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Thomas v. Levinson, et al.

Erie County Legal Journal

*Reporting Decisions of the Courts of Erie County
The Sixth Judicial District of Pennsylvania*

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Erie County Bar Association

Calendar of Events and Seminars

MONDAY, OCTOBER 19, 2009

Criminal Law Update 2009
ECBA Lunch-n-Learn Seminar
Bayfront Convention Center
Lunch ~ 11:45 a.m. - 12:15 p.m.
Seminar ~ 12:15 p.m. - 1:15 p.m.
\$27 (ECBA members) \$39 (nonmembers)
1 hour substantive

TUESDAY, OCTOBER 20, 2009

Issues Facing Nonprofit Organizations in 2009
ECBA Live Seminar
Bayfront Convention Center
Breakfast & Reg. ~ 7:45 a.m. - 8:30 a.m.
Seminar ~ 8:30 a.m. - 10:30 a.m.
\$20 (ECBA members) \$35 (nonmembers)
2 hours substantive

WEDNESDAY, OCTOBER 21, 2009

Consumer Banking and Payments in the 21st Century
PBI Groupcast Seminar
Bayfront Convention Center
9:00 a.m. - 12:15 p.m. (Reg. 8:30 a.m.)
\$214 (member) \$194 (admitted after 1/1/05)
\$234 (nonmember)
Early Registration - If you register more than 2 days before this presentation you will qualify for this Early Registration Fee:
\$189 (member) \$169 (admitted after 1/1/05) \$209 (nonmember)
3 hours substantive

FRIDAY, OCTOBER 23, 2009

ECBA Women's Luncheon
Anastasia Mansion
11:45 a.m. - 1:15 p.m.
\$15/ECBA member

THURSDAY, OCTOBER 29, 2009

4th Annual Diversity Summit
Pennsylvania Bar Association Groupcast
Bayfront Convention Center
8:30 a.m. - 4:45 p.m. (8:00 a.m. reg.)
\$35 Includes BREAKFAST and LUNCH
5 hours ethics

TUESDAY, NOVEMBER 3, 2009

Fire-at-Will in Pennsylvania
PBI Video Seminar
Bayfront Convention Center
9:00 a.m. - 12:30 p.m. (8:30 a.m. reg.)
\$129 (member) \$109 (admitted after 1/1/05)
\$149 (nonmember)
3 hours substantive

THURSDAY, NOVEMBER 5, 2009

2009 PA Motor Vehicle Law Update
ECBA Live Seminar
Bayfront Convention Center
1:00 p.m. - 4:25 p.m. (12:30 p.m. reg.)
\$81 (ECBA member) \$119 (nonmember)
3 hours substantive

TUESDAY, NOVEMBER 10, 2009

Elder Law Update
PBI Groupcast Seminar
Bayfront Convention Center
9:00 a.m. - 12:15 p.m. (8:30 a.m. reg.)
\$224 (member) \$204 (admitted after 1/1/05)
\$244 (nonmember)
Early Registration - If you register more than 2 days before this presentation you will qualify for this Early Registration Fee:
\$199 (member) \$179 (admitted after 1/1/05) \$219 (nonmember)
3 hours substantive

WEDNESDAY, NOVEMBER 11, 2009

Critical Evidentiary Issues in Capital Cases
PBI Groupcast Seminar
Erie County Bar Association
12:30 p.m. - 4:45 p.m. (12:00 p.m. reg.)
LUNCH INCLUDED
\$224 (member) \$204 (admitted after 1/1/05)
\$244 (nonmember)
Early Registration - If you register more than 2 days before this presentation you will qualify for this Early Registration Fee:
\$199 (member) \$179 (admitted after 1/1/05) \$219 (nonmember)
3 hours substantive / 1 hour ethics (integrated)

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KIMBERLY THOMAS, Plaintiff,

v.

**PETER G. LEVINSON, M.D., MARK E. TOWNSEND, M.D.,
HAMOT MEDICAL CENTER, and LAKE ERIE WOMEN'S
CENTER, P.C., d/b/a LAKE ERIE WOMEN'S CENTER and
alternatively d/b/a LAKESIDE OB/GYN WOMEN'S CENTER,
Defendants**

PLEADINGS / PRELIMINARY OBJECTIONS

On Preliminary Objections in the form of demurrers, a Trial Court must recognize as true all well-pleaded material facts set forth in the Complaint and all inferences fairly deductible from those facts.

NEGLIGENCE / ACTIONS AND PLEADINGS

In regard to medical informed consent, a failure to disclose risk factors personal to a surgical physician involving a surgical procedure might constitute a misrepresentation.

ACTIONS AND PLEADINGS

Neither the MCARE Act nor case law has abrogated the cause of action for common law battery.

NEGLIGENCE / ACTIONS AND PLEADINGS

In order to recover for negligent infliction of emotional distress, a Plaintiff must establish, as in any other negligence case, the Defendant's breach of a duty and damages proximately caused thereby, and the Plaintiff must suffer immediate and substantial physical harm.

Plaintiff's pleading causes of action for both intentional infliction of emotional distress and negligent infliction of emotional distress must allege specifics as to when Plaintiff learned of the facts alleged, the source of the knowledge and the specific substantial harm that was caused by the emotional distress.

DISCOVERY / PROTECTIVE ORDERS

A Motion for a Protective Order may be granted for good cause shown in order to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense.

The granting of relief in a discovery proceeding is dependent upon a showing of necessity and the moving party bears the burden of establishing the objectionable nature of the discovery and a showing of evidence that harm will result from disclosure.

DISCOVERY/PROTECTIVE ORDERS/ATTORNEY CLIENT PRIVILEGE

A subpoena of a client's legal file may not be overly broad in its request.

CIVIL PROCEDURE / COMPLAINT / FILING CERTIFICATE OF MERIT

Pa. R.C.P. 1042.3 contemplates that a certificate of merit in a professional negligence complaint shall be filed within sixty (60) days of the filing of the original Complaint unless the Court upon good cause shown shall extend the time for filing of a certificate of merit for a period not to exceed sixty days.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY,
PENNSYLVANIA CIVIL DIVISION NO. 14412-2008

Appearances: Richard E. Filippi, Esq., Attorney for Plaintiff
Leonard G. Ambrose, III, Esq., Attorney for Plaintiff
Steven J. Forry, Esq. and Michael Dube, Esq., Attorneys
for Defendants Levinson, Townsend and Lake Erie
Women's Center
Marcia H. Haller, Esq., Attorney for Defendant Hamot
Medical Center

OPINION AND ORDER

DiSantis, Ernest J. Jr., J

This matter comes before the Court on the following: (1) Defendants, Peter G. Levinson, M.D. ("Levinson"), Mark E. Townsend, M.D. ("Townsend"), and Lake Erie Women's Center, P.C., d/b/a Lake Erie Women's Center and alternatively d/b/a Lakeside OB/GYN Women's Center ("Lake Erie Women's"), Preliminary Objections to the Plaintiff's Amended Complaint and Memorandum of Law in Support of Preliminary Objections; (2) Defendants', Levinson, Townsend, and Lake Erie Women's, Motion to Strike Documents Attached to the Plaintiff's "Reply to Preliminary Objections"; (3) Defendants', Levinson, Townsend, and Lake Erie Women's, Objections to Subpoenas and Motion For a Protective Order; and (4) Defendants', Levinson, Townsend, and Lake Erie Women's, Motion to Strike Plaintiff's Amended Certificate of Merit. On February 26, 2009, this Court held argument.

I. Background of the Case

This is a medical professional liability action arising out of a laparoscopic assisted vaginal hysterectomy that Plaintiff underwent on October 29, 2007. In brief, Plaintiff claims she suffered physical and emotional injuries as a result of the actions and inactions of Defendants. On September 11, 2008, Plaintiff filed a Complaint against Defendants and individual Certificates of Merits as to Levinson and Townsend. On September 30, 2008, Plaintiff filed a Praecipe to Reinstate Complaint. On October 16, 2008, Defendants Levinson, Townsend and Lake Erie Women's filed Preliminary Objections and supporting memorandum. On October 16, 2008, Lake Erie Women's filed a Notice of Intention to Enter Judgment of Non Pros On Professional Liability Claim. On October 20, 2008 Defendant, Hamot Medical Center ("Ramon, filed its Notice of Intention to Enter Judgment of Non Pros On Professional Liability Claims. On October 22, 2008, Plaintiff filed an Amended Complaint and separate Certificates of Merit as to Hamot and Lake Erie Women's. On November 5, 2008, Defendants, Levinson, Townsend, and Lake Erie Women's filed Preliminary Objections to the Plaintiff's Amended Complaint and Memorandum of Law in Support of

Preliminary Objections. On November 24, 2008, Plaintiff filed a Reply to the Preliminary Objections and Brief in Opposition. On November 24, 2008, Defendants filed a Praecipe for Entry of Judgment of Non Pros on Professional Liability Claim. On November 25, 2008 Plaintiff filed separate Amended Certificates of Merit as to Lake Erie Women's and Hamot.

On December 29, 2008, Defendants, Levinson, Townsend, and Lake Erie Women's filed a Motion to Strike the Plaintiff's Amended Certificate of Merit, Motion to Strike Documents Attached to the Plaintiffs Reply to Preliminary Objections, and Objections to Subpoenas and Motion for a Protective Order. Plaintiff filed replies to all.

II. Legal Discussion

A.) Preliminary objections¹

Generally, preliminary objections in the form of demurrers should be sustained when the facts averred are clearly insufficient to establish the pleader's right to relief. *HCB Contractors v. Liberty Palace Hotel Associates*, 652 A.2d 1278, 1279 (Pa. 1995). Moreover, when taking into account a motion for a demurrer, the trial court must recognize as true "all well-pleaded material facts set forth in the complaint and all inferences fairly deducible from those facts." *Yocca v. Pittsburgh Steelers Sports, Inc.*, 854 A.2d 425, 436 (Pa. 2004) quoting *Small v. Horn*, 722 A.2d 664, 668 (Pa. 1998)).

Additionally, "conclusions of law and unjustified inferences are not admitted by the pleadings," *Lobolito, Inc., v. North Pocono Sch. Dist.*, 755 A.2d 1287, 1289 n.2 (Pa. 2000), and the trial court must resolve the intrinsic worth "of the preliminary objections 'solely on the basis of the pleadings' and not on testimony or evidence outside the complaint." *Belser v. Rockwood Casualty Ins. Co.*, 791 A.2d 1216, 1219 (Pa. Super. 2002), quoting *Williams v. Nationwide Mut. Ins. Co.*, 750 A.2d 881, 883 (Pa. Super. 2000)); see also *Texas Keystone, Inc., Pennsylvania Department of Conservation and Natural Resources*, 851 A.2d 228, 239 (Pa.Cmwlth. 2004). A demurrer confronts the pleadings insisting that under the cause of action, relief cannot "be granted *under any theory of law*." See *Regal Industrial Corp. v. Crum and Forster, Inc.*, 890 A.2d 395, 398 (Pa. Super. 2005); *Sutton v. Miller*, 592 A.2d 83, 87 (Pa. Super. 1991); see also *Prevish v. Northwest Med. Ctr.*, 692 A.2d 192, 197 (Pa.

¹ This Court will not consider those documents attached to Plaintiff's Reply to Preliminary Objections. See, *Hess v. Fox Rothschild, LLP*, 925 A.2d 798, 805 (Pa. Super. 2007) ("[N]o testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer.") (citation omitted). Additionally, the traffic citation and pleading from an unrelated civil action amount to scandalous material and appear to have been included for no other reason other than to embarrass Defendant Levinson. As such, these documents will be stricken from the record and Plaintiff will not be granted leave to amend his Amended Complaint in order to attach the documents as exhibits.

Super. 1997), citing *Chiropractic Nutritional Assoc., Inc. v. Empire Blue Cross and Blue Shield*, 669 A.2d 975, 984 (Pa.Super. 1995) ("...a dismissal of a cause of action should be sustained only in cases that are [so] 'clear and free from doubt' that the plaintiff [litigant] will be unable to prove legally sufficient facts to establish any right to relief.").

1.) Motion to Strike paragraphs 69, 70, 72 & 73 of Count III (Lack of Informed Consent)²

Defendants seek to strike as legally insufficient those paragraphs of Count III that aver: (1) Levinson failed to disclose that he was "addicted to or abusing mind altering substances" that could negatively impact his medical/surgical judgment and/or performance, and that this information "would have been a substantial factoring her ultimate decision to proceed or not to proceed with the surgery (Amended Complaint, ¶¶ 69, 72); and, (2) Levinson failed to disclose that he was "suffering from a severe left cervical radiculopathy which was causing increasing weakness and clumsiness in his left upper extremity that could negatively impact his medical/surgical judgment and/or performance," and that this information "would have been a substantial factor in her ultimate decision to proceed or not proceed with the surgery." (Amended Complaint, ¶¶ 70, 73). Defendants Preliminary Objections, ¶¶ 5,6.

Defendants argue that in enacting the Medical Care Availability and Reduction of Error Act of 2002 ("MCARE"), the Pennsylvania legislature codified the lack of informed consent cause of action and, therefore, lack of informed consent causes of action accruing after the enactment are governed by 40 P.S. § 1303.504. *Id.*, at ¶¶ 8,9. Defendants argue that 40 P.S. § 1303.504 is applicable and does not authorize Plaintiff's instant claims. *Id.*, at ¶ 13. Defendants further assert that Plaintiff failed to allege that Levinson's purported addiction/abuse of mind-altering substances, or purported left cervical radiculopathy, caused or contributed to Plaintiff's injuries or that Levinson made a knowing misrepresentation. *Id.*, at ¶ 15.

Plaintiff contends that her assertion that Dr. Levinson was either an alcoholic or suffering from a severe physical impairment clearly relate to a physician's professional credentials, training or experience, and are relevant considerations for a proper informed consent under 40 P.S. § 1303.504. Plaintiff's Reply to Preliminary Objections, at ¶ 14. Plaintiff further contends there is no requirement to prove causation as part of her lack of informed consent claim. *Id.*, at ¶ 15.

² In Count III, Plaintiff also averred that Levinson failed to discuss the alternatives to and potential complications of the laparoscopically assisted vaginal hysterectomy, and that the availability of that information "would have been a substantial factor in her ultimate decision to proceed or not to proceed with the surgery." Amended Complaint, at ¶¶ 68, 71. Defendants are not moving to strike those paragraphs.

The relevant portions of the MCARE Act provide:³

§ 1303.504. Informed consent

(a) Duty of physicians.--Except in emergencies, a physician owes a duty to a patient to obtain the informed consent of the patient or the patient's authorized representative prior to conducting the following procedures:

. . . .

(b) Description of procedure.--Consent is informed if the patient has been given a description of a procedure set forth in subsection (a) and the risks and alternatives that a reasonably prudent patient would require to make an informed decision as to that procedure. The physician shall be entitled to present evidence of the description of that procedure and those risks and alternatives that a physician acting in accordance with accepted medical standards of medical practice would provide.

. . . .

(d) Liability.--

(1) A physician is liable for failure to obtain the informed consent only if the patient proves that receiving such information would have been a substantial factor in the patient's decision whether to undergo a procedure set forth in subsection (a).

(2) A physician may be held liable for failure to seek a patient's informed consent if the physician knowingly misrepresents to the patient his or her professional credentials, training or experience.

40 P.S. § 1303.504.

Here, the Plaintiff has stated a claim against Levinson for lack of informed consent based upon Levinson's failure to disclose evidence of his addiction and/or radiculopathy. If Plaintiff can prove that Defendant

³ Before enactment of the relevant MCARE sections, the doctrine of informed consent did not encompass a claim that a physician misrepresented his/her background or qualifications. Specifically, in *Kaskie v. Wright*, 589 A.2d 213 (Pa. Super. 1991), the Court held that the doctrine of informed consent was not applicable to a physician's failure to inform a patient that he was an alcoholic and unlicensed to practice in Pennsylvania. The Court refused to expand the doctrine of informed consent "to include matters not specifically germane to surgical or operative treatment." *Id.*, at 217. In noted that, "[t]o do so, where the absent information consists of facts personal to the treating physician, extends the doctrine into realms well beyond its original boundaries". *Id.*

In *Duttry v. Patterson*, 771 A.2d 1255 (Pa. 2001), our Pennsylvania Supreme Court held that the doctrine of informed consent was not applicable where a physician knowingly misrepresented his experience with a particular surgery. The Court held that evidence of a physician's personal characteristics and experience was irrelevant to an informed consent claim. *Id.*, at 1259. However, the Court noted that in this type of situation, a plaintiff may have a cause of action for misrepresentation. *Id.*

Levinson had these conditions, they would constitute risk factors attendant with the surgical procedure. Also, this failure to disclose then might well constitute a misrepresentation. 40 P.S. § 1303.504 (b), (d) (1), (2). Therefore, Defendants' motion to strike Count III (lack of informed consent) will be overruled.

2.) Motion to Strike Count II (common law claim of battery)

Defendants contend MCARE abrogated a cause of action for common law battery, and that Plaintiff's exclusive remedy is under 40 P.S. § 1303.504. In support, Defendants cite to *Pollock v. Feinstein*, 917 A.2d 875, 878 n.1 (Pa. Super. 2007).⁴ According to Defendant, Plaintiff has included this count against Levinson "in an effort to bypass the requirement, set forth in 40 P.S. § 1303.504, of pleading and proving that the information she allegedly did not receive would have been a substantial factor in her decision to undergo the procedure at issue in this case." Defendants' Preliminary Objections, at ¶ 23.

In reply, Plaintiff contends that the footnote in *Pollock* is dictum and asserts that MCARE has not abrogated a cause of action for common law battery. Plaintiff also requests permission to amend the Count should the Court sustain the preliminary objection.

Upon review, this Court concludes that neither the Act nor case law has abrogated the cause of action for common law battery. Furthermore, the Plaintiff has sufficiently pled a cause of action. Therefore, Defendants' motion to strike Count II will be overruled.

3.) Motion to Strike Counts X and XI (Vicarious Liability of Lake Erie Women's)

Defendants argue that any claims that Lake Erie was vicariously liable for any alleged failure to obtain informed consent should be stricken with prejudice. Defendant's Preliminary Objections, at ¶ 31. In support, they cite *Valles v. Albert Einstein Medical Center*, 805 A.2d 1232 (Pa. 2002). There, the Pennsylvania Supreme Court held that a "medical facility cannot be held vicariously liable for a physician's failure to obtain informed consent." *Id.*, at 1236.

In reply, Plaintiff alleges she did not advance that claim. Rather, Plaintiff's Amended Complaint alleges "vicarious liability on the basis

⁴ That footnote provides, in relevant part:

Although these statutory definitions now expressly permit a defendant to present evidence that information provided regarding procedure was within acceptable professional standards, 40 P.S. § 1303.504 (b), whether this evidentiary standard legislatively overturns our case law regarding the battery theory of the informed consent claim, or whether an informed consent claim based upon negligence principles is more appropriate as a matter of policy, are issues more properly for our Supreme Court, and, in any event, unnecessary for us to reach for the disposition of this appeal.

Id.

of the aforesaid acts of negligence and/or carelessness and/or wrongful conduct" of Levinson and Townsend. Plaintiff's Reply to Preliminary Objections, at ¶¶ 26, 31. She contends her claims are based on Lake Erie Women's liability for the underlying negligence of Levinson and Townsend. Plaintiff's Brief, at 11.

To the extent that Plaintiff argues that Lake Erie Women's was vicariously liable for any alleged lack of informed consent, she can not prevail and Defendants' motion to strike Counts X and XI (as they reflect that claim) will be sustained. To the extent that Counts X and XI are based upon a negligence theory, they remain intact subject to this Court's determination of the certificate of merit issue. *See*, pp. 18-24 of this Opinion.

4.) Motion to Strike Counts VIII and IX (Corporate Liability of Lake Erie Women's)

Defendants contend that Pennsylvania law does not recognize a cause of action of corporate liability against a professional corporation, such as Lake Erie Women's. *See, Thompson v. Nason Hospital*, 591 A.2d 703 (Pa. 1991). Because Plaintiff agrees and stipulates to the withdrawal of Counts VIII and IX against Lake Erie Women's, those counts will be stricken with prejudice.

5.) Motion to Strike Count IV (Intentional and/or Negligent Infliction of Emotional Distress -Levinson).⁵

Defendants contend that Plaintiff has failed to state a claim for either intentional infliction of emotional distress or negligent infliction of emotional distress against Levinson.

Intentional infliction of emotional distress is defined in Section 46 of the Restatement (Second) of Torts which provides, *inter alia*, that: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Restatement (Second) of Torts, § 46 (1).⁶ "[T]he conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in any civilized society." *Hoy v. Angelone*, 720 A.2d 745, 754 (Pa. 1998) (citation omitted).

⁵ In her Reply, Plaintiff attempts to support her Amended Complaint by relying upon evidence outside the record. As noted *supra*, this Court will not consider that evidence when arriving at its decision.

⁶ Although our Courts have never expressly recognized a cause of action for intentional infliction of emotional distress, they have done so implicitly. *See, Taylor v. Albert Einstein Medical Center*, 754 A.2d 650, 652 (Pa. 2000); *Kazatsky v. King David Memorial Park*, 527 A.2d 988 (1987).

Cases which have found a sufficient basis for a cause of action of intentional infliction of emotional distress have had presented only the most egregious conduct. See e.g. *Papieves v. Lawrence*, 437 Pa. 373, 263 A.2d 118 (1970) (defendant, after striking and killing plaintiff's son with automobile, and after failing to notify authorities or seek medical assistance, buried body in a field where discovered two months later and returned to parents (recognizing but not adopting Section 46)); *Banyas v. Lower Bucks Hospital*, 293 Pa. Super 122, 437 A.2d 1236 (1981) (defendants intentionally fabricated records to suggest that plaintiff had killed a third party which led to plaintiff being indicted for homicide); *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979) (defendant's team physician released to press information that plaintiff was suffering from fatal disease, when physician knew such information was false).

Id., at 754.

"In order to recover for negligent infliction of emotional distress a plaintiff must establish, as in any other negligence case, the defendant's breach of a duty and damages proximately caused thereby. In the context of a claim for emotional distress the action may be sustained under the impact rule, the zone of danger rule or the bystander rule." *Shumosky v. Lutheran Welfare Svcs. of Northeastern PA*, 784 A.2d 196, 199 (Pa. Super. 2001). Recently, Pennsylvania Superior Court recently stated that:

. . . the cause of action for negligent infliction of emotional distress is restricted to four factual scenarios: (1) situations where the defendant had a contractual or fiduciary duty toward the plaintiff; (2) the plaintiff was subjected to a physical impact; (3) the plaintiff was in a zone of danger, thereby reasonably experiencing a fear of impending physical injury; or (4) the plaintiff observed a tortious injury to a close relative.

Toney v. Chester County Hosp., 961 A.2d 192, 197-98 (Pa. Super. 2008). See also, Restatement (Second) of Torts, § 313.⁷ In all four scenarios,

⁷ Restatement (Second) of Torts § 313 provides:

(1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor

(a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and

(b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.

(2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.

Restatement (Second) of Torts, § 313.

"a Plaintiff who alleges negligent infliction of emotional distress must suffer *immediate* and *substantial* physical harm." *Doe v. Philadelphia Community Health Alternatives AIDS Task Force*, 745 A.2d 25, 28 (Pa. Super. 2000), *aff'd*, 564 Pa. 264, 767 A.2d 548 (2001) (emphasis in original).

In Count IV of the Amended Complaint, Plaintiff alleged that at all relevant times, Levinson was addicted to or abusing mind altering drugs which impaired his ability to make medical decisions and/or provide medical treatment regarding the care, diagnosis and treatment of Plaintiff. Amended Complaint, at ¶ 76. Additionally, Plaintiff alleged that Levinson suffered a severe left radiculopathy causing weakness and clumsiness of his left upper arm which impaired his ability to make medical decisions and/or provide medical treatment regarding the care, diagnosis and treatment of Plaintiff. *Id.*, at ¶ 77. Furthermore, Plaintiff alleges that:

The negligent and careless acts of [Levinson] in the care, diagnosis and treatment of [Plaintiff] were done willfully, intentionally, outrageously and/or recklessly intending to cause or inflict emotional distress upon Plaintiff and/or were done in reckless disregard of the probability of causing Plaintiff emotional distress, and these acts have in fact resulted in severe emotional distress causing Plaintiff the damages stated above.

In the alternative, the acts of [Levinson] in the care, diagnoses and treatment of [Plaintiff] were, due to [Levinson's] impairments, negligent and careless and done in reckless and/or negligent disregard of the probability of causing Plaintiff severe emotional distress and these acts have in fact resulted in severe emotional distress causing the Plaintiff damages stated above.

Plaintiff's Amended Complaint, at ¶¶ 78-79.

The Court finds that the amended complaint does not sufficiently plead causes of action for both intentional infliction of emotional distress and negligent infliction of emotional distress. In particular, the Plaintiff has failed to allege when Plaintiff learned of Defendant Levinson's purported addiction and radiculopathy, the source of the knowledge, and the specific substantial physical harm that is a necessary element of these torts. *Love v. Cramer*, 606 A.2d 1175 (Pa. Super. 1992). Therefore, Defendants' preliminary objections to Count IV shall be sustained.

6.) Motion to Strike Count I (Negligence-Levinson) in Part as to 61 (d) & (e).

Defendants request that the Court strike the words "careless and/or reckless" from ¶ 61 (d) and ¶ (e) as legally insufficient because "there are no degrees of negligence in Pennsylvania." Defendants' Preliminary

Objections, at ¶¶ 60-63. In reply, Plaintiff argues that negligence, carelessness and recklessness "are essentially synonymous all being a standard of conduct below that of an ordinary prudent person." Plaintiff's Reply, at ¶ 63.

The Court finds that there is no need to strike the term "careless and/or reckless."

B.) Discovery Issues

1. Defendants' (Levinson, Townsend, and Lake Erie) Objections to Subpoenas and Motion for Protective Order.

Defendants seek a protective order pursuant to Pennsylvania Rule of Civil Procedure 4012. This rule provides:

(a) Upon motion by a party or by the person from whom discovery or deposition is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense. . . .

Pa.R.C.P. 4012 (a).

"The granting of relief in a discovery proceeding is dependent upon a prima facie showing of necessity, since the relief is not to be granted as a matter of right." *In re Estate of Roart*, 390 Pa. Super. 38, 47, 568 A.2d 182, 187 (1989). "The party moving for a protective order based on Pa.R.C.P. 4012 bears the burden of establishing the objectionable nature of the discovery he [or she] is withholding." *Griffiths v. Ulmer*, 55 D & C 4th 370, 373 (Lacka. Cty. 2002); *Platinum Corp. v. Blong*, 43 D & C 4th 445, 446-47 (Fayette Cty. 1998), citing *Cipollone v. Liggett Group, Inc.*, 106 F.R.D. 573, 585 (1985). In order to establish the "good cause" required, the party moving for the protective order must produce, "at a minimum, some evidence upon which a court can make a determination that harm will result from disclosure." *Ornsteen v. Bass*, 50 D & C 3d 371, 374 (Phila. Cty. 1988). "The determination of whether good cause does or does not exist *must be based upon appropriate testimony and other factual data, not the unsupported contentions and conclusions of counsel.*" *Id.*, citing *Davis v. Romney*, 55 F.R.D. 337, 340 (1972). (emphasis added).

Fanelli v. Independence Blue Cross, 75 Pa. D & C 4th 10 (Phila. Cty. 2005)(internal footnote omitted).

Defendants object to the proposed subpoenas directed to the following individuals: (1) **Thomas S. Talarico, Esquire**, requesting all file materials, excluding those covered by the attorney-client privilege and/or constituting attorney work product, involving his representation of Levinson in an unrelated, civil action; (2) **Anthony M. Ruffa, D.O.**,

requesting Levinson's medical documentation; and, (3) **James A. DeMatteis, M.D.**, requesting Levinson's medical documentation. Defendants' Objections to Subpoena and Motion for Protective Orders, 12/29/08, at ¶¶ 5-8.

At the outset, Defendants contend that the Subpoenas should be quashed because of pending preliminary objections. *Id.*, at ¶ 11. In support, Defendants cite *Potts v. Consolidated Rail Corp.*, 37 Pa. D & C 4th 196 (Allegheny Cty. 1998) and argue that the Court should bar discovery until preliminary objections are resolved and defendants have filed answer to complaint. Plaintiff argues that Potts is factually distinguishable, the filing of preliminary objections do not automatically stay discovery, Hamot already filed an Answer, and Defendants waived this theory when they issued Interrogatories to Plaintiff on December 4, 2008 after the filing of preliminary objections. Plaintiff's Reply to Objections to Subpoenas and Motion for Protective Order, 01/02/09, at ¶¶ 11-12.

Based upon this Court's findings concerning the preliminary objections set forth earlier in this Opinion, it will address the remaining issues.

a.) Talarico Subpoena

As to Attorney Talarico's records, Defendants contend all the items are protected by the confidential work product doctrine and/or the attorney-client privilege. Defendants' Objections to Subpoena and Motion for Protective Orders, 12/29/08, at ¶ 15. In response, Plaintiff's argue they are seeking items otherwise discoverable in the unrelated civil action, such as medical records obtained by Attorney Talarico and letters to and/or from the defending insurance company regarding Levinson's alleged disabilities. Plaintiff's Reply to Objections to Subpoena and Motion for Protective Order, 01/02/09, at ¶ 15.

The attorney-client privilege is codified in Pennsylvania as follows:

In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

42 Pa.C.S.A. § 5928.⁸ Pursuant to this statute, the following four elements must be satisfied in order to invoke the protections of the attorney-client privilege:

- 1.) The asserted holder of the privilege is or sought to become a client.

⁸ The attorney-client privilege does not protect information counsel obtained from third parties in the course of the representation. *MacQuown v. Dean Witter Reynolds Co.*, 47 Pa D & C 3d 21, 24-25 (Allegh. Cty. 1987). "Thus, any communications from counsel to the client disclosing information from third parties would not be protected because the underlying communication between counsel and the third party is not protected." *Id.*, at 25.

- 2.) The person to whom the communication was made is a member of the bar of a court, or his subordinate.
- 3) The communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort.
- 4) The privilege has been claimed and is not waived by the client.

Nationwide Mut. Ins. Co. v. Fleming, 924 A.2d 1259, 1265 (Pa. Super. 2007).

Under the attorney work product doctrine, "discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." Additionally:

The underlying purpose of the work-product doctrine is to shield the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case. The doctrine promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients. However, the work-product privilege is not absolute and items may be deemed discoverable if the "product" sought becomes a relevant issue in the action.

Gocial v. Independence Blue Cross, 827 A.2d 1216, 1222 (Pa. Super. 2003)(internal citations omitted).

The party who has asserted attorney-client privilege must initially set forth facts showing that the privilege has been properly invoked; then the burden shifts to the party seeking disclosure to set forth facts showing that disclosure will not violate the attorney-client privilege, *e.g.*, because the privilege has been waived or because some exception applies.

Nationwide Mut. Ins. Co., supra. at 1266.

This Court first notes that only Levinson can assert the confidentiality privilege. Second, it finds Plaintiff's subpoena for Attorney Talarico's legal file to be overly broad. Although medical history may be discoverable, Plaintiff can obtain this information from other sources, including the Defendant Levinson and his health care providers. In addition, much of the information may be - as Plaintiff implies - available as part of the public record in the unrelated lawsuit. The Talarico subpoena, as it now stands, is a fishing expedition.

(b) Ruffa and DeMatteis subpoenas

As to these subpoenas, this Court finds that evidence of Levinson's medical diagnoses and treatment are relevant and discoverable, subject to any valid claim of privilege. Moreover, Levinson put those issues in

the public domain when he filed his civil action at *Dr. Peter G. Levinson, M.D. v. Professional Casualty Association*, Erie County DKN# 14741-2008. Therefore, Defendants' motion shall be granted in part, and denied in part.

C.) Defendants' Motion to Strike the Plaintiff's Amended Certificate of Merit.

Defendants request an order striking the Amended Certificate of Merit ("COM") as to Lake Erie Women's, and striking Counts X and XI of the Plaintiff's Amended Complaint (vicarious liability counts). They contend that Plaintiff improperly filed the Amended COM following a Judgment of Non Pros and that Plaintiff failed to file a COM or motion for an extension of time within 60 days after the filing of the complaint in regards to Counts X and XI of the Amended Complaint.

Pa.R.C.P. 1042.3 applies⁹ and "[t]he rule contemplates that a [COM] will be filed contemporaneously with or shortly after the filing of the complaint, and provides a 60-day window after the filing of the complaint to accomplish the filing of the [COM]." *Zokaites Contracting, Inc., et. al. v. Trant Corp., Inc.*, 2009 Pa. Super 35, ¶ 12, quoting *Varner v. Classic Cmtys. Corp.*, 890 A.2d 1068, 1073 (Pa. Super. 2006) (citation, internal quotation marks, and brackets omitted).¹⁰ As Pa.R.C.P. 1042.3 provides, in part:

Rule 1042.3. Certificate of Merit

(a) In any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the attorney or party that either

(1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or

⁹ On June 16, 2008, the Pennsylvania Supreme Court amended the Civil Rules governing the entry of a judgment of *non pros* for failing to file a COM. See, *In RE; Adoption of Rule of Civil Procedure 1042.6 and Amendment of Rules 1042.1 et. seq. Governing Professional Liability Actions*, No. 493 Civil Procedure Rules, Docket No. 5, (*per curiam* Pa. 2008) (filed June 16, 2008, effective immediately). These amendments are applicable to the case at bar.

¹⁰ See, also *Ditch v. Waynesboro Hosp.*, 917 A.2d 317, 322 (Pa. Super. 2007), *appeal granted in part*, 934 A.2d 1150 (Pa. 2007) (noting that a certificate of merit must be filed within sixty days of the filing of an original complaint and the filing of an amended complaint does not give a plaintiff an additional sixty days to file a certificate of merit) (citations omitted).

(2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, or

(3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.

(b) (1) A separate certificate of merit shall be filed as to each licensed professional against whom a claim is asserted.

(2) If a complaint raises claims under both subdivisions (a)(1) and (a)(2) against the same defendant, the attorney for the plaintiff, or the plaintiff if not represented, shall file

(i) a separate certificate of merit as to each claim raised, or

(ii) a single certificate of merit stating that claims are raised under both subdivisions (a)(1) and (a)(2),

...

(d) The court, upon good cause shown, shall extend the time for filing a certificate of merit for a period not to exceed sixty days. A motion to extend the time for filing a certificate of merit must be filed by the thirtieth day after the filing of a notice of intention to enter judgment of non pros on a professional liability claim under Rule 1042.6 (a) or on or before the expiration of the extended time where a court has granted a motion to extend the time to file a certificate of merit, whichever is greater. The filing of a motion to extend tolls the time period within which a certificate of merit must be filed until the court rules upon the motion.

Note: There are no restrictions on the number of orders that a court may enter extending the time for filing a certificate of merit provided that each order is entered pursuant to a new motion, timely filed and based on cause shown as of the date of filing the new motion.

The moving party must act with reasonable diligence to see that the motion is promptly presented to the court if required by local practice.

In ruling upon a motion to extend time, the court shall give appropriate consideration to the practicalities of securing expert review. There is a basis for granting an extension of time within which to file the certificate of merit if counsel for the plaintiff was first contacted shortly before the statute of limitations was about to expire, or if, despite diligent efforts by counsel, records necessary to review the validity of the claim are not available.

In *Womer v. Hilliker*, 908 A.2d 269 (Pa. 2006), the plaintiff against whom a Rule 1042.6 judgment of non pros was entered, failed to file a COM. The Pennsylvania Supreme Court found that although the plaintiff served an expert report on the defendant, this did not amount to "substantial compliance" with the Rules of Civil Procedure governing the filing of a certificate of merit. In discussing the difference between "no compliance" and "substantial compliance" under Pa.R.C.P. 126, the Pennsylvania Supreme Court stated:

In our view, Hilliker's position is the correct one, since Womer took no steps to comply with Pa.R.C.P. No. 1042.3. Rule 1042.3 is clear and unambiguous in its mandate that in every professional liability action a specific representation about the plaintiff's claim must be filed in the official record in a document called a "certificate of merit" at the time the complaint is filed or within sixty days thereafter. Pa.R.C.P. No. 1042.3(a). Pa.R.C.P. No. 1042.8 provides that "the certificate required for filing by Rule 1042.3(a) shall be substantially in the following form.....," and displays a sample COM that shows precisely what Rule 1042.3 requires. Moreover, Pa.R.C.P. No. 1042.3(d), which allows for the filing and granting upon good cause shown of a motion to extend the time for filing a COM, sets forth the one and only step that a plaintiff is to take if he finds himself unable to secure a COM and desires to avoid the consequences of not satisfying Rule 1042.3 (a)'s COM filing requirement in a timely fashion. Womer, however, did nothing of the sort. Rather, he served discovery materials on Hilliker, which included an expert report. In our view, this was no procedural misstep within the meaning of Pa.R.C.P. No. 126. It was instead, a wholesale failure to take any of the actions that one of our rules requires, of the type that we have heretofore refused to overlook under Rule 126. See *Sahutsky*, 782 A.2d at 1001.

In contending that even though he made no effort to follow Pa.R.C.P. No. 1042.3's requirements, Rule 126 can apply in his circumstances because he fulfilled 1042.3's purpose, Womer is essentially arguing that the doctrine of substantial compliance in Rule 126 not only excuses a party who commits a procedural misstep in attempting to do that which a rule instructs, but also excuses a party who does nothing that a rule requires, but whose actions are consistent with the objectives he believes the rule serves. This is simply not so. The equitable doctrine we incorporated into Rule 126 is one of substantial compliance, not one of no compliance. We reiterate what our case law has taught: Rule 126 is available to a party who makes a substantial attempt to conform, and not to a party who disregards the terms of a rule in their entirety and determines for himself the steps he can take to satisfy the procedure that we have adopted to enhance the functioning

of the trial courts. See *Sahutsky*, 782 A.2d at 1001; *Commonwealth v. Metz*, 534 Pa. 341, 633 A.2d 125, 127 (Pa. 1993). Therefore, we conclude that Womer did not substantially comply with Pa.R.C.P. No. 1042.3 for purposes of Pa.R.C.P. No. 126's application, and hold that the Superior Court erred in including Pa.R.C.P. No. 126 as a factor in its analysis as to whether the trial court correctly denied Womer's request that the judgment of *non pros* be opened.

Id., at 278.¹¹

On September 11, 2008, Plaintiff filed her original Complaint and also contemporaneously filed certificates of merit as to Levinson and Townsend. On October 16, 2008, pursuant to Pa.R.C.P. 1042.6¹², Lake Erie Women's filed a Notice to Enter Judgment of Non Pros on Counts VIII, IX, X and XI of the Complaint (these involve corporate negligence and vicarious liability claims against Lake Erie Women's). On October 22, 2008, Plaintiff filed an Amended Complaint and a COM as to Lake Erie Women's (addressing corporate negligence only). On November 24, 2008, pursuant to Pa.R.C.P. 1042.7¹³, Defendants filed a Praecepte of Judgment of Non Pros as to Count X (vicarious liability) and Count XI (vicarious liability) against Lake Erie Women's. The Erie County Prothonotary's Office docketed the Praecepte but did not enter judgment due to the COM filed on October 22, 2008.¹⁴

¹¹ On June 16, 2008, Rule 1042.8 was renumbered as 1042.9.

¹² Rule 1042.6 provides that, ". . . a defendant seeking to enter a judgment of non pros under Rule 1042.7 (a) shall file a written notice of intention to file the praecipe and serve it on the party's attorney of record. . . no sooner than the thirty-first day after the filing of the complaint. Pa.R.C.P. 1042.6 (a).

¹³ Rule 1042.7 provides that:

- (a) The prothonotary, on praecipe of the defendant, shall enter a judgment of non pros against the plaintiff for failure to file a certificate of merit within the required time provided that
 - (1) there is no pending motion for determination that the filing of the certificate is not required or no pending timely filed motion seeking to extend the time to file the certificate,
 - (2) no certificate of merit has been filed,
 - (3) except as provided by Rule 1042.6 (b), the defendant has attached to the praecipe a certificate of service of the notice of intention to enter the judgment of non pros, and
 - (4) except as provided by Rule 1042.6(b), the praecipe is filed no less than thirty days after the date of the filing of the notice of intention to enter the judgment of non pros.

¹⁴ The accompanying note to Pa.R.C.P. 1042.7 states that "Rule 237.1 does not apply to a judgment of non pros entered under this rule." Pa.R.C.P. 1042.7 note. Accordingly, under Pa.R.C.P. 236, the Prothonotary must provide a party with written notice of entry of the judgment and note in the docket the giving of such notice. *Mumma v. BTPW*, 937 A.2d 459, 464 (Pa. Super. 2007). Furthermore, "the 60 day time limitation of Civil Rule 1042.3 cannot be extended based upon the mere fact that the entry of judgment was technically deficient under Civil Rule 236." *Id.*, at 465.

On November 25, 2008, over 60 days from filing the original complaint and one month from the date she filed her amended complaint and COM alleging only negligence, Plaintiff filed an Amended COM, addressing the corporate negligence and vicarious liability claims against Lake Erie Women's.

Defendants claim that Plaintiff improperly filed the Amended Certificate of Merit following Judgment of Non Pros and, therefore, request this Court to strike the Amended Certificate of Merit and Counts X and XI of Plaintiffs Amended Complaint. Defendants' Motion to Strike the Plaintiff's Amended Certificate of Merit, 12/29/08, at ¶¶ 9-11. In response, Plaintiff claims that counsel inadvertently omitted the second paragraph dealing with vicarious liability from the certificate of merit filed on October 22, 2008. 01/06/09, at ¶ 4-6.¹⁵ Plaintiff further argues that: (1) judgment of non pros has not been entered, (2) the amended certificate of merit corrected a typographical error, and (3) Defendants have suffered no prejudice.

After its review, this Court finds that relevant to the COM filed on October 22, 2008, more than a typographical error was involved. Furthermore, Plaintiff failed to seek court approval before filing the November 25, 2008 Amended COM. Therefore, the Defendants' Motion to Strike shall be granted without prejudice. Plaintiff shall be afforded twenty (20) days to file a motion requesting an extension to file an amended COM.

III. CONCLUSION.

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

ORDER

AND NOW, this 27th day of April, for the reasons set forth in the accompanying opinion, it is hereby ordered that:

- 1.) Defendants' Preliminary Objections are SUSTAINED, in part, and OVERRULED, in part, as follows:
 - (a) Motion to Strike paragraphs 69, 70, 72 & 73 of Count III (Lack of Informed Consent) is OVERRULED;
 - (b) Motion to Strike Count II (common law claim of battery) is OVERRULED;
 - (c) Motion to Strike Counts X and XI (vicarious liability of Lake Erie Women's Center, P.C., d/b/a Lake Erie Women's Center and alternatively d/b/a Lakeside OB/GYN Women's Center, is SUSTAINED with prejudice, to the extent those counts allege vicarious liability for failure to obtain informed consent;

¹⁵ Plaintiff claims that at the time, counsel had an expert report which supported vicarious liability.

- (d) Motion to Strike Counts VIII and IX (Corporate Liability of Lake Erie Women's Center) is SUSTAINED with prejudice;
 - (e) Motion to Strike Count IV (Intentional and/or Negligent Infliction of Emotional Distress) is SUSTAINED without prejudice to Plaintiff. Plaintiff may, within twenty (20) days from the date of this Order, file an Amended Complaint as to Count IV;
 - (f) Motion to Strike Count I (Negligence) in part as to ¶ 61 (d) and (e) is OVERRULED.
- 2.) Defendants' Motion to Strike Documents Attached to the Plaintiff's Reply to Preliminary Objections is GRANTED;
 - 3.) Defendants' Objections to Subpoenas and Motion for Protective Order is GRANTED in part, and DENIED in part as follows:
 - (a) A Motion for Protective Order as to the Talarico Subpoena is GRANTED;
 - (b) A Motion for Protective Order as to the Ruffa and DeMatteis Subpoenas is DENIED, subject to any valid claim of privilege.
 - 4.) Defendants' Motion to Strike Plaintiff's Amended Certificate of Merit is GRANTED without prejudice to the Plaintiff. Plaintiff may, within twenty (20) days from the date of this Order, file a motion for extension of time in which to file an amended certificate of merit as to Defendant, Lake Erie Women's Center, P.C., d/b/a Lake Erie Women's Center and alternatively d/b/a Lakeside OB/GYN Women's Center.

BY THE COURT:

/s/ **Ernest J. DiSantis, Jr., Judge**

**ACTION TO QUIET TITLE
NOTICE TO: CHRISTINE KAY
HODGES**

You have been sued in court. You must defend against the claims set forth in the following pages, and you must take action within twenty (20) days after this publication by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so, the case may proceed without you and a judgment may be entered against you by the court or prothonotary of the court without further notice for any money claimed in the complaint or for any other claim or property or other rights important to you. You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.

Lawyers' Referral Service
PO Box 1792
Erie, Pennsylvania 16507
814-459-4411

COMPLAINT: The Plaintiffs are Jack E. Grayer and Susan Grayer who reside at 654 Mineo Drive, Erie, PA, 16509. The Defendant is Christine Kay Hodges whose last known address was 860 Rumsey Avenue, Erie, PA, 16511. Plaintiffs are the possessors of real property ("the Parcel") as a consequence of deed dated 21 March 2007 recorded at Erie County Record Book 1404 page 0846 which describes the Parcel known as 860 Rumsey, Avenue, Erie, Pennsylvania. Being the same Property conveyed to Randall R. Hodges and Christine K. Hodges, his then wife by deed dated 3 April 1991 and recorded 3 April 1991 in the Office of the Recorder of Deeds, Record Book 0154 page 2164. The property bears Tax index No. 29-10-51-7. WHEREFORE Plaintiff requests the court to enter judgment to Quiet Title against Defendant in the Parcel, confirming and granting unto the plaintiffs their sole, exclusive legal and possession interest in "Parcel" as against the

Defendant Christine Kay Hodges, extinguishing any and all legal and possession rights of the Defendant in the Parcel.

Jack E. Grayer, Esq. Atty. Plaintiff
PO Box 1825
Erie, PA 16507
Tel. 814-218-0345

Oct. 16

CHANGE OF NAME NOTICE

Notice is hereby given that on August 6, 2009, the Petition for Change of Name was filed in the Court of Common Pleas of Erie County, Pennsylvania requesting a decree to change the name of Arthur L. Flemings. The Court has fixed the 26th day of October, 2009 at 10:00 a.m. in Courtroom B of the Erie County Court House as the time and place for the hearing on said Petition, when and where all persons interested may appear and show cause, if any, they have, why the prayer of said Petition should not be granted.

Richard A. Vendetti, Esquire
Vendetti & Vendetti
3820 Liberty Street
Erie, PA 16509
(814) 868-8541

Oct. 16

DISSOLUTION NOTICE

Notice is hereby given that Articles of Dissolution were filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, on 8/28/2009 for the purpose of obtaining a Certificate of Dissolution pursuant to the provisions of the Business Corporation Law of 15 Pa. C.S. Section 1977. The name of the corporation was MagKou USA Corporation.

Oct. 16

FICTITIOUS NAME NOTICE

Pursuant to Act 295 of December 16, 1982 notice is hereby given of the intention to file with the Secretary of the Commonwealth of Pennsylvania a "Certificate of Carrying On or Conducting Business Under an Assumed of Fictitious Name." Said Certificate contains the following information:

FICTITIOUS NAME NOTICE

1. Fictitious Name: Common Threads Quilt Shoppe
2. Address of the principal place of business, including street and number: 1213 W. 38th Street, Erie, PA 16509
3. Names and addresses, including street and number, of the persons who are parties to the registration: Patricia M. Welsler, 16149 Beaverdam Road, Erie, PA 16442
4. An application for registration of a fictitious name was filed with the Department of State under the Fictitious Names Act on or about October 2, 2009.

Oct. 16

FICTITIOUS NAME NOTICE

1. Fictitious Name: Elements Board Shop
2. Address of the principal place of business, including street and number: 6521 Pheasant Run Blvd., Fairview, PA 16415
3. The real names and addresses, including street and number, of the persons who are parties to the registration: JANJ, LLC, 6521 Pheasant Run Blvd., Fairview, PA 16415
4. An application for registration of a fictitious name under the Fictitious Names Act was filed on or about October 9, 2009 with the Pennsylvania Department of State. Russell S. Warner, Esq. MacDonald, Illig, Jones & Britton, LLP
100 State Street, Suite 700
Erie, PA 16507-1459

Oct. 16

FICTITIOUS NAME NOTICE

1. Fictitious Name: Jo's Brooklyn Bagels
2. Address of the principal place of business including street number: 833 West 38th Street, Erie, Pennsylvania 16509
3. The real name and address, including street and number, of the person who is a party to the registration: Josephine Barber, 4405 Stone Drive, Erie, PA 16509
4. An application for registration of a fictitious name under the Fictitious

Names Act was filed on October 6, 2009.
 C. James Vendetti, Esquire
 3820 Liberty Street
 Erie, PA 16509

Oct. 16

LEGAL NOTICE

**NOTICE ON HEARING ON
 PETITION TO INVOLUNTARY
 TERMINATE PARENTAL
 RIGHTS**

IN RE: Adoption of Sebastian Serenity Owens, also known as Sebastian Owens; No 112 of 2009 in the Orphan's Court Division of Westmoreland County, Pennsylvania.

Notice to: UNKNOWN BIRTH FATHER OR PUTATIVE BIRTH FATHER OF SEBASTIAN SERENITY OWENS, ALSO KNOWN AS SEBASTIAN OWENS, born March 20, 2009, at The Chester County Hospital, West Chester, Chester County, Pennsylvania, to the Birth Mother, Gina Coverdale, also known as Gina Marie Owens. The Court has set a hearing to consider ending your rights to your child. That hearing will be held before the Honorable Chris Feliciani, in Courtroom No. 10, Westmoreland County Courthouse, 2 North Main Street, Greensburg, Pennsylvania 15601, on December 29, 2009, at 9:30 A.M. You are warned that even if you fail to appear at the scheduled hearing, the hearing will go on without you and your rights to your child may be ended by the Court without you being present.

You have a right to be represented at the hearing by a lawyer. You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help. This office can provide you with information about hiring a lawyer.

If you cannot afford to hire a lawyer, this office may be able to provide you with information about agencies that may offer legal services to eligible persons at a reduced fee or no fee.

Westmoreland Bar Association
 P.O. Box 565
 Greensburg, PA 15601
 (724) 834-8490

Jeffrey J. Lochner, Esquire
 Attorney at Law
 300 Weyman Plaza, Suite 180
 Pittsburgh, PA 15236
 (412) 881-4380

Oct. 16, 23, 30

LEGAL NOTICE

ATTENTION: MICHAEL GRIFFITHS AKA OCTAVIUS JONES

INVOLUNTARY TERMINATION OF PARENTAL RIGHTS IN THE MATTER OF THE ADOPTION OF MINOR CHILD (J.J.N.); DOB: 11-21-07 #21E IN ADOPTION, 2009

If you could be the parent of the above mentioned child, at the instance of Erie County Office of Child and Youth you, laying aside all business and excuses whatsoever, are hereby cited to be and appear before the Orphan's Court of Erie County, Pennsylvania, at the Erie County Court House, Judge Cunningham, Court Room No. C, City of Erie on October 28, 2009, at 9:15 a.m. and then and there show cause, if any you have, why your parental rights to the above child should not be terminated, in accordance with a Petition and Order of Court filed by the Erie County Office of Child and Youth. A copy of these documents can be obtained by contacting the Erie County Office of Child and Youth at (814) 451-6647. Your presence is required at the Hearing. If you do not appear at this Hearing, the Court may decide that you are not interested in retaining your rights to your child and your failure to appear may affect the Court's decision on whether to end your rights to your child. You are warned that even if you fail to appear at the scheduled Hearing, the Hearing will go on without you and your rights to your child may be ended by the Court without your being present.

You have a right to be represented at the Hearing by a lawyer. You

should take this paper to your lawyer at once. If you do not have a lawyer, or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.

Family/Orphan's
 Court Administrator
 Room 204-205
 Erie County Court House
 Erie, Pennsylvania 16501
 (814) 451-6251

Oct. 16

LEGAL NOTICE

MARSHAL'S SALE: By virtue of a Writ of Execution issued out of the U.S. Court for the W. D. of PA at suit of the USA at Civil No. 1:09-cv-12-E, I shall expose to public sale the real property of Ted R. Hull and Karen L. Hull known as 224 Mark Drive, Seneca, PA 16346, being fully described in the Deed dated May 17, 1989 and recorded May 18, 1989 in Venango County Deed Book Volume 0914, Page 0751.

TIME AND LOCATION OF SALE: Monday, October 19, 2009 at 10:30 A.M. at the Venango County Courthouse, Front Steps, 1168 Liberty Street, Franklin, PA 16323.

TERMS OF SALE: Successful bidder will pay ten percent (10%) by cashier's check, certified check or bank money order at the time of the sale and the remainder of the bid within thirty (30) days from the date of the sale and in the event bidder cannot pay the remainder, the property will be resold and all monies paid in at the original sale will be applied to any deficiency in the price at which the property is resold. The successful bidder must send payment of the balance of the bid directly to the U.S. Marshal's Office c/o Ms. Sheila Blessing, Room 241, U.S. Post Office & Courthouse, Pittsburgh, PA 15219. Notice is hereby given that a Schedule of Distribution will be filed by the Marshal's Office on the thirtieth day after the date of sale, and that distribution will be made in accordance with the Schedule unless exemptions are filed thereto within ten (10) days thereafter. The successful bidder takes the real estate subject to, and shall pay all

taxes, water rents, sewer charges, municipal claims, and other charges and liens not divested by the sale. Purchaser must furnish State Realty Transfer Tax Stamps, and stamps required by the local taxing authority. Purchaser shall furnish Marshal with Grantee information at the time of the sale. Marshal's costs, fees and commissions are to be borne by seller. Thomas M. Fitzgerald, United States Marshal. For additional information visit www.resales.usda.gov or contact Ms. Kimberly Williamson at 314-457-5513.

Sept. 25 and Oct. 2, 9, 16

Erie County Bar Association



*Women's
Lunch*

Friday, October 23, 2009

11:45 a.m. - 1:15 p.m.

*Anastasia Mansion
551 West Eighth Street
\$15/ECBA member*

purely social, purely fun!

Please reserve with the ECBA by Friday, October 16.

CRIMINAL LAW UPDATE 2009

a Lunch -n- Learn
presented by the
Erie County Bar Association
in cooperation with its Criminal Law Section.

Monday, October 19, 2009

Bayfront Convention Center

Time: Lunch: 11:45 a.m. - 12:15 p.m.
Seminar: 12:15 p.m. - 1:15 p.m.
Cost: \$27 (ECBA members)
\$39 (nonmembers)



SPEAKER:

ROBERT A. SAMBROAK, JR., ESQ.
Erie County District Attorney's Office

If you practice in the area of Criminal Law, you won't want to miss this pragmatic program. Offered just once a year, it provides a comprehensive review of the latest case law developments.

Our authoritative speaker's presentation is accompanied by valuable materials that categorize the case law updates and reduce your research time.

ECBA Financial Hardship Policy:

Any lawyer for whom the cost of an ECBA Continuing Legal Education program is a financial hardship may petition the ECBA Executive Director for a reduced fee. For more information on the policy and how to apply, please contact the ECBA office at 459-3111. All requests will be confidential.

THIS SEMINAR
HAS BEEN APPROVED
BY THE PA CLE BOARD
FOR 1 HOUR SUBSTANTIVE
LAW CREDIT.

Reservations are due to the ECBA office no later than Wednesday, October 14, 2009.

ISSUES FACING NONPROFIT ORGANIZATIONS IN 2009

*Special thanks to
The Erie Community Foundation
for generously sponsoring this
seminar, allowing us to offer
registration at a significantly
reduced cost.*



Tuesday, October 20, 2009

Bayfront Convention Center

Networking Breakfast & Registration: 7:45 a.m. - 8:30 a.m.

Seminar: 8:30 a.m. - 10:30 a.m.

\$20 (ECBA members)

\$35 (nonmembers)

SPEAKER:

Carolyn D. Duronio, Esquire

Partner at Reed Smith LLP, Pittsburgh, Pennsylvania

THE SEMINAR HAS BEEN APPROVED BY
THE PA CLE BOARD FOR 2 HOURS
SUBSTANTIVE LAW CREDIT.

Don't miss this timely and definitive seminar of interest to both accountants and attorneys, two professions who not only counsel nonprofits but are routinely asked to serve on their boards. This presentation will focus on "best practices" for boards of nonprofit organizations. It will also address the revised Form 990 as well as the heightened scrutiny on nonprofits by the Internal Revenue Service and the Pennsylvania Attorney General.

Reservations due to the ECBA office by Wednesday, October 14, 2009.

ESTATE NOTICES

Notice is hereby given that in the estates of the decedents set forth below the Register of Wills has granted letters, testamentary or of administration, to the persons named. All persons having claims or demands against said estates are requested to make known the same and all persons indebted to said estates are requested to make payment without delay to the executors or their attorneys named below.

FIRST PUBLICATION**COOKLIS, MICHAEL,
deceased**

Late of Erie County, Pennsylvania
Co-Executors: Karen L. Jendruczak and Michael W. Cooklis, c/o David W. Bradford, Esq., 50 West Main Street, North East, PA 16428
Attorney: David W. Bradford, Esq., 50 West Main Street, North East, PA 16428

**DIMPELFELD, DOROTHY K.,
deceased**

Late of the City of Erie
Executor: Jack M. Gornall, 120 West Tenth Street, Erie, PA 16501
Attorney: Jack M. Gornall, Esq., Knox McLaughlin Gornall & Sennett, P.C., 120 West Tenth Street, Erie, PA 16501

**FIGLIOMENI, FRANCES,
deceased**

Late of Millcreek Township, County of Erie and Commonwealth of Pennsylvania
Executrix: Lisa Davis, 300 State Street, Suite 300, Erie, PA 16507
Attorney: Thomas E. Kuhn, Esquire, Marsh, Spaeder, Baur, Spaeder & Schaaf, LLP, 300 State Street, Suite 300, Erie, PA 16507

**JONES, WARREN H., a/k/a
WARREN JONES,
deceased**

Late of the Township of Millcreek, County of Erie, Commonwealth of Pennsylvania
Executor: T. Warren Jones, 100 State Street, Suite 700, Erie, PA 16507-1459
Attorney: James D. Cullen, Esquire, MacDonald, Illig, Jones & Britton LLP, 100 State Street, Suite 700, Erie, Pennsylvania 16507-1459

**KUPNIEWSKI, ELEANOR a/k/a
ELEANORE KUPNIEWSKI,
deceased**

Late of the City of Erie, County of Erie, State of Pennsylvania
Executor: Raymond P. Kupniewski, 912 Rice Avenue, Girard, Pennsylvania 16417
Attorney: James R. Steadman, Esq., 24 Main St. E., Girard, Pennsylvania 16417

**LAMP, CURTIS E., JR.,
deceased**

Late of the Township of Fairview
Co-Administratrices: Patricia M. Thayer and Lisa L. Lamp
Attorney: Norman A. Stark, Esquire, The Stark Law Firm, 100 State Street, Suite 210, Erie, PA 16507.

**LANGE, LEONA M.,
deceased**

Late of the Township of Union, County of Erie, Commonwealth of Pennsylvania
Executrix: Michelle M. Blystone, 5 Miles Street, Union City, PA 16438
Attorney: Jeffrey G. Herman, Esq., Herman & Herman, 412 High Street, Waterford, PA 16441

**McDANNIELS, EDWARD P., JR.,
a/k/a E.P. McDANNIELS,
deceased**

Late of Lawrence Park Township, County of Erie, Pennsylvania
Executrix: Emily S. Tuttle, c/o 150 West Fifth St., Erie, PA 16507
Attorney: Colleen C. McCarthy, Esq., McCarthy, Martone & Peasley, 150 West Fifth St., Erie, PA 16507

**RICHARDS, MARY ELIZABETH,
deceased**

Late of the Township of Fairview, County of Erie, and Commonwealth of Pennsylvania
Executor: Lenore Matthers
Attorney: James D. McDonald, Jr., Esq., The McDonald Group, L.L.P., P.O. Box 1757, Erie, PA 16507-1757

**RULAND, LARRY KIM,
deceased**

Late of Springfield Township, County of Erie, Commonwealth of Pennsylvania
Administratrix: Julie Schmidt, c/o Quinn, Buseck, Leemhuis, Toohey & Kroto, Inc., 2222 West Grandview Blvd., Erie, PA 16506-4508
Attorney: Scott L. Wallen, Esq., Quinn, Buseck, Leemhuis, Toohey & Kroto, Inc., 2222 West Grandview Blvd., Erie, PA 16506-4508

**WALBRIDGE, VIOLA R.,
deceased**

Late of Fairview Township, Erie County, Commonwealth of Pennsylvania
Executor: Ronald K. Walbridge, 360 East Main Road, Conneaut, Ohio 44030
Attorney: Charles N. Lafferty, Esq., Lafferty Law Office, 365 Main St., P.O. Box 499, Conneaut, OH 44030

**WALSH, LAURA D.,
deceased**

Late of North East Borough, Erie County, North East, Pennsylvania
Administratrix: Margaret M. Walsh, c/o Edward Orton, 33 East Main Street, North East, Pennsylvania 16428
Attorney: Edward Orton, Esq., Orton & Jeffery, P.C., 33 East Main Street, North East, Pennsylvania 16428

**WARD, ROBERT J.,
deceased**

Late of the City of Erie, Erie County, Pennsylvania
Executor: Michael Sobieski, c/o McCarthy, Martone & Peasley, 150 West Fifth Street, Erie, Pennsylvania 16507
Attorney: Joseph P. Martone, Esquire, McCarthy, Martone & Peasley, 150 West Fifth Street, Erie, Pennsylvania 16507

**WEBER, JANET A.,
deceased**

Late of the City of Erie, County of Erie and Commonwealth of Pennsylvania
Executrix: Christine A. Bird-Hall, c/o Kurt L. Sundberg, Esq., Suite 300, 300 State Street, Erie, PA 16507
Attorneys: Marsh, Spaeder, Baur, Spaeder & Schaaf, LLP, Attorneys-at-Law, Suite 300, 300 State Street, Erie, PA 16507

SECOND PUBLICATION

**DASCANIO, JOHN J.,
deceased**

Late of Millcreek Township, Erie, Pennsylvania
Executor: Annette Fiorenzo, c/o Thomas C. Hoffman II, Esq., LLP, West 10th Street, Erie, PA 16501
Attorney: Thomas C. Hoffman II, Esq., Knox McLaughlin Gornall & Sennett, P.C., 120 West Tenth Street, Erie, PA 16501

**DEAN, ANNA B.,
deceased**

Late of the Township of Venango, County of Erie and Commonwealth of Pennsylvania
Executrix: Virginia Rotthoff
Attorney: Craig A. Zonna, Esquire, Elderkin, Martin, Kelly & Messina, 150 East 8th Street, Erie, PA 16501

**DUDEHNOEFER, MATILDA M.,
deceased**

Late of the City of Erie, County of Erie, Commonwealth of Pennsylvania
Executor: Frederick J. Dudenhoefer, 3540 Culpepper Drive, Erie, PA 16506
Attorneys: MacDonald, Illig, Jones & Britton LLP, 100 State Street, Suite 700, Erie, Pennsylvania 16507-1459

**MILLER, REGINA R., a/k/a
REGINA RUTH MILLER,
deceased**

Late of the Township of Millcreek, Erie County, Pennsylvania
Executor: Matthew Richard Miller, 935 Langdon Road, Erie, PA 16509
Attorney: Jeffrey D. Scibetta, Esq., Knox McLaughlin Gornall & Sennett, P.C., 120 West Tenth Street, Erie, PA 16501

**PIFER, HELEN E.,
deceased**

Late of the City of Erie, County of Erie, Pennsylvania
Executor: George A. Pifer, c/o Thomas E. Larson, 2820 W. 23rd St., Suite 101, Erie, PA 16506
Attorney: Thomas E. Larson, Esq., 2820 W. 23rd St., Suite 101, Erie, PA 16506

**WHITESEL, LEE DeWAYNE,
deceased**

Late of the City of Titusville, County of Erie and Commonwealth of Pennsylvania
Executrix: Rose M. Whitesel, c/o 504 State Street, Suite 300, Erie, PA 16501
Attorney: Alan Natalie, Esquire, 504 State Street, Suite 300, Erie, PA 16501

THIRD PUBLICATION

**DONNEY, RAYMOND W.,
deceased**

Late of the City of Erie, Commonwealth of Pennsylvania
Executor: Thomas C. Hoffman II, c/o Thomas C. Hoffman II, Esq., 120 West 10th Street, Erie, PA 16501
Attorney: Thomas C. Hoffman II, Esq., Knox McLaughlin Gornall & Sennett, P.C., 120 West Tenth Street, Erie, PA 16501

**HARMAN, FLOYD W., a/k/a
FLOYD W. HARMON,
deceased**

Late of the Township of Harborcreek
Executrix: Beverly Ann Nelson, c/o 731 French Street, Erie, PA 16501
Attorney: Jeffrey J. Jewell, Esquire, Arduini, Jewell and Karn, 731 French Street, Erie, PA 16501

**HAYES, NORBERT G., a/k/a
NORBERT GLENN HAYES,
deceased**

Late of the Township of Franklin, County of Erie, State of Pennsylvania
Executrix: Judith A. Hayes, 6824 Darlan Drive, Howell, MI 48843
Attorney: James R. Steadman, Esq., 24 Main St. E., Girard, Pennsylvania 16417

**HOWLES, LEWIS J.,
deceased**

Late of the City of Erie, County of Erie, Commonwealth of Pennsylvania
Executor: Lester L. Howles, 618 Samuel Drive, Madison, WI 53717
Attorney: MacDonald, Illig, Jones & Britton LLP, 100 State Street, Suite 700, Erie, Pennsylvania 16507-1459

**LASKEY, DEBORAH M.,
deceased**

Late of Edinboro, City of Erie,
State of Pennsylvania
Executor: Alan W. Laskey, 2741
West 8th Street, Suite 16, Erie, PA
16505
Attorney: Robert C. Brabender,
Esquire, 2741 West 8th Street,
Suite 16, Erie, PA 16505

**MANDO, MERA LE R., a/k/a
MERALE R. MANDO,
deceased**

Late of the Borough of Lake
City, County of Erie and State of
Pennsylvania
Executrix: Susan C. Stahon, 964
W. 26th Street, Apt. 3, Erie, PA
16508
Attorney: David M. Keck, Esq.,
7728 Main Street, P.O. Drawer
S., Fairview, PA 16415

**McCLELLAN, LANE G.,
deceased**

Late of Millcreek Township, Erie
County, Pennsylvania
Executor: Cynthia L. Arnemann,
c/o McCarthy, Martone &
Peasley, 150 West Fifth Street,
Erie, Pennsylvania 16507
Attorney: Joseph P. Martone,
Esquire, McCarthy, Martone &
Peasley, 150 West Fifth Street,
Erie, Pennsylvania 16507

**McLEAN, KEITH O.,
deceased**

Late of the City of Erie
Executor: John M. DeBello, 3524
West 12th Street, Erie, PA 16505
Attorney: Jerome C. Wegley,
Esq., Knox McLaughlin Gornall
& Sennett, P.C., 120 West Tenth
Street, Erie, PA 16501

**PERDUE, JANICE,
deceased**

Late of the City of Erie, County
of Erie and Commonwealth of
Pennsylvania
Executrix: Gretchen A.
Perkowski, c/o Eugene C.
Sundberg Jr., Esq., Suite 300, 300
State Street, Erie, PA 16507
Attorney: Marsh, Spaeder,
Baur, Spaeder & Schaaf, LLP,
Attorneys-at-Law, Suite 300, 300
State Street, Erie, PA 16507

**SACK, LATITIA E.,
deceased**

Late of Lawrence Park Township,
Erie County, Erie, Pennsylvania
Executor: Howard MacLennan,
c/o Attorney Edward Orton, 33
East Main Street, North East,
Pennsylvania 16428
Attorney: Edward Orton,
Esq., Orton & Jeffery, P.C., 33
East Main Street, North East,
Pennsylvania 16428

**SCHWAB, MARK S., a/k/a
MARK STEPHEN SCHWAB,
deceased**

Late of the Township of Fairview,
County of Erie, Commonwealth
of Pennsylvania
Executrix: Laura A. Schwab,
1405 Pasadena Drive, Erie, PA
16505-2724
Attorney: MacDonald, Illig,
Jones & Britton LLP, 100
State Street, Suite 700, Erie,
Pennsylvania 16507-1459

CHANGES IN CONTACT INFORMATION OF ECBA MEMBERS

Valerie H. Kuntz ----- (814) 833-2222
Quinn, Buseck, Leemhuis, Toohey & Kroto, Inc. ----- (f) (814) 833-6753
2222 West Grandview Blvd.
Erie, PA 16506 ----- *vkuntz@quinnfirm.com*

New Phone Number

Matthew J. Parini ----- (814) 464-0638
Recent issues of the Legal Journal advertised a change with the incorrect phone number
John H. Moore ----- (814) 790-4866

New Email Address

Elizabeth Walbridge ----- *elizabethwalbridge@gmail.com*
Ronald A. DiNicola ----- *Ronald@DiNicolaGroup.com*

New Address Effective October 5 through January 1, 2010

Melissa LaFata Pagliari
c/o Raymond A. Pagliari, Jr., Esquire
307 French Street
Erie, PA 16507 ----- *Melissa.Pagliari@gmail.com*

IF THERE ARE ANY NEW ATTORNEYS IN ERIE INTERESTED IN JOINING
THE ERIE COUNTY BAR ASSOCIATION, PLEASE
CALL 459-3111 AND AN APPLICATION WILL BE MAILED TO YOU OR GO TO OUR
WEBSITE AT WWW.ERIEBAR.COM AND FILL OUT THE ONLINE APPLICATION.

IF YOU KNOW OF ANY ADDRESS CHANGES
PLEASE CONTACT THE LEGAL JOURNAL OFFICE AT 459-3111
OR ADMIN@ERIEBAR.COM. THANK YOU.

The Erie County Bar Foundation and its Justice Samuel J. Roberts Scholarship Fund
continue to be in need of contributions to support this scholarship program.

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