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Reports of Cases Decided in the Several Courts of

Erie County for the Year

1999

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ERIE, PA

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

COURTS OF COMMON PLEAS

HONORABLE MICHAEL M. PALMISANO ---------- *President Judge*
HONORABLE WILLIAM E. PFADT ---------- *Senior Judge*
HONORABLE GEORGE LEVIN ---------- *Senior Judge*
HONORABLE ROGER M. FISCHER ---------- *Senior Judge*
HONORABLE FRED P. ANTHONY ---------- *Judge*
HONORABLE SHAD A. CONNELLY ---------- *Judge*
HONORABLE JOHN A. BOZZA ---------- *Judge*
HONORABLE STEPHANIE DOMITROVICH ---------- *Judge*
HONORABLE WILLIAM R. CUNNINGHAM ---------- *Judge*
HONORABLE ERNEST J. DISANTIS ---------- *Judge*

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THE TOWNSHIP OF MILLCREEK

v.

A piece of Land fronting on Interchange Road as described in that Lien filed at No. 50057-1997, with notice to MILLCREEK PLAZA COMPANY LIMITED PARTNERSHIP, Owner

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 11660-1997

THE TOWNSHIP OF MILLCREEK

v.

A piece of Land fronting on Peach Street and Interchange Road as described in that Lien filed at No. 50058 - 1997, with notice to MILLCREEK MALL CORP., Owner

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION- LAW No. 11661 -- 1997

CIVIL PROCEDURE/WRIT OF SCIRE FACIAS

Although the Rules of Civil Procedure do not apply to an action for Writ of Scire Facias Sur Municipal Lien, the Court will consider a Motion for Summary Judgment as Motion for Judgment for want of adequate Affidavit of Defense.

CONTRACTS/WAIVER

Contracts take into account the law at the time of their making. Although the landowner claimed that the developers agreement waived a claim against the landowner for sewer rental liens, the Court found that the landowner was ultimately responsible for sewer rent. Erroneous filings of liens against tenants in the past did not preclude the Township from now filing against the landowner. There was nothing to the contrary in the developers agreement.

CIVIL PROCEDURE/WRIT OF SCIRE FACIAS

A party may challenge the reasonableness of the minimum amount of water or sewer usage charged for by an Authority or Township if the minimum amount is excessive in light of amounts actually used, creating an issue of fact precluding grant of judgment.

CIVIL PROCEDURE/WRIT OF SCIRE FACIAS

An Affidavit of Defense raising claims of certain amounts claimed by the Township are time barred as an issue of fact, precluding grant of judgment.

CIVIL PROCEDURE/WRIT OF SCIRE FACIAS

Tenants filing for bankruptcy does not affect the obligation of the landowner to pay sewer rental or the fact that unpaid sewer rental becomes a lien on the land pursuant to state law.

CIVIL PROCEDURE/WRIT OF SCIRE FACIAS

A claim in Affidavit of Defense which does not state with specificity why the current amount charged for is inaccurate but simply states that there was a dispute is not stated with sufficient definiteness to rebut the presumption that the lien is accurate.

Appearances: Evan E. Adair, Esquire
Gary Eiben, Esquire

OPINION

Anthony, J., September 17, 1998.

This matter comes before the Court on the Plaintiff 's Motion for Summary Judgment.[1] After considering the arguments of counsel and reviewing the pleadings as well as the Developer Agreement, affidavits, records in related cases, municipal ordinances, a lease agreement and other discovery material which was made a part of the record by each of the parties, the Court will deny the motions. The relevant facts and procedural history are as follows.

Millcreek Township (hereinafter "Township") is attempting to collect sewer fees from two distinct but interrelated commercial entities which own the properties generally known as the Millcreek Mall and Millcreek Plaza located in Millcreek, Pennsylvania. In 1973, the Township was much less commercially developed than it is today. At that time, the Cafaro Company was interested in developing a certain parcel of land in the Township.[2] The Township and the Cafaro Company entered into a Developer Agreement on October 26, 1973. The import of this agreement is disputed by the parties.

It is undisputed that as part of the Developer Agreement the Cafaro Company agreed to build and later deed to the Millcreek Township Sewer Authority (hereinafter "Sewer Authority") the sanitary sewer system which would be connected to the Millcreek Mall. The Millcreek Mall was not built as of then but was the Cafaro Company's proposed development. The Township agreed to not charge the developer or any of the tenants of

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[1] These cases have not been consolidated. However, because of the similarity of factual and legal issues, the Court will address both above-captioned cases in this Opinion.

[2] The Cafaro Company president in 1973 was William Cafaro. Today, his son Anthony Cafaro is the president of the Company. The Cafaro Company owns the two entities which own the Millcreek Mall and Millcreek Plaza. In essence, this is a dispute between the Township and the Cafaro Company.

the Millcreek Mall fees for the construction of the sanitary sewer system. However, it was agreed that there would be a fee charged for usage of the sanitary sewer system. Thereafter, ownership of the Millcreek Mall was transferred to the Millcreek Mall Corporation which then deeded the sewer system to the Sewer Authority.

From before 1973 to the present, the Township has had ordinances in place providing for the charging of sewer rental fees to entities which discharge sewage into the sewer system. The Township created the Sewer Authority in order to be able to lease the physical plant of the sewer system to the Sewer Authority. There is a Lease to this effect in place currently. However, the Township still runs the day to day operations of the sewer system and sets rental fees by ordinance.

Up until 1995, it was the practice of the Township to send bills for sewer rental to the tenants of a property unless the landowner in writing requested that it receive the bill. However, each ordinance from 1958 (Ordinance No. 98) up until the practice was changed in 1995, stated that the practice of sending bills to tenants did not relieve landowners of the responsibility of paying the sewer rental bill if a tenant failed to pay. In addition, the ordinances all stated that any sewer rental bill would become a lien on the property pursuant to Pennsylvania law.

In the years leading up until 1995, the Township began to have problems collecting sewer bills from landowners. In some cases, tenants would run up large sewer rental bills of which the landowners were unaware and then the tenants would leave without paying the bills. In addition, the Township was beginning to experience administrative problems keeping track of who the tenants were at various properties in the Township at any given time. In response to these problems, the Township decided to prepare an ordinance which would mandate that sewer bills be sent directly to landowners. However, certain landowners, including the owners of the Millcreek Mall and Millcreek Plaza, who had properties with many tenants asked the Township to reconsider this idea. After consulting with these landowners, the Township did enact an ordinance changing the policy as contemplated but allowing the landowners with multiple commercial tenants to enter into an agreement with the Township whereby the Township would continue to bill the tenants if the landowner would give the Township a current list of tenants, assist with bill collection if it became necessary and guarantee payment to the Township if the tenants did not pay.

The Township sent such an agreement to the owners of the Millcreek Mall and Millcreek Plaza but they did not execute it. Thereafter, beginning in April 1, 1996, the Township began sending the sewer bills to the Cafaro Company. The Cafaro Company has acted as an agent for the owners of the Millcreek Mall and Millcreek Plaza for many years in these parties' dealings with the Township. Subsequently, after an objection to this practice by the entities owning the Millcreek Mall and Millcreek Plaza, the Township

sent the bills to these ownership entities directly. Since April 1, 1996, the Cafaro Company has been collecting sewer rental from the tenants of the Millcreek Mall and Millcreek Plaza, however none of these revenues have been turned over to the Township.

In 1993, the Township filed liens against Pet Center, Erie Travel & Tours, Insta Photo Lab of Erie, and Steakhouse Acquisitions for unpaid sewer rentals. However, these companies were only tenants of the Millcreek Mall and not owners of the land. On April 11, 1997, the Township filed municipal liens on both properties against Millcreek Mall Corporation, the owner of the Millcreek Mall, as well as Millcreek Plaza Limited Partnership, owner of Millcreek Plaza. Thereafter, on May 20, 1997, the Township filed a praecipe requesting the issuance of a Writ of Scire Facias Sur Municipal Lien for both properties. Both landowners then each filed a different Affidavit of Defense with Counterclaims. On July 8, 1997, the Township filed an Answer and Reply to each of these.

Discovery has been conducted but not completed.[3] On May 4, 1998, the Township filed a motion for summary judgment on both cases. Each landowner filed an identical response to each motion.[4] The Court held argument on the motions at which all parties were represented.

The Court will now address the Township's motions. Initially, the Court must determine whether a motion for summary judgment is procedurally proper in this type of an action. It is not proper because the Rules of Civil Procedure do not apply to this action. *Shapiro v. Center Township*, 632 A.2d 994 (Pa. Cmwlth. 1993). However, the Township's motions can be considered as motions for judgment for want of a sufficient affidavit of defense. 53 P.S. §7271. Counsel for the landowners stated at oral argument that he had no objection to the Court considering the Township's motions as such.

Upon the filing of a motion for judgment for want of a sufficient affidavit of defense, the Court must decide whether the defendant has put forth a

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[3] Millcreek Mall Corporation claims that it needs more discovery. The Township argues that sufficient discovery has been conducted for the Court to rule on the present motion. Because of the Court's disposition of the motion, the Court need not address this issue.

[4] The Court notes that the factual and legal issues in each case are separate and distinct. For example, Millcreek Plaza was not even arguably a party to the Developer Agreement. In addition, while there are some billing issues dealing with tenants of the Millcreek Mall which arguably have merit, there are no such issues presented in the Affidavit of Defense in the case involving Millcreek Plaza. Thus, filing identical responses to the motions for summary judgment was inappropriate.

sufficiently certain and definite defense to avoid judgment on the lien. *General Municipal Authority v. Yuhas*, 572 A. 2d 1291 (Pa. Super. 1990)(*alloc. denied*); *Borough of Fairview v. Property Located, Etc.*, 453 A.2d 728, 730 n. 3 (Pa. Cmwlth. 1982). The standard which the Court must apply is whether each Affidavit of Defense with Counterclaims raise any factual issues that must be decided by a fact finder. The Court finds that some of the defenses do raise factual issues which must be decided by a fact finder while others only raise issues of law that the Court can decide at this time.

The Court will address the issues raised by the landowners in the order they are presented in their Affidavits of Defense. Initially, both landowners argue that the Township lacks the authority to assess and collect sewer bills because it created a sewer authority. The landowners assert that only the Sewer Authority has the authority to set rates and collect fees. This contention is without merit. The Township created an ownership authority which owns the assets of the sewer system and then leases them back to the Township. The Sewer Authority has granted the Township the power to set rates and collect sewer rentals. In addition, the Developer Agreement which the landowners claim governs this situation states that "the Township of Millcreek has the right to charge a sewer use or sewer rental charge to any user of said sanitary sewer system." (Emphasis added), Developer Agreement, Point 11.

The primary issue raised by both landowners is that the Developer Agreement prohibits the Township from billing the landowners for sewer usage and from demanding payment from them. The landowners argue that as part of the Developer Agreement, the Township waived its right to seek payment from them or to claim amounts owed from sewer usage as a lien against their properties. This issue is a matter of contract interpretation.

Interpretation of a written contract is a matter of law for the Court unless there is an ambiguity. *Banks Engineering Company, Inc. v. Polons*, 697 A.2d 1020 (Pa. Super. 1997) *alloc. granted* 706 A.2d 1210 (Pa. 1998). In interpreting an unambiguous contract the Court need only look to the language of the contract itself. *Id.*

> The landowners are relying on Point 11 of the Developer Agreement which states:
>
> It is specifically understood by the Developers hereto that this agreement is intended to solely provide for the construction, operation, repair and maintenance of a sanitary sewer, and is not intended in any way to obligate the Township of Millcreek to assume any other responsibility with respect to the easement in which said sewer is to be constructed, save and except restoration of the surface after work is completed, as provided in the Deed of Grant and Easement attached hereto. **Developer also**

> **acknowledges and agrees that the Township of Millcreek has the right to charge a sewer use or sewer rental charge to any user of said sanitary system, but such charge shall in no way be made in relation to the cost of construction and/or installation of said sanitary sewer.** Developer Agreement, Point 11. (Emphasis added).

The landowners rely on the portion in bold for the proposition that the Township waived the provision of state law which states that unpaid sewer bills will become a lien on the property and the provisions of its own ordinances which state that the property owner is still responsible for sewer bills even though the bills will be mailed to the tenants. This is not the meaning of the agreement.[5]

The agreement simply states that the Township would not charge the landowner, tenants or users of the sewer system for the construction of the sewer system because neither the Township nor the Sewer Authority would have paid for its construction. Therefore, the Township should not be allowed to profit from its construction. The developer of the Millcreek Mall and later the owner of the Millcreek Mall would profit from the construction of the sewer system by being able to market the property to prospective tenants as having a sewer system and being able to assure tenants that they would not be responsible for any charges for constructing the sewer system.

Further, contracts take into account the law at the time of their making. *Empire Sanitary Landfill, Inc. v. Commonwealth, Department of Environmental Resources*, 684 A.2d 1047 (Pa. 1996); *Walsh v. School District of Philadelphia*, 22 A.2d 909 (Pa. 1941) *U.S. cert. denied*. The landowners argue that the Township is attempting to retroactively change the Developer Agreement through the enactment of an ordinance after the creation of the contract, such ordinance being the 1995 ordinance which changed the policy of billing tenants. This is incorrect because Pennsylvania law and the Township ordinance in place in 1973, which is when the Developer Agreement was signed, stated that the Township would bill tenants but that landowners were ultimately responsible to pay sewer rental if it was not paid by a tenant. The Developer Agreement is consistent with these laws and nothing in the Agreement leads the Court to find that the parties intended to change the law applicable at the time of its signing.

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[5] The Court also notes that Millcreek Plaza was not even contemplated at the time the Developer Agreement was entered into. There is no evidence that the parties extended the terms of the Developer Agreement to the development of Millcreek Plaza. There is nothing in the record which supports the argument that the Developer Agreement applies to the Millcreek Plaza.

Even the Township's current ordinance is consistent with this interpretation of the Agreement. The Township will bill tenants of multi-tenant commercial developments if a landowner assists the Township in determining the identities of the tenants, assists in collection efforts and takes ultimate responsibility for any unpaid bills as it is already obligated to do under state law.

Next, the landowners argue that the past practices of billing the tenants precludes the Township from now attempting to hold the landowners responsible for the bills. This argument does not have merit. The fact that the Township billed tenants rather than the landowners did not absolve the landowners of their responsibility for these bills. The ordinances in place so stated, as well as state law. Just as with the agreement presently proposed by the Township which states that tenants will be billed but owners held ultimately responsible, the past practice was to bill tenants but hold landowners ultimately responsible. This agreement has been accepted by other developers.

The landowners also argue that the fact that the Township filed liens against tenants in the past precludes it from now filing liens against the landowners. This is incorrect. The fact that the Township may have erroneously filed liens against tenants rather than landowners does not preclude it from correcting its mistake and properly filing any liens against any proper party. To decide otherwise would prevent the Township from recovering the unpaid sewer rents on these properties from any party because the tenants would not be prejudiced by a lien against another party's land and the liens filed against the tenants would be ineffective because they could not be prosecuted against the landowner because the landowner was not named as a party. Thus, the landowners' argument would leave the Township with no remedy.

In summary, the landowners in both of these cases are ultimately responsible for past and present sewer bills. Nothing in the Developer Agreement changed that reality.

Both landowners next raise the issue of detrimental reliance. They argue that because the Township has billed the tenants for twenty years they have relied on that practice and not included provisions in their leases with tenants to recover for administrative costs of billing the tenants. In addition, the landowners argue that the Township would be "unjustly enriched" by not having to do the administrative work in billing the tenants. Lastly, the landowners argue that the Township agreed in the Developer Agreement to bill tenants and that even if the Township is allowed to look to the landowners for payment of the sewer bills the billing of the tenants is a condition precedent to that right. Therefore, the landowners argue that because the Township has not satisfied a condition precedent it can not look to the landowners for payment at this time.

If the Township had unilaterally stopped billing tenants while the landowners were still paying their sewer bills this argument may have had

merit.[6] However, in 1995 and 1996, the Township billed the tenants but the landowners did not pay their bills in full, thus breaching their end of any possible bargain.[7] Therefore, it would be unreasonable to expect the Township to continue this practice when the landowners are not upholding their part of the bargain. In addition, the Township has offered to enter into an agreement where it would bill the tenants if the landowners cooperated in informing the Township of the identification of the tenants, cooperated in collection efforts and agreed to be ultimately responsible for unpaid bills as they already are under state law.

Finally, the landowners challenge the amounts of the liens. They challenge the amounts on various grounds. One argument is that it is improper for the Township to charge for each connection in the developments, the Millcreek Mall and Millcreek Plaza, rather than calculate the sewer rental amount by adding up the total amount of usage by each of the connections in the aggregate and convert it into Equivalent Domestic Units (EDU). As of now, the Township charges each connection individually based on its usage but also charges each connection for a minimum of one EDU per quarter.[8] There is nothing improper or unreasonable about billing for each connection rather than aggregating amounts from different connections.

However, the landowners also challenge the reasonableness of charging each connection for a minimum of one EDU per quarter. An EDU is 70,000 gallons of water. Under Pennsylvania law a party may challenge the reasonableness of a minimum amount of water or sewer usage charged for by an authority or township if that minimum amount is excessive in light of the amounts actually used. *Ridgway Township Municipal Authority v. Exotic Metals, Inc.*, 491 A. 2d 311 (Pa. Cmwlth. 1985)(The Court notes that the minimum charge in Ridgway was Five Hundred Twenty-seven Dollars ($527.00) per month, whereas the Township in the present case charges a minimum of Thirty-eight Dollars (38.00) for every three months). On this issue, the landowners have raised an issue of disputed fact which does preclude the granting of judgment.

The landowners claim that the Township has billed them for amounts not properly owed by them. Millcreek Mall Corporation in its Affidavit of Defense claims that certain amounts claimed by the Township are time

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[6] The Court is not stating that this argument would be persuasive but is simply stating that because of the factual circumstances the Court need not address it.

[7] It is true that the landowners' position is that under the Developer Agreement they were not required to pay the bills if the tenants defaulted on such. However, the Court has found that there is such a requirement under the Developer Agreement.

[8] The Township charges for sewer usage on a quarter year basis.

barred. Affidavit of Defense, Para. 29. Millcreek Plaza Company Limited Partnership in its response to the motion for summary judgment, claims that the Township may have included in the lien amounts which were older than the statutorily allowed time for such and in one case may have included an improper billing. Response to Motion for Summary Judgment, Para. 11 and Exhibit C. However, Millcreek Plaza's claims were not raised in Millcreek Plaza Company Limited Partnership's Affidavit of Defense, thus the Court will assume that they are only in its response to the motion because such is identical to the response submitted by Millcreek Mall Corporation.

Claims such as the Township's claims in this case must be filed on or before the last day of the third calender year after the year when the bills first became due. 53 P.S. §7143 In the present case, the claim was filed in 1997, therefore it is timely as to any bills which became due in 1994, 1995 and 1996. However, because Millcreek Mall Corporation has claimed that the bills which they have received do not itemize the years from which certain past due amounts are included, the Court can not grant judgment on this issue as to these specific tenants in relation to Millcreek Mall Corporation because the past due amounts may have become due before 1994.[9] However, because Millcreek Plaza Company Limited Partnership

[9] In its Affidavit of Defense, Millcreek Mall Corporation claims that the Township is charging for amounts from liens previously filed which would have been due in 1993, and thus time barred. In its Answer and Reply, the Township contends the current lien amount does not include amounts from liens previously filed in 1993. Millcreek Township's Answer and Reply, Para. 29. The Township also directs the Court's attention to a letter it wrote to Millcreek Mall Corporation which the Township asserts states that the liens presently at issue do not include amounts from the 1993 liens. However, the Court has examined the letter and finds that it states the opposite. The April 11, 1997 letter states in part:

> The total amount due as of March 31, 1997 was $82,713.93. This sum includes amounts due under liens previously filed at Nos. 10257-1993, 10263-1993, 10287-1993, 10352-1993 and the lien filed on April 11, 1997.
> April 11, 1997 letter from Millcreek Township's solicitor to Millcreek Mall Corporation.

The Court is unsure of whether the 1993 lien amounts are included in the 1997 lien and therefore must deny judgment on this issue. In addition, the Township's assertions that the landowners know the facts to be different are not evidence. Finally, the moving party may not rely on testimonial evidence from itself or its own witnesses to support a motion for summary judgment. *See Nanty-Glow v. American Surety Company*, 163 A. 523 (Pa. 1932). Although this is not a motion for summary judgment, the same principle applies.

has not raised any specific issues related to its case, the Court does not find that it has raised a disputed issue of fact.

The Millcreek Mall Corporation also raises the issue of certain tenants filing for Bankruptcy in its Affidavit of Defense. However, the obligation to pay sewer rental goes with the land and is ultimately the responsibility of the landowner. Therefore, a tenant's bankruptcy does not effect the obligation of the landowner to pay sewer rental or the fact that unpaid sewer rental becomes a lien on the land pursuant to state law.

Millcreek Mall Corporation claims that certain amounts as to one specific tenant, Insta Photo Lab, were in dispute and therefore can not be properly billed to it. Millcreek Mall Corporation does not state with any specificity why the current amount charged for such unit is inaccurate but simply states that in the past there was a dispute between the tenant and the Township about the amount charged for sewer rental. This allegation is not stated with sufficient definiteness to rebut the presumption that the lien is accurate. *Borough of Fairview, supra*; *See* 53 P.S. § 7187.

Both landowners claim that they as owners of the properties were not sent notice and therefore any interest and penalties should only be calculated from the date when they were sent the bills. The actual owner of both properties, The Cafaro Company, does not deny that it has had knowledge of this dispute for a significant amount of time and the landowners in other parts of their brief argue that the tenants should be billed. Thus, this argument is without merit.

Lastly, Millcreek Mall Corporation claims that it is being charged for sewer usage of land owned by other entities. This assertion has no basis in fact. In its Affidavit of Defense, Millcreek Mall Corporation candidly states at Paragraph 37, "Previously, The Cafaro Company and/or the Millcreek Mall Corp. were billed for units owned by other parties, e.g., Kaufmann' s." (Emphasis added) and at Paragraph 38, "While later bills do not attempt to charge Millcreek Mall Corp. for the units owned by Kaufmann's or others, it is unknown whether the lien amount may include sums previously billed for Kaufmann's or others". As is clear from these statements, Millcreek Mall Corporation can find no evidence in the liens filed, in any of the bills sent to them or other discovery material provided that the Township has billed it for property owned by other entities. Thus, this claim is not definite enough to rebut the presumption of validity which statutory liens are accorded. *Id.*

In conclusion, the Township's motions will be denied. However, the only two valid issues raised by Millcreek Mall Corporation are the possible billing for amounts which are time barred and the reasonableness of the rates charged as it relates to charging each unit for a minimum of 80,000 gallons of use irrespective of the actual use. The only valid issue raised by Millcreek Plaza Company Limited Partnership is the reasonableness of the minimum rate charged.

ORDER

AND NOW, to-wit, this 17th day of September, 1998, it is hereby ORDERED and DECREED that The Township of Millcreek's Motions in the above-captioned cases each styled as a Motion for Summary Judgment are DENIED.

BY THE COURT:

/s/ **FRED P. ANTHONY, J.**

MILLCREEK TOWNSHIP SCHOOL DISTRICT, Appellant

v.

BOARD OF ASSESSMENT APPEALS OF ERIE COUNTY, Appellee

DAVID B. OAS, Intervenor

REAL ESTATE TAXATION/ASSESSMENT

A school district's selective appeal of a property assessment without a "triggering event" provided by statute for cities of the third class, 72 P.S. § 5347.1, violates the Uniformity Clause of the Pennsylvania Constitutution, Article VIII § 1.

REAL ESTATE TAXATION/ASSESSMENT

A school district's selective appeal of assessment of real property within its jurisdiction without existence of a "triggering event" provided by statute, 72 P.S. §5347.1, constitutes "spot reassessment" which is invalid under the provisions of 72 P.S. § 5348.1.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 14077-1997

Appearances: Michael Visnosky, Esquire
Dan Susi, Esquire
John Mehler, Esquire

Anthony, J., October 1, 1998.

This matter comes before the court on Motions to Dismiss filed by the Board of Assessment Appeals of Erie County (hereinafter "Board") and the landowner, David B. Oas. After considering the arguments of counsel as well as the record of this case, the Court will grant the motions. The relevant facts and procedural history are as follows.

This is a tax assessment appeal. Mr. Oas owns a piece of property in MillcreekTownship, Pennsylvania, which property is located in the Millcreek Township School District (hereinafter "School District"). In 1972, the Erie County Assessment Office (hereinafter "Assessment Office") entered an assessment for Mr. Oas's property. In1997, the Assessment Office determined that there should be "no change" to the assessment for Mr. Oas's property. The Millcreek School Board filed a timely appeal with the Board.[1] Thereafter, the Board held a hearing and ruled that there

[1] In practice, Millcreek Township and the School District have been concerned that many properties in their jurisdictions are underassessed. In an effort to alleviate this situation they have filed an action to mandate county wide reassessment which the trial court granted. *Millcreek Township School District v. County of Erie, et. al.* , 80 E.C.L.J. 13 (Erie County, 1997) *affirmed* (No. 1128CD1997) *Slip opinion* 5/28/98 (Pa. Cmwlth.

should be no change in the assessment. This ruling was based on the Board's position that the School District only has standing to appeal an assessment after a "triggering event".[2] It isundisputed that no triggering event had occurred in relation to this property before the current appeal was filed. The School District filed a timely appeal from the Board's decision to this Court. Thereafter, the Board and Mr. Oas each filed a motion to dismiss based on both statutory and constitutional grounds. The Court held argument at which all parties were represented.

The moving parties make three interrelated arguments in support of their motions to dismiss. First, they argue that the School District's selective appeals on this and other properties violate the Uniformity Clause of the Pennsylvania Constitution Article VIII, §1. Next, they argue that this appeal violates the statutory prohibition against "spot reassesment". 72 P.S. §5348.1. Lastly, they argue that the statute granting taxing bodies the right to appeal assessments only granted the taxing bodies that right when there had been a triggering event or if the taxpayer initiated the

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1998)(available on Lexis at LX 463) *petition for allowance of appeal pending*.

In addition, the School District accepted an offer by a private company for the company to evaluate properties within its jurisdiction and recommend certain properties for assessment appeals. The only criteria for these recommendations was that the projected new assessment would bring the School District at least an additional Three Thousand Dollars ($3,000.00) per year of revenue. This tactic has been somewhat successful as several property owners have agreed to settlements in which their property assessments have risen. In addition, there are other similar cases which have been consolidated pending in this Court. In the consolidated case, the Honorable George Levin has entered an Order stating that a taxing body may appeal selected property assessments in a similar manner to the present case. *Millcreek School District v. Erie County Board of Assessment Appeals,* Erie County Docket # 16077-1994, Opinion dated September 28, 1995.

[2] A "triggering event" is an event which allows an assessment office to reassess a property. In Third Class Counties such triggering events are making improvements on a property, conveying a property in smaller parcels or destroying improvements on a property. 72 P.S. §5347.1 The triggering events for reassessing properties in Fourth through Eighth Class Counties include, in addition to those events noted above, economic changes in a county or an area of a county. 72 P.S. § 5453.602a.

appeal. 72 P.S. §5350i.

The School District argues that its right to appeal is coextensive with the landowner's right. 72 P.S. §5350i. Therefore, since the landowner can appeal without a triggering event having occurred, a taxing body may also appeal. In addition, the School District relies on Judge Levin's decision on this issue in the case of *Millcreek School District v. Erie County Board of Assessment Appeals,* Erie County Docket # 16077-1994. Opinion dated September 28, 1995.[3]

After reviewing the law, the Court finds that to allow a taxing body to appeal selected properties without an objective distinction between the properties appealed and not appealed would violate the Uniformity Clause of the Pennsylvania Constitution,[4] the Equal Protection Clause of the United States Constitution and the statutory prohibition against spot reassessment.[5] Pennsylvania Constitution Art. VIII, §1; United States Constitution Amendment 14; 72 P.S. §5348.1.

This is an issue of first impression in Pennsylvania except for Judge Levin's Opinion referenced earlier. There are appellate cases dealing with when a county assessment office may reassess properties but no appellate

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[3] The School District argues that this case is precedent in Erie County because the Order was not appealed. This is incorrect because the Order entered did not end the litigation, therefore it was not a final and appealable order. *Caplan v. Caplan,* 713 A. 2d 674 (Pa. Super. 1998); Pa.R.C.P. 341. The Court has checked the record of this case and it is still pending. The taxpayers or the Board would have a right to appeal Judge Levin's ruling at the conclusion of the case.

[4] Pennsylvania Constitution Art. VIII, § 1 provides that "[a]ll taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

[5] The criteria for appealing this property was that a successful appeal would bring in a certain amount of tax revenue per year. This is not the type of criteria which is acceptable. *See Harrisburg v. Dauphin County Board of Assessment Appeals,* 677 A.2d 350 (Pa. Cmwlth. 1996) *alloc. denied.* The reason this practice is not acceptable is that it could create greater inequity. For example, an appeal of an assessment on a property with a high value would generate this amount of revenue even if the property was only underassessed by a small percentage of its actual market value. However, other properties which were underassessed by a greater percentage would not be appealed because such appeals would not create the required revenue. It is axiomatic that it would violate the Uniformity Clause to tax properties at different rates depending solely on their market value. Therefore, it is just as violative to create the same result through the appeals process.

cases dealing directly with whether a taxing body may appeal selected property assessments absent a triggering event or an appeal by a taxpayer. The only Common Pleas case on this issue found by the parties and the Court is that of Judge Levin.

Initially, the Court notes the issue in this motion is whether the School District has the right to file the current appeal assuming *arguendo* that it would be successful on the merits. Considering the plain language of the statute which grants taxing bodies the right to appeal assessments, the School District would have the right to appeal absent a triggering event just as a landowner does if the statute alone controlled. 72 P.S. §5350i. However, the analysis does not end there because a statute can not grant a taxing body a right which the Pennsylvania Constitution prohibits.

The central issue in the present case is whether it would violate the Uniformity Clause of the Pennsylvania Constitution to allow a taxing body to selectively appeal property assessments. A taxpayer alleging that a tax violates the Uniformity Clause must show that there is a deliberate discrimination in the application of the tax or that the application of the tax has a discriminatory effect. *City of Lancaster v. Lancaster County,*599 A.2d 289 at 294 (Pa. Cmwlth. 1991) *alloc. denied.* A further question is whether there exists a reasonable distinction and difference between classes of taxpayers sufficient to justify different tax treatment. *Id.*

The Court will first address Judge Levin's Opinion because it is the main support for the School District's opposition to the motions. Judge Levin relied on two propositions to support his ruling. First, the fact that landowners could appeal assessments in the absence of a triggering event created a lack of uniformity and therefore the taxing body could attempt to remedy that lack of uniformity by appealing selected assessments. Secondly, Judge Levin found that the taxing body was attempting to create uniformity in a step by step way by appealing underassessed properties and that this furthered the goal of uniformity. The Court disagrees with these propositions.

Although the statute states that the taxing bodies have the same right to appeal, they do not. The reason for this is that the Pennsylvania Constitution puts limits on government actions and not on citizens' actions, generally. For example, the Uniformity Clause talks about levying taxes. This is a government action and thus the government is restrained from levying taxes in a non-uniform way.

The Court finds that there are significant differences when a taxing body appeals an assessment compared to when a landowner appeals an assessment. The differences are such that the taxing body can not constitutionally be allowed to appeal in the same way as a landowner absent a triggering event. While Judge Levin is correct in stating that allowing a taxpayer to appeal an assessment and win a lower assessment will create some lack of uniformity, the lack of uniformity created is not as

substantial as if the taxing body itself is allowed to appeal. A landowner can only appeal a limited number of assessments depending upon how many properties he owns. In contrast, a taxing body can appeal as many properties as it desires.[6]

In addition, when a landowner appeals an assessment any lack of uniformity created is created in an equitable way because all other landowners are effected the same.[7] However; when a taying body appeals an assessment only the one landowner is effected while all other landowners whose properties may be proportionally and or in actual dollars more underassessed than the one landowner are not effected. It could be argued that the effected landowner has the remedy of a common level ratio appeal, however this remedy only becomes available if the common level ratio is more than 15% less than the predetermined ratio for the county. *City of Lancaster, supra* at 292-3; 72 P.S. §5350(a).[8]

In addition, the cases cited by Judge Levin are distinguishable for several

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[6] The taxing body could appeal so many properties as to create a de facto partial county wide reassessment if the taxing body in question was a county. This would create a result where a board of assessment appeals or an assessment office would not be allowed to reassess properties because of a statutory or Constitutional prohibition but the same government entity, the county, could create the same result by simply appealing properties year after year which would then raise the common level ratio for future year. Thus, property assessments could continue to increase on this basis. *See City of Lancaster v. Lancaster County,* 599 A.2d 289 at 300 (Pa. Cmwlth. 1991). The Court also notes that the *City of Lancaster v. Lancaster County* court did not differentiate between Lancaster County and the Board of Assessment Appeals of Lancaster County.

[7] In addition, the landowner would only be motivated by economic gain for himself whereas the taxing body could be motivated by other reasons. For example, under the School District's theory there would be no prohibition to the taxing body appealing all of the assessments of people of the opposite political party or appealing every other house on a block even though every house on the block had gone through the same economic changes. The second type of activity is exactly what the prohibition on spot reassessments for Third Class Counties was meant to prevent. House Journal 1991, p. 474-475, Remarks by Representative Davies who was the sponsor of the amendment which created the prohibition.

[8] The effect of allowing a taxing body to appeal an assessment absent a triggering event would be as follows. Assume a county has a common level ratio of 26 and a predetermined ratio of .40 meaning that the goal is to tax 40% of the market value of each property but on average because of the time lapse since the last county wide reassessment the county is in

reasons. *Millcreek v. Erie County Board of Assessment, supra* at p. 9 note 5. Generally, the cases were dealing with different statutes and different state Constitutions as well as different common law.

The case most similar to the present case is *Alexander v. Town of Barton*, where assessors reassessed a different class of properties, i.e., high value businesses, each year. 565 A.2d 1294 (Vt. 1989). The decision of which class to reassess in any particular year was based on which class of properties was most underassessed.[9] Every property in that class would be reassessed. The landowner in *Alexander* argued that this method of reassessment violated Vermont's Constitution which required that each citizen pay a "proportionate" share of the tax burden. The court found that this method of reassessment was acceptable. *Id.*

This case is distinguishable for several reasons. The Vermont Constitution mandates that each citizen pay a "proportionate" amount of the tax burden. While this is similar to the language in the Pennsylvania Constitution, it is not the same. Thus, each state has its own case law

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actuality only taxing 26% of the market value on average. Assume Landowner A has a property with a market value of One Hundred Thousand Dollars ($100,000) which is being taxed on 26% of its market value, while Landowner B has a property with a market value of Ten Thousand Dollars ($10,000) which is also being taxed on 26% of its market value. The next year the taxing body, as the School District in the present case did, decides to appeal certain assessments based on how much tax revenue they will bring into the taxing body. Appealing Landowner A's assessment would bring in a sufficient amount of revenue, so it is appealed. The taxing body would win the appeal because the market value would be found to be One Hundred Thousand Dollars. This figure is then multiplied by the predetermined ratio because the predetermined ratio is not more than 15% higher than the Common Level Ratio. 72 P.S. §5350(a). The result is that Landowner A's property is assessed on 40% of its value while Landowner B's property is only assessed on 26% of its value.

It is clear that if a tax law was passed to this effect it would be unconstitutional under the Uniformity Clause. It could be argued that this same effect could happen if Landowner A conveyed or subdivided his property. However, the important distinction is that in that situation it is the landowner's action that creates the difference in treatment rather than a government action.

[9] Basically, the state determined the common level ratio separately for different classes of properties each year. Then the class of properties with the lowest common level ratio would be reassessed. This resulted in a rolling reassessment because after a certain class of properties was reassessed its common level ratio would rise to near 100%, assuming properties were taxed on 100% of their actual value.

which differs on this issue. Another important difference is that in *Alexander* an entire class of properties was reassessed rather than simply an individual parcel. In addition, the class was selected on an objective and equitable basis rather than a more arbitrary basis as in the present case. Further, the Pennsylvania prohibition on levying taxes on a county wide reassessment before it is completed would not allow this type of practice. *Harrisburg v. Dauphin County Board of Assessment Appeals*, 677 A.2d 350 (Pa. Cmwlth. 1996) *alloc. denied;* 72 P.S. §5020-402. Lastly, as the *Alexander* court noted, the process would cause all properties to eventually be reassessed even if not all in any one year. These differences compel a different result in the present case.

There are more significant differences in the case of *Wadle & Lamakin Association v. Edison.* 524 A.2d 453 (N.J. Super. 1987), *cert. granted* 532 A.2d 242, *appeal dismissed* 540 A.2d 1276 (N.J. 1988). Most importantly, New Jersey has a statutory provision which states that if any single property is assessed at an amount more than 15% above the average assessment in the jurisdiction, then relief should be granted. N.J.S.A. 54; 51A-6. Pennsylvania has no such protection. In addition, there was no constitutional argument made in the *Wadle* case.

In the case of *Walter-Kroenke Properties v. Missouri State Tax Commission*, the court allowed a certain selected class of properties to be reassessed. 742 S.W.2d 242 (Mo.App. 1987). The assessors reassessed apartment houses which had been under rent control at the time of the last assessment. The rent control law was lifted after the original assessment which resulted in the property owner being able to derive more income from the property than had been determined during the original assessment.[10] Again, in this case there was no constitutional argument made. *Id.* There are sufficient differences to distinguish this case from the present case.

All three of the above cases involved situations where certain classes of property were reassessed rather than just individual properties. Most importantly, none of the cases involved had the same Constitutional provision as Pennsylvania. For these reasons, the Court will now analyze Pennsylvania law and address the issue of whether a taxing body may appeal a property assessment absent a triggering event.

There are certain basis propositions which provide the foundation for the Court's decision. When a county uses a base year system as Erie County does it should not interject considerations of current market value

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[10] Income potential is an acceptable method of determining a property's value for an appraisal or assessment.

into the analysis.[11] *Althouse v. Monroe County Board of Assessment Appeals,* 633 A. 2d 1267 (Pa. Cmwlth. 1993); *City of Lancaster, supra.* However, if properties are reassessed when no "triggering event" has occurred the assessed value tends to reflect the value at the time of the reassessment rather than the value as of the base year. *See Harrisburg v. Dauphin, supra; Althouse v. County of Monroe, supra; City of Lancaster supra.* Finally, it has been decided that uniformity in property assessment is the more important objective as compared to accuracy of assessment. *Schenley v. Allegheny County Board of Property Assessment,* 211 A.2d 79 at 82 n. 1 (Pa. Super. 1965). Thus, it would be preferable to have all properties inaccurately but similarly underassessed rather than to have some properties accurately assessed while having others underassessed.

Most importantly, a reading of the Pennsylvania cases on similar practices which achieved the result desired by the School District in the present case, shows that such a result is unconstitutional no matter how achieved. The Court has not found a Pennsylvania case, nor has the School District provided a Pennsylvania case other than Judge Levin's decision, where a court has allowed a taxing body to reassess only certain properties without a triggering event having occurred. In contrast, many efforts to achieve this result have been rebuffed by the courts.

The case most similar to the present case is *Althouse v. Monroe County. Supra.* In *Althouse,* the only issue before the court was whether a county, through its assessment office, could reassess certain properties in a subdivision to bring them in line with the current market values of other recently sold properties in the subdivision. There was no dispute that the new market values were accurate and that the same method was used in reassessing these properties as was used in assessing the other properties originally. However, the court still found that this selective reassessment

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[11] In Erie County the "base year" is 1969, the year of the last county wide reassessment. Therefore, the goal of the assessment process is to find the actual market value of the property in 1969. However, this does not mean considering the property as it was in 1969. The assessor must take the property in its current condition and imagine the market value for that property in 1969. In addition, the assessor must take today's economic and other conditions into effect and project their affect onto the 1969 value. For example, when a property on Peach Street in Summit Township is reassessed due to a triggering event the assessor must imagine the current developed nature of the surrounding neighborhood, the current zoning and the current demand for property in that area; and then determine what the market value of that property would have been in 1969 if all of today's conditions existed in 1969.

was unconstitutional based on the Uniformity Clause.[12] *Id.*

In *Harrisburg v. Dauphin County Board of Assessment Appeals*, the court found that selective reassessments of properties in the City of Harrisburg violated the Uniformity Clause of the Pennsylvania Constitution. *Supra.* The court relied on the method in which the reassessments were conducted to find them unconstitutional. The county had used a different method in the reassessment being challenged than it had in the original assessment. However, the Commonwealth Court affirmed the trial court's order which mandated county wide reassessment. Therefore, the implied finding was that it was unconstitutional to reassess only certain parcels absent a triggering event.

In *City of Lancaster v. Lancaster County*, the Commonwealth Court ruled that a county could not single out 10 of 60 taxing districts and reassess them without reassessing the entire county. *Supra.* The county chose these taxing districts because each had a common level ratio 15% greater or less than the ratio for the county as a whole.[13] The court found that these reassessments could not be used both because certain properties were singled out by the county and because the method of assessment used in the reassessment was different than the method used during the original assessment. In the present case, the Board and Mr. Oas only raise the first issue. However that issue is sufficient by itself to invalidate the new reassessed value.

In Croasdale v. Dauphin County Board of Assessment Appeals, Dauphin County had found that ninety percent (90%) of the properties were underassessed. 492 A. 2d 793 (Pa. Cmwlth. 1985). The county reassessed these ninety percent of properties but did not reassess the remaining ten percent (10%). A taxpayer whose property had been reassessed appealed on two grounds. The first being that the county could not levy tax on the

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[12] The taxing bodies in *Althouse* raised the argument that they were authorized to appeal in the same way as taxpayers under 72 P.S. §5453.706. The court did not directly address this argument but nothing in its Opinion gives the impression that the case would have been decided differently had the taxing bodies simply appealed the assessments rather than had the assessment office reassess the properties in the first instance. *See* note 3 *infra. In* addition, *Althouse* was decided under Fourth through Eighth Class Assessment Law which allows properties to be reassessed based on a change in economic circumstances. *See* note 4 *infra.* In the present case, the taxing bodies do not have that option under the applicable assessment law.

[13] The Court notes that this method is somewhat more rational than the method chosen by the School District in the current case because all properties in inaccurately assessed taxing districts were reassessed without regard to whether they were expensive properties or inexpensive properties.

reassessed properties until all properties were reassessed because the reassessment of the ninety percent constituted a county-wide reassessment. 72 P.S. § 5042-402(a)(stating a county may not levy taxes on a county-wide reassessment until all properties have been reassessed). In addition, the taxpayer challenged the reassessment on the basis of the Uniformity Clause of the Pennsylvania Constitution. The Court found that no taxes could be levied on the reassessments until all properties had been reassessed based on the taxpayer's first argument. The court did not reach the constitutional argument, however, the result supports this Court's finding in the present case.

The courts have only allowed selected properties to be reassessed when there has been a triggering event, a clerical error or a county-wide reassessment. *Callas v. Armstrong County Board of Assessment Appeals*, 453 A. 2d 25 (Pa. Cmwlth. 1982)(court ruled that the board of assessment appeals had the power to change assessment when the original assessment was based on a clerical error which misstated frontage value as Three Hundred Dollars ($300.00) per foot rather than the Five Hundred Dollars ($500.00) per foot that it was actually valued at per the most recent reassessment); *Carino v. Board of Commissioners of the County of Armstrong,* 468 A.2d 1201 (Pa. Cmwlth. 1983)(statingwhen selected properties may be reassessed in Fourth through Eighth Class Counties).

In conclusion, the Court will dismiss the School District's appeal because to allow a taxing body to selectively appeal a property assessment would violate the Uniformity Clause of the Pennsylvania Constitution and violate the statutory mandate that spot reassessment is not allowed.

ORDER

AND NOW, to-wit, this 1st day of October, 1998, it is hereby ORDERED and DECREED that the Motions to Dismiss are GRANTED.

BY THE COURT:
/s/ **Fred P. Anthony, J.**

REBECCA A. HUIZAR

v.

PETER JOHN HUIZAR

FAMILY LAW/CHILD CUSTODY

Uniform Child Custody Jurisdiction Act (UCCJA), 23 Pa.C.S.A. §5341 et seq., applicable to international custody disputes

FAMILY LAW/CHILD CUSTODY

UCCJA provides for jurisdiction on grounds of home state, significant contact, and parens patriae

FAMILY LAW/CHILD CUSTODY

Where parents were married in Montgomery County and divorced in South Carolina, children have never resided in Erie County, and children and parties have insufficient contacts with Erie County and children have resided in South Carolina and Japan with custodial father, no subject matter jurisdiction of venue in Erie County for mother's complaint for custody

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA FAMILY DIVISION-CUSTODY No. 12739-1998

Appearances: Joseph P. Martone, Esquire for plaintiff
Brian M. DiMasi, Esquire for defendant

OPINION

December 31, 1998 - Fisher, J.

This matter is before the Court upon the father, Peter John Huizar's Motion for Continuance of Custody Intake Conference Pending Determination of Stay of Proceedings Pursuant to 50 U.S.C.A. §501 et seq. and Pending Challenge to Jurisdiction and Venue.

We find that Erie county is not the appropriate court of jurisdiction for the present custody determination.

Rebecca A. Huizar and Peter John Huizar were married on November 24, 1984 and one child was born of that marriage, Peter James Huizar, born July 5, 1986. The parties separated in June of 1988, divorced and were later remarried on June 29, 1990. A second child was born, Jacob Eugene Huizar, born on November 8, 1990.

The Huizars resided in Montgomery County, Pennsylvania at that time. They subsequently separated from that second marriage on March 17, 1993.

On April 13, 1993, a Temporary Court Order was entered in Montgomery County granting Mr. Huizar temporary legal and physical custody of both children.

The parties entered into a joint custody agreement on May 12, 1993 which they later amended. On October 26, 1993, the amended custody

stipulation was approved by the court in Montgomery County and entered as a Court Order. The Custody Stipulation provided for shared legal custody with Mr. Huizar retaining primary residence of both children and with liberal periods of partial custody for Rebecca Huizar.

In August of 1994, Mr. Huizar, a Gunnery Sergeant in the United States Marine Corp, was transferred to Beaufort, South Carolina and he relocated there with the children. Ms. Huizar remained in Pennsylvania and in August of 1995 she moved to New Castle, Lawrence County, Pennsylvania.

Mr. Huizar filed for divorce and on December 12, 1995 a decree in divorce was entered in Beaufort County, South Carolina.

In January of 1996, Mr. Huizar was deployed to Iwakuni, Japan. The children remained in South Carolina until his return in July of 1996.

The parties' second divorce became final in January of 1997 and Mr. Huizar thereafter remarried. In November of 1997, he was again transferred to Iwakuni, Japan and he, his new wife and both children moved there to reside.

Prior to the father's relocation, Ms. Huizar filed an emergency motion for special relief in Montgomery County seeking to prevent the father from removing the children from the United States.

In her petition she asserted that following the father's move to South Carolina, she had telephone contact with the children; six weeks partial custody in the summer and one Christmas in New Castle and one Christmas visit with them in South Carolina.

On November 6, 1997, Judge Emanual A. Bertin of Montgomery County entered an order finding that Montgomery County no longer had jurisdiction of the matter and stated, "Mother, if she desired emergency relief, may apply to the appropriate court in Beauford, South Carolina, the home county of the children, where jurisdiction lies." No further petitions were filed by either party.

Ms. Huizar moved from New Castle, Pennsylvania to Fairview, Erie County, Pennsylvania in late February, 1998. On July 10, 1998, a little over four months later, Ms. Huizar filed the present complaint seeking custody of the children.

Since the children's move to Japan in November of 1997, the mother has had frequent contact with them by telephone and electronic mail but has not seen them or had any periods of partial custody or visitation. Mr. Huizar is not scheduled to return to the United States until November of 2000.

Mr. Huizar challenges the Jurisdiction and venue of this Court and also seeks relief under the soldiers' and Sailors' Relief Act. He asserts that this court lacks subject matter jurisdiction under the Uniform Child Custody Jurisdiction Act, UCCJA, 23 Pa.C.S.A. 5341 et seq.

The UCCJA is applicable to international custody disputes, pursuant to §5665 which provides, "The general policies of this subchapter extend to

the international area." The Act confers jurisdiction based upon three possible grounds: "home state"; "significant contacts" and "parens patriae."

It is clear that the last two grounds are inapplicable to the present action in that the children have never resided in Erie County and have not resided anywhere in Pennsylvania since 1994. And having been in the custody of their father cannot be considered "abandoned."

Ms. Huizar alternatively argues that Pennsylvania should assume jurisdiction because the children have "significant connection" with the Commonwealth and no other state would have jurisdiction under §5344(a)(4).

WE are unable to find that the parties and/or the children have sufficient contacts with Erie County so as to confer jurisdiction and we do not believe that venue is properly here. The children resided in South Carolina for three years form November of 1994 to November of 1997 prior to their father's transfer to Japan. They lived in Japan for almost eight months prior to the filing of Ms. Huizar's petition for custody.

Accordingly, all information and witnesses relating to the children's health, education, and welfare are either in South Carolina or Japan. We therefore find that Erie County does not have jurisdiction or venue of this matter. The mother may seek to file her petition for custody or partial custody in South Carolina or Japan. Those Courts, will then enter determinations as to whether jurisdiction or venue is proper in those locations. Ms. Huizar's complaint for custody is dismissed.

Finally, since we now conclude that Erie County should not assume jurisdiction or venue in this matter, we need not address Mr. Huizar's claim for a stay under the Soldiers and Sailor's Civil Relief Act. He may, of course, raise that argument if proceedings are filed in South Carolina.

ORDER

December 31, 1998: For the reasons stated in the accompanying Opinion, we find that Erie County does not have proper jurisdiction or venue in this matter.

The Complaint for Custody filed by Ms.Huizar is hereby DISMISSED.

BY THE COURT:

/s/ **Roger M. Fischer, Judge**

COMMONWEALTH OF PENNSYLVANIA

vs.

ANDREW FINDLEY

SUMMARY APPEAL/SPEEDING IN A SCHOOL ZONE

Statute requiring traffic control devices notifying drivers of the beginning and end of school zone in each direction requires a traffic control device at all entrances to the school zone. The absence of a traffic control device at the entrance to a school zone renders school zone traffic regulations unenforeceable against violators.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 2769 OF 1998

Appearances: James Blackwood, Esq., for the Commonwealth
Andrew Findley, Esq., pro se, Defendant

OPINION

Domitrovich, J., January 14, 1999

This matter comes before the Court on the Defendant's appeal of a summary conviction for speeding in a school zone in violation of 75 Pa.C.S. s 3365(b).

FINDINGS OF FACT

On September 15, 1998, Officers Robert Huebert and Anthony Letkiewicz of the City of Erie Police Department were conducting a speed check in a school zone on West 38th Street at the Grover Cleveland Elementary School. This school zone is in operation only during certain hours of the day. During the hours when the school zone is in effect, the speed limit is 15 miles per hour; however, during the rest of the day, the speed limit is 35 miles per hour. The school zone is identified by signs and flashing lights on West 38th Street. One sign and set of flashing lights are located east of Allegheny Avenue to notify westbound traffic on West 38th Street at the beginning of the school zone. One sign and set of flashing lights are located west of Ellsworth Avenue to notify eastbound traffic on West 38th Streeet at the beginning of the school zone.

On that day, the Defendant was travelling northbound on Ellsworth Avenue until he reached the intersection of West 38th and Ellsworth Avenue. At the intersection of West 38th and Ellsworth Avenue, there is no traffic control device warning motorists that they are entering a school zone. Furthermore, from that intersection Defendant was able to see only the back of the control device on West 38th Street which indicate that a motorist is entering a school zone. The Defendant was stopped, and the officers determined his speed to be in excess of 15 miles per hour but less than 35 miles per hour.

DISCUSSION

The Defendant was charged with violating 75 Pa.C.S. s 3365(b) which provides:

> **School Zones.**---When passing a school zone as defined and established under regulations of the department, no person shall drive a vehicle at a speed greater then 15 miles per hour. An official traffic-control device shell indicate the beginning and end of each school zone to traffic approaching in each direction .... [emphasis supplied]

Furthermore, 75 Pa.C.S. s 311l(b) provides:

> **Proper position and legibility of device**---No provision of this title for which official traffic-control devices are required shell be enforced against an alleged violator if at the time and place of the alleged violation an official devices Is not in proper position and sufficiently legible to be seen by an ordinarily observant person ....[emphasis supplied]

The issue in the instant case is whether the Defendant may be found guilty of speeding in e school zone when there is no traffic signal indicating entrance to a school zone. A fundamental rule of statutory construction iS that courts should look to the plain meaning of the language used in a statute or rule in order to ascertain the statutes meaning. *Ludmner v. Nernberg,* __ Pa. Super. __, 699 A.2d 764, 765 (1997).

In the instant matter, the statute provides that e school zone shall be marked by a traffic control device in *each* direction. 75 Pa.C.S. § 3365(b). The plain meaning of this statute indicates that a traffic control device must be placed at all entrances to a school zone. Furthermore, the Commonwealth may not enforce any provision of Title 75 requiring traffic control devices if the control device is *not in proper position.* 75 Pa.C.S. § 3111 (b).

Under the plain meaning of the above statutes, the Commonwealth can only enforce the speeding in a school zone provision In Title 75 where a traffic control device exists. Since no traffic control device exists at this time at the West 38th Street and Ellsworth Avenue entrance to the school zone, the Commonwealth cannot enforce the reduced speed provision at said location Defendant is, therefore, found not guilty of the charge.

ORDER OF COURT

AND NOW, to wit, this Fourteenth day of January, 1999, upon consideration of Defendant's Summary Appeal, it is hereby **ORDERED, ADJUDGED AND DECREED** that, for the reasons stated in the attached opinion, Defendant is found NOT GUILTY.

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

ROXANNE COPELAND, Plaintiff

v.

FARMERS MUTUAL FIRE INSURANCE COMPANY OF McCANDLESS COUNTY, Defendants

COMMENCEMENT OF ACTION/STATUTUE OF LIMITATIONS

Action against insurance company for punitive damages and attorneys' fees on ground of bad-faith denial of claim is subject to six-year statute of limitations of 42 Pa.C.S.A §5527

CIVIL PROCEDURE/AMENDMENT OF PLEADINGS

Amending complaint to include count for bad faith denial of claim adds a new cause of action; amendment subject to six-year statute of limitations at 42 Pa.C.S.A §5527

INSURANCE/BAD FAITH DENIAL OF CLAIM

Action against insurer under 42 Pa.C.S.A. §8371 subject to "catchall" six-year statute of limitations at 42 Pa.C.S.A. §5527

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11219 - 1997

Appearances: William P. Weichler, Esquire for the Plaintiff
Mark Mioduszewski, Esquire for the Defendant

OPINION

The parties have placed this Court in the center of an ongoing dispute in Pennsylvania regarding the time period Plaintiffs have to sue insurance companies for bad-faith. Presently there is a split of authority among Common Pleas Courts addressing this issue as well as several federal decisions. While the opinions on each side of this issue are persuasive, the better-reasoned position permits plaintiffs to have six years to file a bad-faith claim.

The facts of the case sub judice are relatively simple. On March 29, 1996, the Plaintiff's home was destroyed by fire. At the time, Plaintiff carried a homeowners insurance policy with the Defendant Farmer Mutual Fire Insurance Company of McCandless County. By letter dated July 19, 1996 the Defendant notified the Plaintiff of a denial of coverage because the Plaintiff's common-law husband allegedly set the blaze.

On April 14, 1997 the Plaintiff filed the instant lawsuit alleging a breach of contract of insurance. On November 5, 1997, the Plaintiff filed a Motion to Amend Complaint seeking to allege the Defendant's breach was in bad faith and requesting remedies for bad faith pursuant to 42 Pa.C.S.A. §8371. The Defendant strenuously objects to the amendment claiming it asserts a new cause of action after the expiration of the two-year statute of limitations.

Plaintiff's response is two-fold: the proposed amendment does not change the cause of action and the statute of limitations was therefore tolled when the complaint was filed on April 14, 1997. Alternatively, Plaintiff contends the applicable statute of limitations is six years as found in 42

Pa.C.S.A. §5527.

Plaintiff's first argument can be disposed of easily. The proposed amendment would require proof of post-contractual and post-fire facts unnecessary to Plaintiff's original claim. To prevail on the original breach of contract claim, Plaintiff needs to introduce evidence regarding the duties each of the parties have contractually. In advancing the bad faith claim, the Plaintiff is not focusing on the cause of the fire and the contractual duties arising therefrom; instead, Plaintiff is focusing on the Defendant's conduct in refusing Plaintiff's claim under the contract. In addition, there are different damages. The contractual claim would entitle Plaintiff to recover property losses up to the policy limits. If successful on the bad faith claim, Plaintiff would be seeking punitive damages and attorneys fees, neither of which are recoverable under her contract action. Accordingly, there can be little question but that Plaintiff's proposed amendment introduces a new cause of action.

The more difficult question is which statute of limitations applies. The failure of the legislature to provide a statute of limitations for a bad faith claim under §8371 has spawned numerous decisions attempting to describe this type of claim. The Defendant contends that a bad faith claim sounds in tort and therefore is subject to a two-year statute of limitations pursuant to 42 Pa.C.S.A. §5524[1]. Plaintiff counters the appropriate statute of limitation is six years pursuant to 42 Pa.C.S.A. §5527[2].

The Defendant argues the legislature created a new tort in §8371 by providing a remedy for claims denied in bad faith. The genesis of this position is a Pennsylvania Supreme Court decision in 1981 in which the Pennsylvania Supreme Court refused to recognize a "new tort" for first party bad faith and encouraged the legislature to take appropriate action. *D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance*

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[1] 42 Pa.C.S.A. §5524(7) provides for a two-year statute of limitations for actions involving:

> (a) any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud, except an action or proceeding subject to another limitation specified in this sub-chapter.

[2] The relevant portions of 42 Pa.C.S.A. §5527 are as follows:

> Any civil action or proceeding which is neither subject to another limitation specified in this sub-chapter nor excluded from the application of a period of limitations by §5531 (relating to no limitation) must be commenced within six years.

Company, 494 Pa. 501, 431 A.2d 966 (1981). The legislature acted nine years later in the passage of §8371 but as noted did not specify a statute of limitations. Subsequently, in one of three decisions from the United States District Court for the Eastern District of Pennsylvania, the federal court relied on the *D'Ambrosio* decision to conclude that the Pennsylvania Supreme Court deems a bad faith claim as tortious and subject to a two year statute of limitations. *Nelson v. State Farm Mutual Automobile Insurance Company*, C.A. #97-4653 (December 12, 1997). The *Nelson* court took an extensive look at the history of bad faith and concluded that the legislature accepted the Supreme Court's invitation in *D'Ambrosio* to create a new tort by passing §8371. Further, the *Nelson* court surveyed various approaches taken by state Supreme Courts and concluded that 29 states recognize bad faith as a tortious claim.

This Court is reluctant to accept precedent by polling. Because the Pennsylvania Supreme Court has yet to address this issue, this Court cannot share the oddsmakers percentages the Supreme Court will follow other state Supreme Courts or even rely on the obiter dictum of the *D'Ambrosio* decision in 1981.

While other courts have struggled with determining whether a bad faith claim is either an action in tort or contract, this Court concludes it is actually sui generis. A bad faith claim encompasses duties both in tort and contract law. The insurer's duty to conduct a reasonable investigation and deal fairly with the insured is a contractual obligation. The behavior in performing this duty could be deemed tortious. Hence this Court concurs with the wise observation of the Honorable Judge Anita Brody that "no explicit statute of limitations applies to a statute that can sound in many different causes of action each governed by a different limitations". *Woody v. State Farm Fire and Casualty*, 965 F. Supp. 691, 695 (E. D. Pa. 1997).

When, as in the case at bar, there is no specific statute of limitation, §5527 provides a "catchall" statute of limitations of six years. Because Plaintiff's proposed amendment comes within six years, it shall be granted.

CONCLUSION

Plaintiff's proposed amendment introduces a new cause of action subject to the six year statute of limitations found in 42 Pa.C.S.A. §5527. Because six years has not lapsed, the amendment shall be granted.

ORDER

AND NOW to-wit, this 1st day of February, 1999, for reasons set forth in the accompanying Opinion, Plaintiff's Motion to Amend is hereby **GRANTED**.

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

EXTENDED CARE CENTERS, INC., d/b/a LAKE ERIE INSTITUTE OF REHABILITATION, a Pennsylvania Corporation, Plaintiff

v.

COUNTY OF ERIE, CITY OF ERIE, SCHOOL DISTRICT OF THE CITY OF ERIE, BOARD OF ASSESSMENT APPEALS OF THE COUNTY OF ERIE, Defendants

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 9799-1993

LAKESIDE HEALTH CORPORATION, d/b/a GREAT LAKES REHABILITATION HOSPITAL, a Pennsylvania Corporation, Plaintiff

v.

COUNTY OF ERIE, CITY OF ERIE, SCHOOL DISTRICT OF THE CITY OF ERIE, BOARD OF ASSESSMENT APPEALS OF THE COUNTY OF ERIE, Defendants

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION- LAW No. 9800-1993

RULES OF CIVIL PROCEDURE/MOTION FOR SUMMARY JUDGMENT AS TO DAMAGES

Motion for Summary Judgment as to Damages is appropriate as to the Plaintiff and shall be granted even though Defendants have indemnity claims against each other that remain pending.

SKILL DAMAGES/CALCULATION OF INTEREST

In a case which involves an invalid tax, rather than an incorrectly calculated one, interest shall accrue from the date of the overpayment rather than from the date of the entry of judgment.

DAMAGES/PAYMENT OF INTEREST

Since interest is not considered a penalty, but as compensation for use of the money, Plaintiff's delay does not affect the Defendant's obligation to pay interest.

Appearances: Stephen R. Thelin, Esquire
Kenneth D. Chestek, Esquire
Gerald J. Villella, Esquire
John W. Beatty, Esquire
Dan W. Susi, Esquire

OPINION and ORDER

Anthony, J., February 2, 1999

This matter comes before the Court on the Plaintiffs' Motions for Summary

Judgment as to damages. After considering the arguments of counsel, as well as reviewing the record of these cases, the Court will grant the Plaintiffs' Motions. The recent procedural history is as follows.[1]

On March 13, 1998, the Court granted Plaintiffs' Motions for summary judgment as to the counterclaims of the City of Erie ("City") and the School District of the City of Erie ("School District"). On December 17, 1998, Plaintiffs' filed Motions for Summary Judgment as to damages[2]. The Court held argument on January 26, 1999, on these Motions.

The Plaintiffs have argued that since liability has been determined and the amount of tax paid is not in question, a motion for summary judgment is appropriate. The only defendant to contest the appropriateness of the summary judgment is the School District. The School District alleges that since it still has an indemnity claim against the County of Erie ("County") and the Board of Assessment Appeals ("Board") summary judgment is inappropriate. However, the School District has cited no cases and this Court is unable to find any case law supporting the School District's position. The Rules of Civil Procedure allow for partial summary judgments[3] and judgments as to damages.[4] Accordingly, this Court finds that summary judgment is appropriate.

The second issue is the amount of interest to be assessed against the Defendants. The County and City have alleged that interest should only accrue from March 13, 1998, the date of the summary judgment as to Defendants' counterclaims. To support this position, the County relies on the recent Commonwealth Court decision in *Air Products & Chemicals, Inc. v. Board of Assessment Appeals of Lehigh County,* 720 A. 2d 790 (Pa. Cmwlth. 1998). In that case, the Commonwealth Court determined that interest on a tax assessment refund should only be due from the date of the judgment and not the date the tax was paid. In so holding, the

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[1] The factual and procedural history was set out in this Court's Opinion and Order of February 12, 1997. Further procedural history was put in the Court's March 13, 1998 Opinion. The Court need not recount those again here.

[2] Plaintiff has also filed a motion to correct the record in regards to the parcel in question. The parcel in dispute in *Extended Care* was misidentified in court records as being Index No. (172) 4006-212 located at 137 West 2nd Street when the parcel is actually located at 145 through 149 West 2nd Street and is Index No. (17) 4006-217. As there was no dispute as to this issue, the Court will grant the motion.

[3] Pa.R.C.P. § 1035.2

[4] Note to Pa.R.C.P. § 1035.2

Commonwealth Court relied on a distinction made in *Welsh Grant Developers Co. v. Board of Revision of Taxes*, 503 A. 2d. 98 (Pa. Cmwlth. 1986). That case distinguished between cases where the tax was incorrectly calculated, in which interest accrued from the date of judgment, and cases where the tax was invalid, in which interest accrued from the date of payment.

This Court, however, finds the case *sub judice* is governed by 72 Pa.C.S.A. §5566b(c)(1) and §806.1. Section 5566b(c)(1) provides that all interest is to be paid pursuant to §806.1. Section 806.1 clearly provides that interest is to accrue from the date of the overpayment. Where the intent of the legislature is clear, then this Court need look no further.

However, even if the distinction in *Welsh Grant* was appropriate, this Court finds this case to involve an invalid tax rather than an incorrectly calculated one. This case deals with whether the various defendants should have assessed the tax against the plaintiffs at all, not that the amount of the assessment was inaccurate. As such, it is more like *Cities Service Oil Company v. City of Pittsburgh,* 297 A. 2d 466 (Pa. 1972) than *Air Products. Cities Service* was an incorrectly assessed mercantile tax. The Supreme Court allowed interest from the date of payment because the City had no right to assess the tax. The Court finds that the Defendants in this case did not have the right to assess the tax. While the Defendants may have believed in good faith that they had a right to assess the tax and have simply misread the statute, it does not affect the Court's previous decision that the Defendants did not have the right to assess the tax in the first place. Thus, interest shall accrue from the date of payment.

A final issue that needs to be determined is whether the Defendants' allegations that the Plaintiffs' delay has affected the payment of interest. This Court notes that in *Cities Service, supra,* there was a delay of 12 years between the filing of an appeal and when the judgment was entered. Even so, the Supreme Court has found that interest is to be considered not as a penalty, but as compensation for use of the money. *Id.* The Court does not find the delay in this case to be that long.[5] Furthermore, Defendants have had the use of Plaintiffs' money for that time and should be required to pay interest.

ORDER

AND NOW, to-wit, this 2nd day of February, 1999, it is ORDERED and DECREED that Plaintiffs' Motions for Summary Judgment as to Damages are hereby GRANTED. It is further ORDERED that:

[5] The overpayment occurred in 1990 and 1991. The case was filed in 1993 and summary judgment was decided as to the various allegations of liability on March 13, 1998.

Judgment is entered in favor of Plaintiff Extended Care Centers, Inc.:

1. Against Defendant School District of the City of Erie for the following amounts:
   A. Taxes paid in 1990 - $9,270.70
   B. Taxes paid in 1991 - $9,888.75
   C. Interest accrued through December 31, 1998, on taxes paid in 1990[6] - $7,174.00
   D. Interest accrued through December 31, 1998 on taxes paid in 1991 -$6,564.50
   E. Interest accrued from January 1, 1999 to be calculated at 7% interest.

2. Against Defendant City of Erie for the following amounts:
   A. Taxes paid in 1990-$8,240.62
   B. Taxes paid in 1991 - $8,343.63
   C. Interest accrued through December 31, 1998 on taxes paid in 1990 - $6,299.90
   D. Interest accrued through December 31, 1998 on taxes paid in 1991 - $5,460.85
   E. Interest accrued from January 1, 1999 to be calculated at 7% interest.

3. Against Defendant County of Erie for the following amounts:
   A. Taxes paid in 1990 - $2,925.42
   B. Taxes paid in 1991 - $3,316.85
   C. Interest accrued through December 31, 1998 on taxes paid in 1990 - $2,210.01
   D. Interest accrued through December 31, 1998 on taxes paid in 1991 - $2,140.87
   E. Interest accrued from January 1, 1999 to be calculated at 7% interest.

Judgment is entered in favor of Plaintiff Lakeside Health Corporation:

1. Against Defendant School District of the City of Erie for the following amounts:
   A. Taxes paid in 1990- $60,747.75
   B. Taxes paid in 1991 - $64,797.60

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[6] The applicable interest rates are as follows- 1990- 11%, 1991 - 11%, 1992 - 9%, 1993 - 7%, 1994- 7%, 1995 - 9%, 1996- 9%, 1997- 9%, 1998- 9%. 61 Pa.R.C.P. §4.2.

C. Interest accrued through December 31, 1998 on taxes paid in 1990 - $47,008.77
D. Interest accrued through December 31, 1998 on taxes paid in 1991 - $43,014.95
E. Interest accrued from January 1, 1999 to be calculated at 7% interest.

2. Against Defendant City of Erie for the following amounts:
A. Taxes paid in 1990 - $53,998.00
B. Taxes paid in 1991 - $54,672.98
C. Interest accrued through December 31, 1998 on taxes paid in 1990 - $41,281.10
D. Interest accrued through December 31, 1998 on taxes paid in 1991 -$35,783.09
E. Interest accrued from January 1, 1999 to be calculated at 7% interest.

3. Against Defendant County of Erie for the following amounts:
A. Taxes paid in 1990 - $19,169.79
B. Taxes paid in 1991 - $21,734.20
C. Interest accrued through December 31, 1998 on taxes paid in 1990 - $14,481.86
D. Interest accrued through December 31, 1998 on taxes paid in 1991 - $14,028.38
E. Interest accrued from January 1, 1999 to be calculated at 7% interest.

BY THE COURT
/s/ **FRED P. ANTHONY, Judge**

LOUIS J. PORRECO

v.

SUSAN J. PORRECO

EVIDENCE/DEPOSITIONS

Where a witness is more than one hundred miles from the place of trial, and the party offering the witness's deposition testimony is not able to compel the witness's attendance by subpoena and did not procure the witness's absence, a trial court is without discretion to exclude the deposition from evidence.

EVIDENCE/DEPOSITIONS

If a party was present or represented at the taking of a deposition, the party's failure to cross-examine the deponent will not preclude admission of the deposition at trial if the other requirements for admission are met.

FAMILY LAW/PRE-NUPTIAL AGREEMENTS

Where, at the time of entering into a Pre-Nuptial Agreement, wife was young, had only a high school education, was estranged from her family, and was supported financially, socially and emotionally by husband and was guided in her everyday actions by her trust in husband, who was older, wealthier, socially prominent and a sophisticated businessman, a confidential relationship existed.

FAMILY LAW/PRE-NUPTIAL AGREEMENTS

Court will rescind Pre-Nuptial Agreement where confidential relationship existed between husband and wife at time agreement was signed and husband procured wife's signature by his representing a worthless stone as a valuable four carat diamond.

FAMILY LAW/PRE-NUPTIAL AGREEMENTS

Pre-Nuptial Agreement may be rescinded for fraud where husband misrepresented authenticity and value of engagement ring in order to induce wife to sign Pre-Nuptial Agreement providing her with minimal compensation compared to what she would have receive under equitable distribution.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA FAMILY COURT DIVISION NO. 13920-1994

Appearances: Joanne Ross Wilder, Esquire
Chris F. Gillotti, Esquire
James H. Richardson, Jr., Esquire

OPINION AND ORDER

Palmisano, P.J., March 5, 1999

Pending before the Court is the Petition for Special Relief to Set Aside Premarital Agreement of Susan J. Porreco. Specifically, Ms. Porreco alleges

that the parties' premarital agreement is invalid based upon the misrepresentation of the value of her engagement ring by the Respondent Louis J. Porreco. A hearing on this matter was conducted on December 2, 1998, and the post-trial memoranda were submitted by both sides.

This case as presented to the Court is an unusual combination of intrigue, drama, beauty, and glamour. The passage of time only complicates the issues, impeding witnesses' ability to recall events despite their generally good faith efforts to extract from their memories the relevant details. The Court has, however, thoroughly reviewed all of the testimony and exhibits in great detail, and the decision is as follows.

I. EVIDENTIARY RULING

During the hearing, the Court reserved ruling on evidentiary issues concerning (1) the admission of certain hearsay testimony and (2) the admission of the deposition of an absent witness. First, the Court holds that the rebuttal hearsay testimony offered by Wife for the purpose of impeaching Husband's witness shall be admitted for that limited purpose only. To the extent that Wife's testimony is, in fact, hearsay, it will not be viewed as substantive evidence. *See*, T. 76-82.

Secondly, the Court holds that the deposition testimony of Judah Samet shall be admitted into evidence pursuant to Pa.R.C.P. 4020(a)(3)(b), (d) ("Rule 4020"). Under Rule 4020, so far as the proposed testimony would be admissible under the rules of evidence,

> [t]he deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds
> ...
> (b) that the witness is at a greater distance than one hundred (100) miles from the place of trial or is outside the Commonwealth, unless it appears that the absence of the witness was procured by the party offering the deposition, or
> ...
> (d) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena...

Pa.R.C.P. 4020(a), (a)(3)(b), (a)(3)(d). The Superior Court has held that when the above criteria have been met, a trial court is without discretion to exclude a deposition. *Larsen v. Philadelphia Newspapers, Inc.*, 602 A.2d 324, 344 (Pa.Super. 1991); *Williamson v. Philadelphia Trans. Co.*, 368 A.2d 1292, 1295 (Pa.Super. 1976); *Kuntz v. Firth*, 264 A.2d 432, 433 (Pa.Super. 1970). Wife asserted at trial and in memorandum that the above requirements have not been fulfilled because the deposition was taken for discovery purposes; because Husband maintains a close association with the witness; and because Wife did not have the benefit of cross-examination of the

witness.[1] Additionally, Wife asserts that Husband "should be charged with procuring Samet's unavailability, particularly in view of his conduct in failing to notify Wife that he had received information that Samet did not intend to appear and would take that opportunity to offer his deposition." Trial Memorandum of Wife, 3.

While the Court is sensitive to Wife's arguments, the Supreme Court's decision in *Riggi v. Control Construction Corp.*, 642 A.2d 451 (Pa. 1991), requires admission of the deposition. There, the discovery deposition testimony of a defense witness was deemed properly admitted at trial where the witness, who was under subpoena to appear at trial the next day, informed defense counsel he would not be attending because he would be flying immediately to Atlanta, Georgia, a locale more than 100 miles from the trial. *Riggi*, 642 A.2d at 452. The Supreme Court ruled that depositions taken for discovery purposes, like the deposition in the instant case, are not exempted from the scope of the broad language of Rule 4020. *Id.* at 453. Moreover, the *Riggi* court upheld the lower court's ruling in a fact pattern substantially similar to the instant one: Mr. Samet failed to comply with a subpoena to testify,[2] and, based on his Pittsburgh residence, was more than one hundred miles from the place of trial. Moreover, as in *Riggi*, defense counsel was aware prior to the hearing that Mr. Samet would not be attending. No evidence is otherwise before the Court suggesting that Husband procured Mr. Samet's absence, and the Court would be overreaching its authority to infer such a conclusion from the alleged close relationship of the parties. Finally, Wife's contention that she was unable to cross-examine the witness must also fail, as Rule 4020 allows a deposition to be admitted and "used against any party who was present or represented at the taking of the deposition or who had notice thereof..." Pa.R.C.P. 4020(a) (emphasis added).

Therefore, because the testimony of Mr. Samet would otherwise be admissible under the Rules of Evidence,[3] and because the grounds

[1] The Deposition of Judah Samet was taken on behalf of Wife during discovery, wherein Wife examined the witness, followed by cross-examination by Husband and re-examination by Wife.

[2] Samet's failure to comply with the subpoena does seem particularly egregious to Wife as well as the Court in light of the fact that, upon motion to quash the subpoenas of Samet and another witness due to a conflict between the original hearing date and a religious holiday of the witnessess, this Court rescheduled the entire hearing in order to accomodate their presence. The law, however, does not allow the Court to punish a party for this type of conduct by excluding evidence.

[3] Although the testimony of Mr. Samet is admissible overall, the Court will limit its review of the substance of that testimony in accordance with the rules of evidence as if Mr. Samet were testifying in open court. *See, Jistarri v. Nappi*, 549 A.2d 210, 216 (Pa.Super. 1988).

enumerated in Rule 4020 have been met, the court has no discretion to exclude the deposition testimony and it shall be admitted into evidence.

II. FINDINGS OF FACT

The subject of this dispute concerns an engagement ring containing a cubic zirconia stone, rather than a four (4) carat diamond,[4] Wife's knowledge thereof upon entering the marriage, and how the ring affects the parties' rights and liabilities under a premarital agreement. The Court finds the following as fact.

Susan Porreco ("Wife") and Louis Porreco ("Husband") first met in the summer of 1980, when Wife was seventeen (17) years of age and Husband was forty-five (45). Transcript, 51. They began dating in January of 1981 while Wife was still living at home with her parents and working at a ski shop. *Id.* Wife had not completed her senior year of high school, but had subsequently obtained a GED certificate. T., 52. Husband was undergoing divorce proceedings from a prior marriage, which officially ended on or around the summer of 1982. *Id.* The parties embarked on a "whirlwind relationship," which greatly upset Wife's parents due to the age disparity between the parties, and Wife left home. *Id*., 110. Husband provided Wife with an apartment, insurance, an automobile, and "everything [she] needed." *Id.*

The parties began living together roughly one year later. *Id.* During this time period prior to marriage, the parties' relationship revolved around Husband, who chose the parties' friends, entertainment, places to dine, and travel destinations. T., 53. Husband was unequivocally Wife's best friend and personal confidante, and the parties agreed, at Husband's request, not to discuss their personal lives and issues with anyone but each other, including family. T., 57.

Husband, a successful businessman, owned a local car dealership and involved himself in numerous joint ventures and business opportunities. T., 127. He handled all of the finances, providing Wife with a weekly allowance, access to one of his credit cards as a secondary card holder, and a gas charge account at his car dealership's fueling station. T., 53-54. Husband paid each of those bills himself. T., 55. Wife had her own, separate checking account into which she deposited her own earnings and any money given to her. T., 91-92. The parties maintained no joint accounts. T., 92. Husband gave Wife stock, which she controlled. *Id.* Wife managed what little money she had of her own and she acted at Husband's direction. *Id.*

Wife's employment around this same time consisted of a six-month stint at an antique store owned and operated by Husband and Husband's

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[4] At a point well into the proceeding, Husband stipulated for the record that the stone was not alleged to be real. Transcript, 139-140.

mother, which the mother abandoned for Florida and left Wife to run. *Id.* Wife, who did not receive a paycheck for her labor, lacked the knowledge and experience to run an antique store, and Husband made the decision to close the establishment. *Id.* Wife then proceeded to take real estate courses in preparation for a license, and she began working in real estate in July, 1984. T., 56. According to Wife's testimony, Husband encouraged her to become involved in selling real estate because he did not want her to look like a "bimbo". T., 93. Wife "agreed with whatever Lou said." *Id.* According to Wife, "[j]ust about everything I did in life from the moment I woke up to the second I went to bed had to do with Lou, and my trust in him, and my everyday actions, everything." *Id.*; T., 95.

The parties discussed marriage over several years prior to becoming engaged at Christmas time,[5] when Wife received the engagement ring at issue.[6] T., 57-59. After becoming engaged, the animosity between Husband and Wife's family began to subside, with the exception of Wife's Father. T., 110, 111.

Prior to receiving the engagement ring, Wife had received several rings from Husband, selected by Husband that contained genuine stones. *Id.* Wife did not accompany Husband to pick out those jewelry pieces. T., 61. Notably, however, Wife did accompany Husband to Schiffman Jewelers in Pittsburgh in July, 1984, to select a wedding ring prior to their August wedding. Id. Wife did not know the value of the wedding ring at that time, as all of the negotiations were undertaken between Husband and the jeweler's then-proprietor, Irving Schiffman. *Id.*

After becoming engaged, the parties took a trip to the Orient, visiting Hong Kong, China, and Japan, with a final stop in Hawaii. T., 97. At this point, Husband's version of the story comes into play, which this Court is not inclined to adopt as fact due to the lack of credibility exhibited by Husband on the witness stand and the internally inconsistent nature of his testimony. According to his testimony, the ring was acquired on the parties' one and only trip to the Orient in 1983. T., 129; Respondent's Exhibit A. He said that Wife wanted a cubic zirconia in lieu of a real stone because she would be wearing the ring to the barn to tend to and ride the horses. T., 130, 150-151. According to Husband, they decided to purchase a ring some place other than in Erie so as to avoid embarrassment to Wife, who didn't want anyone to know the ring was fake, given how "well known"

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[5] The date of the parties' engagement is in dispute. The Court does not, however, find that the discrepancy as to the date of the engagement undermines Wife's credibility with respect to the overall order of events and her ability to recall them.

[6] The original setting of the ring was different from the ring produced in court in that the original was a Tiffany setting involving a single stone with two small diamonds on either side. The setting was subsequently changed in November, 1984. T., 59.

the parties were in Erie. T., 130. Husband, in the course of his testimony, stated or affirmed approximately twelve (12) times that the ring was therefore purchased in Hawaii, the last leg of the Orient trip. T., 129, 130, 131, 147, 150. He went on to describe having visited a commercial district in Hawaii in which the ring was allegedly purchased by credit card, but he did not recall how much it cost or if Wife began wearing it upon return from the trip. T., 131-132. His testimony was directly impeached by Wife's testimony that she was caring for, but not riding horses at that time, T., and, more persuasively, by the photographs entered into evidence as Petitioner's Exhibits 7, 8, and 9. The photographs clearly depict Wife, in China, wearing the subject ring in its original setting, thus making it impossible for the ring to have been purchased in Hawaii at the tail end of the trip. T., 173; Petitioner's Exhibits 7, 8, 9. Even more damaging is that Husband specifically denied having shopped anywhere else for the ring prior the visit to Hawaii. T., 130. Not until his testimony was challenged by the photographs did he recant and admit that the ring was probably purchased in Hong Kong, which is very telling as to the overall lack of veracity of Husband's testimony. T., 163-164.

Indeed, Husband's version was, to this point, not a very palatable one to the Court. Whatever tenuous credibility he may have had up to this point, however, simply collapsed when he abruptly altered his version of events. Husband's testimony, and thus his ultimate credibility as a witness, pure and simply self-destructed.

On or about July of 1984, Husband presented Wife with the first draft of a prenuptial agreement. T., 61-62; Petitioner's Exhibit 1. Prior to then, Wife had been unclear as to what a prenuptial agreement was. *Id.* Husband had mentioned "prenuptial agreements" prior to presenting her with one, but not in any context that Wife connected to the parties' relationship. T., 61-62, 99-100. Husband did not discuss the agreement with her, only to say that it was a standard agreement with the provisions left blank, and that Wife should seek legal counsel. T., 62-63, 109. A second version of the agreement was presented to her that contained provisions for the amount she would receive ($3,500) for each year of marriage, as well as a motor vehicle and automobile and health insurance for a period of one year from the date of termination of the marriage. T., 64; Petitioner's Exhibit 2. Wife did not ask Husband questions about the provisions, stating, "Lou gave me this agreement, I did what Lou asked me to do and I agreed to this agreement." T., 64-65. Husband's insistence that Wife herself requested these limited provisions is not believed by the Court. *See*, T., 143.

The final and complete version of the parties' prenuptial agreement was signed effective August 8, 1984. Petitioner's Exhibit 3. This final version contained a paragraph stating that attorney Elliott Segel represented her, rather than the law firm of Knox, Graham, McLaughlin, Gornall & Sennett

as was mentioned in the second draft. Petitioner's Exhibits 2, 3. Wife's uncle, John McLaughlin, was an attorney with the Knox firm, whom she had originally sought to represent her. She opted not to, however, when her father called her and requested that she not "drag [her] family into the situation." T., 66. She then contacted a friend mutual to the parties, who declined to represent her. Attorney Segel, who lived in the guest house on Husband's property, was finally contacted and agreed to the representation. *Id.*

Attorney Segel was present when Wife signed the agreement. T., 66. Wife consulted with him on one occasion. *Id.* He never conducted negotiations on her behalf, and according to Wife, never explained anything to her about the agreement, including the fact that she would be waiving certain rights. T., 66, 101. Wife testified that although she read the agreement, she did not understand it and she did not ask Attorney Segel any questions about it. T., 101. She did understand, however, the disposition she would receive in the event of divorce, including the $3,500 for every year of marriage, the car, and the insurance. T., 101-102. According to Wife, "I was told I was going to sign the document...I did what I was told." T., 103. She relied on the truthfulness of the provisions contained therein, however, and would not have signed it had she known it contained lies, namely the misrepresentation of the value of the engagement ring. T., 104.

Of critical significance to this Court is the personal financial statement of Wife, the draft of which was admitted at Petitioner's Exhibit 4 and incorporated in its entirety into the final version of the agreement at Petitioner's Exhibit 3. Wife first received the statement from Husband at the office of Husband's attorney, Jim Richardson, immediately prior to signing the agreement. T., 67. Wife was unaware beforehand that such a statement was necessary. *Id.* Husband told her that she needed to sign the statement in order to attach it to the premarital agreement. *Id.*

The importance of the draft financial statement is that the information contained in it was prepared by Husband, and the form was filled out entirely in Husband's handwriting. T., 66-67, 153; Petitioner's Exhibit 4. The itemized assets contained a diamond cocktail ring listed at $2,050; a diamond cluster ring listed as $3,525; the wedding ring at $13,900; and a blue fox coat as $5,000. The subject engagement ring was listed at $21,000. Petitioner's Exhibit 4. Wife believed that the values listed by Husband represented the true value of the items. T., 68. Significantly, all of the jewelry listed on the statement were legitimate pieces of jewelry, with the notable exception of the engagement ring. Wife never independently had the items appraised, nor did she feel compelled to do so. T., 69. Moreover, every single item listed in the schedule had been given to Wife by Husband, including all of the jewelry, the cash she had in the bank and on hand, and the stock valued at $1,510. Petitioner's Exhibit 4; T., 92. Even the $1,166

balance on the Visa credit card, listed in the liability column, was held in Husband's name, as Wife was merely a secondary cardholder on his account. Petitioner's Exhibit 4; T., 107-108.

Husband's explanation for the schedule of assets is completely incredible to this Court. He insists that he knew all along that the ring was fake and without value, yet he intentionally listed the value as $21,000. According to Husband, no consideration was ever given to the idea of leaving the worthless ring out of the schedule. T., 162. He implicates Wife's concern that people might see the schedule and learn that the truth about the stone, and his own concern and embarrassment that since "Susan wore it under everybody's noses, it would be very unusual for it not to appear on the statement." *Id.* When asked about who would possibly see the schedule, he mentioned Attorney Segel, Joe Messina, and Jim Richardson, all of whom were attorneys representing him or Wife at that time. *Id.* The Court finds it untenable that an astute and sophisticated businessman like Husband, certainly accustomed to availing himself of the professional services of an attorney and the confidential nature of the communications associated therewith, would find it necessary to bow to Wife's alleged proprietary concerns about what their attorneys might think if the ring was absent from the statement. Moreover, such an explanation only suggests that Husband, by not confiding the truth in his attorneys at a critical phase in the contract's formation, attempted to pull the wool over everyone's eyes in order to further his deceitful representation.

When the parties married on August 24, 1984, Wife was twenty-one (21) years of age. T., 53. Soon thereafter, Wife fractured a stone in her wedding band and the broken ring was shipped down to Schiffman Jewelers. T., 84. While in Pittsburgh for Thanksgiving weekend with her family, Wife stopped in to Schiffman's store. *Id.* Mr. Schiffman helped Wife select a new wedding band and a new setting for the engagement ring. T., 86. She testified that no one else was present at this meeting, and denied that Mr. Schiffman's son-in-law and employee, Mr. Samet, was present. T., 89. Interestingly, although the wedding band was already in Schiffman's possession, Mr. Schiffman did not do the work on the wedding band or the engagement ring at that time. *Id.* Wife testified that this was because he needed to first "contact Lou to get permission." *Id.* The engagement ring was later mailed down to Pittsburgh by Husband. T., 86-87.

Again, Husband's version of this piece of the story is not credible. He testified that Wife and he both visited Schiffman's together in late November, 1984, to select the new wedding band and engagement ring setting, rather than Wife having made the trip alone. T., 133, 138. Husband testified that Mr. Samet pointed out to him and Wife that the stone was not a real one, at which point he and Wife spontaneously made up a story about having gotten the ring from a jeweler in Buffalo who had bought a car from his dealership. T., 140. He offered no credible explanation as to

why the engagement ring was not simply left in the jeweler's custody rather than being mailed down at a later date. Moreover, he fails to explain why a letter from Irving Schiffman, dated November 28, 1984, plainly refers to the ring as "wife's marquis diamond." *See*, Deposition of Judah Samet Exhibit.[7] The Court find it implausible that a reputable jeweler such as Irving Schiffman, unless laboring under an honest and professional belief to the contrary, would refer to a phony stone as a "diamond" and potentially subject himself to liability for switching a legitimate stone. Additionally, Husband offers no credible explanation as to why the couple was too embarrassed to take a fake stone to a jeweler in Erie to be reset, but found it reasonable to take the stone to a reputable jeweler in Pittsburgh whose salespeople often traveled to Erie to conduct business. Husband's testimony on this matter defies logic, and the Court declines to adopt it as fact.

After the parties' separation, Wife wished to liquidate some pieces of her jewelry, including the engagement ring. She took them to Floyd & Green Jewelers in Aiken, South Carolina in March 1995. T., 8, 74-75. A jeweler there, Mr. Thomas Williams, advised her that the stone was not real. T., 75. This was the only jewelry piece she ever brought in to Floyd & Green Jewelers that was not authentic. T., 13. Upon learning this information, Wife immediately telephoned Schiffman Jewelers in Pittsburgh. *Id*.; Petitioner's Exhibit 5; Deposition of Judah Samet, 5. She asked to speak to Ron Barasch, vice president and 35 percent shareholder of Schiffman's, who had taken over for Irving Schiffman after his death. T., 28, 75. When she informed him that she had learned her engagement ring was fake, Mr. Barasch made statements reflecting his knowledge that the ring was not, if fact, genuine.[8] T., 76. Mr. Barasch made statements to the effect that he had told Husband, "you don't get a Rolls Royce for the price of a Ford." T., 76-77. Wife contacted Mr. Barasch again in June of 1997. T.,

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[7] Since Judah Samet failed to appear at the hearing, and his testimony was introduced by way of deposition transcript, the Court was unable to assess his credibility as a witness in person. His testimony, therefore, is accorded little weight.

In considering his testimony that Wife was present when he made a statement to Irving Schiffman as to the ring's lack of authenticity, the Court finds that his statements are inconclusive to show that Wife was aware that the ring was not genuine or that she was scheming with Husband to pass the stone off as real.

[8] Wife's testimony concerning her conversation with Mr. Barasch is, for the most part, inadmissible hearsay allowed for the limited purpose of impeaching Mr. Barash's earlier testimony. His specific statement that the ring was never real, however, is not offered to prove the truth of the matter asserted. Rather, it goes to his knowledge that the stone was fake, and thus is admissible as substantive evidence.

77; Petitioner's Exhibit 6. This time, Mr. Barasch indicated that he did not want to speak with her, and Wife got the impression that Mr. Barasch did not want Schiffman's to get drawn into the litigation between Husband and Wife. T., 80. While Mr. Barasch may not have been able to recall having spoken to Wife on the telephone on either occasion, T,. 30-31, 32-37, the copies of Wife's phone bill coupled with her testimony convince the Court that the conversations did , in fact, take place. Petitioner's Exhibits 5, 6; T., 75-80. Her conversations with Mr. Barasch further illustrate Wife's lack of prior knowledge concerning the ring's true value.

Around this time, Wife also placed a telephone call to Judge Jess Jiuliante, the officiant at the parties' wedding, to inquire about her legal rights concerning the ring. This conversation, as well, supports her lack of prior knowledge.

Wife plainly testified that had she known that the value of the engagement ring was misrepresented to her and that the ring, in fact, contained a worthless stone, she would not have signed the agreement, and "would not have married the man." T., 71.

III. LEGALANALYSIS

The Supreme Court of Pennsylvania has held that premarital agreements are presumed valid and binding on the parties thereto. *In re Estate of Hillegass*, 244 A.2d 672, 675 (Pa. 1968). Such agreements are enforceable contracts and are therefore governed by general contract principles. *Simeone v. Simeon*e, 581 A.2d 162, 165 (Pa. 1990) (McDermott, J. dissenting); *Mormello v. Mormello*, 682 A.2d 824 (Pa.Super. 1996). Thus, the parties to a premarital contract are bound by their agreement regardless of whether they read or understood the terms or whether the terms were fair or reasonable. *Id.* Like a contract, however, a prenuptial agreement may be avoided under various legal theories which are explored in greater depth below.

Wife sets forth legal bases for setting aside the prenuptial agreement, each of which will be addressed in turn.

A. Confidential Relationship

First, Wife argues that by misrepresenting the value of what amounted to a worthless engagement ring, Husband violated the confidential relationship existing between them so as to render the agreement voidable. "When the relationship between the parties to an agreement is one of trust and confidence, the normal arm's length bargaining is not assumed,[9]

[9] In as prenuptial situation, the parties "do not quite deal at arm's length, but rather at the time the contract is entered into stand in a relation of mutual confidence and trust that calls for disclosure of their financial resources." *Simeone*, 581 A.2d at 167. While confidential relationship cases to date have not specifically dealth with the existence of a confidential relationship in the context of a premarital agreement, the Court feels that the facts in this instance warrant evaluation under this line of legal reasoning.

and overreaching by the dominant party for his benefit permits the aggrieved party to rescind the transaction." *Frowen v. Blank*, 425 A.2d 412, 416 (Pa. 1981); *see also*, *Biddle v. Johnsonbaugh*, 664 A.2d 159 (Pa.Super. 1995). The assumption that each party is acting in his or her own best interest is negated by the presence of a confidential relationship. *Id.* Moreover, once a confidential relationship has been established, the transaction is presumed voidable, and the burden shifts to the proponent of the agreement to demonstrate "that it was fair under all of the circumstances and beyond the reach of suspicion." *Id.*

Generally, the test for determining the existence of a confidential relationship is whether the evidence is clear that the parties did not deal on equal terms. *Id.* One may be found in "any relationship existing between parties to a transaction wherein one of the parties is bound to act with the utmost good faith for the benefit of the other party and can take no advantage to himself from his acts relating to the interest of the other party." *Biddle*. 664 A.2d at 161-162. On one side of the transaction there is overpowering influence, and on the other, weakness, dependence, or trust. *Frowen*, 425 A.2d at 417; *Biddle*, 664 A.2d at 162. "This confidential relationship is not limited to any particular association of the parties, but exists whenever one is in a position of advisor or counselor, whereby the other party, with reasonable confidence, trusts that person to act in good faith for the other's interest." *Rebidas v. Murasko*, 677 A.2d 331, 334 (Pa.Super. 1996), *citing, Biddle, supra*. Except where one exists as a matter of law,[10] the existence of a confidential relationship is a question of fact to be established by the evidence. *Biddle*, 664 A.2d at 162; *In Re Estate of Mihm*, 497 A.2d 612, 614 (Pa.Super. 1985).

The evidence is clear that a confidential relationship existed in this case at the time of entering into the premarital agreement and that the parties did not deal on equal terms. On one side of the transaction was Husband, a much older, wealthier, and sophisticated businessman who was once divorced, accustomed to effecting business deals, and socially prominent. On the other side was Wife, barely an adult with a high school education, who had moved out of her parents' home and into Husband's and consequently estranged from her family. Having lived with him for over two (2) years prior to executing the agreement, she was supported financially, socially, and emotionally entirely by Husband, and was totally guided in her everyday actions by her trust in him. Husband offered no credible evidence to refute the facts leading the Court to this conclusion. Therefore, since a confidential relationship existed, Husband was bound to act in good faith for the benefit of Wife. By attempting to pass off a

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[10] The marital relationship is not confidential as a matter of law, but is a question of fact. *Yohe v. Yoh*e, 353 A.2d 417, 421 (Pa. 1976).

worthless stone as a four (4) carat diamond, he took advantage of Wife's naivete and improperly benefited himself, as the agreement was entirely one-sided in favor of Husband. Husband's lack of good faith renders the agreement unfair and voidable, and the Court, in good conscience, can not allow it to be sustained under the law.

B. Fraudulent Inducement

Rescinding a contract based on fraud involves a different set of criteria than a rescission based on breach of a confidential relationship. *Frowen v. Blank*, 425 A.2d 412, 415 (Pa. 1981).

The recognized elements of fraud in a contractual dispute include "(1) a mirepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker that the recipient will act; (4) justifiable reliance by the recipient upon the misrepresentation; and (5) damages to the recipient as the proximate result." *Volunteer Firemen's Ins. v. CIGNA Prop*. 693 A.2d 1330, 1340 (Pa.Super. 1997), *citing, Gibbs v. Ernst*, 647 A.2d 882 (Pa. 1994). A party alleging fraud must prove each element by clear and convincing evidence. *Id.*; *Moser v. DeSetta*, 589 A.2d 679, 682 (Pa. 1991). "Fraud consists in anything calculated to deceive, whether by single act or combination, or by suppression of truth...It is any artifice by which a person is deceived to his disadvantage." *In re McClellan's Estate*, 75 A.2d 595, 598 (Pa. 1950); *Bortz v. Noon*, 698 A.2d 1311, 1315 (Pa.Super. 1997).

Fraud has clearly been proven in this case. Husband misrepresented the authenticity and value of the engagement ring to Wife upon entering into the premarital agreement. He personally drafted Wife's financial statement in which the value of the ring was quite plainly displayed, and he intended that Wife be induced by the misrepresentation to sign the agreement. She did, in fact, rely to her detriment on his misrepresentation and she was justified in doing so, as Husband was in possession of the true value of the ring. Wife plainly testified that had she known that Husband was passing an imitation stone off as an authentic one, and that the agreement contained the lies that it did, she would never have entered into the agreement or the marriage. Finally, damages were plainly suffered, as Wife's pre-marital estate was improperly inflated, the perceived appreciating asset was, in fact, valueless, and distribution under the agreement was minimal compared to what she would potentially have received upon equitable distribution of the marital estate after ten years of marriage. Accordingly, premarital agreement is legally and morally void.

C. Full and Fair Disclosure

Finally, Wife alleges that Husband failed to fully disclose the true value of the engagement ring on her list of assets, which was prepared by Husband prior to their entering the agreement. Upon forming a prenuptial agreement, "full and fair disclosure of the financial positions of the parties is required" at the time the agreement was executed. *Simeone*, 581 A.2d at

167; *Karkaria v. Karkaria*, 592 A.2d 64 (Pa.Super. 1991). If the agreement provides that such disclosure has been made, then a presumption of full disclosure arises which is rebuttable by a showing of fraud or misrepresentation by clear and convincing evidence. *Id.*; *Mormello v. Mormello*, 682 A.2d 824 (Pa. Super. 1996).

Cases dealing with the issue of disclosure and prenuptial agreements do not address the unique situation presented here in which the non-disclosure alleged pertains to Husband's non-disclosure of the value of an asset belonging to Wife. Here, Husband personally prepared Wife's financial statement, and Husband occupies a position in which he, as the purchaser and donor of the ring, had reason to know its true value yet failed to reveal as much. Given precedent, however, the Court declines to vitiate the agreement on this basis, as sufficient reason exists to do so as outlined above.

IV. CONCLUSION

For the reasons set forth above, Wife's Petition for Special Relief to Set Aside Pre-Marital Agreement is hereby Granted.

ORDER

AND NOW, to-wit, this 5th day of March, 1999, upon consideration of the foregoing Petition for Special Relief to Set Aside Pre-Marital Agreement of Susan J. Porreco, and the arguments and evidence as presented by the parties at the hearing before this Court on December 2, 1998, it is hereby **ORDERED** that said Petition is **GRANTED**.

BY THE COURT:
/s/ **Michael M. Palmisano**
President Judge

ESTATE OF VERA DANCE

v.

BEVERLY DANCE PLAZA

EQUITY/REAL PROPERTY

Plaintiff's request for ejectment will be granted where, as a matter of statutory law, the defendant-occupant's failure to record her deed prior to the time the plaintiff became a holder of a judgment on the property rendered the defendant's deed fraudulent, null and void. 21 P.S. §§ 351, 444.

A deed purporting to convey land to which the grantor had no legal interest is not effective to convey title.

EQUITY/COLLATERAL ESTOPPEL

The doctrine of collateral estoppel, or issue preclusion, will apply where an identical issue in a prior action was necessary to final judgment on the merits, and the party against whom estoppel is raised was a party, or in privity with a party, to the prior action and had a full and fair opportunity to litigate the issue in question.

A defendant-occupant was in privity with two parties to a prior action regarding the validity of two deeds by virtue of her claim to be a partial successor in interest to the title held by one party and as an heir to the estate of a second party, and was therefore estopped from raising the validity of the deeds in a subsequent action.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA EJECTMENT NO. 11071 - 1998

Appearances: Robert J. Jeffery, Esq.
Mario P. Restifo, Esq.

OPINION

The Plaintiff filed a Motion for Partial Summary Judgment requesting ejectment of the Defendant from the Plaintiff's property. For the following reasons, the Motion is **GRANTED**.

FACTUAL AND PROCEDURAL HISTORY

This case emanates from Plaintiff's prior Equity action *Estate of Vera Dance v. Aurora Maria Plaza* (61 Equity 1991 and renumbered 60015-1996) in which a deed dated December 5, 1990 and recorded December 11, 1990, purporting to convey property at 941East First Street in Erie, Pennsylvania from Vera Dance to her granddaughter Aurora Maria Plaza, was rescinded by Court Order. The Defendant in the case *sub judice*, Beverly Dance Plaza, is Vera Dance's daughter and Aurora Maria Plaza's mother.

When the prior case was called for a non-jury trial on February 16, 1996,

the parties informed the Court of an amicable resolution. By Order dated February 16, 1996, the Honorable Michael T. Joyce,[1] pursuant to the parties' agreement, entered judgment in favor of the Plaintiff. After Aurora Maria Plaza failed to abide by the agreement and the February 16, 1996 Order, a contempt hearing was held December 12, 1996.

Although Aurora Maria Plaza failed to appear at the December 12, 1996 contempt hearing, Beverly Dance Plaza asked to be heard by the Court. Beverly Dance Plaza testified that by deed dated June 2, 1995, more than eight months prior to the February 16, 1996 Order, Aurora Maria Plaza conveyed the subject property to herself (Aurora Maria Plaza) and to her mother, Beverly Dance Plaza. However, this deed was not recorded until June 19, 1996 in Erie County Record Book 446 at page 376, four months after the February 16, 1996 Order. Beverly Dance Plaza and her son began residing in the subject property in April, 1996.

By Opinion and Order dated December 5, 1997, Judge Joyce found the transfer from Vera Dance to Aurora Plaza by deed dated December 5, 1990 null and void. As to the subsequent deed from Aurora Maria Plaza to herself and Beverly Dance Plaza, Judge Joyce decreed it was also null and void. However, because Beverly Dance Plaza was never joined as a party to the prior case, Judge Joyce recognized there was no jurisdiction to enter an order against Beverly Dance Plaza. Judge Joyce did indicate Beverly Dance Plaza appeared at the scheduled February 12, 1996 non-jury trial and the December 12, 1996 contempt hearing.

Subsequently, the Plaintiff filed the present action against Beverly Dance Plaza seeking, *inter alia*, a judgment for the market value of rental income and requesting ejectment in the within Motion for Partial Summary Judgment.

ARGUMENT

Plaintiff argues partial summary judgment is appropriate because the record reveals Beverly Dance Plaza acquired no title or interest by virtue of the deeds which Judge Joyce declared null and void. The Defendant therefore has no title or ownership in this property other than as a potential heir to the Estate of Vera Dance.

The Defendant claims partial ownership of the property by the June 2, 1995 deed from her daughter recorded on June 19, 1996 and further contends Judge Joyce's decisions are not res judicata as to her. She maintains there was no identity of the parties or cause of action as to her and therefore res judicata is inapplicable. *Brandschain v. Lieberman*, 320 Pa. Super. 10, 466 A.2d 1035 (1983) .

[1] Now the Honorable Michael T. Joyce of the Superior Court of Pennsylvania.

DISCUSSION

The purported deed of June 2, 1995 is null and void as a matter of law pursuant to long-standing Pennsylvania recording statutes invalidating unrecorded deeds against subsequent titleholders. Alternatively, the Orders of Judge Joyce can be used as a basis to resolve this matter under the collateral estoppel doctrine. Each analysis will be discussed seriatim.

THE FAILURE TO RECORD THE DEED PRIOR TO JUDGMENT RENDERS THE DEED NULL AND VOID

Since 1925, it has been the law in Pennsylvania that:

> "All deeds, conveyances, contracts, and other instruments of writing wherein it shall be the intent of the parties executing the same to grant, bargain, sell, and convey any lands, tenements, or hereditaments situate in this Commonwealth, upon being acknowledged by the parties executing the same approved in the manner provided by the laws of this Commonwealth, shall be recorded in the Office of the Recording of Deeds in the county where such lands, tenements and hereditaments are situate. Every such deed, conveyance, contract or other instrument of writing which shall not be acknowledged or proved and recorded, as aforesaid, shall be adjudged fraudulent and void as to any subsequent bona fide purchaser or mortgagee or holder of any judgment, duly entered in the Prothonotary's office of the county in which the lands, tenements, or hereditaments are situate, without actual or constructive notice unless such deed, conveyance, contract, or instrument of writing shall be recorded, as aforesaid, before the recording of the deed or conveyance or the entry of the judgment under which the subsequent purchaser, mortgagee, or judgment creditor shall claim."
> See 21 P.S. §351.

The salient facts under 21 P.S. §351 are that the Estate of Vera Dance became the holder of a judgment by virtue of Judge Joyce's Order of February 16, 1996 reclaiming title in favor of the Estate as against Aurora Maria Plaza. At the time of this judgment, there was nothing of record transferring an interest to any other party, including the Defendant herein. Since Beverly Dance Plaza failed to record her deed of June 2, 1995 until June 19, 1996, and during the intervening time the Estate of Vera Dance became a holder of judgment on the property, the deed of June 2, 1995 "shall be adjudged fraudulent and void as to any...holder of any judgment..." See 21 P.S. §351.

The same result is reached by applying another statutory provision mandating the recording of a deed within 90 days of its execution. Specifically, "all deeds and conveyances...shall be recorded...within 90

days after the execution of such deeds or conveyances (or) shall be adjudged fraudulent and void against any subsequent...creditor of the Grantor...". See 21 P.S. §444.

Pursuant to this statute, Beverly Dance Plaza had 90 days from June 2, 1995 to record her deed. Her failure to do so means the conveyance is "fraudulent and void" against a subsequent creditor of the Grantor. In this case, the Estate of Vera Dance became a creditor of Aurora Maria Plaza by virtue of the judgment of February 16, 1996, which obviously was prior to the recording of the deed to Beverly Dance Plaza on June 19, 1996.

Interestingly enough, in a decision in which the Honorable Michael T. Joyce participated as a member of the Superior Court of Pennsylvania, Sections 351 and 444 of Title 21 were "read together" to protect against "deceptious appearance of title." See *Roberts v. Estate of Percy Pursley,* 718 A.2d 837, at 841 (Pa. Super. 1998). Accordingly, as a matter of statutory law, the failure to record the deed dated June 2, 1995 until June 19, 1996, with an intervening judgment being entered in favor of Vera Dance's Estate on February 16, 1996, renders the deed of June 2, 1995 fraudulent, null and void. Hence Beverly Dance Plaza never acquired title to the subject property.

In a supplemental brief Beverly Plaza argues the Plaintiff's failure to file a lis pendens means there is no notice to subsequent titleholders such as herself. This argument is unpersuasive since a lis pendens simply provides notice of pending litigation and does not serve to adjudicate any rights or title to the property subject to the lien. In the instant case, a lis pendens is of no moment since Beverly Plaza was on notice of the litigation affecting her chain of title and appeared at all relevant court proceedings. Hence the lack of a lis pendens adds nothing to the resolution of this case.

BEVERLY DANCE PLAZA IS COLLATERALLY ESTOPPED FROM ASSERTING TITLE

The present case has largely been decided by the Order of February 16, 1996 by Judge Joyce and his subsequent Opinion and Order dated December 5, 1997, all at Docket Number 60015-1996. While Beverly Dance Plaza was not a named party to said action, the factual findings and conclusions of law by Judge Joyce cannot be overlooked or ignored in the resolution of the case *sub judice*.

It is undisputed that by the aforesaid Orders, Judge Joyce nullified the conveyance from Vera Dance to Aurora Maria Plaza by deed dated December 5, 1990. Since there was never any appeal by any party from either the Order of February 16, 1996 or December 5, 1997 by Judge Joyce, this conveyance has been legally nullified.

In his Opinion and Order of December 5, 1997, Judge Joyce further nullified the conveyance from Aurora Maria Plaza to herself and her mother Beverly Dance Plaza by deed dated June 2, 1995. However, Judge Joyce recognized that since Beverly Dance Plaza was not a named party, there was no jurisdiction to enter an order against her. Specifically, Judge Joyce's

thoughts are reflected in the last paragraph of his Opinion as follows.

> "Defendant Aurora Maria Plaza's agreement to judgment in favor of the Plaintiff avoided and/or rescinded the deed from Plaintiff's decedent to the Defendant, Aurora Maria Plaza. Even though Defendant, Aurora Maria Plaza, transferred partial interest to her mother and herself shortly before the agreement was reached and made an Order of this Court, Defendant could not legally transfer that to which she had no legal interest. A deed purporting to convey land which Grantor did not own is not effective to convey title. *Hershey v. Porbough,* 21 A.2d 434 (1991); *Southall v. Humbert,* 685 A.2d 574 (1996). Therefore, the deed from Defendant transferring her purported interest to her mother and herself is null and void. This Court is in agreement with Beverly Dance Plaza that she has never been made a party to this action and therefore this Court is without jurisdiction to enter an order against her. It should be clear that this Order concerns the status of Defendant Aurora Maria Plaza's interest in the property and since this Court has found through her agreement that she did not have possessory interest in the property, she could not possibly transfer any interest to Beverly Dance Plaza. At this time, Beverly Dance Plaza's recourse is against her Grantor, the Defendant, Aurora Maria Plaza, who issued a general warranty deed and then subsequently agreed that she did not have valid title as evidenced by the agreement and court order of February 16, 1996."

See pages 3-4 of Opinion of the Honorable Michael T. Joyce, a full copy of which is attached hereto.

Consistent with his written Opinion of December 5, 1997, Judge Joyce entered an Order "that Defendant Aurora Maria Plaza's transfer of property from herself as Grantor to herself and her mother as Grantees is null and void." See Order of December 5, 1997.

Since Aurora Maria Plaza was a party to the prior case, Judge Joyce did have jurisdiction to enter an Order against her as Grantee to the December 5, 1990 deed and Grantor/Grantee to the June 2, 1995 deed. The doctrine of collateral estoppel precludes Beverly Dance Plaza from relitigating these Orders.

According to the Pennsylvania Supreme Court, "collateral estoppel, or issue preclusion, is a doctrine which prevents relitigation of an issue in a later action, despite the fact that it is based on a cause of action different from the one previously litigated. The identical issue must have been necessary to final judgment on the merits, and the party against whom the plea is asserted must have been a party, or in privity with a party, to the prior action and must have had a full and fair opportunity to litigate the issue in question." *Balent v. City of Wilkesboro,* 669 A.2d 309 at 313 (Pa.

1995). While the cause of action in the case *sub judice* is different from the one previously litigated in that Plaintiff is now seeking to enforce the judgment entered in the prior action, nonetheless, the resolution of identical issues, i.e. the validity of the two deeds in question, are necessary to conclude the instant case.

Since the nullification of the deed from Vera Dance to Aurora Maria Plaza cannot be changed because Aurora Maria Plaza never appealed the Orders of Judge Joyce, then legally Aurora Maria Plaza cannot convey an interest in property to which she had no title. See *Southall v. Humbert,* 685 A.2d 574 (Pa. 1996). Since the Grantor has no title, logically the Grantees cannot acquire title. Further, Judge Joyce did have jurisdiction over Aurora Maria Plaza to void the deed of June 2, 1995 as it relates to her ability to be a Grantor/Grantee.[2]

The only remaining issue is whether Beverly Dance Plaza was in privity to a party to the prior action and had a full and fair opportunity to litigate the issues in question. Because of her purported claim to be a partial successor in interest to the title held by Aurora Maria Plaza, Beverly Dance Plaza was in privity with her daughter Aurora Maria Plaza at the time of the prior litigation. Likewise, Beverly Dance Plaza stands in privity as an heir to the estate of her mother, Vera Dance, who was also a party to the prior action.

The record further reflects Beverly Plaza Dance [sic] had ample opportunity to litigate the validity of the deeds in question. There is no dispute Beverly Dance Plaza was present for the non-jury trial on February 16, 1996 and for the contempt hearing on December 12, 1996.[3] At the latter hearing, Beverly Dance Plaza was permitted to testify wherein she disclosed for the first time the existence of a purported deed conveying a partial interest to her. Given her claim to title, Beverly Dance Plaza could have easily petitioned to intervene in the prior action and then either requested reconsideration from Judge Joyce and/or appealed the matter through the

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[2] To hold otherwise could result in a perpetual dispute over title to any property. To follow the Defendant's logic, any future party at any future time could come forward and claim title to this property and be permitted to relitigate the validity of the conveyance from Vera Dance to Aurora Maria Plaza or from Aurora Maria Plaza to herself and Beverly Dance Plaza despite the Orders of Judge Joyce. Without finality to the adjudicative process, the same scenario could perpetuate *ad nauseam*.

[3] There is a factual dispute as to whether Beverly Plaza was in agreement with the settlement that resulted in the February 16, 1996 Order of Judge Joyce. For purposes of the present motion, the resolution of this factual issue is irrelevant, although this Court assumes she was opposed to the settlement agreement since it extinguished any property interest she held.

appellate courts. Instead, she chose to do nothing but now wants to have the opportunity to relitigate the same issues. In such a setting, Beverly Dance Plaza would be asking this Court to overturn the factual findings and conclusions of law as set forth by Judge Joyce. Given the chronology of events, this Court cannot and will not overturn the factual findings and conclusions of law of Judge Joyce.

CONCLUSION

There are no material issues of fact precluding the entry of a partial summary judgment. Given the findings of fact and conclusions of law as admitted in the pleadings and as set forth by the Orders of Judge Joyce, partial summary judgment is warranted in favor of the Plaintiff's request for ejectment.

ORDER

AND NOW to-wit this 1st day of February, 1999, the Plaintiff's Motion for Partial Summary Judgment for ejectment of the Defendant is GRANTED. Plaintiff is entitled to possess and Defendant must vacate 941 East First Street in Erie, Pennsylvania within thirty (30) days from the date of this Order.

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

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN JEETER

CRIMINAL LAW/ARREST

The Court found that the Defendant's arrest was lawful when two off duty City of Erie police officers arrested the Defendant in the City of Erie based on probable cause.

CRIMINAL LAW/ARREST

The Defendant was considered "arrested" when police officers grabbed and handcuffed him even though they did not read him *Miranda* rights or transport him to the police station.

CRIMINAL LAW/ARREST

Two off duty police officers were acting as City of Erie police officers even though when they arrested the Defendant they were patrolling property for the Port Authority pursuant to their own personal contractual relationships with the Port Authority.

MUNICIPAL AUTHORITIES

The City of Erie Port Authority can not hire police officers but can only hire personnel who may function as security guards. Third Class City Port Authority Act, 55 P.S. Sec. 571 *et. seq.*

CRIMINAL LAW/ARREST

Police officers have the same authority whether they are on duty or off duty so long as they are within their jurisdiction. *Commonwealth v. Gommer*, 665 A.2d 1269 (Pa.Super. 1995) *app. denied*; *Commonwealth v. Hurst*, 532 A.2d 865 (Pa.Super. 1987).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 1817 of 1998

MEMORANDUM

Bozza, John A., J.

This matter is currently before the Court following a hearing on the defendant's Omnibus Motion for Pre-Trial Relief. The defendant asserts his arrest was illegal since he was arrested by off-duty City of Erie police officers, who at the time of the arrest were employed by the Port Authority of the City of Erie and not within their geophysical jurisdiction. The Commonwealth takes the position that the officers were in fact on "official business" pursuant to the Municipal Police Officers Jurisdiction Act, 42 Pa. C.S.A. §8953(a)(5), and therefore the arrest was proper.

At the hearing, Officer Stankiewicz testified that he has been employed by the Erie Police Department for approximately eleven (11) years. He also testified that he was hired by the Port Authority to patrol and check various Port Authority properties. While working for the Port Authority, Officer Stankiewicz would wear his Erie Police Department uniform and drive an unmarked Port Authority vehicle. He took no separate oath to

work for the Port Authority; was paid directly by the Authority; and received no instructions from the Authority regarding arrests. He further testified that he behaved no differently as a Port Authority employee, and would occasionally do summary violations on Port Authority property. However, he would call Erie Police to take over while he was on duty with the Port Authority.

On the evening Officer Stankiewicz came in contact with the defendant, he was not on duty for the Erie Police Department, but was working for the Port Authority. He and Officer DeDionisio, also employed by the Erie Police and off duty, were patrolling Port Authority property when they received a request to proceed to the Erie Police Station. While en route to the station, they saw an individual across from the Federal building who appeared to be acting as a lookout. They then noticed the defendant going into the back of a parked Jeep with a soft cover. They radioed the Erie Police Department for assistance and proceeded to drive around the park to investigate further. The defendant was observed hunched over in the Jeep going through the center console. The back part of the soft cover was ripped and flapped open. The officers "grabbed" the defendant, pulled him out of the Jeep and handcuffed him. The defendant dropped a cell phone to the ground when apprehended, and had a pair of safety glasses in his waistband. The on duty Erie Police officers arrived and transported the defendant to the station. Neither Officers Stankiewicz nor DeDionisio gave the defendant his Miranda warnings nor interrogated him.

The first issue raised at the hearing was whether the defendant was in fact arrested by Officers Stankiewicz and DeDionisio or merely detained. An arrest is defined as any act that indicates an intention to take the person into custody and subjects the person to the actual control and will of the person making the arrest. *Commonwealth v. White*, 543 Pa. 45, 669 A.2d 896 (1995) (citations omitted). Pursuant to Officer Stankiewicz' characterization of the encounter with the defendant, i.e. pulling him from the Jeep and handcuffing him, it is obvious that the defendant was not free to leave and was subject to Officer Stankiewicz' control. The defendant was, therefore, under arrest. The issue then becomes whether the officers had the authority to arrest the defendant since they were off duty with the Erie Police and were working for the Port Authority in some type of security capacity at the time they arrested the defendant.

The "Third Class City Port Authority Act" sets forth the rights and powers of Port Authorities in cities like Erie. 55 P.S. § 571 *et seq.* The authorization to establish a police department is not among them. Port authorities in third class cities do have the power to hire personnel and that would include persons to serve as security officers. 55 P.S. § 573(b)(8). The defendant has cited *Commonwealth v. Mundorf*, 699 A.2d 1299 (Pa. Super. 1997) in support of his position that Officers Stankiewicz and DeDionisio acted outside their scope of authority when they arrested him.

Reliance on *Mundorf* is misplaced in substantial part because it dealt with the application of the Railroad and Street Railway Police Act to the jurisdictional limitations placed on the Port Authority Transit Police in Allegheny County. That Act authorizes the appointment of railroad or street railway policemen by second class county port authorities. 22 Pa.C.S. § 3301. The Act also explicitly sets forth jurisdictional limitations. 22 Pa. C.S. § 3303. Because the City of Erie Port Authority is not conducting a railway, is not a second class county, and is not otherwise authorized to establish its own police department, the decision in *Commonwealth v. Mundorf* is not applicable either directly or by analogy.

The Commonwealth's reliance on the Municipal Police Officer Jurisdiction Act is also misplaced. The substance of this statute deals with the circumstances in which members of a municipal police department may exercise their police powers in a location outside of their home jurisdiction. Since the officers in question were not Port Authority police officers operating within a statutorily defined jurisdiction, Section 8953 of the Act is of no assistance in resolving the central issue in this case. Moreover, if it is concluded that in arresting Mr. Jeeter the officers were acting pursuant to their authority as Erie Police officers, they would have been acting within their jurisdictional boundaries. The critical question, then, is what was the status of Officers Stankiewicz and DeDionisio at the time they arrested John Jeeter.

At a minimum, on the evening in question, the officers were being paid by the Port Authority to patrol and check Port Authority properties. Most significantly, however, they were City of Erie police officers who, at the time, were not assigned to regular Erie Police Department duties.[1] At the time the officers observed the defendant breaking into the Jeep, they were on their way to Erie Police Department headquarters for reasons not set forth in the record. They were wearing their Erie Police Department uniforms and when they acted, they intervened directly by grabbing the defendant, handcuffing him, and holding him in custody until on duty Erie Police officers arrived. In such circumstances, it can only be concluded that they were acting as municipal police officers under color of state law. *Commonwealth v. Bradley*, 1999 PA Super, 1.

The authority of municipal police officers is set forth in 42 Pa.C.S.A. § 8952, which states:

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[1] It is noteworthy that the officers were wearing their City of Erie Police Department uniforms while carrying out Port Authority responsibilities. It is not clear whether the Port Authority was contracting with them directly or with the City of Erie Police Department for them to function as municipal police officers assigned to Port Authority property. Clarification of this issue is necessary to avoid further difficulties.

> "Any duly employed municipal police officer shall have the power and authority to enforce the laws of this Commonwealth or otherwise perform the functions of that office anywhere within his primary jurisdiction as to:
>
> (1) Any offense which the officer views or otherwise has probable cause to believe was committed within his jurisdiction.
>
> • • •

42 Pa.C.S.A. § 8952(1).

Municipal police power to arrest is further delineated in 53 P.S. § 37005, which authorizes police to make arrests in circumstances such as those presented here.

As municipal police officers, Officers Stankiewicz and DeDionisio acted well within the scope of their authority. The fact they may have been "off duty" is of no consequence to their powers of arrest. This Court has been unable to find any statutory or decisional law which limits the police powers of off duty municipal police officers. Indeed, quite the opposite appears to be true. In *Commonwealth v. Hurst,* 367 Pa. Super. 214, 532 A.2d 865 (1987), the Superior Court addressed whether a state police officer acted outside his authority when he stopped and cited a truck driver for traffic violations while he was returning home from work. In finding the trooper acted within the scope of his authority, the court noted ". . . the fact that the officer was off-duty does not mean that the trooper's power to conduct official police business automatically ceased." *Hurst,* 367 Pa. Super. at __, 532 A.2d at 869. In a more recent decision, the Superior Court reaffirmed the holding in *Hurst,* and stated, "Upon careful reading of the statutes, we find no explicit limitation of the authority of a state police officer to make a traffic stop or arrest only when the police officer is on duty and/or in uniform. *Commonwealth v. Gommer,* 445 Pa. Super. 551, 557, 665 A.2d 1269, 1272 (1995), *app. denied*, 546 Pa. 676, 686 A.2d 1308 (1996). In *Gommer,* an off-duty state police officer who was not in uniform stopped a motorist after observing him drive in a reckless manner. She informed him that she believed that he was driving under the influence and asked him to wait for the arrival of other troopers and took possession of his keys. The court concluded that the off-duty trooper acted within the scope of her legal authority.

In the present case, off-duty City of Erie police officers, in uniform, observed the defendant breaking into a parked vehicle. They acted in a manner calculated to stop his criminal activity and to take him into custody. They were acting within their jurisdictional limits and consistent with their powers as municipal police officers. The fact that they were also employed in a security capacity with the Erie Port Authority is of no legal consequence. Their municipal police powers were not limited by their off-duty status or by their contractual relationship with the Port Authority.

Consequently, Mr. Jeeter's arrest was proper. An appropriate Order will follow.

ORDER

AND NOW, to-wit, this 24th day of February, 1999, upon consideration of the Omnibus Motion for Pre-Trial Relief and hearing thereon, and in accordance with the opinion set forth in the foregoing Memorandum, it is hereby **ORDERED, ADJUDGED and DECREED** that the Omnibus Motion for Pre-Trial Relief is hereby **DENIED**.

By the Court,
/s/ **John A. Bozza, Judge**

ROSE A. DAHLKEMPER

v.

JOHN F. DAHLKEMPER

FAMILY LAW/DIVORCE/ALIMONY

A settlement agreement which provides for alimony to be paid for the "indefinite future" contemplates that alimony will not be permanent and is subject to modification. As the agreement did contemplate modification, retirement of the spouse paying alimony justifies a reduction in the amount of alimony and this matter is remanded to the Domestic Relations Section for a recommendation as to the appropriate amount of alimony.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA FAMILY DIVISION- SUPPORT
DOCKET NO. NS882602 PACSES NO. 750003476

Appearances: Jack Grayer, Esq.
Dennis V. Williams, Esq.

OPINION

March 15, 1999: This matter is before the Court on the defendant's Petition to Terminate and/or Modify Alimony. The alimony arose by virtue of an agreement which was made into a Court Order and provided as follows:

> John Francis Dahlkemper is now obligated to pay under No. NS882606 alimony in the amount of $415.00 per month to Rose Ann Dahlkemper. The payments shall continue for the indefinite future and shall be subject to the alimony provisions of the Divorce Code ....

The parties were divorced and the entry of a decree dated September 20, 1988 was filed at Erie County Docket 321 l-A-1989. The divorce action was bifurcated and in the settlement of economic claims the parties entered into a Settlement Agreement dated February 21, 1991. The parties to this action were married 23 years and divorced for 10 years. During this period of time, alimony has been paid pursuant to the agreement. The plaintiff's age is 51 and the defendant's age is 55. John F. Dahlkemper, hereinafter sometimes referred to as petitioner or defendant, is employed at UPS and is retiring in July. His income is estimated to be $200 per month per a pension payment as of July, 1999.

Rose A. Dahlkemper, sometimes hereinafter referred to as respondent or plaintiff, has not remarried nor has she co-habitated. The plaintiff responsible under the agreement for the mortgage obligation of $212.00 per month for the marital home transferred to her. Both parties are high

school graduates. Neither party is likely to obtain or receive any significant inheritance. The parties' standard of living was not anything substantial. It was a normal standard of living.

Other than the mortgage liability, there were no significant liabilities that were created during the marriage nor were there significant assets brought into the marriage.

The relative earning capacity of the parties varies significantly. The husband has worked at UPS since before the marriage and will continue to work until retirement. There was no contribution by the wife to the education and training or increased earning power of the husband. The Court has no credible evidence at this time as to whether the wife is able or unable to work and what her minimum wage would be or how long the disability, if any, has existed. The plaintiff has not cohabitated with any party.

The threshold question before the Court is "Does the agreement in question and the resultant Court Order provide for alimony in the amount of $415.00 a month to be paid by John A. Dahlkemper to Rose A. Dahlkemper for the life of John A. Dahlkemper?" Assuming the answer to the first query is "no," what remedy should the Court now impose?

Unfortunately, the facts of this case present legal issues for which there is scant authority or precedent that could serve as a basis for a ruling. The statute dealing with this subject is as follows: 23 Pa. C.S.A. §3105(c) which provides as follows:

> Certain provisions not subject to modification. In the absence of a specific provision to the contrary appearing in the agreement, a provision regarding the disposition of existing property rights and interests between the parties, alimony, alimony pendente lite, counsel fees or expenses shall not be subject to modification by the court.

The Court is also cognizant of 23 Pa. C.S.A. §3706 which states:

> Bar to Alimony. No petitioner is entitled to receive an award of alimony where the petitioner, subsequent to the divorce pursuant to which alimony is being sought, has entered into cohabitation with person of the opposite sex who is not a member of the family of the petitioner within the degrees of consanguinity.

However, this last-mentioned statute is not applicable to the instant case inasmuch as Rose A. Dahlkemper has not remarried or cohabitated with another person.

Hence, the Court must first decide the time period over which these payments should be made by petitioner. This entire problem could have been eliminated if only the agreement had stated the payments to the respondent would continue for the life of John F. Dahlkemper. Since the drafters of the agreement chose not to do so, the Court must assume they were not requiring payments to be made to the respondent over the life of

the petitioner. By the very nature of the words they used, the drafters of the agreement must have intended to leave open the time period over which payments could be made. It can even be logically assumed their purpose in writing this agreement in such a loose and ambiguous fashion was they wanted a Court at a later time to insert a new payment schedule.

In making this finding, the Court has relied in part on the definition of "indefinite" that appears in Blacks Law Dictionary which is as follows:

> Without fixed boundaries or distinguishing characteristics; not definite, determinate, or precise. Term is more synonymous with temporary than with permanent; indefinite contemplates that condition will end at unpredictable time, whereas "permanent" does not contemplate that condition will cease to exist.

Using this definition of "indefinite" causes the Court to construe the words used in the agreement to mean "temporary" as opposed to "lifetime" or "forever." It has often been said "Nothing continues forever except death and taxes," neither of which would be applicable in the case at bar. Thus, these ambiguous words "payments shall continue for the indefinite future" could not be interpreted to mean forever. As such, the resultant Order of $415.00 per month should not solely by virtue of these words alone be enforced for the petitioner's lifetime.

The Court must now determine whether the alimony should be terminated or just be modified. The easier and safer approach by the Court would be to terminate the alimony. However, if the Court did this, would its action be just? The Court is mindful of the ancient Hebrew prayer which reads, "Justice, Justice shall you pursue." The Rabbis told us the word justice was used twice because it is so elusive and so hard to obtain. Nevertheless, this should not prevent this Court or, for that matter, any Court from at least attempting to reach it.

There is little question the present disparity of income between the parties will soon be diminished by virtue of the petitioner's retirement and his going on pension. The correct method to achieve justice is to modify the Order and reduce the monies paid to the respondent. This could best be accomplished by using the guidelines of the Domestic Relations Section as well as the guidelines set forth in 23 Pa. C.S.A. §3701.

It is obvious 23 Pa. C.S.A. §3105(c) does not prevent the Court from modifying the payments for because of the ambiguity there is no enforceable agreement. Likewise, the Order based on said agreement is unenforceable.

In conclusion, the Court in filing this Opinion and entering the accompanying Order is attempting to carry out the intent of the legislature when they enacted 23 Pa. C.S.A. §3701.

This matter is hereby referred to the Domestic Relations Section to make a recommendation as to the amount of alimony to be paid as of the date of

retirement. Upon receipt of said recommendation after hearing, the Court will enter a final Order. The present Order is only interlocutory.

ORDER

March 15, 1999: And now, to-wit, pursuant to the terms of this Opinion, this matter is hereby referred back to the Domestic Relations Section to make a recommendation of the alimony to be paid based on the present circumstances of the parties and giving due deference to 23 Pa. C.S.A. §3701.

In so doing, the Domestic Relations Section should consider the change of circumstances including but not limited to the retirement of the defendant from his employment with UPS.

This Order is only interlocutory.

/s/ **George Levin, Senior Judge**

CARY and BRIDGET FILIPKOWSKI, CHARLES and EVA KLOSZEWSKI, DONALD and NANCY SEYMOUR, GLENN and WILHELMINA SEYMOUR, and EDITH FULLER

vs.

GEORGE M. SCHROECK, ESQUIRE

PRELIMINARY OBJECTIONS/LEGAL MALPRACTICE

In *Muhammad v. Strassburger*, the Pennsylvania Supreme Court refused to recognize an action for legal malpractice allowing clients to sue their counsel after their settlement had been negotiated and accepted since it would discourage settlements and increase substantially the number of legal malpractice cases.

PRELIMINARY OBJECTIONS/LEGAL MALPRACTICE

Distinguishing *Muhammad v. Strassburger*, the Court dismissed Preliminary Objections, finding that the purpose of reducing litigation and encouraging finality would not be served by preventing the Plaintiffs from suing their attorney, where the attorney did not negotiate Plaintiffs' settlement and where the Plaintiffs were not questioning the amount of the settlement, but sought to sue the Defendant because prior to settlement a portion of their claim was dismissed due to Defendant's failure to file an action within the statute of limitations.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11250-1997

Appearances: John E. Quinn, Esq.
James Schadel, Esq.

MEMORANDUM

Bozza, John A., P.J.

This lawsuit relates to the George Schroeck's legal representation of the plaintiffs in an action against Transfuel, Inc., arising out of the emission of toxic fumes from Transfuel's plant. Mr. Schroeck filed an action on behalf of the plaintiffs in state court seeking to enjoin Transfuel from operating the site. Subsequent to a hearing on the injunction, new counsel entered an appearance and asserted personal injury claims on behalf of the plaintiffs. The state court action was subsequently removed to federal court.

Thereafter, the federal court issued an Order granting Transfuel's Motion for Summary Judgment regarding any claim on behalf of the plaintiffs for personal injury and property damage incurred prior to August 28, 1993. This Transfuel lawsuit was subsequently settled between the parties, and the plaintiffs executed a release regarding this settlement.

The plaintiffs filed the instant lawsuit against Mr. Schroeck alleging professional negligence (legal malpractice) and asserting, among other

things, that he failed to protect the statute of limitations on their personal injury claim. Pending before the Court are "Preliminary Objections in the Nature of a Demurrer" to plaintiffs' Complaint. For the reasons set forth below, the Court concludes that the preliminary objections must be overruled.

The defendant contends that the plaintiffs' action for legal malpractice is not cognizable because of the Supreme Court's position as set forth in *Muhammad v. Strassburger, et al.*, 526 Pa. 541, 587 A.2d 1346 (1991). In *Muhammad*, an attorney negotiated a settlement on behalf of the plaintiffs in a medical malpractice case. The plaintiffs agreed to the settlement, but later became dissatisfied with the amount. Thereafter, the plaintiffs filed suit against the attorney asserting legal malpractice. The Supreme Court rejected the Muhammads' legal malpractice claim because of the "strong and historical public policy of encouraging settlements . . ." *Muhammad*, 526 Pa. at 548, 587 A.2d at 1349. The Court reasoned that to allow clients to sue after a settlement has been negotiated and accepted by the clients would "create chaos in our civil litigation system." Id. The court stated that it was refusing to "endorse a rule that will discourage settlements and increase substantially the number of legal malpractice cases." Id.

However, in 1997 the court decided the case of *McMahon v. Shea*, 547 Pa. 124, 688 A.2d 1179 (1997). In *McMahon*, the client sued his divorce attorney based upon alleged attorney negligence in drafting and executing a property settlement agreement. In examining the facts in *McMahon*, the court determined that the public policy of reducing litigation and encouraging finality would not be served by precluding the plaintiff's action. *McMahon*, 547 Pa. at 131-132, 688 A.2d at 1182. The Court noted that the dissatisfied client was not seeking to increase the amount of a previously agreed to settlement, but was attempting to redress the harm caused by his attorney's failure to advise him of possible consequences of the agreement. The Court found that in the facts presented the "laudable purpose of reducing litigation and encouraging finality would not be served . . ." by preventing the plaintiff from suing his attorney in such circumstances. *Id.*

In the instant case, the policy reason articulated in *Muhammad*- to-wit, encouraging settlement, is simply not implicated. The defendant did not negotiate the Transfuel settlement; this was accomplished by different counsel. Significantly, the plaintiffs are not claiming dissatisfaction with the settlement amount, but with the fact that prior to settlement a portion of their claim was dismissed because of their former attorney's failure to file an action within the statute of limitations. In effect, there was no other option available to the plaintiffs but to settle these claims which were no longer legally viable. *White v. Kreithen*, 435 Pa. Super. 115, 644 A.2d 1262 (1994).

Further support for this conclusion is found in the Court of Appeals

analysis in *Wassal v. DeCaro,* 91 F.3d 443 (3rd Cir. 1996). In *Wassal,* a political party and its officers sued their former attorney for failing to prosecute a defamation action in a timely fashion. Although the plaintiffs agreed to a dismissal of the suit, the appeals court concluded that the Pennsylvania Supreme Court's reasoning in *Muhammad* did not apply. The court noted that the plaintiffs did not sue an attorney who had settled their case, were not questioning the amount of a settlement and were, in effect, forced to agree to dismissal to get out from under the joke of incompetent representation. *Id.* Here, none of the policy reasons set forth in *Muhammad* apply. By allowing the plaintiff's claim of legal malpractice to go forward settlement will not be discouraged and litigation will not be encouraged.

Defendant also asserts that the release executed by plaintiffs in the Transfuel federal lawsuit encompasses the legal malpractice cause of action asserted in this lawsuit. However, the release also contains a specific clause excluding any claims the plaintiffs may have against the defendant.

Therefore, the Court finds this argument to be without merit and the release is not a bar to the instant cause of action.

An appropriate Order will follow.

ORDER

AND NOW, to-wit, this 28th day of December, 1998, upon consideration of the Preliminary Objections filed on behalf of the defendant, plaintiffs' response thereto, and argument thereon, and for the reasons set forth in the preceding Memorandum, it is hereby **ORDERED, ADJUDGED and DECREED** that the defendant's Preliminary Objections are hereby **OVERRULED**.

By the Court,
/s/ **John A. Bozza, Judge**

IN RE: ERIE COUNTY TAX SALE
DANIEL THOMAS WOLF
v.
ERIE COUNTY TAX CLAIM BUREAU and DOUG LISEK

IN RE: ERIE COUNTY TAX SALE
DANIEL THOMAS WOLF
v.
ERIE COUNTY TAX CLAIM BUREAU and
GEORGE STADTMUELLER

TAXATION/REAL ESTATE TAXATION/TAX SALES

Where Tax Claim Bureau provided taxpayer incorrect information on amount back taxes owed and taxpayer paid taxes in that amount exceptions to tax sale will be upheld where the taxes paid otherwise would have been insufficient to prevent tax sale of property

TAXATION/REAL ESTATE TAXATION/TAX SALES

Where taxpayer inquires of Tax Claim Bureau as to amount of back taxes owed and offers to make payment it is the duty of the Bureau to inquire whether taxpayer wishes to enter into written installment agreement for taxes

TAXATION/REAL ESTATE TAXATION/TAX SALES

Taxing entities have strict responsibility to provide taxpayers with accurate information concerning tax liability, particularly where taxpayer stands to lose interest in real estate

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 13537 - 1998

Appearances: Jack Grayer, Esquire
Kevin Kingston, Esquire

OPINION and ORDER

Bozza, John A., J.

This matter is before the Court on "Objections and Exceptions to Tax Sale, Index (27) 022.10.5.02 and Index (27) 022.10.5.03." Mr. Daniel Wolf is objecting to the sale of real estate, hereinafter referred to as Parcels #2 and #3 to George Stadtmueller and Douglas Lisek, respectively, by the Tax Claim Bureau of Erie County. The property was sold at a tax sale because Mr. Wolf had failed to pay certain back taxes from the year 1996. A hearing was conducted on Mr. Wolf's objections on February 22, 1999, and as a result, the following facts have been established.

On September 28, 1998, Daniel Wolf was the record owner of three parcels of real estate in Erie County, (27) 022.10.5.00, hereinafter referred to

as Parcel #1, (27) 022.10.5.02, Parcel #2, and (27) 022.10.5.03, Parcel #3. On that date, the Tax Claim Bureau of Erie County conducted a tax sale and sold Parcel #3 to Douglas Lisek for $2,100.00, and Parcel #2 to George Stadtmueller for $2,200.00. At the time of the sales, Mr. Wolf owed back taxes in the amount of $201.30 for 1996, and $179.63 for 1997 for Parcel #2, and on Parcel #3, Mr. Wolf owed $201.30 for 1996 and $179.63 for 1997. Parcel #1 was not brought to sale by the Tax Claim Bureau because Mr. Wolf had paid an amount equal to the outstanding taxes due for that parcel for 1996. The tax bills for all three parcels were sent to Mr. Wolf's home at 7082 East Lake Road.

On or about August 21, 1998, Mr. Wolf visited the office of the Erie County Tax Claim Bureau for the purpose of inquiring about the status of his outstanding tax liability. He gave them his name, "and they pulled up my account, I guess, on the computer." *See,* Transcript, Hearing on Tax Claim Objections, February 22, 1999, p. 7. They told him the amount was $1,158.80, which he subsequently paid by mailing a check to the Tax Claim Bureau. As it turned out, the amount that he paid was equal to the amount owed on Parcel #1 for the year 1996, and did not include any of the amounts owed on the other two parcels. As a consequence, the two remaining parcels of contiguous property were sold at tax sale. Mr. Wolf's home is located on Parcel #1, which is comprised of a little over one acre. The two parcels sold at the tax sale were significantly smaller.

It is Mr. Wolf's position that the tax sales should be set aside because the Tax Claim Bureau gave him the wrong information concerning his tax liability. He also argues that the Bureau should have applied the amount of his payment to the amount owed on all three properties because he was entitled to have the sale stayed upon payment of twenty-five (25 %) per cent of his tax debt and agreeing to make installment payments. For the reasons set forth below, the Court agrees with his position.

The defendants have taken the position that Mr. Wolf should have been aware of the actual amount he owed for his taxes because he had received accurate bills for each of the parcels in question. Indeed, Mr. Wolf acknowledges receiving such bills. The defendants also note that the bills contained an information notice that the taxpayer may prevent the property from being sold by paying twenty-five (25 %) per cent of the amount due and entering into an agreement to pay the balance.

The law in this area has been long-established, although it does not appear that the precise question raised by the facts of this case has been addressed by the appellate courts. In *In re: Sale of Real Estate for Taxes. Lawrence County,* 149 Pa. Super. 440, 27 A.2d 688 (1942), the property owner was seeking to borrow money to allow him to pay back taxes. He requested a statement of all delinquent taxes, which was prepared by the county treasurer. The lender provided the property owner with an amount sufficient to pay the taxes, as set forth on the statement from the county

treasurer. Unfortunately, it turned out that the statement was incorrect, as it did not include the school taxes for 1931, and as a consequence, the property was subsequently sold at tax sale. An exception was filed to the tax sale, which was sustained by the trial court. In affirming the trial court's decision, the Superior Court noted as follows:

> "The courts have uniformly held that a public official charged with the duty of collecting delinquent taxes is obliged to furnish the owner of the real estate a correct and complete statement of taxes certified to him for collection and that payment of all taxes contained in such a statement is a discharge of the real estate from liability for taxes due and payable."

Id., 149 Pa. Super. at 442, 27 A.2d at 689.

In supporting its decision in *In re: Sale of Real Estate for Taxes, Lawrence County,* the court relied in part on the Supreme Court's decision in *Breisch, et al v. Coxe, et al*, 81 Pa. 336 (1876). In *Breisch*, the court noted that because of the failure of the treasurer to provide accurate information concerning taxes owed by a property owner, the property owner cannot be responsible for failure to pay the amount actually due. The Court noted that it is entirely the duty of the treasurer to provide the information necessary to the taxpayer to meet his obligations.

In the present case, Mr. Wolf decided to go to the Tax Claim Bureau to find out directly from them the amount that he owed. Notwithstanding the fact that he had received tax bills in the mail, he was fully entitled to rely on the information provided, and there was no reason to believe that the information provided in the tax bills should be any more valid than the information provided by the representative of the Tax Claim Bureau. It is apparent that the information that he was given was not accurate, because when the clerk entered Mr. Wolf's inquiry into the computer, the information brought to the screen only showed the outstanding taxes for Parcel #1. While this appears to be a limitation of the county's computer system, it nonetheless resulted in inaccurate information being provided to the taxpayer. Thereafter the county accepted Mr. Wolf's payment in the amount that he was told he owed, and it proceeded to sell the other two parcels. Had the correct information been provided, Mr. Wolf was prepared to pay the outstanding amounts owed for all three parcels.

Mr. Wolf has also taken the position that once they realized that he had not paid for the taxes on the two contiguous parcels, they should have applied his payment to all three parcels because it was in excess of the twenty-five (25 %) per cent that would have been required to stay the sale. *See,* 72 P.S. § 5860.603. While it is not necessary for the court to reach the merits of this issue given its previous conclusion, it is instructive to note that the Commonwealth Court has taken the very explicit position that in

circumstances similar to those presented here, it was a violation of due process of law for a taxing unit to fail to inquire of a taxpayer whether he desired to enter into an installment agreement where twenty-five (25 %) per cent of the outstanding indebtedness was tendered. *In re: The Upset Sale of Properties*, 126 Pa. Commw. Ct. 280, 559 A.2d 600 (1989). The affirmative duty to inquire whether a taxpayer wished to enter into a written installment agreement to stay a tax sale was strongly affirmed in *Darden v. Montgomery County Tax Claim Bureau*, 157 Pa. Commw. Ct. 357, 629 A.2d 321 (1993), and *York v. Roach*, 163 Pa. Commw. Ct. 58, 639 A.2d 1291 (1994). These cases demonstrate the court's unequivocal position that taxing entities have a strict responsibility to provide taxpayers with accurate information concerning their tax liability, particularly in circumstances where they stand to lose their interest in real estate.

For all of the preceding reasons, the Court is of the opinion that the sale of the property at issue should be set aside.

Signed this 14 day of April, 1999.

ORDER

AND NOW, to-wit, this 14th day of April, 1999, for the reasons set forth in the preceding Opinion, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that plaintiff's "Objections and Exceptions to Tax Sale, Index (27) 022.10.5.02 and Index (27) 022.10.5.03" is hereby **GRANTED**. It is FURTHER **ORDERED** that the sale of the properties listed at Tax Index (27) 022.10.5.02 and Index (27) 022.10.5.03 is hereby **SET ASIDE**.

By the Court,
/s/ **John A. Bozza, Judge**

RICHARD A. SHOEMAKER and LAURIE SHOEMAKER, his wife

v.

MOLDED FIBERGLASS CONCRETE FORMS COMPANY, MOLDED FIBERGLASS CONSTRUCTION PRODUCTS and MOLDED FIBERGLASS COMPANIES

PRELIMINARY OBJECTIONS

Demurrer sustained on plaintiffs' count alleging spoliation of evidence

PRODUCT LIABILITY

No independent cause of action for spoliation of evidence

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 10814 - 1998

APPEARANCES: Robert C. LeSuer, Esquire
T. Warren Jones, Esquire

OPINION

Bozza, John A., J.

In February, 1996, Richard Shoemaker was seriously injured when a fiberglass form he was filling with concrete ruptured. At the time he was working as a foreman at a construction site in Erie, Pennsylvania. Mr. Shoemaker has now filed a lawsuit alleging, among other things, that the fiberglass form that ruptured was a defective product and unreasonably dangerous. In his complaint he includes counts asserting claims in strict liability, misrepresentation, supplying of dangerous chattels, breach of warranty, negligence and "spoliation" of evidence. The defendants, referred to collectively as MFG, filed preliminary objections demurring to the counts for spoliation, misrepresentation and supplying dangerous chattels, as well as to the claim for punitive damages.

The plaintiffs' claim for spoliation of evidence raises serious legal and public policy issues. In recent years, Pennsylvania courts have had numerous opportunities to decide whether an independent cause of action for spoliation of evidence exists. Although the appellate courts have not squarely decided the issue, Common Pleas' decisions are divided on the question.

Most recently the Superior Court, in *Elias v. Lancaster General Hospital*, 710 A.2d 65, 68 (Pa. Super. 1998), noted:

> " . . . we do not find it necessary to create an entirely new and separate cause of action for a third party's negligent spoliation of evidence because traditional negligence principles are available and adequate remedies exist under those principles to redress the negligent destruction of potential evidence."

In *Elias,* the plaintiff alleged that a hospital was negligent for failing to preserve pacemaker wires which had been removed from his heart following a fall. The plaintiff was contemplating a lawsuit against the pacemaker's manufacturer and needed the wires as evidence. Two years after the incident, the plaintiff requested that the hospital produce the wires. While deciding that "hospitals do not owe a general duty to their patients to preserve foreign objects extracted from their bodies," the Court declined to express an opinion as to whether a cause of action for spoliation of evidence is cognizable under the law of Pennsylvania. *In dicta,* however, the Court noted:

> " . . . we are of the opinion that traditional remedies more than adequately protect the 'non-spoiling' party when the 'spoiling' party is a party to the underlying action."

Elias, 710 A.2d at 67.

Prior Superior Court decisions in *Kelly v. St. Mary Hospital,* 694 A.2d 355 (Pa. Super. 1997), and *Olson v. Grutza,* 428 Pa. Super. 378, 631 A.2d 191 (1993), have also dealt with the general issue of spoliation claims without determining their legal viability. However, following *Kelly,* where the Court concluded that a plaintiff had not adequately pled the measure of damages in a spoliation case, it could be argued that the Superior Court was *de facto* recognizing the existence of such claims.

On the Common Pleas court front, there are decisions from Lebanon (2), Dauphin, Allegheny and Warren Counties that support the existence of spoliation claims in various circumstances. On the other hand, judges in Northampton, Schuylkill and Allegheny have rejected the existence of such claims. It seems the critical concern in all spoliation cases has been whether in the absence of an independent cause of action, sufficient remedies are available to a party whose ability to pursue a legitimate cause of action, or perhaps defend a position, has been hampered by the intentional or negligent failure to preserve evidence.

In both *Lichty v. Kucharczuk, 5* D&C 4th 120 (Northampton 1989) and *Johnson v. Patel,* 19 D&C 4th 305 (Lackawanna 1993), trial court judges concluded in very similar cases involving allegations of doctored medical records, that the availability of adequate remedies precluded the need for a separate cause of action. Judge Freedberg, in reaching his decision in *Lichty,* noted that criminal penalties were available for tampering with evidence and that at trial an aggrieved party can impeach his opponent with evidence of spoliation.

Following a very thorough analysis of the law, trial judges in *Rhoads v. Pottsville Hospital,* 92 Schuylkill L.R. 4 (1996) and *Urban v. Dollar Bank* and *Hough v. Knickerbocker Russell Co., et al,* 145 Pittsburgh Legal Journal 114 (1996), concluded that spoliation claims should not be recognized. Both cases dealt with allegations that a party either failed to

preserve or destroyed evidence critical to the plaintiff's underlying claims. In *Urban,* Judge Wettick noted he agreed with the Court's reasoning in *Rhoads:*

> "I agree with Judge Baldwin that the use of remedial adverse inferences rather than the recognition of the new tort is the more appropriate approach for addressing a spoliation of evidence claim against a defendant."

Urban, 145 Pittsburgh Legal Journal at 121.

In *Liebig v. Consolidated Rail Corp.*, 31 Lebanon Co. L.J. 188 (1994), *Taylor v. Johnson Products, Inc.*, 115 Dauphin Co. Rptr. 398 (1995), *Lorenz v. Kent,* No. 304 of 1995 (Warren Cty., January 21, 1997) and *M.L. v. University of Pittsburgh,* 26 D&C 4th 106 (1995), Common Pleas judges concluded there was a need for a separate cause of action for spoliation. Essentially following the reasoning of Judge Walter in *Liebig,* the judges in these cases found that without a spoliation action, the aggrieved party would be without an adequate remedy. In addition, in *Liebig, Taylor,* and *M.L.*, the judges identified with particularity the elements of the spoliation claim, relying on *Continental Insurance Company v. Herman,* 576 So.2d 313, Fla. Dist. Ct. of App. (1991), *rev. denied,* 598 So.2d 76 (1991). These elements include the following:

1. existence of a potential civil action;
2. a legal or contractual duty to preserve evidence which is relevant to the potential civil action;
3. destruction of that evidence;
4. significant impairment of the ability to prove the lawsuit;
5. a causal relationship between the evidence destruction and the inability to prove the lawsuit; and
6. damages.

It is obvious that there is no consensus among Pennsylvania courts on this timely issue. It is understandable. Traditional problems associated with the destruction or alteration of evidence by a party have typically been dealt with in this Commonwealth in the context of the jury trial, where the trial court can fashion appropriate sanctions. *Schroeder v. Commonwealth of Pennsylvania, Department of Transportation,* 551 Pa. 243, 710 A.2d 23 (1998); *Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76 (3d Cir. 1994). An adverse jury instruction is available where a party has failed to produce a witness, object or document. *See:* Pa. Civil Jury Instructions, 5.06. This, of course, assumes that a case was sufficiently strong without the missing evidence to reach the jury for decision. A more difficult situation arises where, because of the absence of an item of potentially significant evidentiary value, the complaining party has no real ability to pursue a claim or defense. There simply is no question that

there are circumstances where, because of the destruction, misplacement or alteration of critical evidence, a potential plaintiff has been precluded from recovery for a legal wrong. The question is whether the most appropriate way to address this concern is through the development of a judicially-fashioned common law cause of action. This Court does not believe so. Without knowing the scope or the magnitude of the problem, and without careful consideration of all of the options, it is not possible to arrive at the best way to respond to this important area of public policy. The legislative process is far more amenable to this task.

The practical and policy implications of adopting a new cause of action are worthy of a comprehensive inquiry and more efficient response than is allowed in the context of developing case law. Before society chooses to impose civil liability for the spoliation of evidence, at a minimum the following questions need to be addressed:

1. **How serious is the problem?** It is difficult for any court to determine the overall dimensions of the spoliation of evidence problem. Cases tend to be decided in isolation and there is no way to determine whether an increase in the number of cases is, in fact, representative of a growing problem. Before even beginning to address a solution, it is essential to determine, as much as possible, the exact nature and extent of the problem.

2. **Under what conditions should a duty to preserve evidence arise?** It has been suggested by some Pennsylvania trial courts that there is a duty to retain evidence whenever there is "a potential civil action". *Liebig v Consolidated Rail Corp.*, 31 Lebanon Co. L.J. 188 (1994). Given the very broad circumstances under which liability may arise, this may mean anytime someone has been injured, whenever property has been damaged, or where there is a suspicion that a contract has been violated. Such a standard would surely have significant practical and economic consequences.

3. **What is required to be retained or preserved?** For example, if one is involved in a motor vehicle accident, must the vehicle be preserved in its damaged condition? If the windshield shattered, should the broken glass be retained in the event of a products liability action? Should samples of blood be maintained to show the driver wasn't intoxicated? Similar and perhaps more difficult questions may arise in hazardous waste and toxic tort cases or in cases where the records of research conducted years before a lawsuit is filed are important.

4. **Who has the duty to preserve and/or retain evidence?** In *Elias v Lancaster General Hospital,* 710 A.2d 65 (Pa. Super. 1998), the Superior Court noted serious reservations in requiring hospitals to retain "extracted objects" in order to protect the patient's subsequent "financial interests"

in a lawsuit. *Id.* at 69. The court's comments make it clear that the issue of who should be liable in spoliation cases is particularly compelling. Should liability be imposed on those who are not directly involved in potential lawsuits, but who nonetheless may possess items of evidentiary value? If so, does it matter whether the individual was aware of an accident or occurrence or that the item in question is evidence?

5. **How long does the duty last?** It is very difficult to determine how long it will be before a party pursues a civil claim. In circumstances where the "discovery" rule applies and the statute of limitations is tolled, it would be most difficult to objectively identify an appropriate period during which evidence must be preserved. Will issues such as cost and the availability of suitable storage be considerations?

6. **When is one entitled to pursue a spoliation action?** In *Taylor v. Johnson Products, Inc.*, 115 Dauphin Co. Rptr. 398 (1995), Judge Turgeon reinforced Judge Walters' admonition in *Liebig* that a cause of action for negligent spoliation is only available if the plaintiff "fails to succeed on the substantive claims because of the lack of evidence due to its spoliation." *Taylor,* 115 Dauphin Co. Rptr. at 401. This position, most reasonable on its face, raises other issues. Is a party required to wait until final adjudication of the underlying claim before filing an action for spoliation? Should it be required that spoliation be pled in the underlying lawsuit and only resolved following an unfavorable result?

7. **What kind of "tort" is spoliation of evidence?** Should an action for the intentional destruction or alteration or disposal of evidence be structured differently than one based on negligence? Will it be necessary to consider whether the actions of an individual occurred prior to or after notice of a claim, or prior to or after the initiation of a lawsuit? The nature of the spoliation tort embraced by the courts in *Liebig, Taylor* and *M.L.* implies that liability would be "strict," without the need to find fault. The elements of the tort adopted in those cases only require a plaintiff to prove that evidence was destroyed by someone with a duty to preserve it. Apparently, the need to prove carelessness or intentional conduct or scienter is not contemplated.

The resolution of these and other compelling issues requires a deliberative process which will lead to a response calculated to effectively and thoroughly address the spoliation problem as it is determined to be. Even if the appellate courts of Pennsylvania are favorably disposed to the recognition of a new common law tort, it would require years, and perhaps decades, of litigation to resolve these questions in such a way to provide predictable direction to the community at large. The legislative process when pursued in earnest would surely be more likely to accomplish this

task in a shorter period of time and with a more global view of the nature of the problem and possible solutions.

In the case before the Court, plaintiffs have not alleged that there was anything particularly wrong with the fiberglass form that ruptured. Indeed, they have no way of knowing whether anything was wrong since the form is no longer available. The only thing that the plaintiffs know is that defendants no longer have the form in their possession. Apart from the issues raised above, this factual setting raises the particularly thorny issue of what a plaintiff should be required to prove in order to ultimately prevail in a spoliation claim. Obviously, the plaintiff has little chance of prevailing without the fiberglass form. However, there is nothing in the complaint to indicate what they would be able to prove if they did have the form. Allowing recovery in these circumstances would potentially place a plaintiff in a better position to recover than if the product had been retained. It would appear that under the elements developed in *Continental Insurance v. Hermann,* and adopted by the Court in *Liebig,* all the plaintiff would be required to show is a "significant impairment of the ability to prove the lawsuit." *Continental Insurance,* 576 So.2d at 315; *Liebig,* 31 Lebanon Co. L.J. at 193. In the present circumstances, the Shoemakers would easily be able to prevail on the issue of "significant impairment" and would not have to prove anything concerning the merits of their original claim. This almost absolute liability approach certainly requires close scrutiny.

For all the reasons recited above, this Court declines to fashion a new cause of action. The defendants preliminary objection in the nature of a demurrer to the claim for spoliation of evidence shall be sustained.

As to the remaining preliminary objections, because the plaintiffs have failed to assert the existence of an affirmative statement indicating a misrepresentation of a material fact concerning the character or quality of the fiberglass form, the defendants' preliminary objection shall be sustained to Count III.

With regard to defendants' demurrer to Count IV, the Court finds the defendants' position that Restatement (Second) of Torts, §§ 388 and 390, are "merely vehicles for establishing negligence" is accurate, however, that is precisely what the plaintiff has pled, and as a consequence, the demurrer shall be overruled. An appropriate Order will follow. Signed this 30th day of April, 1999.

ORDER

AND NOW, to-wit, this 30th day of April, 1999, upon consideration of the Preliminary Objections filed by the defendants in the above-referenced cause, and for the reasons set forth in the preceding Opinion, it is hereby **ORDERED, ADJUDGED and DECREED** as follows:

1. The defendants' preliminary objection in the nature of a demurrer to Count II is hereby **SUSTAINED**;

2. the defendants' preliminary objection in the nature of a demurrer to Count III is hereby **SUSTAINED**;

3. the defendants' preliminary objection in the nature of a demurrer to Count IV is hereby **OVERRULED**; and

4. the defendants' preliminary objection in the nature of a demurrer to Count VII and all claims for punitive damages are hereby **OVERRULED**.

By the Court,
/s/ **John A. Bozza, Judge**

IN THE MATTER OF THE ESTATE OF OF MERLE WALTER EASTMAN, a/k/a MERLE EASTMAN, Deceased

ESTATES/JOINT ACCOUNTS

Where decedent signed change of beneficiary form but died before delivering it to bank, the change was not effective and ownership of the account passed at death to existing joint owners with right of survivorship

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION NO. 76. OF 1999

Appearances: Donald J. Rogala, Esq. for Petitioner
Richard A. Lanzillo, Esq. for Respondents

OPINION

Connelly, J., June 4, 1999

FACTS

This matter comes before the court pursuant to Barbara S. Eastman's [hereinafter Petitioner] Petition to Determine Ownership of Accounts filed March 5, 1999. The facts of the instant matter reveal that on July 29, 1998, Merle W. Eastman executed a PNC Brokerage Self-Directed IRA Application for the purpose of opening a joint account with rights of survivorship with his daughter, Carrie Sue Crow, and his son, Kirk C. Eastman [hereinafter Respondents]. Upon receiving the Respondents' signatures on the Account Application, Mr. Eastman secured the required signatures of a PNC Brokerage Principal and Investment Consultant who then assigned the Account Number 10160432 [hereinafter Account].

Merle W. Eastman initially transferred $45,000.00 into the Account which represented the proceeds received from the sale of Mr. Eastman's residence in Edinboro, Pennsylvania. Additionally, Mr. Eastman made arrangements for the transfer of assets valued at approximately $24,000.00 from his brokerage account with Salomon Smith Barney. Mr. Eastman was the sole contributor of funds to the Account, and there have been no withdrawals or additional contributions since July 29, 1998.

On October 8, 1998, Merle W. Eastman married Petitioner. On November 20, 1998, Mr. Eastman approached Richard R. Guerrini, an investment consultant with PNC Brokerage, to discuss changing the beneficiary designation with respect to the Account. The new account was to be funded by the transfer in kind of all assets in the brokerage account to the new account. Mr. Eastman then prepared another Account Application and an Investor Disclosure and Acknowledgment form. The Account Application named Petitioner as "Joint Applicant" and indicated the account type as "joint with rights of survivorship." Merle W. Eastman and Petitioner signed both documents at their residence that same evening. However said documents were never returned to Mr. Guerrini until after Mr. Eastman's death on February 2, 1999.

LAW

The first issue which must be addressed is the ownership of the Account. Petitioner argues since Merle W. Eastman was the sole contributor of funds to the Account, he retained complete control of the funds. Thus as sole owner of the entire Account, Mr. Eastman could change the beneficiary designation as he desired. Respondents however maintain that as designated joint owners with rights of survivorship, they remained record owners of the Account at all times with authority to conduct transactions with respect to the Account.

Petitioner cites to *Hanover Bank of Pennsylvania v. United Penn Bank*, 326 Pa.Super. 593, 474 A.2d 1137 (1984) in which the Pennsylvania Superior Court addressed the issue of ownership with respect to three Certificates of Deposit which decedent purchased with his own funds, and subsequently attempted to assign. The trial court reviewed the Multi-Party Accounts Act, 20 Pa.C.S.A. § 6301, *et seq.* which establishes ownership of a joint account during the lifetime of the account owners. Specifically the court noted the language of Section 6303 of the Probate, Estates, and Fiduciary Code [PEF] which provides:

> A joint account belongs, during the lifetime of all parties, to the parties in the proportion to the net contributions by each to the sum on deposit unless there is clear and convincing evidence of a different intent.

20 Pa.C.S. §6303 (a). The trial court opined that the fact the decedent kept the certificates in his possession, plus his attempt to assign such certificates indicated his intention to retain ownership of the entire amount on deposit. *Hanover,* 474 A.2d. at 1140. The Pennsylvania Superior Court adopted the trial court's reasoning and further observed that the decedent's actions of pursuing all possible measures to effectuate the assignment were indicative of his belief he had the right to assign or transfer the certificates as he pleased. *Id.* at 1140.

Similarly at bar, the undisputed evidence reveals Merle W. Eastman was the sole contributor of funds to the Account, and he made attempts to change the designated beneficiary of the Account. Therefore in light of Section 6303(a) and the reasoning in *Hanover,* this court concludes Merle W. Eastman evidenced an intent to retain ownership and control of the entire Account, with the authority to change the beneficiaries of the Account. See *Wilhelm v. Wilhelm*, 441 Pa.Super. 230, 657 A.2d 34, 35 (1995) (father who created joint bank accounts with each of four children and contributed all monies placed in accounts had right to withdraw funds from accounts and children were required to turn over documents needed to effectuate withdrawals).

Respondents maintain Merle W. Eastman's actions of designating them as joint owners with rights of survivorship on the original Account Application demonstrates a "consistent, documented intent that the assets of his brokerage and other accounts would pass to his children upon his death." *Respondents' Post-Hearing Memorandum, p. 5.* In support

Respondents rely on Section 6304 of the PEF which provides:

> Joint Account.- Any sum remaining on deposit at the death of a party to a joint account belongs to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent at the time the account is created.

20 Pa.C.S. §6304(a). Respondents' position would have merit, but for the fact the present issue before this court is the actual identity of the surviving party, which requires a review of the attempted transfer of the Account by Merle W. Eastman, which occurred *during his lifetime.* Accordingly Section 6303, which applies to ownership to joint accounts during the lifetime of the parties, controls the initial inquiry as to which party was the intended survivor of the Account. *Hanover,* 474 A.2d at 1140. Furthermore, the Official Comment to Section 6303 provides:

> The theory of these sections is that the basic relationship of the parties is that of *individual ownership of values attributable to their respective deposits and withdrawals;* the right of survivorship which attaches unless negated by the form of the account really is a *right to the values theretofore owned by another which the survivor receives for the first time at the death of the owner.* That is to say, the account operates as a valid disposition at death rather than as a present joint tenancy.

20 Pa.C.S. §6303, Official Comment- 1976 (emphasis added). Therefore having established Merle W. Eastman's ownership of the Account and his ability to change the designated beneficiary, the next issue is to determine whether Mr. Eastman effectuated such a change entitling Petitioner to the remaining balance of the Account.

Petitioner argues Merle W. Eastman completed the transfer of designated beneficiaries on November 20, 1998 by executing an Account Application naming Petitioner as a Joint Applicant. *See Account Application - Petitioner's Exhibit* 6. Respondents however contend the transfer was not perfected since Mr. Eastman never returned the new account application to PNC, and never obtained or even requested written consents from either of the Respondents.

In addition to addressing the issue of ownership in *Hanover,* the Pennsylvania Superior Court considered whether the decedent, prior to his death, had perfected an assignment of three Certificates of Deposit. As previously mentioned, subsequent to the purchase of the certificates from United Penn Bank, the decedent attempted to assign the certificates to the Hanover Bank of Pennsylvania by entering such language on the back of each of the certificates along with his signature. *Hanover Bank,* 474 A.2d at 1139. However when Hanover Bank requested United Penn Bank to change ownership of the certificates upon decedent's death, United Penn refused to assign the certificates without the signature of both parties on the certificates. *Id.* United Penn Bank maintained that the consent of the Appellants was required before United Penn could issue a written

consent. The Appellants therefore argued the assignment to Hanover Bank was invalid due to decedent's failure to comply with the terms and provisions of the contracts entered into between the parties. *Id.* at 1140.

The court reviewed the signature cards signed by the parties which provided that the certificates were to be governed by the "Uniform Commercial Code and the rules and regulations as set forth on the certificates themselves." *Id.* The court then noted that "[n]owhere in the signature card or on the certificates themselves does it state that consent to an assignment shall be withheld until both parties sign the assignment. This was a requirement which was never put on either form." *Id.* at 1142. Thus the court found this insistence on the consent of both joint owners to be "arbitrary," and concluded the assignment of the certificates was valid as the bank had "no legal reason to withhold consent *under the terms of its own contract."* *Id.* at 1141 (emphasis added).

Presently, when Merle W. Eastman first opened the Account, he filled out a document entitled, "Self-Directed IRA Application" naming Respondents, Carrie S. Crow and Kirk C. Eastman as Primary Beneficiary Designations. *See Self-Directed IRA Application - Respondent's Exhibit A.* Relative to changing designated beneficiaries, this document provided:

> **Important Notes:**
> 1. Beneficiary Change: If prior beneficiary designation are to remain in effect, the name[s] of the beneficiaries must be restated. *The last beneficiary designation will control the distribution of IRA funds upon your death.*
>
> . . . .
>
> 4. You may change the beneficiary designated by *filing a new designation in writing and mail to* PNC *Brokerage Corp.*

Id. (emphasis added).

These instructions, which Mr. Eastman read and understood as evidenced by his signature on such application, clearly direct Mr. Eastman to complete a new beneficiary designation in writing and return it to PNC. However, as previously noted, the only action taken by Merle W. Eastman with respect to a change in the designated beneficiaries was to fill out and execute a new Account Application with Petitioner named as "Joint Applicant". The Application was not returned to Mr. Guerrini at PNC until after Decedent's death on February 2, 1999. In *Hanover,* the court observed that "the decedent took all possible actions to effectuate the assignment . . . . The only matter left was the 'consent' from United Penn Bank." *Id.* at 1141. However at bar it was the actions of the decedent, Merle W. Eastman, which prevented the completion of the transfer.

Petitioner maintains the signature of the manager of PNC is "nothing more than a ministerial act which could have occurred when the documents were actually returned to PNC Brokerage even though they were returned after Mr. Eastman's death." *Petitioner's Brief, p. 10.* In *Estate of Krempasky,* 348 Pa.Super. 128, 501 A.2d 681 (1985), the Pennsylvania Superior Court

addressed a similar factual scenario where the name of the second party was added pursuant to an authorization form prepared by that party and containing the decedent's signature. *Krempasky,* 501 A.2d at 682. The second party returned the authorization form to the bank, and the bank subsequently added her name to the certificates of deposit. However evidence later revealed the decedent had died just prior to the second party returning the form and the bank adding her name to the certificates. *Id.* at 683. Consequently the court concluded the certificates of deposit belonged to the decedent's estate since her death terminated both the second party's and the bank's authority to change the account, reflecting the well established principle:

> ...the death of the principal operates, as an instantaneous and absolute revocation of the agent's authority or power, unless the agency is coupled with an interest. Hence, any act done by the agent, as such, after the principal's death will not affect the estate of the latter.

Estate of Krempasky, 501 A.2d at 683.

Pursuant to the Customer Agreement in the instant case, PNC was to act as Merle W. Eastman's agent "for the purpose of carrying out my directions in accordance with the terms and conditions of this agreement for my account and risk with respect to the purchase or sale of securities." *Customer Agreement-Petitioner's Exhibit 1-A.* Therefore, as in *Krempasky,* Merle W. Eastman's death terminated both Petitioner's and PNC's authority to change the account, and the Account remains the property of the Respondents.

Finally Petitioner makes the argument Merle W. Eastman made a valid inter vivos gift of the Account to Petitioner. As previously discussed, Section 6303(a) establishes the presumption that during the lifetime of the parties to a joint account, such account belongs to the party who contributed the funds. *Id.* at 1381. This statutory presumption may be overcome by clear and convincing evidence of an inter vivos gift demonstrated by the following two elements:

> First, there must be an intention to make an immediate gift. Second, there must be actual or constructive delivery to the donee such as will divest the donor of dominion and control of the subject matter of the gift.

Breitkreutz v. Dept. of Public Welfare, ___ Pa.Cmwlth. __, 699 A.2d1378, 1381 (1997) *quoting Lessner v. Rubinson,* 382 Pa.Super. 306, 310, 555 A.2d 193, 197 (1989), *aff'd* 527 Pa. 393, 592 A.2d 678 (1991). "'Clear and convincing evidence' is the highest burden in our civil law and requires that the fact-finder be able to 'come to clear conviction, without hesitancy, of the truth of the precise fact in issue.'" *In re Estate of Heske*, 436 Pa.Super. 63, 647 A.2d 243, 244 (1994) *quoting Lessner v. Rubinson,* 527 Pa. 393, 400, 592 A.2d 678, 681 (1991).

This court concludes Petitioner has failed to demonstrate through clear and convincing evidence that Merle W. Eastman invested in Petitioner "so much dominion and control of the subject matter" in light of Petitioner's own argument relating to the ownership of the Account. Initially Petitioner averred:

> During Mr. Eastman's lifetime, the assets of that account were the sole property of Mr. Eastman in spite of the designation of the account being joint with rights of survivorship. During his lifetime, Mr. Eastman was the beneficial owner of the entire account based upon the fact that he was the sole contributor to the account.

Petitioner's Brief, p. 5. Petitioner further noted that having made no contributions to the Account, Respondents had no ownership interest in the Account. Similarly nothing in the record indicates Petitioner contributed any funds to the Account. The new account was to be funded by the transfer of all assets in the brokerage account being transferred in kind to the new account. Therefore in line with Petitioner's own argument, Merle W. Eastman maintained complete control as sole contributor at all times, precluding Petitioner from rebutting the presumption that Mr. Eastman did not intend to make an irrevocable gift of any of the funds of the Account. *Hanover,* 474 A.2d at 1140

ORDER

AND NOW, TO-WIT, this 4th day of June, 1999, for the reasons set forth in the foregoing Opinion, it is hereby ORDERED, ADJUDGED and DECREED that the ownership of PNC Brokerage Account No. 10160432 containing $45,000.00 and assets valued at approximately $24,000.00 which were previously owned by Merle W. Eastman, Carrie Sue Crow and Kirk C. Eastman as joint tenants with right of survivorship, passed by operation of law to Carrie Sue Crow and Kirk C. Eastman upon the death of Merle W. Eastman and that petitioner has no right, title to, or interest in said account.

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

COMMONWEALTH OF PENNSYLVANIA

v.

MICHAEL CROSBY

CRIMINAL LAW

A defendant has a right to be arraigned without "unnecessary delay" once he is arrested. *Commonwealth v. Futch*, 290 A.2d 417 (Pa. 1972).

CRIMINAL LAW

Any evidence obtained as the result of an "unnecessary" delay in arraigning a defendant shall be suppressed.

CRIMINAL LAW

Any delay of more than 6 hours between a defendant's arrest and arraignment will be considered "unnecessary" unless certain exigent circumstances exist. *Commonwealth v. Duncan*, 525 A.2d 1177 (Pa. 1987).

CRIMINAL LAW

A delay in arraignment will be considered necessary if it is the result of a defendant having fled the jurisdiction and needing to be returned to the jurisdiction, *Commonwealth v. D'Amato*, 525 A.2d 300 (Pa. 1987); a defendant being mentally unfit to be arraigned, *Commonwealth v. Bracey*, 662 A.2d 1062 (Pa. 1995); or if there is no arraignment judge available because of unexpected circumstances, *Commonwealth v. Keasley*, 462 A.2d 216 (Pa. 1983).

CRIMINAL LAW/CONFESSIONS

If an incriminating statement is started within 6 hours of a defendant's arrest it will not be considered to have resulted from any delay even if the defendant is not arrraigned within 6 hours of arrest. Therefore, no such statement will be suppressed. *Commonwealth v. Odrick*, 599 A.2d 974 (Pa.Super. 1991).

CRIMINAL LAW

Pennsylvania does not require an "interested adult" to be present during the questioning of a juvenile, although the presence of an interested adult will weigh in favor of considering any confession which is given to be voluntary.

CRIMINAL LAW

The Court in this case found that the Defendant was arrested at 1:19 a.m. and arraigned at 3:14 p.m. the same day and thus there had been a pre-arraignment delay of more than 6 hours.

CRIMINAL LAW

The Court held that the Defendant's incriminating statement did not begin until after 6 hours of pre-arraignment delay because the Defendant denied any involvement in the crime until more than 6 hours had passed and only later made incriminating statements.

CRIMINAL LAW

The Court held that a delay so that the police could have the Defendant's mother come to the police station would be considered unnecessary because it was not necessary to have the Defendant's mother present to arraign the Defendant.

CRIMINAL LAW

The Court held that only delays related to arraigning the Defendant would be considered necessary and that delays related to questioning the Defendant would be considered unnecessary.

CRIMINAL LAW

The Court held that the Defendant's confession and the gun which the Defendant led the police to immediately after his confession and before his arraignment where both obtained as a result of "unnecessary delay" in arraigning the Defendant. Therefore, both the confession and the gun would be suppressed.

NOTE: The Commonwealth took a pre-trial appeal on this issue. The Superior Court affirmed the trial court decision. 711 A.2d 1038 (Pa.Super. 1998)(2-1 memorandum). Thereafter, the Commonwealth appealed to the Pennsylvania Supreme Court. The Supreme Court granted review but then after oral argument dismissed the appeal. Two justices dissented from the decision to dismiss the appeal. An out of county jury will hear this case in July of 1999.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 2371 A & B OF 1996

Appearances: Damon Hopkins, Esquire
Timothy Lucas, Esquire

OPINION

Anthony, J., April 9, 1997.

This matter comes before the Court on the Defendant's Omnibus Pre-Trial Motion which in part asks the Court to suppress a statement made by the Defendant and a gun that the Defendant located for the police. After considering the arguments of counsel and the testimony at the suppression hearing, this Court will grant the Defendant's motion suppressing these pieces of evidence. The facts are as follows.

On June 27, 1996, Demitrious Johnson was shot and killed in the City of Erie, Pennsylvania. The Defendant was arrested and taken to the police station in connection with this shooting at 1:19 a.m. on June 28, 1996, by officers of the Erie Police Department. There was no first hand testimony at the suppression hearing about the Defendant's activities or whereabouts at the police station between the Defendant's arrest and 5:30 a.m. Detective McShane testified that he arrived at the police station at approximately 5:30 a.m. and it was his understanding that the Defendant had been sitting in an interview room until that time. The Commonwealth asserts that the delay in having a detective question the defendant occured because the shooting occured at 11:30 p.m. which was between shifts. The timing of the shooting necessitated that detectives be called in from home. In addition, there were many witnesses who needed to be questioned in

relation to this case.

Detective Zimmerman was also at the police station by 5:30 a.m. and involved with this case. At 5:30 a.m., the detectives realized the Defendant was only seventeen years old and therefore they decided to have the Defendant's mother come to the police station. The detectives had the Defendant and his mother sign a juvenile waiver at 6:20 a.m. and then left them alone to talk to each other. At 6:32 a.m. the detectives began questioning the Defendant. At 7:16 a.m., the detectives began a videotaped statement with the Defendant. The Defendant denied any involvement with the shooting during this time span. During this time, Detective Zimmerman was questioning the Defendant while Detective McShane spoke to other witnesses. These other witnesses implicated the Defendant in the shooting.

A little before 7:44 a.m., Detective McShane came into the interview room and Detective Zimmerman updated him on what the Defendant had said up until that point. Detective McShane then asked the Defendant questions for a short time. The Defendant still denied any involvement in the shooting and denied even being in the vicinity where the shooting occurred. At 7:44 a.m., Detective McShane asked that the interview be stopped so that he, Detective McShane, could talk to the Defendant's mother. Detective McShane told the Defendant's mother that the police had spoken to witnesses who had stated that the Defendant was involved in the shooting. Between 7:44 a.m. and 9:40 a.m. when the videotaping began again, the Defendant and his mother spoke four separate times. At 9:40 a.m., the Defendant confessed to his involvement in the shooting. At 10:18 a.m., the videotaping ended and the Defendant voluntarily went with the police and showed them where the weapon, a gun, was located. The Defendant was arraigned at 3:14 p.m. on this same day.

The Defendant argues in support of suppressing the evidence that the police violated the "6 hour rule" which was announced in *Commonwealth v. Davenport*, 370 A.2d 301 (Pa. 1977). The rule stated that if the police held a defendant in custody for more than 6 hours before he was arraigned, then any inculpatory statements made during his pre-arraignment custody which were related to the delay in being arraigned would be suppressed. *Id.* The evidence would not be suppressed however, if the prosecution could show that the delay in arraigning the Defendant was "necessary." *Id.* This rule was later modified in *Commonwealth v. Duncan* to state that only statements made after 6 hours of pre-arraignment custody would be considered for suppression under the rule even if there was "unnecessary delay" in arraigning the defendant. 525 A. 2d 1177 (Pa. 1987).

The rationale for the rule is that if the police are allowed to delay arraigning the Defendant indefinitely until they receive a statement then the situation becomes coercive. The previous standard for suppressing evidence because of delay between arrest and arraignment had stated that any inculpatory statement made as a result of any "unnecessary delay" in arraigning the defendant would be suppressed regardless of the length of

pre-arraignment custody. *Commonwealth v. Futch*, 290 A.2d 417 (1972) *(rehearing denied)*. Previous to *Davenport*, courts often found unnecessary delay in situations where pre-arraignment custody lasted less than 6 hours. *See, e.g., Commonwealth v. McGeachy*, 407 A.2d 1300 (Pa. 1979); *Commonwealth v. Bey*, 341 A.2d 907 (Pa. 1975) *(rehearing denied); Commonwealth v. Barilak*, 333 A.2d 859 (Pa. 1975). Necessary delays were considered to be only delays that were caused by the need for administrative processing of the defendant such as booking and obtaining fingerprints. *McGeachy, supra; Futch, supra. Davenport* only changed this standard by putting a time frame on how much time would be presumed necessary to process a defendant. If the processing or arraigning of the defendant takes longer than this amount of time, 6 hours, the burden shifts to the prosecution to show that the delay in arraigning the defendant was "necessary".

However, cases decided after *Duncan* have held that certain exigent circumstances will justify a longer delay between arrest and arraignment and therefore statements received after 6 hours in those situations shall not be suppressed. The three situations that have been determined to justify a longer delay in arraigning a defendant are (1) the lack of a magistrate to arraign the defendant, (2) the defendant fleeing and needing to be transported back to the jurisdiction, and (3) the defendant's unstable mental and physical condition. *Commonwealth v. Bracey*, 662 A.2d 1062 (Pa. 1995)(mental state); *Commonwealth v. D'Amato*, 526 A.2d 300 (Pa. 1987)(defendant fleeing); *Commonwealth v. Keasley*, 62 A.2d 216 (Pa. 1983)(lack of an arraignment judge).

The court held in *Commonwealth v. Goldsmith* that a defendant could not waive his right to a prompt arraignment and therefore the evidence in the case which was obtained after 6 hours of pre-arraignment custody was suppressed. 619 A.2d 311 (Pa. Super. 1993)(*appeal denied)*. In contrast, there are many post-*Duncan* cases where evidence has been ruled admissible despite allegations that pre-arraignment custody lasted over 6 hours. The cases which have declined to suppress evidence have relied on various rationales. *See Bracey, supra; Commonwealth v. Bond*, 652 A.2d 308 (Pa. 1995); *Commonwealth v. Tedford*, 567 A.2d 610 (Pa. 1989); *Commonwealth v. Hughes*, 555 A.2d 1264 (Pa. 1989); *D'Amato, supra; Commonwealth v. Gray*, 608 A.2d 534 (Pa. Super. 1992); *Commonwealth v. Odrick*, 599 A.2d 974 (Pa.Super. 1991); *Commonwealth v. DeBooth*, 550 A.2d 570 (Pa.Super. 1988); *Commonwealth v. Cessna*, 537 A.2d 834 (Pa.Super. 1988); *Commonwealth v. Gilbert*, 528 A.2d 195 (Pa.Super. 1987). However, these cases are all distinguishable from the present case. None of these cases is factually similar to the present case as they all involve situations where the incriminating information was obtained before 6 hours of pre-arraigment custody or they involve situations involving the three exigent circumstances discussed earlier. The court in *Commonwealth v. Odrick* stated that the time when a defendant first makes an inculpatory statement is the time to measure any pre-arraigment delay rather than

when the formal statement is completed. *Supra.* In the present case, the Defendant's inculpatory statement did not begin within 6 hours of his arrest and the reason for the delay in arraigning the Defendant does not fit into any of the three recognized exigent circumstances. Therefore, the Court will examine whether the standard for suppressing evidence under *Davenport/Duncan* has been met.

Evidence must be suppressed if it is obtained after six hours of pre-arraignment custody and (1) the delay was unnecessary, (2) the evidence is prejudicial, and (3) the obtaining of the evidence was reasonably related to the delay. *Davenport* at 305, *supra.* The primary issue presented in the present case is whether a delay in arraigning the Defendant in order for Detective McShane and the Defendant to speak to the Defendant's mother constitutes a necessary or unnecessary delay.[1] The Defendant was arrested at 1:19 a.m. and did not begin to make the inculpatory statement until 9:40 a.m. There was approximately a one hour delay to have the Defendant's mother come to the station. Therefore, even if we accept this delay as necessary the inculpatory statement would still have begun after seven hours and twenty minutes of pre-arraignment custody and would have been obtained in violation of the *Davenport/Duncan* rule.[2] After questioning began, there was a 1 hour and 56 minute delay for Detective McShane and the Defendant to speak to the Defendant's mother. The dispositive issue is whether this delay constitutes a "necessary" delay.[3]

The prosecution argues that the time spent for the consultations with the Defendant's mother should be considered a "necessary delay"

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[1] In its original brief on this matter the prosecution asserts that the delay due to the lack of detectives to question the Defendant should be exused. [sic] However, this is not a delay in administrative processing but in questioning of the Defendant. Only delays for processing are exused, [sic] not delays for questioning.

[2] Because of the Court's ruling on the second delay, the Court need not address the issue of whether the first delay was "necessary".

[3] The Defendant's inculpatory statement began at 9:40 a.m which was 8 hours 21 minutes after his arrest at 1:19 a.m. The delay to wait for the Defendant's mother to arrive lasted from 5:30 to 6:20, 50 minutes. The Defendant and his mother then spoke alone for another 12 minutes. Even if all of this delay is accepted as "necessary" the Defendant's statement still is considered to have been obtained over 7 hours after his arrest. In addition, even if only the second delay, 1 hour and 56 minutes, is considered to be "necessary" this still does not bring the Defendant's statement into compliance with the *Davenport/Duncan* rule.

It is when the inculpatory statement begins rather than when it is completed which the court must look at in applying the *Davenport/Duncan* rule. *Odrick, supra.*

because it made the statement more likely to be obtained voluntarily. The prosecution is correct in stating that it makes a statement by a juvenile more likely to be considered voluntary if an "interested adult" is present. *See Commonwealth v. Williams, supra; Commonwealth v. Bebout,* 484 A.2d 130 (Pa.Super. 1984); *In Interest of Pack,* 616 A.2d 1006 (Pa.Super. 1992). However, Pennsylvania does not require that an interested adult be present when the police obtain a statement from a juvenile. *Commonwealth v. Williams,* 75 A.2d 1283 (Pa. 1984). Even if the prosecution is correct in stating that it was necessary to delay the questioning of the Defendant while Detective McShane and the Defendant spoke to his mother that is a separate issue than the question of whether it was necessary to delay the arraignment of the Defendant for the consultations with the Defendant's mother. Even if you accept that the police were correct in delaying the questioning of the Defendant, which is questionable considering that Pennsylvania does not follow the "interested adult" rule, that rationale still does not support the assertion that it was necessary to delay the arraignment of the Defendant.

It is important to realize that for a delay to be considered "necessary" under *Davenport/Duncan* the delay in arraignment needs to be the result of a situation which prevents the police from arraigning the Defendant such as lack of an arraignment judge, not a result of a situation that only prevents the police from obtaining a statement or confession from the Defendant. *See Commonwealth v. Jenkins*, 454 A.2d 1004 (Pa. 1982). Attempting to obtain a confession is not a necessary reason to delay arraigning a defendant. In fact, the "6 hour" rule was enacted in order to prevent police from delaying arraignments in order to obtain statements. *Commonwealth v. McGeachy, supra; Commonwealth v. Davenport, supra.*

The *Davenport/Duncan* rule as well as the *Futch* rule are meant to protect a defendant's right to a prompt arraignment as provided by Pennsylvania law. Pa.R.Crim.P. 102. The reasons for mandating a prompt arraignment are (1) to allow a defendant to obtain his freedom though posting bail, (2) to have the defendant hear about his rights from an independent judicial officer, and (3) to allow a defendant to obtain legal counsel. *Futch, supra.* None of these goals was accomplished by having Detective McShane talk to the Defendant's mother and then having the Defendant speak to his mother. In fact, it is very possible that the reason for having the Defendant's mother speak to Detective McShane and then speak to the Defendant was to assist the detectives in obtaining a statement. Detective McShane related to the Defendant's mother that the police had witnesses who saw the Defendant at the scene of the shooting. Therefore, the delay in conferring with the Defendant's mother gives rise to the argument that this was not to assist the Defendant in any way, but to the contrary was intended to assist the police in obtaining a statement. The court in *Commownealth v. Bey* held that a delay in arraigning a

defendant in order to confront him with statements of other witnesses would be considered "unnecessary" and any incriminating statement made by the defendant would be suppressed, 341 A.2d 907 (Pa. 1975). Therefore, the Court cannot find that the delay in the present case was "necessary". *See Commonwealth v. Vaughn*, 10 D.C. 4th 560 (Armstrong Co. 1991).

In relation to the other two parts of the *Davenport/Duncan* rule, the statement and the leading of the police to the gun were certainly incriminating and prejudicial. Finally, the obtaining of the statement was "reasonably related" to the delay. If the Defendant had been arraigned before 9:40 a.m., it is certainly possible that he would not have given the statement in question. *See Commonwealth v. Bey, supra; Commonwealth v. Smith*, 387 A.2d 491 (Pa.Super. 1978). Therefore, all three parts of the *Davenport/Duncan* test have been met. For this reason, the Court must suppress the statement of the Defendant.

The gun which the Defendant led the police to must also be suppressed as it was obtained as result of the illegally obtained statement. *Wong Sun v. United States*, 371 U.S. 471 (1963); *See Commonwealth v. Lodis*, 543 A.2d 1226 at 1229, 1230 (Pa.Super. 1988) (applying "fruit of the poisoned tree" analysis although finding no causal relationship between the gun found and defendant's statement which was suppressed based on *Davenport* rule); *Commonwealth v. Devan*, 487 A.2d 869 (Pa.Super. 1985) (stating that the "fruit of the poisonous tree" doctrine should be applied to confessions obtained in violation of the *Davenport* rule).

For these reasons, the Court is compelled to exclude evidence of the Defendant's statement and the gun.

/s/ **Fred P. Anthony, J.**

In the Matter of the Adoption of C.C.G. and Z.C.G.

FAMILY LAW/ADOPTION

Adoption a purely statutory right

FAMILY LAW/ADOPTION

Adoption Act mandates either termination of existing parental rights or unconditional consensual relinquishment of parental rights. 23 Pa.C.S. §§2711(a), 2714.

FAMILY LAW/ADOPTION

"Qualified consent" exception to requirements of §2711 available only to spouse of a parent. 23 Pa.C.S. §2903.

FAMILY LAW/ADOPTION

Where existing parental rights not terminated or unconditionally relinquished and "qualified consent" exception not available, petitioner cannot meet the prerequisites of the Adoption Act

STATUTORY CONSTRUCTION

Statutes to be construed, if possible, to give effect to all provisions thereof. 1 Pa.C.S.A §1921(a)

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION No. 42 in Adoption 1999

Appearances: Karen Engro, Esq., Attorney for Petitioner

OPINION

Connelly, J., June 18, 1999

This matter comes before the court pursuant to a Petition for Adoption seeking to adopt C.C.G. and Z.C.G., filed May 6, 1999. The facts of the instant case reveal the following. Petitioners, J.C.G. and J.J.G., are adult male individuals who reside together in Erie County, Pennsylvania with the two children who are the subject of this petition. C.C.G. is a male child, age eight, born on March 23, 1991 in Wilmington, Delaware. Z.C.G. is a female child, age six, born on July 2, 1992 in Philadelphia, Pennsylvania. C.C.G. has resided with Petitioners since March 25, 1991, and Z.C.G. has resided with Petitioners since July 10, 1992. Petitioner J.J.G. is the present adoptive parent of both children having adopted C.C.G. on October 25, 1991, and Z.C.G. on April 21, 1993. J.C.G. petitions this court to enter a decree allowing him to adopt the children. Petitioners are unmarried, but view their relationship to the children as co-parents. Furthermore, on June 5, 1998, The Honorable Michael M. Palmisano granted J.C.'s request to change his last name to G.

The present issue is whether Pennsylvania law allows the same sex partner of a parent to adopt the children of that parent. Initially this court would note the well-established principle that "adoption is purely a

statutory right, unknown at common law." *In re Adoption of K.M.W.*, __ Pa.Super. __, 718 A.2d 332, 333 (1998) *citing In re Adoption* of *E.M.A.*, 487 Pa. 152, 409 A.2d 10 (1979). The Adoption Act, 23 Pa.C.S.A. § 2101, *et seq.*, must be strictly construed, and "our courts cannot and should not create judicial exceptions where the legislature has not seen fit to create such exceptions." *Id.*

For the adoption of a minor child, the Adoption Act mandates either the termination of the existing parents' rights or the consensual relinquishment of the parents' rights. 23 Pa.C.S. §§ 2711(a), 2714, *In re K.D.M.A.*, 18 D. & C. 4th 297, 299 (1993). Pursuant to § 2711(d) the contents of the consent of a parent of an adoptee under 18 years of age shall set forth *inter alia*:

> I hereby voluntarily and unconditionally consent to the adoption of the above named child.
>
> *I understand that by signing this consent I indicate my intent to permanently give up all rights to this child.*
>
> I understand such child will be placed for adoption.

23 Pa.C.S.A. § 2711(c) (emphasis added).

A review of the present Petition for Adoption reveals neither of the two prerequisites have been met. It is averred in the petition that "[t]here has not been a decree of termination of parental rights and duties," and it is Petitioner's desire "that J.C.G. be established as the co-parent of the adoptees so as not to terminate the parental rights currently bestowed upon J.J.G." *Petition for Adoption, pp. 3-4.* J.J.G.'s intent to retain his legal rights to the children is further evidenced by his consent which omits the language of § 271l(d) and instead sets forth:

> I, J.J.G., do hereby consent to the adoption of C.C.G. and Z.C.G., minor adoptees herein, by the Petitioner, J.C.G., herein, join in the prayer of this petition, and waive notice of hearing. This consent is voluntarily executed without disclosure of the name or other identification of the adopting parent.

Id. at 7. As J.J.G. refuses to unconditionally relinquish his rights to the children as mandated by the provisions of § 2711, his "qualified consent" is governed by § 2903 of the Adoption Act which reads:

> **§2903. Retention of parental status**
> Whenever a parent consents to the adoption of his child by his spouse, the parent-child relationship between him and this child shall remain whether or not he is one of the petitioners in the adoption proceeding.

23 Pa.C.S. § 2903. This statute, which represents the only exception to the

above-mentioned requirements of 23 Pa.C.S. § 2711, clearly limits situations involving the legal parent's qualified consent to intra-family adoptions where the spouse of the legal parent is seeking to become an adopting parent. *E.M.A.*, 409 A.2d at 11 (emphasis added).

In *In re Adoption of K.M.W.* the Pennsylvania Superior Court utilized this exception to determine an analogous issue of whether a maternal grandmother could adopt her grandchild, while allowing the natural mother to retain her parental rights. Following the strict mandates of § 2903, the court held that since the grandmother was not the spouse of the natural parent, she could not "avail herself of the exclusive family situation which would allow such an adoption." K.M.W., 718 A.2d at 334.

Similarly in the instant case, the Petitioners cannot benefit from the exception set forth in § 2903 as both are of the same sex and cannot marry under Pennsylvania law pursuant to 23 Pa.C.S. § 1704 which reads:

> **§ 1704. Marriage between persons of the same sex**
> It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.

23 Pa.C.S. § 1704; *Adoption of R.B.F. and R.C.F.*, 19 FIDUC. REP. 2d 61, 64 (1998). Accordingly since the exception found in § 2903 is only available to persons enjoying a "legally recognized marital relationship", and Petitioners cannot claim that status, their petition to adopt the two children must be denied. *In re: Adoption of B.L.P.*, 16 FIDUC. REP. 2d 95, 97 (1996).

This court would note the contrary holding in *In re Adoption of E.O.G.*, 28 D. & C. 4th 262 (1993) where the York County Orphans' Court, addressing the issue of same-sex adoptions, determined the Adoption Act did not prohibit against a homosexual couple adopting a child. The court based its decision solely on 23 Pa.C.S. § 2312 of the Adoption Act which provides, "[a]ny individual may become an adopting parent."[1] Although it is true the Adoption Act does allow any individual, married or unmarried, to adopt a child, the prerequisites of the Act must still be met. *K.D.M.A.*, 18 D. & C. 4th at 301. To allow a "same-sex adoptions" in light of the explicit provisions of §§ 2903 and 1704 which undeniably preclude such adoptions, "would be tantamount to rewriting the legislative direction...and an unwarranted and impermissible judicial intrusion into the exclusive

[1] This is in direct contradiction to the Statutory Construction Act, specifically 1 Pa.C.S.A. § 1921(a) which requires that every statute shall be construed, if possible to give effect to all its provisions (emphasis added).

legislative prerogative." *E.M.A.*, 409 A.2d at 11. Furthermore in addressing the legislative intent behind the mandate that a qualified consent be available only to the spouse of a parent, the Pennsylvania Supreme Court has opined:

> It is appropriate and entirely reasonable for the Legislature to provide, as section 503[2] does, a special type of consent available only where there is a husband-wife relationship. So too it is not unreasonable to require non-spouses to comply with the unqualified parental consent provisions. Manifestly, our courts are without authority to ignore or alter the consent provisions of the Adoption Act.

Id. at 12.

WHEREFORE, because the legislature has not seen fit to specifically sanction such adoptions as this, the court is not legally empowered to grant the Petition for Adoption herein.

ORDER

AND NOW, TO-WIT, this 18th day of June, 1999, it is hereby **ORDERED**, **ADJUDGED and DECREED** that the Petition for Adoption filed by J.C.G. and J.J.G. in the above captioned matter is **DENIED** for the reasons set forth in the foregoing Opinion.

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

[2] 23 Pa.C.S. §2903, which replaced 1 P.S. §503, contains the exact language of the repealed statute.

COMMONWEALTH OF PENNSYLVANIA

v.

DURRELL GRAHAM

CRIMINAL PROCEDURE/SPEEDY TRIAL/
RULES OF CRIMINAL PROCEDURE

Criminal defendant's right to a speedy trial was not violated where defendant purposely made himself unavailable between the date of the filing of the criminal complaint and the date of his arrest.

CRIMINAL PROCEDURE/SPEEDY TRIAL/
RULES OF CRIMINAL PROCEDURE

Under Pa.R. Crim. Pro. 1100(c), the period of time between the filing of the written complaint and the defendant's arrest is excluded from the period for the commencement of trial, provided that the defendant could not be apprehended because his whereaouts were unknown and could not be determined by due diligence.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 1498 of 1998

Appearances: Office of the District Attorney
Joseph P. Burt, Esquire

OPINION

Bozza, John A.

Following a jury trial, the defendant, Durrell Graham, was found guilty of aggravated assault, 18 Pa.C.S.A. § 2702. On October 27,1998, the Court sentenced the defendant to sixty (60) to one hundred twenty (120) months incarceration, imposed a $500.00 fine, costs and restitution. This matter is before the Court on the defendant's final Statement of Matters Complained of on Appeal.

The sole issue raised in this appeal relates to the Court's denial of the defendant's Motion to Dismiss Pursuant to Rule 1100 of the Pennsylvania Rules of Criminal Procedure. The defendant contends that his right to a speedy trial was violated since the Commonwealth failed to exercise due diligence in executing the arrest warrant after the Complaint was filed.

The Court held a hearing on the defendant's Motion on September 17, 1998, from which the following facts emerged:

On August 27, 1997, charges were filed and a warrant for the defendant's arrest was initiated by the Erie Police Department. *See*, Jury Trial - Motions Transcript, September 17, 1998, pp. 13-14. An APB pickup request was also filed and announced at roll call. The police went to the defendant's listed address on four different occasions, namely August 27, 1997, September 2, 1997, January 22, 1998, and April 14, 1998. On the first three occasions, relatives informed the officers that the defendant was not there. The officers in turn informed the relatives that a warrant had been issued

for the defendant's arrest and that he should turn himself in. *Id.* at pp. 17-19. On the April 14, 1998, attempt, the officers were told that the defendant no longer lived at that address. *Id.* at p. 20.

The officer in charge of the warrant division of the Erie Police Department, Sgt. Odom, testified that during the time the defendant's warrant was pending, the department had between 350 to 475 warrants pending and that the department does not have a warrant staff that attempts to execute search or arrest warrants. *Id.* at p. 37. The department does, however, share and exchange information with all agencies within the state and country regarding attempts to locate individuals. *Id.* at pp. 34-35. On September 2, 1997, Sgt. Odom talked with one of the agents at the state parole office and advised him that a warrant had been issued for the defendant. The agent informed Sgt. Odom that they would attempt to have the defendant come in and then the Erie Police could serve the warrant. The defendant did not appear for his appointment and the state parole office also issued a warrant for a technical parole violation. *Id.* at p. 36. State parole also informed Sgt. Odom that the defendant would be entered into NCIC and that state parole would still be searching for the defendant since they also had a warrant for him. *Id.* at p. 39.

Officers from the State Board of Probation and Parole testified as to the steps their office took to locate the defendant when he failed to report to their office. Parole agents also went to the defendant's house on different occasions in an attempt to arrest him. On September 8, 1997, no one was home. *Id.* at p. 45. On September 11, 1997, two attempts were made and no one was home. *Id.* On September 17, 1997, an aunt informed the parole agent that the defendant was staying with his girlfriend but some of his clothes were still at his house. *Id.* at p. 46. The agent told the aunt to have the defendant report the following Tuesday, however, he did not. Agent Worley testified that he had at least monthly contact with the Erie Police and other agents to see if the defendant had been seen. Agent Worley also went to the defendant's home on September 25, 1997, and left a written instruction for the defendant to report. He also sent a certified letter to the defendant which was unclaimed. Agent Worley and other agents also patrolled the areas the defendant was known to frequent. *Id.* at p. 49.

On October 31, 1997, Agent Worley outlined the problems encountered with locating the defendant and requested the Court to declare the defendant delinquent. *Id.* at p. 50. Thereafter, the defendant was entered into the Commonwealth's Central System as a fugitive. After December, the parole office continued to patrol areas where they heard the defendant could be located. *Id.* at pp. 51 and 55. The defendant was spotted by another agent in March and a chase ensued but the defendant escaped arrest. *Id.* at pp. 61-62. The defendant was ultimately arrested on May 16, 1998, during a routine traffic stop. *Id.* at p. 20.

Rule 1100 of the Pennsylvania Rules of Criminal Procedure provides in

relevant part the following:

> (c) In determining the period for commencement of trial, there shall be excluded therefrom:
>
> (1) the period of time between the filing of the written complaint and the defendant's arrest, provided that the defendant could not be apprehended because his or her whereabouts were unknown and could not be determined by due diligence;
>
> (2) any period of time for which the defendant expressly waives Rule 1100;
>
> (3) such period of delay at any stage of the proceedings as results from:
>
> (i) the unavailability of the defendant or the defendant's attorney;
>
> (ii) any continuance granted at the request of the defendant or the defendant's attorney.

Pa. R. Crim. P. 1100(c).

The issue in this case is whether the defendant was unavailable and if so, could he have been found? As can be seen from the record in this case, the defendant was unavailable and in fact made himself unavailable. Each time the Erie Police and/or parole agents went to his address they informed family members to inform the defendant of the warrant for his arrest and to have him turn himself in. This never occurred. The defendant knew he was required to report to the parole office, yet never appeared. Written correspondence was ignored by the defendant and certified mail was returned unclaimed. Perhaps most indicative of the defendant being responsible for his own unavailability is the fact that he fled from parole agents in March of 1998 and therefore eluded capture. Therefore, the Court has no trouble concluding that the defendant purposefully made himself unavailable between the time the complaint was filed and his subsequent arrest.

Having determined that the defendant was unavailable, the issue becomes could he have been found -- did the Commonwealth exercise due diligence in attempting to find him? The actions of the Commonwealth are judged by what was done. *Commonwealth v. Ingram*, 404 Pa. Super. 560, 591 A.2d 734 (1991); *appeal denied*, 530 Pa. 631, 606 A.2d 901 (1992). Lack of due diligence should not be found simply because other options were available or, in hindsight, would have been more productive. *Id.* What was done as well as what could have been done to locate a fugitive must be viewed within the context of the practical circumstances that then existed, including the limited resources of the law enforcement agencies. On at least seven different occasions between August 27, 1997 and September 25, 1997, either Erie Police or state parole agents went to the

defendant's home in an attempt to execute the arrest warrant. After being told on September 17th that the defendant was staying with a girlfriend, Agent Worley believed it would have been futile to have returned to the defendant's address in an attempt to locate him. *See*, Jury Trial - Motions Transcript, September 17, 1998, pp. 57-58. Since repeated contacts were useless and the certified mail was returned, Agent Worley made no further efforts at the defendant's residence. *Id.* at pp. 56-57. Between October and December of 1997, monthly contact between Erie Police and Agent Worley continued to see if the defendant had been seen. Agent Worley and other agents also conducted a rolling surveillance of the area in an effort to spot the defendant. Erie Police went to the defendant's home on at least two occasions in 1998 prior to the defendant's arrest; and as indicated earlier, the defendant eluded arrest in March of 1998.

Based upon these facts, the Court concludes that the Commonwealth exercised due diligence in attempting to locate the defendant. It makes no difference that Erie Police did not initiate the contact at the defendant's home between September 2nd and January, 1998. During this period of time state parole agents could not find the defendant, and given the lack of Erie Police Department personnel available to conduct searches for suspects, more could not have been reasonably expected.

Since the defendant was unavailable and could not be found, the Court is of the opinion that the Motion to Dismiss was properly denied.

Signed this 10th day of February, 1999.

By the Court,
/s/ **John A. Bozza, President Judge**

COMMONWEALTH OF PENNSYLVANIA
v.
DELMAR RAHEEM TATE

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION No. 1256 of 1998

COMMONWEALTH OF PENNSYLVANIA
v.
MICHAEL LEE NEAVINS

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION No. 1252 of 1998

COMMONWEALTH OF PENNSYLVANIA
v.
ROBERT HARRIS

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION No. 1251 of 1998

CRIMINAL PROCEDURE/DOUBLE JEOPARDY/FAIR TRIAL/ PROSECUTORIAL MISCONDUCT

Double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant where misconduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial.

CRIMINAL PROCECURE/PROSECUTORIAL MISCONDUCT/ FAIR TRIAL

Prosecutor's failure to disclose evidence to defense prior to trial was sufficiently prejudicial to deny defendants a fair trial where the evidence potentially supported alternative defense of self-defense

CRIMINAL PROCEDURE/PROSECUTORIAL MISCONDUCT/ FAIR TRIAL

Prosecutor's intentional withholding of the substance of witness's statement was clearly prejudicial and deprived defendants of a fair trial where statement was exculpatory as to defendants and corroborated their alibi defense.

Appearances: Vincent P. Nudi, Esq. - Assistant District Attorney
Dennis V. Williams, Esq. for Defendant Tate
Timothy J. Lucas, Esq. for Defendant Neavins
Krista A. Sitterle, Esq. for Defendant Harris

OPINION

FACTS

Pa.R.Crim.P. 305(B)(1), Pretrial Discovery and Inspection, states in relevant part that in all court cases, on request by the defendant, the Commonwealth shall disclose to the defendant's attorney all of the following requested items or information...

> (a) Any evidence favorable to the accused which is material to guilt...and which is within the possession or control of the Commonwealth.

The testimony both at the defendants' aborted trial of November 16, 1998 and at the hearing on defendants' motions for dismissal based on double jeopardy grounds clearly reveal that the Commonwealth was in possession of, at least a week before trial, two separate pieces of evidence which not only were favorable to the accused but were in and of themselves probably exculpatory in that one raised a legitimate self defense issue and the other clearly corroborated the defendants' previously filed alibi defenses.

The first piece of evidence was not revealed to the defense until the jury was sworn when in the Commonwealth's opening statement the prosecutor stated:

> . . . Rickie Pullium was 16 or 17 years of age. He's not old enough to own -- he's not old enough to have a license. He's going to tell you he had a gun and he had it for protection. He'll tell you it was a .38 caliber. And he'll tell you as the car was coming up, he actually put his hand on his gun because he didn't know what was going on. ...When the shots started, he goes to the ground. He'll tell you he pulls his .38 caliber out and he starts returning fire as the shots are coming at them and he returns fire.[1]

(N.T., Trial, Day I, 11/16/98, p. 16, II. 2-13).

Based on the above said proposed testimony all three defendants asked for a mistrial at the conclusion of the Commonwealth's opening statement claiming that "We were never advised that Mr. Pullium was going to testify that he had a .38 and that he pulled it out and fired until this moment."[2] (NT., Trial, Day I, 11/16/98, p. 19, II. 23-25).

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[1] A .38 caliber revolver was found at the scene but no fingerprints were on it, five empty rounds were in it, no bullet fragments were matched to it, and in all his previous statements Mr. Pullium had never said the gun was his or that he had fired it at the defendants, or even been armed.

[2] The Commonwealth admitted this information had not been turned over but stated the defendants were aware of it because when they viewed the gun at the Erie Police Department the running joke was that it was probably Pullium's gun and perhaps they would have a better self defense claim than alibi defense. (N.T., Trial, Day I, 11/16/98, p. 22, II. 5-10).

When asked, the prosecutor stated that "...up until recently Rickie [Pullium] never admitted it." (N.T., Trial, Day I, 11/16/98, p. 22, II. 10-11). Subsequent testimony at the December 2, 1998 hearing revealed the prosecutor had this admission approximately one week before trial and did not turn it over to defense counsel (discovery indicated the victims never had any weapons).[3]

Further, after the court denied the motion for a mistrial but granted a continuance for a day, upon reconvening on November 18, 1998, defense counsel again asked for a mistrial based on new information it had gleaned from a Kevin Clanton[4] which the prosecution had in its possession at least a week prior to trial but, once again, had not turned over pursuant to discovery.

The prosecutor testified both at trial and at the hearing that he was aware Kevin Clanton had recanted the testimony that the Commonwealth had put forth to the defense at least a week before the trial, and that Mr. Clanton now stated he was at the Swinging Door Lounge 16 blocks from the scene and minutes prior to the shooting and that he heard gunshots there and heard Jamar Phillips, DeMarco Tate and Leonard Joyce (at least one of the three) say, "Let's go get those pussies" and get into the 1991 black Mazda MX6 (later identified as the car involved in the shooting), and that he saw Jamar run by him after hearing shots at the scene. (N.T., Trial, Day II, November 18, 1998, p. 7, I. 16 through p. 9, line 24).

However, knowing the substance of the aforesaid Clanton testimony, on Friday before the Monday of the trial, the prosecutor called Attorney Lucas (and the other attorneys) and advised them that "he would not be calling Kevin Clanton as a witness."[5] (N.T., Trial, Day II, November 18,

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[3] Surprisingly, the other alleged victim in the case, Harrison Jones, upon being re-interviewed by the prosecution during the recess in the trial admitted he was in possession of a .44 Magnum that he also fired. This was immediately turned over to the defense and does not form a basis for the relief requested.

[4] Kevin Clanton was known to the defense but would never speak with them. (N.T., Trial, Day II, November 18, 1998, p. 5, II. 19-23). He had spoken to and been subpoenaed by the Commonwealth and the defense was informed he would testify that he was present at the scene of the crime, and that after the shots were fired Kevin Clanton chased the males who had been shooting from the black Mazda and identified Delmar Tate, one of the defendants, as running through an alley. (N.T., Trial, Day II, November 18, 1998, p. 6, II. 1-11).

[5] Although Clanton was known to the defense prior to trial, he would not speak to any of the defendants' attorneys. (N.T., Trial, Day II, November 18, 1998, p. 5, II. 22-23).

1998, p. 6, II. 13-14).[6] Later, at the December 2, 1998 hearing, the prosecutor adds that Clanton also said he saw the three defendants at the Swinging Door Lounge and they did not get into the black Mazda.

Upon learning this new information the court granted defendants' second request for a mistrial.

LAW

The seminal case in this area is the Pennsylvania Supreme Court case of *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992).[7] Prior to *Smith* the courts had held that "double jeopardy will attach only to those mistrials which have been intentionally caused by prosecutorial misconduct." *Commonwealth v. Simmons*, 514 Pa. 10, 16, 522 A.2d 537, 540 (1987) adopting the federal constitutional standard set forth in *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L. Ed.2d 416 (1982). In *Smith* the Pennsylvania Supreme Court recognized that prosecutorial overreaching may also prejudice or harass a defendant, and that unlike prosecutorial error, "overreaching is not an inevitable part of the trial process and cannot be condoned. It signals the breakdown of the integrity of the judicial proceeding and represents the type of prosecutorial tactic which the double jeopardy clause was designed to protect against. *Commonwealth v. Starks*, 490 Pa. 336, 341,416 A. 2d 498, 500 (1980) (citations omitted)". *Smith* therefore held that the double jeopardy clause of the Pennsylvania Constitution also prohibits retrial of a defendant when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial as well.

The facts in the case at bar are egregious. A prosecutor selects a jury and enters upon the prosecution of very serious attempted homicide and several other related felony and misdemeanor charges against three co-defendants who have filed an alibi defense.[8] The first piece of evidence places one of the victims firing a gun found at the scene five times at the car it is alleged the defendants were in. This in all likelihood would arguably

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[6] The prosecutor testified he was inexperienced, did not know what to do with this information, and acted as he did only after consulting two more experienced members of the district attorney's staff.

[7] Pennsylvania law in this area differs from federal law in that the Pennsylvania Constitution prohibits retrial of defendants not only when prosecutorial misconduct is intended to provoke a defendant into moving for a mistrial but also when the conduct of a prosecutor is intentionally undertaken to prejudice the defendant to the point of denial of a fair trial.

[8] Under the circumstances, at the very least the prosecutor should have requested a continuance or told the defendants of the information so they could have requested a continuance.

give the defendants (had they been aware of it prior to trial) the alternative defense[9] of self defense which would place the burden upon the Commonwealth to prove the defendants did not act in justifiable self defense beyond a reasonable doubt. Because the prosecutor intentionally withheld this information from the defendants prior to trial, defense counsel was unable to even consider the preparation of such a defense prior to trial and this clearly prejudiced the defendants to the point where they were denied a fair trial.

Possibly even more prejudicial to the defendants was the prosecutor intentionally withholding the substance of Kevin Clanton's statement which not only was exculpatory as to the defendants but also corroborated their alibi defense (that they were not in the black Mazda, that they were seen 16 blocks away, and that it was someone else, not one of the defendants, seen running from the scene). Under any theory or interpretation of law, and pursuant to the Rules of Criminal Procedure, and to a prosecutor's sworn oath, and in the interests of justice, the prosecutor's intentional withholding of this information can be characterized as nothing less than prosecutorial misconduct which clearly prejudiced the defendants and certainly deprived them of any chance of a fair trial.

The prosecutor alleges that if he did error it was because of inexperience, and/or incompetence, and/or bad advice, and/or lack of knowledge of the law. The court is without sympathy. Once that oath is sworn, a prosecutor assumes the awesome power of the Commonwealth and justice and fairness can be his only companions. His duty is not to convict at all costs but to insure compliance with the rules, and fairness before and during trial. And when in doubt a prosecutor must error on the side of caution and the defendant. Justice allows the prosecutor to strike hard blows for his case but demands that they be fair ones.[10]

Clearly under these circumstances and with the information the prosecutor possessed, pressing forward to trial without providing such to the defense could only have been done to prejudice the defendants and deprive them of a fair trial, or at the very least to provoke a mistrial which

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[9] There is no legal prohibition against the assertion of alternative defenses. See *Commonwealth v. McGrogan,* 449 Pa. 584, 297 A.2d 456 (1972); *Commonwealth v. Walker,* 447 Pa. 146, 288 A.2d 741 (1972); *Commonwealth v. Finnie,* 415 Pa. 166, 202 A.2d 85 (1964).

[10] This is a paraphrase. The actual quote, referring to a United States Attorney, is, "But, while he may strike hard blows, he is not at liberty to strike foul ones" by Mr. Justice Sutherland in the case of *Berger v. United States,* 295 U.S. 78 at p. 88 (1934).

the defendants were forced to request not once but twice. Indeed, prejudice to the accused is so highly probable that one would not be justified in assuming its non-existence. And the inevitable cumulative effect of the misconduct cannot be disregarded as inconsequential. Therefore the defendants having been placed unfairly in jeopardy once, to do so on a second occasion would constitute a manifest injustice of the magnitude the Constitutions of Pennsylvania and the United States preclude and declare to be double jeopardy.

ORDER

AND NOW, TO-WIT, this 7th day of December, 1998, defendants' Motions to Dismiss Based on Double Jeopardy are hereby **GRANTED** for the reasons set forth in the foregoing OPINION.

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

HON YING FUNG, Administrator of the ESTATE OF PO CHEUNG FUNG, Plaintiff

v.

SAINT VINCENT HEALTH CENTER, RICHARD C. JUANG, M.D., Defendants

TORTS/NEGLIGENCE/DUTY

Hospitals do not have a duty to require that physicians obtain informed consent of their patients before they perform elective surgery.

TORTS/NEGLIGENCE/DUTY

Standards of the Joint Commission on Accreditation of Health Care Organizations are relevant to determining a hospital's duty of care to its patients under a corporate negligence theory of liability.

TORTS/PLEADINGS/GENERAL REQUIREMENTS

Plaintiff failed to plead facts concerning defendant-hospital's failure to follow standards of the Joint Commission on Accreditation of Health Care Organizations with sufficient specificity to allow defendant to prepare a defense.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 11564 - 1998

Appearances: Harold Bender, Esquire
Wayne Johnson, Esquire
Joel Snavely, Esquire
Robert Grimm, Esquire

OPINION

Anthony, J., August 20, 1998.

This matter comes before the Court on the preliminary objections of Defendant Saint Vincent to the Plaintiff's complaint. After considering the arguments of counsel and the pleadings, the Court will sustain the objections in part and overrule them in part. The relevant facts and procedural history are as follows.

On January 14, 1997, the Plaintiff Decedent went to his family physician, Defendant Juang, for complaints of bloating and gas. Defendant Juang ordered certain tests to be conducted at Saint Vincent on February 11, 1997. The tests showed that the Plaintiff Decedent had benign polyps on his colon. Thereafter, Defendant Juang recommended surgery and stated that he would arrange for a qualified surgeon to perform the procedure.

According to Plaintiff' s complaint, the following occurred. On March 12, 1997, the Plaintiff Decedent was admitted to Saint Vincent and Defendant Juang and Dr. Bajorek performed surgery removing at least a portion of the Decedent's colon. During the operation complications

developed which included bleeding. While attempting to stop the bleeding, a vain [sic] was mistakenly cut and the pancreas was injured. No one in the operating room noticed the injury to the pancreas or the cutting of the vein. These complications caused serious medical problems for the Decedent.

Later that evening into the next morning, an emergency procedure was performed on the Decedent in an effort to correct various serious conditions which he was suffering as a result of the problems during the first surgery. After this operation, the Decedent was seen by various specialists in an attempt to treat the different medical conditions suffered by the Decedent. On March 26, 1997, another operation was performed. On April 11, 1997, Po Cheung Fung died as a result of these complications.

During all of these events Saint Vincent was accredited by the Joint Commission on Accreditation of Health Care Organizations (hereinafter, "Joint Commission"). Saint Vincent used this accreditation for marketing purposes.

On April 9, 1998, the Plaintiff who had previously been duly appointed as the Administrator of the Decedent's estate initiated this suit by filing a complaint. He also filed a discovery request which was served on Saint Vincent and Defendant Juang with the complaint. Defendant Juang filed an answer to the complaint. Saint Vincent filed preliminary objections. The Court held argument on such at which the Plaintiff and Saint Vincent were represented.

The preliminary objections raise three issues: 1) is it proper for the Plaintiff to make allegations against Saint Vincent for not having policies in place to ensure that informed consent is obtained by doctors performing an elective procedure or not enforcing such policies, 2) is it proper for the Plaintiff to allege non-compliance with standards of the Joint Commission in his complaint, and 3) if it is proper to make such allegations has the Plaintiff done so with sufficient specificity.

The Court will address these questions in the order presented above. As to the informed consent issue, the hospital is not responsible to obtain such or to assure that the doctors obtain such. *Kelly v. Methodist Hospital*, 664 A.2d 148 (1995). Even if the hospital has procedures to assure that informed consent is obtained this does not create an enforceable duty upon the hospital. *Id.*

The first case cited by the Plaintiff on this issue was unique in that the hospital itself was conducting a scientific study and therefore assumed a duty to obtain informed consent. *Friter v. IOLAB Corp.*, 607 A.2d 1111 (Pa.Super. 1992). This case does not change the general rule stated above. In addition, *Jones v. Philadelphia College of Medicine* cited by the Plaintiff is also inapplicable. 813 F.Supp. 1125 (E.D. Pa. 1993). This case is not a Pennsylvania state case and therefore is not binding on this Court. More

importantly, the case does not stand for the proposition stated by the Plaintiff.

Next, Saint Vincent argues that the Plaintiff is attempting to create a cause of action based on the standards of the Joint Commission. This is incorrect. The cause of action is for corporate negligence. However, in determining the duty of care owed by Saint Vincent to its patients the Joint Commission standards would be relevant. *See Richardson v. LaBuz,* 474 A.2d 1181, 1192 (Pa. Cmwlth. 1984); *Pendroza v. Bryant,* 677 P.2d 166 (Wash. 1984)(addressing the standard of care in corporate negligence cases and stating that accreditations standards and hospital by-laws are relevant to the standard of care for a hospital in corporate negligence cases); *Darling v. Charleston Community Memorial Hospital,* 211 N.E.2d 253 (Ill. 1965). Therefore, if there was a breach of a standard which caused injury to the Decedent it would be relevant to the cause of action although not dispositive.

However, Saint Vincent is correct that the Plaintiff has not sufficiently pled how the guidelines apply to this case and the facts that show how Saint Vincent breached any standards. *Conner v. Allegheny General Hospital,* 461 A.2d 600, (Pa. 1983). In addition, it is not sufficient to state that facts will be developed in discovery. The facts must be discovered first and then pled, rather than the other way around. A plaintiff must plead sufficient facts so a defendant can prepare a defense. *Foster v. Peat Marwick Main & Company,* 587 A.2d 382 (Pa.Cmwlth. 1991). The allegations related to the Joint Commission standards have not been pled sufficiently to allow Saint Vincent to prepare a defense.

The one appellate case cited by the Plaintiff on this issue, *Moser v. Heistand,* 681 A.2d 1322 (Pa. 1996), is inapplicable to the present situation because the court was addressing a demurrer and not a motion for more specific pleading. *See Foster* at 386, *supra* (stating that if a defendant only asserts a demurrer he waives any relief on the grounds that the allegations are insufficiently specific).

In conclusion, the Plaintiff may not plead policies or actions of Saint Vincent related to informed consent. The Plaintiff may plead Joint Commission standards and breaches of them. However, they must be pled more specifically.

ORDER

AND NOW, to-wit, this 20 day of August, 1998, upon consideration of the Defendants' Preliminary objections to the Plaintiff's Complaint, it is hereby ORDERED and DECREED that the Preliminary Objections in the nature of a motion for a more specific complaint with regard to paragraphs 29, 30, 31, 32, 33, 34, 35, 36, 37, and 38 are SUSTAINED.

In addition, the preliminary objections in the nature of a motion for more

specific complaint are SUSTAINED as to subparagraphs 26 (h), (j), (k), and (l).

The preliminary objections in the nature of a motion for more specific complaint are OVERRULED as to 26(q).

Further, the preliminary objections in the nature of a demurrer to claims for lack of informed consent are SUSTAINED.

BY THE COURT:
/s/ **Fred P. Anthony, Judge**

WILLIAM G. WICKHAM, Jr., Plaintiff

vs.

MARK D. SUPROCK, M.D., LAKE ERIE ORTHOPEDICS, JAMES OSKIN, D.O., RICHARD W. NAGLE, M.D. and HAMOT MEDICAL CENTER, Defendants

TORTS/NEGLIGENCE/DUTY

The theory of "corporate negligence," which has been applied to hospitals and hospital-type facilities such as HMOs, does not extend to doctors who have incorporated their practice.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION- LAW NO. 14344- 1997

Appearances: Stanley Berlin, Esquire
Kimberly Oakes, Esquire
Francis Klemensic, Esquire

OPINION

Anthony, J., April 27, 1998

This matter comes before the Court on two sets of preliminary objections by the Defendants.[1] After considering the arguments of counsel and reviewing the record, the Court will sustain the preliminary objections.[2] The facts and procedural history are as follows.

This is a medical malpractice case. In 1993, the Plaintiff was having back problems which turned out to be related to injuries to his spinal discs. On May 11, 1993, the Plaintiff began treating with Dr. Suprock and remained under his care through 1996. On November 1, 1993, the Plaintiff underwent surgery in an effort to resolve his back problems. The surgical procedure was performed by Dr. Suprock at Hamot Medical Center. After the surgery

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[1] Dr. Oskin and Dr. Nagle filed one set of preliminary objections and Dr. Suprock, Lake Erie Orthopedics and Hamot Medical Center filed a separate set of preliminary objections.

[2] At oral argument, the parties agreed that the Plaintiff will file an amended complaint in an attempt for the parties to resolve issues regarding the specificity of the complaint without the Court's intervention. In addition, the Plaintiff agreed that the amended complaint will not contain a demand for punitive damages and attorneys fees. The Defendants will all retain their right to file new preliminary objections to the amended complaint. Thus, the only issue remaining for the Court to resolve at the present time is Lake Erie Orthopedics' demurrer to Count II of the complaint. Count II is a cause of action in corporate negligence.

the Plaintiff began to experience increasing pain in his lower back and right leg.

Subsequent to the surgery, the Plaintiff had X-rays and CT scans performed which were read by Dr. Suprock. The Plaintiff alleges that these tests showed a certain type of injury to his back and that Dr. Suprock was negligent in not diagnosing and treating that injury. In addition, CT scans were performed and read by Dr. Oskin and Dr. Nagle. The Plaintiff claims these Defendants were negligent for the same reasons as Dr. Suprock. On September 19, 1996, the Plaintiff underwent surgery to correct the back injury which had not been diagnosed earlier. The delay in diagnosing this injury is alleged to have caused the Plaintiff to suffer unnecessary pain and various damages.

Dr. Suprock is affiliated with Lake Erie Orthopedics (hereinafter "Lake Erie"). The Plaintiff alleges that Lake Erie failed to promulgate proper policies, monitor its employees and otherwise exercise due care under the circumstances. The Plaintiff also claims vicarious liability against Lake Erie in a separate Count of the Complaint.

The Plaintiff commenced this action by Complaint in December of 1997. The Defendants filed two separate sets of preliminary objections. The Court held argument at which all parties were represented.

The issue presented is whether a corporate negligence claim can be maintained against a group of doctors who have incorporated their practice. In *Thomas v. Nason Hospital*, Pennsylvania adopted the theory of corporate malpractice with respect to hospitals. 591 A.2d 703, 704 (Pa. 1991). Under this theory a hospital owes a patient a non-delegable duty and can be held liable if it is negligent with respect to one of four enumerated duties. *Id.* at 706. In Pennsylvania, this doctrine has not been extended beyond hospital type facilities.

In *McClellan v. Health Maintenance Organization*, the court allowed a corporate negligence claim to go forward against a health maintenance organization. 604 A.2d 1053 (Pa.Super. 1992) *alloc. denied*, on remand, *McClellan v. Health Maintenance Organization*, 660 A.2d 97 (Pa.Super. 1995) *affirmed on other grounds by an equally divided Supreme Court* 686 A.2d 801 (Pa. 1996). However, the court's decision to allow the corporate negligence claim to go forward was based on the fact that the health maintenance organization had "assumed the role of a comprehensive health center." *McClellan*, 604 A.2d 1053, 1059. Thus, a corporation can only be held liable under the corporate negligence theory if it is a hospital or takes on the role and functions of a hospital.[3] *See Welsh v. Bulger*, 698 A.2d 581

[3] The Plaintiff states in his brief that nothing in *Thomas* suggests that the theory of corporate negligence is limited to hospitals. The Court disagrees. In *Thomas*, the Court expressly adopts the theory "with respect to hospitals" and the entire Opinion talks about hospitals. *Thomas* at 704.

(Pa. 1997). In the present case, the Plaintiff's Complaint does not allege that Lake Erie operated as a hospital, therefore the demurrer to the corporate negligence claim must be sustained.

ORDER

AND NOW, to-wit, this 27 day of April, 1998, it is hereby ORDERED and DECREED that the Preliminary Objections in the nature of a demurrer to Count II of the Complaint are SUSTAINED. Further, by agreement of all parties the Plaintiff is given leave to file an amended complaint. The Defendants may raise any and all preliminary objections to such amended complaint.

BY THE COURT:
/s/ **Fred P. Anthony, J.**

RICHARD J. APPLEBEE and LAYNE L. APPLEBEE, Plaintiffs

v.

ANTHONY J. BRZEZINSKI and HENRYKA BRZEZINSKI, Defendants

EQUITY

Fairness dictates the outcome of an action in equity

EQUITY

Agreement providing for conveyance of gas wells continent on outcome of pending litigation to determine ownership of the gas wells will be specifically enforced

CONTRACTS/STATUTE OF FRAUDS

Oral agreement to transfer an interest in real estate is unenforceable

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 60003 - 1998

Appearances: Edwin Smith, Esquire
Paul Burroughs, Esquire

OPINION

On January 30, 1998, a Complaint in Equity was filed in this case seeking a determination of rights arising out of a real estate transaction. Upon consideration of the evidence, the following Findings of Fact are hereby entered.

FINDINGS OF FACT

1. By deed dated July 31, 1995, Richard J. Applebee and Layne L. Applebee, husband and wife (hereinafter Plaintiffs) conveyed to Anthony J. Brzezinski and Henryka T. Brzezinski, husband and wife (hereinafter Defendants), approximately 130.5 acres of land in Venango Township, Erie County for the sum of $150,000.00. This deed is duly recorded in Erie County Record Book 395 beginning at page 2237.

2. As part of the conveyance, Plaintiffs reserved the following:

> "...all right, title and landowners interest in the two existing gas wells located on the above-described premises until such time as such wells shall be removed from production and plugged by parties of the first part (or their lessee) in accordance with applicable law; notwithstanding the foregoing, parties of the second part shall be entitled to draw from such wells, so long as sufficient gas is produced therefrom, free gas to service the residence located on the above-described premises."

3. In addition to the deed, at the time of the closing on July 31, 1995, the parties entered into a separate, negotiated written agreement "regarding the gas rights in the property and the rental of the barn located on the property by the Sellers from the Buyers". See Plaintiffs Exhibit 2 (hereinafter "Agreement"). The Agreement was necessary because at the time of

closing there was an unresolved question of whether Plaintiffs owned the gas rights to the subject property. At the time of closing, Plaintiffs were in the midst of litigation with Kenco, Inc. regarding ownership of the gas rights. In general terms, the Agreement provided that in the event Plaintiffs were successful in recovering ownership of the gas rights in the litigation with Kenco, then Plaintiffs would convey those rights to the Defendants.

4. A brief history of the development of the gas rights begins with lease agreements entered into between Plaintiffs and Kaltas Oil Company to develop a gas production and distribution system on Plaintiffs' property. Eventually four separate gas wells became productive on various portions of Plaintiffs' property, which wells were interconnected by a three-inch and a one-inch distribution line. Two of the four wells are on the property conveyed by Plaintiffs to the Defendants.

5. On November 21, 1986, Kaltas Oil Company Inc assigned its interest under the Applebee leases to Kenco Oil and Gas. See Exhibit 10. In 1989, Plaintiffs instituted a lawsuit against Kenco Oil and Gas for monetary damages and later sought declaratory relief to terminate the lease and claim ownership of the wells and equipment. It was this litigation which was pending at Erie County Docket Number 10148-1995 at the time of the closing on July 31, 1995.

6. While the Plaintiffs were proceeding with their lawsuit against Kenco, the Pennsylvania Department of Environmental Protection initiated litigation against Kenco Oil and Gas resulting in a final Order in the Court of Common Pleas of Erie County at Docket Number 60005-1997 on May 8, 1997 declaring the leases to be abandoned under the Pennsylvania Oil and Gas Law.

7. Meanwhile, the Plaintiffs secured a default judgment against Kenco on January 10, 1997 at Docket Number 10148 of 1995. On June 2, 1997, Attorney Thomas Pendleton, counsel for Plaintiffs in the Kenco litigation, executed an Affidavit and filed same with the Recorder of Deeds for Erie County in which ownership of the gas rights are claimed by the Plaintiffs. See Exhibit 14. Consistent with this Court's Order of July 14, 1998, the litigation between Plaintiffs and Kenco, Inc. at Erie County Docket Number 10148-1995 was successfully concluded in favor of the Plaintiffs on June 2, 1997 by the recording of the Affidavit of Attorney Thomas Pendleton.

8. Oil Field Production, Inc. was attempting to buy out the Kenco leases and as a way to resolve their litigation against Kenco, the Plaintiffs signed a ratification and consent with Oil Field Production, Inc. on July 25, 1996. Likewise, on that same date, the Defendants executed a similar ratification and consent with Oil Field Production, Inc. See Plaintiffs Exhibit 19.

9. During the negotiations for the purchase of the property in 1995, there were discussions between Plaintiffs and Defendants regarding the gas rights. Plaintiffs explained to Defendants the gas distribution system

involving the four wells. There were also discussions regarding the responsibility and costs associated with bonding or plugging a gas well. These discussions culminated in the Agreement executed at the closing on July 31, 1995. Both parties had active input into the terms of the Agreement as there was at least one prior draft agreement and there are multiple handwritten entries on the final Agreement initialed by all parties.

10. By deed dated April 11, 1996, the Defendants transferred to Warren and Peggy Poniatowski a portion of the property acquired from Plaintiffs and upon which was located one of the two wells. The deed of conveyance utilized nearly identical language for reserving the gas rights as in the deed from Plaintiffs to Defendants. See Exhibits 4 and 29.

11. On December 26, 1996, Plaintiffs conveyed to Crawford a portion of their property along with the existing gas connection. See Exhibit 2.

12. On March 21, 1997, Plaintiffs conveyed a portion of their property with existing gas connection to their daughter Sharon Applebee. See Exhibit 3.

13. On December 1, 1997, the Defendants sold property to Kraft, Hartman and Parker. See Stipulation of Parties at Paragraph l(d). Further, the Defendants assigned their rights, duties and obligations under the July 31, 1995 Agreement with Plaintiffs to Kraft, Hartman and Parker. See Stipulation of the Parties at Paragraph 2(a). By assignment dated May 27, 1998, Kraft, Hartman and Parker conveyed back to the Defendants any and all interest in the July 31, 1995 Agreement. See Stipulation of Parties Paragraph 2(b) .

14. Following the July 31, 1995 closing, the parties lived in relative harmony as neighbors for a period of time. In late November, 1997, Richard Applebee assisted the Defendants with a flooding problem in their home. While there, Mr. Applebee helped the Defendants and their building contractor locate the existing gas lines in the area to be excavated for a new home for the Defendants.

15. In early January, 1998, Richard Applebee again provided assistance to the Defendants in locating the gas line at the excavation site. In addition, Richard Applebee told the Defendants to tie in the gas line from the Defendants new home to the one-inch gas line running behind the Defendants new home. When Richard Applebee explained these developments later that evening to his wife, Layne Applebee, she immediately disapproved of any tap-in to the gas line instead of the gas well. The next day, probably January 5th or 6, 1998, Richard Applebee orally informed the Defendants building contractor not to tie into the gas line. Further, Plaintiffs sent a letter to the building contractor rescinding any permission to tie into the gas line. See Plaintiffs Exhibit 17. A similar letter was sent by certified mail from the Plaintiffs and received by the Defendants on January 26, 1998. See Plaintiffs Exhibit 18.

16. Sometime in late January, 1998, the Defendants hired Rick McClain,

who made the necessary gas connections between the Defendants' home and the one-inch gas line running behind Defendants home.

17. Prior to the Defendants connection to the gas line, there was a brief discussion between the parties regarding bonds for the wells. Specifically, on or about May 20, 1997, Plaintiffs received a letter dated May, 1997 from the Department of Environmental Protection advising that the gas wells in question were being placed on a plugging list unless appropriate bonds were filed. See Plaintiffs Exhibit 19.

18. On that same day, May 20, 1997, there was a chance meeting in the driveway between Layne Applebee and Henryka Brzezinski. Mrs. Applebee informed Mrs. Brzezinski of the letter from the DEP and the need for bonding of the wells. Mrs. Brzezinski, who may not have understood all of the nuances of bonding and plugging like Mrs. Applebee, did not affirmatively respond that the Brzezinskis would secure the necessary bonding. Then on that same day, May 20, 1997, Layne Applebee mailed a "request to transfer well permit or registration", signing the application as "operator or agent to whom transfer is requested". The application was received by DEP on May 23, 1997 and the transfer was approved on July 15, 1997. See Plaintiffs Exhibit 16. The Plaintiffs posted the necessary bonds for all four wells, including the two wells on the Defendants' property.

19. On November 26, 1997, Pennsylvania enacted a statute providing that bonding on certain wells, including the wells on the Defendants' property, was no longer required as of November 26, 1997.

20. Other than the May 20, 1997 meeting in the driveway between Mrs. Applebee and Mrs. Brezezinski [sic], there were no discussions after the July 31, 1995 closing between the parties regarding posting a bond for the two wells on Defendants' property as part of a transfer of ownership of the gas rights.

21. At no time have Plaintiffs ever tendered a quit claim deed or any other written instrument to the Defendants conveying any interest(s) in the gas rights to the Defendants pursuant to the Agreement.

DISCUSSION

Sitting as a Court of equity, fairness dictates the outcome. Upon consideration of all the circumstances and equities, the fairest conclusion is to compel the Plaintiffs to convey the gas rights to the Defendants pursuant to the July 31, 1995 Agreement.

Any analysis should begin with the recognition that the parties actively negotiated a real estate transaction for the sale of approximately 130 acres of land with a house and a barn for the sum of $150,000.00. Included in the negotiations was the inherent belief by the Plaintiffs that they would prevail in their lawsuit against Kenco and would therefore be able to convey the gas rights to the Defendants. The purchase price no doubt reflected this likelihood. Having consummated the transaction and pocketed the $150,000.00, the Plaintiffs herein attempt to keep the gas

rights based primarily on a chance conversation in the driveway between Mrs. Applebee and Mrs. Brzezinski. Equity cannot allow such an inequitable result.

By the Agreement of July 31, 1995, Plaintiffs were obligated to convey to Defendants "all right, title and interest in the two gas wells existing on the property" upon the successful conclusion of Plaintiffs' litigation with Kenco. By Affidavit dated and filed June 2, 1997, Plaintiffs obviously believed their litigation with Kenco had been successfully completed because they were claiming ownership of all of the gas rights. At no time thereafter did Plaintiffs ever tender any written instrument conveying the gas rights or even communicate with the Defendants on this subject.

Instead, the lone communication even remotely connected to this subject occurred on May 20, 1997 when Mrs. Applebee happened to meet Mrs. Brzezinski in the driveway and discuss the bonding requirements to avoid plugging of the wells by DEP. This conversation is irrelevant since it occurred before the Plaintiffs had declared victory in their lawsuit with Kenco. Plaintiffs have not proven any obligation on the part of the Defendants to post bond for the wells in May, 1997. Hence the driveway conversation of May 20, 1997 between the two wives is of no evidentiary value.

Even assuming arguendo the May 20, 1997 conversation was relevant, it only involved two of the four individuals who were parties to the July 31, 1995 Agreement. There is no factual dispute Mr. Brzezinski was not present for the conversation and never assented to any purported abandonment of rights accruing under the Agreement.

Importantly, the Defendants never executed any written document abandoning their interests under the Agreement or conveying any interest in the gas rights back to the Plaintiffs. The Agreement provides "... (t)he entire understanding of the parties with regard to the matters set forth herein, and may not be modified or amended except in a writing signed by all parties." See Exhibit B, paragraph 5. At no time did all of the parties execute a document amending or modifying the Agreement. Under these circumstances, there was no meeting of the minds of all four parties reduced to writing whereby the Defendants abdicated their rights under the Agreement.

Further, any oral conveyance as Plaintiffs allege occurred on May 20, 1997 is in violation of the Statute of Frauds. By statute older than the Declaration of Independence, oral agreements to transfer any interest(s) in real estate are unenforceable. See 33 P.S. §1 et seq. effective April 10, 1772. Hence any attempt by Plaintiffs to claim the Defendants conveyed back to them the gas rights is precluded by the Statute of Frauds.

Alternatively, Plaintiffs argue that as a condition precedent to their obligation to convey the gas rights under the Agreement, the Defendants were obligated to post bond. Plaintiffs contend the Defendants failure to

post bond means the Plaintiffs obligation to convey the gas rights was never triggered. This argument is both illogical and disingenuous.

To accept Plaintiffs' logic means the Defendants were required to post bond for property which they did not own. The Agreement provides "... (a)t such time, and assuming such litigation results in the Sellers obtaining clear title to the gas wells, Sellers will, subject to the conditions hereinafter set forth, execute an appropriate quit claim deed or assignment, transferring such gas rights and wells to the Buyers. Buyers shall post bond at such time..." See Exhibit B, paragraph 1. (emphasis added)

A common sense interpretation of this provision means the Defendants obligation to post bond arises at the time ownership is transferred. Literally thousands of real estate and even motor vehicle transactions occur daily in this country in which the buyers obligation to provide insurance or post bond begins at the time the buyer receives ownership. There is nothing unique in this transaction which would cause any departure from this common practice or even from common sense.

It is also important to note that the Agreement imposed an obligation to bond only on the owners of the wells. Specifically, the Agreement provided "(f)inally, it is agreed between the parties that at all times relevant hereto, the owners of the wells shall maintain sufficient bonding as required for the gas wells and agree to insure that the wells meet any and all local, state and federal rules and regulations concerning oil and gas wells". See Exhibit B, paragraph 2. On May 20, 1997, the Defendants were not yet owners of the gas rights or wells and therefore had no obligation under the Agreement to post bond. Accordingly, the Defendants cannot be held in breach of the Agreement since there was no obligation on their part on May 20, 1997 to post bond for the wells.

In addition, Plaintiffs argument must fail because in January, 1998, when the Defendants tied in to the gas line, there was no legal obligation on the part of either the Plaintiffs or Defendants to post bond for the wells. By statute effective November 26, 1997, there was no bonding requirement for any of the wells in question. Since the Defendants had no obligation to post bond, Plaintiffs cannot rely on the Defendants failure to do so as a basis to refuse to convey the gas rights.

Finally, Plaintiffs contend the Defendants breached the Agreement by tapping into the gas line instead of the gas well and therefore Plaintiffs are not obligated to transfer ownership. This argument is without merit. While the Agreement specifies the number of tap-ins available to the Defendants, the Agreement is silent as to the actual location of the tap-ins. Under the Agreement, the Defendants had the right to tap in "...to the current system servicing the Buyers' and Sellers' properties." See Exhibit B, paragraph 2. Nothing in this language limits the tap in to the wellhead.

Instead, this provision in the Agreement places the parties in an equal sharing arrangement of gas pulled from all four wells. To hold otherwise

would mean the Plaintiffs would be entitled to draw gas from the Defendants' wells but the Defendants would not be entitled to draw gas from the Plaintiffs' wells. The language in the Agreement evinces the intent of the parties to allow mutual access to the gas distribution system servicing all four wells. Under these circumstances, the tap-in by the Defendants in January, 1998 was not a breach of the Agreement.

The remaining issue is whether the gas lines and equipment on the Defendants' property, in addition to the gas wells, belong to the Defendants. A review of the relevant documents compels the conclusion the Defendants are the legal owners of all gas lines, equipment and gas wells on their property.

In the deed, Plaintiffs reserved "...all right, title and landowners interest in the two existing gas wells located on the above described premises...". This reservation did not include any reference to the gas lines and/or equipment. Since the deed otherwise conveyed all of the real estate "together, with all and singular the rights, liberties, privileges, hereditaments, improvements, and appurtenances, whatsoever thereto belonging...and also, all the estate and interest whatsoever of the said party of the first part, in law or equity, of, in, to or out of the same..." the gas lines and equipment were conveyed to the Plaintiffs in the deed of July 31, 1995. See Exhibit A.[1]

CONCLUSIONS OF LAW

1. The parties entered into a binding contract on July 31, 1995. Pursuant to the contract, the Plaintiffs were to convey to the Defendants "all right, title and interest in the two gas wells existing on the property" upon the successful completion of Plaintiffs litigation with Kenco Inc.

2. On June 2, 1997, Plaintiffs litigation with Kenco Inc. at Erie County Docket Number 10148 of 1995 was successfully concluded such that Plaintiffs recovered ownership of the gas wells/gas rights.

3. From July 31, 1995 to the present, Plaintiffs have never executed and/or tendered to Defendants any written instrument conveying any interest in the gas rights/gas wells pursuant to the Agreement of July 31, 1995.

4. The Defendants were not in breach of the Agreement by a failure to post bond for the wells on their property in May, 1997 or at any time after June 2, 1997.

5. As of July 31, 1995, the Defendants are the legal owners of all gas lines and gas equipment on the property conveyed to them by the Plaintiffs.

6. As of June 2, 1997, the Defendants are owners of all gas rights and

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[1] Because the Defendants were owners of the gas lines as of July 31, 1995, the Defendants could properly tap into their own lines in January, 1998.

gas wells on the property conveyed to them by the Plaintiffs by Deed dated July 31, 1995.

7. The connection by the Defendants to the one-inch gas line from the Defendants' home in early 1998 is permitted under the Agreement.

ORDER

AND NOW to-wit, this 9th day of August, 1999, in accordance with the Findings of Fact and Conclusions of Law set forth in the accompanying Opinion, verdict is hereby in favor of the above Defendants.

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

IN RE: JOET B. KONIECZKO, by change of name JOET B. BURROUGHS, deceased, by JOHN BURROUGHS, Administrator of the Estate of JOET B. BURROUGHS, a/k/a JOET B. KONIECZKO, and JOHN BURROUGHS, individually

vs.

CHARLES R. KONIECZKO

CIVIL PROCEDURE/JURISDICTION

Once the Petitioner has been appointed administrator of the estate of a deceased party to a marital settlement agreement, the Petitioner has standing to bring an action on behalf of the estate to enforce the agreement.

CIVIL PROCEDURE/JURISDICTION

Even though this action was originally brought in Family Court, it is within the Court's jurisdiction to allow the case to proceed in Orphan's Court upon the granting of letters of administration, within the Family - Orphan's Court Division of the Court of Common Pleas.

FAMILY LAW/MARITAL SETTLEMENT AGREEMENT

The parties entered into a divorce agreement, knowingly, intelligently and understandingly, they are bound by the agreement incorporated into a divorce decree to resolve all marital disputes and issues and the divorce agreement will be enforced to the same extent as the divorce decree issued by the Court.

PROBATE AND ESTATES

The deceased entered into divorce agreement in Pennsylvania, resided in Pennsylvania and entered into an annuity contract in Pennsylvania, and there are no estate proceedings in any other state, the Court finds that Section 6111.2 of the Probates, Estates and Fiduciary Code applies to disqualify the deceased's former husband as a beneficiary of the annuity contract where there is no evidence of designation from the designation itself or subsequent court order or contract that the deceased intended her designation of beneficiary to have survived the divorce.

FAMILY LAW/MARITAL SETTLEMENT AGREEMENT

When determining the effect of a marital Settlement Agreement, the Court must adopt a construction which gives effect to the parties' reasonable and probable intent, in view of the surrounding circumstances and purposes of the contract. In this case, the Court finds the parties intended to relinquish any claims to the other parties for its savings plan or insurance policies, including the annuity contract at issue.

EQUITY

The Court has full equity power pursuant to 23 Pa.C.S. §3105 to enforce the Divorce Agreement and bar the decedent's former husband from collecting the proceeds of the annuity contract.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION NO. 151-1997

(ALSO CROSS-FILED IN: FAMILY COURT DIVISION NO. 5860-A-1991)

Appearances: Donald W. Grieshober, Esq., for Plaintiff
James L. Moran, Esq., for Defendant

ORDER OF COURT

Domitrovich, J., May 8, 1997

This matter is before the Court on Plaintiff's Petition to Enforce Agreement. Plaintiff is John Burroughs, brother and Administrator of the Estate of Joet B. Burroughs, also known as Joet B. Konieczko. Plaintiff seeks to enforce a Divorce Agreement entered into on March 6, 1992, between the deceased and her former husband, Charles Konieczko.

The said Petition and hearing thereon, spurred several preliminary issues which must be addressed prior to reaching an ultimate decision on the merits of said Petition. These issues are: (1) whether John Burroughs has standing to bring this matter before the Court; and (2) whether this Court has Jurisdiction over this matter.

In order to address these issues, a brief recitation of the facts is necessary. Joet B. Burroughs and Charles R. Konieczko were married on April 27, 1985, and separated on November 20, 1991. A Decree of Divorce dated May 28, 1992, was issued by The Honorable Jess S. Jiuliante. A Divorce Agreement was entered into on March 6, 1992, and was incorporated into said Decree and made enforceable under §401.1(a) of the Amended Divorce Code (now §3105 of the Divorce Code). On June 30, 1990, Joet Burroughs submitted an original application for a payroll deducted annuity contract whereby money is deducted from employee's paychecks prior to being taxed. This annuity contract was issued by Aetna Life Insurance and Annuity Company. Aetna issued a Group Annuity Contract No. E000250, Certificate No. 0017042000 to Joet B. Konieczko. On or about August 12, 1990, the decedent listed her husband, Charles Konieczko, as the primary beneficiary, and her brother, John Burroughs, as the contingent beneficiary. The Divorce Agreement referred to above included clear language mutually releasing each spouse from any claims related to cash or life insurance policies previously held by either party. After the dissolution of her marriage, Joet Burroughs moved to California where she died on January 1, 1997. John Burroughs, her brother and Administrator of her Estate is her only surviving heir.

The first issue is whether John Burroughs has standing to bring this Petition to Enforce Marital Settlement Agreement since John Burroughs was not a party to the Marital Settlement Agreement. At a status conference with both counsel on this preliminary issue, the Court granted leave for John Burroughs to file a Petition for Grant of Letters of Administration. On April 7, 1997, said Letters of Administration were granted and John Burroughs was appointed Administrator of the Estate of Joet B. Burroughs,

also known as Joet B. Konieczko. Now that Petitioner has been appointed administrator of the estate, the Court finds he has standing to bring this action on behalf of his sister, Joet Burroughs.

The second issue on jurisdiction relates to the authority of the Court to hear both Family and Orphans' Court matters. Although this matter was initiated in Family Court, this Court, in the interests of judicial economy, permitted the Petition originally filed as a Family Court matter to also be cross-filed and heard in Orphans' Court. By Administrative Order dated February 15, 1997, President Judge John A. Bozza set forth this Family-Orphans' Court Division as one of two administrative divisions of the Erie County Court of Common Pleas. This Court, as part of the Family-Orphans' Court Division, is authorized to hear motions and pleadings arising in both Family Court and Orphans' Court. Therefore, even though this action was originally brought in Family Court, it was within this Court's jurisdiction to allow Plaintiff to proceed in Orphans' Court, upon the granting of Letters of Administration, within the Family-Orphans' Court Division.

The next issue is substantive in nature: whether Petitioner should prevail on his Petition to Enforce Agreement. In his motion, Plaintiff seeks to bar the Defendant from receiving the benefits accrued from the deceased's Aetna annuity policy. Plaintiff asserts that the Defendant is not entitled to the benefits according to the Divorce Agreement entered into by the parties on March 6, 1992. The Divorce Agreement, which was incorporated into the Decree of Divorce, provided that the parties would mutually release the other from all right, title, and interest or claims against the property or estate which each party now had or might accrue in the future, whether arising out of any former acts, contracts, engagements or liabilities. Furthermore, paragraph six of this Agreement stated that it was the intention of the Husband and Wife to give each other by execution of the Agreement, a full, complete and general release with respect to any and all property of any kind or nature, real, personal, or mixed, which the other now owns or may hereafter acquire. Paragraph 23 specifically provided as follows:

> Neither the Husband nor the Wife will make any claims against each other for any cash assets of any nature that either of them own by way of any checking accounts, savings account, savings certificate, credit union account nor with regard to any IRA accounts, if any. Neither of them will make any claim against each other with regard to any pension plans that each of them have through their place of employment nor will they make any claims against the other with regard to their deferred savings plan. Neither of them will make any claims with regard to insurance policies insuring the life of the other and each of them will retain the ownership interest of any insurance policy insuring their own life.

The Divorce Agreement was incorporated into the Decree of Divorce. As such, the Divorce Agreement became an enforceable Court Order. According to statutory and case law, this Court may enforce the Marital Settlement Agreement to the same extent that an Order of Court may be enforced. 23 Pa.C.S. §3105(a). See also, *Sorace v. Sorace*, 655 A.2d 125, 440 Pa. Super. 75 (1995). A review of paragraph 23 dictates that, upon dissolution of the marriage, each party knowingly and intelligently had agreed not to make any claims against each other's cash assets or insurance policies. The former husband is attempting to collect on his former wife's annuity contract, which directly contradicts the Divorce Agreement. There is no dispute that the Divorce Agreement was entered into by the parties knowingly, intelligently and understandingly, and are thereby bound by the Agreement incorporated into a Divorce Decree to resolve all marital disputes and issues. This Court finds that, pursuant to Pa.C.S. §3105(a), the Divorce Agreement will be enforced to the same extent as the Order of May 28, 1992; thereby, the Defendant is estopped from collecting on his former wife's annuity contract.

To further bolster his position, the Administrator contends that the provision of §6111.2 of the Probate, Estates and Fiduciaries Code (20 Pa.C.S. §6111.2) makes the beneficiary designation of Charles Konieczko ineffective and results in the payment of the proceeds of the annuity contract to the estate of Joet Burroughs.

§6111.2 of the Probate, Estates and Fiduciaries Code provides in relevant part as follows:

> If a person domiciled in this Commonwealth at the time of his death is divorced from the bonds of matrimony after designating his spouse as beneficiary of a life insurance policy, annuity contract, pension or profit-sharing plan or other contractual arrangement providing for payments to his spouse, any designation in favor of his former spouse which was revocable by him after the divorce shall become ineffective for all purposes and shall be construed as if such former spouse had predeceased him unless it appears from the wording of the designation, a court order or a written contract between the person and such former spouse that the designation was intended to survive the divorce.

While Mr. Konieczko, the ex-husband, argues that this statute does not apply to the issue at hand since the decedent was domiciled in the State of California at the time of her death, the Court finds the statute applies for the following reasons: Although Joet Burroughs died in California, she was married and divorced in Pennsylvania. She entered into the Divorce Agreement in Pennsylvania. She also resided in Pennsylvania when she entered into the annuity contract. Letters of Administration were granted in Pennsylvania when the Estate was opened. There are no estate

proceedings in any other state. Furthermore, the Administrator of the Estate resides in Pennsylvania. Because the parties were married and later divorced, §6111.2 operates to disqualify automatically Mr. Konieczko as a beneficiary. There is no evidence from the designation itself or from a subsequent court order or contract that Joet Burroughs or Charles Konieczko intended for her designation as beneficiary to survive the divorce.

For the following reasons, this Court holds that §6111.2 can also be construed as applying and, therefore, the beneficiary designation of the decedent's divorced spouse is ineffective since the marital settlement agreement did not designate Mr. Konieczko as beneficiary and did not survive the divorce of the parties.

A similar issue arose in the case of *Roth v. Roth,* 413 Pa.Super. 88, 604 A.2d 1033 (1992). In *Roth*, the parties entered into a separation agreement upon the dissolution of their marriage. The agreement mutually released the other from any interest he or she may have in each other's retirement or pension. After the husband died, it was learned that the beneficiary designation for his pension death benefit was still in the name of his former wife. The Superior Court held that the language in the separation agreement at issue was sufficiently specific to revoke the beneficiary designation of a lump sum pension benefit.

In *Roth*, the Superior Court first looked to the agreement in order to determine the intentions of the parties. *Lipschutz v. Lipschutz,* 391 Pa. Super. 537, 571 A.2d 1046 (1990). Furthermore, in construing the validity of a marital settlement agreement, the court looked to the case of *Wertz v. Anderson,* 352 Pa.Super. 572, 508 A.2d 1218 (1986) which held:

> A property settlement agreement between husband and wife will be enforced by the courts in accordance with the same rules of law applying to determining the validity of contracts generally.

Moreover, when determining the effect of a marital settlement agreement, the court "must adopt that construction which gives effect to the parties' reasonable and probable intent, in view of the surrounding circumstances and purposes of the contract." *Litwack v. Litwack,* 289 Pa. Super. 405, 433 A.2d 514 (1981).

In the present case the intentions of the parties is clear from the specific language of the Divorce Agreement. It is overwhelmingly apparent that the parties intended to relinquish any claim to the other party's deferred savings plan or any insurance policies. This includes the Aetna annuity contract at issue.

During the hearing on the Motion to Enforce Agreement, Plaintiff introduced testimony of Douglas Wolf, agent and employee of Aetna Life Insurance Company, and the Court makes the following findings: The deceased, during her marriage, employed Mr. Wolf to make arrangements

to enroll her into the annuity contract. On October 19, 1994, after her divorce but before her demise, Mr. Wolf again met with Mrs. Burroughs. Mr. Wolf acknowledged that, at that time, both a Loan Document and a Change of Beneficiary Document were signed by Joet Burroughs. Both documents were notarized and sent to the home office of Aetna (N.T., 3-3-97, pp. 16-28). While the loan document was received by the home office, the change of beneficiary form either did not reach its final destination or was misplaced at the home office. Mr. Wolf's testimony bolsters the decedent's intention to relinquish her former husband's claim as per the Divorce Agreement.

Regardless of whether §6111.2 of the Probate, Estates and Fiduciaries Code is applicable in the case at hand, this Court has full equity power pursuant to 23 Pa.C.S. §3105 to enforce the Divorce Agreement. Said Agreement became part of an enforceable Court Order upon the signing of the Decree of Divorce. Whether the legal theory applied is one where the Court utilizes §3105 to enforce the Divorce Agreement or where the Court utilizes §6111.2 to rescind the beneficiary designation, the outcome or result is the same: The Defendant is not entitled to the proceeds from the Aetna Annuity Contract. Furthermore, because the Divorce Agreement bars the Defendant from collecting the proceeds from the Aetna annuity contract, said proceeds will automatically [be] paid directly to the decedent's brother, John Burroughs, as he was listed as the contingent beneficiary on the Aetna contract.

For all the above reasons, the Court hereby grants the relief requested by Petitioner, John Burroughs, Administrator of the Estate of Joet B. Burroughs a/k/a Joet B. Konieczko, deceased, as follows:

DECREE NISI

AND NOW, to-wit, this Eighth day of May, 1997, for the reasons set forth in the accompanying Opinion, the Court finds that Charles Konieczko is disqualified as a beneficiary of the Aetna Annuity Contract of the decedent, Joet B. Burroughs, also known as Joet B. Konieczko.

Aetna Life Insurance and Annuity Company is authorized to pay the benefits to John Burroughs, individually.

Each party has ten (10) days to file Exceptions from the date of said Order.

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

PETITIONERS FOR AUDIT, ALAN F. WOOLSLARE, et al, Petitioner

v.

JONES MARSH MASTERSON LYONS SMITH COMMITTEE, Respondent

STATUTES/ELECTION CODE AND IMPLEMENTING REGULATIONS/ DEFINITIONS OF "CONTRIBUTION" AND "EXPENDITURE"

Despite the similarity in the Election Code definition of the terms, a "contribution" is not the same thing as an "expenditure." 25 Pa.C.S.A. §3241. An expenditure is paid out by a party whereas a contribution is received by a party.

In-kind contributions to an election campaign committee are not expenditures. Therefore, the committee is not required, pursuant to 4 Pa. Code, §177.2(d), to produce details of the in-kind contributions.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION- LAW CASE NO. 11383-1999

Appearances: Alan F. Woolslare, Esquire
Roger H. Taft, Esquire
Elizabeth A. Malc, Esquire

OPINION

Anthony, J. July 16, 1999

This matter comes before the Court on Petitioner's Petition for Audit of Expense Accounts. After reviewing the petition, the Respondent's answer and the arguments of counsel, the Court will deny the petition. The factual and procedural history is as follows.

The Jones Marsh Masterson Lyon Smith Committee (hereinafter "Committee") filed both its annual report for the period covering January 1, 1998 to December 31, 1998, and its termination report on January 29, 1999. Petitioners made an information request for vouchers pursuant to the Election Code on February 16, 1999. The request was for five items:

1. An item listing transcript costs for Marsh Spaeder Baur Spaeder and Shaaf [sic], dated 3/10/98 in the amount of $234.00.
2. An item listing legal services for Quinn Buseck Leemhuis Toohey & Kroto, dated 3/23/98 in the amount of $81.25.
3. An item listing legal services for Quinn Buseck Leemhuis Toohey & Kroto, dated 6/17/98 in the amount of $100.00.
4. An item listing legal services for Quinn Buseck Leemhuis Toohey & Kroto, dated 0/0/99 [sic] in the amount of $1,073.08.
5. An item listing legal services for MacDonald Illig Jones & Britton, dated 0/00/99 [sic] in the amount of $1,099.07.

The request also asked for details of two in-kind contributions, one from MacDonald Illig Jones & Britton in the amount of $12,219.50 dated 1/15/99, and the other from Marsh Spaeder Baur Spaeder & Shaaf [sic] in the amount of $7,500.00 dated 1/29/99.

The vouchers for the five items requested were subsequently made available before the Court hearing on June 2, 1999. However, Petitioners still requested the details of the in-kind contributions and that an audit be performed. The issue before this Court is whether the Petitioners are entitled to the details of the in-kind contributions.

The petitioners have relied on 4 PA. Code §177.2(d) as support for the position that the details of those contributions should be disclosed. Therefore, the Court will consider whether §177.2(d) requires that the Respondent turn over details of these transactions. Section 177.2(d) states that "[a] person may inspect or copy the vouchers, or copies of vouchers, for **expenditures itemized in a Campaign Finance Report**..." (emphasis added). Petitioners contend that in-kind contributions are "obviously expenditures under the Election Code" and therefore are subject to §177.2(d). As further support, the Petitioners cite the definitions for "contribution" and "expenditure" in 25 Pa.C.S.A. §3241. Petitioners contend that the definitions of those two terms in the Election Code show that they are to be considered the same thing.

This Court disagrees that in-kind contributions are "expenditures" under the Election Code. First, the common sense understanding of those terms is that an expenditure is something paid out by a party and a contribution is something that is donated to a party. The language of §3241 is not to the contrary. The Court will agree that the terms are defined similarly but that does not mean that the legislature intended them to be considered the same thing. Both definitions are utilized throughout the Election Code and must be all-inclusive. However, no language incorporates a "contribution" of any kind, into the definitions of "expenditures." They are both simply inclusive statements about what constitutes either a "contribution" or an "expenditure" within the general definitions of those terms.

The Court will also note that "expenditure" and contribution" may be terms associated with the same transaction but from different points of view. A contribution to a committee such as this one is necessarily an expenditure by the person making the contribution. However, that does not mean that the terms are referring to the same thing. The terms are being used to discuss the different vantage points of the transaction. This may mean that a transaction will need to be recorded as a contribution by one entity and an expenditure by another entity. There is no suggestion, in either §3241, §177.2(d) or anywhere else in the Election Code that an expenditure includes contributions or vice-versa. Nor has the Petitioner supplied any case law that supports that proposition.

Thus, this Court is unwilling to reach such a result without compelling

reason. Petitioners have not presented such in either the hearing or their brief. Therefore, the Petition will be denied.

ORDER

AND NOW, to-wit, this 16 day of July, 1999, it is hereby ORDERED and DECREED that Petitioner's Petition for Audit of Expense Accounts is DENIED.

BY THE COURT:
/s/ **Fred P. Anthony, Judge**

COMMONWEALTH OF PENNSYLVANIA

v.

CALVIN M. HARPER

CRIMINAL LAW

A defendant who flees to avoid apprehension is subject to punishment under 18 Pa.C.S. Sec. 5126.

CRIMINAL LAW

However, under 18 Pa.C.S. Sec. 5126(a) if a person is "at liberty" pursuant to a Court Order and does not show up as required by that Order, the person shall not be subject to prosecution under Sec. 5126.

CRIMINAL LAW

In a case of first impression, the Court ruled that a defendant free on probation is not "at liberty" as stated in Sec. 5126(a).

CRIMINAL LAW

The Court found that the Defendant in this case who was on probation and who fled to avoid being arrested pursuant to an arrest warrant could be prosecuted under 18 Pa.C.S. Sec. 5126.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 298 OF 1999

Appearances: Garrett Taylor, Esq., for the Commonwealth
John Daneri, Esq., for the Defendant

OPINION

Domitrovich, J., August 24, 1999

Defendant, a probationer from the State of Ohio, failed to appear for his due process hearing for alleged violations of his probation in the State of Ohio. A warrant was issued for his arrest from the State of Ohio and served in Pennsylvania by local law enforcement officials. Defendant is charged in Pennsylvania with Flight to Avoid Apprehension, Trial or Punishment, pursuant to 18 Pa.C.S. § 5126 (hereinafter §5126). Defendant filed this Motion for Writ of Habeas Corpus, and raises an issue of first impression within this Commonwealth: whether § 5126(b) excludes Defendant from prosecution since Defendant was released and placed on a probationary order.

The facts are as follows: on November 20, 1998, the City of Erie Police Department, Narcotics Division, in Pennsylvania, received information at police roll call that there was an arrest warrant for a Calvin Harper issued by Erie County, Ohio. Detective Matt Fischer additionally requested a photograph of Defendant from Ohio. Upon receiving this photograph, Detective Fischer realized this was the same individual he was investigating on another matter. Detective Fischer proceeded to Defendant's residence at 436 East 17th Street, Erie, Pennsylvania in an unmarked vehicle and

radioed for police assistance for this arrest. The units responded and confronted the Defendant with the arrest warrant, at which time the Defendant fled on foot. Detective Fischer pursued Defendant until he fell into the side of a police cruiser. Defendant was then placed into custody.

Defendant's issue focuses on the interpretation of the legislative term "set at liberty" as applied in the exception of § 5126(b). Defendant believes "set at liberty" includes release on an order of probation or parole in order to bring Defendant within the statute's exclusion. This Court disagrees.

The statute at § 5126 in its entirety reads as follows:

> (a). OFFENSE DEFINED- A person who willfully conceals himself or moves or travels within or outside this Commonwealth with the intent to avoid apprehension, trial or punishment, commits a felony of the third degree when the crime which he has been charged with or has been convicted of is a felony and commits a misdemeanor of the second degree when the crime which he has been charged with or convicted of is a misdemeanor.
>
> (b) EXCEPTION- Subsection (a) shall not apply to a person set at liberty by a court order who failed to appear at the time or place specified in the order.

§ 5126(a) applies to a person who moves or conceals herself or himself within or outside our jurisdiction and flees with intent to avoid apprehension. The exception at paragraph (b) excludes those Defendants who are "set at liberty" by court order and fail to appear at a specific court ordered date and time.

To determine the legislative intent as to "set at liberty," this Court has conducted extensive research; however, the results revealed no pertinent legislative history.

This Court must now focus its attention on the overall legislative scheme of both 18 Pa.C.S. § 5124 (hereinafter § 5124), and § 5126, which impose criminal sanctions on defendants. This Court interprets these statutes, when read together, as companion statutes requiring all defendants to appear in Court when ordered, to ensure the smooth operation of the judicial system. Specifically, § 5124 applies to "bail jumpers" while § 5126 applies to defendants who are released on order of probation or parole. In § 5124, Defendants are subjected to additional criminal sanctions if they fail to appear at the required date and time as the Court directs without lawful excuse. Under § 5126, those on probation or parole are subjected to additional criminal sanctions if they flee from law enforcement officials after they are informed of a warrant for their arrest.

Defendants on probation or parole are specifically excluded from § 5124 under paragraph (b):

(b) EXCEPTION- Subsection (a) of this section does not apply to obligations to appear incident to release under suspended sentence or on probation or parole.

The intent of § 5124 has long been recognized to impose an additional punishment where a defendant fails to make a required court appearance while on bond, as opposed to forfeiting bond. Kingsley A. Jarvis, PENNSYLVANIA CRIMES CODE AND CRIMINAL LAW, § 5124, p. 25 (1997). To make § 5124 more effective, the legislature included not only monetary bail situations but also defendants released on their own recognizance. Sheldon S. Toll, PENNSYLVANIA CRIMES CODE ANNOTATED 2D, 1998 REV. ED., 18 Pa.C.S.A. § 5124, p. 470 (West Pub.).

This Court interprets the purpose of § 5126 to expand on § 5124, which only covers those on bail. The intent of § 5126 is to impose criminal sanctions on probationers and parolees who flee from authorities once informed there is a warrant for their arrest. It is clear that Defendant, an Ohio state probationer, after being informed of an arrest warrant, tried to avoid apprehension by fleeing from local law enforcement officials here in Erie, Pennsylvania. Detective Fischer of the City of Erie Police Department successfully pursued Defendant to place him in custody in Pennsylvania.

Based on the above findings of fact and this Court's review of the statutory scheme, Detective Fischer had properly charged Defendant with § 5126, a felony pursuant to Pennsylvania law. For all the above reasons, Defendant's issue raised in his Motion for Writ of Habeas Corpus is meritless.

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

MONICA ABBATE, Appellant

v.

CITY OF ERIE ZONING HEARING BOARD, Respondent

CITY OF ERIE, Intervenor

ZONING

Notice of Appeal from order of Zoning Hearing Board dismissed because an order denying a party's motion to dismiss a notice of zoning violation and quash a related subpoena is not a final order giving rise to a right of appeal.

CONSTITUTIONAL LAW

Fifth amendment does not apply to subpoena issued by Zoning Hearing Board in proceeding to enforce Zoning Ordinance.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 10927-1998

Appearances: Peter J. Belott, Esq.
Robert C. Brabender, Esq.
Sumner E. Nichols, II, Esq.

OPINION

By Order dated June 26, 1998, this Court affirmed the February 10, 1998 decision of the City of Erie Zoning Hearing Board denying Appellant's Motion to Dismiss and Motion to Quash Subpoena. Appellant has filed an appeal, which must fail because not only does it lack merit, but it is also an appeal from an interlocutory order.

PROCEDURAL HISTORY

On September 19, 1997 the City of Erie, through zoning officer Garrett Antalek, served Appellant with notice of a violation of Erie Zoning Ordinance No. 40-1968, averring "[a] massage parlor is not a permitted use in a C-1 (Local Business District) Zone. A massage parlor is located less than 750 feet from a Residential Zoning District. No zoning Certificate [was] secured for a massage parlor."

In addition, the City of Erie served a subpoena on Appellant for business records. On September 29, 1997, Appellant initiated a two-pronged attack by filing a Motion to Dismiss the Notice of Violation and by requesting the subpoena be quashed. On January 13, 1998, the Board heard evidence and argument regarding Appellant's motions.

On February 10, 1998, the Board denied all of Appellant's Motions and set a hearing date on the merits of the case for April 14, 1998. On February 18, 1998 Appellant filed a Land Use Notice of Appeal from the Board's February 10, 1998 decision. By Order dated June 26, 1998, the Board's February 10, 1998 decision denying Appellant's Motions was affirmed. This Court further ordered Appellant to comply with the

subpoena, and remanded the case to the Zoning Hearing Board for a hearing on the merits of whether a zoning violation exists.

On July 17, 1998, Appellant filed a Notice of Appeal. This Opinion is in response to the Statement of Matters Complained of on Appeal filed by Appellant.

LAND USE APPEAL

It is important to distinguish at the outset what this case is about and what it is not about. It is about Appellant attempting a pre-emptive strike which has no basis in procedural or substantive law. It is not about Appellant filing a land use appeal from an adverse decision on the merits of whether Appellant is in violation of a zoning ordinance. To style this appeal as a land use appeal is a disingenuous ploy by Appellant to gain at least two opportunities for appellate review and to forestall any enforcement action by the City of Erie.

The Zoning Board's February 10, 1998 decision did not dispose of any issue on the merits of this case. It held only that the evidence presented was sufficient to raise an issue as to whether Appellant's establishment was operating in violation of the City's zoning ordinance and justifying the issuance of a subpoena. *See* Decision, 2/10/98, pp. 10-11. Further, the decision scheduled a hearing for April 14, 1998, but provided the hearing would be continued pending disposition of any proceedings before the Court of Common Pleas. See Decision, 2/10/98, p. 16.

Appellant correctly indicates a zoning hearing board is vested with "the exclusive jurisdiction to hear and render final adjudications in matters involving...appeals from the determination of the zoning officer". 53 P.S. §10909.1(a)(3). Appellant also highlights that "(a)ll appeals from all land use decisions...shall be taken to the court of common pleas of the judicial district wherein the land is located". 53 P.S. §10002-A.

The Municipalities Planning Code further provides a land use appeal may be taken from "any decision rendered [by a zoning board]", 53 P.S. §11001-A. "The board...shall render a written decision within 45 days after the last hearing before the board". 53 P.S. §10908(9).

In the case sub judice, a final hearing has yet to occur. There have been no written findings of fact or conclusions of law filed by the Zoning Hearing Board. The Appellant cites no credible authority, nor does any exist, for the proposition that the Board's February 10, 1998 decision to schedule a hearing on the merits of the case is a "final adjudication" or "decision" rendered by the Board within the meaning of 53 P.S. §10909.1(a)(3), §11001-A, and §10908(9) supra, permitting a land use appeal to a Court of Common Pleas, 53 P.S. §10002-A, supra.

Only a final order of the Zoning Hearing Board may be appealed to the Court of Common Pleas. *Allegheny West Civil Council Inc. v. City Planning Commission of Pittsburgh, et al.*, 470 A.2d 1122 (Pa. Cmwlth. 1984). It is well-settled that "an order is "final", for purposes of appeal, if it

precludes a party from presenting the merits of its case to the lower court." *Daily Exp. Inc. v. Office of State Treasurer*, 683 A.2d 693 (Pa. Cmwlth. 1996). No decision on whether Appellant violated the Zoning Ordinance was ever rendered. Appellant remains able to litigate the merits of this case before the Board. As no final order has been issued by the Board providing the procedural prerequisite for appeal to the Court of Common Pleas, Appellant's appeal is premature, interlocutory and improvidently filed.

As to Appellant's Motion to Quash Subpoena, 53 P.S. §10908(4) provides, in relevant part:

> "The chairman of the [zoning] board shall have power to...issue subpoenas to compel the attendance of witnesses and the production of relevant documents and papers, including witnesses and documents requested by the parties."

This statute unequivocally gives the Board authority to issue subpoenas to produce relevant documents. Interestingly, Appellant does not challenge the relevance of the documents requested, only the statutory authority given the zoning board to issue subpoenas. Appellant argues that such subpoena power compels Appellant to participate in proving the City's case. However, Appellant has provided no authority for the proposition that the self-incrimination clause of the Fifth Amendment is applicable to these proceedings. Further, Appellant overlooks the common practice in civil cases for a moving party to call an adverse party as a witness in its case in chief or to compel pre-trial discovery from an opposing party. As Appellant's position has no basis in law or logic, it must fail.

CONCLUSION

Appellant's Land Use Appeal and Statement of Matters Complained of on Appeal are appeals in form only. In substance, they are but a subterfuge designed to obfuscate the underlying issues and prevent the Board from implementing its legislatively-derived power to subpoena relevant documents to assist it in rendering a proper decision on the merits of whether a zoning violation exists.

For the foregoing reasons, this appeal is interlocutory, without merit, improvidently filed and should be quashed.

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

TRUST OF HENRY ORTH HIRT, Settlor
Trust Under Agreement Restated December 22, 1980
With Respect to Susan Hirt Hagen
No. 100-1998
and
TRUST OF HENRY ORTH HIRT, Settlor
Trust Under Agreement Restated December 22, 1980
With Respect to F.W Hirt
No. 101-1998

CIVIL PROCEDURE/PLEADINGS/PRELIMINARY OBJECTIONS

Preliminary Objections to Petition for Declaratory Relief granted based on matter not being ripe for judicial review. Petition seeks statutory interpretation regarding ability to nominate directors, but no shareholder has been denied an opportunity to nominate a director to the board.

TRUSTS/TRUSTEE POWERS

Courts have no power to direct trustees with regard to discretionary decisions.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHAN'S COURT DIVISION

OPINION

On May 7, 1999, the corporate trustee, Bankers Trust Company of New York (Bankers Trust) filed a Petition for Declaratory Relief requesting a judicial interpretation of an insurance statute regarding, inter alia, the method by which directors of a domestic insurer are nominated. See 40 P.S. §991.1405(c)(4). Before the Court are Preliminary Objections filed by F.W. Hirt, Erie Indemnity Company and the Board of Directors of Erie Indemnity Company. Among the plethora of objections, only the ripeness issue needs to be addressed.

Accepting as true the averments in the Petition for Declaratory Relief filed by Bankers Trust, the salient facts amount to a disagreement between the individual co-trustees, F.W. Hirt and Susan Hirt Hagen, as to whether the H.O. Hirt Trusts, as the majority shareholder of Class B stock, can nominate director(s) to the Board of Erie Indemnity Company. F.W. Hirt asserts that all nominations must come from the Nominating Committee while Susan Hagen Hirt contends the Trusts can independently nominate a candidate.

At the time the Petition was filed, in essence Bankers Trust was asking for a determination as to which individual co-trustee was correct. Subsequent to filing the Petition, Bankers Trust filed an Answer to the Preliminary Objections of F.W. Hirt in which Bankers Trust now takes the affirmative position that the interpretation of the insurance statute by Susan Hirt Hagen is correct. In the view of Bankers Trust, its interpretation

is in the best interest of the H.O. Hirt Trusts because it protects the corpus and preserves "unified ownership and control" of Erie Indemnity Company.

In taking this position, Bankers Trust is doing exactly what H.O. Hirt envisioned when he provided for a third trustee to resolve any disputes between the two individual trustees. In fact, Bankers Trust is getting paid a fee, in part, to make the types of decisions it has made herein to break the deadlock between the two individual trustees.

Since there is no dispute that a majority of the Trustees is needed (i.e. two of the three) to take action on behalf of the H.O. Hirt Trusts, Bankers Trust along with Susan Hirt Hagen can decide what action, if any, to take regarding the nomination of director(s) to the Board of Erie Indemnity Company. Because such a decision on the part of the Trustees is discretionary and not ministerial, a court cannot "direct the ...trustees to do or abstain from doing any particular act in their fiduciary capacity." 42 Pa. C.S.A. §7535(2)[1].

Further, both Bankers Trust and Susan Hirt Hagen frame the issue as a straightforward request for a judicial interpretation of the insurance statute. In their view, there is no issue of whether the terms of the H.O. Hirt Trusts empower Trustees to nominate a director to the Board of the Erie Indemnity Company. Hence the Petition does not involve the administration of the Trusts, instead it is tantamount to a request for judicial blessing on a Trustee's decision to take discretionary action. Because the administration of the Trusts is not at issue, there is no need for the Court to act at this time pursuant to 42 Pa.C.S.A. §7535(3).[2]

Consideration has also been given to the abstract nature of the request of Bankers Trust. On the face of it, the Petition is a simple request for an

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[1] Susan Hirt Hagen does not need an Orphan's Court ruling to decide whether or not to challenge the statute. As she avers in her Memorandum of Law in Opposition to the Preliminary Objections, she is the owner of Class B voting stock of Erie Indemnity Company in her individual capacity. As such, she is free to take any action regarding the nominating procedure without having to work within the structure and terms of the H.O. Hirt Trusts.

[2]To the extent the administration of the Trusts is affected because of the current search for a successor corporate trustee, given the timetable established for the selection process, any final resolution of this issue cannot occur prior to the ultimate selection of a corporate trustee. Any prospective trustee no doubt will be made aware by the individual trustees of the differing interpretations of the insurance statute. As part of the due diligence process, the prospective trustee can determine the appropriate resources to devote to this client, with the fee schedule set accordingly.

interpretation of the insurance statute. However, Erie Indemnity Company is being asked to respond to the Petition in a vacuum. To date, no Class B shareholder, including the H.O. Hirt Trusts, has been denied an opportunity by the Erie Indemnity Company to nominate a director to the Board. In the absence of such a denial, Erie Indemnity Company is nonetheless placed in the position of defending itself for action it may or may not take. More importantly, the present "facts" are hypothetical only. Without a more concrete set of facts with identifiable parties, judicial review is based on conjecture.

In sum, this matter is not yet ripe for judicial review. Anyone familiar with the storms on Lake Erie knows that even the most ominous, threatening front may pass without striking. In the event the storm clouds which have gathered in this case erupt into an actual dispute among defined parties, if asked, the Court will respond.

In light of the finding of a lack of ripeness, the remaining Preliminary Objections of F.W. Hirt, Erie Indemnity Company and the Board of Directors of Erie Indemnity Company are moot and will not be addressed.

BY THE COURT:
WILLIAM R. CUNNINGHAM, JUDGE

DOLORES L. JOHNSON and THOMAS R. JOHNSON, her husband

v.

MARY TRACY GUTFREUND

INSURANCE/LIMITED TORT OPTION

75 PA. C.S.A. §1705(d) precludes recovery of non-economic damages where plaintiff has not sustained serious injury

INSURANCE/LIMITED TORT OPTION

Serious impairment of body function required

INSURANCE/LIMITED TORT OPTION

Medical testimony generally needed to establish the existence, extent and permanency of the impairment

INSURANCE/LIMITED TORT OPTION

Limited disabilities resulting from pain, which do not substantially limit the essential functions of daily life, not sufficient to constitute serious injury

INSURANCE/LIMITED TORT OPTION

In the absence of legislative guidance, "serious injury" for purposes of limited tort option will be construed narrowly

STATUTES/PARTICULAR STATUTES

In the absence of legislative guidance, "serious injury" for purposes of 75 Pa. C.S.A. §1705(d) limited tort option will be construed narrowly

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11289-1997

Appearances: David L. Hunter, Esquire
W. Patrick Delaney, Esquire

OPINION

Bozza, John A., J.

Dolores Johnson was injured as a result of an automobile accident that occurred on April 22, 1995. At the time of the accident, Ms. Johnson was insured under the provisions of a “limited tort” policy, which prevented her from recovery of non-economic damages, unless she sustained a “serious injury.” 75 Pa.C.S.A. § 1705(d). The defendant, Mary Gutfreund, has filed a Motion for Summary Judgment, arguing that as a matter of law Ms. Johnson has not suffered a serious injury.

The summary judgment record, after resolving any issues of fact in a manner most favorable to Mrs. Johnson, indicates that Dolores Johnson is 39 years old and has one child, a daughter, Rachel, who is four years old. She works full time as an operator at GTE Company. As a result of the accident, she suffered a broken ankle, a laceration to her head, and shoulder injury. Her broken ankle required a cast for approximately four weeks and

a walking cane for two additional weeks. No further treatment for the ankle was required. The scalp laceration was closed with eight stitches, and the accompanying concussion did not necessitate formal medical treatment. The injury to one or both of her shoulders, the nature of which is not set forth in the record, has been treated with the use of medication, and perhaps some form of self-administered "motion therapy."

As a result of both the ankle injury and injuries to her shoulders, she continues to have difficulty climbing stairs, picking up her daughter, doing heavy cleaning, and climbing ladders. *See*, Excerpt from the Deposition of Dolores L. Johnson, September 4, 1998, pp. 27-28, attached as Exhibit "B" in the Appendix to Motion for Summary Judgment. She can no longer roller skate. Both of her treating physicians have opined that she cannot walk without pain and should not walk long distances. The medicine she takes for her shoulder problem has led to improvement. Overall, there are no activities that she did prior to her accident that she no longer engages in as a result of her shoulder injury. She described the current condition of her health as "aches and pains." *Id*. at p. 43.

In order to determine whether the record on summary judgment supports a finding of "serious injury," it is necessary to determine whether she has suffered a "serious impairment of body function." In that regard, the legal standard is well-defined and was most recently set forth by the Supreme Court in *Washington v. Baxter,* 695 Pa. 447, 719 A.2d 733, 740 (1998). In summary, it is necessary to determine the nature of the particular body function that was impaired, and whether that impairment was serious. In adopting the definition of "serious impairment of body function" as set forth in the Michigan decision of *DiFranco v. Pickard,* 398 N.W.2d 896 (Mich. 1986), the Court reiterated the following:

> "The focus of these inquiries is not on the injuries themselves, it is on how the injuries affected a particular body function. Generally, medical testimony will be needed to establish the existence, extent and permanency of the impairment . . . . In determining whether the impairment was serious, several factors should be considered: the extent of the impairment, the length of time the impairment lasted, the treatment required to correct the impairment, and other relevant factors. An impairment need not be permanent to be serious." *Washington,* 695 Pa. at _____, 719 A.2d at 740.

The "serious impairment of body function" standard is obviously less than objective in nature, at least to the extent that use of the term "serious" requires a relative determination. While it may be a fairly simple task to distinguish between the most and least serious injuries, there is a range in between which provides much room for subjective analysis. Nonetheless, it is an essential inquiry mandated by the legislature's reluctance to define

"serious injury" in a practically useful manner.

Recently, in November, 1998, Judge Walker of the Court of Common Pleas of the Thirty-Ninth Judicial District found no serious injury in circumstances somewhat parallel to those found in this case. In *Little v. Rife*, No. A.D. 1997-523 (Franklin County, November 17, 1998), the plaintiff suffered fractured ribs, a face laceration, and a broken ankle bone. The ankle injury required surgery and a two-day hospitalization. Mr. Little was unable to work for more than three months. Thereafter, he was limited to performing "light duty" for a period of time. In addition, he could not go up and down steps or up and down hills for approximately two and one-half months. Thereafter, it appeared that he was able to perform substantially all of his day-to-day activities. After a thorough analysis, the Court concluded that his impairment was not serious.

In *Murray. v. McCann*, 442 Pa. Super. 30, 658 A.2d 404 (1995), the court found that no serious injury had been demonstrated by a plaintiff who suffered from soft tissue injuries to her back, neck, legs and right hip. As a result of her injuries, she lost two and one-half weeks, although four years following the accident she continued to suffer shoulder and neck pain. She experienced difficulty when sitting in certain positions, and no longer engaged in playing miniature golf and roller skating. In concluding that the plaintiff did not suffer a serious injury, the court noted:

> "Appellant stated that she is stiff and sore and that she experiences pain when she lifts heavy loads, but her testimony also establishes that she still performs all her daily activities fully."

Murray, 442 Pa. Super at 39, 658 A.2d at 408.
The Court concluded that she had "suffered minor, rather than serious, interference with her daily life." *Murray*, 442 Pa. Super. at 40, 658 A.2d at 409.

In *Dodson v. Elvey*, 445 Pa. Super. 479, 665 A.2d 1223 (1995), *alloc. granted*,__ Pa. __ ,674 A.2d 1072 (1996), the court found no serious injury in circumstances where as the result of a motor vehicle accident, the plaintiff had a rotator cuff injury, a fractured elbow, and back strain. Three years following the accident, the plaintiff continued to have pain associated with his injuries. He was unable to work for five years, and was no longer able to go bowling, play softball or lift weights. The court concluded " that the record shows no serious interference with appellant's daily life." *Dodson*, 445 Pa. Super. at 501,665 A.2d at 1235.

As the law continues to evolve in this area, it is evident that limited disabilities resulting from pain, which do not substantially limit the performance of the essential functions of daily life, will not be sufficient to constitute serious injury. *See*, *Dodson v. Elvey*, 445 Pa. Super. 479, 665 A.2d 1223 (1995), *alloc. granted*, __ Pa. __, 674 A.2d 1072 (1996). Any impairment is not sufficient, it must be serious in nature. Every injury by its nature has some consequence. Every bodily injury carries with it some

inconvenience or limitation, but when one selects the limited tort option, only in the most narrow circumstances can one recover for "pain and suffering" type damages. While it is unfortunate that the legislature provided so little guidance in assessing what may constitute a "serious impairment of body function," [the] Pennsylvania Supreme Court has adopted general criteria which were set forth in *Washington v. Baxter*, 695 Pa. 447, 719 A.2d 733,740 (1998).

After viewing all of the uncontested facts in this case in a light most favorable to the plaintiff, and applying the summary judgment standard and criteria set forth in *Washington*, this Court must conclude that reasonable minds could not differ as to whether Ms. Johnson sustained a "serious injury." She did not. While there is no doubt that Ms. Johnson has limitations and finds certain activities painful, she is able to perform all of the essential functions of daily life.

An appropriate Order shall follow.

ORDER

AND NOW, to-wit, this 27th day of September, 1999, upon consideration of the Motion for Partial Summary Judgment filed on behalf of the defendants and in accordance with the attached Opinion, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that the Motion is **GRANTED**.

By the Court,
/s/ **John A. Bozza, Judge**

FEDORKO PROPERTIES, INC.

v.

MILLCREEK TOWNSHIP SCHOOL DISTRICT, a/k/a SCHOOL DISTRICT OF THE TOWNSHIP OF MILLCREEK and WESTMINSTER PLACE PARTNERSHIP

COMPETITIVE BIDDING

A resolution passed by a school district to authorize the sale of real property by sealed, competitive bidding upon certain conditions would not be effective as to those conditions which were not set forth in the notice to bidders, advertisement of sale, or bid instructions.

COMPETITIVE BIDDING

A school district's solicitation of sealed, competitive bids "as is" excluded all implied warranties, indicates that the buyer takes the entire risk as to quality of the items offered for sale, and puts the buyer on notice that there may be liabilities attendant to the purchase.

COMPETITIVE BIDDING

Bidding instructions indicating that there were no "representations" as to specific items or any other matters affecting the property indicate that there are no statements, express or implied, in regard to some past or existing fact, circumstance, or state of facts which would be influential in bringing about the agreement.

COMPETITIVE BIDDING

The fact that a school district indicated in its bidding instructions that real property would be sold "as is" with no representation as to size, marketability, general conditions, terrain, or any other matters affecting the property did not prohibit a bidder from attaching to its bid certain conditions regarding "clear title", obtaining "permits", and other important matters, where none of the bidder's conditions required the school district to guarantee anything or to change the character or condition of the property.

COMPETITIVE BIDDING

Although the bidding process by the school district was conducted properly, the resulting contract with the successful bidder would be void and the bidding process would be set aside where, after the bidding, the school district, in contradiction to its bidding instructions, made written representations regarding the condition of the property, viz., that the property did not contain any hazardous waste or other obnoxious substances and would indemnify the buyer in that regard.

COMPETITIVE BIDDING

It was improper for the school district to make changes in the contract for sale which followed competitive bidding even when the bidding itself was appropriate or the school district's action lead to what may have been a favorable result.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 60051-1998

Appearances: Kevin L. Colosimo, Esquire
James T. Marnen, Esquire
Eric J. Purchase, Esquire

OPINION

Bozza, John A., J.

This dispute arises out of Millcreek Township School District's sale of the property known as the Tracy School, to Westminster Place Partnership. Fedorko Properties, Inc., one of the unsuccessful bidders, has asserted that the School District should not have accepted Westminster's bid because it did not comply with the bid specifications. Pending before the Court are cross-motions for summary judgment filed by all of the parties.

The facts, which are not in dispute, can be briefly summarized. The School District Board of School Directors passed a resolution on June 15, 1998, whereby it authorized the sale of the Tracy School property. *See*, Resolution of Millcreek Township School District Board of School Directors of June 15, 1998.[1] The resolution directed that the sale would be by "sealed bids" and specified the terms and conditions upon which bids would be solicited. These included the following:

1. The property will be sold in an "as is" condition.
2. There shall be no minimum purchase price.
3. The purchase contract must be executed within fifteen (15) days after a purchaser is selected.
4. The terms of the purchase contract shall require that the School District receive a hand payment of no less than $100,000.00, with the balance of the purchase price to be paid at the time of closing, and all transfer taxes will be paid by the purchaser.
5. The closing will be held on or before November 1, 1998, with "time being of the essence."
6. The School District will not be obligated to pay any real estate commissions.
7. Possession will be at the time of closing.

A notice to bidders and advertisement of sale, together with bid instructions, were prepared by Dr. Fred Garnon, Director of Operations and Facilities. The bid instructions provided prospective bidders with necessary information about the terms and conditions of the sale. The bid

[1] All documents referred to herein may be located in the *Appendix To Motion For Summary Judgment* filed by Millcreek Township School District.

instructions did not contain the same terms and conditions as the resolution. In particular, the bid instructions did not include the "time being of the essence" provision with regard to the date of closing. In addition, the bid instructions included an additional disclaimer of warranty that stated as follows:

> ". . . [T]hat the owner makes no representations as to the size of the property or the marketability of title, general conditions and terrain, or any other matters affecting the property."

See, Instructions to Bidders, Article VII, Section 1.
Further, no mention was made concerning the hand payment and final payment provisions, nor the obligation of the buyer to pay real estate commissions and pay transfer taxes.

Seven bids were received for the property. Westminster's bid was for $1,751,000.00; Fedorko Properties, Inc.'s bid was for $1,188,888.88; Scott's Development Company, Inc.'s bid was $1,125,000.00; and Commercial Net Lease Realty, Inc.'s bid was $1,000,000.00. The remaining bids were for amounts considerably less. Therefore, Westminster's bid was approximately $560,000.00 more than the second highest bid.

Prior to the bid process, the School District had received an appraisal of the property from Sammartino and Mueller, Inc., a real estate valuation service, indicating that the value of the property, if sold "as is" in April, 1997, was $1,170,000.00. In his appraisal Mr. Raymond Sammartino indicated,

> "It is noted that the School District should offer the subject property on an "As is" basis, since the indicated value conclusion herein is predicated on the purchaser incurring the cost of demolition. Accordingly, it is recommended that the district obtain accurate demolition, asbestos removal, and site clearing costs. A significant difference as to these costs will alter the value conclusion."

See, Complete Appraisal Summary Report, p. 41.

The School District selected Westminster's bid and both executed an agreement "For The Sale and Purchase of Real Estate."

The specific issue in dispute centers on the provisions of Article VII, Section 1 of the "Instructions to Bidders" prepared by the School District and relating to the sale and/or lease of the property. Article VII contains the following language in its entirety:

ARTICLE VII - RESPONSIBILITY OF BIDDERS

> SECTION I. Each bidder before submitting his proposal shall be deemed to understand and acknowledge that Tracy School property shall be sold or leased in an "AS IS" condition as of August 1, 1998, that the Owner makes no representations as to the size of the property or the marketability of title, general conditions and terrain or any other matters affecting the property.

This section contains two separate clauses. The first states that the Tracy School property shall be sold or leased in an "as is" condition. Although that term is not defined in the bid documents, it has been universally recognized as referring to a seller's position that it makes no guarantees concerning the character or condition of the property in question. The Uniform Commercial Code explicitly provides that a seller excludes all "implied warranties" and "makes plain that there is no implied warranty" by using the term "as is." 13 Pa.C.S.A. § 2316(c)(1). The comment to Section 2316 notes that when goods are sold "as is," the buyer takes the entire risk as to the quality of the goods. Comment, Paragraph 7.

In real estate transactions, the term "as is" has been interpreted to mean that "the buyer is put on notice that there may be liabilities attendant to the purchase." *PBS Coals, Inc. v. Burnham Coal Company*, 384 Pa. Super. 323, 328, 558 A.2d 562, 564. (1989), *app. denied*, 524 Pa. 598, 568 A.2d 1248 (1989). In other jurisdictions, courts have come to similar conclusions. *See*, *e.g.*, *Barker v. Stoner*, 650 N.E.2d 1372, 1374 (Ohio Mun. 1994) ("[a] contractual agreement to accept real property in 'as is' condition relieves the seller of any duty to disclose that the property was sold in a defective condition."); *1845 Ocean Associates v. Stein*, 449 N.Y.S.2d 54, 56 (1982) (" . . . the passing of title on an 'as is' basis generally extinguishes any claim for after discovered defects or breakdowns.").

The second portion of the bid document clause in question states that the School District makes no "representations" concerning a number of specific items and "any other matters affecting the property."[2] The term "representations" is also not defined in the bid documents, but Black's Law Dictionary describes it as follows:

> "A statement expressed or implied made by one of two contracting parties to the other, before or at the time of making the contract, in regard to some past or existing fact, circumstance, or state of facts pertinent to the contract, which is influential in bringing about the agreement."

Blacks Law Dictionary, Sixth Edition 1990.

It may also be understood in common usage to refer to statements concerning the character or quality of any matter about which contracting parties may be concerned. As used here, it obviously refers to the School District's refusal to make any warranties or statements of quality or character concerning the enumerated items, including "any other matters affecting the property." So the question remains as to the implications of Article VII, Section 1, "Instructions to Bidders." The answer quite simply is that the

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[2] This term is not included in the terms and conditions set forth in the resolution of the School District Board authorizing the sale of the property.

School District would not accept a bid if it required the School District to make any warranties concerning the quality, condition or suitability of the property for any purpose.

We turn now to Westminster's bid, which quite explicitly is subject to a number of conditions that have to do with matters affecting the property. The issue is whether these conditions require the School District to make warranties or "representations" concerning the Tracy School property. A close examination of the language of the bid leads this Court to the conclusion that they do not. While Westminster's conditions are very broad and relate to a number of important matters such as "clear title" and obtaining "permits" which would allow intended development, none of them require the School District to guarantee anything or to change the character or condition of the property. Rather, they impose on the buyer the responsibility to investigate the condition of the land to determine if it meets their anticipated needs.[3] Westminster is obligated to pursue a resolution of its conditions in good faith, knowing that if they are not met, it has no recourse against the School District and can only choose not to finalize the sale of the property at the stated price. It is analogous of circumstances in an "as is" transaction where the buyer has the obligation to inspect the property prior to finalizing the sale to determine if contingencies were met. *1845 Ocean Associates v. Stein*, 449 N.Y.S.2d 54 (1982).

Although the "as is" requirement must be a part of the prospective purchaser's bid, the bid instructions do not preclude conditional sales, except to the extent that there can be no condition of sale which would require Millcreek to warrant its property. This was obviously contemplated by Fedorko, who specifically noted in its bid that the offer to purchase was limited to being carried out "in accordance with the terms and conditions of an agreement for the sale of real estate, or otherwise upon terms and conditions agreed to in writing between the Millcreek Township School District (the "seller") and the purchaser . . ." What those terms and conditions would subsequently be is not known, but Fedorko obviously did not believe that the "as is" or no representations portions of the bid specifications did not preclude a conditional sale.

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[3] It is also noteworthy that the Millcreek Township School District stated in the bid documents that the Tracy School property was "available for inspection during the month of August, 1998." *See*, Instructions to Bidders, Article VII, Section 2. This is an indication that the School District was aware that prospective bidders would want to consider the property's limitations and make appropriate adjustments with regard to their subsequent bid price and conditions of sale.

Fedorko has also made the additional argument that Westminster was given preference by extending the deadline for closing. In that regard, Fedorko states that the bids must have been conditioned on closing on or before November 1, 1998, and that "time is of the essence". As Westminster has pointed out, there is no provision in the bid specifications stating that "time is of the essence." While language to that effect is included in the School Board's resolution, for reasons not known the Court, it was not included in the notice and instructions that were provided to prospective bidders. Therefore, it cannot be considered to be a part of seller's conditions of sale and no bidder would have been obligated to adhere to that standard. Accordingly, Fedorko's assertion that Westminster was treated favorably in that regard is without merit.

Ultimately, the issue to be decided is whether in accepting Westminster's conditional bid the School District gave it a competitive advantage over the unsuccessful bidders. There is no doubt that the specifications issued by the School District had to be strictly followed. *Smith v. Borough of East Stroudsburg*, 694 A.2d 19 (Pa. Commw. Ct. 1997), *app. denied*, 549 Pa. 731, 702 A.2d 1062 (1997). While perhaps the School District could have written the bid specifications using more commonly understandable language, all of the bidders were equally free to add conditions and concomitantly raise the bid price. It is obvious that Westminster contemplated the cost of the contingencies it was requiring and adjusted its bid price accordingly. The others chose to approach the matter differently. This is not a situation like that found in *Conduit and Foundation Corp. v. City of Philadelphia*, 41 Pa. Commw. Ct. 641,401 A.2d 376 (1979), where Philadelphia's specifications for a construction project led general contractor bidders to believe that only a single subcontracting supplier could be listed as a part of the general bid, and then went on to award the bid to the only bidder who listed alternative suppliers. In that instance, the Court concluded that it was obvious that the person who did not follow the bid specifications had a competitive advantage by being able to separately negotiate with different subcontractors after the bid had been received. Here, with the exception of its "no guarantee" contingency, the School District said nothing about not allowing conditions or contingencies in bids for the Tracy School property. Everybody was presented with the same rules, and Westminster's bid followed those rules. When Westminster consummates the sale, the School District will not have the obligation to guarantee anything about the nature or the integrity of the property. Moreover, up to this point in the bid process, there is nothing in this case approaching "fraud, collusion, bad faith or arbitrary action." *Karp v. Redevelopment Authority of the City of Philadelphia*, 129 Pa. Commw. Ct. 619, 566 A.2d 649 (1989), *app. denied*, 527 Pa. 619, 590 A.2d 760 (1990). Therefore, the bid process was carried out in an appropriate manner, consistent with the requirements of law. Unfortunately, however, this is not the end of the matter.

Following the acceptance of Westminster's bid, the School District and Westminster signed a written "formal purchase contract" and for some inexplicable reason, included promises it said it would not make. The bid instructions explicitly stated that the property shall be sold "AS IS" and **"the owner makes no representations as to the size of the property or the marketability of the title, general conditions and terrain or any other matters affecting the property."** As this Court has concluded, these terms obviously indicated the School District's position that it would not make any warranties concerning the property. In the purchase contract, the School District, ignoring its position, states that it not only **"represents or warrants to the buyer"** that it **"has good, absolute and marketable title . . ."** but also that the property **"does not contain any hazardous waste or other obnoxious substances . . ."** and that it will **"indemnify"** the buyer in that regard. *See*, For the Sale and Purchase of Real Estate, V(1)(a) and (c). In addition, the School District also "represented" that no portion of the subject parcel has been delineated as a wetlands, and gave Westminster the right to rescind the contract if a wetland problem "adversely impacts Buyer's intended usage." *See*, For the Sale and Purchase of Real Estate, V(1)(d). Were these promises important? Apparently the School District thought so, as they explicitly acknowledged in the contract that they were a "material inducement" to Westminster to purchase the property. *See*, For the Sale and Purchase of Real Estate, V(1).

What then should be the result of the School District's not following its own conditions for accepting bids? More than ninety years ago, the Pennsylvania Supreme Court, addressing the issue of post-bid/acceptance/ changes noted the importance of competitive bidding in guarding against collusion and favoritism. *Louchheim v. Philadelphia*, 218 Pa. 100, 66 A. 1121 (1907). In *Louchheim*, the Court found that it was improper for a city official to negotiate a change in the original bid terms tendered by the lowest bidder. It decided that such a procedure was repugnant to the notion of competitive bidding. The Court had concluded that private negotiations had occurred subsequent to the opening of bids, which resulted in one of the bidders modifying its bid such that it became the lowest bidder.

In more recent times, the Commonwealth Court has resolved cases with similar if not identical issues. In *Philadelphia Warehousing and Cold Storage v. Hallowell*, 88 Pa. Commw. Ct. 574, 490 A.2d 955 (1985), the Court concluded it was improper for the Pennsylvania Department of Agriculture to award a three year contract on certain terms and conditions as a result of competitive bidding, and then terminate the agreement and re-negotiate the provisions for the third year. In *Fumo v. Redevelopment Authority of Philadelphia*, 115 Pa. Commw. Ct. 542, 541 A.2d 817 (1988), *app. dism'd., Greek Orthodox Cathedral of Saint George v. Fumo*, 524 Pa. 32, 568 A.2d 947 (1990), the court similarly concluded that after the authority

accepted a qualified bid for the purchase of city-owned real estate, it could not then force the successful bidder to accept a new and additional term.

While these cases do not have facts identical to those found here, the legal principle underlying the decisions is the same. The purpose of competitive bidding is to assure that a governmental entity obtains the best possible deal for the public in a manner that assures fair and just competition. *Louchheim v. Philadelphia*, 664 A. 1121, 218 Pa. 100 (1907). In *Conduit and Foundation Corporation v. City of Philadelphia*, 41 Pa. Commw. Ct. 641,646, 401 A.2d 376, 379 (1979), the Commonwealth Court noted that the purpose of competitive bidding for public contracts is that of "inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of municipal contracts . . ." (citations omitted). Perhaps most significantly, it does not matter that the governmental entity's reason for doing what it did was laudable, or led to what appears to be a favorable result. If the process is not consistent with the attainment of the goals of competitive bidding, it cannot withstand legal scrutiny. In 1907 Mr. Justice Elkin concluded that when "the terms and conditions of the competitive bids are modified or changed, resulting either to the advantage or disadvantage of the city, . . . such are not within the spirit and purpose of the law and therefore the process is deficient". *Louchheim v. Philadelphia*, 218 Pa. 100, 103-04, 66 A. 1121, __ , (1907).

The School District, by materially deviating from the conditions set forth in its bid documents, gave rise to the obvious inference that once they accepted a bid that was almost $600,000.00 larger than the next largest offer, it was willing to change the rules of the game. None of the prospective buyers should have assumed that what Millcreek said in its bid instructions would not turn out to be true. Would the offers for purchase have been higher if the prospective bidders knew that the School District was willing to guarantee title, warrant against hazardous waste, obnoxious substances and wetland problems, and indemnify the purchasers if certain problems arose? It is instructive to note that the School District's appraiser, Mr. Sammartino, advised them that the value of the property would be considerably altered by the costs associated with "demolition, asbestos removal and site clearing costs." It was for this reason that he had recommended that the property be sold on an "as is" or no warranty basis. Is it likely that a prospective buyer would pay less money for property where it was entirely their responsibility to deal with such matters. Indeed, in this case, the costs of removing any sort of hazardous waste or obnoxious substance, including such things as asbestos, could be quite significant. Similarly, it is likely that a prospective buyer would offer far less money for a piece of property where the marketability of title is not guaranteed. Problems with the marketability of title can run the gamut from the existence of old but innocuous liens, to the presence of major financial and ownership claims. Had the other bidders known that Millcreek was going to provide

these warranties and other "inducements" for sale, they may very well have increased their bids.

While the record is insufficient to conclude that the School District intended to act in bad faith, the impression provided to anyone who is interested enough to observe would not be favorable. The government, like everyone else, is expected to mean what it says. Promises, once made, are to be kept and paying close attention to the details of public transactions cannot be an afterthought. Because of the fundamental inconsistencies between the bid instructions and the purchase contract, the "sealed bid" approach that was selected pursuant to the Public School. Code was not carried out with sufficient integrity to enhance public confidence in the manner intended.

Therefore, the Court concludes that the contract with Westminster Place Partnership is void and the bidding process must be set aside. The School District may pursue the sale of the property in any manner authorized pursuant to 24 P.S. § 7-707, the Public School Code. An appropriate Order shall follow.

ORDER

AND NOW, to-wit, this 22nd day of September, 1999, upon consideration of the Motions for Summary Judgment of all parties in the above-referenced cause and argument thereon, and for the reasons set forth in the preceding Memorandum Opinion, it is hereby **ORDERED, ADJUDGED and DECREED** as follows:

1. The Motion for Summary Judgment of plaintiff Fedorko Properties, Inc. is hereby **GRANTED** to the extent that the contract with Westminster Place Partnership is **VOID** and the bidding process is **SET ASIDE**;
2. The Motion for Summary Judgment of defendant Millcreek Township School District is hereby **DENIED**; and
3. The Motion for Summary Judgment of defendant Westminster Place Partnership is hereby **DENIED**.

By the Court,
/s/ **John A. Bozza, Judge**

JOSEPH MAZZA

v.

TERRA ERIE ASSOCIATES and VICTOR LIBERATORE, SR.

LIMITED PARTNERSHIPS/CAUSES OF DISSOLUTION

Pursuant to the provisions of a written limited partnership agreement, the withdrawal of the designated general partner constituted a dissolution of the limited partnership where another general partner was not selected. The actions of the partners during the periods of time relevant to the current action also confirm that they regarded the partnership as a general partnership.

PARTNERSHIP/DISSOLUTION OF PARTNERSHIP/ CAUSES OF DISSOLUTION

A partnership will be dissolved when it can no longer carry on its business in a productive manner due to mistrust and acrimony and where the parties are in agreement that the partnership must be ended.

PARTNERSHIP/DISSOLUTION OF PARTNERSHIP/ PROCEDURES OF DISSOLUTION

Although the managing partner's practices have not been entirely consistent with acceptable business standards, where the partnership continues to be a viable business and has enjoyed some degree of profitability, the managing partner will be permitted to manage the day-to-day affairs of the partnership during the winding up of the partnership affairs and shall be paid a management fee fixed by the court.

A receiver is to be appointed only as an extraordinary remedy to prevent significant waste of partnership assets, to preserve assets, or for other compelling reasons. The appointment of a receiver is within the sound discretion of the court and should be avoided where injury could result or where the appointment would not accomplish any good.

A receiver with limited responsibilities will be of significant benefit and will be appointed where the parties cannot agree on the value of the partnership's major asset and this disagreement threatens the timely and equitable distribution of partnership assets.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 10353 - 1998

Appearances: T. Warren Jones, Esquire
D. Christopher Ohly, Esquire
Jeffrey M. Robinson, Esquire
John R. Falcone, Esquire

FINDINGS OF FACT AND MEMORANDUM

Bozza, John A., J.

Findings of Fact:

Following a non-jury trial commencing on September 1, 1999, the Court finds as follows:

1. On January 1, 1989, Victor Liberatore and Joseph Mazza purchased an interest in a Pennsylvania limited partnership known as Terra Erie Associates.

2. Liberatore purchased a thirty-five (35%) per cent interest for the amount of $884,625.00, and Mazza purchased a five (5 %) per cent interest for the amount of $126,375.00.

3. The sole asset of the partnership was a shopping center known as Eastway Plaza located in Harborcreek Township, Erie County, Pennsylvania.

4. At the time that Liberatore and Mazza purchased an interest in Terra Erie, there were three other individuals who had a partnership interest:

Patrick M. Nardelli	twenty (20%) per cent
Rita M. McGinley	twenty (20%) per cent
John R. McGinley, Jr.	twenty (20%) per cent

5. The only general partner of Terra Erie Associates was Patrick Nardelli.

6. On or about September 1, 1990, Nardelli assigned to Osceola Mac Company a ten (10%) per cent "general partnership" interest in Terra Erie Associates.

7. On or about September 30, 1990, Osceola assigned to Victor Liberatore a thirty (30%) per cent "general partnership" interest.

8. On or about September 30, 1990, John McGinley assigned to Victor Liberatore a fifteen (15 %) per cent "general partnership" interest.

9. On or about September 30, 1990, John McGinley assigned to Joseph Mazza a five (5 %) per cent "general partnership" interest.

10. At sometime during 1991, Nardelli transferred the balance of his ten (10%) per cent interest to Victor Liberatore.

11. Terra Erie Associates, operated pursuant to an agreement and certificate of limited partnership, which remained in effect until such time as the limited partnership was dissolved.

12. In October of 1989, John R. McGinley, Jr., one of the limited partners, prepared a new partnership agreement identified as "Amendment and Restatement of Terra Erie Associates' Partnership Agreement," (*See*: plaintiffs' Exhibit 1 (b)). In a letter accompanying that document, McGinley manifested the limited partnership's intention to become a general partnership. There is no evidence that the agreement was ever signed.

13. The documents assigning various partnership interests in September, 1990, all refer to Terra Erie Associates as a "Pennsylvania general partnership," and all of the assignors and assignees, including Victor Liberatore and Joseph Mazza, acknowledged that the nature of the assignment was an interest in a general partnership.

14. Under the Amended Limited Partnership Agreement of 1985 (plaintiffs' Exhibit 4(a)), the dissolution of the partnership would occur upon the "withdrawal or removal of the general partner, unless the business of the partnership shall be continued in a reconstituted form, and another person selected as a successor general partner pursuant to Paragraph

20(c) hereof."[1]

15. At the latest, Mr. Nardelli withdrew as the sole general partner sometime in 1991.

16. At the time Liberatore and Mazza became the only partners in Terra Erie Associates, the partnership was conducting business as a general partnership.

17. Terra Erie Associates, through Mazza and Liberatore, has filed partnership tax returns identifying the partnership as a "general partnership."

18. During the time the partnership operated as a limited partnership there existed a management agreement whereby Nardelli managed the business of Terra Erie Associates. No such written agreement was ever entered into between Liberatore and Mazza.

19. At the time that Liberatore and Mazza became the sole partners, the plaza was suffering financial difficulties and was owed approximately $340,000.00 by Nardelli.

20. The plaza needed extensive repairs including parking lot resurfacing and repaving and new roofing.

21. The occupancy rate of the Eastway Plaza at the time that Liberatore and Mazza became the sole partners was approximately seventy per cent.

22. Since Mazza and Liberatore became the sole partners, Liberatore has managed the Eastway Plaza property with the agreement of Mazza.

23. Mazza has played virtually no role in the day-to-day management of the Eastway Plaza, nor has he requested to do so.

24. From time to time Mr. Mazza has requested from Mr. Liberatore information and documents concerning the operation of Eastway Plaza.

25. After becoming the only partners, Liberatore contributed an additional $1.1 million, and Mazza contributed an additional $130,000.00 to partnership capital by buying out a government bond obligation.

26. In order to pay off a Dollar Bank loan, Liberatore loaned the partnership approximately $1,000,000.00, and Mazza loaned the partnership approximately $117,000.00.

27. Over a period of a little less than two years during 1993-94, Liberatore paid to Mazza interest on his loan at the rate of ten and one-half (10.5 %) per cent for a total of $22,395.00.

28. At the time that Mazza and Liberatore became sole partners, the partnership had significant mortgage or mortgage-related debt, as well as

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[1] The amended limited partnership agreement of 1985 varies from the original agreement and certificate of limited partnership which provides for different mechanisms of dissolution, including "the election to dissolve the partnership by the general partner" or "the happening of any other event causing the dissolution of the partnership under the laws of Pennsylvania."

obligations to roofers and snow removal contractors.

29. As a general partnership, Liberatore and Mazza operated without the benefit of a written partnership agreement.

30. Mazza manifested an intention that Liberatore would run the Eastway Plaza in order to overcome the financial problems they were encountering and make it a profitable venture.

31. For his work in managing Eastway Plaza, Liberatore charged the partnership an average of approximately eight (8%) per cent for the years 1996, 1997, and 1998.

32. Customary management fees range between three and one-half (3.5 %) and five (5 %) per cent.

33. It has been the responsibility of Liberatore in his capacity as manager of the Eastway Plaza to maintain all business records of the partnership and the plaza.

34. It was Liberatore's policy to destroy records more than three years old. The only detailed records available are for the years 1996, 1997 and 1998, with limited records in the nature of bank statements and checks available for 1995.

35. The record-keeping practices of Liberatore are generally inadequate with no records available prior to 1995.

36. Although record retention standards vary, good policy dictates the maintaining of all business records for a period of at least six years, and in some cases, permanently.

37. The absence of records makes an accurate accounting for the first years of the partnership between Mazza and Liberatore impossible.

38. Liberatore's response to Mazza's requests for information has been less than entirely cooperative, although access to the records of the previous three years have been made available for inspection at his Buffalo office.

39. During the time that Liberatore has managed the Eastway Plaza, he or his companies have performed various work at Eastway Plaza. Records documenting costs, wages, and supplies, as well as routine IRS forms, were not available as of the time of the trial.

40. In his capacity as manager of Eastway Plaza, good business practice required that Mr. Liberatore keep records and created reports which would have more accurately reflected the financial status of Eastway Plaza. These would have included at a minimum management reports, financial statements, rent history reports, aging reports, tax returns, accounting records, insurance policies, leases, mortgage documents and depreciation records.

41. The lack of sufficient data concerning the financial status of the partnership may make it more difficult to finance and/or sell the partnership asset.

42. The current vacancy rate has been detrimentally affected by the

status of the Dahlkemper space which, because of the presence of asbestos, has greatly limited its marketability. Currently there is a dispute with the Commonwealth of Pennsylvania concerning the status of that space.

43. Liberatore took steps to remove part of the asbestos by utilizing a company he owns, but his records regarding his costs for performing that work are inadequate.

44. With the exception of the Dahlkemper store, it appears that the vacancy rate for the rest of the plaza is within normal limits.

45. While there is no sophisticated marketing plan for a continuing effort to rent space, Liberatore has made reasonable efforts to lease space and attract tenants.

46. Liberatore's own company has made extensive changes to the facade of the plaza and mistakenly treated it as a repair cost rather than a capital improvement for income purposes.

47. Liberatore did not solicit bids for the facade project, which would normally be expected in a business of this type and for the nature of the work to be accomplished.

48. The repairs to the plaza and the improvements to the facade completed by Liberatore were necessary and the costs associated therewith were within reasonable limits.

49. A check in the amount of $10,000.00 provided to Terra Erie Associates as a part of the Taco Bell transaction was deposited by Liberatore in an escrow account under his name. Although currently available to the partnership, it should have been deposited in a partnership escrow account.

50. Liberatore had a debt to an individual by the name of Peter Dozi, and he utilized approximately $97,000.00 of Terra Erie Associates' money to pay it.

51. Mr. Mazza did not share in the debt obligation to Dozi.

52. The current value of the Eastway Plaza has been estimated by the parties to be between $3,000,000.00 and $11,500,000.00.

53. The parties have made contributions and loaned money to the partnership on the basis that Liberatore had a ninety (90%) per cent interest and Mazza had a ten (10 %) per cent interest.

54. Joseph Mazza and Victor Liberatore were once good friends, however, they no longer speak to each other and cannot communicate with each other in a manner which would facilitate the best interests of the partnership.

55. Mazza's efforts to escrow the proceeds from the Eckerd transaction were in good faith and not to the detriment of the partnership.

56. Both partners desire to dissolve the partnership.

57. Mr. Liberatore failed to provide information and/or documents pursuant to Mr. Mazza's discovery requests and this Court's Order and a further hearing is required.

Discussion:

The threshold issue in this dispute is whether Terra Erie Associates is a

general or limited partnership. Initially, the partnership known as Terra Erie Associates was a limited partnership that was duly organized under the laws of the Commonwealth of Pennsylvania. The original and even subsequent members of the limited partnership approved and utilized written limited partnership agreements. Nonetheless, the limited partnership ended when all of the partnership interests were conveyed to Mr. Mazza and Mr. Liberatore. As of that time, there was no designated general partner because Mr. Nardelli had effectively withdrawn by conveying his general partnership interests to others, and according to the provisions of the limited partnership agreement then in effect, his withdrawal constituted a dissolution unless the partnership decided to continue in a modified form with another party selected to act as general partner. This obviously did not occur. In addition, the evidence is overwhelming that Mr. Mazza and Mr. Liberatore acted and proceeded to conduct business on the basis of their assumption Terra Erie Associates was a general partnership. Mr. Liberatore explicitly so stated in income tax returns that he had prepared and filed. Moreover, his conduct and his approach to managing Terra Erie Associates were certainly not consistent with what he would have been required to do had he been acting as the general partner pursuant to the Terra Erie Associates Limited Partnership Agreement, as amended. Indeed, neither Mr. Mazza nor Mr. Liberatore behaved in any manner consistent with a limited partnership arrangement. Finally, all of the written assignments of partnership interests that preceded Mr. Mazza and Mr. Liberatore becoming the only two partners characterized the assignment as an assignment of a "general partnership" interest. There simply can be no question but Terra Erie Associates has been operating as a general partnership since the time Mr. Liberatore and Mr. Mazza became the two remaining owners.

It is also evident that Terra Erie Associates is a partnership which can no longer carry on business in a productive manner. Mr. Mazza and Mr. Liberatore will not communicate directly with each other at all, and there appears to be a very deep vein of mistrust in their relationship. What apparently started as a friendly venture where their investment in a limited partnership offered the promise of a successful business opportunity has now become a partnership where amicability has been replaced by acrimony and cooperation by litigation. Indeed, the parties are in agreement that the partnership must be ended. Pursuant to the provisions of the Uniform Partnership Act, the Court will enter an appropriate Order providing for dissolution. 15 Pa.C.S.A. § 8354(a)(3) and (4) and § 8354(a)(6). The more difficult question is how to accomplish the dissolution in a way that best meets the purposes of the partnership and the original intentions of the parties.

In the absence of a written partnership agreement, management of Terra Erie Associates has been left t o Mr. Liberatore through an informal

agreement with Mr. Mazza. Indeed, there has never been an explicit manifestation of the parameters of Mr. Liberatore's responsibilities or the performance objectives of the partnership. It is apparent that in the early years, it was Mr. Mazza's intention to have Mr. Liberatore do whatever was necessary to turn Terra Erie Associates, and more specifically, the Eastway Plaza, into a more financially sound business venture. The parties have a different view as to whether Eastway Plaza is better off today than it was when it originally became subject to the direction of Mr. Mazza and Mr. Liberatore.

The evidence introduced during the trial indicates that while there have been instances where Mr. Liberatore's business practices have not been entirely up to acceptable standards, overall, the Plaza remains a going concern and has enjoyed some degree of profitability through the years. Its success has been challenged by its age, difficulties with the vacant Dahlkemper's space, and competition. Obviously, the hostile nature of the partners' relationship has not been helpful. It is now necessary for there to be a workable arrangement to facilitate the sale of the Eastway Plaza and distribute the proceeds consistent with the parties' respective interest in the partnership. Mr. Liberatore's equity interest is ninety (90%) per cent, and Mr. Mazza's equity interest is ten (10%) per cent. In addition, each made a loan to the partnership to pay off a loan from Dollar Bank and each would be owed a reasonable amount of interest. Mr. Liberatore also owes to the partnership the amount utilized to pay off the debt to Mr. Dozi.

The lack of appropriate record keeping has left somewhat of a cloud over the business performance of Terra Erie Associates, particularly in those years prior to 1996. While the lack of records has also made it more difficult to determine if the work that Mr. Liberatore performed for the partnership in constructing the facade and making other repairs was done for the best available price, the evidence at trial was not sufficient to conclude that the price charged by Mr. Liberatore was not reasonable. Generally, the day-to-day management of Eastway Plaza has been carried out by Mr. Liberatore with the intention of making the partnership profitable. With the exception of the former Dahlkemper space which has experienced the serious problem of asbestos removal, the vacancy rate is comparable to what it has been in the past, including the time in which the property was acquired by Mr. Mazza and Mr. Liberatore.

The challenges that remain in dissolution are as follows:

1. To collect all of the available information, including business records, concerning the business history of Terra Erie Associates, and to ascertain its present financial condition;

2. to determine the precise amount owed to the respective parties for the loans made to the partnership with regard to the Dollar Bank transaction;

3. to assure the amount paid by Victor Liberatore to Mr. Dozi with Terra Erie Associate funds is returned to the partnership;

4. to facilitate and arrange for the sale of Eastway Plaza; and

5. to wind up the affairs of the partnership and distribute the proceeds to the partners consistent with their partnership interest and the requirement of the Uniform Partnership Act.

15 Pa.C.S.A. § 8362.

This Court believes that it will be in the best interest of the partnership to allow Mr. Liberatore to manage the day-to-day affairs of the partnership, including making arrangements for the lease of plaza space. For his continued management responsibilities, Mr. Liberatore shall be paid a five (5 %) per cent management fee. The amount previously charged for the three years documented in evidence was in excess of what should have been reasonably charged to the partnership and Mr. Liberatore must return to the partnership the amount he received in excess of five (5 %) per cent per year for the three years in question.

It is obvious, given the contentious nature of the relationship between the parties, that Terra Erie Associates requires the assistance of a neutral party to assist in the winding-up of partnership affairs. The Court recognizes that the appointment of a receiver is an extraordinary remedy and ordinarily would not be contemplated except in those cases where there has been, or stands to be, significant waste of partnership assets, other need to preserve assets, or other compelling reason. *Hankin v. Hankin*, 507 Pa. 603, 493 A.2d 675 (Pa. 1985). The decision to appoint a receiver remains within the sound discretion of the Court, and must be avoided in circumstances where such an appointment would result in "an irreparable injury to the rights and interests of others, where greater injury will probably result from the appointment or where the appointment will do no good . . . ." *Hankin*, 507 Pa. at 608, 493 A.2d at 677.

Id., p. 677.

Here the facts indicate that the need for appointment of a receiver with limited responsibilities is essential to assuring that there is ultimately an equitable distribution of partnership assets. Both Mr. Mazza and Mr. Liberatore have very different views as to the value of Eastway Plaza which cannot be reconciled without the assistance of an objective third party. This issue needs to be resolved so that a sale or other disposition can occur in a timely and orderly fashion. Any undue delay will be more detrimental to the parties' already tenuous relationship, contribute to a more heightened level of distrust, and more than likely result in additional and unnecessary litigation. Given the very limited role of the temporary receiver, the extraordinarily antagonistic relationship of the parties and the need to efficiently carry out the parties' desire for dissolution, the appointment of a receiver will be of significant benefit to Terra Erie Associates.

An appropriate Order shall follow.

ORDER

AND NOW, to-wit, this 12 day of October, 1999, upon consideration of this Court's Findings of Fact and Memorandum, it is now hereby **ORDERED**, **ADJUDGED** and **DECREED** as follows:

1. That pursuant to 15 Pa.C.S.A. §8354, the general partnership known as Terra Erie Associates is **DISSOLVED**.

2. Until such time as the affairs of the partnership are wound up, Victor Liberatore, Sr. shall continue to manage the day-to-day affairs of the partnership and fulfill all the responsibilities attendant thereto and he shall be paid a management fee of five (5%) per cent.

3. John Falcone, Esquire, is **APPOINTED** as a temporary receiver of the partnership for the following limited purposes:

a. To assure that all partnership records and all records pertaining to the operation of Eastway Plaza are properly prepared, retained and made available for review by the partners;

b. take the steps necessary to determine the value of the sole partnership asset, Eastway Plaza;

c. take the steps necessary to arrange for the sale of the Eastway Plaza subject to consultation with the partners and the approval of the Court;

d. assure that an accounting of all partnership assets and income for the past five (5) years is properly conducted and that all partnership assets and income are properly distributed between the partners; and

e. to carry out such other responsibilities as the Court may direct.

4. Victor Liberatore, Sr. shall repay to the partnership the full amount of the funds utilized to pay indebtedness to Mr. Dozi.

5. The funds that have been held in escrow in the approximate amount of $750,000 for the sale of the partnership property as a part of the Eckerd Drug transaction shall now be available for partnership use.

6. Mr. Liberatore shall repay to the partnership the amount of the excess management fees as more fully described in this Court's Findings of Fact and Memorandum.

7. Mr. Liberatore shall deposit a sum at the direction of the Court, from partnership assets, in an escrow account for the purpose of assuring the fair compensation of the receiver and the payment of expenses associated with the carrying out of the receiver's responsibilities.

8. Mr. Mazza's request for attorneys' fees is **DENIED**.

A hearing concerning the alleged violations of this Court's Discovery Order is set for **October 29, 1999 at 9:00 a.m.** before the undersigned in Courtroom "C" of the Erie County Courthouse.

By the Court,
/s/ **John A. Bozza, Judge**

COMMONWEALTH OF PENNSYLVANIA

v.

DEMOND JOSEPH SHERMAN

CONSTITUTIONAL LAW/"LOITERING IN AID OF A DRUG OFFENSE"/OVERBREADTH

Ordinance not overly broad; Does not "authorize punishment of constitutionally-protected conduct" or "prohibit that which may not be punished"; Proof of criminal intent necessary; totality of circumstances (including innocent conduct) may demonstrate person's intent or purpose to violate the drug law.

CONSTITUTIONAL LAW/"LOITERING IN AID OF A DRUG OFFENSE"/VAGUENESS

Ordinance not vague: Allows person of ordinary intelligence to determine what is prohibited; If individual's purpose is to violate drug laws, then otherwise innocent conduct becomes criminal; Ordinance does not invite arbitrary and discriminatory enforcement; Law regarding justification for investigation stops, arrests and any other custodial scenario not changed; Ordinance identifies specific behaviors police can consider in taking action, thereby placing additional parameters on police; Police still need to articulate probable cause.

CONSTITUTIONAL LAW/"LOITERING IN AID OF A DRUG OFFENSE"/SELF-INCRIMINATION

Ordinance does not compel a person to speak to police or impose affirmative obligation on person to explain conduct in violation of privilege against self-incrimination.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 611 OF 1998

Appearances: Kenneth A. Zak, Esquire for the Commonwealth
David A. Schroeder, Esquire for the Defendant

OPINION

Cunningham, William R., Judge

On September 3, 1998 the Defendant was found guilty of Possession with Intent to Deliver (marijuana), Resisting Arrest and the summary offense of Loitering in Aid of a Drug Offense. On September 30, 1998, the Defendant filed a Post-Sentencing Motion, only raising the issue of whether the City of Erie Ordinance (hereafter "Ordinance") is unconstitutional. The Ordinance is constitutional and therefore the Defendant's Motion is denied.

FACTS

On August 8, 1997 the Defendant and two other individuals were observed standing on a street corner engaged in what appeared to be a

drug transaction. The Defendant was immediately recognized by Officer Nolan of the Erie Police Department as an individual with a record of prior drug arrests. The Defendant gestured with his hands with the two other individuals standing on the street corner. Officer Nolan saw the Defendant look in the direction of the police officers and then hurriedly try to put a plastic baggie of what appeared to be marijuana in his left pants pocket. When the Defendant began to walk away, the officer pulled up in his vehicle and ordered the Defendant by name to stop. The Defendant replied "no way". The Defendant continued to leave the scene, and after being ordered again to stop, ran away. At the conclusion of the chase, the Defendant resisted arrest and several baggies of marijuana and a pager were found on the Defendant's person.

DISCUSSION

The Defendant argues the Ordinance is unconstitutional because it is overly broad, vague, circumvents the law on probable cause and violates a citizen's self-incrimination protection. Each of these arguments will be addressed seriatim.

A statute has been deemed overly broad if it "authorizes the punishment of constitutionally-protected conduct. The statute need not be vague in order to be overbroad. . .a clear and precise enactment may nevertheless be overbroad if in its reach it prohibits constitutionally-protected conduct . . .the crucial question is whether the statute prohibits that which may not be punished." See *Commonwealth v. Roth*, 531 A.2d 1133, 1139 (Pa.Super. 1987) .

Initially, the Defendant contends the Ordinance is so overly broad that even innocent conduct such as possessing a pager or cellphone could constitute an offense. In making this argument, the Defendant intentionally ignores what behaviors are proscribed by the Ordinance:

"(a) No person, with the purpose to commit or aid the commission of a drug abuse offense, shall loiter in any public place, and do any of the following:

1. Repeatedly beckon, stop, attempt to stop, or engage passersby or pedestrians in conversation; also
2. Repeatedly stop or attempt to stop motor vehicles; or
3. Repeatedly interfere with the free passage of other persons."

See Section 1 (A) of the Ordinance, a complete copy of which is appended hereto.

The Ordinance defines a "drug abuse offense" as any violation of the Controlled Substances Drug, Device, Service and Cosmetic Act 35 P.S. §780.101 et seq. The term "loiter" means "to resort to, to remain, or wander about in an idle manner essentially in one place and shall include the concepts of spending time idlely, or sitting, standing or walking about aimlessly." The term "public place" is any publicly-owned property, including streets, or any other area where the public has access. See the

definitions set forth in Section l(c)(d) and (e) .

The conduct proscribed in the Ordinance is behavior consistent with an individual either engaging or assisting in the commission of a drug offense. The Ordinance does require proof of a criminal intent to commit or aid in the commission of a drug abuse offense. Although innocent conduct in and of itself will not constitute an offense, the totality of circumstances (including innocent conduct) may demonstrate a person's intent or purpose to violate the drug laws.

The sophistry of the Defendant's argument is that the context of an individual's otherwise innocent conduct is to be disregarded. The Defendant asks that a person's actions be viewed in a vacuum without regard to the circumstances surrounding the conduct. It is true certain behaviors, like carrying a beeper and/or cell phone, are innocent behaviors, however, when coupled with the totality of the circumstances, these behaviors may be pieces of the puzzle establishing a persons' intent and/or purpose.[1]

In the case sub judice, the Defendant is not being cited for innocent acts such as possessing a pager, cellphone or waving to a passing friend. Instead, the act proscribes behaviors consistent with those individuals whose purpose and intent it is to violate the drug laws. As such, the Ordinance is not overly broad nor does it punish innocent behavior or "that which may not be punished." *Roth, supra* at 1139.

The same rationale applies to the Defendant's argument on vagueness. The Pennsylvania Supreme Court has defined a vague statute as follows:

> "Vague statutes deny due process in two ways: they do not give fair notice to people of ordinary intelligence their contemplated activity may be unlawful, and do not set reasonably clear guidelines for law enforcement officials and courts, thus inviting arbitrary and discriminatory enforcement."

*Park Home v. City of Williamspor*t, 680 A.2d 835 (Pa. 1996).

When read as a whole, the Ordinance allows a person of "ordinary intelligence" to determine what is prohibited. While few laws are passed which precisely address every possible scenario, this Ordinance does describe behaviors that are easily understandable as consistent with drug trafficking and therefore criminal.

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[1] To follow the Defendant's argument to its logical end, an individual who lawfully purchases and possesses a firearm could never be convicted of possessing an instrument of a crime for illegally using that same firearm. In other words, the innocent act of lawfully possessing a firearm would preclude, according to the Defendant's logic, an arrest for illegal use of the firearm.

Decades of drug transactions have established that it is common for street level drug dealers to appear in public places and solicit business from passing vehicles and/or pedestrians. The Ordinance simply recognizes this long-standing practice and deems it in the interest of public safety to prohibit it. Nothing in this Ordinance prevents a person from appearing in a public place to exercise a First Amendment right, for example, to disseminate religious information and/or a political viewpoint. Instead, if the individual's purpose is to violate the drug laws, then such action becomes criminal. Ironically, the individuals most likely to understand what is proscribed by this Ordinance are the individuals who are most likely to violate it.

Further, there is nothing in the Ordinance which invites "arbitrary and discriminatory enforcement". The Defendant's bald argument that the Ordinance is used as a pretext for police sweeps and/or interrogations is without a basis in law or facts of record. In support of this argument, the Defendant cites the following section of the Ordinance:

> (f) In determining the purpose of an offender under this Article the Court shall consider all relevant surrounding circumstances, which may include but are not limited to the following factors in addition to the facts set forth in §A:
>
> 1. That the person has been convicted or been found delinquent for a drug abuse offense within the three years preceding the arrest.
>
> 2. That the person is loitering and directing pedestrians or motorists through words hailing, waving of arms, pointing, signaling or other bodily gesture to a person or premises where controlled substances are possessed or sold.
>
> 3. The person is loitering and has an electronic device, walkie-talkie or beeper within 100 yards of a person or premises where controlled substances are possessed or sold.
>
> 4. Any statement by the offender.

See Section (F) .

This Court underscored the language "shall consider all relevant surrounding circumstances, which include but are not limited to ..." as proof that the Ordinance does not change the law regarding justification for investigatory stops, arrests and/or any other custodial scenario. Instead, the above section simply provides a non-exclusive list of factors as guidance for police action. Importantly, these guidelines are in addition to the safeguards currently in place protecting all citizens. Furthermore, these factors identify specific behaviors the police can consider in taking action thereby placing parameters on the police and not inviting arbitrary or discriminatory enforcement.

The Ordinance does not change the law on the need for justification for police intrusion into a citizen's life. To make an arrest for a violation of this Ordinance, the police still need to articulate probable cause. The Ordinance was not used in this case as a substitute for probable cause. Instead, the Commonwealth was required to show and in fact showed probable cause to arrest the Defendant for violating the Ordinance. See the Order of the Honorable Judge Fred P. Anthony dated June 23, 1998.

The Defendant's argument he did not know he was engaging in prohibited conduct stretches the limits of credulity. The Defendant was standing on a street corner in a public area known for drug trafficking. The Defendant was known to the arresting officer, who also had personal knowledge of the Defendant's prior drug convictions within the preceding three years. The Defendant was observed engaging in an apparent drug transaction with two other individuals. The Defendant was observed gesturing to the other two people and when the Defendant saw the police, he hastily tried to put a plastic baggie of what appeared to be marijuana in his left pants pocket. The Defendant then started to walk away. When the officer approached the Defendant and addressed him by name asking him to stop, the Defendant fled. Upon being apprehended, several baggies of marijuana and a pager were found on the Defendant. Given these facts, the Defendant's purpose for standing on the street corner was to loiter in the commission of a violation of the drug law.

Finally, the Defendant argues the following language in the Ordinance imposes upon a citizen a duty to speak to the police to explain his or her purpose thereby violating a constitutional privilege against self-incrimination:

> "No arrest shall be made for a violation of this Article until the arresting officer first requests and affords such person an opportunity to explain such conduct and no person shall be convicted upon trial if it appears that the explanation tendered is true and considering the surrounding circumstances disclosed a lawful purpose."

Ordinance, Section 1(G).

The Defendant misconstrues this Section as creating an affirmative obligation on the part of a citizen to explain the innocence of his conduct lest he suffer an arrest. To the contrary, this section does not compel a person to say anything, nor does it change any facet of the law regarding self-incrimination. If anything, this section provides an additional layer of protection as an arrest cannot occur if a person chooses to speak to the officer and provide a plausible explanation for his conduct.[2] A suspect's

[2] Indeed, many criminal investigations do not result in arrests directly as a result of a suspect's voluntary and plausible explanation of his/her conduct

decision to remain silent remains inadmissible. If a person decides to talk to the police, the Miranda warnings are still applicable. Hence there is no violation of the self-incrimination protections found in the Constitutions of the United States or Pennsylvania.

CONCLUSION

For the foregoing reasons the Defendant's constitutional challenges to the Ordinance are without merit and the Motion is **DENIED**.

ORDER

AND NOW to-wit this 10th day of December, 1998 for the reasons set forth in the accompanying Opinion, the Defendant's Motion is hereby **DENIED**.

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

JOSEPH PRISCHAK, NARENDRA HANDA and PEARLIE EDWARDS, Plaintiffs

v.

ROBBIN JOHNSON, indivdually and d/b/a COMPANY KEY CREATIONS and COMPANY KEY CREATIONS, INC., Defendants

CONFLICT OF LAWS

Where plaintiffs situate in Erie County bring a tort action alleging violations of Pennsylvania Wiretap Act by defendant situate in Ohio, Pennsylvania conflict of laws jurisprudence will be used to determine the controlling law

CONFLICT OF LAWS

Where there is a true conflict between the laws of the two states, the court will determine which state has the greater interest in the application of its laws

CONFLICT OF LAWS

Where plaintiffs situate in Erie County bring a tort action alleging violations of Pennsylvania Wiretap Act by defendant situate in Ohio, Pennsylvania law will govern where the call originated in Ohio and was received in Pennsylvania; Ohio law will govern where the call originated in Pennsylvania and was received in Ohio

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION- LAW CASE No. 12939-1998

Appearances: Craig Markham, Esquire for the Plaintiff
Marcia H. Haller, Esquire for the Defendant

OPINION

Anthony, J., October 19, 1999.

This matter comes before the Court on both Plaintiffs' and Defendants' motions for Summary Judgment. After a review of the record and the briefs of the parties and considering the arguments of counsel, the Court will grant each motion in part and deny each motion in part. The factual and procedural history is as follows.

There is no dispute as to the facts of the case. Defendant Robbin Johnson (hereinafter "Johnson") is a resident of Ohio. At the relevant time, Plaintiffs were all employed by Plastek, a corporation that maintains an office and has a principal place of business in Erie, Pennsylvania. There was a series of at least ten telephone conversations between Johnson and Plaintiffs between August 31, 1995, and January 29, 1997. All of these conversations except one were initiated by Johnson calling the Plaintiffs who were located in Erie, Pennsylvania. Johnson recorded all of these conversations on an audio recording device without the consent of the Plaintiffs.

Plaintiffs filed suit in Erie County alleging invasion of privacy and violations of the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa.C.S.A. §5701 *et. seq.* (hereinafter "Wiretap Act") on July 30, 1998. Defendants responded on November 16, 1998 with an Answer and New Matter. The Plaintiff responded to the New Matter on November 25, 1998 and the pleadings were closed.

Plaintiffs filed their motion for partial summary judgment on June 7, 1999. Defendants responded with a brief in opposition and their own motion on June 28, 1999. Plaintiffs filed their brief in response on July 28, 1999. Oral arguments were held in chambers for which all parties were represented.

In addition to the facts, both sides agree to the substantive law at issue in this case. Both sides agree that Pennsylvania's Wiretap Act does not allow a party to record a telephone conversation without the consent of both of the parties, which admittedly did not happen here. Both sides also agree that Ohio's Wiretap Statute, Ohio Revised Code §2933.52, does allow the recording of a telephone conversation if the one doing the recording is a party to the conversation. This allows a party to tape a conversation without the consent of the other party. The only issue before the Court is whether Ohio law or Pennsylvania law governs the dispute. Plaintiffs contend that Pennsylvania law governs while Defendants argue that Ohio law governs.

In order for a party to be granted summary judgment it must be shown that there are no disputed issues of material fact and that the moving party is entitled to a judgment as a matter of law. *Ducjai v. Dennis*, 656 A. 2d 102 (Pa. 1995). In addition, the record must be looked at in the light most favorable to the non-moving party. *Id.* However, the non-moving party may not rest upon the pleadings. Pa.R.C.P. 1035.3. The non-moving party, if it bears the burden of proof at trial, must produce evidence of the facts essential to its cause of action in order to defeat a motion for summary judgment. Pa.R.C.P. 1035.2.

This Court does not agree with the Defendants that since the actual recording only took place in Ohio that Ohio law must apply. The actions of Defendant Johnson had a direct and immediate impact upon the Plaintiffs located in Pennsylvania. Therefore, while the alleged act may have occurred in Ohio, the result was in Pennsylvania. Thus, the simple act cannot be determinative of whether Ohio or Pennsylvania law applies. Instead, the Court must apply conflicts of law jurisprudence to determine whether Ohio or Pennsylvania law applies.

The Court is aware that the Honorable Judge Hogan reached a different result in *Broughal v. First Wachovia*, 14 D. & C. 4th 525 (Northampton County 1992). In that case, the trial court determined that any call recorded outside of Pennsylvania was not covered by the Wiretap Statute. The trial court stated that since the conduct was lawful in the state where the

conversation was recorded (North Carolina), a cause of action under 18 Pa.C.S.A. §5725 cannot be sustained. However, the court in *Broughal* did not apply conflict of law jurisprudence as it applies to torts. This Court has determined that the case *sub judice* is better decided based on Pennsylvania's conflicts of law jurisprudence. Therefore, the Court will not follow *Broughal*.

The jurisprudence of conflict of laws has been a complex and often confusing realm of law for many years. However, there are several general approaches to such problems. The first, called *lex loci delicti*, was described as the "place of the wrong." In jurisdictions following this rule, the law that was to be applied depended on where the first harmful impact was "inflicted" upon the party. Robert A. Leflar, *American Conflicts Law*, §131 (3rd ed. 1977). This approach became difficult to apply and was replaced by several interest-based approaches.[1] The goal of these interest-based approaches is to find the state's law that is best suited to the particular facts.

Pennsylvania utilizes an approach combining the governmental interest analysis and the significant relationship test articulated in the Restatement (Second) of Conflicts §145 (1971). *Normann v. Johns-Manville Corporation,* 593 A.2d 890 (Pa.Super. 1991)(citations omitted). This approach requires the Court to first determine whether there is a true conflict between the laws of the two states. *Rosen v. Tesoro Petroleum Corporation,* 582 A.2d 27, 30 (Pa.Super. 1990). If there is a true conflict then the Court must "analyze the governmental interests underlying the issue and determine which state has the greater interest in the application of its law." *Id.*

Having examined the statutes of both states, the Court is convinced that there is a true conflict between the law of Pennsylvania and the law of Ohio on this issue. Both states have a similar interest in protecting the privacy of their respective residents. However, Ohio has determined that a party may record its own telephone conversations regardless of whether the other party agrees to, or even knows about, the recording. Pennsylvania has chosen a more protective statute, requiring that both sides consent to the recording before it is lawfid. These statutes cannot be reconciled when there is a phone call involving both states.

Plaintiffs' argument that there is no conflict because Ohio's law is only for the protection of its citizens and residents and not Pennsylvania's citizens is not convincing. While this is undoubtably true, Plaintiffs fail to

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[1] These interest-based approaches such as the "most significant contacts", governmental interests analysis, and "principles of preference" all have subtle differences but all rely on an examination of the interests between the competing jurisdictions.

understand that Ohio's statute, and Pennsylvania's as well, is for the protection of all its citizens. This included those citizens wishing to record a conversation as well as those who do not wish to have their conversations recorded. Therefore, both states have an interest and a true conflict exists.

Consequently, the Court must examine the circumstances of the case before deciding on which state's law applies to the present controversy. The Court must look at the contacts with the relevant states qualitatively and not quantitatively. *Giovanetti v. Johns-Manville Corporation,* 539 A.2d 871, 873 (Pa.Super. 1988). Important factors to consider include the place of the injury, domicile of the parties and the place where the relationship between the parties is centered. *Myers v. Commercial Union Assurance Companies,* 465 A. 2d 1032, 1035 (Pa.Super, 1983).

However, an examination of those factors leaves the Court with little direction. The alleged injury occurred in Pennsylvania but the alleged harmful act took place in Ohio. The Plaintiffs maintain residence in Pennsylvania whereas Johnson resides in Ohio and the Defendant business is also in Ohio. Nor does there appear to be any evidence to show that the relationship of the parties was centered in any one jurisdiction, either Ohio or Pennsylvania.

Nevertheless, there is one distinguishing factor that resolves the issue. Both parties have agreed that almost all of the calls were made from Ohio and one was made from Pennsylvania. This Court holds that any call from Ohio to Pennsylvania should be governed by Pennsylvania law for the following reasons. First, Johnson used the telephone to contact Plaintiffs instead of coming to Pennsylvania and meeting with them in person. As such, he has, in some sense, entered into Pennsylvania. Therefore, the parties could reasonably expect Pennsylvania law to apply to those calls. *See Tenna Manufacturing Company v. Columbia Union National Bank,* 484 F. Supp. 1214 (W.D.Mo. 1980) (holding that a call made from Ohio to Missouri was governed by Missouri law because it was used as a substitute for entering Missouri.); *Emery Corporation v. Century Bancorp.,* 588 F.Supp. 15 (D.Mass. 1984) (holding that a call from Pennsylvania to Massachusetts was governed by Massachusetts law.).

Furthermore, the party making the call ("the caller") has foreknowledge about the call that the party receiving the call ("the receiver") does not necessarily possess. The caller is aware of his location and the location of the receiver, including the state in which the receiver resides. He is also aware of the time the call is going to be placed. While the receiver may have this knowledge, he or she may also be completely unaware of these facts until some time into the conversation.[2] Thus, it would be equitable to put the onus on the caller to understand whether his or her actions

[2] It is also possible that the receiver may never become aware of some of these facts, including the location of the caller.

would be illegal under either state law and adjust his conduct accordingly.

To put the requirement on the receiver, as Defendants' theory would effectively do, would require that the receiver know the law of all jurisdictions and discover the location of the caller before accepting the call. This would be an onerous burden for the citizens of this Commonwealth and not within the intent of the legislature.

Finally, this result effectuates the intent of the legislatures of both states. Both Pennsylvania and Ohio are concerned with the privacy of its citizens and residents. Requiring the caller to learn the law of the receiver's state allows any resident to be able to expect what can or cannot occur as far as recording is concerned. This protects the privacy interests of the receiver, who, if the law of the caller governed, may have different expectations of privacy than what actually exists. The caller is likewise protected. Since he or she would be able to find out the law of the receiver's state, the caller would also be aware of what privacy expectations are legitimate for him or her. Thus, a caller from Pennsylvania would be aware that the call may be monitored and can adjust his conduct accordingly. Likewise a caller from Ohio could discover the law of Pennsylvania and realize that the consent of both the parties is required before recording the conversation.

In conclusion, any call that was made by Johnson to the Plaintiffs in Pennsylvania is governed by Pennsylvania law. The call that was made from Plaintiffs to Johnson is governed by Ohio law. Therefore, Plaintiffs' motion will be granted as to all calls made from Johnson and Defendants' motion will be granted as to the call made from Pennsylvania.

ORDER

AND NOW, to-wit, this 20 day of October, 1999, after consideration of the parties respective motions for summary judgment, it is hereby ORDERED and DECREED that all telephone calls at issue that originated in Ohio and placed to a location in Pennsylvania are governed by Pennsylvania law, while all calls that originated in Pennsylvania and placed to a location in Ohio are governed by Ohio law.

BY THE COURT:
/s/ **Fred P. Anthony, J.**

MARK E. GUNDRUM

v.

ERIE INSURANCE EXCHANGE

INSURANCE/MVFRL/PEER REVIEW/CAUSATION

Improper for issue of causation to be resolved in context of PRO review. Denial of benefits proper where based on PRO decision that treatment no longer medically necessary. Denial not rendered improper because one of PRO reports contained reviewing physician's gratuitous opinion of causation.

INSURANCE/MVFRL/PEER REVIEW/BAD FAITH

Punitive damage provisions of Insurance Bad Faith statute, 42 Pa.C.S.A. §8731, do not conflict with MVFRL where the Insurance Carrier incorrectly follows the PRO process and §1797 remedies are inapplicable.

INSURANCE/BAD FAITH/INSUFFICIENT BASIS

Insufficient facts set forth to state bad faith claim. Bad Faith defined as relating to frivolous or unfounded refusal to pay insurance claim. Proof necessary that insurer knew or recklessly disregarded its lack of reasonable basis in denying the claim.

INSURANCE/MVFRL/PEER REVIEW/DAMAGES

Items not cognizable as damages under peer review provision of MVFRl are not recoverable. Section 1797 sets forth what damages are recoverable where an insurance company has acted inconsistent with its provisions.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11601-1998

Appearances: James L. Moran, Esquire for the Plaintiff
Craig R.F. Murphey, Esquire for the Defendant

OPINION and ORDER

Bozza, John A., J.

On October 1, 1994, Mark E. Gundrum was involved in an automobile accident in which he suffered low back, neck, and leg pain. At the time, he was insured by Erie Insurance Exchange, which provided him with coverage for the costs associated with medical treatment related to injuries caused by the accident. Following the accident, Mr. Gundrum submitted claims for medical bills and they were paid by Erie Insurance. Sometime in the late summer or fall of 1996, Erie Insurance submitted a request to Consolidated Rehabilitation Company (CRC), a peer review organization, for a determination as to whether the treatment that Mr. Gundrum was receiving was reasonable and necessary. At that time, Mr. Gundrum was, for the most part, involved in a physical therapy program. CRC referred the matter to Dr. Carl R. Goodman, M.D., F.A.C.P., who concluded that after

August 7, 1995, Mr. Gundrum's physician, Dr. Bohatiuk, could have ordered for him a "fitness and rehabilitation program to self-supervise" and stated that "patient could have been discharged from formal physical therapy at that point." Dr. Goodman went on to conclude that continued treatment was not reasonable and necessary.

Dr. Bohatiuk requested reconsideration of Dr. Goodman's conclusion, and Erie Insurance Exchange complied and forwarded to CRC another request for peer review. At this time the case was referred to Martin A. Schaeffer, M.D., who wrote a report indicating that although he was not certain of the date Mr. Gundrum received maximum benefit from his physical therapy, he estimated that it would have been sometime during November or December of 1995. He went on to note that he believed that it was reasonable and necessary for Dr. Bohatiuk to continue "overall management" of Mr. Gundrum "with regards to his continued pain complaints and to reinforce the exercise review." In his report Dr. Schaeffer apparently gratuitously opined that Mr. Gundrum's pain problems were not associated with the auto accident in question. The question proposed to him by Erie Insurance was, "Do you concur with the initial PRO determination?" The initial PRO determination did not address the issue of the cause of Mr. Gundrum's complaints.

When Erie Insurance received the reconsideration report and noted that it addressed causation, it was returned to CRC with a letter noting that they cannot use a report which addresses causation and requesting that the reconsideration be done by another physician and "causation not brought into it." CRC did not comply with Erie Insurance's request, but rather re-submitted Dr. Schaeffer's report without the textual material addressing causation. Apparently satisfied that this report met the requirements of Pennsylvania law, Erie Insurance accepted it and forwarded it to Dr. Bohatiuk indicating that they were unable to consider further payment of his bills as his treatment after December 31, 1995 was no longer reasonable and necessary. Mr. Gundrum continued to treat with Dr. Bohatiuk into 1997 and incurred additional medical expense for treatment that he provided as well as treatment provided by Dr. Joseph Thomas, a pain specialist, and for diagnostic studies that were ordered. Erie Insurance denied payment of bills associated with those services.

On April 14, 1998, Mr. Gundrum sued Erie Insurance Exchange for its failure to pay his medical bills. In his lawsuit he has asserted that Erie Insurance "acted in derogation of the provisions found in the Pennsylvania Financial Responsibility Motor Vehicle Act, Section 75 Pa.C.S.A. 1701 *seq.*, by failing to pay the bills of Drs. Lyons, Thomas and Bohatiuk, and by relying on Dr. Goodman and Schaeffer's reports." Mr. Gundrum went on to assert that Erie Insurance's actions were done maliciously, wantonly, willfully, recklessly, and/or oppressively, and with reckless indifference to the rights of the plaintiff. He seeks damages for the breakdown in his

relationship with Dr. Bohatiuk, his inability to obtain further treatment, his inability to submit further bills to Erie Insurance, his need to spend money on his lawsuit, the incurrence of attorneys' fees and other "economic harm." He seeks an award of punitive damages, court costs, and attorneys' fees, pursuant to 42 Pa.C.S.A. § 8371, and attorneys' fees and interest related to his Motor Vehicle Financial Responsibility Law claims.

On May 11, 1998, defendant filed preliminary objections to plaintiff's complaint and on June 19, 1998, amended preliminary objections raising standing were filed as well. The case was stayed while a case concerning the "standing" issue was resolved by the Supreme Court. *Kuropatwa v. State Farm Ins. Co.*, __ Pa. __,721 A.2d 1067 (1998). Currently before the Court are the defendant's remaining preliminary objections in the nature of a demurrer to the claim that Erie Insurance acted improperly by relying on a PRO report containing a reference to causation, a demurrer to the bad faith claim pursuant to Section 8371, and a demurrer to the plaintiff's claim for items of damage not included in the Motor Vehicle Financial Responsibility Law. This Court having accepted all well-pled facts in the plaintiff's Complaint, now addresses the merits of defendant's contentions as follows:

A. Reliance on the PRO Reports of Drs. Goodman and Schaeffer

Erie Insurance Exchange has argued that it is proper for an automobile insurer to deny payment of medical bills by relying on a PRO report which concludes that the medical condition in question was not caused by the automobile accident. Alternatively, the defendant argues that Mr. Gundrum did not allege that it relied on the causation opinion of Dr. Schaeffer. In essence, it's the defendant's position that the inclusion of such material in a report does not, by itself, render a denial decision improper.

The only Pennsylvania appellate case addressing the appropriateness of a causation determination by a PRO is *Bodtke v. State Farm Mutual Automobile Insurance Company*, 432 Pa.S. 31, 637 A.2d 648 (1994). *rev'd.*, 540 Pa. 540, 659 A.2d 541 (1994). Apparently the trial court in *Bodtke* was presented with a situation where a PRO had concluded that an insured's injuries were not the result of an auto accident. In the footnote, the trial court stated that saying that injuries were not the result of an accident "was simply another way of stating that they were not medically necessary." *Id.* In dicta, two judges in the *Bodtke* panel noted that the trial court was correct. The third panel member, Judge Kate Ford Elliot, rejected the notion that Section 1797(b)(1) contemplates a PRO determination of whether an accident caused certain injuries. This Court finds Judge Ford Elliot's analysis persuasive.

The language of Section 1797(b)(1) states that an evaluation by a PRO "shall be for the purpose of confirming that such treatment, products, services or accommodations conform to professional standards of

performance and are medically necessary." 75 Pa.C.S.A. § 1797(b)(1). It is difficult to conclude that determination of whether a treatment is medically necessary has anything to do with how the underlying condition arose. Whether a treatment, diagnostic test or medical procedure is "medically necessary" is a function of the characteristics of the injury, regardless of what may have caused it. If a person seeks medical treatment for a broken arm or a sore back, the response of a physician should be the same whether it occurred in a motor vehicle accident or by falling off a bicycle. The challenge is how to treat the injury, not to figure out how it happened. It requires a substantial semantic leap to conclude that the legislature contemplated that the phrase "medically necessary" means caused by a motor vehicle accident. *Hice v. Prudential Insurance Company*, 34 Pa. D. & C. 4th 97 (Westmoreland County 1996). If an insurance provider believes that its insured's injuries are not related to an automobile accident, a different approach from pursuing PRO review must be considered. Therefore, this Court concludes that it is improper for the issue of causation to be resolved in the context of a PRO review, and therefore, plaintiff's position has merit.[1]

Notwithstanding the choice of language by the legislature regarding the limitations of peer review, it is easy to understand how a physician in Dr. Schaeffer's position would be drawn to consider etiology when reviewing the patient's medical history. The practical realities of reviewing medical records suggests that it would be naive to believe a reviewing physician will consciously ignore evidence that something other than a motor vehicle accident caused an insured's injuries. The fact that Dr. Schaeffer's professional curiosity was drawn to the issue of causation is not at all surprising, nor is it surprising that his causal analysis found its way into his PRO report. The question is whether the presence of his causal analysis in his report leads to the inexorable conclusion that Erie Insurance Exchange did something legally wrong. This Court believes that the answer, at least in this case, is no. Based on a fair reading of the facts and inferences therefrom as set forth in the plaintiff's Complaint, there is simply no indication that the Erie Insurance Exchange relied on Dr. Schaeffer's causation commentary. Indeed, Mr. Gundrum has not even made such an allegation. Rather, the record indicates that the Erie agent called the mistake to the PRO's attention and even requested a new review.[2]

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[1] This Court's view was formulated with the awareness that there are well-reasoned Common Pleas decisions to the contrary. *See, DeSantis v. Erie Insurance Exchange*, 28 Mercer Co. L.J. 97 (1997); *Murphy v. Progressive Insurance Company*, 27 Mercer Co. L.J. 373 (1996).

[2] The fact that the PRO rejected the defendant's request and simply re-supplied the edited version of the doctor's report is troubling. The record does not reveal why this occurred.

Indeed, it can be reliably concluded that the defendant's decision to deny benefits was based on both Dr. Goodman's and Dr. Schaeffer's conclusion that physical therapy was no longer medically necessary. Therefore, this Court will sustain Erie Insurance's demurrer to Mr. Gundrum's assertion that the denial was improper because one of the peer review reports contained the reviewing physician's opinion of causation.

This is not to conclude, however, that the plaintiff has failed to state a claim with regard to whether Erie Insurance Exchange's refusal to pay the medical bills of Dr. Lyons, Bohatiuk and Thomas was appropriate. This is a separate and distinct issue which has to do with a determination of whether Dr. Schaeffer's opinion encompassed subsequent services provided by these physicians.

B. Damages Pursuant to Both Motor Vehicle Financial Responsibility Law and the Insurance Bad Faith Statute

There is continuing controversy concerning whether an insured can recover pursuant to both 75 Pa.C.S.A. § 1797 and 42 Pa.C.S.A. § 8371 for improper actions of an insurance company in response to an insured's request for payment of medical bills. It is a confusing situation because in 1990 the legislature adopted an insurance "bad faith" statute which provides that if the court finds that an insurer acted in bad faith toward an insured, it may do the following:

> (1) Award interest in the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest, plus 3 %.
> (2) Award punitive damages against the insurer.
> (3) Assess court costs and attorney fees against the insurer.

42 Pa.C.S.A. § 8371.

At the same time, the legislature adopted certain provisions of the Motor Vehicle Financial Responsibility Law, providing that where an insurer has refused to pay for medical treatment without challenging its reasonableness and necessity before a PRO, an insured may challenge its decision in court and be awarded "treble damages" if the insurance company's conduct is found to be "wanton". 75 Pa.C.S.A. § 1797(b)(4). In addition, if the court finds that the medical treatment was necessary, the insurance company must pay for the bills, plus twelve per cent interest, "costs", and attorney's fees. 75 Pa.C.S.A. § 1797(b)(6). A number of courts have found that the provisions of these statutory sections cannot be reconciled. *Barnum v. State Farm Mutual Automobile Insurance Company,* 635 A.2d *155, rev'd. and remanded,* _ Pa. _,652 A.2d 1319 (1994); *Bennett v, State Farm Fire & Casualty Insurance Company,* 890 F. Supp. 440 (E.D. Pa. 1995).

Under the facts of the present case, the defendant followed the PRO procedure, including t he reconsideration procedure. Therefore, Section

1797(b)(4) does not apply to the plaintiff's contention that Erie Insurance wrongfully relied on its PRO reports. Section 1797 is entirely silent as to any damages which may be recoverable by the insured in these circumstances. It only provides remedies where:

1. There is no PRO review and the insurer's denial of benefits is wrong. 75 Pa.C.S.A. § 1797(b)(4) and (6);
2. The PRO determination is favorable to the insured. 75 Pa.C.S.A. § 1797(b)(5); or
3. The PRO determination is favorable to the insurer. 75 Pa.C.S.A. § 1797(b)(7).

What happens then if an insurance company wrongfully denies benefits after PRO review or, as in this case, incorrectly follows the PRO process? It would be necessary to look beyond the confines of Section 1797 where the MVFRL does provide for, in addition to twelve (12 %) per cent interest, the payment of attorney fees where an insurer "acted in an unreasonable manner in refusing to pay the benefits when due." 72 Pa.C.S.A.§ 1716; *see* also, 72 Pa.C.S.A. § 1798(b). There is no provision in the act for an award of punitive damages or anything akin to punitive damages except the "treble damage" provision of Section 1797(b)(4), which is inapplicable to this case.

Therefore, the punitive damage provisions of 42 Pa.C.S.A. § 8371 do not conflict with the MVFRL as applied to this case and provide the only statutory authority for an award of punitive damages under the circumstances here presented. *Seeger v. Allstate Insurance Co.*, 776 F. Supp. 986 (M.D. Pa. 1991).

The question then becomes whether Mr. Gundrum has set forth sufficient facts to state a bad faith claim pursuant to Section 8371. A close analysis of the facts in this case leads this Court to conclude that he has not. It is apparent that Erie Insurance Exchange acted quite reasonably in both following the requirements of the Motor Vehicle Financial Responsibility Law and addressing the circumstances associated with the reports it received from the two PRO reviewers. "Bad faith" has been defined in Pennsylvania as relating to the "frivolous or unfounded" refusal to pay an insurance claim. *Woodey v. State Farm Fire and Casualty Company*, 965 F. Supp. (E.D. Pa. 1997). A plaintiff must be able to prove that an insurer ". . . knew or recklessly disregarded its lack of reasonable basis in denying the claim," *Terletsky v. Prudential Property and Casualty Insurance Co.*, 437 Pa. 108, 649 A.2d 680 (1994), *alloc. denied*, 540 Pa. 641,659 A.2d 560 (1995). Notwithstanding the inclusion of Dr. Schaeffer's causation analysis in his first PRO report, both reviewing physicians concurred that physical therapy was no longer reasonable and necessary. While Dr. Goodman suggested that physical therapy should have stopped in August and Dr. Schaeffer concluded that it was sometime in November or December, it was obvious that both concurred that it should stop. Erie Insurance, giving

the insured the benefit of the doubt, refused to pay for medical treatment after December 31, 1995. In such circumstances, as a matter of law, it would be improper to conclude that Erie Insurance's denial was either unfounded or reckless. Therefore, the defendant's demurrer in this regard must be sustained.

C. Damages for Items Not Set Forth in the Motor Vehicle Financial Responsibility Law.

Mr. Gundrum is also seeking damages for such items as the breakdown of his relationship with his physician, his inability to obtain further treatment, his inability to obtain compensation for medical bills because of the expiration of the statute of limitations, and other undefined economic harm. Erie Insurance Exchange is correct in that none of these items are cognizable as items of damages pursuant to the Motor Vehicle Financial Responsibility Law. Section 1797 sets forth what damages are recoverable in circumstances where an insurance company has acted inconsistent with the Act's provisions. None of the items of damages set forth above are included and therefore defendant's demurrer will be sustained.

Signed this 26 day of April, 1999.

ORDER

AND NOW, to-wit, this 26 day of April, 1999, upon consideration of Preliminary Objections to Civil Complaint filed by defendant, Erie Insurance Exchange, in the above-referenced cause, and for the reasons set forth in preceding Opinion, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** as follows:

1. the demurrer to claim arising from insurer' alleged wrongful acquisition and use of PRO report addressing causation is hereby **SUSTAINED**;

2. the demurrer to bad faith claim under 42 Pa.C.S.A. § 8371 is hereby **SUSTAINED**; and

3. the demurrer to claim for damages other than those recoverable under the MVFRL is hereby **SUSTAINED**.

By the Court,
/s/ **John A. Bozza, Judge**