Barth v. Barth

Equitable division of property — Partnership interest — Termination of interest

In this divorce proceeding, husband's interest in a limited partnership was not included in the division of property, because the partnership agreement contained a valid provision stating that a partner's interest was terminated if that person divorced.

Wife filed an action for dissolution of marriage. The parties were married in July 1999. They separated in December 2014. During the marriage, husband obtained a 33% interest in a limited partnership known as Barth Family Ltd. ("BFL"). BFL was created in December 1999, by husband's parents. Husband and one of his brothers were named as limited partners of BFL from the beginning, but the initial capital contributions, totaling $653,000, were made solely by husband's parents. Over the years, husband and his brother made gifts of partnership interests to a third brother, with all three brothers eventually owning an equal number of units in BFL. In 2012, the brothers and their parents entered into a settlement agreement and mutual release. Husband and his brothers bought out their parents' entire interest in BFL in 2013 by paying them $1.3 million.

Husband sought a declaratory judgment for ancillary relief, asking the court to make a declaration regarding husband's ownership interest in BFL and whether any such interest constituted marital property for purposes of equitable distribution in the divorce. At the hearing on the declaratory relief matter, wife testified that there was no discussion with husband during the marriage relating to the BFL limited partnership agreement. Wife was not involved in the drafting of the agreement and was never asked for her input. She only became aware of the limited partnership agreement three months after the parties separated. Wife acknowledged she did not know anything about the books of the partnership. With regard to the division of property in the divorce, wife made a claim for equitable distribution as to husband's ownership interest in BFL.

The limited partnership agreement for BFL recited that all capital contributions were made by husband's parents. Paragraph 15 of the limited partnership agreement specifically provided that if a limited partner died, divorced, became insane, or had a judgment entered against him in excess of $1,000, that partner's interest was terminated immediately and his interest in BFL was to be distributed on a pro rata basis among the remaining limited partners.

The court held that paragraph 15 was enforceable, because it clearly, concisely and unambiguously provided that upon divorce, a partner's interest was terminated and distributed among the other partners. Accordingly, the court determined it was required to give effect to the language contained in the limited partnership agreement. Husband received the property as a gift from his parents, so his ownership interest in BFL was non-marital property. However, the increase in value was marital property. The court directed the equitable master to first calculate the increase in value over the course of the marriage of husband's ownership interest in BFL, then use this calculated increase as a factor in forming the equitable distribution recommendation. The court also indicated the master should not use the increase in value figure in husband's ownership interest in BFL as a dollar-for-dollar offset, nor consider husband's interest in BFL as an asset, because once the divorce degree was entered, husband would no longer own the interest in the partnership.

C.P. of Lawrence County,

Susan M. Papa, for plaintiff
Frank G. Verterano, for defendant
Phillip L. Clark, for additional defendants

HODGE, *J*., Mar. 24, 2017—This matter is before the Court on an action for Declaratory Judgment for Ancillary Relief filed on behalf of the Defendant, Daniel Barth. The Plaintiff in this matter is Michelle Barth. The Additional Defendant, Barth Family Ltd. (hereinafter, "BFL")., is a limited partnership formed in Ohio. This action involves Defendant's ownership interest in BFL and whether any such interest constitutes marital property for purposes of equitable distribution.

Procedural and Factual Background

Plaintiff filed a divorce complaint in this matter on December 30, 2014. The divorce complaint seeks equitable distribution of marital properties, primary physical custody of the parties' three (3) minor children, alimony *pendente*

lite, alimony, costs, expenses and attorney's fees. With the consent of Plaintiff, the Defendant filed an Amended Response to Plaintiff's divorce complaint including an action for Declaratory Judgment for Ancillary Relief. A hearing on the action was conducted before the Court on November 3, 2016. All parties have since filed briefs in support of each party's respective position.

The Plaintiff and Defendant were married on July 10, 1999. They separated on December 6, 2014. During the course of the marriage, the Defendant obtained a 33% interest in BFL. Defendant possesses his interest in BFL with his two (2) brothers, Brian C. Barth and Scott D. Barth (collectively, the "Barth Brothers"). Each Barth Brother owns 33% of BFL, totaling 99% of ownership in the business. The remaining 1% interest in BFL is owned by Barth Brothers Land Holdings, LLC, (hereinafter, "BBLH"), a limited liability company, whereby BBLH is the general partner of BFL. The Defendant owns a 33 1/3% interest in BBLH. The Defendant's two brothers also each own a 33 1/3% interest in BBLH as well.

BFL was created on December 16, 1999 by Defendant's parents, Charles C. Barth and Carolyn L. Barth (collectively, the "Barth Parents") with Scott Barth and the Defendant. Pursuant to the BFL Limited Partnership Agreement, the Barth Parents were both general partners and limited partners of the business, and Scott Barth and the Defendant were named as limited partners. The initial capital contribution the Barth Parents made to BFL was $326,500.00 each, a total of $653,000.00. Neither Scott Barth nor the Defendant contributed money towards the

formation of BFL.[1]

Over the course of six years after creation of BFL, Scott Barth and the Defendant made gifts of partnership units to Brian Barth, the third sibling, and as a result of the annual gifting, all three Barth Brothers eventually owned an equal number of units in BFL. In 2012, the Barth Brothers and the Barth Parents entered into a Settlement Agreement and Mutual Release regarding BFL and a business called, "B&B Farms, Inc." As of December 20, 2013, the Barth Brothers bought out the Barth Parents' entire general and limited partnership interests in BFL, paying them $1,300,000.00 and allowing the Barth Parents to reserve 42% of the mineral rights and oil and gas rights for the associated real property. The Barth Brothers also bought out the Barth Parents' interest in B&B Farms, Inc. The amount paid by the Barth Brothers to the Barth Parents for their interests in BFL and B&B Farms, Inc. and towards certain loans was a total $2,200,000.00. The Barth Brothers obtained a loan from AgChoice Farm Credit to make the payment.

During the hearing conducted regarding the action for declaratory judgment, the Plaintiff testified that during the marriage, there was no discussion with the Defendant relative to the BFL Limited Partnership Agreement. (N.T., Nov. 3, 2016, pps. 8, 9). The Plaintiff testified that she was not involved in any way in drafting the Agreement. (NT., Nov. 3, 2016, pps. 8, 9). Plaintiff further testified that the Defendant never asked for Plaintiff's input regarding the Agreement, nor presented Plaintiff with the Agreement

1. Although Scott Barth contributed certain real property to BFL after its creation, this real property was initially gifted to him by the Barth parents.

itself for any review during their marriage. (N.T., Nov. 3, 2016, p. 9).[2] Plaintiff indicates that she only became aware of the Limited Partnership Agreement three (3) months after the parties separated, when she learned of its existence from Nicole Barth, Scott Barth's wife. (N.T., Nov. 3, 2016, p. 10).

Plaintiff testified that in March of 2014, Defendant told her that once the Barth Brothers obtained control of the farm, each Barth Brother would be worth $3,300,000.00. (N.T., Nov. 3, 2016, pps. 13-14). Plaintiff reports that shortly after this conversation, "things got weird" and "everything became a secret." (N.T., Nov. 3, 2016, p. 14). Plaintiff acknowledges that she did not know anything about the books of the partnership, but only know that the Barth Brothers had to pay the Barth Parents $2,000,000.00. (N.T. Nov. 3, 2016, pps. 19-21). Plaintiff is currently making a claim for equitable distribution as to Defendant's ownership interest in BFL and BBLH. (N.T., Nov. 3, 2016 pps. 11-12).

During cross examination, the following questioning occurred between Defendant's Counsel and the Plaintiff:

> Q. Mrs. Barth, do you know how Dan (the Defendant) acquired the initial interest in the partnership (BFL)?
>
> A. No.
>
> Q. You don't know that it was gifted to him by his mom and dad?

2. A review of the Limited Partnership Agreement reveals that the Plaintiff is not a signatory party to the Agreement. Moreover, the Court has not been presented with any written waiver and/or release executed by Plaintiff relative to the Limited Partnership Agreement.

A. Well, yes, I know that. (N.T., Nov. 3, 2016, p. 15).

Later, the Plaintiff testified as follows:

Q. What did you pay for the partnership?

A. They — they used us for —

Q. No, I mean in money. Can you tell us how much money was paid?

A. I don't know. (N.T., Nov. 3, 2016, pps. 18-19).

Defendant testified that Plaintiff was aware of the BFL Partnership Agreement shortly after 1999, at a time when the Defendant then showed the Agreement to her. (N.T., Nov. 3, 2016, pps. 105-106).

Exhibits

At the hearing of November 3, 2016, multiple exhibits were admitted into the evidence. The exhibits go into detail and lay a foundation for the Court to analyze the respective ownership interests of not only the parties to the litigation, but also as to any limited or general partners of the business entities. The exhibits are summarized below.

Plaintiff's Ex. 1 — A copy of the Settlement Agreement and Mutual Release. This document was entered into on December 31, 2012 by and among the Barth Parents, the Barth Brothers, BFL and B&B Farms, Inc. This Agreement and Release references a dispute described in a Memorandum dated November 15, 2007. The parties were involved in mediation on or about October 24, 2012 which resulted in a resolution of all issues among the respective parties. Among the essential terms of this Agreement and Release are that in consideration of $362,000.00,

all shares of stock in B&B Farms, Inc. owned by the Barth Parents would be redeemed by B&B Farms, Inc.; in consideration of payment of the sum of $1,338,000.00 by the Barth Brothers, the entire general and limited partnership interest of the Barth Parents in BFL would be liquidated from BFL, with the Barth Parents to receive an additional 42% interest in all mineral rights on land owned by BFL; that B&B Farms, Inc. would pay to the Barth Parents the sum of $545,000.00 in annual payments of $54,500.00 principle, commencing on January 1, 2014, and continuing each year for a period of ten (10) years thereafter, with interest at the rate of 6% per annum; and, that there is a full and complete release by and between all parties. Paragraph 20(i) of the Agreement and Release provides that the Agreement shall be construed and interpreted in accordance with, and governed by, the laws of the Commonwealth of Pennsylvania.

BFL's Exhibits

Exhibit A — BFL filings with the Department of the State of Ohio. These documents provide that in 2014, the Barth Parents resigned as general partners of BFL and have liquidated and relinquished their entire interest as such in BFL to BBLH.

Exhibit B — the Limited Partnership Agreement for BFL. The Partnership Agreement was entered on December 16, 1999 by the Barth Parents, the Defendant and Scott Barth. The Agreement indicates that all capital contributions were made only by the Barth Parents. Paragraph 15 of this Agreement provides that should a limited partner die, *divorce*, become insane, or have a judgment entered against them in excess of $1,000.00, that partner's interest shall be terminated immediately, and

that limited partner's interest in BFL shall be distributed on a pro-rata basis among the remaining Limited Partners (*emphasis added*).[3]

Exhibits C and D — Assignments of Partnership Interests. These documents provide that each Barth Parent gifted 1,513 BFL units to the Defendant.

Exhibit E — Amended Statement of the Capital Contributions of the Limited Partners as of June 1, 2000. This document in part provides that Scott Barth contributed certain acreage to BFL.

Exhibits F through N — A series of Amended Certificates of Limited Partnership regarding BFL commencing on December 20, 2000 and ending on December 31, 2013. Exhibit N provides that as of December 20, 2013, Scott Barth, Brian Barth and the Defendant each possessed a 33% ownership interest in BFL and BBLH was a 1% general partner with BFL.

Exhibit O — Certificate of Organization of BBLH as a Pennsylvania Domestic Limited Liability Company filed on January 3, 2013 with the Pennsylvania Department of State. The BBLH Limited Liability Company Operating Agreement and other schedules are attached to this Certificate. This Exhibit reflects that the Scott Barth, Brian Barth and the Defendant each possess a 1/3 ownership interest in BBLH as of January 3, 2013.

Issue

The issue before the Court involves the enforceability of

3. Scott Barth and Brian Barth each testified that if Defendant becomes divorced, the expectation is that Defendant's interest in BFL would be terminated, and he would not later simply be given back an interest in BFL. (N.T., Nov. 3, 2016, pps. 49-50, 97-98).

Paragraph 15 of the BFL Limited Partnership Agreement and its effect on distribution of the marital estate of the Plaintiff and Defendant in that the Agreement provides that if a partner, i.e., the Defendant, shall become divorced, upon his divorce, his interest in BFL shall be terminated and distributed to the remaining partners.

Legal Analysis and Conclusion

The language of Paragraph 15 in the Limited Partnership Agreement is clear, concise and unambiguous. It clearly provides that should a limited partner divorce, that partner's interest shall be terminated immediately and be distributed to the remaining limited partners. As mentioned previously, Paragraph 23 of the Agreement provides that the Agreement shall be governed by, construed and enforced in accordance with the laws of the State of Ohio. With this understanding, no party objected to the Court of Common Pleas of Pennsylvania to decide the declaratory judgment action currently before it.

Generally, Pennsylvania courts must give plain meaning to a clear and unambiguous contract provision unless to do so would be contrary to a clearly expressed public policy. *Prudential Property and Casualty Ins. Co. v. Colbert*, 572 Pa. 82, 87, 813 A.2d 747, 750 (2002). Where the language of the contract is clear and unambiguous, a court is required to give effect to that language. *Prudential Property and Casualty Ins. Co. v. Sartno*, 588 Pa. 205, 212, 903 A.2d 1170, 1174 (2006). Similarly, in Ohio, the courts will look to the plain and ordinary meaning of the language used in the contract unless another meaning is clearly apparent from the contents of the agreement. *Sunoco, Inc. (R&M) v. Toledo Edison Co.*, 129 Ohio St.3d 394, 2011 Ohio 2720, 953 N.E.2d 285 (2011). When the language of a written

contract is clear, an Ohio court may look no further than the writing itself to find the intent of the parties. *Id.*

In the case *sub judice*, the Barth Parents initiated the creation a partnership entity after having amassed significant assets. They contributed these assets to the formation of the BFL and brought in the Defendant to the partnership at no cost to him. The Barth Parents have the legal right to create an estate plan which they believe would be in their long term best interest, as well as the best interest of their family members. To that end, when creating BFL as a legal entity, the language of paragraph 15 was added to the BFL Partnership Agreement in order to attempt to protect Barth family assets should a partner become divorced and lose assets as a result of the divorce process.[4]

Because the language used in Paragraph 15 of the BFL Limited Partnership Agreement is clear, based upon both Pennsylvania and Ohio law, the Court is to give effect to the meaning of this language. The Court cannot rewrite the contractual status of the parties simply because the Court may believe this situation will not result in fair, just or equitable relief to Plaintiff relative to the divorce proceedings.

Section 3501(a) of the Divorce Code provides that, generally, all property acquired by either party during a marriage, and the increase in value of any non-marital property, is "marital property" and is subject to equitable distribution. 23 Pa.C.S.A. §3501 (a). Section 3501(a) (3) of the Code provides that marital property does

4. The Court notes that Plaintiff's signature is not part of any agreement whereby she has an ownership interest in any business controlled by any of the Barth parents or Barth brothers.

not include property acquired by gift, except between spouses, bequests, devise or dissent or property acquired in exchange for such property. 23 Pa.C.S.A. §3501 (a)(3).

First, the Court determines that the initial ownership interest in BFL obtained by Defendant was gifted to him by the Barth Parents. As such, the Defendant's ownership interest in BFL, by definition, is non-marital property. However, an increase in value of the Defendant's ownership interest in BFL may have occurred over the course of the marriage between the Plaintiff and the Defendant. Such an increase in value would customarily be considered to be marital property. Of utmost significance, however, is here, due to the Barth Parents' family planning strategies, once a divorce decree is entered, the Defendant shall no longer own a BFL partnership interest as an asset. This scenario shall have a direct, negative effect on the marital estate of which Plaintiff is to share for equitable distribution purposes. These circumstances are exceptionally unique.

Based upon all of the foregoing, the Court concludes that the most proper method to move forward is to direct the Equitable Distribution Master to first calculate the increase in value over the course of the marriage of Defendant's ownership interest in BFL. Then, the Master should use this calculated increase in value as a factor in forming the equitable distribution recommendation. The Master should also consider that the Defendant entered into the Partnership Agreement with the Barth Parents, and that by including Paragraph 15 of the Agreement, the marital estate, a portion of which the Plaintiff would be entitled, has been negatively impacted. Lastly, the Master should not use the increase in value figure in Defendant's ownership interest in BFL as a dollar-for-dollar offset, nor

consider the Defendant's ownership interest in BFL as an asset, because once a divorce decree is entered, Defendant will no longer own the interest in BFL and it shall have no value to him.

ORDER OF COURT

AND NOW, this 24th day of March, 2017, this matter being before the Court on Defendant's action for Declaratory Judgment for Ancillary Relief, with the Plaintiff, Michele Barth, represented by Susan M. Papa, Esquire, the Defendant, Daniel Barth, represented by Frank G. Verterano, Esquire, and the Additional Defendants, Barth Family Ltd., represented by Phillip L. Clark, Jr., Esq., and after a complete and thorough review of the applicable record, in accordance with the accompanying Opinion, the Court hereby ORDERS and DECREES as follows:

1. The initial ownership interest of the Defendant, Daniel Barth, in the business entity, Barth Family Ltd., was gifted to him by his parents, Charles Barth and Carolyn Barth. Therefore, the Defendant's ownership interest in Barth Family Ltd. is non-marital property belonging to the Defendant.

2. Paragraph 15 of the Barth Family Ltd. Limited Partnership Agreement is enforceable. Due to such enforceability, once a divorce decree is entered between the Plaintiff, Michele Barth, and Defendant, the Defendant's ownership interest in Barth Family Ltd. will be terminated.

3. The Master is first directed to calculate any increase in value of Defendant's ownership interest in Barth Family Ltd. which occurred over the course of the marriage between Plaintiff and Defendant. The Master is then

directed to fully consider this increase in value, as well as the effect of Defendant having entered into the Partnership Agreement containing Paragraph 15 to the detriment of the marital estate and its impact on Plaintiffs claim for equitable distribution, as a factor in forming the equitable distribution recommendation. The Master shall not use the calculated increase in marital value as a dollar-for-dollar offset, nor consider the increase in value as an individual asset to be distributed.

4. Further proceedings shall be in accordance with the Pennsylvania Rules of Civil Procedure and the Pennsylvania Divorce Code.

5. The Prothonotary shall properly serve notice of this Order upon counsel of record, and if a party has no counsel, then upon said party at their last known address as contained in the Court's file.

ACS171921, LLC v. Pa. Liquor Control Board

Licensing — Liquor license — Intermunicipal transfer — Reasons for rejection

The Reading Township Board of Supervisor's reasons for denying applicant's request for approval of an intermunicipal transfer of a liquor license pursuant to 47 P.S. §4-461(b.3) were not supported by substantial evidence where there was no objective evidence that granting the request would be contrary to the health, safety and welfare of the citizens of the township. The court approved applicant's request for an intermunicipal transfer of a liquor license.

In early 2016, counsel for applicant ACS171921, LLC asked the solicitor for Reading Township to approve an intermunicipal transfer of a liquor license pursuant to 47 P.S. §4-461(b.3). The license, previously issued to a location in Littlestown, would be transferred to a Rutters store in Reading Township. At a hearing on the matter, the applicant's counsel

explained that Rutters was only interested in beer sales, including craft beer, to be housed in only one section of the store with select hours of operation. Members of the public raised various objections to Rutters selling alcohol at the subject location. After the hearing, the Reading Township Board of Supervisors (Town Board) unanimously voted to reject applicant's request. Applicant then applied to the Pennsylvania Liquor Control Board (Liquor Board) for an intermunicipal transfer of a liquor license. The Liquor Board denied the application. Thereafter, the Court of Common Pleas of Adams County granted applicant's motion for remand and directed Reading Township to file findings of fact and reasons for its decision. The Town Board said in findings of fact and reasons that it rejected the application because the Rutters store functions as a "farm" store for the community, being a store catering to a general agricultural community, which was not compatible with the sale of beer. Moreover, the store was located at a busy intersection which would be made more so by additional store patrons seeking to buy beer. Finally, the Town Board reasoned that the township already had two locales serving beer to the public and a beer distributorship, which entities sufficiently met the public's demand for beer product. Applicant then petitioned for appeal from the Town Board's decision denying its request for approval of the intermunicipal transfer of the liquor license into Reading Township. The court granted applicant's petition. Section 461(b.3) of Pennsylvania's Liquor Code governs the intermunicipal transfer of liquor licenses, the court explained. Section 461(b.3) is silent as to the standard a municipality must use when deciding whether to grant or deny a request for an intermunicipal transfer of a liquor license. "Without any standard, the board of supervisors could arbitrarily deny or grant a request for an intermunicipal transfer of a liquor license," the opinion said. The evidence in this case consisted only of the testimony of applicant's attorney and comments from members of the public. There was no objective evidence of record that granting applicant's request would be contrary to the health, safety and welfare of the citizens of the township, the court observed. The court thus found, under Local Agency Law, that the Town Board's reasons for its decision were not supported by the substantial evidence and that applicant was entitled to relief.

C.P. of Adams County, Civil 2016-S-1158

L. C. Heim, Esq., for plaintiff
Robert W. McAteer, for defendant PLCB
Victor A. Neubaum, for defendant Reading Township

WAGNER, *J.*, September 6, 2017—Before this Court is Plaintiff's Petition for Appeal from Decision of Reading Township denying Plaintiff's request for approval of the intermunicipal transfer of Pennsylvania Restaurant Liquor License R-18379 into Reading Township, such Petition for Appeal filed on June 30, 2017. For the reasons set forth herein, Plaintiff's Petition for Appeal from Decision of Reading Township is hereby granted.

PROCEDURAL BACKGROUND

On March 17, 2016, counsel for ACS171921, LLC (hereinafter referred to as Plaintiff) hand delivered a letter to Reading Township's Solicitor requesting the Township approve an intermunicipal transfer of a liquor license.[1] On April 19, 2016, Reading Township held a public hearing on the matter. Plaintiff's counsel attended the hearing and presented testimony.[2] At the meeting, Defendant (Reading Township Board of Supervisors, hereinafter referred to as Reading Township) unanimously voted to reject Plaintiff's request for an intermunicipal transfer of a liquor license.[3]

Thereafter, Plaintiff sent an application for an intermunicipal transfer of a liquor license to Defendant (Pennsylvania Liquor Control Board, hereinafter referred to as PLCB) arguing because "the Township failed to act . . . its application was deemed approved."[4] On October 31, 2016, PLCB sent Plaintiff's counsel a letter informing him the application for an intermunicipal transfer of a liquor license "had been cancelled."[5]

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1. *See* Plaintiff's Petition to Appeal, Exhibit B.
2. Plaintiff's Petition to Appeal at para. 8 and 9.
3. *See* Defendant's Motion to Dismiss Petitioner's Appeal, Exhibit A at 3.
4. *Id.* at para. 6.
5. *See* Plaintiff's Petition to Appeal, Exhibit A. The letter stated, in

On November 16, 2016, Plaintiff filed a Petition for Appeal from PLCB's decision to deny the intermunicipal transfer. This Court issued a rule to show cause order on PLCB on November 18, 2016 which directed PLCB to answer Plaintiff's Petition for Appeal within twenty (20) days of service. On December 13, 2016, PLCB filed a Motion to Dismiss Petitioner's Appeal. Plaintiff filed its Answer to Motion to Dismiss Appeal and Plaintiff's Brief in Support of Petition of Appeal and in Opposition to PLCB's Motion to Quash on December 21, 2016 and January 10, 2017, respectively. By Order of Court dated January 12, 2017, this Court scheduled oral argument for February 3, 2017. On January 18, 2017, this Court stayed paragraph two of its November 18, 2016 Court Order requiring PLCB to file an Answer to Petitioner's Appeal within twenty (20) days. Argument before this Court occurred on February 3, 2017.

On February 13, 2017, PLCB filed a Motion to Join Indispensable Party, seeking to join Reading Township, Adams County, Pennsylvania as an indispensable party in the above-captioned litigation. This Court, on February 15, 2017, issued a rule to show cause order on Plaintiff and Reading Township directing them to file an Answer to PLCB's Motion to Join Indispensable Party. On February 23, 2017, Plaintiff filed Plaintiff's Answer to Defendant's Motion to Join Reading Township. Reading Township filed its Answer on March 2, 2017. By Order of Court dated March 13, 2017, this Court granted PLCB's Motion to Join Indispensable Party and joined Reading Township

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relevant part, "[s]ince a municipal resolution was not received from the receiving municipality, Reading Township, the information you provided was referred to our Legal Bureau for decision. Legal has opined the application should be denied." *Id.*

as an indispensable party to the above-captioned action.

On April 7, 2017, Plaintiff filed a Motion for Remand, seeking the "matter be remanded to the Township for the entry by the Township of a resolution either approving the transfer of the license into the Township or disapproving the transfer of the license into the Township, which resolution shall contain findings of fact from the existing record, without re-hearing, that are supported by evidence in the record." On April 21, 2017, this Court scheduled a pre-trial conference for May 8, 2017. Following pre-trial conference, this Court issued, on May 8, 2017, a rule to show cause order upon PLCB and Reading Township to show cause why Plaintiff's Motion for Remand should not be granted. On May 19, 2017, PLCB filed its Answer to Petitioner's Motion for Remand. Thereafter, Reading Township filed its Answer and Memorandum of Law in Support of its Answer on May 26, 2017. In accordance with Local Agency Law, 2 *Pa. C.S. § 555*, this Court, on June 8, 2017, granted Plaintiff's Motion for Remand and directed Reading Township to file, within thirty (30) days from the date of the Order, Findings of Fact and Reasons for Decision, regarding the hearing held before Reading Township Board of Supervisors on April 19, 2016.

On June 21, 2017, Reading Township filed Findings of Facts and Reasons for Decision of Reading Township. On June 30, 2017, Plaintiff filed a Petition for Appeal from Decision of Reading Township denying Plaintiff's request for an intermunicipal transfer of liquor license. On July 12, 2017, this Court ordered PLCB and Reading Township "thirty (30) days from receipt of this Order of Court to file a brief in reference to Plaintiff's Petition for Appeal from Decision of Reading Township." Plaintiff filed Plaintiff's

Supplementary Brief in Support on July 21, 2017. Reading Township filed its Brief of Reading Township on Petition for Appeal of ACS171921, LLC on July 31, 2017. On August 3, 2017, PLCB filed its Brief Responding to Plaintiff's Petition for Appeal from Decision of Reading Township. Finally, on August 7, 2017, Plaintiff filed Plaintiff's Reply Brief in Support of Petition for Appeal.

READING TOWNSHIP'S FINDINGS OF FACT

For ease of reference, this Court is including in its Opinion Reading Township's Findings of Facts and Reasons for Decision.

1. On March 17, 2016, ACS171921, LLC, by their attorney, L.C. Heim, Esq., requested by way of a letter to the Reading Township, for approval of an intermunicipal transfer of the license pursuant to 47 P.S. § 4-461(b.3).

2. That letter requested a public hearing for the purpose of receiving comments and recommendations of interested individuals residing within the municipality concerning the transfer.

3. The request indicated that the license was currently in safekeeping and was previously issued to the premises at 2350 Harney Road, Littlestown, [Adams County], and, the license would be transferred to 2115 East Berlin Road, Reading Township, Adams County. This location is a Rutters Store ("Rutters"). The letter referenced "transfer of Pa. Liquor License #R-18379, LID 58967."

4. Reading Township scheduled a public hearing on Applicant's request for its regularly scheduled meeting

of the Board of Supervisors for April 19, 2017 [sic] and advertised Notice of the Hearing in the Evening Sun Newspaper (Hanover, PA) on March 31, 2016 and April 7, 2016.

5. On April 19, 2016, the Reading Township Board of Supervisors ("Board") held its regular meeting; during this meeting, the Board held a hearing on the request of Applicant. Chairman Paul Bart, Vice-Chairman Marcia Weaver and Supervisor Donald Kauffman were in attendance for the Board of Supervisors.

6. Appearing on behalf of the Applicant was L.C. Heim, Esq. Attorney Heim represented to the Board that there first must be a resolution approving the request. Attorney Heim also indicated that although this is an R license transfer, Rutters "is only interested in beer sales, including craft beer" that will be housed in only one section of the store with select hours of operation. The business would be primarily carryout of the beer, but seating would be provided such that patrons could drink a beer on the premises. Following the Liquor Code, hours of operation are: 7:00 A.M. until 2:00 A.M. every day except Sundays, which would be 9:00 A.M. to 2:00 A.M.

7. No other person appeared at the hearing representing Applicant.

8. Subsequently, comment from the public was received by the Board. The members of the public voiced various objections to Rutters selling alcohol at that location, including comments that: Rutters is a farm store; that the roadway intersection is already a dangerous intersection; and adding alcohol sales there would

make the dangerous intersection more dangerous; and, there are many bars in the area and a beer distributor where alcohol can already be purchased. One member of the public spoke in favor of the application.

9. Following public comment, the Board closed the hearing. By motion of Supervisor Bart, the Board of Supervisors voted to reject the application with a vote of three votes in favor to reject and no votes against.

READING TOWNSHIP'S REASONS FOR REJECTION

The Board of Supervisors rejected the application for the reasons stated by the public at the meeting.

1. The Rutters store functions as a "farm" store for the community, being a store catering to a generally agricultural community, which is not compatible with its sale of beer.

2. The intersection of Pa. Rt. 94 and Pa. Rt. 234 is a busy and dangerous intersection which would be made more so by the additional customers patronizing the Rutters for the purpose of purchasing alcoholic beverages.

3. Reading Township already has two locales that serve beer to the public, along with a beer distributorship 5 miles away from the Rutters in the Borough of East Berlin, all of which sufficiently meet the demand for the consumption of beer products.

LEGAL STANDARD

Section 461(b.3) of the Liquor Code states, in relevant part, that

> An intermunicipal transfer of a license or issuance of a license for economic development under subsection (b.1) (2)(i) must first be approved by the governing body of the receiving municipality when the total number of existing restaurant liquor licenses and eating place retail dispenser licenses in the receiving municipality equal or exceed one license per three thousand inhabitants. Upon request for approval of an intermunicipal transfer of a license or issuance of an economic development license by an applicant, at least one public hearing shall be held by the municipal governing body for the purpose of receiving comments and recommendations of interested individuals residing within the municipality concerning the applicant's intent to transfer a license into the municipality . . . . The governing body shall, within forty-five days of a request for approval, render a decision by ordinance or resolution to approve or disapprove the applicant's request for an intermunicipal transfer of a license . . . . The municipality may approve the request. A decision by the governing body of the municipality to deny the request may not be appealed. A copy of the approval must be submitted with the license application. . . . Failure by the governing body of the municipality to render a decision within forty-five days of the applicant's request for approval shall be deemed an approval of the application in terms as presented unless the governing body has notified the applicant in writing of their election for an extension of time not to exceed sixty days. Failure by the governing body of the municipality to render a decision within the extended time period shall be deemed an approval of the application in terms as presented.

47 P.S. § 4-461(b.3).

Local agency law provides that "[i]n the event a full and complete record of the proceedings before the local agency was made, the court shall hear the appeal without a jury on the record certified by the agency." *2 Pa.C.S. § 754*. "After hearing the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law . . . or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence." *Id.*

DISCUSSION

Plaintiff appeals Reading Township's decision to deny its request for approval of an intermunicipal transfer of a liquor license. As stated above, Plaintiff argues Reading Township's reasons for denying Plaintiff's request are not supported by the requisite substantial evidence. Reading Township based its decision to deny the request on public safety reasons. In support of its decision, Reading Township cites the comments made at the April 19, 2016 public hearing, and *53 P.S. § 65607(1)* which states "[t]he board of supervisors shall: (1) [b]e charged with the general governance of the township and the execution of legislative, executive and administrative powers in order to ensure sound fiscal management and to secure the health, safety and welfare of the citizens of the township."[6]

As an initial matter, during the pendency of this appeal, the Commonwealth Court in *Giant Food Stores, LLC v. Penn Twp.*,[7] held that even though Section 461(b.3)

6. *53 P.S. § 65607(1)*; Brief of Reading Township on Petition for Appeal of ACS171921, LLC at 2, para. 5.

7. No. 1310 C.D. 2016, 2017 WL 3026922 (Pa. Commw. Ct. July 18, 2017). Penn Township, after a public hearing, denied Giant's request

of the Liquor Code states there is no right to appeal a municipality's decision to deny an intermunicipal transfer of a liquor license, under Local Agency Law, Giant could appeal the Township's decision.[8] The Court also found that, procedurally, Giant did not have to first apply to the PLCB, wait for the PLCB to deny the intermunicipal transfer application based on the lack of municipal approval, and then appeal that decision.[9] "Giant need not and, in fact, must not wait for the PLCB to ministerially refuse its license application to appeal from the Township's decision."[10] Therefore, under *Giant*, this case is correctly before this Court for review.

"[U]nder Section 754(b) of the [Local Agency Law] . . . where a full and complete record[11] of the proceedings has been made before the local agency, the trial court may reverse the agency's decision if the agency's findings of fact were not supported by substantial evidence, an

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for an intermunicipal transfer of a liquor license. *Id.* at *1-2.Two of the issues on appeal before the Commonwealth Court were "(1) whether the trial court erred by quashing an appeal brought under the Local Agency Law; and, (2) whether the trial court erred by concluding that Giant's appeal was premature. . . ." *Id.* at *1 (footnote omitted).

8. *Id.* at *2, 7. The Court explained,

> Although Giant could apply to the PLCB for the License transfer, *without the statutorily-mandated prerequisite municipal approval, Giant's application* would be *fatally flawed*, and the PLCB would be statutorily-mandated to reject it. Further, even if the PLCB held a hearing on the application under Section 464 of the Liquor Code, it has no authority to review the Township's decision. Thus, absent the right to appeal under the Local Agency Law, the Township's decision would be insulated from *any* review.

Id. (emphasis in original) (footnote omitted).

9. *Id.* at *8. "[S]ince the Township's decision is an adjudication, and Giant must either initially obtain approval from the [Township] or appeal [from] the denial under Section 752 of the Local Agency Law, Giant here properly appealed from the Township's decision to the trial court." *Id.* at *9 (internal quotations omitted) (citation omitted).

10. *Id.* at *9.

11. All parties are in agreement that this Court has a full and complete record before it and de novo review is not necessary.

error of law was committed, constitutional rights were violated, or the procedure before the agency was contrary to statute." *Boston Concessions Grp., Inc. v. Logan Twp. Bd. of Supervisors*, 815 A.2d 8, 11 (Pa. Commw. Ct. 2002) (citing *SSEN, Inc. v. Borough Council of the Borough of Eddystone*, 810 A.2d 200, 207 (Pa. Commw. Ct. 2002) (internal citation omitted)). Substantial evidence has been described as "'more than a mere scintilla' of evidence and [is] that which a reasonable mind might accept as adequate to support a conclusion." *SSEN, Inc.*, 810 A.2d at 207 (citing *Kish v. Annville-Cleona Sch. Dist.*, 645 A.2d 361, 364 (Pa. Commw. Ct. 1994)).

Section 461(b.3) of the Liquor Code governs the intermunicipal transfer of liquor licenses. Prior to its amendment in 2006, the statute provided, in part, that "[t]he municipality must approve the request unless it finds that doing so would adversely affect the welfare, health, peace and morals of the municipality or its residents."[12] However, that language was removed from the statute and replaced with the much more general "[t]he municipality may approve the request" language.[13] Since Section 461(b.3) of the Liquor Code is silent as to the standard a municipality must use when deciding whether to grant or deny a request for an intermunicipal transfer of liquor license, this Court agrees with Reading Township's reliance on *53 P.S. § 65607(1)*. Without any standard, the board of supervisors could arbitrarily deny or grant a request for an intermunicipal transfer of a liquor license.[14]

In *SSEN*, the Commonwealth Court explained "[o]ur

12. *47 P.S. § 4-461(b.3)* (former).
13. *47 P.S. § 4-461(b.3)*.
14. *See Giant*, 2017 WL 3026922, at *7.

legislature has established the principle that a licensed establishment is not ordinarily detrimental to the welfare, health and morals of a neighbor- hood or its residents." 810 A.2d at 208. In affirming the trial court's decision to reverse the Borough Council's finding that the intermunicipal transfer "would adversely affect the Borough or its residents . . . .[,]" the Commonwealth Court focused on the lack of objective evidence in the record before the Borough Council. *Id.* at 208-09.[15] In *AWT Beaver Independence Deli, Inc. v. Commonwealth of Pennsylvania*, 876 A.2d 500, 505 (Pa. Commw. Ct. 2005), the Commonwealth Court again focused on the lack of objective evidence and found "the record [before the Board] lack[ed] any specific evidence indicating that the license transfer would be detrimental to the Township or its residents."[16] *See also Boston Concessions Group, Inc.*, 815 A.2d at 13-14 ("Here, the record is absent of any specific evidence indicating that the license transfer would in fact be *detrimental* to Lakemont or its patrons.") (emphasis in original).[17]

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15. The Commonwealth Court stated "[l]ittle objective evidence was presented by the Borough; in fact, testimony intended to demonstrate increased traffic hazards, parking problems, drinking and driving under the influence which would result from the transfer was, at most, general and speculative." *SSEN*, 810 A.2d at 208.

16. Although several residents expressed concerns regarding the possible dangers of alcohol-related problems . . . we note that little objective evidence was presented by the Township. Testimony intending to demonstrate a negative impact on the use and enjoyment of nearby facilities and other possible dangers of alcohol-related problems was merely general and too speculative." AWT Beaver, 876 A.2d at 505 (footnote omitted).

17. This Court recognizes that *SSEN*, *AWT Beaver and Boston Concessions Group, Inc.* all deal with the previous version of Section 461(b.3) which includes the language "the municipality must approve or disapprove the request unless it finds that doing so would adversely affect the welfare, health, peace and morals of the municipality or its residents." However, this language is very similar to the language in *53 P.S. § 65607(1)* which states "[t]he board of supervisors shall: (1) [b]e

Instantly, the evidence before the Board of Supervisors at the April 19, 2016 public hearing consisted only of the testimony of Plaintiff's attorney and comments from members of the public. The minutes from the meeting summarize the public comments as follows,

> Members of the public at the meeting voiced objection to Rutters selling alcohol. The comments related to the fact that Rutters is a 'farm store' and that intersection is already a dangerous intersection without adding alcohol to the mix. Another objection was to the fact there are many bars in the area and a beer distributor where alcohol can be purchased.[18]

Noticeably absent from the record is any objective evidence that granting Plaintiff's request for an intermunicipal transfer of a liquor license would run contrary to "the health, safety and welfare of the citizens of the township."[19]

Therefore, under Local Agency Law, this court finds Reading Township's Reasons for Decision were not supported by substantial evidence. As such, this Court grants Plaintiff's Petition to Appeal.

ORDER OF COURT

AND NOW, this 6th day of September, 2017, Plaintiff's Petition for Appeal From Decision of Reading Township is hereby Granted. This Court reverses Reading Township's decision to deny Plaintiff's request for an intermunicipal

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charged with the general governance of the township and the execution of legislative, executive and administrative powers in order to ensure . . . the health, safety and welfare of the citizens of the township." Therefore, this Court finds the aforementioned cases both instructive and relevant.

18. *See* Defendant's Motion to Dismiss Petitioner's Appeal, Exhibit A at 3.

19. *53 P.S. § 65607(1).*

transfer of a liquor license and, in accordance with 47 P.S. § 4-461(b.3) and 40 Pa. Code § 7.61 approves Plaintiff 's request for an intermunicipal transfer of Pennsylvania Restaurant Liquor License R-18379 into Reading Township.

PLCB's Motion to Dismiss Plaintiff's Appeal is Granted and Plaintiff's Petition for Appeal, filed on November 16, 2016 is hereby Dismissed.

Alderette v. Dollar Tree, Inc.

Breach of duty of care — Business invitee — Reasonable care — Summary judgment

Plaintiffs failed to establish that defendants breached their duty of care where one of the plaintiffs injured her hand and arm when her finger became lodged in the locking system of a door. The court granted defendants' motion for summary judgment.

Plantiffs Silk Alderette and Kixx Alderette, along with their son, entered the Dollar Tree store in New Castle. The store had a set of exterior and interior double doors in the entry way. The left side of the exterior doors was locked. Ingress and egress to the store was provided through the right side. The left side of the interior set of metal doors was blocked by shopping carts, but the right interior door was propped open. Silk Alderette walked through the interior door after her son. While walking through the doorway, Silk struck her left hand on the locked left interior door and her middle finger became lodged within a rectangular hole that was part of the locking system. Being unaware that her finger was lodged in the door, Silk Alderette continued walking in the store, but was jerked backward. She was able to dislodge her finger from the door, but sustained lacerations and a severe sprain as a result. Plaintiffs also alleged that Silk Alderette injured her shoulder in this incident.

The complaint asserted claims for negligence, premises liability and negligent infliction of emotional distress. The court previously sustained defendants' preliminary objection, striking the claim for negligent infliction of emotional distress. Plaintiffs were granted leave to file an amended complaint, but failed to do so within the time allowed.

Defendants moved for summary judgment, arguing that plaintiffs failed to present evidence to demonstrate that defendants breached a duty of care regarding the doors and locking mechanism. It was undisputed that plaintiffs were business invitees when they entered the store. A possessor of land must exercise reasonable care in maintaining property, but is not the insurer of safety for an invitee. *Sheridan v. Great Atlantic & Pacific Tea Co.*, 353 Pa. 11. Plaintiffs argued that the left doors should have been unlocked to provide enough space for individuals to enter and exit the building. However, the court held that plaintiffs did not present sufficient evidence to demonstrate the doors were defective or unsafe in any manner. Plaintiffs provided no expert opinion that the entry doors caused the accident because they were unsafe.

With respect to their negligence per se claim, plaintiffs argued that defendants violated various ordinances requiring defendants to provide ingress and egress to the store. The court found that these ordinances were intended to protect individuals who were already in the store, to ensure that they had a safe exit. The ordinances were not enacted to protect an individual entering the store from injuring herself on the locking mechanism of a door. The injuries suffered by plaintiff were not the type of harm intended to be addressed by those regulations.

The court granted defendants' motion for summary judgment on all of plaintiffs' remaining claims.

C.P. of Lawrence County, No. 10352 of 2016

MOTTO, *P.J.*, September 19, 2017—This case is before the Court for disposition of the Motion for Summary Judgment filed on behalf of the Defendants, Dollar Tree, Inc. and Dollar Tree Stores, Inc., which asserts they are entitled to judgment as a matter of law as the Plaintiffs, Silk Alderette and Kixx Alderette, have failed to present evidence to demonstrate the Defendants breached a duty of care concerning the doors and locking mechanism at issue.

On June 9, 2014, the Plaintiffs, Silk Alderette and Kixx Alderette, and their son, Skylar Alderette, entered the Dollar Tree store located at 2567 West State Street, New Castle, Lawrence County, Pennsylvania. The Dollar

Tree store is equipped with a set of exterior and interior metal double-doors to enter the store. The left side of the exterior doors was locked while ingress and egress to the store was provided through the right door. Kixx Alderette held the exterior door open while Skylar Alderette entered the store first followed by the Plaintiff, Silk Alderette. The left side of the interior double-doors was blocked by shopping carts of bargain items while the right interior door was being propped open. Skylar Alderette entered the interior doors first and moved to the side upon noticing another individual approaching the doorway in an attempt to exit the store. The other individual stood to the side to allow Plaintiff and her son to walk through the door before exiting. Plaintiff walked through the interior door after her son. While walking through the doorway, Plaintiff struck her left hand on the locked left interior door and her middle finger became lodged within a rectangular hole used for the locking system. Unaware that her finger was lodged in the door, Plaintiff continued to walk into the store, but was jerked backwards.

Plaintiff and her husband dislodged Plaintiff's finger, but she suffered two large lacerations as a result. She was subsequently taken to Jameson Memorial Hospital where she was diagnosed with two deep lacerations and a severe sprain. Plaintiff also avers she injured her shoulder during the incident, was examined by an orthopedic surgeon, Dr. Robert McGann, and she was diagnosed with bicipital tendonitis.

Plaintiff initiated this action by filing a Praecipe for Writ of Summons on April 8, 2016, and filed a Complaint on May 11, 2016, asserting claims for negligence, premises liability and negligent infliction of emotional distress.

Defendants responded by filing Preliminary Objections and Plaintiffs filed a First Amended Complaint on June 1, 2016. Defendants issued Preliminary Objections to Plaintiffs' First Amended complaint and, after oral argument, the Court sustained Defendants' preliminary objection concerning the legal insufficiency of Plaintiffs' claim for negligent infliction of emotional distress and that count was stricken from the Amended Complaint. Plaintiffs were granted leave to file a Second Amended Complaint alleging negligent infliction of emotional distress within 20 days, but Plaintiffs failed to do so.

On June 28, 2017, Defendants filed a Motion for Summary Judgment asserting they are entitled to judgment as a matter of law as Plaintiffs have failed to present evidence to demonstrate Defendants breached a duty of care concerning the doors and locking mechanisms at issue. Plaintiffs contend they have provided facts necessary to establish all claims pleaded within the First Amended Complaint, which includes negligence *per se* and premises liability.

The mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for a trial. The summary judgment rule exists to dispense with a trial of the case or, in some matters, issues in a case, where a party lacks the beginnings of evidence to establish or contest a material issue. *Ertel v. Patriot-News Company*, 544 Pa. 93, 674 A.2d 1038 (1996), reargument denied, (1996), certiorari denied, 519 U.S. 1008 (1996). Any party may move for summary judgment in whole or in part as a matter of law whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense

which could be established by additional discovery or expert report or if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to jury. Pa.R.C.P. No. 1035.2.

Summary judgment may be granted only in cases where it is clear and free from doubt that there is no genuine issue as to any material fact and that the moving party is entitled to a summary judgment as a matter of law. *Kafando v. Erie Ceramic Arts Co.*, 764 A.2d 59, 61 (Pa. Super. 2000) (citing *Rush v. Philadelphia Newspaper, Inc.*, 732 A.2d 648, 650-651 (Pa. Super. 1999)). The moving party bears the burden of proving the non-existence of any genuine issue of material fact. *Id.* A material fact, for summary judgment purposes, is one that directly affects the outcome of the case. *Gerrow v. Shincor Silicones, Inc.*, 756 A.2d 697 (Pa. Super. 2000); *Kuney v. Benjamin Franklin Clinic*, 751 A.2d 662 (Pa. Super. 2000).

The non-moving party bears a clear duty to respond to a motion for summary judgment under Pa.R.C.P. No. 1035.3(a). The non-moving party must adduce sufficient evidence on issues essential to its case on which it bears the burden of proof such that a jury could return a verdict in its favor. Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as matter of law. *Ertel*, *supra*. The non-moving party must demonstrate that there is a genuine issue for trial and may not rest on averments in its pleadings. *DeSantis v. Frick Company*, 745 A.2d 624 (Pa.

Super. 1999); *Merriweather v. Philadelphia Newspaper, Inc.*, 453 Pa. Super. 464, 469-472, 684 A.2d 137, 140 (1996).

When determining whether to grant a motion for summary judgment, the Court must view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Hughes v. Seven Springs Farm, Inc.*, 563 Pa. 501, 752 A.2d 339 (2000); *Dean v. Commonwealth Department of Transportation*, 561 Pa. 503, 751 A.2d 1130 (2000).

Summary judgment is proper only when the uncontroverted allegation in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. *P.J.S. v. Pennsylvania State Ethics Comm'n*, 555 Pa. 149, 153, 723 A.2d 174, 175 (1999). Unsworn exhibits and documents not complying with Pa.R.C.P. No. 1035 may not be considered as part of the record on summary judgment. Pa.R.C.P. No. 1035; *Wheeler v. Johns-Manville Corp.*, 342 Pa. Super. 473, 493 A.2d 120 (1985). A party moving for summary judgment may not rely exclusively upon its own testimony or its witnesses' oral testimony, through either testimonial affidavits or deposition testimony, even if uncontradicted, to establish a genuine issue of material fact. *Borough of Nanty-Glo v. American Surety Co.*, 309 Pa. 236, 163 A. 523 (1932); *Gruenwald v. Advanced Computer Applications, Inc.*, 730 A.2d 1004 (Pa. Super. 1999).

The trial court must confine its inquiry when confronted with a motion for summary judgment to questions of

whether material factual disputes exist. *Township of Bensalem v. Moore*, 152 Pa. Cmwlth. 540, 620 A.2d 76 (1993). It is not the function of the Court ruling on a motion for summary judgment to weigh evidence and to determine the truth of the matter. *Keenheel v. Pennsylvania Securities Commission*, 143 Pa. Cmwlth. 494, 579 A.2d 1358 (1990).

The Court must first address whether there is sufficient evidence to establish an issue of material fact concerning Plaintiffs' claim for premises liability.

"[T]he mere happening of an accident or an injury does not establish negligence nor raise an inference or a presumption of negligence nor make out a prima facie case of negligence." *Amon v. Shemaka*, 419 Pa. 314, 317, 214 A.2d 238, 240 (1965) (citing *Steiner v. Pittsburgh Railways, Co.*, 415 Pa. 549, 204 A.2d 254 (1964). A landowner's duty of care is dependent on whether person entering the property is a trespasser, licensee, or invitee. *Carrender v. Fitterer*, 503 Pa. 178, 184, 469 A.2d 120, 123 (1983) (citing *Davies v. McDowell National Bank*, 407 Pa. 209, 180 A.2d 21 (1962)). It is undisputed Plaintiff was a business invitee when entering the Dollar Tree store and Defendants are required to provide the duty of care commensurate with that status.

A possessor of land is not the insurer of safety for an invitee, but is required to exercise reasonable care in maintaining the property. *Sheridan v. Great Atlantic & Pacific Tea Co.*, 353 Pa. 11, 13, 44 A.2d 280, 281 (1945) (citations omitted). In accordance with Restatement (Second) of Torts § 343, a possessor of land is subject to liability if the following are present:

> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitee, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger. *See Carrender*, 503 Pa. at 185, 469 A.2d at 123.

"A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." Restatement (Second) of Torts § 343A; *Carrender*, 503 Pa. at 185, 469 A.2d at 123. "The landowner is under an affirmative duty to protect a business visitor, not only against known dangers, but also against those which might be discovered with reasonable care." *Emge v. Hagosky*, 712 A.2d 315, 317 (Pa. Super. 1998). This includes a duty to conduct reasonable inspections of the property to discover any dangerous conditions which may exist. *Crotty v. Reading Industries, Inc.*, 237 Pa. Super. 1, 9-10, 345 A.2d 259, 263 (1975).

The aforementioned principles were applied by the Court in *McAdoo v. Autenreith's Dollar Stores*, 379 Pa. 387, 109 A.2d 156 (1954), to address injuries sustained by the appellee caused from being struck by a door at the appellant's store. In that case, the appellee entered the appellant's store by walking into a display vestibule, which is connected to the store by a doorway closed off by

double swinging doors. The appellee approached the "In" door and pushed it open while a man was approaching the "Out" door. After walking through the doorway, the appellee started walking to her right. The appellee was then struck by the "Out" door when it swung back into the store, which propelled her to the floor. The appellee was injured and filed suit against the appellant. A trial was held in that matter and the jury entered a verdict awarding damages to the appellee. The appellant presented a motion for judgment n.o.v. claiming the appellee's injuries were caused by the intervening negligence of a third person, the appellee failed to establish a case of causative negligence and the appellee was responsible for contributory negligence[1]. That motion was denied by the trial court and the appellant appealed to the Pennsylvania Superior Court.

The *McAdoo* Court emphasized the issue to be resolved was whether the entrance doors were reasonably safe for their intended purpose when used with ordinary care. *Id.*, 379 Pa. Super, at 392, 109 A.2d at 158. The Court reasoned the appellee failed to present any evidence the doors, as maintained by the appellant, were dangerous as constituted on the date of the incident, which is required to determine the appellant was negligent. *Id.*, 379 Pa. Super. at 396, 109 A.2d at 160. In fact, the Court stated, "there is not a scintilla of evidence that the [appellant's] swinging doors deviated in any way from ordinary and customary usage or that there was anything faulty, defective or dangerous in the design, construction or equipment of the doors." *Id.*, 379 Pa. Super. at 392-393, 109 A.2d at 159. In

1. The *McAdoo* Court did not address the issues of intervening negligence of a third person and contributory negligence.

addressing the appellee's contention the door should have been equipped with door stops, the Court explained all swinging doors are not dangerous merely because they are not equipped with door stops as it is based on numerous factors such as size, weight or location. *Id.*, 379 Pa. Super, at 396, 109 A.2d at 160. It was the appellee's burden to provide evidence the doors maintained by the appellant were dangerous without being equipped with door stops, which the appellee failed to do. *Id.* Resultantly, there was nothing to provide a basis for adjudging that the appellant breached any established standard of care. *Id.*

In the case *sub judice*, Plaintiffs have failed to present evidence demonstrating the interior doors of the Dollar Tree store were defective or unsafe in any manner. In her deposition, Plaintiff asserts the left door should not have been locked to provide enough space for individuals entering and exiting the store. However, Plaintiff failed to testify there was a defective condition with the door itself or there was a connection between the left door being locked and her injuries. Plaintiff indicated there were other individuals walking toward the door to exit the store, which caused her and her son to move over slightly to provide space in the event those individuals continued through the door. However, plaintiff's son was able to walk through the doorway without incident while Plaintiff's left hand struck the door and her middle finger became lodged in the locking mechanism. Plaintiff testified she was at the Dollar Tree store on approximately ten occasions without incident. There is no other evidence the doorway at issue caused any other injuries nor is there an explanation by an expert stating the locking mechanism or door was defective or dangerous. In addition, Plaintiff does not state in her deposition the locking mechanism on the door

was defective or dangerous when utilized in the proper manner. Plaintiff merely states the locking mechanism should be fitted with a cover to prevent someone's finger from entering the rectangular hole and becoming lodged.

This situation is similar to *McAdoo*, in which a door providing ingress and/or egress to a store caused an injury. In McAdoo, the Court stated the issue to be resolved is whether the entrance doors were reasonably safe for their intended purpose when used with ordinary care. *Id.*, 379 Pa. Super. at 392, 109 A.2d at 158. In reaching its decision, the Court noted the appellee failed to produce any evidence to demonstrate the entrance doors were defective or dangerous merely because they lacked door stops. In fact, the Court determined it was not sufficient to aver there should have been door stops installed, but the appellee was required to demonstrate door stops were necessary to prevent a dangerous condition that existed when the door was utilized with reasonable care. The current case is analogous to *McAdoo* in that Plaintiffs have not established the door at issue was defective or dangerous if used in the proper manner. Based upon Plaintiff's testimony, the injury occurred because she swung her arm, striking the door and causing her finger to get lodged. Had Plaintiff walked through the doorway without swinging her arm and striking the door, her finger would not have gotten lodged allowing her to avoid injury. Plaintiff testified she entered the Dollar Tree store on approximately 10 occasions without incident, which demonstrates the door was not defective. It is not sufficient to merely demonstrate an injury occurred, it is incumbent upon Plaintiff to demonstrate Defendants breached a duty of care, which Plaintiff has failed to do. Therefore, Plaintiffs have not provided sufficient evidence

to establish an issue of material fact that the Defendants breached a duty of care. Therefore, Defendants' Motion for Summary Judgment regarding the claim for premises liability and negligence is granted.

Plaintiffs also contend Defendants are negligent *per se* for violating several sections of the Pennsylvania Code concerning exits or egress.

"The violation of a legislative enactment by doing a prohibited act makes the actor liable for an invasion of an interest of another." *Jinks v. Currie*, 324 Pa. 532, 538, 188 A. 356, 358 (1936) (quoting Restatement (First) of Torts § 286). "The concept of negligence *per se* establishes both duty and the required breach of duty where an individual violates an applicable statute, ordinance or regulation designed to prevent a public harm[.]" *Braxton v. Commonwealth Dept. of Transportation*, 160 Pa. Cmwlth. 32, 45, 634 A.2d 1150, 1157 (1993). Negligence *per se* requires a showing the violation of the statute or ordinance caused the type of harm the statute was intended to avoid and the person injured was in the class the statute was intended to protect. *McCloud v. McLaughlin*, 837 A.2d 541, 545 (Pa. Super. 2003) (citation omitted). A party is liable for negligence *per se* if the following exits:

> (a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and
>
> (b) the interest invaded is one which the enactment is intended to protect; and
>
> (c) where the enactment is intended to protect an interest from a particular hazard, the invasion of the interests results from that hazard; and

(d) the violation is a legal cause of the invasion, and the other has not so conducted himself as to disable himself from maintaining an action. *Ennis v. Atkin*, 354 Pa. 165, 169, 47 A.2d 217, 219 (1946).

In *Ennis*, the Court determined a statute placing a restriction upon parking within fifteen feet of a fire hydrant did not provide grounds for negligence *per se* as it was intended to provide availability to the hydrant in case of a fire and not intended to aid in regulating traffic for purposes of highway safety. *Id.*

Plaintiffs cite to several statutes or regulations encompassing requirements for providing egress or access to exit doors. While those regulations require Defendants to provide a means of egress or exit from the Dollar Tree store, Plaintiff is not within the class of individuals being protected by those regulations. Those enactments are meant to protect individuals who are already within the store and must be given the ability to exit the store. Plaintiff was entering the Dollar Tree store, not attempting to exit the same, when her injury occurred. Moreover, the regulations or Pennsylvania Code sections cited by Plaintiffs were meant to provide individuals the ability to exit the store and have the ability to take safe refuge outside of the building. The regulations cited by Plaintiffs were not enacted to protect an individual entering a store from injuring herself on the locking mechanism of a door.[2] Thus, Plaintiffs' claim for negligence per se is also deficient as the regulations or Pennsylvania Code sections cited are not applicable to the current case, Plaintiff

2. Plaintiffs cite to 6 Pa. Code. § 11.81, which is inapplicable to this matter as a whole as it is a regulation directed to older adult daily living centers, which does not include the Dollar Tree store at issue.

is not within the class of individuals to be protected by those regulations and the injuries suffered by Plaintiff are not the type of harm intended to be addressed by those regulations.

Plaintiffs have argued extensively that the condition of the entrance way and the manner in which it was maintained, with the left doors locked, and the placement of shopping carts created a dangerous condition that was the cause of injury. However, the evidence of record does not allow for such an inference without an expert opinion. Plaintiffs have produced no expert opinion that the entryway, the doors or any component of the door was in any way defective or unsafe, or that any defect or unsafe condition was the cause of the accident.

Finally, Plaintiffs reference a claim for negligent infliction of emotional distress. However, that claim was dismissed when the Court granted the Defendants' Preliminary Objections on August 31, 2016. Plaintiffs were granted 20 days from the date of that Order to file a Second Amended Complaint to aver that cause of action, but Plaintiffs have not done so and Plaintiffs have not sought leave of court to file the Second Amended Complaint attached to Plaintiff's Evidentiary Materials, which were filed on August 16, 2017. As that document was not properly docketed as its own entry, it was not filed within the 20 days provided in the Order of Court granting Defendants' Preliminary objections and Plaintiffs have failed to obtain leave of court to file a Second Amended Complaint, there is no claim for negligent infliction of emotional distress currently pending before the Court. Therefore, the Court will not address Plaintiffs' contention they are entitled to recover for negligent infliction of

emotional distress as set forth in their Brief in Opposition to Defendant's [*sic*.] Motion for Summary Judgment.

Based upon the foregoing, Defendants' Motion for Summary Judgment is granted and the claims contained within Plaintiffs' First Amended Complaint are dismissed.

AND NOW, this 19th day of September, 2017, in accordance with the accompanying Opinion of even date herewith, it is ORDERED, ADJUDGED, and DECREED that the Defendants' Motion for Summary Judgment is GRANTED. Judgment is entered in favor of Defendant and against Plaintiffs and the Plaintiffs' First Amended Complaint for Negligence, Premises Liability and Negligent Infliction of Emotional Distress is DISMISSED in its entirety.

Citibank, N.A. v. Harris

Account stated — Real party in interest — Lack of capacity to sue

In this action to collect on a credit card account, the court granted defendant's motions to dismiss because plaintiff failed to allege sufficient facts to show it was the real party in interest, and the complaint and exhibit did not adequately set forth the credit agreement and the history of the charges.

Citibank, N.A.'s suit consisted of one untitled count. The complaint alleged defendant was indebted to Citibank regarding a certain account number, and attaching a copy of a statement to the complaint an exhibit. Citibank further alleged that defendant agreed to pay any charges on the account, that defendant defaulted on the account, and that a balance of $1,990 was owing on the account.

The exhibit attached to the complaint reflected that it was an AT&T Universal Platinum Card statement for the billing period from May 25, 2016, through June 23, 2016. Defendant's name was printed on the statement, as well as the balance asserted in the complaint. The only reference to Citibank on the statement was a "Citi" logo on the upper

right corner of the billing statement.

Defendant filed preliminary objections, asserting that the complaint was defective. First, defendant argued the complaint failed to state a claim. The court held that in a credit card collection case based upon a breach of contract theory, a plaintiff's failure to attach copies of the cardholder agreement, an accurate statement of the account, and a written assignment of the contract was grounds for sustaining a preliminary objection.

The complaint did not state whether it was based on a breach of contract or an account stated theory. Nothing in the complaint itself or in the attached exhibit set forth the history of the charges on the account. The exhibit did not explicitly indicate that Citibank was the creditor. The statement requested that payments be made to "AT&T Universal Card." The court sustained defendant's preliminary objection that plaintiff failed to prosecute the action in the name of the real party in interest. The court granted the motion to dismiss, but gave plaintiff leave to amend to state the details by which Citibank became the real party in interest, including the attachment of any applicable agreement or assignment of the credit account to Citibank.

C.P. of Lawrence County, No. 10451 of 2017

Christopher A. Titus, for plaintiff
John J. DeCaro, for defendant

HODGE, *J*., Sept. 14, 2017—Before the Court for disposition are the Preliminary Objections to Plaintiff's Complaint filed on behalf of the Defendant, Gregory L. Harris. On May 10, 2017, the Plaintiff, Citibank, N.A., filed a Complaint consisting of one untitled count, which the Court presumes to be a count for Breach of Contract/ Account Stated. Plaintiff's Complaint avers the following: The Defendant was indebted to the Plaintiff on November 19, 2003 regarding current account number XXXX-4896; a copy of the Defendant's statement is attached to the Complaint marked as Exhibit "A"; by using the account, the Defendant agreed to repay any incurred balance, charge or cash advances made to the account; failure to pay the

incurred charges on the account is considered a default; at all times relevant hereto, the Defendant used the account for the purchase of products, goods and/or for obtaining services; the Defendant was provided with copies of statements showing debits and credits for transactions on the aforementioned account; the Defendant is in default with respect to the debt for failure to make the required payments on the account, with the last payment date on this account being on or about December 21, 2015; as of the date of the Complaint, the remaining balance due, owing and unpaid on the Defendant's account as a result of the Defendant's and any authorized users of said account, is in the sum of $1,990.51; and, that despite reasonable demands for payment, the Defendant has refused and continues to refuse to pay all sums due and owing on the account, all to the damage and detriment of the Plaintiff.

Attached to the Complaint is Exhibit "A", an AT&T Universal Platinum Card statement for billing period May 25, 2016 through June 23, 2016. The statement sets forth Defendant's name, that he has been a member since 2003 and that he is associated with an account number ending in "4896". The statement also reflects that a minimum payment of $688.36 is due as of July 21, 2016, with a new balance of $1,990.51. The billing statement additionally contains an indication that if payment by mail is to be utilized, that the remitter is to enclose a valid check or money order payable to "AT&T UNIVERSAL CARD", and that payment should not include cash or foreign currency. Lastly, Exhibit "A" provides a website, www.universalcard.com, for contact information. The only indication and reference to "Citibank, N.A." is a "Citi" logo on the upper right corner of the billing statement.

Defendant's preliminary objections were filed on May 31, 2017. The first group of preliminary objections argues that the Plaintiff's Complaint is defective for failure to conform to rule of law pursuant to Pennsylvania Rule of Civil Procedure 1019(a), 1019(h), 1019(i) and 1019(f). Defendant's second general category of preliminary objections are in the nature of lack of capacity to sue based upon Rule 2002. Defendant's third category of preliminary objections is in the nature of a demurrer, based upon the alleged legal insufficiency of the Complaint.

Pennsylvania Rule of Civil Procedure 1028(a)(2) provides that preliminary objections may be filed by any party to any pleading on the grounds of failure of a pleading to conform to law or rule of court. No. Pa.R.C.P. No. 1028(a)(2). Rule 1028(a)(3) permits a party to file preliminary objections asserting insufficient specificity in a pleading. Pa.R.C.P. No. 1028(a)(3). "The pertinent question under Rule 1028(a)(3) is 'whether the complaint is sufficiently clear to enable the defendant to prepare his defense,' or 'whether the plaintiff's complaint informs the defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may know without question upon what grounds to make his defense.'" *Rambo v. Greene*, 906 A.2d 1232, 1236 (Pa. Super. 2006) (citing, *Ammlung v. City of Chester*, 302 A.2d 491, 498 n. 36 (Pa. Super. 1973)).

Pennsylvania Rule of Civil Procedure 1019(a) provides that the material facts on which a cause of action or defense is based shall be stated in a concise and summary form. Pa.R.C.P. No. 1019(a). Rule 1019(h) provides that when any claim or defense is based upon an agreement, the pleading shall state specifically if the agreement is oral

or written. Pa.R.C.P. No. 1019(h). Rule 1019(i) provides that when any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing. Pa.R.C.P. No. 1019(i). Rule 1019(f) requires that averments of time, place and items of special damage shall be specifically stated. Pa.R.C.P. No. 1019(f). Rule 2002 largely provides that, generally, all actions shall be prosecuted by and in the name of the real party in interest. Pa.R.C.P. No. 2002.

In a credit card collection case based upon a breach of contract theory, a plaintiff's failure to attach copies of the cardholder agreement, an accurate statement of the account and a written assignment of the contract to the complaint is grounds for sustaining a preliminary objection. *Hilko Receivables. LLC v. Haas*, 10274 of 2009, C.A. ((C. P. Lawrence 2009) (citing *Atlantic Credit and Finance, Inc. v. Giuliana*, 829 A.2d 340 (Pa. Super. 2003)); *Commonwealth Financial Systems v. Hartzell*, No. 10390 of 2010, C.A. (C.P. Lawrence, October 19, 2010); *Discover Bank v. Jason R. Doneluck*, No. 10346 of 2010, C.A. (C.P. Lawrence, October 25, 2010). The failure to produce the cardholder agreement establishes a meritorious defense and a basis for preliminary objections pursuant to Pa.R.C.P. No. 1019(i). *Atlantic Credit and Finance, Inc.*, *supra*; *see, Target National Bank v. Kilbride*, 10 Pa.D.&C.5th 489 (Centre Co. 2010); *see also*, *World Wide Asset Purchasing LLC v. Stern*, 153 Pitts. Leg. J. 111 (Allegheny Co. 2004) (holding that the required attachments include the application signed by the consumer and any other relevant terms and conditions which govern the issuer's claims). *Id.*

An account stated is an account in writing, examined and expressly or impliedly accepted by both parties thereto as distinguished from a simple claim or a mere summary of accounts. *Capital One Bank (USA) v. Clevenstine*, 7 Pa.D.&C. 5th 153 (Centre Co. 2009) (citing, *Target National Bank/Target Visa v. Samanez* (Allegheny Co. 2007) and *Target National Bank/Target Visa v. Celesti*, (Allegheny Co. 2007)). A plaintiff does not need to attach a copy of the original contract if its claims are based upon an account stated theory. *Citibank v. Weaver*, No. 01614 of 2008 (Pa. Com. PI. Lebanon 2008). However, a defendant is entitled to know the dates on which individual transactions were made, the amounts therefore and the items purchased to be able to answer intelligently and determine what items he can and what he must contest. *Remit Corporation v. Miller*, 5 Pa. D. & C. 43 (Centre 2008); *accord*, *Marine Bank v. Orlando*, 25 Pa.D.&C.3rd 264 (Erie 1982). *Marine Bank v. Orlando*, 25 Pa. D. & C. 3d 264, 268 (Pa. Com. PI. Erie 1982). An account stated is more appropriately pled in a situation in which two equal, sophisticated parties have an ongoing business relationship. *Capital One Bank v. Clevenstine*, *supra*.

From the Court's inspection of the Plaintiff's Complaint, the Plaintiff has attached to it as Exhibit "A", a billing statement for the time period of May 25, 2016 through June 23, 2016 which identifies the minimum payment due of $688.36, a new balance of $1,990.51 and a payment due date of July 21, 2016, and which indicates that payment can be issued to AT&T Universal Card. Plaintiff's Complaint does not indicate whether it is based upon a breach of contract theory or an account stated theory. A cardholder agreement is not attached to the Complaint, nor any explanation as to the reason it is

not attached, necessary to satisfy the requirements of a breach of contract theory of recovery. Moreover, neither the Complaint nor Exhibit "A" specifically aver a history of charges, a beginning balance, dates of charges, items purchased by such charges, charges of interest or other related items necessary to satisfy an account stated theory of recovery. Next, the statement attached to the Complaint as Exhibit "A" does not explicitly indicate that the Plaintiff, "Citibank, N.A.", is the creditor, and there is no written application between the Defendant and the Plaintiff designating "Citibank, N.A." as a party to any agreement with the Defendant. In fact, the statement requests that payments be made to "AT&T UNIVERSAL CARD."

As a result of the foregoing, the Defendant's preliminary objections with respect to failure to conform to rule of law are hereby sustained. Plaintiff shall have sixty (60) days from the date of this Order to file an amended complaint which conforms to rule of law in accordance with this Opinion. Next, the Court shall sustain Defendant's preliminary objection regarding Plaintiff's failure to prosecute the action in the name of the real party in interest. The Plaintiff shall likewise have sixty (60) days from the date of this Order to file an amended complaint which details the manner by which "Citibank, N.A." became the real party in interest (including attachment of any applicable agreement or assignment of the credit card account at issue to Citibank, N.A.) or to prosecute this action in the name of the actual, real party in interest. With reference to the Defendant's preliminary objection in the nature of the legal insufficiency of the pleading, the Court concludes that considerations regarding the same are adequately addressed above, and as such, the Court will not engage in a separate discussion of these alleged insufficiencies.

In accordance with this Opinion, the Court enters the Order attached hereto.

ORDER OF COURT

AND NOW, this 14th day of September, 2017, this case being before the Court on the Defendant's Preliminary Objections to Plaintiff's Complaint, with the Plaintiff, Citibank, N.A., represented through counsel, Christopher A. Titus, Esquire, and the Defendant, Gregory L. Harris, represented through counsel, John J. DeCaro, Jr., Esquire, and after consideration of briefs submitted by counsel, and a complete and thorough review of the applicable record, the Court enters the following Order in accordance with the attached Opinion, and it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. The Defendant's preliminary objection with respect to failure to conform to rule of law is hereby SUSTAINED. The Plaintiff shall have sixty (60) days from the date of this Order to file an amended complaint in compliance with the attached Opinion; any amended complaint to include designation of a breach of contract and/or account stated cause of action.

2. The Defendant's preliminary objection relative to lack of capacity to sue is hereby SUSTAINED. The Plaintiff shall have sixty (60) days from the date of this Order to file an amended complaint detailing the manner by which "Citibank, N.A." became the party in interest, including attaching any agreement or valid assignment, or by naming a correct real party in interest.

3. The considerations regarding Defendant's preliminary objection in the nature of demurrer are adequately addressed in the attached Opinion, and as

such, this preliminary objection is not specifically reached by the Court.

4. The Prothonotary shall be responsible for properly serving a copy of this Order upon all counsel of record, and unrepresented parties in this action, in accordance with Pa. R.C.P. No. 236 and Rule L 236.

Chairge v. Geisinger Community Medical Center et al.

Agency claim — Pleading requirements — Failure to identify

The court rejected defendants' attempt to strike plaintiff's agency claims for failure to identify defendants' actual or ostensible agents by name while also warning the defense bar that the persistent pursuit of such an argument regarding the pleading of agency claims can only serve to delay the progress of litigation and needlessly increase defense costs. The court overruled defendants' preliminary objections.

Plaintiff received medical treatment from defendants, Geisinger Community Medical Center and Geisinger Clinic, in August 2015. She presented with chest pains and shortness of breath, but later experienced neurological symptoms. Ultimately, plaintiff filed this medical professional liability action asserting that the care and treatment defendants provided to her deviated from the applicable standard of care. The complaint identified three specific physicians and one specific physician assistant as agents, servants and employees of defendants. The complaint also named as agents, servants and employees "those physicians, residents, fellows, interns, physician assistants, technicians, and nurses who participated in, were consulted about or were otherwise responsible for caring for [plaintiff]" and were known only to defendants and would require additional discovery. Defendants filed preliminary objections seeking to strike plaintiff's agency allegations as overly vague and insufficiently specific because the complaint did not identify those agents by name, set forth each agent's authority and describe how the agent's negligence was within the scope of that authority or, if unauthorized, was ratified by defendants. The Superior Court originally indicated that in pleading a vicarious liability claim, a plaintiff must

identify the agent by name or appropriate description and set forth the agent's authority and how the tortious acts of the agent either fall within the scope of that authority or, if unauthorized, were ratified by the principal, the court explained, citing *Alumni Assn. Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan*, 535 A.2d 1095 (Pa. Super. 1987), *aff'd* 572 A.2d 1209 (Pa. 1989). However, in *Sokolsky v. Eidelman*, 93 A.3d 858 (Pa. Super. 2014), the appellate court expressly concluded that simply because employees are unnamed within a complaint or referred to as a unit does not preclude one's claim against their employer under vicarious liability if the employees acted negligently during the course and within the scope of their employment. Thereafter, in *Estate of Denmark ex rel. Hurst v. William*, 117 A.3d 300 (Pa. Super. 2015), the appellate court recognized that in Sokolsky, it concluded that it is not necessary for a plaintiff to establish a right to recover on a claim for vicarious liability based upon the negligence of a specific named employee. Under Sokolsky and its progeny, the failure to identify health care provider's agents by name, or the designation of those individuals as a unit, does not justify striking agency allegations in a complaint. Since the holdings in Sokolsky and Estate of Denmark, the court has consistently rejected defense efforts to strike agency claims for failure to identify the actual or ostensible agents by name. The court rejected the argument again in this case, while also warning defense counsel that "the persistent pursuit of such an argument regarding the pleading of agency claims can only serve to delay the progress of litigation and to needlessly increase defense costs.

C.P. of Lackawanna County, No. 2017 CV 1851

Derek R. Layser, for plaintiff

Daniel J. Ferhat and *Russell P. Lieberman*, for defendant Geisinger Community Medical Center

Mark T. Perry and *Christian Owens*, for defendant Geisinger Clinic

NEALON, *J.*, September 22, 2017—

ORDER

Defendants' preliminary objections in this malpractice action raise a recurring issue that continues to be asserted

by malpractice defendants who contend that a plaintiff's agency allegations must be stricken unless the complaint identifies the defendants' actual or ostensible agents by name, sets forth those agents' authority, and avers how the agents' tortious conduct either fell within the scope of that authority or was ratified by the defendant principal. It is perplexing and disquieting that defendants persist in advancing this argument via preliminary objections more than three years after the Superior Court of Pennsylvania specifically concluded that a plaintiff is not barred from asserting a vicarious liability claim against a defendant simply because the alleged agent was not named in the complaint.

Plaintiff, Diann Chairge, R.N., B.S.N, ("Chairge"), instituted this medical professional liability action against defendants, Geisinger Community Medical Center ("CMC") and Geisinger Clinic (the "Clinic"), asserting malpractice with respect to her care and treatment by the Clinic at CMC on August 18, 2015, and August 19, 2015. Chairge avers that she presented to CMC's Emergency Department on August 18, 2015, with complaints of chest pain and shortness of breath, underwent a cardiac catheterization at 3:19 PM, and was transferred from the cardiac catheterization lab to the intensive care unit at 5:48 PM. (Docket Entry No. 1 at ¶¶ 15-20). At 7:10 PM, "Chairge exhibited new neurologic symptoms for the first time as documented by a neurologic examination of 'no movement' of the left side," and "was unable to move her left side during the remainder of her ICU admission." (*Id.* at ¶¶ 21-22).

It is alleged that although "Chairge's new neurologic symptoms were consistent with a stroke" at 7:10 PM,

radiologic imaging of her head was not performed until 9:37 PM, a neurology consultation was not ordered until 10:24 PM, and a neurology consultation was not actually conducted until August 19, 2015, at 9:51 AM. (*Id.* at ¶¶ 23-25). Chairge maintains that warranted medical intervention compromised of intravenous ("IV") tissue plasminogen activator treatment ("tPA"), intra-arterial tPA and increased IV Heparin were not provided, nor was she furnished with indicated surgical intervention, including thrombectomy. (*Id.* at ¶¶ 26-27). A CT scan of the head without contrast was conducted at 9:37 PM on August 18, 2015, and was interpreted as "worrisome for an acute right MCA territory infarction" and "worrisome for acute thrombus," and that interpretation "was 'relayed directly' by radiologist Tejpal Bal Singh, M.D., to the ICU physician's assistant, Tanner McCalley, PA-C" at 10:13 PM. (*Id.* at ¶¶ 28-29). Notwithstanding that fact, "no STAT CT angiogram was either ordered or performed" and no "endovascular intervention or mechanical extravasation of the thrombo-embolus" was undertaken "to alleviate Ms. Chairge's acute right hemisphere stroke with acute thrombus in the right internal carotid and middle cerebral arteries." (*Id.* at ¶¶ 31-32).

In paragraph 52 of the complaint, Chairge identifies 59 claimed deviations from the standard of care by the actual or ostensible agents of CMC and the Clinic "who participated in the care of Diann Chairge on August 18, 2015, through August 19, 2015." (*Id.* at ¶¶ 52(a)-(ggg)). Chairge submits that "[t]he identities of these agents, servants and employees include Srinivasarao Ramakrishna, M.D., Vithalbhaid Dhaduk, M.D., Mohamed Akzur, M.D., and Tanner McCalley, PA-C, as well as

those physicians, residents, fellows, interns, physician assistants, technicians, and nurses who participated in, were consulted about or were otherwise responsible for caring for Diann Chairge at Geisinger CMC from August 18, 2015, through August 19, 2015, as more particularly described herein, and whose names and/or handwriting appear in the medical chart, but are indecipherable and are not known or knowable to [Chairge] after reasonable investigation, or whose notes do not appear in the chart, but who were involved with caring for Diann Chairge at Geisinger CMC from August 18, 2015, through August 19, 2015, and are known only to [CMC and the Clinic], and will require additional discovery from [CMC and the Clinic]." (*Id.* at ¶¶ 4-5).

Citing *Alumni Ass'n, Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan*, 369 Pa. Super. 596, 535 A.2d 1095 (1987), *aff'd*, 524 Pa. 356, 572 A.2d 1209 (1989) and *Ettinger v. Triangle-Pacific Corporation*, 791 A.2d 95 (Pa. Super. 2002), *app. denied*, 572 Pa. 742, 815 A.2d 1042 (2003), CMC and the Clinic have filed preliminary objections seeking to strike Chairge's agency allegations as overly vague and insufficiently specific since the complaint does not identify those agents by name, set forth each agent's authority, and describe how the agent's negligence was within the scope of that authority, or if unauthorized, was ratified by CMC and the Clinic. (Docket Entry No. 10 at pp. 4-7; Docket Entry No. 16 at pp. 5-6). Chairge counters that when the 74 paragraphs of the complaint are viewed in their entirety, including the agency allegations contained in paragraphs 4-5 and 52-53, they are more than sufficient to support her vicarious liability claims against CMC and the Clinic. (Docket Entry No. 21 at pp. 7-8). She submits

that the preliminary objections presented by CMC and the Clinic are particularly unwarranted since they "have much more access to or knowledge of the facts" being sought. (*Id.* at p. 9). Following the completion of oral argument on September 22, 2017, the preliminary objections pursuant to Pa.R.C.P. 1028(a)(3) were submitted for a decision. (Docket Entry No. 27).

The purpose of a complaint is to place the defendant on notice of the claim against which [s]he will have to defend. *U. S. Bank, N.A. v. Pautenis*, 118 A.3d 386, 402 (Pa. Super. 2015). Pennsylvania is a fact-pleading state, and the pleader must set forth the essential facts upon which a cause of action is based. *McShea v. City of Philadelphia*, 606 Pa. 88, 96-97, 995 A.2d 334, 339 (2010); *Grossman v. Barke*, 868 A.2d 561, 569 (Pa. Super. 2005), *app. denied*, 585 Pa. 697, 889 A.2d 89 (2005). However, "the complaint need not cite evidence but only those facts necessary for the defendant to prepare a defense." *Unified Sportsmen of Pennsylvania v. Pennsylvania Game Commission*, 950 A.2d 1120, 1134 (Pa. Cmwlth 2008); *Lilac Meadows, Inc. v. Rivello*, 25 Pa. D. & C. 5th 250, 269 (Lacka. Co. 2012). "In assessing whether particular paragraphs in a complaint satisfy this requirement, they must be read in context with all other allegations in the complaint to determine whether the defendant has been provided adequate notice of the claim against which it must defend." *Estate of Denmark ex rel. Hurst v. Williams*, 117 A.3d 300, 306 (Pa. Super. 2015).

The Superior Court of Pennsylvania originally indicated that in pleading a vicarious liability claim, a plaintiff must "identify the agent by name or appropriate description," and "set forth the agent's authority and how

the tortious acts of the agent either fall within the scope of that authority or, if unauthorized, were ratified by the principal." *Alumni Ass'n*, 369 Pa. Super. at 605 n.2, 535 A.2d at 1100 n.2 (citing P.L.E. Agency § 174); *Ettinger*, 799 A.2d at 109 (quoting *Alumni Ass'n*, *supra*). However, in *Sokolsky v. Eidelman*, 93 A.3d 858 (Pa. Super. 2014), the Superior Court expressly concluded that "[s]imply because employees are unnamed within a complaint or referred to as a unit i.e., the staff, does not preclude one's claim against their employer under vicarious liability if the employees acted negligently during the course and within the scope of their employment." *Id.* at 866. It subsequently recognized that "[i]n *Sokolsky*, we concluded that it is not necessary for a plaintiff to establish a right to recover on a claim for vicarious liability based upon the negligence of a specific named employee." *Estate of Denmark*, 117 A.3d at 306. Based upon *Sokolsky* and its progeny, the failure to identify a health care provider's agents by name, or the designation of those individuals as a unit, does not justify striking agency allegations in a complaint. *See Sokolsky*, *supra* (holding "that the trial court erred as a matter of law when it reasoned that Sokolsky was required to 'make a threshold showing that a specific medical practitioner owed a certain duty to her' in order to establish her vicarious liability claim against Manor Care and Lehigh Valley.").

Following the holdings in *Sokolsky* and *Estate of Denmark*, we have consistently rejected defense efforts to strike agency claims for failure to identify the actual or ostensible agents by name, and had assumed that defendants would cease filing preliminary objections on that basis. *See Hughes v. Wilkes-Barre Hospital Company*,

2017 WL 3479383, at *13-14 (Lacka. Co. 2017); *Walker v. Scranton Hosp. Co., LLC*, 2016 WL 1045751, at *6-7 (Lacka. Co. 2016). Regrettably, the defense bar continues to assert this argument notwithstanding the clear rulings in *Sokolsky* and *Estate of Denmark*. *See, e.g.*, *Geisel v. Bosch et al.*, No. 17 CV 1262, Nealon, J., at p. 3 (Lacka. Co. Sept. 20, 2017). Absent appellate reconsideration or reversal of *Sokolsky* and *Estate of Denmark*, the persistent pursuit of such an argument regarding the pleading of agency claims can only serve to delay the progress of litigation and to needlessly increase defense costs.

As a practical matter, the identity of every health care professional who was involved with Chairge's medical care at CMC on August 18, 2015, and August 19, 2015, can readily be ascertained by CMC and the Clinic from their risk management, personnel, payroll, billing and medical records departments. Our esteemed late colleague, Judge S. John Cottone, aptly observed almost 25 years ago that "[t]he exact facts pertaining to the propriety of care of the plaintiff are within the physicians' records or recall" and "the defendants certainly must be aware of which of their 'agents, servants or employees,' if any, assisted in the treatment of the plaintiff." *Johnson v. Patel*, 19 Pa. D. & C. 4th 305, 308-309 (Lacka. Co. 1993). Furthermore, "[i]f plaintiffs in malpractice actions were required to identify in their pleadings each defendant's employee, the employee's authority and whether the employee's negligent conduct was either authorized or ratified by that defendant, it would undoubtedly result in serial requests for pre-complaint discovery under Pa.R.C.P. 4003.8 in virtually every case in order to preempt the filing of preliminary objections by the defense." *Mills v. Green*,

2012 WL 1155899, at *4 (Lacka. Co. 2012); *Kroposky v. De La Fuente*, 2011 WL 1131488, at *8 (Lacka. Co. 2011).

Such pre-complaint discovery is unnecessary since a plaintiff is not required under *Sokolsky* and *Estate of Denmark* to identify a defendant's agents by name, to describe the agent's authority, and to aver whether the agent's tortious acts were within the scope of the agent's authority or ratified by the principal. The averments of Chairge's complaint sufficiently articulate her agency claims against CMC and the Clinic for the negligence of four specifically identified medical professionals, as well as other unidentified health care providers who "are known only to defendants and will require additional discovery." (Docket Entry No. 1 at ¶¶ 4-5). Accordingly, the preliminary objections of CMC and the Clinic under Pa.R.C.P. 1028(a)(3) will be overruled.

AND NOW, this 22nd day of September, 2017, upon consideration of the preliminary objections of defendants, Geisinger Community Medical Center and Geisinger Clinic, the memoranda of law submitted by the parties, and the oral argument of counsel on September 22, 2017, and based upon the reasoning set forth above, it is hereby ORDERED and DECREED that:

1. Defendants' preliminary objections pursuant to Pa.R.C.P. 1028(a)(3) are OVERRULED; and

2. Within the next twenty (20) days, defendants shall file a responsive pleading to the complaint.

Angry v. Car Solutions, LLC

Rescission — Mutual mistake — Condition — Unjust enrichment

Purchaser of a used vehicle was entitled to the return of her $2,000 deposit, less expenses sand fees actually incurred by the dealership, because the parties were mutually mistaken with regard to the availability of financing provided by a third party.

Plaintiff visited defendant's vehicle dealership, where she decided to purchase a 2008 Ford Taurus. The cash purchase price of the vehicle was $8,500. Plaintiff provided a non-refundable cash down payment of $2,000 for the Taurus. Plaintiff filled out a credit application stating she was employed and earned monthly gross income of $1,940. Defendant attempted to obtain conventional financing for plaintiff, but was unable to do so because of plaintiff's prior credit history and recent repossession of another vehicle. Plaintiff's credit application was provided to Tebo, an indirect subprime lender. Tebo provided preapproval for acquiring the debt owed for plaintiff's purchase of the Taurus. The purchase price of the vehicle was increased to $10,165 to account for a $2,000 financing fee required by Tebo for acquiring the debt.

On the following day, plaintiff received possession of the Taurus from defendant's dealership. She maintained insurance on the vehicle. One week later, Tebo informed defendant that it denied plaintiff's application because she did not qualify for its program based upon the income stated in her paystubs. Plaintiff attempted to make payment to Tebo, but was informed she did not have an account with Tebo.

Plaintiff later appeared at defendant's dealership, and the manager asked her for the keys to the Taurus so he could check the mileage. After viewing the vehicle, the manager informed plaintiff that he was repossessing the vehicle based on her failure to provide defendant with payment in accordance with the retail installment sale contract.

The court found that at the time the parties entered into the retail installment sale contract, they believed the transaction would be financed by Tebo. The belief that Tebo had approved the financing was a basic assumption of the contract and was the inducement for the parties to enter into the retail installment sales contract. Plaintiff failed to make the installment payment to defendant because she erroneously believed the payment was due to Tebo. The court concluded that the misconception as to approval of financing by Tebo was a condition of assent to the contract by both parties. Mutual mistake voided the contract.

Plaintiff also alleged a claim for unjust enrichment. The court held it was inequitable for defendant to retain the entirety of plaintiff's $2,000

deposit, because both parties were mistaken in their belief that Tebo was acquiring the debt.

Defendant had already repossessed the vehicle, so the court determined that the parties could be placed in their former positions by the return of plaintiff's $2,000 deposit, less defendant's expenses of $742, which consisted of sales tax, a title fee, encumbrance fee and document fee. Defendant also sought reimbursement for repair costs, but the court found insufficient evidence as to any costs of repair.

The court rejected plaintiff's claims for violations of trade practices law, because she did not demonstrate that there were any deceptive representations. The court also rejected plaintiff's claim for intentional infliction of emotional distress, because plaintiff did not provide any medical confirmation that she actually suffered emotional distress.

C.P. of Lawrence County, No. 10143 of 2015

Stanley Booker, for plaintiff
Phillip L. Clark, for defendants

MOTTO, *P.J.*, Sep. 28, 2017—This case is before the Court for disposition following the conclusion of a non-jury trial. The current action was initiated by the Plaintiff, Jasmine L. Angry, through filing of a Complaint on February 13, 2015, asserting claims for violations of the Unfair Trade Practices and Consumer Protection Law (hereinafter "UTPCPL"), fraudulent misrepresentation, breach of contract, unjust enrichment, intentional infliction of emotion distress and punitive damages. On March 2, 2015, the Defendant, Car Solutions, LLC, filed Preliminary Objections to Plaintiff's Complaint. In response, the Plaintiff filed an Amended Complaint on May 1, 2015, raising the same causes of action. On September 2, 2015, the Defendant filed an Answer, New Matter and Counterclaim to Plaintiff's Amended Complaint, which included a counterclaim seeking to recover for damages allegedly incurred to the vehicle while it was in the possession of Plaintiff. This matter then proceeded to a

non-jury trial, which was held on September 11, 2017 and September 12, 2017.

FINDINGS OF FACT

1. Plaintiff previously owned a Chevrolet Malibu, which was repossessed on February 11, 2014.

2. Plaintiff received an income tax refund in the amount of $7,000.00, and she intended to utilize a portion of that refund to acquire a vehicle.

3. On February 26, 2014, Plaintiff visited Defendant's dealership located in Hermitage, Pennsylvania, to purchase a vehicle.

4. Plaintiff first demonstrated interest in a Hummer automobile, but subsequently decided to purchase a 2008 Ford Taurus X (hereinafter "Taurus"), which had a cash purchase price of $8,500.00. *See* Exhibit B.

5. The Taurus was being sold on consignment by Defendant and was owned by an individual named John Murray.

6. On February 26, 2014, Plaintiff signed a document indicating the sales price for the Taurus was $8,500.00, a document fee of $120.00, tax in the amount of $510.00, title transfer fee of $75.00 for a total amount of $9,205.00. *See* Exhibit B.

7. Plaintiff provided a non-refundable cash down payment of $2,000.00 to be applied to the purchase of the Taurus.

8. Plaintiff also signed a credit application, stating she was employed by Reliant Overlook Holdings, LLC, or ROH, LLC, and her previous employer was identified as

"Haven". *See* Exhibit C.

9. The credit application stated Plaintiff's gross monthly income was $1,940.00.

10. Plaintiff provided Anthony Lombardo, manager for Defendant's Hermitage, Pennsylvania, dealership, with paystubs from Reliant overlook Holdings, LLC, for the pay periods ending on January 13, 2014, and ending on January 27, 2014. *See* Exhibits D and E.

11. The paystub ending on January 13, 2014, indicated Plaintiff earned $9.50 per hour and the paystub ending on January 27, 2014, stated Plaintiff earned $9.65 per hour. The paystub for the period ending on January 27, 2014, set forth Plaintiff had earnings of $2,113.61 for the year to date.

12. First, Defendant attempted to obtain conventional financing for Plaintiff, but was unable to do so based upon Plaintiff's prior credit history and recent repossession.

13. It was determined subprime lending would be necessary to obtain financing for Plaintiff's purchase of the Taurus.

14. Plaintiff's credit application was provided to Tebo Financial Services (hereinafter "Tebo"), an indirect subprime lender, who acquires contracts concerning the purchase and financing of automobiles. Tebo provided preapproval for acquiring the debt owed for Plaintiff's purchase of the Taurus based upon the credit application stating Plaintiff maintains a gross monthly income of $1,940.00.

15. The purchase price of the vehicle was increased to $10,165.00 to account for additional costs associated with

obtaining subprime financing through Tebo, including a financing fee of $2,000.00 charged by Tebo for acquiring the debt. The Bill of Sale states Plaintiff was also required to pay for a documentation fee of $105.00, Tag/Title/License fee of $68.50, Gap Insurance coverage of $499.00[1], sales tax of $609.90, other fees or taxes in the amount of $20.00 for total costs of $11,467.40. *See* Exhibit F.

16. Plaintiff signed a Retail Installment Sale Contract with Defendant, in which she agreed to finance the amount $9,467.40 with a finance charge of $4,047.01 and an interest rate of 20.99 percent. Plaintiff was required to pay 91 bi-weekly payments of $148.50 beginning on March 28, 2014. If all payments were made, Plaintiff would pay $13,514.41 plus the $2,000.00 deposit for a total amount of $15,514.41 for the purchase of the Taurus. *See* Exhibits G and 5.

17. The Retail Installment Sale Contract stated, "If you default, we may take (repossess) the vehicle from you if we do so peacefully and the law allows it." *See* Exhibit G and 5.

18. According to the Retail Installment Sale Contract, if payment was not made within 10 days after it is due, Defendant could demand a late charge of 2 percent per month of the part of payment that is late. *See* Exhibits G and 5.

19. Tebo provided a preapproval based upon the income information provided on credit application, but

1. Plaintiff did not sign the portion of the Retail Installment Sale Contract indicating she wished to purchase the optional gap contract through Nations Safe Drivers. *See* Exhibits G and 5. However, Plaintiff executed a Deficiency waiver Addendum provided by Tebo Financial Services on February 26, 2014, concerning the purchase of gap insurance. *See* Exhibit 4.

it was necessary for Tebo to review Plaintiff's income information and all documentation before granting final approval for financing Plaintiff's purchase of the Taurus.

20. Plaintiff received possession of the Taurus on February 27, 2014, from Defendant's dealership located in New Castle, Pennsylvania and she maintained insurance on said vehicle commencing on February 26, 2014.

21. A Certificate of Title was executed on February 27, 2014, transferring title of the Taurus from Mr. Murray to Defendant. On March 18, 2014, the Certificate of Title was reassigned to Plaintiff with Defendant registered as a lienholder, which was not signed by Plaintiff, but executed by Eugene Razzano as power of attorney for Plaintiff[2].

22. On March 5, 2014, Tebo informed Defendant it denied Plaintiff's application as Plaintiff did not qualify for its program based upon the income stated within her paystubs. Robert M. James, Business Manager for Tebo, explained the denial was based upon the earnings demonstrated within Plaintiff's paystubs being less than the gross monthly income contained on the credit application. Tebo required a co-applicant by the close of business on March 5, 2014 to obtain approval. *See* Exhibit J.

23. Plaintiff attempted to make payment to Tebo, but was informed she did not have an account with Tebo.

24. Plaintiff then contacted Mr. Lombardo, who informed her Tebo required additional paystubs to approve her financing. Mr. Lombardo instructed Plaintiff

2. Defendant did not provide any evidence Plaintiff executed a power of attorney providing Defendant with authority to execute the Certificate of Title on her behalf.

to provide the paystubs to Defendant's dealerships in New Castle or Hermitage.

25. On April 1, 2014, Plaintiff appeared at Defendant's dealership in New Castle and was asked by Anthony Ulbrycht, manager for Defendant's New Castle location, to provide him with the keys to the Taurus, so he could check the mileage on said vehicle. After viewing the vehicle, Mr. Ulbrycht informed Plaintiff that Defendant was repossessing the vehicle based upon her failure to provide Defendant with payment on or before March 28, 2014, in accordance with the Retail Installment Sale Contract.

26. Plaintiff received a letter dated April 3, 2014, issued by Eugene Razzano, President of Car Solutions, LLC, stating Defendant repossessed the Taurus as Defendant did not receive the first payment due on March 28, 2014. The letter also informed Plaintiff she had 15 days from the date of the letter to pay the full amount of $9,667.00 to purchase the vehicle.

27. At the time the parties entered into the Retail installment Sale Contract, Plaintiff's Exhibit G, the parties believed that the transaction would be financed by Tebo. Plaintiff believed that Tebo was providing the financing and Defendant believed Tebo was purchasing the debt reflected in the agreement.

28. The purchase price stated in the Retail Installment Sale Contract was updated in order to support the amount Tebo would require in order to approve financing the transaction and to provide a net payment to Defendant of approximately $7,000.00. This amount included the $2,000.00 payment to Tebo which Tebo would retain as an additional transaction fee.

29. The belief Tebo had approved the financing was a basic assumption of the contract and was the inducement for the parties to enter into the Retail Installment Sale Contract. The purchase price was determined based upon Tebo's financial requirements for approval.

30. Plaintiff failed to pay the payment due on March 28, 2017 to Defendant as set forth in the Retail Installment Sale Contract because she believed, erroneously, that the payment was due to Tebo as the entity financing the purchase.

31. The misconception as to approval of financing by Tebo entered into the contemplation of both parties and was a condition of assent to the Retail Installment Sale Contract by both parties.

32. Plaintiff at all times acted in good faith.

33. The parties can be placed in their former positions by the return of the vehicle to Defendant and the return of the deposit of $2,000.00 to Plaintiff, less Defendant's expenses of $742.40, consisting of sales tax of $609.90; title fee of $22.50; encumbrance fee of $5.00; plate fee of $10.00; and document fee of $105.00. There is insufficient proof of any other expenses recoverable by Defendant or of the cost of repair of any damage to the vehicle.

CONCLUSIONS OF LAW

In her Amended Complaint, Plaintiff has averred claims for breach of contract, violations of the UTPCPL, fraudulent misrepresentation, unjust enrichment and intentional infliction of emotional distress. Plaintiff asserts Defendant breached written agreements entered into by the parties by repossessing the vehicle, failing to obtain proper financing for the purchase of the vehicle and failing

to obtain proper approval to transfer title of the vehicle.

"A cause of action for breach of contract must be established by pleading (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." *Corestates Bank, N.A. v. Cutillo*, 723 A.2d 1053, 1058 (Pa. Super. 1999) (citing *Gen. State Auth. v. Coleman Cable & Wire Co.*, 27 Pa. Cmwlth. 385, 365 A.2d 1347, 1349 (1976)). A plaintiff must prove the existence of a contract by demonstrating there was an offer, acceptance and consideration. *Mundie v. Christ United Church of Christ*, 987 A.2d 794, 801 (Pa. Super. 2009) (citing *Hatbob v. Brown*, 394 Pa. Super. 234, 575 A.2d 607, 613 (1990)). "Contracts are enforceable when parties reach mutual agreement, exchange consideration and have set forth terms of their bargain with sufficient clarity." *Presbyterian Medical Center v. Budd*, 832 A.2d 1066 (Pa. Super. 2003) (citing *Biddle v. Johnsonbaugh*, 444 Pa. Super. 450, 664 A.2d 159, 163 (1995)).

The doctrine of mutual mistake acts as a defense to the formation of a contract and occurs when the parties held an erroneous belief as to a basic assumption of the contract at the time of formation which has a material effect on the agreed upon exchange. *Hart v. Arnold*, 884 A.2d 316, 333 (Pa. Super. 2005). A mutual mistake occurs when the written agreement fails to set forth the "true agreement" of either party. *Id.* (citing *Daddona v. Thorpe*, 749 A.2d 475, 487 (Pa. Super. 2000)). In order to assert a contract is voidable on a theory of mutual mistake, a party must meet the following three conditions: (1) the mistake relates to a basic assumption on which the contract is based; (2) the mistake has a material effect on the agreed upon exchange of performance; and (3) the mistake must not be one as

to which the party seeking relief bears the risk. *Id.* (citing Restatement (Second) of Contracts § 152 (1981)). "A contract entered into in a mutual mistake as to an essential fact which formed the inducement to it, may be rescinded on discovery of the mistake, if the parties can be placed in their former position with reference to the subject matter of it." *Blygh v. Samson*, 137 Pa. 368, 377, 20 A. 996 (1891). The doctrine does not apply to every mutual mistake, but only those mistakes which affect the essence of the contract. *Vrabel v. Scholler*, 369 Pa. 235, 85 A.2d 858 (1952) (citing *Miles v. Stevens*, 3 Pa. 21, 37 (1846); *Holmes v. Cameron*, 267 Pa. 90, 110 A. 81 (1920)).

The relief available to a party adversely affected by a mutual mistake in a written contract depends on the nature and effect of that mistake. *RegScan, Inc. v. Con-Way Transp. Services, Inc.*, 875 A.2d 332, 340 (Pa. Super. 2005) (citing *Lanci v. Metropolitan Ins. Co.*, 388 Pa. Super. 1, 564 A.2d 972, 974 (1989)). "If a mistake is demonstrated, the contract may be reformed, or the injured party may avoid his or her contractual obligations." *Id.* (citing *Loyal Christian Benefit Assoc. v. Bender*, 342 Pa. Super. 614, 493 A.2d 760, 762 (1985)).

In the current case, Plaintiff visited Defendant's dealership located in Hermitage, Pennsylvania, to purchase a vehicle. She decided to purchase a 2008 Ford Taurus X being sold by Defendant on consignment from an individual named John Murray. On the same date, Plaintiff signed a document indicating the sales price for the Taurus was $8,500.00 $8,500.00, a document fee of $120.00, tax in the amount of $510.00, title transfer fee of $75.00 for a total amount of $9,205.00. Anthony Lombardo attempted to pursue conventional financing for Plaintiff, which was rejected. It was then determined Plaintiff would require

subprime financing to purchase the vehicle. Plaintiff signed a credit application, which indicated that her gross monthly income was $1,940.00. She also provided paystubs to Mr. Lombardo to demonstrate her actual earnings for pay periods ending on January 13, 2014, and January 27, 2014. At that time, Plaintiff paid a deposit in the amount of $2,000.00 to Defendant. Based upon the gross monthly income stated within the credit application, Tebo granted preapproval for acquiring the debt incurred by Plaintiff to purchase the Taurus.

As result of Tebo's preapproval, Plaintiff and Defendant executed the Retail Installment Sale Contract and Bill of Sale, in which the cash price for the Taurus was increased from $8,500.00 to $10,165.00 to account for additional costs associated with obtaining subprime financing through Tebo. Plaintiff obtained possession of the Taurus on February 27, 2014, from Defendant's dealership located in New Castle, Pennsylvania. However, on March 5, 2014, Tebo informed Defendant it denied Plaintiff's application as the income demonstrated in Plaintiff's paystubs did not qualify for its program because it was less than the gross monthly income stated in the credit application. Tebo instructed Defendant that Plaintiff would require a co-applicant by the close of business on March 5, 2014, to obtain approval. Plaintiff then attempted to provide a payment to Tebo, who informed her that she did not maintain an account with Tebo. Plaintiff's vehicle was then repossessed by Defendant on April 1, 2014, for failure to provide the payment due on March 28, 2014.

While it is apparent the parties entered into written agreements concerning the purchase of the Taurus, they were based on the assumption the purchase would be financed by Tebo. This belief was initiated by Tebo

providing preapproval for acquiring the debt based upon the gross monthly income contained within Plaintiff's credit application. Financing provided by Tebo was a basic assumption upon which the contract was based as the cash price of the Taurus was increased from $8,500.00 to $10,165.00 to account for the costs or charges requested by Tebo to acquire the debt. This was testified to by Eugene Razzano, president for Defendant. Clearly, Tebo's refusal to approve the acquisition of the debt had a material effect on the exchange of performance between the parties as Plaintiff was under the assumption she was to provide her payments directly to Tebo. In fact, Plaintiff attempted to tender payment to Tebo, but was informed that she did not have an account with Tebo, which prompted her to contact Mr. Lombardo. At that time, Mr. Lombardo informed Plaintiff to provide Defendant with additional paystubs in an attempt to obtain financing through Tebo. This caused Plaintiff to appear at Defendant's New Castle dealership on April 1, 2014, which resulted in Defendant repossessing the Taurus. Furthermore, Plaintiff does not bear the risk of the mistake as she was not directly in contact or communication with Tebo relating to the financing of the debt. As a result, it would unreasonable to allocate the risk of the mistake to Plaintiff.

Based upon the foregoing, a mutual mistake existed between the parties caused by the assumption that financing would be provided from Tebo as a result of the preapproval. Therefore, it is incumbent upon the Court to determine the appropriate relief given the facts of this case. Reformation of the contract is not possible as the vehicle in question has been sold to another individual, who is not a party to this action. It would be improper to reform the contract under those circumstances. As such, the only

recourse is to void the parties' contractual obligations, and to place the parties in the same or similar positions they were in prior to the execution of the contract. In order to do so, it is necessary to provide Plaintiff with a refund of her deposit. However, a complete refund of that amount would be inequitable to Defendant as it incurred expenses of $742.40, including sales tax of $609.90; title fee of $22.50; encumbrance fee of $5.00; plate fee of $10.00; and document fee of $105.00. Defendant is entitled to retain $742.40 of Plaintiff's deposit to compensate it for paying the aforementioned expenses and fees. Therefore, Plaintiff is awarded monetary damages in the amount of $1,257.60, which constitutes her deposit of $2,000.00 less the expenses incurred by Defendant.

Plaintiff also averred claims for violations of the UTPCPL and fraudulent misrepresentation asserting Defendant fraudulently informed Plaintiff she was approved for financing through Tebo, failed to promptly return Plaintiff's deposit, failed to provide a vehicle which conformed to the contract and misrepresented Defendant was authorized to sale the Taurus.

The catchall provision of the UTPCPL, 73 P.S. § 201-2(4)(xxi) defines an unfair trade practice as "Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding." To set forth a cause of action under 73 P.S. § 201-2(4)(xxi), the Plaintiffs must prove the elements of common law fraud or the defendant engaged in deceptive conduct. *Bennett v. A.T. Masterpiece Homes at Broadsprings, LLC*, 40 A.3d 145, 155-156 (Pa. Super. 2012). The elements of common law fraud are as follows: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to

whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. *Skurnowicz v. Lucci*, 798 A.2d 788 (Pa. Super. 2002) (citing *Bortz v. Noon*, 556 Pa. 489, 729 A.2d 555 (1999)). In order to establish a claim for deceptive conduct, a plaintiff must establish the defendant had knowledge of the falsity of its statements or the misleading quality of its conduct. *Belmont v. MB Inv. Partners, Inc.*, 708 F.3d 470 (3d Cir. 2013); *See also Wilson v. Parisi*, 549 F. Supp. 2d 637, 666 (M.D. Pa. 2008). The UTPCPL is to be liberally construed to effectuate its objective of protecting consumers from unfair business practices, *Commonwealth by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A.2d 812 (1974).

In the case *sub judice*, Plaintiff has failed to establish her claims for Defendant's alleged violations of the catchall provision of the UTPCPL and fraudulent misrepresentation as the evidence at trial does not demonstrate Defendant or its employees knowingly made false statements to Plaintiff to induce her into purchasing the Taurus. Plaintiff claims Defendant fraudulently represented to Plaintiff that she was approved for financing through Tebo. Defendant was informed financing was preapproved by Tebo based upon the gross monthly income contained within Plaintiff's credit application. Mr. Lombardo believed financing would be approved by Tebo based upon that preapproval. Defendant had no reason to believe Tebo would not approve the acquisition of the debt at that time. It was not until March 5, 2014, when Defendant received notice from Tebo that it would not be acquiring the debt as it discovered Plaintiff earned insufficient income to qualify for its program. At the time of executing the contracts for

the purchase of the Taurus, Defendant and its employees believed that Plaintiff would be approved and permitted Plaintiff to obtain possession of the vehicle. Defendant would not have provided possession of the vehicle to Plaintiff if it were aware Tebo would not finance the transaction. Therefore, Plaintiff was unable to establish Defendant knowingly misrepresented that Plaintiff was approved for financing through Tebo as it was operating under the belief financing would be approved.

Plaintiff also contends Defendant fraudulently and deceptively represented it had authority to transfer title to the Taurus and the title would be transferred to her upon completion of her installment payments. Again, there is no evidence demonstrating the title would not have been transferred to Plaintiff upon the payment of all installments due pursuant to the Retail Installment Sale Contract. Exhibit 1 indicates the title to the Taurus was transferred from John Murray to Defendant on February 27, 2014, and the title was assigned to Plaintiff with Defendant being a lienholder on March 18, 2014. That document indicates the appropriate transfers were being made. The record is devoid of any indication Defendant lacked the authority to transfer the Taurus to Plaintiff. However, Plaintiff was not provided with the title to the Taurus as she failed to make the first installment payment to Defendant, which became due on March 28, 2014. Subsequently, on April 1, 2014, Defendant repossessed the Taurus. The record lacks any evidence indicating Defendant would not have provided the title to Plaintiff, if all payments were made.

Furthermore, Plaintiff asserts Defendant engaged in deceptive practices by increasing the purchase price to account for costs associated with financing through Tebo. Plaintiff has again failed to demonstrate Defendant

misled her by increasing the purchase price. The Bill of Sale containing Plaintiff's signature clearly demonstrates the purchase price of $10,165.00. It was incumbent upon Plaintiff to properly review the documents relating to this transaction and, if there was a question concerning the purchase price, to raise it at that time. Plaintiff was aware of the increased purchase price as she knew it was necessary to obtain the financing through Tebo. Although the agreement between Defendant and Tebo states Defendant should refrain from increasing the purchase price based upon seeking financing through Tebo, that agreement in no way creates any cause of action or remedy for Plaintiff. When determining if Defendant performed a fraudulent or deceptive act, the Court must examine the conduct of Defendant when negotiating or dealing with Plaintiff. After reviewing the entirety of the record, it has been determined that there is insufficient evidence to conclude the increase in the purchase price for the Taurus was fraudulent or deceptive as the increase was neither misrepresented to or concealed from Plaintiff.

It is Plaintiff's contention Defendant also violated 73 P.S. § 201-2(4)(iv) and (vi) by increasing the purchase price and failing to inform Plaintiff of said increase. Those sections state, "(iv) using deceptive representations or designations of geographic origin in connection with goods or services;" and "(vi) Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand". 73 P.S. § 201-2(4)(iv) and (vi). As stated previously in this Opinion, Plaintiff signed the Bill of Sale, Plaintiff's Exhibit F, and Retail Installment Sale Contract, Plaintiff's Exhibit G, demonstrating she was aware of the increase in the purchase price of the Taurus to account for the cost of financing through Tebo. Defendant

did not engage in any deceptive practices by altering the purchase price as Defendant made Plaintiff aware of said change by placing that information within the Bill of Sale and Retail Installment Sale Contract. Thus, Plaintiff is not entitled to relief pursuant to 73 P.S. § 201-l(4)(iv) and (vi).

Based upon the foregoing, Plaintiff has failed to present sufficient evidence to establish her claims for violations of the UTPCPL and fraudulent misrepresentation as there is nothing of record indicating Defendant fraudulently or deceptively induced Plaintiff to purchase the Taurus.

Fourth, Plaintiff has asserted a claim for unjust enrichment contending it would be inequitable to allow Defendant to retain the $2,000.00 deposit paid by Plaintiff on February 26, 2014, when the vehicle was repossessed on April 1, 2014.

A quasi-contract imposes a duty, in the absence of an agreement, when one party receives unjust enrichment at the expense of another. *AmeriPro Search, Inc. v. Fleming Steel Co.*, 787 A.2d 988 (Pa. Super. 2001). "The elements of unjust enrichment are benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances it would be inequitable for defendant to retain the benefit without payment of value." *Id.* The most significant element of unjust enrichment is whether the defendant was unjustly enriched. *Styer v. Hugo*, 422 Pa. Super. 262, 619 A.2d 347, 350 (1993). "The doctrine does not apply simply because the defendant may have benefitted as a result of the actions of the plaintiff." *Id.*

The evidence presented at trial demonstrates Plaintiff paid a deposit in the amount of $2,000.00 on February 26, 2014, to be applied to the purchase of the Taurus.

Defendant then provided possession of said vehicle to Plaintiff on February 27, 2014. However, both parties believed the transaction would be financed by Tebo when the deposit was paid based upon preapproval granted by Tebo. On March 5, 2014, Tebo informed Defendant of its decision to reject Plaintiff's application for financing and Tebo would not be purchasing the debt. Moreover, the Taurus was repossessed by Defendant on April 1, 2014, which is 33 days after Plaintiff received possession of said vehicle. Defendant subsequently sold the vehicle to another purchaser. It is inequitable to allow Defendant to retain the entirety of the deposit paid by Plaintiff in light of the mistaken belief of both parties that Tebo would be acquiring the debt and Plaintiff only maintained possession of said vehicle for a very limited period of time. Given all of the circumstances of this case, it is apparent Plaintiff is entitled to a refund of her $2,000.00 deposit less the expenses incurred and actually paid by Defendant, which consist of $742.40 for sales tax of $609.90; title fee of $22.50; encumbrance fee of $5.00; plate fee of $10.00; and document fee of $105.00. Therefore, Plaintiff is awarded monetary damages in the amount of $1,257.60, consisting of her deposit of $2,000.00 less the expenses incurred by Defendant.

Plaintiff's final claim is for intentional infliction of emotional distress arising from Defendant repossessing the Taurus, which deprived Plaintiff of a vehicle to transport herself to and from work resulting in her loss of employment.

The Pennsylvania Courts have adopted the approach taken by Restatement (Second) of Torts § 46, which states:

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. *Bartanus v. Lis*, 332 Pa. Super. 48, 480 A.2d 1178 (1984) (citing Restatement (Second) of Torts § 46.

The conduct to support recovery for intentional infliction of emotional distress must be so outrageous in character that it goes beyond all bounds of decency, and it has not been enough to demonstrate that the defendant acted with intent which is tortious or even criminal or with malice to a degree that would entitle the plaintiff to punitive damages for another tort. *Toney v. Chester County Hosp.*, 961 A.2d 192, 202 (Pa. Super. 2008) (quoting *Reardon v. Allegheny College*, 926 A.2d 477, 488 (Pa. Super. 2007)). Comment d to Restatement (Second) of Torts § 46 states in part, "Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim 'Outrageous!'".

In the current case, the conduct of Defendant was not so outrageous that it is actionable pursuant to a claim for intentional infliction of emotional distress. Defendant exercised its right to repossess the vehicle pursuant to the Retail Installment Sale Contract for Plaintiff's failure to provide the first installment payment due on March 28, 2014. While there is conflicting testimony as to whether Plaintiff was aware she was required to provide said payment directly to Defendant, the Retail Installment Sale Contract sets forth that the first payment was due on March 28, 2014, and the agreement was between Plaintiff and Defendant. Although Defendant repossessed Plaintiff's vehicle only three days after the first installment payment

was due, Defendant's conduct was not so shocking it would cause a member of the community to exclaim "Outrageous!" nor does it go beyond the bounds of decency as Defendant believed it was entitled to do so based upon the language contained within the Retail installment Sale Contract.

Moreover, a party asserting a claim for intentional infliction of emotional distress must provide expert medical confirmation that he or she actually suffered emotional distress. *Kazatsky v. King David Memorial Park, Inc.*, 515 Pa. 183, 197, 527 A.2d 988, 995 (1987). "Those truly damaged should have little difficulty in procuring reliable testimony as to the nature and extent of their injuries." *Id.* At trial, Plaintiff did not provide any expert medical testimony to demonstrate objective proof of her emotional distress, which is required to establish her claim. Without competent medical evidence to establish an objective basis for Plaintiff's claim for intentional infliction of emotional distress, Plaintiff failed to meet her burden of proof regarding said claim. Therefore, Plaintiff is not entitled to the relief requested concerning her claim for intentional infliction of emotional distress.

Defendant averred a counterclaim for damages allegedly sustained to the Taurus while it was in Plaintiff's possession. Mr. Ulbrycht testified that, when he observed the vehicle on April 1, 2014, it had scratches and one tire was replaced by a spare tire or, as it was referred to during trial, a "doughnut". According to Mr. Razzano, repossession of the vehicle was based upon Plaintiff's failure to timely provide the first installment payment and the condition of the vehicle. However, Defendant did not provide any evidence to demonstrate the cost of repairs made to the Taurus as a result of harm allegedly sustained

while it was in Plaintiff's possession. Defendant also failed to provide any objective evidence of the alleged damage to the vehicle, such as photographs, demonstrating the condition of the vehicle when it was repossessed on April 1, 2014. Without said evidence, Defendant has failed to meet its burden relating to its counterclaim and its demand for monetary damages is denied.

Based upon the foregoing, on Count III, breach of contract, and Count v, unjust enrichment, of Plaintiff's Amended Complaint, the Court finds in favor of Plaintiff and against Defendant and judgment is entered in the amount of $1,257.60. On the remaining Counts of Plaintiff's Amended Complaint, a verdict is entered in favor of Defendant and against Plaintiff. Concerning Defendant's Counterclaim, a verdict is entered in favor of Plaintiff and against Defendant.

ORDER OF COURT

AND NOW this 28th day of September, 2017, this case being before the Court for disposition following a non-jury trial held on September 11, 2017, and September 12, 2017, with the parties appearing through counsel, the Plaintiff represent by Stanley T. Booker, Esquire, and the Defendant represented by Phillip L. Clark, Jr., Esquire, after a thorough review of the applicable record, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. On Counts III and IV of the Plaintiff's Amended Complaint, a verdict and judgment is entered in favor of Plaintiff and against Defendant in the amount of $1,257.60.

2. On all remaining Counts of Plaintiff's Amended Complaint, a verdict and judgment is entered in favor of Defendant and against Plaintiff.

3. On Defendant's Counterclaim; a verdict and judgment is entered in favor of Plaintiff and against Defendant.

4. The Court's findings of fact and conclusions of law supporting the verdicts rendered in the above-captioned matter are specifically stated within the attached Opinion of even date herewith and are incorporated herein by reference.

5. The Prothonotary shall serve a copy of this Order of Court and attached Opinion to counsel of record, Stanley T. Booker, Esquire, and Phillip L. Clark, Jr., Esquire, by way of appropriate service.

Charlesworth v. Galacci

Net worth — Punitive damages claim — Pa.R.Civ.P. 4003.7 — Dog bite case

Plaintiffs were entitled to net worth discovery to support punitive damages in this dog bite case where they offered a prima facie case that defendants acted in a reckless manner and demonstrated willful and wanton disregard for the safety of others by disregarding their dog's vicious propensity for biting humans. The court granted plaintiffs' motion to compel net worth discovery.

Plaintiffs Rosangela F. Charlesworth and Charles Charlesworth filed this personal injury action against defendants, Donald and Leslie Galacci. According to the complaint, Rosangela suffered injuries when she was bit by defendants' dog while cleaning their residence. Plaintiffs also asserted a claim for punitive damages. They noted that defendants' dog bit two other people before the incident in question and attacked its own brother. Despite the dog's history of aggressive behavior, defendants advised Rosangela that the dog "gets along with everybody and favors women." Defendants, in arguable disregard of the risk of harm, advised Rosangela that the dog was friendly and would not bite, according to the suit. Plaintiffs alleged that defendants acted in a reckless manner in failing to take proper action to protect Rosangela. Here, the court considered plaintiffs' motion to compel a response

to net worth discovery. Punitive damages are appropriate when an individual's actions are of such an outrageous nature as to demonstrate intentional, willful, wanton or reckless conduct, the court explained. To secure financial wealth discovery under Pa.R.Civ.P. 4003.7, the plaintiff must identify facts that establish a prima facie basis for the recovery of punitive damages. In Pennsylvania, a punitive damages claim must be supported by evidence sufficient to establish that the defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that he acted, or failed to act, in conscious disregard of that risk. In determining an appropriate amount of punitive damages, the jury may consider the character of the defendant's act, the nature and extent of the harm suffered and the wealth of the defendant, the court said, citing *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800 (Pa. 1989). Plaintiffs sufficiently identified facts demonstrating defendants' prior knowledge and subjective appreciation for the dog's vicious propensity and proclivity for biting humans, the court observed. Moreover, plaintiff's liability expert concluded that defendants acted in a "reckless" manner and demonstrated willful and wanton disregard for the safety of others. Under the circumstances, plaintiffs demonstrated their right to financial wealth discovery under Kirkbride and Rule 4003.7. Defendants correctly noted that discovery after the filing of a certificate of readiness is viewed with disfavor. However, plaintiffs' discovery request did not raise new issues, as the financial wealth request merely concerned one of the three relevant factors for the jury to consider in calculating an amount of punitive damages. As such, plaintiffs were entitled to the net worth discovery.

C.P. of Lackawanna County, No. 14 CV 3390

Vincent S. Cimini, for plaintiff
Harry T. Coleman, for defendants

NEALON, *J.*, Sept. 19, 2017—

ORDER

In this dog bite case, plaintiffs, Rosangela Freitas Charlesworth and Charles Charlesworth ("the Charlesworths"), have filed a "Motion to Compel Responses to Net Worth Discovery" that was served upon defendants, Donald Galacci and Leslie Galacci ("the

Galaccis"). (Docket Entry No. 16). The Charlesworths contend that discovery of the Galaccis' financial information is relevant to the Charlesworths' pending punitive damages claim against the Galaccis. (*Id.* at ¶¶ 3, 5-6, 9). The Galaccis oppose the requested discovery on the grounds that they filed a Certificate of Readiness on January 19, 2017, (Docket Entry No. 10), as a result of which the Charlesworths' request for net worth discovery is untimely. (Docket Entry No. 19 at p. 6) ("The issue here is not if the claim of punitive damages is in play, but rather is the wealth discovery untimely.").

Ms. Charlesworth was allegedly attacked by the Galaccis' American Bulldog, "Zeus," while performing house cleaning services at their home on October 29, 2013. (Docket Entry No. 1 at ¶¶ 3-4, 8). The parties' discovery revealed that Zeus was originally owned by Mr. Galacci's prior paramour, but after that relationship terminated, Mr. Galacci assumed sole custody of the dog. During the course of that relationship and their joint custody of the dog, Zeus bit two other people and attacked its own brother, Duke. While within Mr. Galacci's sole custody, Zeus trapped another cleaning service employee in the Galaccis' bathroom, and the veterinarian's records reflect that Mr. Galacci called for advice "because Zeus was growling and nipping at the owner" who "wants to know why he is attacking and what is causing him to be that way now." Despite this history and other incidents of aggressive behavior, Mr. Galacci advised Ms. Charlesworth "that [Zeus] gets along with everybody and favors women." (Docket Entry No. 19, Exhibit B at pp. 4-6).

The Charlesworths have retained a canine behavior expert, Robert H. Brandau, who is a certified animal control

officer and an approved evaluator for the American Kennel Club. (Docket Entry No. 19, Exhibit B). He has opined that the Galaccis "had an obligation to make sure that Zeus was securely confined when they were not home and employees like [Ms. Charlesworth] would be there to work." (Id at p. 7). In light of Zeus' "aggressive history" and multiple prior attacks, Mr. Brandau has concluded that the Galaccis acted in a "reckless manner in failing to take the proper actions to protect [Ms. Charlesworth] in this case." (*Id.*). He further states that the Galaccis demonstrated "willful and wanton disregard for the safety of others," including Ms. Charlesworth. (*Id.*). The Charlesworths have asserted a claim for punitive damages, and the Galaccis have never filed a motion for partial summary judgment seeking to dismiss that claim for punitive damages. (Docket Entry No. 1 at ¶ 11).

On January 19, 2017, the Galaccis filed a Certificate of Readiness pursuant to Lacka. Co. R.C.P. 214(b) attesting that "all discovery in the case has been completed" and "no case dispositive motions are pending nor does any party or attorney contemplate filing such a case dispositive motion." (Docket Entry No. 10). However, approximately five months later, the Galaccis filed certificates on June 9, 2017, as prerequisites to their service of subpoenas upon four healthcare providers seeking the production of Ms. Charlesworth's treatment records. (Docket Entry No. 12). By notice dated May 31, 2017, the Deputy Court Administrator scheduled a status conference before the undersigned on July 2, 2017, and following the completion of that conference, this matter was scheduled for trial on November 13, 2017. (Docket Entry Nos. 11, 14).

"Punitive damages are appropriate when an individual's

actions are of such an outrageous nature as to demonstrate intentional, willful, wanton, or reckless conduct." *Dubose v. Ouinlan*, 125 A.3d 1231, 1240 (Pa. Super. 2015); *Rockwell v. Knott*, 32 Pa. D. & C. 5th 157, 167 (Lacka. Co. 2013). Wanton or reckless conduct "means that the actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow." *Lomas v. Kravitz*, 130 A.3d 107, 128-129 (Pa. Super. 2015) (*en banc*); *Dean v. Community Medical Center*, 46 Pa. D. & C. 4th 334, 345 (Lacka. Co. 2000). However, "a showing of mere negligence, or even gross negligence, will not suffice to establish that punitive damages should be imposed." *Hall v. Episcopal Long Term Care*, 54 A.3d 381, 395 (Pa. Super. 2012), *app. denied*, 620 Pa. 715, 69 A.3d 243 (2013). "Thus, in Pennsylvania, a punitive damages claim must be supported by evidence sufficient to establish that (1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) [s] he acted, or failed to act as the case may be, in conscious disregard of that risk." *Hutchison v. Luddy*, 582 Pa. 114, 124, 870 A.2d 766, 772 (2005); *Lasavage v. Smith*, 23 Pa. D. & C. 5th 334, 340 (Lacka. Co. 2011).

In determining an appropriate amount of punitive damages to be awarded, the jury may consider: (1) the character of the defendant's act; (2) the nature and extent of the harm suffered by the plaintiff; and (3) the wealth of the defendant. *Kirkbride v. Lisbon Contractors. Inc.*, 521 Pa. 97, 102, 555 A.2d 800, 803 (1989); *Busy Bee, Inc. v. Wachovia Bank*, 73 D. & C. 4th 135, 142-143 (Lacka. Co. 2005). A defendant's net worth has been recognized

as a valid measure of the defendant's wealth for purposes of punitive damages. *Sprague v. Walter*, 441 Pa. Super. 1, 61-63, 656 A.2d 890, 920 (1995), *app. denied*, 543 Pa. 730, 673 A.2d 336 (1996); *Rutkowski v. Allstate Insurance Company*, 69 Pa. D. & C. 4th 10, 45 (Lacka. Co. 2004). Pennsylvania Rule of Civil Procedure 4003.7 governs the discovery of a defendant's wealth in connection with a claim for punitive damages, and states that "[a] party may obtain information concerning the wealth of a defendant in a claim for punitive damages only upon order of court setting forth appropriate restrictions as to the time of the discovery, the scope of the discovery, and the dissemination of the material discovered." Pa.R.C.P. 4003.7.

To secure financial wealth discovery under Rule 4003.7, the plaintiff must identify facts that establish a *prima facie* basis for the recovery of punitive damages under Pennsylvania law. *See Ogazaly v. American Honda Motor Co., Inc.*, 104 Lacka. Jur. 354, 360, 2003 WL 26131652, at *5 (Lacka. Co. 2003) ("We believe that by vesting trial courts with the authority to establish 'appropriate restrictions as to the time' of discovery with respect to a defendant's wealth, Rule 4003.7 retains the requirement that a plaintiff must demonstrate a *prima facie* right to recover punitive damages before such financial discovery will be ordered. The maintenance of the *prima facie* standard protects the privacy rights of the defendant by ensuring that there is some factual basis for the plaintiff's punitive damages claim before the defendant will be compelled to divulge confidential and proprietary financial information to an adversary in litigation."). Although it is not necessary for the plaintiff to produce an expert report providing an opinion or evidentiary basis for

a finding of "outrageous" conduct and the corresponding recovery of punitive damages, the production of such an expert report establishes the requisite *prima facie* basis to recover punitive damages so as to be entitled to net worth discovery under Rule 4003.7. *See, e.g.*, *Ogazaly v. American Honda Motor Co., Inc.*, 67 Pa. D. & C. 4th 314, 333-334 (Lacka. Co. 2004). *See also Genevich v. TSE, Inc.*, 2012 WL 781160, at *3-4 (Lacka. Co. 2012).

Punitive damages are recoverable if the defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed, but nonetheless acted, or failed to act, in conscious disregard of that risk. *Valentino v. Philadelphia Triathlon, LLC*, 150 A.3d 483, 488 (Pa. Super. 2016) (*en banc*); *Millan v. Pennsylvania American Water Company*, 25 Pa. D. & C. 5th 181, 186 (Lacka. Co. 2012). In the case *sub judice*, the Charlesworths have identified facts in the record demonstrating Mr. Galacci's prior knowledge and subjective appreciation of Zeus' attacks on other people. Notwithstanding that documented notice of the dog's vicious propensities and proclivity for biting humans, Mr. Galacci specifically advised Ms. Charlesworth, in arguable disregard of the risk of harm, that the bulldog supposedly "was friendly and would not bite." (Docket Entry No. 19, Exhibit B at p. 6). Additionally, the Charlesworths' liability expert has concluded that the Galaccis acted in a "reckless manner" and demonstrated "willful and wanton disregard for the safety of others." (*Id.* at p. 7).

Consequently, the Charlesworths have demonstrated their right to financial wealth discovery under *Kirkbride* and Rule 4003.7. The Galaccis correctly note that discovery subsequent to the filing of a Certificate of Readiness under

Lacka. Co. R.C.P. 214 is viewed with disfavor and generally prohibited. *See Campbell-Perfilio v. PennDOT*, 67 Pa. D. & C. 4th 31, 48 n.4 (Lacka. Co. 2004) ("Since the moving defendants have not demonstrated the requisite good cause to justify supplemental expert witness discovery after the Certificate of Readiness has been filed and this matter has been scheduled for a trial, *see* Lacka. Co. R.C.P. 214(b), the defense's alternate motion to conduct such discovery under Pa.R.C.P. 4003.5(a)(2) will be denied."). If the Charlesworths were seeking discovery that would raise new issues or identify previously undisclosed evidence pertaining to the Galaccis' liability or Ms. Charlesworth's claimed injuries, medical expenses or lost earning capacity, such discovery would tend to prejudice the Galaccis' ability to defend this matter at the time of trial on November 13, 2017, and likely would be denied for that reason. However, the discovery of the Galaccis' financial wealth merely concerns one of the three relevant factors that the jury may consider in calculating an amount of punitive damages, assuming that the jury concludes that exemplary damages are warranted. *See* Pa. SSJI (Civ.) § 8.20 (4th ed.).

Since the Galaccis have not identified any prejudice that they will suffer in responding to the Charlesworths' net worth discovery, which financial material will enable the jury to consider relevant information, and Local Rule 214(b) must be interpreted in a manner consistent with the Pennsylvania Rules of Civil Procedure, *see* Lacka. Co. R.C.P. 128(c), including Pa.R.C.P. 126 requiring all rules to "be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable," the Charlesworths' motion to

compel responses to their financial wealth discovery will be granted.[1] Pursuant to Rule 4003.7, the Charlesworths and their counsel will be required to execute a confidentiality agreement restricting the disclosure or dissemination of any discovery that they obtain from the Galaccis relative to their financial wealth. *See Ogazaly*, 67 Pa. D. & C. 4th at 334-335. The confidentiality stipulation to be signed by the Charlesworths and their counsel will prohibit them from divulging the Galaccis' financial wealth information or records to any third party other than their expert witness or consultant addressing the subject of the Galaccis' wealth, unless expressly granted leave to do so by further order of court.

AND NOW, this 19th day of September, 2017, upon consideration of the "Motion of Plaintiffs, Rosangela Freitas Charlesworth and Charles J. Charlesworth, to Compel Defendants, Donald Galacci and Leslie Galacci's Responses to Net Worth Discovery Served by the Plaintiffs," the defendants' response thereto, and the memoranda of law submitted by the parties, and based upon the reasoning set forth above, it is hereby ORDERED and DECREED that:

1. Plaintiffs' motion to compel defendants' responses to plaintiffs' net worth discovery pursuant to Pa.R.C.P. 4003.7 is GRANTED;

2. Within the next ten (10) days, plaintiffs and their counsel shall execute a confidentiality agreement with defendants agreeing not to disclose or disseminate

1. An example of the liberal construction and application of our local procedural rules is the Galaccis' service of medical records subpoenas several months after their filing of a Certificate of Readiness. (Docket Entry No. 12).

defendants' financial wealth information or documentation to anyone other than plaintiffs' counsel and expert witness or consultant in this litigation, unless permitted to do so by further order of court; and

3. Within twenty (20) days of the date of the parties' execution of the foregoing confidentiality agreement, defendants shall provide answers to plaintiffs' financial wealth discovery under Pa.R.C.P. 4003.7.

Bravo v. 2536-38 North Broad St. Assoc., LP

Failure to file post-trial motion — Nunc pro tunc — Extraordinary circumstances

Counsel's failure to file a post-trial motion did not qualify for nunc pro tunc relief, because no extraordinary circumstances existed and allowing such relief prejudiced the opposing party.

Following a bench trial, the court found in favor of plaintiff and awarded him judgment against defendants in the amount of $140,109. No post-trial motions were filed. Defendants filed an appeal and a motion to stay execution. The court filed a Rule 1925(a) opinion on July 20, 2017, which concluded that because defendants failed to file a post-trial motion, they waived their issues on appeal. Defendants subsequently withdrew their notice of appeal. The court then dismissed defendants' stay of execution as moot.

On July 21, 2017, Defendants filed a motion for reconsideration of the court's Rule 1925(a) opinion and requested leave to file a motion for post-trial relief nunc pro tunc. Defendants acknowledged that the only thing that alerted them to the need to file a post-trial motion was the court's opinion of July 20, 2017. The only reason provided by counsel as to why a post-trial motion was not filed was that counsel misread or misunderstood the procedural rules.

Defendants argued for a lesser standard than the extraordinary circumstances standard normally applied to requests for nunc pro tunc post-trial relief. The case of *Lenhart v. Cigna Co.*, 824 A.2d 1193 articulated that the court may grant nunc pro tunc consideration of a motion for post-trial relief where the circumstances occasioning the

failure to file the motion did not stem from counsel's negligence or from a failure to anticipate foreseeable circumstances, but rather, stemmed from extraordinary circumstances involving fraud or some breakdown in court operations.

Defendants sought the application of a lower standard found in *Watkins v. Watkins*, 775 A.2d 841, which said that the court had discretion to consider a belated motion, but it also had to consider prejudice to the opposing party. Plaintiff argued the more stringent standard applied.

The court concluded that the extraordinary circumstances standard applied to these facts. The only relief defendants asked for was a stay of execution. Nothing in their motion gave the court the opportunity to correct alleged errors or even suggested it should do so. None of the purposes of pre-trial motions were accomplished by defendants' previous filings. The court found no extraordinary circumstances, only defense counsel's fault in the way he chose to proceed.

Even under the lesser standard, the court held defendants were not entitled to relief, because there were no other factors such as inclement weather that prevented the timely filing of a posttrial motion. Furthermore, plaintiff asserted prejudice from the delay. The court agreed that defendants' conduct led to increased litigation which prejudiced plaintiff.

Plaintiff appealed, seeking attorney fees, but the court rejected this requested because plaintiff did not timely request attorney fees, so the issue was waived.

C.P of Philadelphia County, November Term, 2014, No. 1464

MCINERNEY, *J*., Oct. 12, 2017—

I. BACKGROUND

On March 15, 2017, a bench trial of the above-caption matter commenced before this Court. The trial spanned three days and thereafter the Parties submitted proposed findings of fact and conclusions of law. On June 28, 2017, the Court filed comprehensive findings of fact, discussion, and conclusions of law. The Court found in favor of Plaintiff John Bravo ("Plaintiff") and against Defendants 2536-38 North Broad Street Associates, LP ("Defendant

Partnership"), Slavko Properties, Inc., and Slavko Brkich ("Defendant Brkich") (collectively, "Defendants") in the amount of $642,306.75, plus interest of $140,109.53.

No post-trial motions were filed. Rather, on July 18, 2017, Defendants filed an "appeal to the Superior Court of Pennsylvania from the [F]indings of Fact, Discussion and Conclusions of Law entered in this matter on the 28th day of June, 2017." (Defs.' Notice of Appeal, July 1, 2017). That same day, Defendants also filed a motion for stay of execution. In that motion, Defendants stated:

> Pursuant to Pa. R. Civ. P. 3121(b), Defendant's 2536-38 North Broad Street Associates, LP, Slavko Properties, Inc., and Slavko Brkich hereby move that the Court stay execution on the judgment entered in the amount of $642,306.45 plus interest of $140,109.53 as a result of its Findings of Fact. Discussion and Conclusions of Law dated June 28, 2017 (the "Decision"). The grounds for the Motion are as follows:
>
> The breach of contract findings in the Decision largely turn on whether there is an implied duty of good faith and fair dealing owed by a general partner to a limited partner where a partnership agreement gives the general partner control over the management of the partnership. This issue is pending before the Pennsylvania Supreme Court in *Hanaway v[.] Parkesburg[] Group, LP*, 2015 PA Super 263, 132 A.[3]d 461 ... (2015), allocator granted, Docket No. 55 MAP 2016. The case was argued in December 2016. A decision that there is no such duty would undermine most, if not all, of the breach of contract claim. Plaintiff should not be proceeding with execution on the judgment pending that decision.

(Defs.' Mot. for Stay of Execution, pp. 1-2).

Defendants also noted: "on the same day as they are filing ... this Motion [they are] also filing a Notice of Appeal to the Superior Court of Pennsylvania. The appeal will assert that the Court in its Decision made reversible errors of law as a result of which all or part of the judgment may be reversed." (*Id.* at p. 2). And thereafter, Defendants provided six examples of this Court's purported reversible errors of law. (*See id.* at pp. 2-3).

On July 20, 2017, this Court filed a *Pennsylvania Rule of Appellate Procedure* 1925(a) opinion. Therein, the Court noted "*Pennsylvania Rule of Civil Procedure* 227.1 sets forth the requirements for post-trial relief and provides in most relevant part that '[p]ost-trial motions shall be filed within ten days after ... the filing of the decision in the case of a trial without jury." (Op., June 20, 2017, *quoting* Pa. R. Civ .P. 227.1(c)). The Court also noted, "'[i]f an issue has not been raised in a post-trial motion, it is waived for appeal purposes.'" (Op., June 20, 2017, *quoting L.B. Foster Co. v. Lane Enterprises, Inc.*, 710 A.2d 55 (Pa. 1998)). As such, the Court concluded that since Defendants failed to file a post-trial motion, they waived their issues on appeal.

On July 20, 2017, after having been served with the Court's opinion, Defendants filed a praecipe to withdraw their notice of appeal. Then, on July 21, 2017, the Court having concluded Defendants had waived their issues and Defendants having withdrawn their notice of appeal, the Court dismissed Defendants' Motion for Stay of Execution as moot.

On July 21, 2017, after the Court had dismissed their Motion for Stay of Execution as moot, Defendants filed

a motion for both reconsideration of the Court's July 20, 2017 opinion and leave to file a motion for post-trial relief *nunc pro tunc*. Therein, Defendants presented the following two questions, which Defendants suggested should be answered in the affirmative:

> 1. Should the Court's Opinion of July 20, 2017 stating that a now withdrawn appeal should be quashed because Defendants did not file a motion for post[-]trial relief be reconsidered and vacated where the Defendants have without undue delay filed a motion to file a motion for post[-]trial relief *nun*[*c*] *pro tunc* only 11 days after the non[-]jurisdictional 10 day requirement of Pa. R. Civ. P. 227.1 [?] [*Suggested*] *Answer*: *Yes*.
>
> 2. Should the Court exercise its discretion to allow Defendants leave to file a motion for post[-]trial relief *nun*[*c*] *pro tunc* of a Decision against them for over $782,000 where the filing would be only 11 days past the 10 day requirement of Pa. R. Civ. P. 227.1, the grounds of the motion were largely presented in connection with a motion for stay of execution which [defense] counsel thought the Court could use to correct any alleged errors in the Decision in a Rule 1925 opinion for the Superior Court ... [?] [*Suggested*] *Answer*: *Yes*.

(Defs.' Recons. Mot. (Mem.), July 21, 2017, pp. 1-2 (some emphasis added)).

In terms of why defense counsel failed to file a timely post-trial motion and how he became alerted of the need to do so, Defendants elaborated as follows:

> The Court presumably received prompt notice that a Notice of Appeal had been accepted for filing on July

> 19, 2017 and understandably spoke out that alleged errors in its June 28 Decision had been waived on appeal because Defendants had not timely filed a motion for post[-]trial relief. Alerted to the problem, [defense counsel] withdrew the Notice of Appeal before the Office of Judicial Records had transmitted it to the Superior Court. So the Notice of Appeal did not remove this matter from the Court's jurisdiction.
>
> The mistake in not filing a motion for post[-]trial relief was based on the understanding that if the Court was otherwise alerted to the alleged errors in its Decision, it could address them in the Opinion it would be required to provide to the Superior Court pursuant to Rule 1925(a) of the *Pennsylvania Rules of Appellate Procedure*[.]
>
> ***
>
> [Defense counsel] ... filed a Notice of Appeal thinking that the Court would write a Rule 19[2]5 Opinion. Also filed was a Motion to Stay Execution [mentioning] ... several errors which Defendants believed existed in the Decision. The thought was that once these errors were briefed in [the context of the Motion to Stay Execution], the Court could use the parties arguments to decide if any modifications or corrections should be made to the Decision in its Rule 1925 Opinion.

(*Id.* at pp. 2-3 (emphasis added)).

Thus, Defendants acknowledged the only thing that alerted them to the need to file a post-trial motion following the filing of a decision in the case of a trial without jury, was this Court's initial opinion. And the only reason given

for not filing a post-trial motion was a mis-reading and/or understanding of rules of procedure that would not have provided the Trial Court an opportunity to change or modify its decision. At most, it would have allowed the Trial Court to suggest to the Superior Court in a 1925(a) opinion that it be reversed and the case be remanded based on arguments from a motion unrelated to the appeal, that only asked the Trial Court stay execution pending the Supreme Court's decision in *Hanaway*.

Having withdrawn their notice of appeal and purportedly concerned about losing the right to appeal the Court's decision thirty days after the filing of the Findings of Fact, Discussion, and Conclusions of Law, Defendants also requested that the Court consider the motion on an expedited basis. On July 24, 2017, the Court accommodated this request and set a response date of July 26, 2017, but noted "'[t]he grant of *nunc pro tunc* relief is not designed to provide relief to parties whose counsel has not followed proper procedure in preserving appellate rights.'" (Order, July 24, 2017, *quoting Lenhart v. Cigna Companies*, 824 A.2d 1193, 1197-98 (Pa. Super. Ct. 2003)).

On July 25, 2017, Defendants filed a supplemental memorandum in support of their motion for reconsideration and leave to file a motion for post-trial relief *nunc pro tunc*. Therein, Defendants primarily attempted to argue against the applicability of *Lenhart*, which the Court had quoted for the proposition that *nunc pro tunc* relief is not designed to provide relief to parties whose counsel has not followed proper procedure in preserving appellate rights. Secondarily, Defendants attempted to minimize the extent of their fault for the position they were in by again reiterating the nonsensical argument "that a Rule

1925 opinion written with the knowledge of the errors in the Decision which Defendants discussed in the Motion to Stay Execution would enable the Court to modify or correct its decision in the same way as it could in deciding a motion for post[-]trial relief." (Defs.' Supplemental Mem., July 25, 2017, p. 4).

In terms of *Lenhart*, Defendants argued against the extraordinary circumstances standard for *nunc pro tunc* post-trial relief applied in that case and in favor of a lesser standard as articulated in *Watkins v. Watkins*, 775 A.2d 841 (Pa. Super. Ct. 2001). Under the extraordinary circumstance standard, a trial court may grant *nunc pro tunc* consideration of a motion for post-trial relief where the circumstances occasioning the failure to file the motion did not stem from counsel's negligence or from a failure to anticipate foreseeable circumstances, but rather stem from extraordinary circumstances involving fraud or some breakdown in court operations. *See Lenhart*, 824 A.2d at 1196. Under the *Watkins*-type standard, whenever a party files a post-trial motion at a time when the trial court has jurisdiction over the matter but outside the ten-day requirement of *Pennsylvania Rule of Civil Procedure* 227.1, the trial court has the discretion to consider the motion and will "not be subject to review unless the opposing party objects." *Watkins*, 775 A.2d at 845 (quotations omitted). "If the opposing party objects, then the trial court must consider the fault of the party filing late and the prejudice to the opposing party." *Id.*

Defendants argued:

> Here although a Notice of Appeal was filed in the trial court, it was quickly withdrawn before it was transmitted to the Superior Court and before an appeal

> had been docketed. The motion for leave was filed on the same day, only 11 days after the deadline when this Court had, and still has, jurisdiction to exercise its discretion. Even though the motion would be filed in a procedurally flawed manner, that discretion must be exercised applying the *Watkins* factors — the fault of the party filing late and the prejudice to the opposing party.

(Defs.' Supplemental Mem., July 25, 2017, p. 4).

On July 26, 2017, within the abbreviated schedule set by the Court, Plaintiff filed his response to Defendants' motion. Therein, Plaintiff argued the extraordinary circumstances standard should be applied, stating in part "[t]he fact that Defendants ultimately withdrew their notice of appeal [after they were alerted to the problem by the trial court] does not excuse the fact that the appeal had been filed and the jurisdiction of the trial court had been divested." (Pl.'s Resp., July 26, 2017, p. 4). Plaintiff, however, also argued that:

> even if [the Trial] Court still has jurisdiction, the Court should deny the instant motion as [Plaintiff] objects to consideration of Defendants' motion to file post[-] trial motions *nunc pro tunc*. Thus, the fault of Defendants in failing to timely file post[-]trial motions must be considered. As previously noted, Defendants' failure to timely file post[-]trial motions was inexcusable. Moreover, [Plaintiff] is prejudiced by any further delay in this matter as further delays will deprive him of the ability to collect the significant judgment in this case from the Defendants, who were found liable for commingling funds and failing to observe corporate formalities, and have transferred hundreds of thousands

> of dollars to other entities controlled by Defendants. While the delay is admittedly not substantial, Defendants have failed to provide any legitimate explanation for ... failing to timely file post[-]trial motions.

(*Id.* at p. 5).

Thereafter, Defendants filed a reply memorandum in further support of their motion. Therein, Defendants doubled down on their nonsensical argument for not filing a post-trial motion. Defendants, however, also included a dubious argument that because the Court included "discussion" in the findings of fact and conclusions of law, defense counsel believed "no further ruling by the [C]ourt would be forthcoming[] [s]o [he] spelled out the alleged errors in the Decision in the separate context of a motion to stay execution — the same errors as would have been the basis for a post-trial motion — so they could be considered by the Court in preparing a Rule 1925 Opinion." (Defs.' Reply Mem., July 26, 2017, p. 1). Defendants continued that the result of the manner in which they proceeded "could be a modification or reversal of the Decision before the Superior Court considered the matter in the same way as it would have considered this Court's ruling on a post-trial motion for relief." (*Id.* at pp. 1-2). And "[t]he purpose of the motion for post-trial relief procedure would have been served[,]" according to Defendants. (*Id.* at p. 2).

On July 28, 2017, the Court entered an order denying Defendants' motion. And on July 31, 2017. Defendants again filed an appeal. This time, however, Defendants purported to appeal from not just the Court's decision following the bench trial, but also from: (1) the July 20, 2017 opinion stating the initial appeal should be quashed because all issues related to the Court's decision were

waived by the failure to file a post-trial motion; (2) the July 28, 2017 order denying Defendant's motion for both reconsideration of the aforementioned opinion and leave to file a motion for post-trial relief *nunc pro tunc*; and (3) the March 24, 2016 order granting Plaintiff's motion for reconsideration of an October 5, 2015 order striking Count III of Plaintiff's Amended Complaint and reinstating that count for breach of fiduciary duty.

On August 10, 2017, Plaintiff filed a cross-appeal to the Superior Court. Therein, Plaintiff purported to appeal from both the decision to not award him legal fees and costs following the bench trial and the June 16, 2016 order sustaining Defendants' Amended Preliminary Objections to the Second Amended Complaint and dismissing Count VI thereof for fraudulent transfer.

The Court directed both parties to file a *Pennsylvania Rule of Appellate Procedure* 1925(b) statement. In Defendants' 1925(b) Statement, which covered nine pages, they asserted nineteen errors related to the four areas from which they were appealing. In Plaintiff's 1925(b) Statement, he asserted his two purported errors across six paragraphs.

II. DISCUSSION

A. Defendants' Appeal

In their prolix nine-page 1925(b) statement, Defendants assert nineteen complaints of error. At their eighteenth complaint of error, Defendants argue "[this] Court erred in its Order dated July 24, 2017[,] in suggesting with its quote from *Len[h]art* ... that it should decide whether to allow the *nunc pro tunc* filing by determining if Defendants had shown 'extraordinary circumstances' of the type required

in *Len[h]art*, where, unlike this case, the motion was made *after* the trial [c]ourt had already lost jurisdiction to the appellate court.'" (Defs.' 1925(b) Statement ¶ 18 (some emphasis added)).

The specific intent of this Court in including the quote was not to suggest which standard should be applied, but rather to suggest that even though the Court was willing to accommodate Defendants' desire for expedited consideration of the motion they still had a tough row to hoe. Nevertheless, the Court agrees with Plaintiff that the extraordinary circumstances standard is in fact the correct standard to be applied to determine whether Defendants were entitled to *nunc pro tunc* relief.

In this case, unlike cases such as *Watkins* where an untimely motion that could be treated as a motion for post-trial relief was filed and addressed before filing a notice of appeal, 775 A.2d at 845, Defendants did not file anything that could meaningfully be considered an untimely motion for post-trial relief before filing notice of appeal and invoking the jurisdiction of the Superior Court. Defendants, now, in an after-the- fact manner attempt to put great weight on their motion for stay of execution that was filed nearly simultaneously with their notice of appeal. However, there is nothing about that motion, or the procedure Defendants created/followed, that entitle them to a *Watkins*-type standard of review. *Cf. Watkins*, 775 A.2d at 845n.l (noting a motion for reconsideration filed fifteen days after the final order was entered and before filing notice of appeal was properly "treated as an untimely motion for post-trial relief incorrectly captioned as a motion to reconsider" by the trial court at a time when it still had jurisdiction over the case).

In their motion, the only relief Defendants asked for was a stay of execution pending the Pennsylvania Supreme Court's decision in *Hanaway*. While Defendants in an effort to bolster their argument in favor of a stay also mentioned errors this Court purportedly made, and that they had filed an appeal thereof which could result in all or part of the Court's decision being reversed, there is nothing about the motion that gave the Court an opportunity to correct alleged errors or even suggested that Defendants desired the Trial Court to do so. Rather, what Defendants did was specifically invoke the jurisdiction of the Superior Court and suggest to the Trial Court that its myriad errors and likely reversal in whole or part by the Superior Court further favored stay of execution.

The Pennsylvania Supreme Court had reasoned that the filing of post-trial motions:

> ensure[s] that the trial judge has a chance to correct alleged trial errors. This opportunity to correct alleged errors ... advances the orderly and efficient use of our judicial resources. First, appellate courts will not be required to expend time and energy reviewing points on which no trial ruling has been made. Second, the trial court may promptly correct the asserted error. With the issue properly presented, the trial court is more likely to reach a satisfactory result, thus obviating the need for appellate review on this issue. Or if a new trial is necessary, it may be granted by the trial court without subjecting both the litigants and the courts to the expense and delay inherent in appellate review. Third, appellate courts will be free to more expeditiously dispose of the issues properly preserved for appeal....

Sahutsky v. H.H. Knoebel Sons, 782 A.2d 996, 1000 (Pa.

2001), *quoting Benson v. Penn Central Transp. Co.*, 342 A.2d 393, 394 (Pa. 1975). *See also Motorists Mut. Ins. Co. v. Pinkerton*, 830 A.2d 958, 964 (Pa. 2003) (emphasis added) (stating "[t]he venerable purpose of the post-trial motion procedure is to permit the trial court to correct its own errors *before* appellate review is commenced.").

Here, none of the purposes for filing post-trial motions were accomplished by Defendants' near simultaneous filing of a motion for stay of execution and a notice of appeal. This Court would have had no opportunity to promptly correct the alleged errors and appellate review would be necessitated. Defendants' argument "that a Rule 1925 opinion written with the knowledge of the errors in the Decision which Defendants discussed in the Motion to Stay Execution would enable the Court to modify or correct its decision in the same way as it could in deciding a motion for post[-]trial relief[,]" (Defs.' Supplemental Mem., July 25, 2017. p. 4)[,] is nonsensical and a clear attempt to minimize the extent of their fault for the position they were in. Asking the Superior Court in a 1925(a) opinion for reversal, after having parsed together arguments from a motion that is not even the subject of the appeal, neither gives the trial court a chance to correct alleged errors, nor obviates the need for appellate review.

Moreover, admittedly, the only thing that alerted Defendants to the need to file a post-trial motion was this Court's initial 1925(a) opinion, which was promptly filed after receipt of Defendants' initial notice of appeal. In this Court's opinion, under such circumstances, Defendants should not benefit from a lesser standard of review at Plaintiff's expense by their subsequent withdrawal of their initial notice of appeal. Assuming the withdrawal of

the appeal returned jurisdiction to this Court, the Court still believes under the circumstances of this case the extraordinary circumstances standard is the appropriate standard to be applied to determine whether or not Defendants were entitled to *nunc pro tunc* relief.

As stated above, under the extraordinary circumstance standard, a trial court may grant *nunc pro tunc* consideration of a motion for post-trial relief where the circumstances occasioning the failure to file the motion did not stem from counsel's negligence or from a failure to anticipate foreseeable circumstances, but rather stem from extraordinary circumstances involving fraud or some breakdown in court operations. *See Lenhart*, 824 A.2d at 1196. Defendants do not even attempt to argue they meet this standard as unfortunately there is nothing more in this case than defense counsel's negligence or fault in the way he chose to proceed. As such, this Court's July 28, 2017 order denying Defendant's motion for, *inter alia*, leave to file a motion for post-trial relief *nunc pro tunc* should be affirmed and the remainder of Defendants' appeal should be quashed as all other issues have been waived.[1]

Nevertheless, even applying the Watkins-type standard, Defendants were not entitled to *nunc pro tunc* relief.

1. While in his after-the- fact attempt to salvage issues for appeal defense counsel also purports to appeal from the March 24, 2016 order granting Plaintiff's motion for reconsideration of an October 5, 2015 order striking Count III of Plaintiff's Amended Complaint and reinstating that count for breach of fiduciary duty, the issues related thereto have also been waived. "Once an issue is raised in a proceeding, it must be preserved at each and every stage in the proceeding, including a contemporaneous objection at trial, post-verdict motions if required, and the briefing and argument of post-verdict motions. Otherwise, it is waived." 20 West's Pa. Prac., Appellate Practice § 302:59 (footnote omitted). As Defendants did not follow this procedure, their issues related to the March 24, 2016 order have also been waived.

As stated above, under that standard, whenever a party files a post-trial motion at a time when the trial court has jurisdiction over the matter but outside the ten-day requirement of *Pennsylvania Rule of Civil Procedure* 227.1, the trial court has the discretion to consider the motion and will "not be subject to review unless the opposing party objects." *Watkins*, 775 A.2d at 845 (quotations omitted). "If the opposing party objects, then the trial court must consider the fault of the party filing late and the prejudice to the opposing party." *Id.*

In *Leffler, Inc. v. Hutter*, 696 A.2d 157, 166 (Pa. Super. Ct. 2003), the plaintiff filed a cross-motion for post-trial relief one day late because of inclement weather the day before. Thereafter, the defendants filed a response, asserting the motion was untimely and the issue raised therein should be deemed waived. *Id.* The trial court agreed with the defendants "that the late filing, of itself, warranted the waiver sanction and refused to entertain [the plaintiff's] motion." *Id.*

Applying the *Watkins*-type standard on appeal, the Superior Court noted the only argument made for waiver was that the motion was filed one day late, but "[n]o allegation was made that this lateness prejudiced the [defendants] or in any way impeded the speedy and effective resolution of the case." *Id.* at 166. Thereafter, the Superior Court stated that while "[i]t is true, as the [defendants] assert[ed], that the language of Rule 227.1 does not require a showing of prejudice prior to a party's motion being dismissed for failure to timely file[,]" in interpreting the Rule, it has held prejudice must be considered under a *Watkins*-type standard. *See id.*

Applying that standard to the facts of the case, the

Leffler court noted the motion was filed only one day late and copies were immediately mailed to opposing counsel. *Id.* "Aside from the mere fact of the tardy filing itself," the court "fail[ed] to see how [the plaintiff's] lateness upset effective court procedure or prejudiced the [defendants]." *Id.* The court noted:

> While this late filing was surely a transgression of the Rules, not all transgressions are equal and, therefore, sanctions such as waiver should be reserved for those instances in which indulgence of a late filing actually works to prejudice the interests of the adverse party or the orderly administration of justice. The Rules recognize this distinction, and thereby permit a court to mete out the proper punishments accordingly.

Id. Thereafter, the Superior Court held the trial court abused its discretion in refusing to entertain the plaintiff's motion and addressed the substantive merits of the issue raised therein. *Id.*

In this case, unlike the movant in *Leffler*, Defendants were not entitled to nunc pro tunc relief. First, regarding fault, unlike the inclement weather in *Leffler*, there is nothing more than defense counsel's negligence or fault to consider in this case. Second, regarding prejudice, unlike the adverse party and one day late filing in *Leffler*, Plaintiff has asserted prejudice and Defendants filed their motion eleven days late.

While Plaintiff admitted the delay was not substantial, he asserted he would be prejudiced by any further delay in his attempt "to collect the significant judgment in this case from the Defendants, who were found liable for commingling funds and failing to observe corporate

formalities, and have transferred hundreds of thousands of dollars to other entities controlled by Defendants." (Pl.'s Resp., July 26, 2017, p. 5). This Court agrees.

Moreover, this Court sees other prejudice to Plaintiff that was not mentioned in his response, which at Defendants' request was court ordered to be filed in a hastened manner. First, the procedure Defendants created/followed has led to increased litigation. The Parties have already had to devote some time to this issue of whether or not Defendants are entitled to *nunc pro tunc* relief and no doubt will have to devote substantially more. Second, as will be addressed below, the procedure Defendants created/followed has also in all likelihood led Plaintiff to waive his issue regarding legal fees and costs. The Court sees this as further prejudice to Plaintiff.

Finally, indulgence of a late filing in this case would actually work to prejudice, and has already prejudiced, the orderly administration of justice. In this case, Defendants filed an earlier notice of appeal and the Court an earlier opinion. Now, the Court is being forced to spend considerably more time addressing competing positions regarding the standard of review and questionable assertions from Defendants as to why they did what they did simply because this Court filed its earlier opinion in an expeditious manner.

For these reasons, and others, the Court stands by its assertion that the "[t]he grant of *nunc pro tunc* relief is not designed to provide relief to parties whose counsel has not followed proper procedure in preserving appellate rights[,]" *Lenhart*, 824 A.2d at 1197-98, is an appropriate consideration in this case. Moreover, the Court would assert the statement from our Supreme Court

"that if inadvertence of counsel were a valid reason for disregarding the time limitation [of its] rules .... , then they might as well not have any rules at all[,]" *E. J. McAleer & Co. v. Iceland Prod., Inc.*, 475 Pa. 610, 615, 381 A.2d 441, 444 (1977), is equally applicable.

Simply put, this Court believes Defendants have failed to present any legitimate reason for the procedure they created/followed and failure to comply with *Pennsylvania Rule of Civil Procedure* 227.1. Therefore, for all the reasons mentioned above, this Court's July 28, 2017 order denying Defendant's motion for leave to file a motion for post-trial relief *nunc pro tunc* should be affirmed even under a *Watkins*-type standard and the remainder of Defendants' appeal should be quashed as all other issues have been waived.

B. Plaintiff's Appeal

In his 1925(b) statement, Plaintiff asserts two complaints of error. Plaintiff's first complaint is that this Court "erred in sustaining Defendants' Amended Preliminary Objections to the Second Amended Complaint and dismissing Count VI of the Second Amended Complaint for [f]raudulent [t]ransfer." (Pl.'s 1925(b) Statement ¶ 1). Plaintiff's second complaint is that this Court erred in not awarding legal fees and costs to Plaintiff as part of its decision following the bench trial. (*See* Pl.'s 1925(b) Statement ¶¶ 4-6).

Addressing Plaintiff's second complaint first, as indicated above, this Court believes Plaintiff has waived his issue regarding legal fees and costs by failing to file a timely post-trial motion. As stated above, *Pennsylvania Rule of Civil Procedure* 227.1 sets for the requirements for post-trial relief and provides in most relevant part that "[p]

ost-trial motions shall be filed within ten days after ... the filing of the decision in the case of a trial without jury." Pa. R. Civ. P. 227.1(c). The Rule further provides that "[i]f a party has filed a timely post-trial motion, any other party may file a post-trial motion within ten days after the filing of the first post-trial motion." *Id.*

Here, in all likelihood Plaintiff's counsel made a considered decision to not file a post-trial motion regarding legal fees and costs when Defendants filed no post-trial motion regarding this Court's decision. If Defendants had filed a timely post-trial motion, Plaintiff would almost assuredly have filed his own post-trial motion regarding his issue within ten days thereafter, pursuant to *Pennsylvania Rule of Civil Procedure* 227.1(c).

But now that Defendants are pursuing the instantaneous appeal without having filed a timely post-trial motion, Plaintiff's counsel in all likelihood has made a considered and tactical decision to pursue the issue of legal fees and cost on appeal. In this Court's estimation, however, none of that (nor anything else) obviated the need for Plaintiff to file a timely post-trial motion. As such, Plaintiff's issue regarding not awarding legal fees and costs should be deemed waived.

Addressing Plaintiff's first complaint, the Court also finds it to be waived, but also without merit. In his 1925(b) statement, Plaintiff notes that the Court stated in its order sustaining Defendants' preliminary objections and dismissing Count V of the Second Amended Complaint for fraudulent transfer that:

> Plaintiff ... lacks standing to assert direct claims against the newly added defendants for fraudulent

> transfer of the funds of [Defendant Partnership] since he is not a "creditor" of the partnership with respect to the dividends or profits allegedly due to him. Claims seeking return of such funds from the newly added defendants could be asserted only by the partnership, which has not been done here.

(Pl.'s 1925(b) Statement ¶ 2,). Thereafter, in claiming error, Plaintiff asserts:

> In the instant case, on March 24, 2016[,] [Plaintiff] was granted leave to file a Second Amended Complaint against Melon Green Realty Group, Inc. ("Melon Green"), Hunting Park Plaza Associates, LP ("Hunting Park") and Brewery Park Associates, LP ("Brewery Park") as these entities received hundreds of thousands of dollars from [D]efendant Brkich and [D]efendant Partnership from funds that should have been distributed to shareholders such as [Plaintiff]. [Defendant] Partnership's other limited partners (Slavko Properties, Inc., The Brkich Family Irrevocable Deed of Trust f/b/o Steven Slavko and The Brkich Family Irrevocable Deed of Trust f/b/o Marko Brkich), all of which were controlled by [D]efendant Brkich and in collusion, would certainly not be inclined to file any claim for fraudulent transfer against other entities also controlled by [Defendant] Brkich.

(Pl.'s 1925(b) Statement ¶ 3).

While neither party provided binding authority on the issue of whether Plaintiff could assert a cause of action for fraudulent transfer against the defendants that were added, the Court found persuasive Defendants' citation of Third Circuit precedent for the proposition that Plaintiff did not

have a "claim," nor was he a "creditor," etc., for purposes of the Pennsylvania Uniform Fraudulent Transfers Act ("PUFTA"), 12 Pa. C.S. § 5101 *et seq.* For example, having noted those courts have held "provisions of the PUFTA and the Bankruptcy Code should be construed and interpreted uniformly because consistency between the two statutes was a goal of those who drafted the PUFTA and who have interpreted it[,]" (Defs.' Am. Prelim. Objections (Mem.) p. 4, *quoting Fid. Bond & Mortg. Co. v. Brand*, 371 B.R. 708, 719 (E.D. Pa. 2007)), Defendants cited *In re Ben Franklin Hotel Assocs.*, 1998 WL 94808, at *2 (E.D. Pa. Mar. 4, 1998), for the proposition "that the expectation of profit associated with a limited partnership interest is not a 'claim' and that a limited partner is therefore not a 'creditor.'" (Defs.' Am. Prelim. Objections (Mem.) pp. 4-5).

In response, Plaintiff had merely argued the cases cited by Defendants were not binding, were distinguishable and "do not apply to claims by a limited partner against a partnership or transferees based on fraudulent transfer." (Pl.'s Resp. to Defs.' Am. Prelim. Objections (Mem.) p. 2, *incorporating by reference* Pl.'s Reply in Supp. of Mot. to Am. Compl. 3). For example, Plaintiff had argued "[e]ven if limited partners are generally not 'creditors' under the [B]ankruptcy [C]ode as to their equity interests, [that] does not mean that [Plaintiff] does not have a claim against [Defendant] Partnership based on breach of the [p]artnership agreements as well as under the [PUFTA]." (Pl.'s Resp. to Defs.' Am. Prelim. Objections (Mem.) p. 2, *incorporating by reference* Pl.'s Reply in Supp. of Mot. to Am. Compl. 4).

Plaintiff now appears to making solely a direct versus

derivative standing- type argument. Having not been briefed or argued before, this Court fails to see how that argument affects whether Plaintiff had a claim, was a creditor, or was owed a debt for purposes of the PUFTA. As such, Plaintiff's appeal of this issue should be quashed or denied. *See, e.g.*, *Hinkal v. Pardoe*, 133 A.3d 738, 746 (Pa. Super. Ct. 2016) (*en banc*) (stating a Rule 1925(b) statement is not a vehicle in which previously unasserted issues may be raised for the first time and, therefore, such issues waived for purposes of appeal).

WHEREFORE, for the reasons stated above, the instant appeals should be quashed in part and denied in part.

In the Interest of B.L.C

Checkpoint stops — Voluntary search — Motion to suppress

The court granted a motion to suppress evidence obtained from a checkpoint stop where the commonwealth failed to demonstrate sufficient factual data to support a checkpoint at the site in question, and where the search was not a voluntary, consensual one.

State police set up a checkpoint in Berks County, near Shartlesville. At approximately 1:15 a.m. on November 24, 2016, B.L.C., a juvenile, stopped at the checkpoint. As soon as B.L.C. lowered a window, trooper Matthew Deck noticed a strong odor of burnt marijuana. Deck asked the occupants of the vehicle where the marijuana smell was coming from, but none of them answered him. After the two passengers left the scene with other law enforcement personnel, Deck asked B.L.C. to step out of the car for further investigation, and B.L.C. complied. Then Deck administered field sobriety tests, two of which B.L.C. failed. Supplemental testing indicated possible drug use.

B.L.C. argued that no evidence established prior administrative approval for this checkpoint. The patrol supervisor testified he was personally familiar with this area and had approval to conduct a checkpoint. The court took issue with the time and place aspects of the checkpoint. It found a lack of sufficient statistical data to support a checkpoint at

the proposed site. The map used by the patrol supervisor was the only evidence setting forth any statistical data regarding arrests for driving under the influence in the area where the checkpoint occurred. However, nothing in the record enumerated the number of stops, accidents or other information regarding impaired drivers. Also, the checkpoint at issue took place in the early hours of Thursday morning, but the patrol supervisor admitted that statistics showed a larger percentage of motorist drank on Friday and Saturday nights. The court concluded that the commonwealth failed to show sufficient time and location evidence regarding the activity targeted by the checkpoint, making it unconstitutional. The court granted the motion to suppress.

During the checkpoint stop, Deck asked B.L.C. to open his mouth and stick out his tongue, whereupon Deck observed a green tint and vegetable matter debris. B.L.C. claimed this was an illegal search of his person. The court found this did constitute a physical search, and because Deck had reason to suspect B.L.C. ingested marijuana and was operating a motor vehicle under the influence, sufficient facts existed to justify an investigatory detention. However, the court held a warrantless search was not permissible under these circumstances. Deck did not advise B.L.C. that he had a right to refuse or that it was necessary to obtain his consent before searching his mouth. The court found the search was not voluntary, so it granted the motion to suppress on this issue.

C.P. of Berks County, No. JV-707-2016

Ellen R. West, for Commonwealth
Eric J. Taylor, for juvenile

LASH, *J*., Oct. 16, 2017—The matter before this Court is the Motion To Suppress Physical Evidence And Observations filed by Juvenile, B.L.C, (hereinafter "Juvenile"). A suppression hearing was held on August 31, 2017. This Court issues the following adjudication:

I. FINDINGS OF FACT

1. As of the date of the hearing in this case, Sergeant Corey S. Mengel had been a member of the Pennsylvania State Police for 11 1/2 years. (N.T. p. 5).

2. At all times relevant to this case, then Corporal Mengel was Patrol Section Supervisor for Troop L — Hamburg Barracks. (N.T. p. 6).

3. As part of his responsibilities, Corporal Mengel decided where driving under the influence (DUI) checkpoints would be located. (N.T. p. 7).

4. While stationed at the Hamburg Barracks, Corporal Mengel chose checkpoint sites approximately 6 to 8 times. (N.T. p. 8).

5. Funding for the checkpoint is provided by the federal government. This money is used to pay the troopers who participate in the checkpoint. The Pennsylvania State Police divide the money among the Troops in the form of funding for work hours. The troop captain delegates these hours to the patrol section lieutenant, who then divides them among the 5 stations of the Troop. The lieutenant notifies Corporal Mengel that he is approved to conduct a checkpoint at a particular time, such as in conjunction with the holiday weekend, and that he is allotted a specific number of hours to pay the troopers who take part in the checkpoint. (N.T. pp. 7, 23).

6. Corporal Mengel then decides the location of the checkpoint. (N.T. pp. 7, 24).

7. Location decisions are based upon roads having ample amount of traffic, the location of certain establishments in the area, and where there is a high volume of DUI-related crashes or on-view DUI arrests. (N.T. p. 8).

8. In November 2016, Corporal Mengel decided to set up a checkpoint in the area of Old Route 22 and Wolf Creek Road, Borough of Shartlesville, Upper Tulpehocken

Township, Berks County, Pennsylvania. (N.T. p. 7).

9. Corporal Mengel chose this area because he has lived there all of his life and is familiar with the amount of traffic, restaurants, bars, and taverns in the area, and the statistics for DUI crashes and violations. (N.T. p. 24).

10. Three (3) establishments serve alcohol in the area of the checkpoint: the Shartlesville Fire Company, Haag's Hotel, and the Riverboat Saloon. (N.T. p. 25).

11. DUI-related incidents were set forth on a map made part of the Pre-Deployment Briefing Packet given to the troopers shortly before the checkpoint was set up. (N.T. p. 25). (Exhibit No. 2).

12. The checkpoint was established approximately 100 yards west of the intersection of Old State Route 22 and Wolf Creek Road. (N.T. p. 9). (Exhibit No. 1).

13. Old State Route 22 is a two-lane asphalt highway in a rural area. It is a straightaway at the checkpoint site with a lower speed limit because drivers are traveling through a borough. (N.T. pp. 10, 19).

14. At the corner adjacent to the checkpoint location is a parking lot that was used by the State Police as an interview area where troopers would conduct standardized field sobriety testing and the recording of the tests. (N.T. p. 11).

15. Signs indicating a sobriety checkpoint were placed 600 yards away from the checkpoint, one facing east, the other west. Additionally, signs advising drivers to be prepared to stop were placed 400 yards away from the checkpoint facing in both directions. (N.T. p. 13). (Exhibit

No. 2).

16. The checkpoint area was illuminated by emergency lighting and flares were lit on either side of the checkpoint. (N.T. p. 12).

17. The checkpoint began on the day before Thanksgiving, Wednesday, November 23, 2016, starting at 11:30 p.m. and ending at 2:30 a.m. on Thanksgiving, November 24, 2016. (Exhibit No. 2).

18. At 11:00 p.m. on November 23, 2016, the troopers taking part in the checkpoint attended a briefing at the State Police Barracks where they were given the Pre-Deployment Briefing Packet for the sobriety checkpoint. (N.T. p. 20). (Exhibit No. 2.)

19. The Packet set forth the procedures to be followed at the checkpoint, the trooper's assignments at the scene, and the equipment to be used. (Exhibit No. 2).

20. Eight (8) officers were assigned to conduct initial contact with motorists. (N.T. p. 20). (Exhibit No. 2).

21. Corporal Mengel was the supervisor of the checkpoint. (N.T. p. 6). (Exhibit No. 2).

22. He did not participate in stopping vehicles and did not conduct interviews with drivers. (N.T. pp. 16, 28).

23. His role was to ensure safety for the motorists and the troopers, making sure the area is illuminated, and waving cars through the checkpoint if there was a backup. (N.T. pp. 16-18).

24. At approximately 1:15 a.m. on November 24, 2016, the Juvenile stopped at the checkpoint and came in contact