entitled to judgment as a matter of law.

*Ertel v. Patriot-News Company*, 674 A.2d 1038, 1042 (Pa. 1996).

At the outset, this Court notes that this is a matter of contract interpretation. In *Miller v. Poole*, 45 A.3d 1143 (Pa. Super. 2012), the Pennsylvania Superior Court summarized the applicable parameters of analysis:

> We consider the trial court's determinations mindful of the following principles. "Insurance policies are contracts, and the rules of contract interpretation provide that the mutual intention of the parties at the time they formed the contract governs its interpretation. Such intent is to be inferred from the written provisions of the contract." *Penn America Ins. Co. v. Peccadillos, Inc.*, 27 A.3d 259, 264 (Pa. Super. 2011), (quoting *American and Foreign Ins. Co. v. Jerry's Sport Center, Inc.*, 606 Pa. 584, 2 A.3d 526, 540 (2010)).
>
> "When the words of an agreement are clear and unambiguous, the intent of the parties is to be ascertained from the language used in the agreement,... which will

be given its commonly accepted and plain meaning[.]" *LJL Transp., Inc. v. Pilot Air Freight Corp.*, 599 Pa. 546, 962 A.2d 639, 647 (2009) (citations omitted). "When, however, an ambiguity exists, parol evidence is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is patent, created by the language of the instrument, or latent, created by extrinsic or collateral circumstances." *Insurance Adjustment Bureau, Inc. v. Allstate Ins. Co.*, 588 Pa. 470, 905 A.2d 462, 468 (2006). "A contract is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." *Id.* at 468 - 469. Additionally, "[t]he provisions of an insurance contract are ambiguous if its terms are subject to more than one reasonable *1147 interpretation when applied to a particular set of facts." *Kropa v. Gateway Ford*, 974 A.2d 502, 508 (Pa. Super. 2009) (internal quotation omitted). "When a provision in a policy is ambiguous, ...the policy is to be construed in favor of the insured to further the contract's prime purpose of indemnification and against the insurer, as the insurer drafts the policy, and controls coverage." *Erie Ins. Exchange v. Conley*, 29 A.3d 389, 392 (Pa. Super. 2011) (quoting *Government Employees Ins. Co. v. Ayers*, 955 A.2d 1025, 1028 - 29 (Pa. Super. 2008)).

As noted above, the question whether contract language is ambiguous depends on the particular facts to which the policy language is to be applied.

*Id.* at 1146 —1147.

Pursuant to the provisions of the *Uninsured/Underinsured Motorist Endorsement - Pennsylvania (Edition 4/03),* as of May 10, 2005, the contract provided:

**OUR PROMISE**

If Uninsured Motorists Coverage is indicated on the **Declarations,** we will pay damages for bodily injury that you or your legal representative are legally entitled to recover from the owner or operator of **an uninsured motor vehicle**.

Damages must result from a motor vehicle accident arising out of the ownership or use of the **uninsured motor vehicle** or **underinsured motor vehicle** as a motor vehicle and involve bodily injury to you or others we protect. Bodily injury means physical harm, sickness, disease or resultant death to a person.

Page 2 of the same Endorsement in the section entitled "Others We Protect" includes any relative or "anyone else while occupying a non-owned auto other than:...one being operated by anyone other than you or a relative". (See ¶¶ 1 and 4). Pages 2 and 3 of the Pioneer Family Auto Insurance Policy (Edition 4/97) in effect on the date of the accident provide the following additional definitions:

**"Relative"** means a **resident** of **your** household who is:

1. A person related to you by blood, marriage or adoption, or
2. A ward or any other person under 21 years old in your care.

**"Resident"** means a person physically lives with **you** in **your** household. Your unmarried, unemancipated children under age 24 attending school full-time, living away from home will be considered residents of your household.

> **"You", "your"** or **"named insured"** means the person(s) in Item 1 on the Declarations. Exception in the GENERAL POLICY CONDITIONS Section, these words include **your** spouse if a **resident** of the same house.
>
> **"Non-owned auto we insured"** or **"non-owned auto"** means any vehicle not owned by you as described in the AUTOS WE INSURE Section of this policy.
>
> "Occupying" means in or upon, getting into or getting out of.

The UIM Endorsement contains what is generally known as a "regular use" exclusion. Specifically it states:

> **What We Do Not Cover - Exclusions**
> This insurance does not apply to:...
> 10. Bodily injury to **you** or a **resident** using a **non-owned motor vehicle** or a non-owned miscellaneous vehicle which is regularly used by **you** or a **resident,** but not insured for Uninsured or Underinsured Motorist Coverage under this policy.

"Regular use" has been defined as "regular" or "habitual", *Crum & Forster Personal Insurance Co. v. Travelers Corporation,* 631 A.2d 671, 673 (Pa. Super 1993). The term suggests a principal as distinguished from a casual or incidental use.

Plaintiff argues that her use of Lake Shore's vehicles was neither regular nor habitual, but was casual, contingent and incidental. Plaintiff also asserts that the policy is ambiguous as to who is covered under Section 4.b and 4.c of the UIM endorsement. Those two paragraphs provide coverage for:

> 4. anyone else while occupying a non-owned auto other than;... (b) one furnished or available for the regular use of you or anyone residing in your household... (c) one being operated by anyone other than you or a relative.

In assessing the parties claims, this Court finds *Brink v. Erie Insurance Group,* 940 A.2d 528, 533 (Pa. Super. 2008) instructive. That case involved cross motions for judgment on the pleadings. The Brinks had purchased personal automobile insurance from Erie Insurance Group which provided coverage, including underinsured motorist coverage, for their son, a police officer. His duties required him to respond to motor vehicle accidents and to operate police vehicles. In September 2004, Officer Brink responded to an incident that involved an automobile collision in which he suffered physical injury. The other motorist involved was not covered by liability insurance in an amount sufficient to compensate Brink for his injuries. The Brinks then filed a claim under their policy to recover UIM benefits. *Id*. at 529 - 530.

As plaintiff does here, the Brinks first claimed that the language of the "regular use" exclusion was ambiguous. Second, they contended that the exclusion did not apply because Officer Brink's use of the police vehicle was not regular. *Id.* at 531.

The Superior Court determined that the policy provision was not ambiguous. *Id.* at 533. As it said:

> In Pennsylvania, the test for "regular use" is whether the use is "regular" or "habitual". (citation omitted) Federal courts have held that an employee "regularly uses" a fleet vehicle if he regularly or habitually has access to vehicles in that fleet. Regular use of any **particular** vehicle is not required." (citation omitted) We find this analysis persuasive and hereby adopt it.

*Id.* at 535. The fact that Officer Brink did not always use a particular vehicle was not dispositive. Rather, as he had access to a number of vehicles, his use was "regular". *Id.* at 535.

The Superior Court also addressed the claim that he was entitled to UIM benefits based upon a theory of reasonable expectation of coverage. In other words, "that Erie's agent created a reasonable expectation that Officer Brink would be covered under the policy while he was operating police vehicles and that this expectation must prevail over the strict terms of the exclusion." *Id* at 535. Rejecting this argument, the Superior Court noted:

> However, while reasonable expectations of the insured are the focal points of interpreting the contract language of insurance policies, an insured may not complain that his or her reasonable expectations were frustrated by policy limitations which are clear and unambiguous.

*Id.* (quotation and citations omitted). As a result, the exclusion applied.

Ms. Campbell-Gill's use of Lake Shore's vehicles may not have been as common as Officer Brink's. However, that fact does not remove this case from the parameters of the *Brink* holding. The deposition testimony uncontrovertibly established that plaintiff and other employees had access to, and used Lake Shore's vehicles as the situation demanded. See, Gill Deposition at 20 - 21, 28 - 29, 33 - 36 and 41; Rinderle Deposition at 8 - 10, 12 - 13, 17 - 18. Therefore, the "regular use" exclusion applies and plaintiff's activities are excluded under the UIM provisions of the policy.[1]

CONCLUSION

Based upon the above, this Court will issue an order granting Defendant's Motion For Summary Judgment and denying Plaintiff's Motion For Summary Judgment.

**ORDER**

AND NOW, this 17th day of May 2013, for the reasons set forth in the accompanying opinion, it is hereby ORDERED that defendant's Motion For Summary Judgment is GRANTED and the plaintiff's Motion For Summary Judgment is DENIED.

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

[1] Compare, *Liberty Mutual Insurance Group v. Johnson*, 2007 WL 1726518, 2007 U.S. Dist. Lexis 43278 (W. D. Pa. 2007). (There the court granted summary judgment finding that the "regular use" exclusion applied. Significantly the claimant used certain vehicles four nights per month for only six months per year and had no access to keys for the vehicles as that access was subject to supervisor's approval. Although this case is not precedential, the *Brink* Court cited its persuasive authority. *Id.* at 534 - 535.)

**SANDI LANDRICH and THOMAS REIGELMAN, her husband, Plaintiffs,**
**v.**
**JEFFREY L. DAKAS, M.D., RICHARD W. PETRELLA, M.D., and UPMC HAMOT, Defendants**

*PLEADINGS / PRELIMINARY OBJECTIONS*

When ruling on preliminary objections, a court must accept as true all well-pled facts which are relevant in material as well as all inferences reasonably deductible there from. To sustain preliminary objections, it must appear with certainty that based upon the facts pled, the plaintiff will be unable to prove facts legally sufficient to establish the right to relief.

*PLEADINGS / GENERAL REQUIREMENTS*

A complaint in a medical malpractice case which sets forth the date of the harm, the hospital at which the plaintiff was treated and the names of at least some of the individuals who treated the plaintiff is sufficiently specific to survive preliminary objections.

*TORTS / UNFAIR COMPETITION*

As a provider of medical services, a hospital is exempt from the Unfair Trade Practices and Consumer Protection Law with respect to allegations related to those medical services.

*TORTS / CORPORATE NEGLIGENCE*

A claim of corporate negligence against a hospital is properly pled when the claim is based upon a claim of professional negligence against physicians who treated the plaintiff at the hospital in question.

*DAMAGES / PUNITIVE DAMAGES*

When pleading facts relevant to the remedy of punitive damages, a plaintiff must allege the defendant's willful or wanton conduct and this state of mind may be averred generally.

*TORTS / MEDICAL PROFESSIONAL NEGLIGENCE*

To demonstrate medical professional negligence, plaintiff must allege and prove (1) the duty owed by physician to patient, (2) a breach of that duty, (3) that the breach of duty was the proximate cause of, or a substantial factor in, bringing about the harm suffered by the patient.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION No. 12926-2012

Appearances: Brendan B. Lupetin, Esq., Attorney for Plaintiffs
Peter W. Yoars, Jr., Esq., Attorney for Defendant UPMC Hamot
Thomas M. Lent, Esq., Attorney for Defendants Jeffrey Dakas and Richard Petrella

**OPINION**

Connelly, J., May 8, 2013

The matter before the Court is pursuant to two sets of Preliminary Objections, the first by UPMC Hamot (hereinafter "Defendant Hamot") and the second filed jointly by Jeffrey Dakas, M.D., (hereinafter "Defendant Dakas") and Richard Petrella, M.D., (hereinafter "Defendant Petrella"). Both sets of Preliminary Objections are in response to the Complaint

filed by Sandi Landrich (hereinafter "Plaintiff Landrich") and her husband Thomas Reigelman (hereinafter "Plaintiff Reigelman") and thus will be addressed together.

**Statement of Facts**

On August 30, 2010, Plaintiff Landrich experienced dizzy spells and arrived at Hamot Hospital for evaluation. *Pl. Compl. ¶ 13*. The next day, August 31, 2010, she underwent an echocardiogram ordered by Defendant Dakas. *Id. at ¶¶ 17-18.* Following the echocardiogram, she underwent a catheterization procedure performed by Defendant Petrella. *Id. at ¶ 24*. Following the catheterization, but before the effects of anesthesia had worn off, Plaintiff Landrich was awakened and told she needed an implantable cardioverter defibrillator (ICD). *Id. at ¶ 26.* When Plaintiff Landrich expressed she did not want an ICD, she and Defendant Dakas discussed the ICD, and under the belief she would die without one, Plaintiff Landrich signed a consent form to undergo the procedure. *Id. at ¶¶ 27-32*. Plaintiff alleges Defendant Dakas did not explain the procedure or the side effects relative to the ICD. *Id. at ¶ 33*. Defendant Dakas then performed a single-chamber ICD on Plaintiff Landrich. *Id. at ¶ 34.* Plaintiff Landrich avers the ICD was not necessary and the surgery to implant it caused her harm. *Id. at ¶¶ 35-44.*

**Procedural History**

On September 17, 2012, Plaintiffs filed their Complaint and served it on all Defendants. On October 16, 2012, Defendant Hamot filed its Preliminary Objections and its Brief in Support. On October 18, 2012, Defendants Dakas and Petrella filed their Joint Preliminary Objections and their Brief in Support. On November 15, 2012, Plaintiffs filed their Responses to both Preliminary Objections and their Briefs in Support.[1]

**Analysis of Law**

The Pennsylvania Rules of Civil Procedure state "any party to any pleading" may file preliminary objections. *Pa. R.C.P. 1028(a).* When 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). 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.*

**I. Defendant Hamot argues Paragraph 5 of Plaintiffs' Complaint should be stricken, or, in the alternative, be pled more specifically.**

Defendant Hamot argues Paragraph 5 of Plaintiffs' Complaint is factually insufficient. *Def. Hamot's Br. In Supp. 5.* Defendant Hamot contends the phrase "including, but not limited to" is overbroad as "virtually any possible employee, agent and/or servant of [Defendant Hamot] can later be encompassed in the Complaint." *Id.*

Plaintiffs assert Paragraph 5 is not overly broad and the negligence allegation mirrors similar complaints commonly accepted across the state. *Pls. Br. In Opp. to Def. Hamot's Prelim Objs. 5.* Further, Plaintiffs contend the agents responsible for the care of Plaintiff Landrich are

[1] Plaintiffs failed to serve a copy of their Briefs in Opposition upon the Court, a violation of Erie County Rules of Civil Procedure. "[W]ithin thirty (30) days of receipt of the objecting party's brief . . . the nonmoving party shall forward a copy of [their] brief to the assigned judge." *Erie L.R. 1028(c)(2).*

identified later in the Complaint, specifically Certified Registered Nurse Practitioner Sharon Scully and medical technician Matthew W. Tierney. *Id.* at 6. Plaintiffs assert, if other agents are added later, Defendant Hamot can challenge the additions at that time. *Id.*

"The material facts on which a cause of action or defense is based shall be stated in a concise and summary form." *Pa. R.C.P. 1019(a).* "The purpose of the pleadings is to place the defendants on notice of the claims upon which they will have to defend." *Yacoub v. Lehigh Valley Med. Assoc.*, 805 A.2d 579, 588 (Pa. Super. 2002), citing *McClellan v. Health Maint. Org. of Pa.*, 604 A.2d 1053 (Pa. 1992). "[O]n determining whether a particular paragraph in a complaint has been stated with the necessary specificity, such paragraph must be read in context with all other allegations in that complaint." *Yacoub*, 805 A.2d at 589.

For example, the Common Pleas Court of Northampton County found a paragraph which included "other physicians, nurses, technicians and others that cared for the plaintiff' was too broad where "[n]owhere in the complaint are there allegations which identify an agent by name or appropriate description, or describes the nature of the agency . . . ." *Spagnola v. Mehta*, 2009 Pa. D. & C. Lexis 442, *5 (September 23, 2009). However, when claims are alleged more precisely, courts are more likely to permit paragraphs which include other unnamed agents.

Here, Plaintiffs' claim stems from the events of August 31, 2010, and the agents for whom Hamot may be responsible are the nurses, doctors, and technicians who dealt with Plaintiff Landrich on that day and the days following. It is appropriate in a medical malpractice case to "give plaintiffs a reasonable period of discovery and amend the complaint accordingly" because the defendant usually has superior knowledge of the acts of those who provided the plaintiff's treatment. *Johnson v. Patel*, 19 Pa. D. & C.4th 305, 309 (Lackawanna 1993). At this point in the pleadings, Paragraph 5 is sufficiently specific to put Defendant Hamot on notice of the claims against it. Therefore, Defendant Hamot's First Preliminary Objection is overruled.

**II. Defendant Hamot argues Plaintiff's UTPCPL claim is legally insufficient.**

Defendant Hamot contends via demurrer that Plaintiffs' Unfair Trade Practices and Consumer Protection Law (UTPCPL) claim is impermissible under Pennsylvania law.[2] *Def. Hamot's Br. In Supp. ¶ 3.* Preliminary objections in the form of demurrer may be filed for legal insufficiency of a pleading. *Pa. R.C.P. 1028(a)(4).* "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). A demurrer should be sustained 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.*

The UTPCPL prohibits unfair methods of competition and deceptive practice in trade or commerce, specifically condemning misrepresentations and fraudulent conduct. *73 Pa. Cons. Stat. § 201-3.* Defendant Hamot argues Pennsylvania courts have consistently ruled the UTPCPL does not apply to providers of medical services. *Def. Hamot's Br. In Supp.*

[2] Defendant Hamot also claims that because Plaintiffs reside in New York, the case should be tried under New York law, and Pennsylvania's UTPCPL should not apply. *Def. Hamot's Br. In Supp. 5.* As the events of the instant case took place in Pennsylvania, Pennsylvania has jurisdiction. Therefore, the UTPCPL can apply if it otherwise qualifies.

*4-5.* Plaintiffs argue UTPCPL protection applies only to physicians providing treatment, not to hospitals and other medical service providers which employ them. *Pls'. Br. In Opp. To Def. Hamot's Prelim. Objs. 4.*

In 1990, the Pennsylvania Superior Court first ruled on the applicability of the UTPCPL to the medical profession. *Gatten v. Merzi,* 579 A.2d 974 (Pa. Super. 1990). In *Gatten,* the plaintiff underwent an unsuccessful weight loss procedure and sued her surgeon under a variety of claims, including violations of the UTPCPL. *Id.* at 975. Specifically, the plaintiff alleged the surgeon's pre-surgery advice contained "misrepresentations regarding the operation's approval, standards, and possible results ." *Id.* at 974. The *Gatten* Court, affirming dismissal of the UTPCPL claim, stated [i]t is . . . clear that the legislature did not intend the [UTPCPL] to apply to physicians rendering medical services." *Id.* at 976; *See also Foflygen v. Zemel,* 615 A.2d 1345 (Pa. Super. 1992) (holding, in a case involving advice given before a stomach stapling procedure, that the UTPCPL was inapplicable to procedures of medical services.) The Superior Court found imposing the UTPCPL standards on physicians for advice given before medical procedures would make the physician liable for unsuccessful outcomes even without fault, and such a result "would be absurd." *Gatten,* 579 A.2d at 976.

Plaintiffs argue a physician's' exclusion from the UTPCPL for medical services does not extend to the entities that employ him, citing the persuasive authority of *Lebish v. Whitehall Manor Inc.* 57 Pa. D. & C. 4th 247 (Lehigh Co. 2002). *Lebish* involved a plaintiff living in a personal care facility, who was choked and punched, had money stolen from her, and was marred by several falls. The *Lebish* court refused to sustain a preliminary objection similar to Defendant Hamot's in the instant case as the caselaw "only addresses the inapplicability of the UTPCPL to physicians providing treatment." *Id.* at 256.

However, the Superior Court has ruled that the UTPCPL did not apply to "the processing, review, and analysis of reports" involving pap smears, explaining that as long as the provider of medical services was providing medical services and not "consumer-oriented, nonmedical activities" medical providers were exempt from UTPCPL. *Walter v. Mcgee Womens Hospital,* 876 A.2d 400 (Pa. Super. 2005).

In the instant case, Plaintiffs allege Defendant Hamot's agent, just after one procedure and before another, misled Plaintiff Landrich regarding the risks inherent with the second procedure. These facts clearly involve medical services rather than the falls and thefts which occurred in *Lebish*. Thus, as Defendant Hamot is a provider of medical services, and these allegations are related to medical services, it is therefore exempt from UTPCPL.[3] Thus, Defendant Hamot's Third Preliminary Objection, as to the UTPCPL claim, is sustained.[4]

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[3] In their Brief in Opposition to Defendant Hamot's Preliminary Objections, Plaintiffs request "to amend their complaint in order to more specifically illustrate how defendant Hamot's fraudulent and deceptive conduct has created a cause of action under the UTPCPL." *Pls. Br. In Opp. 4.* These proposed amendments include the scheduling of a heart catheterization before an echocardiogram test to determine whether or not the catheterization was even necessary and unwarranted representations to Plaintiff Landrich. *Pls. Br. In Opp. 4-5.* Both of these claims involve medical services, and claims under the UTPCPL may not be permitted against providers of medical services for the medical services they offer. Hence, this claim cannot be pursued for any of the facts alleged.

[4] Defendants Dakas and Petrella also filed a Preliminary Objection contesting Plaintiffs' pursuit of UTPCPL claim. *Def. Dakas and Petrella's Objs. ¶¶ 10-15.* Plaintiff does not object to this Preliminary Objection, and requests leave to withdraw Count VI from their Complaint as to Defendants Dakas and Petrella. *Pls. Br. In Opp. 4-5.*

**III. Defendant Hamot argues Plaintiffs' corporate negligence claim is legally insufficient.**

Defendant Hamot avers corporate defendants are immune from corporate negligence allegations stemming from Informed Consent claims against their physician employees. *Def. Hamot's Br. In Supp. 6-8.* Defendant Hamot argues "[i]t is obvious that Plaintiff's corporate negligence claims . . . are founded upon their theory of informed consent" and therefore any allegation of corporate negligence in the Complaint is legally insufficient. *Def. Hamot's Br. In Supp. 7.*

Plaintiffs are not permitted to pursue vicarious liability against hospitals based on a physician's alleged failure to obtain informed consent. *Valles v. Albert Einstein Med. Ctr.*, 805 A.2d 1232 (Pa. 2002) (holding that failure to gain informed consent occurs outside the scope of employment, the Court stated "the duty to obtain informed consent belongs solely to the physician.")

Plaintiffs do not dispute that hospitals cannot be held directly liable through lack of informed consent claims against their agents. *Pl. Br. In Opp. to Def. Hamot's Prelim. Objs. 7.* Instead, Plaintiffs argue they seek corporate negligence against Defendant Hamot for the separate and distinct claim of professional negligence against Defendants Dakas and Petrella. *Id.* Professional negligence is a claim through which corporate negligence can be pursued. *See generally Scampone v. Highland Park Care Ctr.*, 57 A.3d 582 (Pa. 2012). Therefore, Plaintiffs may bring a corporate negligence claim based on the professional negligence claims against Defendants Dakas and Petrella. Thus, Defendant Hamot's Third Preliminary Objection, as to the corporate negligence claim, is overruled.

Defendant Hamot also filed a Preliminary Objection claiming Plaintiffs are not entitled to punitive damages. *Def. Hamot's Prelim. Objs. ¶ 4.* Plaintiffs have requested leave to withdraw their punitive damages claim against Hamot. *Pl. Br. In Opp. to Def. Hamot's Prelim. Objs. 7.* The Court grants Plaintiff leave to do so, thus Defendant Hamot's Fourth Preliminary Objection is moot.

**IV. Defendants Dakas and Petrella argue Plaintiffs are not entitled to punitive damages.**

Defendants Dakas and Petrella, in their First Preliminary Objection, contend Plaintiffs have failed to plead facts sufficient to show punitive damages are appropriate. *Def. Dakas and Petrella's Prelim. Objs. ¶¶ 2-9.* To pursue punitive damages in a medical malpractice case, Plaintiffs must show the "health care provider's willful or wanton conduct or reckless indifference to the rights of others." *MCARE Act, 40 P.S. § 1303.505(a) (2012).* "A showing of gross negligence is insufficient to support an award of punitive damages." *40 P.S. § 1303.505(b).* Pennsylvania Courts of Common Pleas[5] have held that "punitive damages are generally not recoverable in malpractice actions unless the medical provider's deviation from the applicable standard of care is so egregious as to evince a conscious or reckless disregard of patent risk or harm to the patient." *Lasavage v. Smith,* 23 Pa. D. & C.5th 334, 340 (Lackawanna 2011) (citations omitted). Determining whether malpractice rises to the level of willful, wanton, or recklessly indifferent conduct depends upon the "circumstances"

[5] Due to the recent 2002 enactment of the MCARE ACT, no Pennsylvania Appellate Courts have yet to address the issue of punitive damages in a medical setting.

of the case. *Mellor v. O'Brien*, 2012 Pa. D. & C. Dec. Lexis 172 *9 (January 11, 2012) (citations omitted).

Plaintiffs argue the actor's state of mind is vital in determining whether punitive damages are appropriate. *Pl. Br. In Opp. to Def. Hamot's Prelim. Objs. 3.* Without further discovery and depositions, they cannot determine whether Defendants' conduct warrants the imposition of punitive damages. *Id.*

"Malice, intent, knowledge and other conditions of the mind may be averred generally." *Pa. R.C.P. 1019(b).* The Pennsylvania Superior Court has held that wantonness and recklessness, as conditions of the mind, may also be averred generally. *Archibald v. Kemble*, 971 A.2d 513 (Pa. Super. 2009) (holding that wantonness and recklessness were similar to intent or knowledge.) In the pleading stage, Plaintiffs must allege Defendants' willful or wanton conduct, and this state of mind may be averred generally. Thus, Plaintiffs have averred sufficient facts to overcome demurrer at this time and Defendants' demurrer as to the punitive damages claim is overruled.

**V. Defendants Dakas and Petrella argue Plaintiffs' negligence claim is legally insufficient.**

Defendants Dakas and Petrella contend Plaintiffs are pursuing a negligence claim within an informed consent claim, which is impermissible under Pennsylvania law. *Def. Dakas and Petrella's Prelim. Objs. ¶ 16.* Defendants argue "[p]laintiffs are mixing claims for lack of informed consent with a claim for breach of the standard of care . . ." and have failed to plead a claim for negligence. *Def. Dakas and Petrella's Prelim. Objs. ¶ 16.* Plaintiffs argue that they are not overlapping their claims, but actually alleging two separate claims: one for lack of informed consent and one for negligence. *Pl. Br. In Opp. to Def. Dakas and Petrella's Prelim. Objs. 5.*

In the Complaint, Plaintiffs claim negligence occurred not through failing to gain informed consent, but by choosing to implant an ICD within Plaintiff Landrich which she did not allegedly need. *Pl. Compl. ¶¶ 74-78.* Plaintiffs allege this negligence claim is completely distinct from the battery of informed consent. *Id.*

"The informed consent doctrine requires physicians to provide patients with material information necessary to determine whether to proceed with the surgical or operative procedure or to remain in the present condition." *Sinclair v. Block*, 534 Pa. 563, 633 (1993) (citations omitted). If a physician performs a procedure without gaining informed consent from a patient, the patient has been unable to make an informed choice regarding whether to proceed, and the physician has committed a battery by touching the patient with consent that was not fully informed. *Morgan v. MacPhail*, 704 A.2d 617 (Pa. 1997). Hence, failing to gain informed consent, which is inherently a battery, is distinct from medical negligence. *Montgomery v. Bazaz-Sehgal, et al*, 798 A.2d 742 (Pa. 2002). "[Negligence claims and informed consent claims often co-exist in the same tort action . . . ." *Id.* at 749. The existence of the negligence claim thus does not preclude the informed consent claim, nor vice versa.

To demonstrate medical professional negligence, Plaintiffs must establish (1) the duty owed by physician to patient, (2) a breach of that duty, and (3) that the breach of duty was the proximate cause of, or a substantial factor in, bringing about the harm suffered by the patient. *Thierfelder v. Wolfert*, 52. A.3d 1251, 1264 (Pa. 2012). Here, Plaintiffs have alleged Defendants Petrella and Dakas owed a duty to Plaintiff Landrich to provide

treatment in a manner consistent with applicable medical standards, that the Defendants breached that standard by implanting the ICD, performing a left heart catherization, and failing to properly interpret cardiac testing, and that these breaches caused harm to Plaintiffs. *Pl. Comp. ¶¶ 74-79.* These allegations, if true, are sufficient for a professional negligence claim. Thus, Defendants Dakas' and Petrella's Third preliminary Objection seeking demurrer is overruled.

Defendants Dakas and Petrella also filed Preliminary Objections to strike Counts III and IV as being duplicative of Counts I and II, as well as to strike Paragraph 37 of Plaintiff's Complaint. *Def. Dakas and Petrella's Prelim. Objs. ¶¶ 17-21*. Plaintiffs, have requested leave to withdraw Counts I, II, and Paragraph 37. *Pl. Br. In Opp. to Def. Dakas and Petrella's Prelim. Objs. 5-6.* As Counts I and II and Paragraph 37 are withdrawn, Defendants Preliminary Objections are rendered moot.

**ORDER**

**AND NOW, TO WIT,** this 8th day of May 2013, it is hereby **ORDERED, ADJUDGED & DECREED:**

I. Defendant Hamot's First Preliminary Objection seeking to strike Paragraph 5 of Plaintiffs' Complaint is **OVERRULED.**

II. Defendant Hamot's Second Preliminary Objection seeking more specificity as to Paragraph 5 of Plaintiffs' Complaint is **OVERRULED.**

III. Defendant Hamot's Third Preliminary Objection is **OVERRULED** in part and **SUSTAINED** in part. The portion seeking to strike Count VI, the claim under Unfair Trade Practices/Consumer Protection Law (UTPCPL), is **SUSTAINED.** The portion seeking to strike Count VII, the claim against Defendant Hamot under Corporate Negligence, is **OVERRULED.**

IV. Plaintiffs have voluntarily withdrawn their claims of punitive damages against Defendant Hamot, and therefore Defendant Hamot's Fourth Preliminary Objection is rendered **MOOT.**

V. Defendants Dakas and Petrella's First Preliminary Objection as to punitive damages in Counts III, IV, and IV is **OVERRULED.**

VI. Plaintiffs have voluntarily withdrawn their UTPCPL claim against Defendants Dakas and Petrella. Thus, their Second Preliminary Objection is rendered **MOOT.**

VII. Defendants Dakas and Petrella's Third Preliminary Objection seeking to strike claims of medical negligence is **OVERRULED.**

VIII. Plaintiffs have voluntarily withdrawn Counts I and II and therefore Defendants Dakas and Petrella's Fourth Preliminary Objection seeking to strike Counts III and IV is rendered **MOOT.**

IX. Plaintiffs have voluntarily withdrawn Paragraph 37 of their complaint and therefore Defendants Dakas and Petrella's Fifth Preliminary Objection is rendered **MOOT.**

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

**COMMONWEALTH OF PENNSYLVANIA**
**v.**
**ALIMAYU LUCAS, Defendant**

*CRIMINAL PROCEDURE / INITIAL TRAFFIC STOP*

State trooper's observation of a vehicle blatantly crossing fog line twice provides a reasonable basis for believing a moving violation has occurred and, therefore, the initial stop of the vehicle is lawful.

*CRIMINAL PROCEDURE / INVESTIGATORY DETENTION*

When a trooper tells a driver he is free to leave following a valid initial traffic stop but then reinstates contact with the driver such that a reasonable person would not believe he is free to leave, the law characterizes the subsequent round of questioning as an investigative detention requiring reasonable suspicion.

*CRIMINAL PROCEDURE / INVESTIGATORY DETENTION*

A driver's nervousness, his furtive movements, and the presence of air fresheners in the car, without more, are insufficient to establish reasonable suspicion to support an investigative detention.

*CRIMINAL PROCEDURE / SUPPRESSION MOTION*

A motion to suppress evidence discovered as a result of an investigation detention is properly granted when the investigative detention is unlawful for lack of reasonable suspicion.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION No. 193-2013

Appearances: John B. Carlson, Esq., Attorney for the Defendant
The Office of the District Attorney, for the Commonwealth

**OPINION**

Garhart, J., June 7, 2013

This matter comes before the Court on Defendant's Omnibus Pre-Trial Motion for Relief. Upon consideration of the facts, and after an evidentiary hearing and oral argument, Defendant's Motion is GRANTED.

**I. Factual and Procedural History**

This matter arises out of Defendant's November 16, 2012 arrest, following a motor vehicle stop northbound on 1-79 at 11:22 a.m. (Prelim. Hr'g Tr. at 4:24-5:6; 20:19-21.) At the hearing and oral argument on Defendant's Motion to Suppress, the Commonwealth rested on the record made at the Preliminary Hearing. At the Preliminary Hearing, Trooper Padasak, of the Pennsylvania State Police testified as follows.

Trooper Padasak was stationary when he observed a beige Honda Accord "blatantly" cross the fog line onto the shoulder twice. (*Id.* at 5:11-20.) After catching up with the vehicle, Trooper Padasak engaged the emergency lights and siren of his marked patrol car, and stopped Defendant's vehicle. (*Id.* at 7:3-15.) While speaking with Defendant, Trooper Padasak observed that Defendant was nervous, made furtive movements and his speech was garbled. (*Id.* at 8:5-9:6.) During the stop, Trooper Padasak also observed three air

fresheners hanging from the rearview mirror. (*Id.* at 9:12- 18.) Thereafter, Trooper Padasak gave Defendant a warning for crossing the fog line, but did not issue any citations, and told Defendant that he was free to leave. (*Id.* at 10:15-16, 11:12-14.)

Just moments after telling Defendant he was free to leave, Trooper Padasak reinitiated contact with Defendant and asked him if he could ask a few more questions. (*Id.* at 11:15-12:8.) Trooper Padasak asked if there were any guns or drugs inside the vehicle, to which Defendant responded in the negative. (*Id.* at 12:15-23.) Then, Trooper Padasak asked for consent to search the vehicle and Defendant refused consent. (*Id.* at 12:24-13:7.) Trooper Padasak advised Defendant that he believed that criminal activity was afoot based on Defendant's nervousness, his criminal history, and the air fresheners in his car. (*Id.* at 13:10-17.) Thereafter, Defendant was placed under an investigatory detention[1] to await the arrival of a drug sniffing dog. (*Id.* at 13:21-16.) Corporal Peters arrived with the dog around 12:10 p.m. and proceeded to walk the dog around the vehicle. (*Id.* at 14:10-21.) The dog provided a positive "hit," indicating the presence of narcotics in the vehicle. (*Id.* at 15:2-10.) Ultimately, six gallon-sized bags of marijuana were recovered from Defendant's vehicle. (*Id.* at 16:6-18.)

Defendant has been charged with the following offenses: Possession with Intent to Deliver, 35 Pa.C.S. § 780-113(a)(30), and Possession, 35 Pa.C.S. § 780-113(a)(16). Defendant now brings a Motion to Suppress, seeking the suppression of all evidence obtained as a result of the illegal stop and/or detention of Defendant. Defendant argues the initial stop was made without reasonable suspicion or probable cause that Defendant was operating his vehicle in violation of the motor vehicle code. Defendant further argues he was subjected to an investigative detention without reasonable suspicion.

**II. Discussion**

First, this Court finds that the initial traffic stop of Defendant was lawful. With regard to motor vehicle stops, a police officer must only provide a reasonable basis for his belief that a motor vehicle code violation has occurred in order to validate the stop. *Commonwealth v. Anderson*, 753 A.2d 1289, 1293 (Pa. Super. 2000). This standard "is less stringent than probable cause, but the detaining officer must have more than a mere hunch as the basis for the stop." *Id.* (citation omitted). Trooper Padasak testified that he observed Defendant blatantly cross the fog line two times. (Prelim. Hr'g Tr. at 5:11-20.) These movements clearly provided Trooper Padasak with a reasonable basis to believe that a motor vehicle code violation had occurred, and therefore, the initial stop was valid.

However, this Court finds that the investigatory detention of Defendant was unlawful. With regard to Defendant's continued detention after being told he was free to leave, our Supreme Court has explained,

> Where the purpose of an initial, valid traffic stop has ended and a reasonable person would have believed that he was free to leave, the law characterizes a subsequent round of questioning by the officer as a mere encounter. Since the citizen is free to leave, he is not detained, and the police are free to ask questions appropriate to a mere encounter, including a request for permission to search the

[1] At the hearing and oral argument on Defendant's Omnibus Motion, the Commonwealth conceded that Defendant was under an investigatory detention at this point. At the preliminary hearing, Trooper Padasak also indicated that from the time he requested the drug sniffing dog, Defendant was not free to leave and was effectively detained. (Prelim. Hr'g Tr. at 43:3-16.)

> vehicle. However, where the purpose of an initial traffic stop has ended and a reasonable person would not have believed that he was free to leave, the law characterizes a subsequent round of questioning by the police as an investigative detention or arrest. In the absence of either reasonable suspicion to support the investigative detention or probable cause to support the arrest, the citizen is considered unlawfully detained.

*Commonwealth v. By*, 812 A.2d 1250, 1255-56 (Pa. 2002) (citations omitted). Moreover, "[f]urtive movements and nervousness, standing alone, do not support the existence of reasonable suspicion." *Commonwealth v. Moyer*, 954 A.2d 659, 670 (Pa. Super. 2008).

Here, Defendant received a warning for crossing the fog lines and was told he was free to leave. However, Defendant was clearly not free to leave after refusing consent to search his vehicle, as testified to by Trooper Padasak and conceded to by the Commonwealth. Therefore, the purpose of the initial stop had ended, and Defendant was placed under an investigative detention, pending the use of a drug sniffing dog, and reasonable suspicion was required in order to so detain him. This Court finds that the reliance on only Defendant's nervousness, furtive movements, and the presence of air fresheners, without more, was insufficient to establish reasonable suspicion to support the investigative detention. Accordingly, Defendant was unlawfully detained, and suppression of the evidence is proper.

**IV. Conclusion**

For the foregoing reasons, Defendant's Omnibus Pre-Trial Motion for Relief is granted.

**ORDER**

AND NOW, this 7th day of June, 2013, it is hereby ORDERED, ADJUDGED, and DECREED that Defendant's Omnibus Pre-Trial Motion for Relief is GRANTED.

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

**MOTION FOR LEAVE TO ENTER NOLLE PROSEQUI**

AND NOW, this 25th day of June, 2013, comes the Commonwealth, by and through Chief Deputy District Attorney Elizabeth Hirz, and moves the Honorable Court for leave to enter a Nolle Prosequi in the above-entitled case for the reason stated below:

**REASON FOR NOLLE PROSSE:**

On June 7, 2013, this Court entered an Order granting the Defendant's motion to suppress evidence. The Commonwealth will not appeal that Order, and therefore has insufficient evidence to prove the charges.

/s/ **Elizabeth Hirz, Esq., Chief Deputy District Attorney**

**ORDER**

AND NOW, this 1st day of July, 2013, it is hereby **ORDERED, ADJUDGED, and DECREED** that leave is granted to enter a nolle prosse, with costs upon the Commonwealth.

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

**S.J.S.**
**v.**
**M.J.S.**

*FAMILY LAW / CHILD CUSTODY*

In a child custody case, the appellant must prove that the trial court abused its discretion, to be successful on appeal. To prove an abuse of discretion, the appellant must show that the trial court's factual findings are not supported by competent evidence of record, or that the trial court's conclusions are unreasonable or that the trial court misapplied the law.

*FAMILY LAW / CHILD CUSTODY*

To qualify as a relocation case under the Child Custody Act, there must be a break in the continuity and frequency of contact between the child and the non-relocating parent that threatens significant impairment to the non-relocating parent's ability to exercise his or her custodial rights.

*FAMILY LAW / CHILD CUSTODY*

In a relocation case, the burden of proof is to be placed upon the party proposing to relocate to prove that the relocation will serve the best interests of the child under the factors specified in the Child Custody Act in section 5337(h).

*FAMILY LAW / CHILD CUSTODY*

When a Court is deciding a proposed relocation at the same time as deciding an initial final custody award, the relocation analysis must be part of the overall broader best interests analysis that the Court must perform using the factors set forth in section 5328(a) of the Child Custody Act as the factors in section 5337(h) take into account only the concerns related to relocation. The Court must undertake a dual review of factors in both sections.

*FAMILY LAW / CHILD CUSTODY*

It is proper for the trial court to determine that the elimination of weekly custodial periods with the non-relocating parent would have a detrimental impact on the child if allowed to relocate with the moving parent, specifically as it relates to the bond between the child and the non-relocating parent and the child's emotional development. Extended custody time over the summer, holiday and school breaks is not a sufficient substitute for the regular, weekly contact between the child and the non-relocating parent.

*FAMILY LAW / CHILD CUSTODY*

In a relocation case, it is proper for the Court to give weight to one parent's role as the primary caretaker, however, this role is only one part of the overall analysis that must be performed by the Court and it is not dispositive. It is also proper for the Court to consider the other parent's ability to be the primary caretaker for the children if the children are not permitted to relocate.

*FAMILY LAW / CHILD CUSTODY*

In a relocation case, the impact upon the child of having to switch schools is proper for the trial court to consider in evaluating the child's stability. Further, a comparison analysis of the schools should be undertaken if one parent is asserting a better educational opportunity is available to the children if permitted to relocate.

*FAMILY LAW / CHILD CUSTODY*

While necessity is not required for the Court to find in granting relocation, the parent

seeking to relocate needs to show that the motive for the relocation is not that parent's own self-serving reasons and desires.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
FAMILY DIVISION - CUSTODY NO. 11777-2008

Appearances: Stacey K. Baltz, Esquire
Zanita A. Zacks-Gabriel, Esquire
Office of Custody Conciliation

**MEMORANDUM OPINION**

Trucilla, J., Judge

October 18, 2012: This matter is before the Court upon, Appellant, S.J.S.'s, appeal of this Court's August 24, 2012 Memorandum Opinion and Order (hereinafter: "Memorandum Opinion") regarding custody of the minor children, C.S., born March 10, 2002, and E.S., born November 11, 2004. Appellant is the Mother and Appellee, M.J.S., is the Father. Notably, because this case involves custody of minor children, it qualifies as a children's fast-track appeal pursuant to Pa.R.A.P. 102. In accordance with Pa.R.A.P. 1925(a)(2), S.J.S. filed her Statement of Matters Complained of on Appeal (hereinafter: "Mother's Statement") on September 19, 2012. This opinion, pursuant to PA.R.A.P. 1925(a)(2) demonstrates that Mother's appeal and request for relief must be dismissed.

**FACTUAL & PROCEDURAL HISTORY**

This appeal involves a request by Mother to relocate the children to Buckingham, Pennsylvania (hereinafter: "Buckingham") from Erie, Pennsylvania (hereinafter: "Erie"), which is a move of over 400 miles. Mother desires to be awarded final primary custody and to reside in Buckingham with her independently wealthy "life partner," A.M., whom she met on the Internet. Mother and the children have no family in Buckingham, and the children have only had contact with A.M. on an intermittent basis. Up until this point, both parties' and the children's entire lives have been centered in Erie. Father objects to Mother's proposed move with the children.

In this Court's Memorandum Opinion it set forth the relevant procedural and factual history, which is hereby incorporated by reference. However, in response to Mother's Statement and due to her number of claims, additional details are set forth below.

The parties were married in November of 2001. Separation came in June of 2008 when Father learned of Mother's relationship with A.M. Since the parties' separation in June of 2008, Mother and Father were following an informal custody arrangement by mutual agreement, wherein Mother was the primary custodian and Father maintained regular partial custody periods. On May 9, 2012, Mother mailed a Notice of Relocation to Father, however, she mailed it to an incorrect address. She subsequently served Father with a proper Notice of Relocation on May 17, 2012. Father filed a formal Custody Complaint on May 16, 2012 in an effort to prohibit Mother from relocating with the children. On May 29, 2012, Father filed a Counter-Affidavit regarding relocation which indicated that he objected to the proposed relocation and to Mother's proposed custody arrangement. As

a result of these motions, a custody conciliation conference was held on June 13, 2012. At the conference, the parties were able to come to an agreement where Father was afforded weekly custody periods pending resolution of the relocation request advanced by Mother.

On July 25, 2012, an adversarial hearing was held in the matter. At the hearing, testimony was taken from several witnesses on behalf of Mother. As discussed on the record, the Court did not find that testimony from Father, or any of the witnesses identified in Father's pretrial narrative statement, necessary because Father's fitness, competence, and capability to parent the children were never at issue. In fact, these issues were conceded by Mother. *See* Notes of Testimony (hereinafter: "N.T."), 7/25/12, at 213. Also, it was undisputed at trial that Father has formed a deep-seated emotional bond with both minor children and has consistently been a part of the children's lives since birth.

On August 24, 2012, this Court issued a Memorandum Opinion, denying Mother's request for relocation and holding that the June 13, 2012 Order would become final and remain *status quo*, wherein Mother would remain primary custodian of the children in Erie. The Court ordered, however, that if Mother decided to move away from the Erie area, Father would become primary custodian of the children pursuant to their best interests. This Court reached this conclusion in accordance with the Child Custody Act, 23 Pa.C.S. §§ 5321-5340. Specifically, this Court's decision was governed by a dual review of § 5337(h) regarding relocation and the best interests analysis of § 5328(a).

On September 19, 2012, Mother filed a Notice of Appeal from this Court's Memorandum Opinion, as well as her Statement of Matters Complained of on Appeal. In Mother's Statement, she asserts fourteen reasons why this Court erred in reaching its decision regarding custody in this case.

For the reasons set forth below, Mother's issues on appeal are without factual and legal merit. Therefore, Mother's appeal from this Court's Memorandum Opinion governing custody of C.S. and E.S. must be **DISMISSED**.

## DISCUSSION

In Mother's Statement, she asserts fourteen reasons why this Court erred in issuing its Memorandum Opinion regarding custody of C.S. and E.S. After a careful review of Mother's claims, this Court has determined that its factual findings are supported by competent evidence of record, its conclusions are reasonable, it has not misapplied the law and, consequently, has not abused its discretion in addressing issues of custody herein. Therefore, Mother's claims should be dismissed.

Under well-established child custody law in Pennsylvania, in order for Mother to succeed in her claims she must prove that this Court abused its discretion. Specifically, our Superior Court in *C.M.K. v. K.E.M.*, 45 A.3d 417, 421 (Pa. Super. 2012), set forth the following as the standard of review in a challenge to a trial court's order addressing a request to relocate and to modify custody:

> [O]ur scope is of the broadest type and our standard is abuse of discretion. This Court must accept findings of the trial court that are supported by competent evidence of record, as our role does not include making independent factual determinations. In addition, with regard to issues of credibility and weight of the evidence, this Court must defer to the trial judge who presided over the proceedings and thus viewed the witnesses first hand. However, we are not bound by the trial court's deductions or inferences from its factual findings. Ultimately,

> the test is whether the trial court's conclusions are unreasonable as shown by the evidence of record. We may reject the conclusions of the trial court only if they involve an error of law, or are unreasonable in light of the sustainable findings of the trial court.

The reasons for dismissing Mother's issues on appeal are addressed in this Court's Memorandum Opinion. Therefore, this Court primarily relies on the merits of that opinion to demonstrate that Mother's instant claims do not warrant relief.

Further, this Court is also guided by the holding set forth in *C.M.K.*, *supra*. *C.M.K.* is a recently decided relocation case which utilized the provisions of the Child Custody Act. Specifically, *C.M.K.* confronted similar and analogous facts to the current case and applied the factors set forth in § 5337(h).

Factually, *C.M.K.* concerned custody and relocation of one minor child. See *C.M.K*, at 419-28. The mother was the primary custodian of the child, and similar to the instant case, the father had partial custody every Wednesday and every other weekend. *Id*. Also consistent with the current case, the child enjoyed a good relationship with both parents. *Id*. Both parents were deemed to be fit and competent caregivers. *Id*. The parties lived in Grove City, Pennsylvania (Mercer County) from at least the child's birth in 2004 until they separated in 2008. *Id*. The record demonstrated that the child had a strong family unit in Grove City and several friends. *Id.* In 2011, the mother proposed relocation of the child to Albion, Pennsylvania (Erie County), encompassing a distance of 68 miles from Grove City. *Id.* The mother had immediate family and several relatives living in Albion. *Id*. However, the mother's primary motive to relocate was premised on her prospects of an increased job opportunity as a partner in an insurance company with the hope of economic improvement. *Id.* The mother offered the father a substitute partial custody schedule which would effectively eliminate weekday visitation. *Id*. The father opposed the relocation. *Id*. The trial court denied the relocation and the Superior Court affirmed the trial court's finding. *Id*.

The Superior Court found that the case qualified as a "relocation" case under the Child Custody Act because "Mother's proposed relocation would break the continuity and frequency of Father's involvement with Child and therefore threatens significant impairment of Father's ability to exercise his custodial rights." *Id*. at 426. After making this determination, the Superior Court continued and assessed the case pursuant to § 5337(h) of the Child Custody Act. *Id*. at 427-29. Upon conclusion of its assessment, the Superior Court affirmed the trial court's holding that relocation was not in the best interests of the child. *Id*. at 429. In affirming the trial court, the Superior Court favorably cited the trial court's reasoning, stating that relocation of the child would "have a negative impact on Child's emotional development and on his bond with Father and other relatives and friends." *Id*. at 428. The Superior Court recognized that the elimination of the "critical" weekly custody periods that the child had with father would have a detrimental impact on the child. *Id.* Moreover, the Court emphasized that the child did not have an "equally strong support system from Mother's family in the Albion area" and would have to "adjust to Mother's family, as well as to his new neighborhood, school, and surrounding area." *Id*. at 427-28. Further, the Court found that the mother's asserted economic improvements were speculative. *Id*. at 428. Ultimately, the Court found that the benefits of moving the child to

Albion were minor and were outweighed by the best interest considerations of remaining in Grove City. *Id*. at 428-29.

Turning to the facts *sub judice*, if the children were permitted to relocate to Buckingham, Father's regular consistent custody periods with the children would be eliminated thereby resulting in a negative impact on the children's emotional development and their bond with father. *See also C.M.K*. at 428. Moreover, as was determined in *C.M.K.*, this breach in the regular weekly contact with Father would "jeopardize [Child's] relationship with Father, Father's family and [Child's] friends." *Id*. at 428. Additionally, as was the case in *C.M.K*., Mother's economic prospects in Buckingham are speculative. In fact, in the instant case, Mother has no job in Buckingham and only has an interview, which is even more tenuous than the mother's circumstance in *C.M.K*. Further, as the Court in *C.M.K*. considered, the children will have to adjust to an entirely new set of surroundings and group of friends. *Cf. C.M.K*. at 427-28.

To further illustrate how damaging the relocation would be in this case, the distance considered for relocation from Father and family is over 400 miles. That distance is more than six times farther than the move which was proposed and denied by the Court in *C.M.K*. *Id.* at 429. Continuing, Mother's proposed relocation to Buckingham would take the children to a new school with no friends and none of Mother's family present. This is vastly different from the significant family ties that the children in *C.M.K*. would have if Mother was permitted to relocate to Albion. *Id*. at 426-28. Again, in this case, Mother is only relying on her relationship with A.M. to assist in stabilizing the children's lives in Buckingham. The current set of facts is even more egregious than those set forth in *C.M.K*. wherein relocation was denied. Therefore, applying the holding and rationale of *C.M.K*. to these facts, dismissal of Mother's requested relief is warranted.

Consequently, this Court cites your Honorable Court to the Memorandum Opinion and the holding in *C.M.K*. to deny Mother's appeal. However, to the extent that Mother has raised fourteen issues in her appeal, each will be addressed *ad seriatim.*

A. Issue One

First, Mother argues:

> The Trial Court erred in failing to give proper weight to the role of Mother as primary caretaker of the children, in determining that Mother should have primary custody of the children unless she relocates to Buckingham, Pennsylvania, but then failing to award Mother primary custody of the children in Buckingham, Pennsylvania.

*See* Mother's Statement ¶ 1.

Here, Mother misinterprets the Court's holding. This Court did, in fact, give weight to Mother's role as a primary caregiver. *See* Memorandum Opinion at 21 (discussing § 5328(a)(3), which this Court noted favored Mother as primary custodian). To that end, this Court found that if Mother stayed in Erie she would remain primary caregiver. However, this Court found that if Mother were to leave the Erie area, it would not be in the children's best interests to go with her. Rather, the children's best interests would be served by remaining in Erie, where their entire lives were centered. After weighing all custody factors, this Court found that it was in the children's best interests to remain in Erie, whether it was

with Father or Mother. In sum, Mother's role as a primary caregiver was given significant weight by this Court, but was outweighed by the factors militating against awarding Mother primary custodianship in Buckingham. *See* Memorandum Opinion at 14-26.

Moreover, Mother is misguided in her argument regarding how much weight should be given to her role as primary caretaker of the children. By the plain language of § 5328(a) and §5337(h), a party's role in caring for the child is only part of the overall analysis that must be performed. The Court assessed Mother's role and weighted it accordingly. Importantly, this Court also scrutinized Father's role as a caregiver for the girls. Historically, Father was credited with caring for the children before the parties' separation in June of 2008. Although Mother can claim the role as primary caregiver for the children, her role was not in a vacuum or without substantial assistance from Father. In fact, it was undisputed at trial that Father was a fit parent capable of primarily caring for the children. Mother admitted that if relocation were denied, she "would consider and let [Father] have primary custodianship." *See* N.T. at 170. Consequently, this Court's assessment of Mother as primary caregiver explored the comparative role of each parent as caregivers and gave Mother the proper valuation for her role. Ultimately, however, awarding Mother primary custody of the children in Buckingham was not in the best interests of the children.

B. Issue Two

In her second argument, Mother contends:

> The Trial Court erred in emphasizing the stability of the children's relationships and lives in Erie, Pennsylvania as a main factor in denying Mother's request to relocate with the children, where the children will be experiencing a change in their school (1) if they live with Mother in Erie, due to the fact that their prior school has closed, and (2) if they live with Father in Erie, as he is in a different school district than Mother.

*See* Mother's Statement ¶ 2.

In this argument, Mother's claim is again misplaced because, by comparative analysis, the change that the children would experience from switching schools to Cold Spring Elementary in Buckingham would be vastly more profound and tumultuous than changing their schools in Erie. The record established that the children have a network of family and friends in Erie that would support them. A change in schools *within* Erie will not undermine the children's stability. It was undisputed that the children have resided in Erie for their entire lives. Their group of friends includes classmates from Glenwood Elementary, the school they attended last year. However, Glenwood Elementary is closing, and the girls will be forced to attend a new school in Erie. Nonetheless, the Court would be hard pressed to conclude that the girls would not maintain their current relationships and also possibly have former Glenwood Elementary classmates join them in their new school. Regardless, the geographic composition of Erie and the proximity of other elementary schools are conducive for the girls to continue these friendships and continue to enjoy the support of their extended family in and around the Erie area. What *would* undermine the children's stability, however, is enrolling them in a new school, in a new neighborhood over 400 miles away in Buckingham, removed from their life-long established relationships with family and friends in Erie.

C. Issue Three

In her third claim, Mother asserts:

> The Trial Court erred in disregarding the developmental needs of the children which are served primarily by Mother and the impact on the children's physical, educational and emotional development which would result from a transfer of primary custody to the Father, where the Father has no involvement with the children's schooling, school activities, friends, little to no involvement with their extracurricular activities, and no history of providing any extended care of the children over the past four years.

*See* Mother's Statement ¶ 3.

Mother's argument is similar to her first claim on appeal, asserting her role as primary caregiver should have been given more weight by the Court, thereby allowing her to relocate and retain primary custodianship of the children in Buckingham. However, Mother again argues her role as primary custodian in isolation, disregarding the multitude of other factors that a Court must consider in a best interests analysis. Moreover, although Father has not recently been substantially involved with the children's schooling, friends and extracurricular actives, Father was a co-caregiver in the past. This Court recognizes that Mother's recent role as primary caregiver must be given its accordant weight. *See* this opinion, *supra* at 7-8. However, Mother's argument against Father as primary caregiver is also contradicted by her position at trial. Mother readily conceded that Father was a fit parent, capable of being a primary custodian and caring for the children's needs. Again, it is underscored that there would be a traumatic and harmful emotional impact on the children if they were relocated to Buckingham, far away from the only life they have known in Erie. It should not be underestimated that to have the children move to Buckingham would be to introduce them to completely unfamiliar surroundings without family and friends and in a home with a man (A.M.) who is best described as an acquaintance of the children.

Thus, Mother's assertion that this Court has "disregarded" the children's needs in light of her role as primary caregiver is in error because this Court performed a comparative analysis considering not only Father's current and historical role in the children's lives but also the emotional impact separation from Father would have on the girls. Father has remained a consistent and stable parental figure in the girls' lives. This Court understands that, although Father has recently not been the primary custodian of the children, he has had weekly contact with them for essentially their entire lives. In fact, C.S., the older sister of E.S., testified that she wants to continue to see both parents. In her testimony, it was noted that she was emotionally torn about moving to Buckingham. When asked if she would miss Father, C.S. became emotional on multiple occasions. *See* N.T. at 30-53.[1]

Clearly, any separation from Father and a disruption in his regular weekly contact with the girls would have a negative impact on their best interests. Accordingly, proper weight was given to the children's needs and Mother's role as primary caregiver.

D. Issue Four

In her fourth issue, Mother states:

[1] The Court, with agreement of the parties, did not find that it was necessary to hear testimony from E.S. because it would be duplicitous and would cause the young girl undue stress. *See* N.T. at 53-54.

> The Trial Court erred in placing weight on the lack of "necessity" of the move to Buckingham, Pennsylvania, where the statutes and case law do not require the custodial parent to show that a move is necessary before a relocation is granted.

*See* Mother's Statement ¶ 4.

Mother's argument here fails as well. This Court did not find as a matter of law, as Mother seems to imply in her statement, that a move be "necessary" in order for Mother to be granted permission to relocate with her children. In fact, this Court acknowledged that, sometimes, moving residences for children is "unavoidable." *See* Memorandum Opinion at 22. Precisely, this Court noted that Mother's relocation with the children was not "absolutely necessary" only to show Mother's elevation of her own desires and self-serving reasons for relocation over those of her children's best interests. *Id*. Moreover, this notion was only part of the Court's overall analysis and hardly made up a dispositive factor in denying Mother's request to relocate, as Mother seems to imply.

E. Issue Five

In her next issue, Mother provides:

> The Trial Court erred in determining that there are not adequate substitute partial custody arrangements which would preserve the relationship between Father and the children.

*See* Mother's Statement ¶ 5.

Mother's argument here is belied by the record. As is addressed in this Court's Memorandum Opinion, the substitute custody that Mother proposes would completely disrupt the constant, regular contact that the children have always had with Father. *See* Memorandum Opinion at 16-17. Buckingham is over 400 miles from Erie and located nearly across the state, which makes regular and consistent visitation with Father nearly impossible. Mother's proposed offer of extended custody time with Father over the summer, holidays and school breaks is not a sufficient substitute for the regular, weekly contact Father has with the girls. In fact, C.S. testified to the Court that she enjoys seeing her Father on a regular basis and would be unhappy if she "wouldn't get to see [her] Father like every day." *See* N.T. at 43-44. Thus, the partial custody schedule proposed here would negatively impact the children and disrupt their relationship with Father and extended family. In reaching this conclusion, the Court is persuaded by the holding in *C.M.K.*, *supra*, previously discussed herein at pp. 4-6, where the Superior Court found a proposal for substitute custody in a factually similar relocation case not to be in the child's best interests. *See C.M.K.*, 45 A.3d at 429. In *C.M.K.*, the mother's proposed relocation was 68 miles. *Id*. The Court found that such a distance between the parties' residences would inhibit the father's regular, consistent visitation with the child. *Id*. Here, the proposed distance between residences is much farther, over 400 miles, and much more disruptive to Father's regular, consistent contact with the children. It is not lost on the Court that any separation of the children from Mother would have an emotional toll on them. However, for the reasons demonstrated throughout this opinion, relocation to Buckingham with Mother and A.M. is not in the best interests of the children.

Therefore, for the above reasons, the substitute visitation schedule proposed by Mother was considered and found to be inadequate.

F. Issue Six

In her sixth issue, Mother asserts the following:

> The Trial Court erred in finding that factor five of 23 Pa. C.S. § 5337(h) and factor one of 23 Pa. C.S. § 5328(a) are neutral as to their application to either Mother or Father, where there is a clear pattern established that Mother acted to promote the relationship between Father and the children since the parties' separation, and where there is no allegation or evidence that Father has taken any steps to promote the relationship between Mother and the children.

*See* Mother's Statement ¶ 6.

In addressing this argument, it is clear from this Court's Memorandum Opinion that the Court considered Mother's actions in cooperating with Father in facilitating visitation with the children. In fact, this Court noted that Mother's cooperation with Father was "commendable" in this area. *See* Memorandum Opinion at 17 (in this Court's discussion of § 5337(h)(5)). Continuing, this Court also assessed § 5328(a)(1) and again noted that both parties were cooperative in facilitating visitation. *See* Memorandum Opinion at 20.

Mother's attempt now to paint a picture revealing her as the only party cooperating in facilitating a relationship between the children and both parents is clearly contradicted by the record. Under the totality of the evidence presented, both parties cooperated in visitation until early in 2012. In fact, Father and Mother mutually agreed to all terms of custody until Mother filed a Notice of Relocation, which prompted Father to file a Complaint in custody in order to stop Mother from moving with the girls. Also, the only evidence of record of either party attempting to thwart the other party's relationship with the children was Mother's statement at the adversarial hearing where she testified that part of her motivation for leaving the Erie area with the girls was to "be away from the situation," and that she did "not want to be around [Father]." *See* N.T. at 167, 161, respectively. *See also* Memorandum Opinion at 17, 20.

Accordingly, for these reasons, it was not error for this Court to assess § 5337(h)(5) and § 5328(a)(1) as neutral.

G. Issue Seven

In her seventh argument, Mother provides:

> The Trial Court erred in emphasizing the emotional toll a relocation would have on the children if regular and consistent contact with Father is taken away and in failing to consider the emotional toll it would take on the children to be removed from the primary care of Mother and the day-to-day contact and care provided by Mother if the children are not permitted to reside primarily with her.

*See* Mother's Statement ¶ 7.

This Court disagrees with Mother's argument here, which is similar to her first and third arguments. First, Mother admitted that, although she may not prefer it, it is entirely possible for her and A.M. to remain in Erie sparing the children any emotional turmoil that relocation may bring. This Court did not find that Mother would or could not be primary caregiver if she remained in Erie. To the contrary, this Court did find that relocation to

Buckingham with Mother was not in the children's best interests. Namely, the negative emotional impact on the children of leaving their home, family and friends and moving to Buckingham with Mother and A.M. is far more detrimental than remaining in Erie. Again, it is worth repeating that Mother admitted that the children had a strong bond with Father and their family in Erie and did not dispute that Father was qualified to be the children's primary custodian. This Court also re-emphasizes that C.S. testified she clearly did not want her contact with Father to be disrupted and the thought of moving away from him caused her to become upset. Accordingly, Mother's argument here does not warrant relief.

H. Issue Eight

In her eighth issue, Mother claims:

> The Trial Court erred in determining that Mother's motives for the move to Buckingham, Pennsylvania were not based upon what is in the children's best interests, where Mother testified that she wanted the children to have better financial and educational opportunities and to have the opportunity to move out of the inner-city into a suburban and family-oriented setting.

*See* Mother's Statement ¶ 8.

Mother's claim is not supported by the record. This Court properly concluded that Mother's motive was to improve her best interests instead of the children's educational and financial opportunities. First, Mother provided no conclusive evidence that a move to Buckingham would bring a better educational opportunity for the children than those provided in Erie. Consequently, although Cold Spring Elementary is recognized as an excellent school, it was not found to be superior to any proposed school in Erie because no comparison analysis was undertaken.

Mother continues and claims that the move would also improve the children's "financial opportunity" and the children would be able to move out of the "inner city" and into a suburban setting. This assertion is unavailing as well. First, Mother has no job in Buckingham. Mother's testimony was that she had a "second interview" with a company that could possibly pay her more money than her current job in Erie. *See* N.T. at 95. Despite her best wishes, Mother's testimony underscores the tenuous and speculative nature of her employment opportunities in Buckingham. This hardly impresses this Court that Buckingham is a better financial situation for the children. This is contrasted by Mother's employment situation in Erie, where she has worked for the same company for fifteen years with a steady and secure income.

Essentially, if Mother moved to Buckingham with the children, they would be almost entirely dependent on A.M.'s trust fund stipend. A.M. has no job, no book deals and only the monthly trust fund as his source of income. Consequently, reliance on Mother's relationship with A.M. becomes somewhat critical to the children and their financial circumstances. Logically, if the relationship between A.M. and Mother collapses, so does the dependence on his money and the home the children would live in. Again, the Court has every reason to believe that this relationship is less than permanent. There have been no outward signs of commitment by A.M. to the relationship with Mother and, importantly, her children. Despite describing Mother and himself as "life partners," he has not proposed or asked Mother to marry him, no engagement ring or "promise" ring was given and A.M.

is the only named lessor on the home in Buckingham. Mother and children are identified as "permanent guests" on the one year lease. In fact, A.M. even testified that he has considered breaking up with Mother. Mother appears to be the committed partner in this relationship. She has offered to move her children away from everything they know and across the state to a location that best suits A.M.'s needs as an aspiring author. Therefore, if Mother and A.M. were to separate, this could have a devastating effect on the children and their "financial opportunity."

For these reasons, it is proper to conclude that Mother's contention that the children's educational and financial opportunities would be improved by moving to Buckingham is misplaced. It was, therefore, fair for this Court to opine that Mother's primary motive to move to Buckingham with A.M. was not to promote the children's best interests but appeared to be motivated to improve her own.

I. Issue Nine

Next, Mother argues:

> The Trial Court erred in determining that factor ten of 23 Pa. C.S. § 5328(a) is neutral rather than heavily in favor of Mother, where Father has failed to attend to or even participate in any area of the children's lives other than to provide brief periods of supervision, and where Mother has been solely responsible for the children's daily needs, medical needs and educational needs for four years since the parties separated.

*See* Mother's Statement ¶ 9.

Again, Mother's claim here fails. It was undisputed at trial that both parties are capable of caring for the daily physical, emotional, developmental, and educational needs of the children. Mother may have actually provided more of this type of care in the past for the children, which this Court recognized in other factors in this analysis, however, that is not what § 5328(a)(10) contemplates. This factor specifically asks which party is more likely to care for the child's needs, implying needs in the *future*. It was conceded that Mother had a history of attending to the girls' needs. However, it was undisputed that both parents were not only likely to be able to care for the children's needs, but entirely capable of doing so. Consequently, this Court's conclusion in assessing § 5328(a)(10) as neutral is supported by the record. Moreover, as previously noted, crediting Mother with the role of a primary caregiver responsible for the children's needs is but one factor in the overall analysis. However, even if Mother is credited with this factor to be in her favor, it is not dispositive and clearly not "heavily" in her favor as she contends. Father clearly is ready, willing and able to meet the children's needs.

J. Issue Ten

Tenth, Mother asserts:

> The Trial Court erred in failing to analyze both custodial options on equal ground, where there was no prior custody determination made by the Court.

*See* Mother's Statement ¶ 10.

This Court addressed Mother's argument in its Memorandum Opinion and it incorporates that discussion herein. The plain language of the Child Custody Act mandates that the

burden of proof be placed on the party proposing to relocate. Specifically, the Act provides: "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 factors set forth in subsection (h)." 23 Pa.C.S. § 5337(i). Here, Mother filed a Notice of Relocation asking this Court to approve the proposed move of the girls to Buckingham. Thus, by the plain language of § 5337(i), Mother bears the instant burden of proof as she is the party prosing relocation in this matter.

Further, the cases relied upon by Mother in her brief at trial to support her position (that where there is no prior custody order in place the burden of proof should be equal) were decided before the effective date of the current Child Custody Act. *See Kirkendall v. Kirkendall*, 844 A.2d 1261 (Pa. Super. 2004); *Collins v. Collins*, 897 A.2d 466 (Pa. Super. 2006); *Klos v. Klos*, 934 A.2d 724 (Pa. Super. 2007)(cited in Mother's brief at 10). Thus, the clear language of the Child Custody Act effectively replaces this authority.

However, this Court is cognizant of the holding in *N.J.M. v. C.C.M.*, 2012 Pa. Super. LEXIS 2852, and its recognition of *Kirkendall, supra,* and *Collins, supra,* which state that custody options be assessed equally when determining a proposed relocation and an initial custody award. Nonetheless, *N.J.M.* is an unpublished opinion providing no controlling authority, whereas the language of the Child Custody Act is clear and unequivocal. *See* 23 Pa.C.S § 5337(i). Thus, this Court's assessment of the burden of proof in this matter was not in error.

Most importantly, however, Mother's argument regarding the burden in this case is entirely inconsequential. As this Court expressly provided in its Memorandum Opinion, it would have reached the same holding with regard to custody of the children regardless of which party the burden of proof was placed on, or if there was no burden assigned at all. *See* Memorandum Opinion at 13. Ultimately, as demonstrated in the Memorandum Opinion, this Court effectively assessed the custody situation as if it were on equal ground. Thus, any error that Mother alleges with regard to the instant burden of proof is harmless.

K. Issue Eleven

In her eleventh matter complained of on appeal, Mother states:

> The Trial Court erred in concluding that the best interests of the children would be served by awarding Mother primary custody on the condition that Mother remain in Erie, Pennsylvania, rather than analyzing both the residence of Mother in Buckingham and of Father in Erie on equal footing in an initial custody determination.

*See* Mother's Statement ¶ 11.

To the extent that Mother again questions her burden of proof, this Court relies on the above discussion to show the reasons why Mother's argument is without merit. Mother's argument is again flawed because this Court extensively considered both Mother's proposed residence in Buckingham and Father's residence in Erie. This Court did not conclude that the children's best interests were solely governed by the condition that Mother remain in Erie.

The fitness of Father as a primary caregiver and his residence was undisputed. Mother conceded she would be open to Father as a primary custodian. In fact, not only was Father a historical caregiver for the children, he recently has had regular contact and overnight

visitation with the girls. Thus, no further analysis of his parenting skills was necessary.

In light of Father's undisputed status as a fit parent, this Court found it appropriate to analyze the children's residence in Erie, whether it were with Father or Mother versus their potential residence in Buckingham with Mother and A.M. To that end, this Court analyzed §5328(a) and §5337(h) and determined that it was in the best interests of the children to remain in Erie, whether it was with Mother or Father. In fact, in this Court's order following the Memorandum Opinion, if Mother remained in Erie, the custody order would remain status quo and Mother would remain primary custodian.

Thus, Mother's argument that this Court did not analyze Father's residence in Erie against Mother's residence in Buckingham is belied by the assessment performed by this Court and set forth in the Memorandum Opinion. Consequently, both residences and parties were assessed equally and Mother's consideration as primary custodian was not conditioned solely on her residing in Erie.

L. Issue Twelve

In her twelfth argument, Mother insists:

> The Trial Court erred in failing to conclude that it is in the children's best interests to reside with Mother in Buckingham, Pennsylvania.

*See* Mother's Statement ¶ 12.

Here, Mother is simply making a bald assertion that this Court failed to properly consider the evidence of record or so overlooked it as to abuse its discretion. This Court has exhaustively addressed Mother's argument in this matter and previously in the Memorandum Opinion, explaining why it is in the best interests of the children to remain in Erie.

M. Issue Thirteen

Thirteenth, Mother states:

> To the extent the relocation factors apply to this case, the Trial Court failed to give proper weight to the facts that Mother has no opportunity for advancement in employment at her current position, that Mother testified that the house selected for the first year was selected where there would be opportunities to purchase a residence within the children's school district and that Mother is in a four-year relationship with her paramour with significant time spent together.

*See* Mother's Statement ¶ 13.

Again, Mother's argument is without merit, as was demonstrated in this Court's Memorandum Opinion. First, Mother's claim that this Court did not address the fact that she has no opportunity for advancement in employment in Erie is hardly persuasive. Mother failed to demonstrate how she would have superior employment opportunities for financial growth in Buckingham as opposed to Erie. It was not lost on this Court that although Mother had job interviews in Buckingham which promised higher pay than her Erie job, she did not have a job in Buckingham. Rather, Mother only has prospects of employment. Mother's assertion that she may make more money in Buckingham is speculative. By contrast, Mother has worked for fifteen years in Erie with a stable income. Although Mother testified that she has reached her economic capacity in Erie and she

might be able to earn more money in Buckingham, this fact does not carry the day in advancing the best interests of the children when viewed in conjunction with the totality of factors considered by the Court.

Mother's next assertion that she has an "opportunity" to buy a house within the children's school district in Buckingham is entirely collateral to the determination of whether awarding Mother primary custody and allowing relocation to Buckingham is in the best interests of the children. This Court noted in its Memorandum Opinion that Cold Spring Elementary is an excellent school, however, it was not proven to be a better school than those in Erie. *See* Memorandum Opinion at 16. Nor was any evidence presented that suggests that the schools in Erie did not meet Pennsylvania academic standards. Thus, it is irrelevant whether Mother can purchase a house in that school district, because she has not proven that the school district is superior to school districts in Erie.

Continuing, it was proper for the Court to consider that the home in Buckingham was only rented for one year in A.M's name alone. Mother and the children were not named leaseholders, rather, they were named as "permanent guests." *See* N.T. at 194. Therefore, if A.M. chose to evict Mother and children from the residence, Mother and children would have little recourse. It is difficult to surmise how this uncertainty can be stated to be in the best interests of the children. The fact that Mother has the "opportunity" to buy a house in the same school district does not change this fact. The "opportunity" to buy a house in Buckingham is of very little significance. Mother has the same "opportunity" to purchase a home in the suburbs of Erie. What is of concern, however, is that Mother's primary reason to move to Buckingham is premised on her relationship with A.M. Consequently, if Mother's relationship with A.M. does not survive, Mother would have no home for the children, no job, and no economic or family support.

Despite Mother's contentions to the contrary, this Court is not convinced that Mother and A.M.'s relationship is stable or a permanent one. Mother describes her relationship with A.M. as "life partners." Mother insists that she has spent "significant" time with A.M. However, this assertion does not change the facts recited in this Court's Memorandum Opinion illustrating the tenuousness of the relationship. *See* Memorandum Opinion at 18-19, 21-22, 24-25. The Court again emphasizes that Mother and A.M. met on the Internet, have never shared the same residence, and have only spent "significant" time with one another on an intermittent basis and on vacation trips. Further, A.M.'s lease on the home in Buckingham names Mother and the children as "permanent guests." There simply are no objective signs of commitment by A.M. to this relationship. He has not given Mother an engagement ring, there is no proposal, no wedding date, and A.M. has admitted he has contemplated breaking off the relationship with Mother. The Court has every reason to opine that it does not have confidence in the permanency of this relationship and, if broken, the result would be detrimental to the children if uprooted from Erie and moved to Buckingham.

Accordingly, Mother's claims in her thirteenth matter complained of on appeal must be dismissed.

N. Issue Fourteen

Lastly, Mother argues:

The Trial Court erred in failing to apply the best interests analysis under 23 Pa.

C.S. §(a) [sic] to each proposed residence in the initial custody determination, and apply the relocation factors as just one corner of that analysis.

*See* Mother's Statement ¶ 14.

Mother's claim does not warrant relief. This Court did undertake an initial custody determination and apply a best interests analysis to each proposed residence in accordance with the factors set forth in § 5328(a). As noted above, and in its Memorandum Opinion, this Court compared Mother's proposed residence in Buckingham with Father's residence in Erie. The Court also contemplated keeping the order *status quo* with Mother as primary caregiver if she remains in Erie. Father's fitness as a parent and the appropriateness of his residence were not in dispute. Both parties conceded that either parent was fit and competent to care for the children. This Court found it appropriate to compare the best interests of the children between Mother's proposed residence in Buckingham and the residences in Erie, with Mother or Father. This Court fully assessed the children's relationship with family and friends, schooling and all aspects of their lives in Erie. Thereby, the crux of this case was whether relocation of the children to Buckingham to live with Mother and A.M. was in the best interests of the children. This Court analyzed that question in its bi-lateral analysis of § 5328(a) and § 5337(h) and after carefully weighing all of the factors held that it was not.

Mother's assertion that this Court should have considered the relocation factors as "one corner of the analysis" is opaque. Mother made this same claim in her brief at trial, wherein she cited *Kirkendall*, *supra* at 1265 and *Collins*, *supra* at 472, to support her argument. *See* Mother's brief at 10-11. However, it is difficult to discern Mother's exact argument. It appears Mother is implying that the relocation analysis should take a secondary role to the best interests analysis. To the extent Mother argues such, her argument is erroneous. First, *Kirkendall* and *Collins* were decided before the effective date of the Child Custody Act, reducing the import of their persuasive value. *Kirkendall* was decided in 2004; *Collins* was decided in 2006. However, even assuming these cases are still authoritative, they do not support the legal theory Mother supposes. Rather, the cases hold that where the Court is deciding a proposed relocation along with an initial final custody award, the relocation analysis should be *part* of the overall broader best interests analysis that must be performed, because the relocation factors "take into account only those best interest concerns related to relocation." *See Collins*, *supra* at 472 (citing *Kirkendall*, *supra* at 1265).

Here, this Court's analysis did not violate this principle. This Court analyzed both the § 5337(h) relocation factors and the broader § 5328(a) best interests factors. In fact, this Court expressly stated that it was not elevating one set of factors over the other. *See* Memorandum Opinion at 14. This Court analyzed the two sets of factors harmoniously, in accordance with the Child Custody Act. Thus, Mother's assertion that this Court erred because it did not apply the relocation factors as "one corner of the analysis" is meritless.

## CONCLUSION

For the foregoing reasons, Mother's appeal should be **DISMISSED**. Accordingly, this Court's August 24, 2012 Order awarding Mother primary custody of the children in Erie and denying relocation of the children to Buckingham should be **AFFIRMED**.

**BY THE COURT:**
/s/ **John J. Trucilla, Administrative Judge**

**COMMONWEALTH OF PENNSYLVANIA**
**V.**
**KENNETH A. WHEELER**

*CRIMINAL PROCEDURE / AUTOMOBILE STOPS*

"Reasonable suspicion" that a violation of the Vehicle Code is occurring can only justify a vehicle stop when the driver's detention is capable of serving an investigatory purpose relevant to the suspect violation.

*CRIMINAL PROCEDURE / AUTOMOBILE STOPS*

Where a driver's detention cannot serve an investigatory purpose relevant to the suspected Vehicle Code violation, a stop of the vehicle is justified only where the officer can articulate specific facts which provide probable cause to believe that the vehicle or driver was in violation of the Vehicle Code.

*CRIMINAL PROCEDURE /MISCELLANEOUS TRAFFIC OFFENSES*

Police must have specific articulable facts --- not mere reasonable suspicion --- which provide probable cause that a driver is engaged in texting while driving to justify a vehicle stop for an alleged violation of **75 Pa.S. § 33169(a)** Prohibiting Text-based Communications.

*CRIMINAL PROCEDURE /MISCELLANEOUS TRAFFIC OFFENSES*

A driver's mere holding of a cell phone with a lit screen for two (2) to three (3) seconds towards the middle of the vehicle as he drove past a parked police vehicle provides neither probable cause nor reasonable suspicion to believe that a violation of **75 Pa.S. § 33169(a),** Prohibiting Text-based Communications, had or was occurring.

*CRIMINAL PROCEDURE / MISCELLANEOUS TRAFFIC OFFENSES*

The mere holding of a cell phone in such a manner does not substantiate a conclusion that the cell phone could have obstructed the driver's view of the roadway; probable cause to support a stop for the vehicle for Careless Driving was not present.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION NO. 1156 of 2013

Appearances: Brandon Bingle, Esquire, Attorney for Commonwealth
J. Timothy George, Esquire, Attorney for Defendant

**OPINION**

Connelly, J. August 14, 2013

The facts have been stipulated by counsel. Of significance are the facts that on January 13, 2013 at approximately 12:45 A.M. Albion Borough Police observed an illuminated cell phone screen for two (2) to three (3) seconds being held out in front of the Defendant with his right hand toward the middle of the vehicle as he drove by their parked vehicle. Thereafter, the police followed the Defendant's vehicle and did not see anything unusual or out of the ordinary in terms of the vehicle's operation. No other traffic or pedestrians were in the vicinity. The Defendant's vehicle was subsequently stopped based on the assumption that the Defendant could have been texting in violation of **75 P.S. § 33169(a)** Prohibiting Text-based Communications. The Defendant was also cited for Careless Driving because the way the cell phone was being held could have possibly obstructed the Defendant's vision of the roadway.

**75 Pa.C.S.A. § 6308(b)** allows a police officer to stop a vehicle when he has a "reasonable suspicion" that a violation of the Vehicle Code is occurring. Such applies to "investigatory" stops only. However, mere "reasonable suspicion" will not justify a vehicle stop when the driver's detention cannot serve an investigatory purpose relevant to the suspected violation. In those instances the police office must articulate specific facts which provide probable cause to believe that the vehicle or driver was in violation of the Motor Vehicle Code. *Commonwealth v. Feczko*, 10 A.3d 1285 (Pa. Super. 2010).

As to the careless driving charge, it is evident that under the above said law that violation either occurred or did not when the Defendant's vehicle passed in front of the police car and therefore probable cause was necessary at the time of the stop. The facts clearly do not substantiate the conclusion on the violation of careless driving based on the observation that the cell phone, as held, "could have" obstructed the driver's view of the roadway.[1]

Similarly, whether or not the Defendant was in violation of the Motor Vehicle Code for engaging in prohibited text-based communications must have taken place during the two (2) to three (3) seconds the Defendant passed by the police. Further, investigation would not (and did not) substantiate this charge.[2] Therefore, probable cause was necessary for a stop based on this alleged violation as well. Clearly such was not present considering all the other uses to which the Defendant could have been engaged in with the cell phone under these facts. Even if one were to apply the "reasonable suspicion" standard, the mere holding of a cell phone with a lit screen in the manner described cannot give rise to such. Considering the myriad uses of a cell phone (calling, receiving a call, talking, listening to music, checking weather, time, contacts, calendar, navigation, applications, etc.), to conclude that the Defendant was texting is not reasonable but merely speculative and cannot constitute legal grounds to conduct a stop of the Defendant's vehicle on a public roadway especially where there is no other outward manifestation that a motor vehicle violation is or has occurred.

**ORDER**

**AND NOW, to-wit,** this 14th day of August, 2013 it is hereby **ORDERED** that the Defendants Omnibus Pre-Trial Motion, Motion to Suppress Evidence is hereby **GRANTED.**

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

[1] It is also noteworthy that there were no outward manifestations of improper operation of the vehicle which would corroborate this conclusion. *See also Commonwealth v. Holmes*, 14 A.3d 89 (Pa. 2011) where even if reasonable suspicion grounds for stop there must be some objective facts to support the conclusion that the driver's view was materially impaired.

[2] Even if one were to argue that evidence of a text message may be later found on a cell phone, there would be no way to ascertain when or if such was being utilized at the time of the police observations.

**COMMONWEALTH OF PENNSYLVANIA**
**V.**
**WILLIAM GILLESPIE**

*CRIMINAL PROCEDURE / SEARCH & SEIZURE / WARRANTLESS SEARCHES*

To determine whether a search passes constitutional muster under Article I, Section 8, courts consider four factors: 1) the nature of the privacy interest; 2) the nature of the intrusion created by the search; 3) notice; and 4) the overall purpose to be achieved by the search and the immediate reasons prompting the decision to conduct the actual search.

*CRIMINAL PROCEDURE / SEARCH & SEIZURE / WARRANTLESS SEARCHES / POINT OF ENTRY SEARCH / CONTAINERS*

Pursuant to an administrative order, the Erie County Sheriff's Department possesses the authority to conduct reasonable searches of persons and property entering the courthouse for weapons. Included within this authority is the ability to inspect all packages, briefcases, and other containers in the immediate possession of persons entering the courthouse.

*CRIMINAL PROCEDURE / SEARCH & SEIZURE / WARRANTLESS SEARCHES / POINT OF ENTRY SEARCH / CONTAINERS*

A deputy sheriff's opening of a white plastic pill bottle placed in a plastic bin by the defendant pursuant to a point of entry security check did not exceed the scope of a reasonable search for weapons. Despite its size, the white plastic pill bottle could have contained a weapon or a life-threatening powdered substance such as anthrax and ricin.

*CRIMINAL PROCEDURE / SEARCH & SEIZURE / WARRANTLESS SEARCHES / POINT OF ENTRY SEARCH / NOTICE*

Signs posted at the entrance of the courthouse provided the defendant with sufficient notice of the security process and that his person and items in his immediate possession were subject to inspection, despite the fact that the signs did not specifically warn of searches for contraband.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION NO. 1030 OF 2013

Appearances: District Attorney's Office, for the Commonwealth
Nicole Sloane, Esq., Attorney for the Defense

**OPINION**

Cunningham, W., Judge

The presenting matter is a Motion to Suppress cocaine seized from the Defendant during the screening process at the single point of entry for the public into the Erie County Courthouse. After an evidentiary hearing, the Motion is **DENIED.**

**FACTUAL BACKGROUND**

The Erie County Courthouse (Courthouse) serves as the physical center of all county governmental functions. All three branches of Erie County's Home Rule government are located in the Courthouse.

All judicial matters involving any state law issues are heard in the Courthouse including

Criminal, Civil, Family Court and Orphans Court. All nine Common Pleas Court Judges in Erie County have courtrooms and offices in the Courthouse. All Row and ancillary offices, including the Clerk of Courts, Prothonotary, Recorder of Deeds, Register of Wills, Court Administration, Adult Probation, Juvenile Probation, Custody Office, Domestic Relations Office, Protection From Abuse Office, Arbitration Hearing Room, Jury Assembly Room and Law Library are in the Courthouse. Preliminary hearings in all criminal cases filed in the Erie urban area are heard by Magisterial District Justices at Central Court in the Courthouse.

The Erie County Executive, County Personnel, County Finance and County Planning offices are all housed in the Courthouse. Any member of the public wishing to secure a marriage license, apply for a county job, pay real estate taxes, participate in a tax assessment appeal, bid at a tax/foreclosure sale, register to vote or purchase a dog, hunting or fishing license can do so at offices located in the Courthouse. Other Executive branch offices in the Courthouse include the District Attorney's Office, Sheriff's Office, Coroner's Office and Office of Veterans Affairs.

The legislative branch of Erie County Government, which is Erie County Council, has offices and a meeting room in the Courthouse.

Erie County is a Third Class county under Pennsylvania law with a population of over 280,000 people according to the 2010 census. The Courthouse is a very busy place. On a daily average, 1,800 people enter the Courthouse through the public access entrance. During jury trial terms, the daily average is 2,600 to 2,700 people entering the Courthouse through the public entrance.

Many people entering the Courthouse are participants in emotional legal matters. It is not uncommon for there to be various forms of threats made against prosecutors, police, judges, lawyers, litigants, witnesses, probation officers, case workers and line staff. The threat of violence is real, even to innocent bystanders within the Courthouse. The neighboring courthouse in Warren County still bears the bullet hole on the back of a judge's bench after an unhappy litigant shot at a prosecutor and then killed the presiding Judge.

In addition to the general concerns regarding guns and knives, there have been threats involving substances capable of widespread harm. In fact, the Courthouse was closed down for three days as a result of threats of mass destruction made with a powdery substance. There have been several other instances where powder substances with purported destructive ability have been used to threaten court personnel.

The Sheriff of Erie County is charged with the responsibility of providing security for the Courthouse. A single point of entry for the public was created to provide for the screening of all members of the community entering this public facility.

An Administrative Order was entered by this Court in the former capacity of President Judge on April 15, 2003. *See Defendant's Exhibit A (hereinafter Administrative Order).* The Administrative Order provided the Sheriff's Department with authority to conduct reasonable searches of persons and property entering the Courthouse for the purpose of preventing any potential weapon from entering the building. The use of searches by a metal detector was authorized as well as a pat down search of any person activating a signal from the metal detector. As part of this process, administrative authority was given to search "all packages, briefcases and other containers in the immediate possession of

persons entering Courthouse property… ." *Paragraph 4(c) of Administrative Order.*

The Sheriff's Department has deputies posted at the single point of entry for the public. As a person enters the Courthouse through this entrance, there are two possible lanes to proceed through a metal detector. On either lane, the person is asked to remove any loose item(s) of personal property and place them in a plastic bin which is viewed by a Deputy Sheriff. The person then proceeds through a metal detector.

All persons entering the Courthouse, regardless of age, gender or race, are required to go through this process.[1] Such were the circumstances on March 27, 2013 when the Defendant entered the Courthouse. Like any other member of the public, the Defendant was required to place any loose items of personal property in the plastic bin to be viewed by a Deputy Sheriff. The Defendant was then required to proceed through a metal detector. Among the items the Defendant placed in the plastic bin was a white plastic bottle bearing a label for Anacin.

Upon observing the plastic bottle the Defendant placed in the bin, Deputy Sheriff Stephen Welch shook the bottle "and it didn't rattle or anything like a normal bottle would… there was something in there, but it didn't have--like a normal rattle of just loose pills inside of a hard plastic container. You could feel it. There was something in there, but it was kind of like padded." *Preliminary Hearing Transcript of Stephen Welch, April 8, 2013 at p. 6.* Deputy Welch opened the Defendant's bottle and observed what appeared to be packages of crack cocaine. *Id. p. 10.* The Deputy asked the Defendant for identification and the Defendant indicated that he did not have identification with him. *Id. p. 9.*

Deputy Welch retained possession of the bottle. It appeared to Deputy Welch that the Defendant then headed to Central Court where preliminary hearings are held in criminal cases. *Id. p. 9.* At no time was the Defendant detained by Deputy Welch or subjected to any custodial interrogation. Instead, Deputy Welch notified his supervisor, Corporal Bowers, of the situation. *Id. p. 6.*

A short time later, Corporal Bowers discussed the matter with Jon Reddinger, an Erie County Detective with the District Attorney's Office. Detective Reddinger field-tested one of the baggies in the Defendant's bottle and determined that it was positive for cocaine. Detective Reddinger then filed the present criminal charges against the Defendant.

## MOTION TO SUPPRESS

The Defendant seeks suppression of the cocaine packages contending the search of the bottle exceeded the scope of a reasonable search for weapons. According to the Defendant, the Deputy Sheriff has no authority to search for contraband. Also, the Defendant argues he was not given proper notice that any search upon entering the Courthouse would include a search for contraband.

The Defendant challenges the search of his plastic bottle under the Fourth Amendment of the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution. The Defendant relies on a Commonwealth Court decision regarding the constitutionality of a Courthouse point of entry search as follows:

[1] A separate entrance is available for County employees.

> Our Supreme Court has stated that, because Article I, Section 8 of the Pennsylvania Constitution requires a greater degree of scrutiny for all searches, if a search passes constitutional muster under Article I, Section 8, that search will also satisfy the reasonableness test of the Fourth Amendment. *In the Interest of F.B.*, 555 Pa. 661, 726 A.2d 361 (1999). To determine whether a search passes constitutional muster under Article I, Section 8, courts consider four factors: (1) the nature of the privacy interest; (2) the nature of the intrusion created by the search; (3) notice; and (4) the overall purpose to be achieved by the search and the immediate reasons prompting the decision to conduct the actual search. *Id.*

*Minich v. County of Jefferson*, 919 A.2d 356, 358-359 (Pa. Commw. Ct. 2007).

The Defendant concedes that the first prong of the four factors enunciated in *Minnich, supra*, has been satisfied. *See Paragraph 20, Motion to Suppress.*

**NATURE OF THE INTRUSION**

The second prong is consideration of the nature of the intrusion created by the search. According to the Defendant, it was unnecessary to look into the bottle as such a search exceeded the scope of a reasonable search for weapons.

The Administrative Order gave the Sheriff's Department the authority to conduct reasonable searches of persons and property entering the Courthouse to look for weapons. Included within this authority was the ability to inspect all packages, briefcases and other containers in the immediate possession of persons entering the Courthouse. The logical reason for this administrative authority was to enable personnel from the Sheriff's Department to intercept any weapon or dangerous substance coming into the Courthouse. If Sheriff personnel could not inspect packages, briefcases or other containers then the security process is rendered impotent.

The administrative authority given to Sheriff personnel was not absolute. Searches are required to be reasonable for the purpose of detecting a potential weapon.

In the case sub judice, it was reasonable and not beyond the scope of the administrative authority granted to Sheriff personnel to open the Defendant's plastic bottle to determine whether there was a weapon or a substance which could pose a risk of harm to persons within the Courthouse. Despite its size, it is possible that the plastic bottle could have contained a weapon. Alternatively, as Sheriff Merski testified, life-threatening powdered substances such as anthrax and ricin could have been contained within the bottle.

The dark side of human nature, coupled with the expansion of the Internet, allows for the rapid dissemination of information about ways to smuggle weapons into a courthouse. As a result, there are many devious and creative means that are only limited by the human imagination to smuggle an instrument or substance within this Courthouse that could cause physical harm. As confirmation, simply Google "weapon pill bottle" and learn about the various weapons that can be hidden in a small pill bottle or ways to convert a pill bottle into a weapon.

It is true that the Defendant's bottle could have contained the legal items identified by the Defendant. The fact that the bottle may have contained legitimate items does not preclude the possibility that it could have contained a substance or an item that could be used as a

weapon.

The Defendant's reliance on *Commonwealth v. Sherman*, 2011 Pa. Dist. and Cnty. Dec. LEXIS 135, is misplaced. *Sherman* is a Court of Common Pleas decision from Allegheny County which has no precedential value. More importantly, it is factually irrelevant because it does not involve a Courthouse security screening. Instead, the issue in *Sherman* was whether a warrantless search of a pop can in the Defendant's possession during an investigative street detention was justified under the plain-view doctrine. Unlike the police officer working the street in *Sherman*, Deputy Welch was given administrative authority to search containers coming into the Courthouse for any possible weapons. Deputy Welch never subjected the Defendant to a custodial interrogation nor did he take the Defendant into custody in contrast to the affiant in *Sherman.* Deputy Welch viewed the items within the Anacin bottle from a lawful position authorized by the Administrative Order. Hence, *Sherman* adds nothing to the analysis of this case.

The video footage of the Defendant going through security and the seizure of the Defendant's pill bottle is captured in Commonwealth's Exhibit 1. There is nothing in this video which contradicts the testimony of Deputy Welch. It was reasonable for Deputy Welch to rule out the possibility of a weapon within the Defendant's plastic bottle.

The Defendant's African American race was mentioned by counsel at the evidentiary hearing. Defense Counsel implies that race was a factor in the search of Defendant's bottle. *See Paragraph 25, Motion to Suppress.* However, to the extent that the Defendant is arguing any form of discrimination in the security measures at the Courthouse, such an argument is unsupported by the record.

As Sheriff Merski testified, every member of the public who enters the Courthouse, regardless of age, gender or race, is required to go through the security safeguards. There is nothing within the video, *Commonwealth's Exhibit 1,* that establishes any form of discrimination against the Defendant. Likewise, there is nothing within the testimony of Deputy Welch that suggests he opened the bottle because of the Defendant's race. To the contrary, Deputy Welch provided a plausible explanation for opening the pill bottle. Hence, the Defendant's reckless allegation regarding race is not a basis for relief.

**NOTICE**

Consistent with the Administrative Order, on March 27, 2013 there were signs posted at the entrance of the single point of entry for the public which read as follows:

ATTENTION
ENTERING THIS BUILDING REQUIRES PASSAGE THROUGH A METAL DETECTOR ANY ITEM THAT HAS THE POTENTIAL TO CAUSE HARM WILL BE CONFISCATED

WARNING
NO WEAPONS ALLOWED.
PERSON ENTERING MAY BE SEARCHED.
ANY WEAPONS FOUND WILL BE CONFISCATED.
VIOLATORS ARE SUBJECT TO PUNISHMENT FOR CONTEMPT OF COURT OR ARREST FOR VIOLATION OF CRIMINAL LAWS.
-BY ORDER OF THE COURT-

Because these signs do not specifically mention contraband, the Defendant contends that he did not have notice that his bottle could be searched. This argument is unsupported by the record, law or common sense.

The signs put the Defendant on notice of the ensuing security screening. Towards this end, there can be only one conclusion the Defendant could reach when asked to empty the contents of his pockets and place them in a plastic bin for inspection, to-wit, that his bottle could be searched for a weapon. If the Defendant did not realize this fact when he walked into the Courthouse, he certainly had sufficient time and opportunity to choose to turn around and leave the Courthouse without placing his bottle in the plastic bin. Nothing and no one prevented the Defendant from leaving the Courthouse rather than going through security.

The Defendant ignores the fact that it is illegal to possess cocaine anywhere in Pennsylvania, including when going to a security entrance for a public building. The Defendant is presumed to know the law. The Defendant cannot cite any authority for the proposition that members of the public have to be put on notice that you cannot bring an illegal substance into the Courthouse. There is no legal requirement that a sign or notice has to precede the seizure of an illegal substance such as cocaine.

In this case, the notice provided to the Defendant on March 27, 2013 informed him of the security process. It was the Defendant's decision to proceed through security. The Defendant is not given constitutional cover because the warning sign did not include a statement that you cannot bring illegal drugs into the Courthouse.

**THE OVERALL PURPOSE TO BE ACHIEVED BY THE SEARCH AND THE IMMEDIATE REASONS PROMPTING THE DECISION TO CONDUCT THE ACTUAL SEARCH**

The Defendant contends Deputy Welch opened the Anacin container to search for illegal drugs rather than to search for weapons. There is nothing within the testimony of Deputy Welch or the actual video footage itself to support the Defendant's bald allegation.

Perhaps the best evidence of Deputy Welch's intent was the fact he did not detain, interrogate or arrest the Defendant. He simply retained the illegal substance and the Defendant was free to go. The matter was referred to Deputy Welch's supervisor, who then conferred with Detective Reddinger. The decision to arrest was then made at the discretion of Detective Reddinger and not the discretion of Deputy Welch.

This is not a case where a Deputy Sheriff was independently conducting a narcotics investigation beyond the scope of any investigative, administrative or arrest powers. Instead, while looking for weapons, the Deputy observed the cocaine which was possessed by someone unwisely bringing it to the Courthouse. The ultimate decision whether to file criminal charges was left to Detective Reddinger.

In sum, the video portrays a busy Deputy conducting a routine inspection of a plastic bottle which did not sound like it contained pills. As a result, the possibility existed that the bottle could contain something other than pills, including a weapon or powder that could endanger people within the Courthouse. Accordingly, the purpose of the search of the bottle was consistent with the legitimate public interest in safety in a busy public building. The factual basis for the search of the bottle was reasonable. The search was no more intrusive than necessary to preserve the public safety in the Courthouse.

## CONCLUSION

As the Commonwealth Court acknowledged in *Minnich*, supra: "U.S. Supreme Court Justice Ginsberg indicated that point of entry searches at the entrances to courts and other official buildings are reasonable because the risk to public safety is substantial and real." *Minnich*, 919 A.2d at 360. Deputy Welch was acting within the administrative authority given him to determine whether the Defendant's bottle contained a weapon or any other substance capable of harming a human. This is particularly true since the bottle did not sound like it contained pills. Accordingly, the search was reasonable under the federal and Commonwealth Constitutions and the Motion to Suppress is **DENIED.**

## ORDER

For the reasons set forth in the accompanying opinion, the Defendant's Motion to Suppress is **DENIED.**

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

**RYAN R. CARLISLE, Individually and as Administrator of the Estate of ERIN CARLISLE, Deceased, Plaintiff**

**v.**

**AARON HERTEL, MICHAEL BROWN and ERIE YACHT CLUB, Defendants**

**v.**

**JAMES P. CUMMINGS, JAMES BYHAM, Individually and d/b/a BAYSHORE MARINE SERVICES and CHARLES J. MILLER, Individually and d/b/a NORTH COAST MARINE SERVICES, Additional Defendants**

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW NO. 13251-2012

*Consolidated with 11142-2013 for Discovery Only at No. 13251-2012*

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**RACHEL PALKOVIC, Plaintiff**

**v.**

**MICHAEL BROWN and AARON HERTEL, Defendants**

**v.**

**JAMES P. CUMMINGS, JAMES BYHAM, Individually and d/b/a BAYSHORE MARINE SERVICES and CHARLES J. MILLER, Individually and d/b/a NORTH COAST MARINE SERVICES, Additional Defendants**

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW NO. 11142-2013

*Consolidated for Discovery Only at No. 13251-2012*

*PLEADING / PRELIMINARY OBJECTIONS*

When addressing a demurrer, the court must accept as true all well pled facts set forth in the complaint and give the plaintiff the benefit of all reasonable inferences from those facts and must overrule the demurrer unless it is certain that there is no set of facts under which the plaintiff could recover; any doubt must be resolved in favor of overruling the demurrer.

*PRODUCTS LIABILITY / NEGLIGENCE*

Restatement of Torts – Second, §402A permits a plaintiff asserting a products liability claim against a seller to also pursue a claim against that seller under the alternative theory of negligence, where such negligence can be proved.

*NEGLIGENCE / NECESSARY ALLEGATIONS OF PLEADINGS*

Pennsylvania is a fact-pleading jurisdiction and Pa. R. Civ. P. 1019(a) requires a plaintiff to allege the material facts supporting all four elements of a cause of action in negligence: (1) a duty; (2) a breach of the duty; (3) a causal connection between the breach of the duty and resulting injury; and (4) actual loss or damage.

*NEGLIGENCE / DUTY*

The existence of a legal duty in a negligence claim is a question of law and all of the following factors must be weighed by the court when determining whether a legal duty exists in a negligence claim: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty; and (5) public interest to be served.

Appearances: Thomas Talarico, Esq. Attorney for Ryan R. Carlisle
Raymond Conlon, Esq., Attorney for Rachel Palkovic
Robert Sweeney, Esq., Brian T. Corrigan, Esq. and Sean S. Kelly, Esq. Attorneys for Ryan Carlisle
David Spotts, Esq. Attorney for Ryan Carlisle
Dale Huntley, Esq. and Craig Murphey, Esq. Attorneys for Aaron Hertel
Charles Longo, Esq. Attorney for Aaron Hertel
Arthur J. Leonard, Esq. and James J. Buldas, Esq. Attorneys for Michael Brown
Mark Mioduszewski, Esq. Attorney for Erie Yacht Club
Tibor R. Solymosi, Esq. Attorney for James P. Cummings
William R. Haushalter, Esq. Attorney for James Byham and Bayshore Marine Services
S.E. Riley, Jr., Esq. Attorney for Charles Miller and North Coast Marine Services

## OPINION

These cases arise from the catastrophic explosion of a boat engine resulting in the death of a passenger and serious injuries to two others. At issue is whether a former owner of the boat can be held negligent for the tragic explosion.

The buyers of the boat allege the seller was negligent for failing to inspect, maintain, repair, replace or disclose any worn, old or inadequate parts prior to the sale. However, there is no factual or legal basis establishing such a duty, a breach of that duty or how any breach was the cause of the injuries and death. Therefore, the negligence claim against the former boat owner cannot be sustained.

## STATEMENT OF FACTS

The salient facts are not in dispute. In the spring of 2011, Additional Defendant James P. Cummings (Cummings) was selling his 1987 Wellcraft boat named the *Jimmy Time*. This boat was twenty-three years old and Cummings owned it for the preceding fifteen years.

Aaron Hertel (Hertel) and Michael Brown (Brown) were prospective buyers of the *Jimmy Time*. Hertel and Brown had a professional boat survey conducted by Additional Defendant, Charles Miller (Miller). Hertel and Brown discussed the boat survey with Miller before purchasing the boat on May 25, 2011.

On May 30, 2011, Hertel and Brown were pleasure-boating on the *Jimmy Time* with guests, Ryan and Erin Carlisle. Needing fuel, Hertel and Brown went to the gas dock at the Erie Yacht Club where attendant Rachel Palkovic was working.

After refueling, Hertel and Brown had difficulty starting the engine. While continuing to try to start the engine, there was a horrific explosion and fire. Tragically, Erin Carlisle was killed during the explosion and her husband, Ryan Carlisle, was severely injured. The gas dock attendant for the Erie Yacht Club, Rachel Palkovic, also suffered serious injuries.

On September 26, 2012, at Docket Number 13251-2012, Ryan Carlisle filed suit on his own behalf and as the representative of the estate of his deceased wife against Hertel, Brown and the Erie Yacht Club. At Docket Number 11142-2013, Rachel Palkovic filed suit

against Hertel and Brown on April 29, 2013. Defendants Hertel and Brown subsequently filed a Complaint to Join Additional Defendants against Cummings (and others) at both dockets. At Docket Number 13251-2012, the Erie Yacht Club filed Cross-Claims against Cummings seeking contribution and/or indemnity.

In the second Amended Complaint filed by Carlisle, among the various allegations of negligence, Carlisle alleges Hertel and Brown failed to repair or replace "worn, old or inadequate equipment." *See Paragraph 31(a),(b),(c),(e) and (f).* By responsive pleading Hertel and Brown formally deny all of the allegations of negligence.

In filing their Complaint against Cummings, Hertel and Brown assert that if there was any negligence in the failure to repair or replace any worn, old or inadequate equipment, it was the negligence of Cummings who owned the boat for fifteen years while Hertel and Brown only owned the boat for five days prior to the explosion.

Cummings filed Preliminary Objections to the Complaints at both docket numbers. These cases were then consolidated by Order dated August 5, 2013. Cummings seeks the dismissal of the cases against him for the failure to state a claim upon which relief can be granted; the Complaint is legally insufficient to form the basis of any legal action against Cummings; and the Complaint fails to state enough facts to put Cummings on notice of the basis upon which recovery is sought.

## STANDARD OF REVIEW

This case is at an early procedural stage. Before the Court are the Preliminary Objections filed by Cummings to the Complaint filed by Hertel and Brown and the Cross Claims of Erie Yacht Club.

When reviewing Preliminary Objections in the nature of a demurrer, all material facts and all reasonable inferences therefrom are treated as true. A demurrer is limited to only those cases where no recovery is possible based on the facts alleged within the complaint. "Where any doubt exists as to whether a demurrer should be sustained, it should be resolved in overruling the demurrer." *Vulcan v. United of Omaha Life Insurance Company,* 715 A.2d. 1169, 1172 (Pa. Super 1998), quoting *Jackson v. Garland,* 622 A.2d. 969, 970 (Pa. Super 1993).

Applying this standard, each Preliminary Objection is considered seriatim.

## I. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Cummings contends that under the guise of a negligence claim Hertel and Brown are actually pleading a products liability claim. Cummings points to the attempt to extend a duty of care to all foreseeable users as proof that this is simply a disguised product liability claim. Because he is not a manufacturer or merchant of boats, Cummings argues that he cannot be sued under the Restatement of Torts Second, §402A on a products liability claim.

A products liability claim does not preclude a party from also asserting a negligence claim. These causes of actions are not mutually exclusive. As set forth in the commentary to §402A, "the rule stated here is not exclusive and does not preclude liability based upon the alternative ground of negligence of the seller, where such negligence can be proved." *Restatement (Second) Torts,§402A, comment a (1965).* Under Pennsylvania law, a plaintiff can plead alternative causes of action. *See Pa. R. C. P. 1020(c).*

Hertel and Brown do commingle products liability language within their negligence

claim against Cummings. Nonetheless, it is clear that Hertel and Brown are asserting a negligence claim against Cummings and not a products liability claim. Hence, the Preliminary Objection based on the failure to state a claim upon which relief can be granted is overruled.

## II. LEGAL INSUFFICIENCY OF COMPLAINT

Generally, a claim or negligence involves four elements: (1) a duty; (2) a breach of the duty; (3) a causal connection between the breach of the duty and the resulting injury; and (4) actual loss or damage. The only element of negligence Hertel and Brown have factually alleged is the last one because of the death of Erin Carlisle and the injuries to Ryan Carlisle and Rachel Palkovic. Hertel and Brown have not averred a factual or legal basis for a duty, breach of the duty or a causal link between the breach and the resulting injuries.

### A. DUTY

Perhaps the most important element in a negligence claim is establishing a duty of a party to conform to a particular standard of care for the protection of another. *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d. 1218 (Pa. 2002). The existence of a duty is a question of law. *Emerich v. Philadelphia Center for Human Dev., Inc.*, 554 Pa. 209, 720 A.2d 1032, 1034 (1998).

The Pennsylvania Supreme Court has set forth five factors to weigh when determining whether a legal duty exists in a negligence claim. These factors include: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty; and (5) public interest to be served. *Althaus v. Cohen*, 562 Pa. 547, 756 A.2d 1166 (Pa. 2000). All of these factors have to be weighed as not one standing alone is determinative. The balancing of these factors does not weigh in favor of imposing a duty upon Cummings.

Hertel and Brown are seeking to create a duty not just to themselves, but to all foreseeable users of the *Jimmy Time*. There is nothing averred within the relationships of these parties that would require the extension of a duty to third parties unknown to Cummings. There is privity between Cummings, Hertel and Brown. There are no personal or commercial relationships alleged between Cummings, the Carlisles or Palkovic.

Cummings entered into a contract for the sale of a used good with Hertel and Brown who now seek to make the Carlisles and Palkovic third party beneficiaries of the contract. However, Hertel and Brown have not alleged any factual or legal basis for a third party to benefit from the contract.

Hertel and Brown rely on *Phillips v. Cricket Lighters*, 841 A.2d 1000 (Pa. 2003), for the proposition that the seller of a defective good is liable to all foreseeable users of that good under a negligence theory. In *Phillips*, a two-year old child started a house fire with a lighter found in his mother's purse. Sadly, the fire killed the two-year old child, his five-year old brother and his mother. In analyzing whether a duty existed by the manufacturer of the lighter toward the mother and children, the Pennsylvania Supreme Court found that the relationship between the mother, as the purchaser of the lighter, weighed in favor of a duty. However, there was no relationship between the manufacturer and the deceased children and therefore this factor did not weigh in favor of a duty owed to the deceased children. *Id*. at 1010, 1011.

The deceased mother in *Phillips* has a relationship similar to Hertel and Brown because

she was the purchaser of the lighter. The Carlisles and Palkovic have a relationship similar to the two deceased children since they were not the purchasers of the product and therefore this factor does not weigh in favor of a duty owed to them under a negligence theory.

A separate legal reason for this result is that the risk of loss passed from Cummings to Hertel and Brown on May 25, 2010. Thereafter, Hertel and Brown owed a duty of care to their boat guests and the gas dock attendant. It is not averred that Cummings agreed to maintain the boat or continue to assume the risk of loss after the sale. There is nothing within the relationships between the parties that created a duty owed by Cummings to the Carlisles, Palkovic or all foreseeable users of the *Jimmy Time* after its purchase by Hertel and Brown on May 25, 2010.

The second factor, an analysis of social utility, focuses on the conduct of Cummings. In the Complaint, Cummings is described as an adult individual believed to be living in Cape Coral, Florida. *See Paragraph 6.* Cummings owned the *Jimmy Time* for approximately fifteen years when he advertised to sell it in the Spring of 2011. *Paragraphs 17 and 18.* Cummings was primarily responsible for the maintenance of the *Jimmy Time* when he owned it. *Paragraph 19.* In the Spring of 2011, Hertel and Brown began negotiations with Cummings to buy the *Jimmy Time. Paragraph 16.* During the negotiations, Cummings represented to Hertel and Brown that the *Jimmy Time* was in good operating condition; that Cummings had used the boat extensively over fifteen years; Cummings had experienced no significant problems with the boat; and the boat needed no significant mechanical or engine work. *Paragraph 22.* Cummings also informed Hertel and Brown that the two engines had been rebuilt and were in good operating condition; Cummings provided receipts corroborating these representations. *Paragraph 23.*

Prior to purchasing the *Jimmy Time*, Hertel and Brown hired a professional boat surveyor to perform a comprehensive boat inspection "including inspection and evaluation of the boats structural integrity, fuel system, electrical system, electronics and overall maintenance." *Paragraph 34.* The boat surveyor, Miller, informed Hertel and Brown that the *Jimmy Time* was mechanically sound and safe for use. *Paragraph 41.* Thereafter, Cummings sold the boat to Hertel and Brown and "transferred ownership to them on May 25, 2011… ." *Paragraph 24.* Prior to the explosion, Hertel and Brown had no problem with the boat and made no inspection or repair. *Paragraph 25.*

These averments describe a common transaction involving the sale of a used boat between private parties. Prior to their purchase, Hertel and Brown had the boat professionally inspected; the inspection corroborated the representations by Cummings regarding the condition of the boat.

There is social utility in the ability of a private owner of a used boat to sell it on an "as is" basis. However, the ability to sell a used boat does not provide Cummings with immunity from a negligence claim. Thus, consideration must be given to the alleged conduct by Cummings that caused the harm to the Carlisles and Palkovic.

It is alleged that Cummings "knew or should have known the details of the boat's condition and the need for repair and/or replacement of various parts of the *Jimmy Time*, including its fuel, ventilation, mechanical and electrical systems." *Paragraph 21.* There were "defects caused by Mr. Cummings failure to exercise reasonable care in maintaining the boat." *Paragraph 27.* As the "owner and maintainer of the boat," Cummings should

have noticed any defects had he made a reasonable inspection of the boat. *Paragraph 26.* Cummings should have disclosed the defects that he knew or should have known on the *Jimmy Time* prior to the sale to Hertel and Brown. *Paragraphs 28 and 29.*

In sum, Hertel and Brown are alleging that Cummings knew or should have known about unspecified defect(s) that were caused by his failure to properly maintain the boat. Further, Cummings failed to disclose the unspecified defect(s) to Hertel and Brown prior to the sale.

As a conceptual matter, there is little, if any, social utility served when a private boat owner knowingly sells a used boat with defect(s) to another private owner without disclosing the defect(s). However, Pennsylvania is a fact-pleading jurisdiction. There is nothing alleged within the Complaint against Cummings identifying any defect that Cummings failed to maintain, identify, repair, replace or disclose. The alleged defect is the most material fact in this case. Without knowing the actual defect(s), there is no factual basis to find any conduct by Cummings that lacked social utility.

The conduct of Cummings cannot be considered in a vacuum. In deciding the social utility of Cummings conduct, consider what Hertel and Brown do not allege:

a. Cummings was a manufacturer or merchant of boats such as the *Jimmy Time*;
b. Cummings was an expert mechanic;
c. Hertel and Brown had insufficient time to inspect the *Jimmy Time;*
d. Cummings denied them any opportunity to take the boat on the water for a sea trial;
e. Cummings denied them any opportunity to inspect for worn, old or inadequate parts;
f. They were denied access to any part of the *Jimmy Time;*
g. They were denied an opportunity to have a professional boat survey;
h. Cummings pressured or forced them to purchase the boat before they were ready to do so;
i. There was a written contract between the parties;
j. The written contract or oral contract between the parties contained an express or implied warranty regarding the condition of the boat or any parts thereof;
k. The boat was not sold in an "as is" condition;
l. As part of their agreement, Cummings promised and/or agreed to inspect, repair or replace any worn, old or inadequate part(s);
m. The sale was contingent upon Cummings inspecting, repairing or replacing any worn, old or inadequate part(s);
n. Cummings agreed to continue to maintain the boat and assume the risk of loss after the sale;
o. Cummings engaged in any unfair trade practice;
p. There was a breach of contract, misrepresentation, fraud or breach of warranty by Cummings.

The absence of the above averments eliminates most of the undesirable conduct imaginable for a seller of a used boat. Most telling is the elimination of any claim of fraud, breach of contract or breach of warranty. In the context of this commercial transaction, Hertel and Brown are seeking to impose a duty that was not bargained for within their

contractual relationship with Cummings and is sought only after a tragedy.

The question becomes then, what is the social utility of imposing a duty on a private seller of a twenty-three year old boat sold in an "as is" condition to inspect, repair or replace worn, old or inadequate parts prior to the sale when such a duty was not part of the contract and the boat had been professionally inspected by the buyer's expert?

This is not an ordinary duty that Hertel and Brown are seeking to impose upon Cummings. Hertel and Brown are seeking the imposition of a duty that would require Cummings to exercise greater care than the boat surveyor hired by Hertel and Brown to inspect the *Jimmy Time*. According to Hertel, Miller "was the proprietor of North Coast Marine Services, and held himself out as knowledgeable, experienced and capable of providing a potential boat buyer with a comprehensive boat inspection, including inspection and evaluation of the boat's structural integrity, fuel system, electrical system, electronics and overall maintenance." *Paragraph 34, Hertel Additional Defendant Complaint.*

Prior to purchasing the *Jimmy Time*, Hertel and Brown were informed by Miller:

> "a. *Jimmy Time* was, on the whole, mechanically sound and could be used immediately;
> b. *Jimmy Time* required only minor maintenance items, which could safely be delayed until the boat was winterized in the fall of 2010;
> c. *Jimmy Time* was safe to use for the rest of the season and Mr. Hertel and Mr. Brown could continue to use the *Jimmy Time* throughout the summer of 2011 with no difficulty; and
> d. that in Mr. Miller's opinion, the fair market value of the *Jimmy Time* was $15,000-16,000."

*Paragraph 41, Hertel Additional Defendant Complaint.*

The upshot of these averments is that Miller, with his expertise, inspected the *Jimmy Time* and found no deficiencies other than minor maintenance items which could be deferred.

Thus, the duty that Hertel and Brown are seeking to impose upon Cummings is to inspect, repair or replace worn, old or inadequate parts that even Miller did not find. Hertel and Brown are asserting there is social utility in requiring Cummings to take the initiative to inspect, repair or replace parts when their expert did not find any problem. This argument is unpersuasive.

There is no social utility in imposing such a high standard of expertise upon an ordinary lay person selling a twenty-three year old used good in an "as is" condition and who was under no contractual duty to do what the buyer's expert was hired to do. Accepting as true Hertel and Brown's allegation that Miller was negligent in surveying the *Jimmy Time* does not change the argument Hertel and Brown are making that Cummings should have done his own expert inspection.

Hertel and Brown's point that Cummings owned the boat for fifteen years while they owned it a mere five days creates the inference that Cummings had a longer period of time than Hertel and Brown to know or discover any defects. Accepting as true this inference, this argument does not advance the claim against Cummings because of the failure of Hertel and Brown to identify what defect existed that Cummings should have discovered that they did not.

In *Phillips*, the Pennsylvania Supreme Court found there was social utility in extending a duty to the two deceased children. This was an easy result to reach since it was uncontroverted the lighter lacked a child resistant feature, which could have prevented the two-year old child from starting the fire. Thus, there was social utility in designing a product that would prevent small children from being harmed or killed by accidental fires. *Id.* at 841 A.2d 1010.

There is no similar rationale in the case sub judice. In *Phillips*, the product's seller was a manufacturer who mass-produced new lighters without childproof features and placed them in the stream of commerce of a global economy. Hence, there was a widespread risk of harm to children. By contrast, Cummings was not a manufacturer or a merchant of a new product mass-produced for international distribution. Instead, he was a private citizen engaged in a single transaction of selling a used twenty-three year old boat to two adults who had the boat professionally inspected prior to their purchase. The boat was sold in an "as is" condition without any warranty. The social utility that existed in *Phillips* does not exist in this case.

To impose a duty under these circumstances creates an express warranty in a private transaction regarding the parts and condition of a used good when the parties did not bargain for the duty or the warranty. If such a duty exists, it requires a person who sells a used riding lawn mower in an "as is" condition at a garage sale for a nominal price to inspect, repair or replace all worn, old or inadequate parts to keep the mower from malfunctioning or exploding and harming all foreseeable individuals. This result is untenable in the ordinary course of commerce between private parties conveying used goods in an "as is" condition. The buyer has to accept responsibility for the condition of the used good after the sale absent a duty created by contract before the sale.

In any event, consideration of the social utility of Cummings' conduct as alleged in the Complaint does not weigh in favor of imposing a duty upon Cummings for any post-transaction tragedy.

The third factor is an analysis of the nature of the risk imposed and foreseeability of the harm incurred. What complicates this analysis is the fact that Hertel and Brown never identify what part(s) Cummings should have repaired or replaced. It has now been two and one half years since the explosion. Hertel and Brown simply allege negligence without identifying what part(s) Cummings failed to repair or replace. The engine and operating systems on the *Jimmy Time* are complex, with some components posing a greater risk of harm if not repaired, replaced or properly operated. Some worn, old or inadequate parts may pose little or no risk of harm. Without stating what Cummings did wrong, there can be no informed discussion about the nature of the risk taken by Cummings or the foreseeability of any ensuing harm.

In *Phillips*, the nature of the risk imposed and foreseeability of the harm incurred was readily apparent. A lighter without childproof safety features poses a greater risk of harm than a lighter with safety features. It is foreseeable that a child could accidently start a fire with a lighter lacking any child safety device. The risk of harm is the possibility of serious injuries and/or death. It is understandable how the Pennsylvania Supreme Court determined that the nature of the risk and foreseeability of the harm weighed in favor of a duty of care owed to infants by the manufacturer of new lighters.

Several of the other cases cited by Hertel and Brown are distinguishable on the facts. In *Flavin v. Aldrich*, 258 A.2d 185 (Pa. Super 1968), the seller was a merchant who allegedly sold a used automobile with defective brakes. In *Bailey v. Lewis Farm, Inc.*, 171 P. 3d. 336 (Or. 2007), the factual basis averred was the negligent maintenance of an axle on a tractor trailer. In each of these cases, there was an identifiable defect that could be analyzed. By comparison, there are no factual averments in the instant case describing a child-proof lighter, faulty brakes, defective trailer axle or other identifiable defect which would create a risk of foreseeable harm.

The fourth factor is consideration of the consequences of imposing a duty on Cummings. What is posited by Hertel and Brown is the requirement that a non-merchant engaged in a single transaction of selling a twenty-three year old boat subjected to professional scrutiny prior to the sale and sold in an "as is" condition without any warranty is nonetheless required to repair or replace any worn, old or inadequate components despite having no contractual duty to do so. The duty Hertel and Brown seek to impose on Cummings is even greater care than what was expected of their expert, Miller.

To impose a duty under these circumstances is to inject the government into a privately negotiated transaction and create a duty that was not negotiated by the parties. The creation of such a duty defeats the purpose of selling a used good in an "as is" condition and emasculates what remains of the historical doctrine of caveat emptor, which requires purchasers to buy at their own risk.

It also means the buyer of a used good would not have to accept legal responsibility for the condition of the used property. The risk of loss would never transfer to the buyer. If the seller of a used good retains responsibility for any damage caused by worn, old or inadequate parts, the floodgates of litigation would be opened because a seller such as Cummings would then have a right to join the entity from whom he purchased the *Jimmy Time*. All sellers in the chain of title of any used boat or other used good could be liable.

There is little social utility in such litigation or in not requiring a buyer to accept responsibility for the condition of a used good bought "as is." While the consequences that occurred in this case are heart-wrenching, Hertel and Brown do not assert a factual basis to transfer legal responsibility back to Cummings.

The final factor is consideration of the public interest in imposing the duty suggested by Hertel and Brown. In essence, Hertel and Brown are asking Cummings to insure them and all foreseeable users of the *Jimmy Time* from any harm. In the centuries of commercial law within this country and Commonwealth, during which time a countless number of used boats have been sold between private parties, no legislature or Appellate Court has seen fit to impose a duty upon a private seller of a used boat in an "as is" condition to inspect, repair or replace any worn, old or inadequate parts in the absence of a contractual duty bargained for by the parties. Likewise, such a duty in a commercial transaction between private parties has not surfaced in our tort law. There is no public interest to be served by the post-transaction imposition of a duty after a tragedy has occurred.

In considering the five *Althaus factors*, the balance weighs in favor of not imposing a duty on Cummings. This is largely because of the failure of Hertel and Brown to provide any factual or legal basis for the establishment of a duty.

B. BREACH OF DUTY

Hertel and Brown do not provide a sufficient factual basis regarding how Cummings breached any duty owed to foreseeable users of the *Jimmy Time.* What is pled is pure speculation and leaves unanswered material questions of fact. For example, was it a failure of Cummings to inspect a part? Maintain a part? Repair a part? Replace a part?

Hertel and Brown never identify the defective part(s). Was it a part in the ventilation system? Electrical system? Mechanical system? Fuel system? Flame control system? Ignition system? Given the different functions of these various systems, the answers to these questions require material facts necessary to determine whether a breach of duty occurred.

Also left unexplained is how the defective part created such a massive explosion.

C. LACK OF CAUSATION

There is no factual basis to establish that a breach of a duty by Cummings was the cause of death of Erin Carlisle and the injuries to Ryan Carlisle and Rachel Palkovic. There are bald allegations of negligence without any factual basis establishing a causal connection between the breach of duty and the harm.

**III. INSUFFICIENT SPECIFICITY IN A PLEADING**

Cummings claims the Complaint filed by Hertel and Brown lacks the specifics necessary to establish a claim against him. This Court concurs for the reasons previously stated.

**CONCLUSION**

Pennsylvania is a fact-pleading jurisdiction. Hertel and Brown are required to allege the material facts supporting a cause of action in negligence. *Pa. R. Civ. P. 1019(a).* While Hertel and Brown are not expected to plead their entire case, there has to be a sufficient factual basis alleged to put Cummings on notice of what he did that was negligent.

There are not enough material facts alleged by Hertel and Brown to establish the elements of a negligence claim against Cummings. Hertel and Brown use conclusory terms instead of facts. To allege that Cummings failed to maintain, inspect, repair, replace or disclose a defective part does not relieve Hertel and Brown of the obligation to fill in the blank regarding the most important material fact, to-wit, informing Cummings of the actual defect(s).

This Court recognizes that Hertel and Brown are simply restating the negligence claim asserted against them by Carlisle and Palkovic. However, Hertel and Brown are the moving party in joining Cummings as a party and as such, have a duty to comply with Pa. Rule of Civil Procedure 1019(a). Notably, it has been two and one half years since the boat exploded which is sufficient time for Hertel and Brown to identify the defect they claim Cummings failed to disclose to them.

It may be that Hertel and Brown are hoping to learn through the discovery process the defect which they can attribute to Cummings. If so, it is unfair to Cummings to force him to continue to defend this case while Hertel and Brown are searching for the defect.

This Court is mindful of the threshold needed to grant a demurrer upon a Preliminary Objection. However, given the dearth of material facts putting Cummings on notice of what he did that was negligent, it is clear that no recovery is possible against Cummings.

Accepting as true the averments in the Complaint and all reasonable inferences therefrom, there is no legal duty owed by Cummings to all foreseeable users of the Jimmy Time. Nor are there enough material facts alleging a breach of duty or how such a breach caused the death of Erin Carlisle and the severe injuries to Ryan Carlisle and Rachel Palkovic.

Part of the problem in this case is the attempt by Hertel and Brown to employ negligence concepts in the context of a commercial transaction. Hertel and Brown are seeking to impose a duty upon Cummings which the parties did not create as part of their transaction. At this point, the Complaint is devoid of allegations which created a duty by Cummings either by contract or in tort.

In the interest of fairness, Hertel and Brown are granted thirty (30) days from the date of this Order to amend their Complaint to assert material facts in support of claim of negligence against Cummings. The failure to do so will result in the dismissal of this case.

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

**C.B. ENTERPRIZES, INC. and CARL BOONE, Plaintiffs**

**v.**

**UNION CITY VOLUNTEER FIRE DEPARTMENT and BOROUGH OF UNION CITY, Defendants**

**v.**

**JOHN A. LUEBBERT, SR., RALPH EUGENE LEE BURGER, VICTOR CHARLES LEESE, SR., and DARELL STEENROD, Additional Defendants**

*POLITICAL SUBDIVISIONS / MUNICIPAL CORPORATIONS / GOVERNMENTAL IMMUNITY*

Volunteer fire companies are entitled to governmental immunity.

*POLITICAL SUBDIVISIONS / MUNICIPAL CORPORATIONS / GOVERNMENTAL IMMUNITY*

Exceptions to governmental immunity are to be narrowly interpreted.

*POLITICAL SUBDIVISIONS / MUNICIPAL CORPORATIONS / GOVERNMENTAL IMMUNITY*

Volunteer fire company's presence on private property to fight fire in structure located thereon does not constitute "custody or control" for purposes of real property exception to governmental immunity.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION NO. 13756-2011

Appearances: Scott McPartland, Esq., Attorney for Plaintiffs
Paul N. Lally, Esq., Attorney for Borough of Union City
Brooks R. Foland, Esq., Attorney for Union City Volunteer Fire Department

**OPINION AND ORDER**

Currently before the Court is the motion for summary judgment of defendant, Union City Volunteer Fire Department ("Fire Department"). Plaintiffs have filed a response and the additional defendants have not. Those parties who have submitted filings have waived oral argument. (As additional defendants did not respond, they are precluded from oral argument.)

**BACKGROUND OF THE CASE**

This is a civil suit for money damages filed by plaintiffs against the Fire Department and the Borough of Union City. By order dated September 13, 2013, summary judgment was granted in favor of the Borough of Union City. Plaintiff Carl Boone is an adult individual who is president of C.B. Enterprizes, Inc. See Complaint at ¶ 2. The Fire Department is a volunteer fire department located in Erie County, Pennsylvania. Complaint at ¶¶ 3 - 4.

On or about April 29, 2008, the plaintiff, Carl Boone, acquired a building located at 77 S. Main Street, Union City, Pennsylvania. Complaint ¶ 6. On or about December 2, 2010, a fire occurred in the building.[1] Upon discovery, a 911 call was made and the Fire Department responded. See

[1] The plaintiffs purchased the property with the intent of creating an indoor shopping center and had rented out space to several tenants. The building was equipped with a dry pipe fire suppression system. In order to be operational, the suppression system would need to be activated by the fire department by connecting water hoses to water connections on the outside of the building. In and around November 2010, the Fire Department toured

*continued ...*

Complaint at ¶¶ 17 - 20. Plaintiffs have alleged that the Fire Department committed a trespass upon its property and that its actions in response to the call were negligent. As a result, plaintiffs allege that they were injured as a result of damages to their property.

**LEGAL DISCUSSION**

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

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

Pa.R.C.P. 1035.2.

Summary judgment may be granted where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law. The purpose of the summary judgment rule "is to eliminate cases prior to trial where a party cannot make out a claim or defense". *Miller v. Sacred Heart Hospital*, 753 A.2d 829, 833 (Pa. Super. 2000) (citation omitted). The Court must examine the record in the light most favorable to the non-moving party and resolve all doubt against the moving party. *Aetna Casualty and Surety Company v. Roe*, 650 A.2d 94, 97 (Pa. Super. 2004).

A moving party has the burden of proving that no genuine issue of material fact exists. *Gutteridge v. A.P. Green Services, Inc.*, 804 A.2d 643, 651 (Pa. Super. 2002) (citation omitted). 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).

> [P]ursuant to *Nanty-Glo Borough v. American Surety Co.*, 309 Pa. 236, 163 A. 523 (1932), summary judgment may not be entered where the moving party relies exclusively on oral testimony, either through testimonial affidavits or deposition testimony, to establish the absence of a genuine issue of material fact except where the moving party supports the motion by using admissions of the opposing party or the opposing party's own witness.

*... continued*
the building to familiarize itself with it. On November 2, 2010, two individuals were allegedly stealing metal from the building using a blowtorch. As a result it is alleged that the fire was started. It is alleged that once the Fire Department responded to the call, it did not extinguish the fire and, according to plaintiffs, directed other responding fire departments not to provide fire protection services. As a result, the building was permitted to burn. Plaintiffs' Brief In Opposition To Defendant's Motion For Summary Judgment at 1 - 2.

*First Philson Bank, N.A. v. Hartford Fire Ins. Co.,* 727 A.2d 584, 587 (Pa. Super. 1999) (citation omitted).

Pa.R.Civ.P. 1035.3 provides, in part:

(a) the adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty (30) days after service of the motion identifying

(1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or

(2) evidence in the record establishing the facts essential to the cause of action or defense which the motions cite as not having been produced.

The Pennsylvania Supreme Court has stated that:

> Where the non-moving party has failed to produce sufficient evidence to establish the existence of an element essential to the case, in which he bears the burden of proof, the moving party is entitled to judgment as a matter of law.

*Ertel v. Patriot-News Company,* 674 A.2d 1038, 1042 (Pa.1996).

The Fire Department asserts that it is entitled to summary judgment because it is immune under the Political Subdivision Tort Claims Act ("PSTCA"), specifically 42 Pa.C.S.A. § 8541. It claims that it is a local agency as defined by the PSTCA and that its actions do not fall within the enumerated exceptions.

Under the PSTCA, a local agency or any of its employees may be liable for certain acts involving: (1) vehicle liability; (2) care, custody or control of personal property; (3) real property; (4) trees, traffic controls and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; and (8) care, custody or control of animals. 42 Pa.C.S.A. § 8542(b).

The Fire Department argues that negligent fire suppression, trespass, etc., do not fall within the exceptions. Furthermore, it argues that the real property exception apply because a dangerous condition must exist arising from the care, custody and control of the real property by the governmental agency. It further avers that there is no evidence to support the plaintiffs' position that the Fire Department intentionally permitted the fire to burn which allegedly resulted in a total loss of the property and, even if it did, liability would not extend to the Fire Department. See, Defendant Union City Volunteer Fire Company's Motion For Summary Judgment at 3 - 8.

Plaintiffs respond that for summary judgment purposes they have been able to establish that there is evidence that the Fire Department is not immune under the care, custody or control of personal/real property exception. They aver that the Fire Department's representatives toured the subject building months prior to the fire and were aware of the nature of the structure and the fire suppression system. Plaintiffs further claim that its witnesses will testify that the Fire Department did not operate the fire suppression system either at all, or to its maximum capabilities and it did not act with the sense of urgency required in combating the fire that occurred. They also allege that there was a preconceived plan by the Fire Department to allow the building to burn if it ever caught fire. Plaintiffs' Brief In Opposition To Defendant Union City Volunteer Fire Company's Motion For Summary Judgment at 3 - 4. Plaintiffs further argue that once the Fire Department responded to the

scene of the fire, it assumed control of the building and the property. Therefore, the Fire Department had "control" of that property. *Id.* at 4 - 5.

Volunteer fire companies are entitled to governmental immunity, even when they are not acting in furtherance of their fire fighting duties. See, *Guinn v. Alburtis Fire Co.,* 614 A.2d 218, 220 (Pa. 1992); *Plavi v. Nemacolin Volunteer Fire Co.,* 618 A.2d 1054, 1056 (Pa. Cmwlth. 1992) (summary judgment granted on basis that fire department is not liable for acts of one of its members who allegedly sexually assaulted a minor at the firehouse). Moreover, as a matter of statutory interpretation, the exceptions to governmental immunity are to be narrowly interpreted, "given the expressed legislative intent to insulate political subdivisions from tort liability". See, *Mascaro v. Youth Study Center,* 523 A.2d 1118, 1123 (Pa. 1987) (other citations omitted).

All parties agree that in order to maintain a negligence claim under the real property exception, the injured party must prove that the injury resulted from a dangerous condition of the real property itself, arising from the care, custody and control of the real property by a local governmental agency. See *Mellon v. City of Pittsburgh Zoo,* 760 A.2d 921, 924 (Pa. Cmwlth. 2000). In support of its position, the Fire Department cites *Walsh by Walsh v. Camelot Bristol Co., Inc.,* 517 A.2d 577 (Pa. Cmwlth. 1986), a case which the plaintiffs argue is factually distinguishable. In that case, Brian Walsh, a junior fireman, sustained personal injuries while fighting a fire. He alleged that the volunteer fire companies were negligent through their respective officers' conduct in ordering him to enter and remain inside a burning building without proper safety equipment. *Id.* at 577. The departments did not own the building. In *Walsh,* the common pleas court granted summary judgment finding that the volunteer fire companies were local agencies entitled to governmental immunity under the PSTCA. Id. at 578. As the Commonwealth Court critically noted:

> A volunteer fire company's temporary occupancy of a privately owned building for the limited purpose of extinguishing a fire does not constitute "possession" of that property for the purposes of Section 8542(b)(3). We conclude that Section 8542(b)(3) is inapplicable.
> *Id.*

Plaintiffs rely on *Gramlich v. Lower South Hampton TP.,* 838 A.2d 843 (Pa. Cmwlth. 2003). In that case, Mr. Gramlich was injured while collecting recyclable materials during the course of his employment with a waste management company. *Id.* at 844. He stepped in an opening around a drainage pipe which was covered with snow. As a result, hurt his knee. As it turns out, the open hole was located on property owned by private individuals, but was adjacent to a public roadway. The drainage hole into which he stepped was located one to two feet from the paved surface of the street. There was no covering or grating on top of the opening. *Id.* at 844. The Commonwealth Court analysis first focused on the "streets exception" of the PSTCA. After its review, it rejected the plaintiff's contention that street exception applied. *Id.* at 847. The Court then addressed the real property exception. It found that:

> There is no evidence that the Township has ever exercised any sort of dominion or control over the drainage hole. In fact, the Cullmans never notified the Township of the drainage pipe, nor did they apply for permits to construct or improve the

> drainage pipe. Consequently, we agree with the trial court that the Township has not "possessed" the real property where the drainage pipe is located and, as a result, the real property exception to governmental immunity does not apply.

*Id.* at 848. Although the Cullmans utilized the Township's right-of-way, no facts established liability on behalf of the Township.

*Gramlich* is of no aid to the plaintiff. In the case at bar, the Fire Department's contact with the property was to fight the fire. Furthermore, contrary to plaintiffs' assertions derived from the deposition testimony (see Plaintiffs' Brief at 4 - 5), the evidence of record does not create a genuine issue of material fact as to the real property exception. Rather it is clear and free from doubt that under the circumstances of this case, the Fire Department is immune from liability. *Guinn v. Alburtis Fire Co., supra.*

**CONCLUSION**

Based upon the above, this Court finds that the Fire Department is entitled to summary judgment and will issue the appropriate order.

**ORDER**

AND NOW, this 18th day of September 2013, for the reasons set forth in the accompanying opinion, it is hereby ORDERED that the Defendant Union City Volunteer Fire Department's Motion For Summary Judgment is GRANTED.

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

**MARYANN ANDERSON, Plaintiff**
**v.**
**RICHARD PERHACS, Defendant**

*PLEADINGS / PRELIMINARY OBJECTIONS*

When reviewing Preliminary Objections in the nature of a demurrer, all material facts and all reasonable inferences therefrom are treated as true. A demurrer is limited to only those cases where no recovery is possible based on the facts alleged within the Complaint.

*STATUTES / PENNSYLVANIA WHISTLEBLOWER ACT / CONSTRUCTION / TIMELINESS OF SUIT*

A Plaintiff has 180 days "after the occurrence of the alleged violation" to file a Whistleblower claim. 43 P.S. §1424(a). Using May 11, 2007 as a starting point means the Plaintiff had until approximately November 11, 2007 to file the within action. Plaintiff did not file this case until April 19, 2013, thus it is nearly five and one half years too late.

*STATUTES / PENNSYLVANIA WHISTLEBLOWER ACT / PROPER PARTY TO SUIT*

As a solicitor, the Defendant cannot be deemed to be an "employer" as defined under the Whistleblower Act. The Defendant had no authority to discipline, sanction or fire the Plaintiff. The Defendant had no authority to decide the Plaintiff's compensation, terms, conditions, location or privileges of employment. The Defendant was not a supervisor of the Plaintiff. The Pennsylvania Supreme Court has made it clear that a solicitor is responsible only to the appointing body and owes no separate duty to any member of the public.

*STATUTES / PENNSYLVANIA WHISTLEBLOWER ACT / GOOD FAITH WHISTLEBLOWER REPORTS*

A "whistleblower" is defined as "a person who witnesses or has evidence of wrongdoing or waste... ." 43 P.S. § 1422. Plaintiff did not witness nor did she have evidence that her computer was or would be tampered with as part of an investigation into an anonymous letter writing campaign. Hence Plaintiff cannot be treated as a whistleblower nor her report a good faith report.

*STATUTES / PENNSYLVANIA WHISTLEBLOWER ACT WHISTLEBLOWER REPORT NO PERSONAL GAIN OR BENEFIT*

A whistleblower report has to be made without consideration of personal benefit for the whistleblower. The Plaintiff claims the Defendant's improper investigation destroyed her credibility and besmirched her reputation. Under these facts, the Plaintiff cannot be found, as a matter of law, to be a disinterested whistleblower

*STATUTES / PENNSYLVANIA WHISTLEBLOWER ACT / RETALIATORY ACTION*

The Plaintiff fails to identify any action the Defendant did to adversely affect her compensation, terms, conditions, location or privileges of employment. The Plaintiff's Complaint does not aver any retaliatory acts committed by the Defendant in response to any report of waste or wrongdoing by the Plaintiff regarding the Defendant.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW NO. 11015-2013

Appearances: Charles Steele, Esq., Attorney for Plaintiff
David L. Haber, Esq., Attorney for Defendant

## OPINION

This case involves a claim by a school district employee against the solicitor for the school district under the Pennsylvania Whistleblowers Act. Before the Court are various Preliminary Objections in the nature of a demurrer filed by the Defendant. This Court finds Plaintiff's claim is time-barred; the Defendant is not a proper party under the Whistleblower Act; the Plaintiff's allegations do not constitute protected reports under the Whistleblower Act; and there is no basis to find the Defendant had the legal authority to retaliate or, in fact, retaliated against the Plaintiff. Therefore, the Preliminary Objections are **SUSTAINED**.

## STANDARD OF REVIEW

When reviewing Preliminary Objections in the nature of a demurrer, all material facts and all reasonable inferences therefrom are treated as true. A demurrer is limited to only those cases where no recovery is possible based on the facts alleged within the Complaint. "Where any doubt exists as to whether a demurrer should be sustained, it should result in overruling the demurrer." *Vulcan v. United of Omaha Life Insurance Company*, 715 A.2d 1169, 1172 (Pa. Super 1998)(quoting *Jackson v. Garland*, 622 A.2d 969, 970 (Pa. Super 1993)).

Applying this standard, no recovery is possible based on the averments alleged within the Complaint.

## THE COMPLAINT

Plaintiff has filed a 195 Paragraph Complaint against the Defendant.[1]

Plaintiff was employed at the Millcreek Township School District ("MTSD") as the Director of Special Education from September of 1988 to August of 2006 and as the Director of Personnel from July of 2005 to September of 2009. *Complaint*, ¶¶ 15, 16. Her immediate supervisor was the Superintendent of MTSD, Dean Maynard ("Maynard"). The solicitor for MTSD is the law firm of Knox, McLaughlin, Gornall and Sennett, P.C. ("Knox"). The Defendant was a shareholder in the Knox firm and was engaged in labor relations as a solicitor for MTSD. *Complaint*, ¶¶ 9, 10.

At a Board of Education meeting at MTSD on March 12, 2007, the Defendant, in his capacity as the labor relations solicitor for MTSD, was directed by the Board to investigate the author of anonymous letters sent to Maynard threatening to expose his personal lifestyle. *Complaint*, ¶¶ 17-22. Maynard was suspected as the author of the letters in an attempt to divert the attention of the MTSD from other hiring practices by him. *Complaint*, ¶ 20.

On March 16, 2007, Plaintiff stayed home from work because of an illness. Complaint, ¶ 29. Plaintiff had her school-issued lap top computer with her at home. Late in the day of March 16, 2007, "Maynard contacted the Plaintiff and asked that she bring her computer to the MTSD Education Center the next day, Saturday, March 17, 2007." *Complaint*, ¶ 31.

Plaintiff was concerned about this request from Maynard, fearing he may attempt to destroy evidence in her computer, plant digitized copies or otherwise cast her as the author of the anonymous letters. *Complaint*, ¶ 34-37. The Plaintiff opted to turn her school-issued lap top computer over to Attorney Timothy Sennett, one of the Defendant's partners in the

[1] This Court knows the number of Paragraphs because this Court had to count them. Pages 1-32 of the Complaint contained Paragraphs 1-185. Next are Paragraphs 150 through 157. Then comes another Paragraph 145 followed by Paragraph 158.

Knox law firm and also a solicitor for MTSD. *Complaint,* ¶11 and ¶38.

Plaintiff met Attorney Sennett at a convenience store "and handed her computer over to him explaining that she wanted to preserve the integrity of its contents in the context of Maynard asking for her to produce it to him over the weekend." *Complaint,* ¶ 39. Plaintiff reported to Attorney Sennett "her concerns that Maynard had previously tampered and was going to tamper with electronic evidence relating to the anonymous letters investigation and/or the investigation into concerns of nepotism." *Complaint,* ¶ 40.

Plaintiff's report to Attorney Sennett on March 16, 2007 is alleged to have been a report of wrongdoing under the Pennsylvania Whistleblower Act against the Defendant. *Complaint,* ¶ 153 (*the second* ¶153.)

Plaintiff contends that following her March 16, 2007 report to Attorney Sennett, "Plaintiff was entitled to the protection of the Whistleblower Law for the report of wrongdoing that she was about to make and eventually made in the days and weeks that followed." *Complaint,* ¶ 155 (*the second* ¶ 155.)

Thereafter, Plaintiff made "additional reports of wasteful spending, lack of oversight in the use of MTSD credit cards and travel expenses, and Maynard hiring practices on April 19, 2007 and beforehand, also constituting reports of wrongdoing and/or waste pursuant to the Pennsylvania Whistleblower Law." *Complaint,* ¶ 156 (*the second* ¶ 156.)

As a result of her purported whistleblower activities on March 16, 2007 through April 19, 2007, the Plaintiff claims the Defendant approved of various acts of retaliation by Maynard. *Complaint,* ¶ 157 (*the second* ¶157.)

These alleged acts of retaliation by the Defendant "interfered with Plaintiff's ability to carry out her job duties and/or otherwise affected Plaintiff's compensation, terms, conditions, locations or privileges of employment." *Complaint,* ¶ 158 (*the second* ¶ 158.) Plaintiff makes a demand for damages for lost wages and attorneys fees in excess of $500,000.

## PROCEDURAL HISTORY

On May 11, 2007, the Plaintiff filed a civil action in Federal Court alleging violations of her civil rights under 42 U.S.C. §1983 and the Pennsylvania Whistleblower Law. Named as Defendants were the school directors of Millcreek Township, Maynard, Rebecca Mancini (Plaintiff's successor) and Susan Sullivan (former School Board member). *See Docket Number 07-001.*

On November 11, 2011, the Plaintiff filed a lawsuit in federal court against the Defendant in this case, Attorney Richard Perhacs, at federal Docket Number 11-289. The Complaint asserted a §1983 civil rights claim and a Pennsylvania Whistleblower claim against Attorney Perhacs.

By Opinion and Order dated March 26, 2013, the Honorable Judge Sean J. McLaughlin[2] dismissed all of the claims against all of the Defendants at Docket Number 07-001 finding, *inter alia,* that the Plaintiff had not established reports protected under the Whistleblower Act, or in the one instance when there was a possible report, there was no causal link between the report and any alleged retaliation.

By Opinion and Order dated March 29, 2013, the Honorable Judge Sean J. McLaughlin

[2] Now a retired Judge.

granted Attorney Perhacs' Motion to Dismiss the Plaintiff's §1983 civil rights claim with prejudice based on the finding that Attorney Perhacs, as solicitor for MTSD, was not a state actor and had not engaged in any behavior in which he became a state actor. The Plaintiff's Whistleblower claim was dismissed without prejudice as the federal court declined to exercise supplemental jurisdiction.

On April 19, 2013, Plaintiff filed the present case against the Defendant.

## PENNSYLVANIA WHISTLEBLOWER LAW

Under the Pennsylvania Whistleblower Law "no employer may discharge, threaten or otherwise discriminate or retaliate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee or a person acting on behalf of the employee makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste." 43 P.S. §1423(a).

An "employee" is defined as "a person who performs a service for wages or other remuneration under contract of hire, written or oral, express or implied, for a public body." 43 P.S. §1422.

An "employer" is "a person supervising one or more employees, including the employee in question; a superior of that supervisor; or an agent of a public body." 42 P.S. §1422.

A "whistleblower" is "a person who witnesses or has evidence of wrongdoing or waste while employed and who makes a good faith report of the wrongdoing or waste, verbally or in writing, to one of the person's superiors, to an agent of the employer or to an appropriate authority." 43 P.S. §1422.

A "good faith report" is "a report of conduct defined in this act as wrongdoing or waste which is made without malice or consideration of personal benefit in which the person making the report has reasonable cause to believe is true." 42 P.S. §1422.

"Wrongdoing" is defined as "a violation which is not of a merely technical or minimal nature of a federal or state statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or ethics designed to protect the interest of the public or the employer." 43 P.S. §1422.

The Whistleblower Act further provides that "a person who alleges a violation of this act may bring a civil action in a court of competent jurisdiction for appropriate injunctive relief or damages or both, within 180 days after the occurrence of the alleged violation." 42 P.S. §1424(a).

## TIMELINESS OF PLAINTIFF'S COMPLAINT

The Plaintiff alleges her first whistleblower report occurred on March 16, 2007 when she turned her school-issued lap top computer over to Attorney Sennett. *Complaint*, ¶ 153 (*the second* ¶153.)

Plaintiff cites a second protected report under the Whistleblower Law on April 19, 2007 when she reported wasteful spending, misuse of credit cards and travel expenses and hiring misfeasance. *Complaint*, ¶ 156 (*the second* ¶156.)

All of the acts of retaliation alleged by the Plaintiff occurred in 2007. Complaint, ¶45 (taking personal property from Plaintiff's office); ¶87(denying Plaintiff's right to attend a job fair at Penn State, the right to attend CORE meetings and the right to have access to MTSD); ¶88 (denying right to copy Maynard's personnel record); ¶104 (change of

Plaintiff's supervisor); ¶106 (approving letter to Department of Public Welfare). All of these acts were part of the federal claim Plaintiff filed on May 11, 2007 against Maynard, MTSD, et al. at Docket Number 07-001.

The Plaintiff had 180 days "after the occurrence of the alleged violation" to file a Whistleblower claim. 43 P.S. §1424(a). Using May 11, 2007 as a starting point means the Defendant had until approximately November 11, 2007 to file the within action. Plaintiff did not file this case until April 19, 2013, thus it is nearly five and one half years too late.

The Plaintiff's attempt to invoke the discovery rule is unavailing since the time period set forth within the Whistleblower law is mandatory and does not provide for judicial extensions[3]. Therefore, Plaintiff's claim against the Defendant is time-barred.

**THE DEFENDANT IS NOT A PROPER PARTY**

The material, uncontroverted fact is that the Defendant was acting as the solicitor for the MTSD when he was hired to investigate the source of the anonymous letters regarding Maynard. Working as a solicitor, the Defendant cannot be deemed to be an "employer" as defined under the Whistleblower Act.

The Plaintiff's employer was MTSD. The Plaintiff's immediate supervisor was Maynard. It was MTSD and/or Maynard who held the authority to determine Plaintiff's compensation, terms, conditions, location or privileges of employment.

The Defendant, as a solicitor, had no authority to discipline, sanction or fire the Plaintiff. The Defendant had no authority to decide the Plaintiff's compensation, terms, conditions, location or privileges of employment. The Defendant was not a supervisor of the Plaintiff. When Plaintiff's supervisor was changed, Maynard made the change. *Complaint,* ¶104. MTSD and/or Maynard did not need the Defendant's approval for any decisions affecting the Plaintiff's employment. It was the Defendant's responsibility to find the anonymous letter-writer, not to oversee the terms of the Plaintiff's employment.

In the federal action the Plaintiff filed against the Defendant, the Honorable Judge Sean McLaughlin found the Defendant did not engage in any behavior which made him a state actor who could violate the Plaintiff's civil rights. *Memorandum Opinion, C.A. No. 11-298, 3/29/13.*

School district solicitors are not "public employees" or "public officials" required to file financial statements under the Ethics Act. *See Snelbaker v. Commonwealth of Pennsylvania, State Ethics Commission,* 453 A.2d 709 (Pa. Cmwlth. 1982) aff'd at 503 Pa. 86, 468 A.2d 746 (Pa. 1983). On a prior occasion, the Pennsylvania Supreme Court held that municipal solicitors are not "public employees" or "public officials" who need to file financial statements under the Ethics Act. *See Ballou v. State Ethics Commission,* 436 A.2d 186 (Pa. 1981).

The Pennsylvania Supreme Court shed light on the role of solicitors by stating: "… unlike a public official, the solicitor is responsible only to the appointing body, and may act only pursuant to that body's authorization. He owes no independent duties to the public,

[3] The discovery rule will not save the Plaintiff's case. Plaintiff alleges that by October 6, 2011, during the discovery process in the federal case at Docket Number 07-001, she became fully aware of the Defendant's behavior. Complaint, ¶44. Accepting as true this representation means the Plaintiff should have filed this lawsuit by April of 2012. Giving the Plaintiff the benefit of the discovery rule still means this lawsuit is over one year too late.

and exercises none of the powers of sovereignty." *Ballou* at 189. Possessing none of the powers of sovereignty means a school district solicitor cannot be deemed to be an employer capable of retaliating against a whistleblowing school employee.

Notably, in defining the relationship of a solicitor to a municipal body, the Pennsylvania Supreme Court made it clear the solicitor is responsible only to the appointing body and owes no separate duty to any member of the public. *Id.*

As applied to this case, MTSD was the Defendant's client. The duty to conduct a proper investigation was owed by the Defendant to MTSD, not to the Plaintiff. There was no attorney/client relationship between the Defendant and the Plaintiff. As a result, the Defendant owed no duty to the Plaintiff regarding the investigation he was appointed to conduct by MTSD.

The Plaintiff's dissatisfaction with the Defendant's investigation does not convert the Defendant's role as a solicitor into the status of an employer liable under the Whistleblower Law to the Plaintiff.

The Plaintiff baldly argues the Defendant is an "agent of a public body" and therefore becomes an employer under the Whistleblower statute. The Plaintiff's attempt to change the attorney/client relationship between the Defendant and MTSD into an agency relationship is unsupportable. The attorney/client relationship that existed enabled MTSD to hire the Defendant to investigate the source of the anonymous letters about Maynard. As the solicitor working in that capacity, the Defendant could inform MTSD of his investigative results. In so doing, it is an attorney reporting the findings of an investigation to a client. Consistent with his role as a solicitor, the Defendant could give legal advice to MTSD. The solicitor's advice is not binding on MTSD directors or employees, all of whom retain the authority to make independent decisions in school-related matters. There is nothing within the attorney/client relationship that converts it to that of an agent/principal[4].

The fact the Plaintiff is dissatisfied with the Defendant's investigation does not create an agency relationship between the Defendant and MTSD. Accordingly, the Defendant is not an employer subject to liability to an employee under the Whistleblower Act.

## LACK OF WHISTLEBLOWER REPORTS

The Plaintiff identifies her report on March 16, 2007 to Attorney Sennett as a Whistleblower report entitled to protection under the Pennsylvania Whistleblower Law. *See Complaint,* ¶ 153 (*the second* ¶153.) According to the Plaintiff, she was suspicious of Maynard's intentions and feared that he may destroy or plant electronic evidence in her computer. *Complaint,* ¶ 34.

Assuming the truth of these averments and all reasonable inferences therefrom, Plaintiff's March 16, 2007 conduct cannot be construed as a whistleblower report about the Defendant. The Plaintiff was expressing her concern that Maynard may tamper with her school computer. Plaintiff does not express any concern the Defendant would tamper with her computer.

[4] As a matter of law, to treat a lawyer as an agent of a client makes the lawyer liable for all acts of the client committed during the lawyer's representation. It renders the lawyer liable for any crimes, fraud, retaliation, etc. committed by the client during the course of the lawyer's representation. It would make a school district solicitor liable for any illegal acts or wrongdoing by any employee or board member of the school district. This Court is not aware of any jurisdiction which has declared that an attorney/client relationship creates such an agency.

Equally important, the Plaintiff's concerns about what Maynard might do are not the report of a whistleblower because it does not report an actual act of wrongdoing or waste. A "whistleblower" is defined as "a person who witnesses or has evidence of wrongdoing or waste… ." 43 P.S. §1422. Plaintiff did not witness nor did she have evidence that Maynard (or the Defendant) in fact tampered with her computer as part of the investigation into the anonymous letter-writer. Hence, Plaintiff cannot be treated as a whistleblower[5].

To the Plaintiff's knowledge in 2007, or at the latest by 2011, Maynard and/or the Defendant never in fact never tampered with her computer. For the Plaintiff to file this lawsuit on April 19, 2013, knowing that neither Maynard nor the Defendant tampered with her computer and yet try to portray her concern on March 16, 2007 as a whistleblower report is unsustainable.

As a result, Plaintiff's concern does not constitute a "good faith report" as defined under the Whistleblower Act. A good faith report has to be based on reasonable cause to believe it was true. At the time she expressed her concerns to Attorney Sennett, she had no reasonable cause to believe it was about the Defendant. By the time Plaintiff filed this lawsuit, she knew her suspicion was not true about Maynard or the Defendant.

Separately, a whistleblower report has to be made without consideration of personal benefit for the whistleblower. Assuming the Plaintiff to be credible in all of her allegations, the Plaintiff makes it abundantly clear there was animosity between her and Maynard and she was upset the Defendant did not report Maynard's wrongdoing to MTSD. The Plaintiff claims the Defendant's improper investigation destroyed her credibility and besmirched her reputation. In her view, the Plaintiff had something to personally gain or lose by way of her accusations against Maynard. Under these facts, the Plaintiff cannot be found, as a matter of law, to be a disinterested whistleblower.

The second whistleblower report alleged by the Plaintiff concerned "reports of wasteful spending, lack of oversight in the use of MTSD credit cards and travel expenses and Maynard hiring practices on April 19, 2007 and beforehand… ." *Complaint*, ¶ 156 (*the second* ¶ 156.)

Accepting as true the averments within Paragraph 156 (the *second* Paragraph 156), this information does not constitute a report of any wrongdoing or waste by the Defendant. It is obviously a report of wrongdoing or waste by Maynard and possibly other employees of MTSD. At no time throughout the 195 Paragraphs of her Complaint does Plaintiff allege the Defendant engaged in or approved of any wasteful spending, misuse of credit cards or travel expenses and/or engaged in any improper hiring practices. Therefore, the allegations leading up to the purported April 19, 2007 disclosures provided by the Plaintiff do not constitute a report of any wrongdoing or waste by the Defendant under the Whistleblower Law.

## LACK OF RETALIATORY ACTION

The Plaintiff never identifies any action the Defendant directly did to adversely affect her compensation, terms, conditions, location or privileges of employment. Instead, all of the Plaintiff's allegations are that the Defendant "approved" of directives issued by Maynard

[5] It invites chaos to construe every claim about what an employer might do as a protected Whistleblower claim. It means that an employee could make an outlandish report without corroboration about future wrongdoing and yet be protected by the Whistleblower status.

against the Plaintiff. *Complaint* ¶145 (*the second* ¶145.)

The Plaintiff's Complaint is devoid of any evidence establishing the authority of the Defendant to "approve" of any directive by Maynard. As a matter of law, the Defendant could not direct, force or order Maynard or any director or employee of MTSD to do any act of retaliation against the Plaintiff. The Defendant had no authority to decide Plaintiff's compensation, terms, conditions, location or privileges of employment. MTSD and/or Maynard did not need the Defendant's approval to decide the terms of Plaintiff's employment. The Defendant was charged with the task of locating the author of the anonymous letters. The Plaintiff's Complaint does not aver any retaliatory acts committed by the Defendant in response to any report of waste or wrongdoing by the Plaintiff regarding the Defendant.

The Plaintiff's argument that the Defendant is an agent of MTSD and/or Maynard also backfires on the Plaintiff. In dismissing the case against all of the Defendants in federal court at Docket Number 07-001, Judge McLaughlin found that MTSD, Maynard and all of the Defendants had not engaged in any retaliatory acts against the Plaintiff, including any acts in response to the whistleblower report for the Plaintiff as of April 19, 2007. Because of this determination, the Defendant, as the alleged agent for MTSD and Maynard, cannot be held liable for the actions of MTSD and Maynard which were deemed not to be retaliatory. In other words, if the principal actors are found not to have committed any retaliatory acts, their agent, the Defendant, cannot be found to have engaged in retaliatory actions.

## CONCLUSIONS

The gravamen of Plaintiff's Complaint is the Defendant conducted a biased investigation into the source of the anonymous letters, aligned himself with Maynard and "approved" of retaliatory acts against the Plaintiff. The Plaintiff cannot timely set forth a good faith report by a whistleblower against an employer for waste or wrongdoing by the Defendant.

The Plaintiff did not file this lawsuit within the 180 days mandated by the Whistleblower Act.

As the solicitor conducting an investigation for his client MTSD, the Defendant is not an employer who can be liable under the Whistleblower Act. As the solicitor, the Defendant is not an agent of MTSD.

The Plaintiff's Complaint fails to set forth any acts of wrongdoing or waste committed by the Defendant which would give rise to a Whistleblower report by the Plaintiff. The Plaintiff's allegations regarding Maynard do not give her Whistleblower status against the Defendant.

The Complaint is devoid of any acts of retaliation committed by the Defendant. There was no legal authority possessed by the Defendant to retaliate against the Plaintiff.

Based on the foregoing, all of the Preliminary Objections are **SUSTAINED.**

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