# Jackson v. Consolidated Rail Corp.

*Negligence — Heart attack on the job — Employer negligence — Transport refusal*

Personal representative of former ConRail employee who had a heart attack on the job, but did not go to hospital, appealed jury verdict finding that defendants were not negligent. Jury verdict was found not contrary to the weight of the evidence. Recommendation that the court's verdict be affirmed.

On March 28, 2011, Robert Jackson was working on the railroad track in Bayonne, New Jersey, as an employee of defendant Consolidated Rail Corp. and Norfolk Southern Railway Co. (Conrail). When he picked up a jackhammer, he felt discomfort in his chest and complained of arm and chest pain and nausea. His co-workers brought him back to headquarters and offered to drive him to a walk-in medical facility. Jackson opted to go to a real hospital closer to home, where he had surgery and was hospitalized for three to four weeks.

He did not return to work and filed the complaint on March 14, 2014. Jackson died on July 12, 2014, and was replaced as plaintiff by the representative of his estate, Carrie Jackson, appellant in the present action. During the jury trial in June 2015, testimony from medical experts for both sides was heard, and the jury found in favor of Conrail. Damages were not awarded.

In appellant's statement of errors complained of on appeal, the court noted that only one of the 22 issues identified the core of appellant's case — that the finding of "not negligent" was against the weight of the evidence. On raising the appeal, appellant's burden was to prove that defendants were negligent and that negligence caused or contributed to the health injury to decedent.

In its review, the court noted that plaintiff established "only that Mr. Jackson's injury occurred during the scope of his employment and that his employment was in furtherance of the railroad's commerce." As evident in the taped depositions, decedent refused repeated offers of transport to a medical facility, and his communications were clear to all around him. No mention was made of him having a heart attack or that he believed he was experiencing one. Evidence did not show that he was in a "helpless state" or that his co-workers were aware of any helplessness. Therefore, the court did not discern that the jury verdict was contrary to the evidence presented and recommended affirmation of the jury's decision.

C.P. of Philadelphia County, March Term, 2014 No. 02160; 3735 EDA 2015

BUTCHART, *J.*, June 8, 2016—Plaintiff, Carrie L. Jackson, as personal representative for the estate of Robert A. Jackson, appeals the jury verdict that Defendants, Consolidated Rail Corporation and Norfolk Southern Railway Company ("Conrail"), were not negligent.

## FACTUAL HISTORY

Robert A. Jackson was hired by Conrail as a track man in 2008. Video Deposition ("V.D.") 4/12/12 p. 8. He began work on a 'tie-gang,' and was supervising a tie gang at the Bayonne Depot on March 28, 2011, when he had a heart attack. Oral Deposition ("O.D.") 4/12/12 p. 69, N.T. 6/23/15 p. 91. In his videotaped testimony, Mr. Jackson described feeling "something" in his chest in the late afternoon, when he picked up a jackhammer. V.D. 4/12/12 p. 21. His coworkers brought him back to his vehicle and a coworker, Jorge DaSilva, drove back to headquarters. O.D. 4/12/12 p. 75, 77, V.D. 4/12/12 p. 23. Mr. Jackson declined an offer to go to Concentra, a walk-in medical facility and opted instead to go to a "real" hospital near his home. O.D. 4/12/12 p. 78-79, V.D. 4/12/12 pp. 27-28. Mr. Jackson had surgery and was hospitalized three to four weeks, and did not return to work. V.D. 4/12/12 p. 33. Mr. Jackson died on July 12, 2014.

## PROCEDURAL HISTORY

On March 14, 2014, Plaintiff filed a Complaint.

On April 9, 2014, Defendant, Conrail, filed an Answer

with New Matter.

On April 29, 2014, Plaintiff filed a Reply to New Matter.

On August 11, 2014, a Praecipe to Substitute Carrie L. Jackson for Robert A. Jackson was filed.

On March 25, 2015, Defendants filed a Motion in Limine to preclude evidence and argument regarding their alleged failure to provide medical assistance to Robert A. Jackson. The Motion was denied on June 23, 2015.

On April 20, 2015, Plaintiff filed a Motion in Limine to preclude evidence or testimony collateral source benefits. The Motion was granted on June 22, 2015.

On June 4, 2015, Defendant filed a Motion in Limine to preclude Plaintiff's expert, Dr. Donald Rubenstein, from testifying that Robert A. Jackson's heart attack was the result of his employment. On June 23, 2015, the Court entered an Order limiting the expert testimony of Dr. Rubenstein.

The matter went to trial with twelve jurors on June 22, 2015. Plaintiff presented five witnesses: Carrie Jackson, Brian Beck, John Cunha, Richard Kvartek, John Falcao and videotaped deposition testimony of Robert A. Jackson, Jorge DaSilva, and Donald Rubenstein, M.D. Defendant presented the videotaped deposition testimony of Howard Cobert, M.D. On June 26, 2015, the jury returned a verdict in favor of Defendant. No damages were awarded to Plaintiff. This appeal followed.

On July 2, 2015, Plaintiff filed a post-trial motion,

which the Court denied on October 29, 2015.

On November 27, 2015, Plaintiff filed a Notice of Appeal to the Superior Court of Pennsylvania.

## ISSUE ON APPEAL

In her 1925(b) statement, Plaintiff posits that: "[t]he jury verdict of 10 to 2 finding that Conrail was not negligent was against the weight of the evidence.[1]" Statement at ¶3.

## DISCUSSION

When reviewing the sufficiency of evidence presented at trial, this Court must determine whether the evidence and all reasonable inferences therefrom, viewed in the light most favorable to the verdict winner, was sufficient to enable the factfinder to find against the losing party. *Reichman v. Wallach*, 452 A.2d 501 (Pa. Super. 1982). The decision to grant or deny a new trial based upon a claim that the verdict is against the weight of the evidence rests with the trial court. *Dierolf v. Slade*, 581 A.2d 649, 652 (Pa. Super. 1990). On appeal, the test is not whether the appellate court would decide the case in the same way but, rather, whether the jury's verdict was so contrary to the evidence as to shock one's sense of justice and "to make the award of a new trial imperative, so that right

1. In her *Concise Statement of Errors* submitted pursuant to Rule 1925(b)(1), Appellant included twenty-two (22) separate issues. In six, (Nos. 4, 5, 10, 16, 17, and 21), she argues the jury "improperly determined", "improperly listened" or "disregarded" testimony, argument or legal instructions during the trial. Many of the remaining issues revisit matters raised pre-trial in *motions in limine* or complain about arguments made by counsel during the trial. The Court considers Number 3, "The jury verdict of 10 to 2 finding that Conrail was not negligent was against the weight of the evidence" as the gravamen of Appellant's appeal.

may be given another opportunity to prevail." *Id.* (quoting *Commonwealth v. Taylor*, 471 A.2d 1228, 1230 (Pa. Super. 1984)); *Vattimo v. Eaborn Truck Service, Inc.*, 777 A.2d 1163, 1164-65 (Pa. Super. 2001).

"[T]he issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same circumstances." *Wilbert* at 409.

In the instant matter, it was Plaintiff's burden to prove that Defendants were negligent and that Defendants' negligence caused or was a contributing factor to Mr. Jackson's harm. Plaintiff established only that Mr. Jackson's injury occurred during the scope of his employment and that his employment was in furtherance of the railroad's commerce. The evidence established that Mr. Jackson was a railroad employee on March 28, 2011 working at Defendants' track in Bayonne, New Jersey. N.T. 6/25/15 p. 78. Evidence established that Mr. Jackson suffered a heart attack on March 28, 2011. O.D. 4/12/12 p. 69, N.T. 6/23/15 p. 91. Evidence did not establish that Defendant was negligent and/or that Defendant's negligence played any part in Mr. Jackson's heart attack. *See Lehman*.

The jury verdict demonstrates that it found that the conduct of the Conrail employees was "what a reasonable and prudent person would have done under the same circumstances." *See Wilbert* at 409. The jury heard evidence that Mr. Jackson thought he pulled a muscle or was getting sick and believed he would be fine, and that his arm and

chest hurt and that he felt something pop. N.T. 6/23/15 pp. 72, 106. He was provided aspirin. N.T. 6/23/15 pp. 96, 106, V.D. 11/19/14 pp. 19-20. Various Conrail employees asked Mr. Jackson several times if he wanted to go to the hospital or wanted an ambulance called. N.T. 6/23/15 pp. 73, 82, 126-127, 135, V.D. 11/19/14 p. 21. Mr. Jackson refused repeated offers and requested to be taken home. N.T. 6/23/15 pp. 73, 83. He effectively communicated in a clear manner to the people around him, stated that he wanted to go home, repeatedly refused offers to call an ambulance or to be taken to Concentra, or to a hospital. N.T. 6/23/15 pp. 73, 82-83, 108, 126-127, 135, V.D. 11/19/14 p. 21. He never stated that he believed he was having a heart attack. N.T. 6/23/15 p. 83-84. His words or actions did not give his coworkers any indication that he had a heart attack. V.D. 5/12/15 pp. 45-46, N.T. 6/23/15 p. 136. There was no evidence presented to indicate that Mr. Jackson was in a "helpless condition" and that his coworkers were aware of it.[2] Based on the above, the jury's verdict was not contrary to the weight of the evidence as to shock one's sense of justice, and the verdict was consistent with the competent evidence presented.

## CONCLUSION

For all of the reasons stated above, this Court's decision should be affirmed.

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2. In FELA cases, an employer must render medical assistance "when an employee, to the employer's knowledge, becomes so seriously ill while at work as to render him helpless to obtain medical aid or assistance for himself...." *Bell v. Norfolk Southern Railway Company*, 476 S.E.2d 3, 5 (1996) (*citing Handy v. Union Pacific Railroad*, 841 p.2d 1210, 1221 (Utah Ct. App. 1992).

## Jupiter Tavern v. Pennsylvania Liquor Control Board

*Liquor license appeal — Denial of license renewal — Standing — Assignment of rights*

Following a sheriff's sale of a former tavern, which listed a hotel liquor license as an asset for purchase with the property, would-be pub operator discovered that she could not transfer or renew the liquor license to proceed with her business plan. On determining lack of standing, the court denied the appeal.

Nominal petitioner Jupiter Tavern, the former holder of a liquor license, used it as collateral on a loan to TD Bank and then failed to timely renew the license, which expired on Sept. 30, 2010. When Jupiter Tavern defaulted on the loan, TD Bank notified it that the license would be sold. Defendant Pennsylvania Liquor Control Board (LCB) informed TD Bank that the license was a privilege and that it needed to take special steps to renew and sell the license. TD Bank took no action and listed the license along with the property at a sheriff's sale in May 2013. The property was bought by St. Matthew's UCC, and the now-defunct license remained in the name of Jupiter Tavern.

Petitioner Gretchen Pettit, who had no ties to or assignment of rights from Jupiter Tavern, had an unwritten understanding with the church under which the church would receive one acre of the land and petitioner the remainder, plus the liquor license. In March 2014 petitioner filed to transfer the license to herself but was denied, allegedly the first time she was aware of a problem with the license. In July 2015 she filed four renewal/validations under the name of Jupiter Tavern to retroactively cover the time the license had been out of existence; her intent was to renew the license as Jupiter Tavern then transfer it. The LCB denied the application for renewal. On denial of the appeal, petitioner appealed to the present court. The LCB filed a motion to strike the appeal on grounds that petitioner lacked standing to bring the appeal; in other words, she did not meet the standards for an aggrieved person.

On evaluation of the circumstances before it, the court determined that petitioner had no ownership or direct interest in the license, since the license was never transferred from Jupiter Tavern and it had expired from non-use and failure to renew. She may have a pecuniary interest but provided no documentation of purchase price or value of the property, with and without liquor license. She had no legal interest, as the license was not in her name, even if it still existed.

Petitioner also was determined to not be eligible to bring a nunc pro tunc appeal. Her original counsel allegedly failed to file the paperwork

but at the latest in October 2013, when she was advised to seek new counsel as he was "not qualified in this type of liquor license transfer," she was on the clock to apply for a renewal. While a delay in filing of a week or so was a standard acceptable time, petitioner waited over a year to file to renew. She also waited over a year after knowledge of the problem before she appealed. To her argument that the LCB would not be prejudiced by the appeal, the court showed that it would create a loophole for resurrecting long-extinct licenses, the LCB would have no overview and no authority to ensure the regulations were met. Petitioner missed the deadline for filing a later renewal by over two years. The LCB would not have been able to approve the renewal in any case since the license had ceased to exist years before, the former owner or assignee did not apply for renewal, and further no certification of tax obligations was filed.

C.P. of Monroe County, No. 726 CIVIL 2016

*Nicholas A. Miller*, for petitioners.
*Melissa J. Noyes*, for respondent.

WILLIAMSON, *J.*, June 20, 2016—This matter comes before the Court on the appeal of Gretchen G. Pettit to the denial of a Liquor License renewal by the Pennsylvania Liquor Control Board (hereinafter "Board"). The parties relied on the record before the Pennsylvania Liquor Control Board and additional testimony of Gretchen G. Pettit (hereinafter "Petitioner") at a hearing held on March 22, 2016. The Liquor License in question, known as H-1212, was last listed by the Board as being owned by Jupiter Tavern, Inc., a restaurant that occupied the building Gretchen G. Pettit currently owns. Jupiter Tavern is listed as a party to these proceedings, but made no appearance, nor does Petitioner have authority to act on its behalf. The Liquor License was also additional collateral in a loan TD Bank made to Jupiter Tavern. Jupiter Tavern failed to timely renew the License and it expired on September 30,

2010. The License remained in the name of Jupiter Tavern. On October 19, 2010, TD Bank contacted the Board to inform them Jupiter Tavern had defaulted on the loan and the License would be sold.

On November 24, 2010, the Board replied with a letter explaining that holding a liquor license is considered a privilege and extra steps would need to be taken by TD Bank (incorrectly referred to as "Unity Bank") if they wished to renew and sell the License. Apparently, no other action was taken by TD Bank. In 2013, a Sheriff's Sale of real property belonging to Jupiter Tavern occurred where Petitioner alleges the License was sold by the Sheriff with the underlying real estate, and a bill of sale was issued for the Liquor License. (The foreclosure action between TD Bank and Jupiter Tavern is located at 9572 CV 2010. The License is listed as an asset sold at the sale without any documentation showing TD Bank had complied with the Board's November Letter setting forth requirements to be met to show TD Bank had authority to act regarding this License.) Petitioner was not the named purchaser of the real estate at the sale. The Sheriff's deed from May 7, 2013 lists St. Matthew's UCC as the buyer of record.

According to Petitioner, she had an agreement with St. Matthew's UCC to split the cost of the property if the church were allowed to keep an acre of land and she would own the rest from which to run a pub. Petitioner alleges that all other property from the sale was transferred to her on August 5, 2013, including rights to the License. Petitioner stated at the March 22, 2016 hearing that there was no written contract between her and St. Matthew's UCC and no other evidence has been provided. Petitioner

also has not provided any of the paperwork for the alleged assignment of rights of the License into her possession. Finally, Petitioner claims all of the purchased assets were placed into an LLC she controls called Kunkletown Pub, LLC once transferred to her from St. Matthew's UCC.

An initial application for transfer of the License was filed by the Petitioner in March 2014 and denied. Petitioner alleges this was the first time she realized something was wrong with the License. On July 20, 2015, Petitioner filed four renewal and validations of the License to cover the time the License had been in safekeeping and out of existence. These renewals were filed under the name Jupiter Tavern with Petitioner listed as owner. Petitioner admits she is not the owner of Jupiter Tavern, nor does she have an assignment of rights from Jupiter Tavern. Petitioner claims that if she were granted a renewed License, she would then file to transfer it to Kunkletown Pub LLC. There is no transfer application currently pending. On September 28, 2015, the Board issued a letter to Petitioner's counsel denying the renewals. A *nunc pro tunc* appeal was filed by Petitioner and an Administrative Hearing was held on November 15, 2015. The Petitioner's appeal was denied and she filed the instant appeal with this Court.

1. Gretchen G. Pettit's Standing to Appeal the LCB Decision —

An appeal from a Board decision refusing renewal of a liquor license may be heard de novo by the trial court, and can issue its own findings and conclusions of law based upon the established record. *Two Sophia's, Inc. v.*

*PLCB*, 799 A.2d 917 (Pa. Cmwlth. 2002). The trial court may sustain, alter, modify or amend the Board's action. *PLCB v. Richard E. Craft American Legion Home Corp.*, 718 A.2d 276 (Pa. 1998). The Board has filed a Motion to have this appeal stricken as Petitioner Gretchen G. Pettit lacks standing as a "successor in interest" to Jupiter Tavern. The Administrative Opinion noted Petitioner did not have standing based upon a liquor license being a privilege, not a right, and her failure to provide any transfer documentation. The last listed owner was Jupiter Tavern. "The board may of its own motion, and shall upon the written request of any applicant... whose application for such license, renewal or transfer... has been refused, fix a time and place for hearing." 47 Pa. Stat. Ann. § 4-464 (West). Petitioner properly requested a hearing before the Board regarding the License renewal and one was held on November 10, 2015. "Any applicant who has appeared at any hearing... who is *aggrieved* by the refusal of the board... to renew or transfer any such license... may appeal... within twenty days from date of refusal or grant, to the court of common pleas of the county in which the premises or permit applied for is located." 47 Pa. Stat. Ann. § 4-464 (West) (emphasis added). Petitioner only has standing to appeal the Board's renewal refusal to this Court if she has standing as an aggrieved person.

Although the Board claims in their Motion the only applicant they will recognize under the authority of the Liquor Code is Jupiter Tavern, persons may challenge Board decisions who are not owners or alleged owners of licenses. Aggrieved persons are not confined to those with an ownership interest in the disputed license. "Any

church, hospital, charitable institution, school or public playground located within three hundred feet of the premises applied for, aggrieved by the action of the board in granting the issuance of any such license or the transfer of any such license, may take an appeal limited to the question of such grievance" based upon the effect it will have on their organizations from a nearby premises selling alcohol. 47 Pa. Stat. Ann. § 4-464 (West). Likewise, owners of other liquor licenses in the same area as the disputed license have standing as an aggrieved party because they have a distinct financial interest in new licenses not being issued to compete with their businesses. *Application of El Rancho Grande, Inc.*, 496 Pa. 496, 437 A.2d 1150 (1981). Petitioner's situation does not seem to fall into any of these courts' decisions. She is attempting to assert a right to a license listed as being owned by another party, and therefore, having a right to bring a renewal application on their behalf.

The Pennsylvania Supreme Court gave guidance on who qualifies as an aggrieved person in *William Penn Parking Garage v. City of Pittsburgh*. In that case, the court stated that in order to appeal, the petitioner "must have a direct interest in the subject matter of the particular litigation." *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269, 280 (1975). To qualify as a direct interest "the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains." *Id.* at 282. The Petitioner does not have a direct interest in the License renewal at issue. The License is in the name of Jupiter Tavern. The Board never approved a transfer of the License to the Petitioner. The Petitioner

is not seeking to transfer the License into her own name or into the name of her LLC, but rather simply to renew the License on behalf of Jupiter Tavern. According to the Board, the License has passed out of existence due to non-use and lack of a timely renewal by Jupiter Tavern. Even if the License still existed for purposes of renewal, it would be in the name of Jupiter Tavern as that was the last Licensee prior to non-renewal and no transfer has been approved. Jupiter Tavern has the direct interest in renewal of the License as the last titled owner of the License. Petitioner acknowledged this through her own testimony as she noted her one attempt at transferring the license was unsuccessful and all of the renewal applications list the License as being owned by Jupiter Tavern. Petitioner also stated at both hearings that she is not affiliated with, nor has any interest in Jupiter Tavern. Based upon this, Petitioner has failed to provide any documentation the License or rights in the License, have been transferred to her. If it had, she would be able to make the claim in her own right and not as a "successor in interest" of Jupiter Tavern. Petitioner is not an automatic "successor in interest" as "purchase at a sheriff's sale is not a transfer of the license but instead, only grants to purchaser the right to apply for the transfer of the license." 40 Pa. Code § 7.33. That transfer cannot occur because Jupiter Tavern did not timely renew the License. As such, no License existed to have a right to transfer or be conveyed at the Sheriff's Sale.

TD Bank did not follow the proper procedure in selling the License at Sheriff Sale since it was not timely renewed, nor was it transferred to TD Bank. TD Bank did not

produce the required information to the Board necessary for the Board to recognize any interest in the License given to them. Thereafter, Petitioner could not have purchased a proper right to apply for a license transfer as none existed for TD Bank with the Board. There was no assignment of rights or other required documents signed by Jupiter Tavern necessary for a transfer of this License. Also, it is important to note Petitioner is appealing a renewal decision, not a transfer application. She is not trying to exercise her own rights as the named owner of the license; rather, she attempts to exercise a third party right to the named owner so she can later make a transfer claim of her own. Therefore, Petitioner has no direct interest in the Board's renewal decision of Hotel License H-1212.

Under *William Penn Parking Garage*, in addition to a direct interest, a petitioner's interest must be pecuniary, substantial, immediate, and not based solely upon the consequences of the court's decision. *Id.* The pecuniary interest of a petitioner need only be minimal to confer standing. *Id.* at 284. Petitioner testified at March 22, 2016 hearing, that she paid money for what she thought was a valid liquor license and is being harmed financially by the Board's decision to renew the License because alcohol sales would prevent her business from operating at a loss. She gave no specifics of what she paid for the property, or value of the property and business with and without a Hotel Liquor License. Therefore, the testimony was speculative. The petitioner's interest must also be substantial in a non-pecuniary way which shows an "adverse effect other than the abstract interest all citizens in having others comply with the law." *Id.* at 284. Again, as Petitioner is

not the named owner of the License, has not successfully transferred it, nor is the Board required to transfer it to her through the purchase at the Sheriff's Sale, the Petitioner has no legal interest in the License being renewed, let alone a substantial interest that is non-pecuniary.

Petitioner also lacks an immediate interest in the License. In addition to the fact that Petitioner holds no current claim to the License, the License itself is long past the point of renewal, having gone out of existence on October 13, 2013. Even if the License had been properly sold at the Sheriff's Sale under 40 Pa. Code § 7.33, the actual buyer, St. Matthew's UCC, would have needed to file for and been approved for the license transfer, and then Petitioner would have had to file and been approved by the Board for another license transfer. The alternative would have been an assignment of rights from St. Matthew's UCC to Petitioner. "It is clear that the possibility that an interest will suffice to confer standing grows less as the casual connection grows more remote." *William Penn Parking Garage*, supra at 283. Petitioner is several persons removed from having an immediate interest in the License. She was also unable to present any documentation that St. Matthew's UCC assigned their interest in the License to the Petitioner, other than her statement that they did.

Finally, a petitioner's interest cannot be based solely upon a court's future determination. Petitioner is essentially before the Court looking to renew the License so she can establish a named interest in it at a future time. Petitioner testified at the March 22 hearing that if the License is renewed she plans on working to transfer it to herself and then to her LLC. The only way Petitioner will

be able to begin this process is if this Court essentially grants her a renewal of the License last held by an entity not a party in this matter from which she can then transfer. Therefore, Petitioner's underlying interest in the License is a future event that relies upon this Court's determination as to renewal and she does not have standing to appeal the Board's decision as she is not an aggrieved person as to that renewal.

2. Nunc Pro Tunc Appeal —

Even if the Petitioner has proper standing to bring this action, there remains the issue as to whether she has grounds for a *nunc pro tunc* Appeal. The Administrative Opinion found against the Petitioner and refused her *nunc pro tunc* appeal, citing negligence on her part and the extended period from the time she realized there was a problem to when she filed the initial renewal. The standard for granting a *nunc pro tunc* appeal was set forth by the Pennsylvania Supreme Court in *Cook v. Unemployment Compensation Board of Review*:

> "Where an appeal is not timely because of 1) non-negligent circumstances, either as they relate to appellant or his counsel, and 2) the appeal is filed within a short time after the appellant or counsel learns of and has an opportunity to address untimeliness, and 3) the period which elapses is of very short duration, and 4) appellee is not prejudiced by the delay, the court may allow an appeal *nunc pro tunc*."

*Cook v. Unemployment Comp. Bd. of Review*, 543 Pa. 381, 671 A.2d 1130, 1131 (1996) (*numbering added*).

First, Petitioner must prove the delay in the renewal was caused by non-negligent circumstances as they relate to her or her counsel. The Administrative Opinion states Plaintiff acted negligently in failing to file a renewal application. In *Cook*, the petitioner was found not to have been negligent when he did not yet have counsel and was unable to file an appeal until four days after the deadline due to a heart attack. *Id.* at 1131. In *Bass v. Commonwealth Bureau of Corrections*, which the *Cook* court discusses, a lawyer was found not to be negligent when appeal papers were properly prepared, but were filed late when the only person in the office with knowledge of the filling deadline became ill and was out of the office for a week. *Id.* Petitioner testified in both hearings she blames her prior counsel for the licensing issue remaining outstanding for so long. Petitioner claims she was not negligent because the attorney essentially failed to timely file the paperwork. Petitioner testified to a bill which she received from prior counsel which noted a discussion about the License in January and March of 2013, but not what the discussion entailed. *LCB Hearing Transcript* at 20. We note this was prior to the Sheriff's Sale and that Petitioner appeared to proceed without counsel at the time of the Sheriff's Sale and in whatever agreement she came to with St. Matthew's UCC, regarding the actual purchase of the real property at the Sheriff's Sale. Petitioner then acknowledged she received a letter from prior counsel as early as October 10, 2013, stating he was not qualified in this type of liquor license transfer and recommended she seek new counsel. *Id.* at 19. Petitioner could be found not to have been negligent for failure to file the required transfer or

renewal applications within the period prior to October 2013, as she testified she believed her prior counsel was initially working on the issue and would keep her updated on it. *Id.* at 44. However, there is clear evidence Petitioner knew nothing was being done regarding the License as early as October 2013, but she did not seek alternative counsel. Nor did she immediately apply for a renewal with the Board. Therefore, she shares blame for not seeking to rectify the issues at hand earlier.

The next step in the *Cook* analysis is the time period between learning of the untimeliness and addressing it. The Administrative Opinion found Petitioner had not acted within a reasonable amount of time to file her appeal. In *Cook* and *Bass*, the appeals were filed approximately a week or so after the deadline. The Board previously argued Petitioner should have been on alert of possible problems with the License because it was allegedly purchased at a Sheriff's Sale. *Id.* at 60. The Petitioner testified her prior counsel contacted TD Bank before the sale and no red flags were raised to her. *Id.* at 14. Additionally, just because something is bought at a Sheriff's Sale does not make it automatically defective. At the Administrative hearing, Petitioner's counsel testified she had received a letter in March of 2014 from the Board denying her initial request to transfer the License because it no longer existed. *Id.* at 50-51. At the hearing before this Court, Petitioner alleges this was the first time she was put on notice the License did not exist due to non-renewal. However, Petitioner's four renewal applications were not filed until July 20, 2015, sixteen months after the denial of transfer. As the Board pointed out at the Administrative hearing, the sixteen

months does not include the time in which Jupiter Tavern, which Petitioner claims to be a successor of, did not file renewals. *Id.* at 59. Even without the time accumulated before the Sheriff's Sale, sixteen months far exceeds the time allowances considered in *Cook* and *Bass*.

In regard to the third prong, by Petitioner's own testimony, the duration between knowledge of the problem and the appeal was well over a year. "An appellant seeking permission to file a nunc pro tunc... appeal must proceed with reasonable diligence once he knows of the necessity to take action." *City of Philadelphia v. Tirrill*, 906 A.2d 663, 667 (Pa. Commw. Ct. 2006). In *Amicone v. Rok*, the court found that a period of four months was unreasonable to file a *nunc pro tunc* appeal, stating that amount of time was a "lengthy delay" in filing. *Amicone v. Rok*, 2003 PA Super 500, ¶ 13, 839 A.2d 1109, 1115 (2003). Here, the delay was sixteen months, which was not a prompt appeal.

Finally, the Petitioner must prove the Board was not prejudiced by the appeal. Petitioner alleges the Board would suffer no prejudice from the License being renewed because the Board would benefit from the additional revenue generated through the License. The Board's counsel has stated that allowing Petitioner's appeal would set detrimental precedent because it would essentially create a market for expired liquor licenses. *LCB Hearing* at 60. In consideration of how tightly regulated Liquor Licensing is in Pennsylvania and the extent to which the State has gone to control it, the Board would be prejudiced because a loop hole would be created in the Liquor Code. Primarily, there is the issue of whether or not a Petitioner should even have standing to file a renewal application

when not the listed owner of the License. Secondly, the Board would potentially lose control of being able to say affirmatively when a license ceases to exist. Long dormant licenses thought to be out of existence could be revived. In a worst case scenario, this could potentially throw off the balance of liquor licenses in each county if they are allowed to be resurrected from the grave. The Board would effectively lose the authority they have to ensure licensing fees are paid, renewal applications are filed, and licensing provisions are met, if there was no threat of a permanent loss of a license for failure to adhere to the Board's requirements. Liquor Licenses are valuable assets in Pennsylvania, as evidenced by the fact they can be used as collateral on a mortgage, and allowing an appeal such as this one would certainly result in persons trying to revive licenses that ceased to exist years, if not, decades ago. The Licenses are deemed a privilege and not a right. Therefore, the potential for abuse that would result from the precedent of this appeal would cause great prejudice to the Board and its ability to function.

We do sympathize with the Petitioner's predicament. A liquor license is very difficult and prohibitively expensive to obtain. The loss of what was once a valid Hotel License at this location is unfortunate. However, the Board regulations are to be strictly construed. Board regulation 7.33(4) required a renewal application be filed by October 1, 2011. Under certain circumstances, a late, or *nunc pro tunc* filing for renewal is allowed under Section 470(a) of the Liquor Code if received within two years of expiration of a license. Here, the filing deadline was September 30, 2013. Therefore, the Board had no authority to approve

a renewal application. It also had no authority to grant a renewal because there was no proof that all tax reports of Jupiter Tavern were properly filed and paid, nor was a tax clearance certificate received as required by Section 477 of the Liquor Code. Finally, application for renewal was not made by the entity listed as the owner of the License, or someone with a written assignment of rights. For these and the prior reasons set forth, we must deny the appeal.

ORDER

AND NOW, this 20th day of June, 2016, the appeal for renewal of Liquor License #H-1212 is DENIED.

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## National Bear Hill Trust v. Rinker

*Sheriff's sale — Illegal occupancy — Legal description — Equivalent to title abstract*

Despite sheriff's sale of real property, former owners continued to occupy the property. The new owner sought ejectment, but inhabitants raised preliminary objections on grounds of a technicality. Preliminary objections denied.

On Dec. 30, 2015, plaintiff National Bear Hill Trust bought real property in Sciota, Pa., at a sheriff's sale. Defendants Stacy and Kenneth Rinker did not vacate the property. Plaintiff sought a judgment for possession, and defendants answered with preliminary objections based on a technicality under Pa. R.C.P. 1028(a)(2).

Defendants objected that plaintiff's pleading did not conform to law or rule of court in not providing the title abstract. The abstract would serve to establish a "right of exclusive possession" and generally is required. However, plaintiff purchased the property at a public sale, and on completion of the sale, would have a vested right in the property thus purchased. Citing from *Pennsylvania Co. for Insurances on Lives & Granting Annuities, to Use of Jefferson Med. Coll. of Philadelphia v. Broad St. Hosp.*, "the subsequent acknowledgement and delivery of the deed provides the purchaser with the evidence of the title which relates

to, and takes effect as of the date of, the sale recited in it." The holder of a sheriff's deed was entitled to possession of the property.

To satisfy the technicality, the court found that the sheriff's deed provided a sufficient legal description and served as an abstract of title, including legal description and previous owners. The complaint conformed to the rules of court and referenced the sheriff's deed, how the title was obtained, previous owners, deed book references and sales dates, which was itself considered equivalent to an abstract of title in a sheriff's sale.

C.P. of Monroe County, No. 2374 CIVIL 2015

*Sean M. Duffy*, for plaintiff.
*Steven E. Krawitz*, for defendants.

WILLIAMSON, *J*., June 21, 2016—This matter comes before the Court on Defendants' Preliminary Objections to the Plaintiff's Complaint. Oral argument was not requested and this issue was decided upon briefs.

The underlying matter in this case is an ejectment action. National Bear Hill Trust (hereinafter "Plaintiff") purchased the property known as 226 Fenner Avenue, Sciota, PA 18354 at Sheriff's Sale on December 30, 2015. Stacy A. and Kenneth Rinker (hereinafter "Defendants") are the prior owners of the property. Plaintiff is seeking a judgment for Possession against the Defendants who are still occupying the Fenner Avenue home.

Under Pa. R.C.P. No. 1028(a), preliminary objections may be made on the following grounds:

(1) Lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form of service of a writ of summons or a complaint;

(2) failure of a pleading to conform to law or rule of

court or inclusion of scandalous or impertinent matter;

In consideration of preliminary objections, all material facts set forth are admitted as true. *Hykes v. Hughes*, 2003 PA Super 397, 835 A.2d 382, 383 (2003).]

Defendants' sole preliminary objection is brought under Pa. R.C.P. 1028(a)(2) based upon the Complaint's perceived failure to conform to law or rule of court. Defendants argue Plaintiff has failed to attach "an abstract of the title upon which the party relies" as required under Pa. R.C.P. 1054(a). "An abstract of title is simply a compilation in an abridged form of [a] record of [a] vendor's title; it is a summary of the most important parts of the deeds and other instruments compromising the evidences of title, arranged in [a] chronological order, and intended to show the original source and incidents of title." *Bustin v. Whiting*, 369 Pa. Super. 563, 566, 535 A.2d 1078, 1080 (1987) (*citing* 77 Am.Jur.2d Vendor and Purchaser §259). An abstract of title is necessary in order to succeed in an ejectment action because the plaintiff must establish a right of exclusive possession through title. *Doman v. Brogan*, 405 Pa. Super. 254, 263, 592 A.2d 104, 108 (1991). However, once a purchaser at a public sale of land complies with all terms of the sale, he obtains a vested right in the sold property. *Pennsylvania Co. for Insurances on Lives & Granting Annuities, to Use of Jefferson Med. Coll. of Philadelphia v. Broad St. Hosp.*, 354 Pa. 123, 47 A.2d 281, 284 (1946). In terms of a Sheriff's Deed, "the subsequent acknowledgment and delivery of the deed provides the purchaser with the evidence of his title which relates to, and takes effect as of the date of, the sale recited in it." *Id.* at 285. Further a Sheriff's Deed entitles the holder to obtain possession of a property. *Id.*

We find the Sheriff's Deed attached to the Complaint serves the same purpose as an abstract of title. The Sheriff's Deed is documentary evidence that Plaintiff has a right to the property. Additionally, the Sheriff's Deed attached "summarizes the

most important parts of the deeds and other instruments of title" as it gives an adequate legal description of the property and names the previous owners. The Sheriff's Deed attached to the Complaint is sufficient as an abstract of title under Pa. R.C.P. 1054 and the Complaint does conform to the rules of court. Furthermore, we note the Complaint references the Sheriff's Deed, how Plaintiff obtained title, the prior owners and all deed book references and dates of the sale. This also sufficiently serves as an abstract of title meeting the legal requirements under the circumstances of a sheriff sale. Therefore, Defendants' Preliminary Objection will be denied.

ORDER

AND NOW, this 21st day of June, 2016, Defendants' Preliminary Objection to Plaintiff's Complaint is DENIED.

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## Miles v. PennDOT

*Evidence — Vehicle code — Hearsay — AOPC electronic avidence*

Pennsylvania motorist convicted of driving under suspended license objected to the admissibility of a two-page report from the PennDOT computer system that was received from the AOPC, indicating the conviction. The report's transmission history was determined to make it ineligible hearsay not admissible as evidence. Recommendation to Commonwealth Court to affirm common pleas order on grounds that

defendant failed to meet its burden of proof.

On Oct. 27, 2014, plaintiff Kevin Miles violated §1543(a) of the Pennsylvania Vehicle Code and was notified in December that his driving privileges would be suspended as a result. At trial on Nov. 13, 2015, defendant Pennsylvania Department of Transportation (PennDOT) submitted as evidence a two-page report of the conviction that was sent from the Administrative Office of Pennsylvania Courts (AOPC).

The section manager with the Bureau of Driver Licensing also testified during the trial that the report was a screenshot from the PennDOT computer system; he made the assumption that "the information originated from a magisterial district court and passed through the AOPC before somehow making its way to the Department." At no time was that report elicited from the magisterial district court.

After the common pleas court raised the issue of the admissibility of the report, the parties submitted briefs arguing their positions on the admissibility of the document. On March 7, 2016, the court sustained the objection to the admissibility, sustained the appeal and rescinded the suspension. Defendant appealed.

Plaintiff's counsel objected to the report on grounds that it was hearsay. Defendants argued that a hearsay exception under 75 Pa. C.S. §1550(d)(2) was applicable, for documents received electronically from a court; however, the AOPC, from which defendant received the report, was not a court. Defendant offered no other justification for authority to admit the report, other than Pa. R.Crim.P. 771, under which the clerk of courts is tasked to transmit the disposition of charges to defendant, not to the AOPC. In addition, Rule 771 expressly did "not address the admissibility of evidence."

Defendant finally attempted to invoke the intent of the Legislature in construing §1550(d)(2), arguing that not allowing the report would lead to an "absurd" result. The court commented that the only absurd thing about the case was defendant's omission of requesting the confirmation of the report directly from the magisterial court. On the subject of ascertaining the Legislature's intent, the court pointed out that: "[i]f the General Assembly had intended or now wishes to provide a hearsay exception for information that the [PennDOT] receives from the AOPC by electronic submission, the General Assembly could have done so and can do so by amending Section 1550(d)(2) to add the AOPC. Until it does so, the Department should obtain an electronic transmission from the court before which the motorist was found guilty."

C.P. of Philadelphia County, January Term, 2015 No. 02762

MOSS, *J*., June 27, 2016—In this case, the court is asked to decide whether a screenshot from a Department of Transportation ("Department") computer that was transmitted to it by the Administrative Office of Pennsylvania Courts ("AOPC") is admissible under Section 1550(d)(2) of the Vehicle Code, 75 Pa. C.S. § 1550(d)(2), to prove that Mr. Miles was convicted of a summary offense under the Vehicle Code. Section 1550(d)(2) provides a hearsay exception for documents received by the Department from any other court. This court held that the screenshot did not fall within the above hearsay exception because the screenshot was received by the Department from the AOPC rather than from a court. Additionally, the court was unable to find another hearsay exception that was applicable.

## I. Factual Background

On December 23, 2014, the Department mailed a letter to Kevin Miles that informed him that his driving privilege would be suspended pursuant to Section 1543 of the Vehicle Code, 75 Pa. C.S. § 1543, as a result of a December 15, 2014 conviction of violating Section 1543(a) of the Vehicle Code, 75 Pa. C.S. § 1543(a),[1] on October 27, 2014. (Exhibit C-1)

1. Section 1543(a) provides that "Except as provided in subsection (b), any person who drives a motor vehicle on any highway or trafficway of this Commonwealth after the commencement of a suspension, revocation or cancellation of the operating privilege and before the operating privilege has been restored is guilty of a summary offense and shall, upon conviction, be sentenced to pay a fine of $200." Section 1543(c)(1) requires the Department of transportation to suspend a person's operating privilege for one year if "the department's records show that the person was under suspension, recall or cancellation on the date of violation, and had not been restored."

Mr. Miles took a timely appeal.

At the November 13, 2015 trial, the Department sought to prove the underlying conviction through the admission of a "record of conviction details received by the Department electronically on 12/16/14, from the Administrative Office of Pennsylvania Courts ("AOPC") for citation no. C1433920, date of violation 10/27/14, and date of conviction 12/15/14." (N.T. at 5 and Exhibit C-1) The record was part of a series of documents that were marked C-1 and were included with a certification and attestation from the Department pursuant to Sections 6103 and 6109 of the Judicial Code, 42 Pa. C.S. §§ 6103 and 6109. Mr. Miles' attorney objected to the admission of the two-page record. (N.T. at 5-15)

The two-page record is a screenshot titled "Conviction Detail" that the AOPC electronically transmitted to the Department. The information on the screenshot contains biographical information about Mr. Miles and purportedly shows that he entered into a guilty plea in a court located in County 15, Borough/Township 301 on December 15, 2014 to having violated Section 1543(a) of the Vehicle Code on October 27, 2014. A copy of the Department's certification and the two-page screenshot are attached to this Opinion.

At the trial, the Department also presented the testimony of Matthew Whitaker, the section manager with the Department's Bureau of Driver Licensing. (N.T. at 16-25) Mr. Whitaker confirmed that the two-page record was a screenshot from the Department's computer system. (N.T. at 18) He further assumed that the information originated

from a magisterial district court and passed through the AOPC before somehow making its way to the Department. (N.T. at 18-20).

The court held under advisement the issue of the admissibility of the two-page screenshot. It provided the parties with the opportunity to submit briefs on the issue and permitted the Department with the right to supplement the record. (N.T. at 25-29) The Department did not supplement the record by submitting a certified record from the magisterial court showing Mr. Miles' conviction. Rather, the Department chose to submit a brief in which it argued that the two-page screenshot was admissible under Section 1550(d)(2). Mr. Miles also submitted a brief in which he argued that the two-page screenshot was inadmissible.

The court entered a March 7, 2016 Order in which it sustained the objection to the admissibility of the two-page screenshot and, therefore, sustained the appeal and rescinded the suspension. The court also explained its reasoning in the Order. The Department took a timely appeal from the March 7, 2016 Order.

## II. Discussion

The two-page screenshot is hearsay. It is a statement that the declarant, the AOPC, did not make while testifying at the November 13, 2015 trial and that the Department offered in evidence to prove the truth of the conviction, which is the matter asserted in the statement. *See* Pa.R.Evid. 801(c). Since it is hearsay, it "is not admissible except as provided by these rules, by other rules prescribed by the Pennsylvania Supreme Court, or

by statute." Pa.R.Evid. 802. Additionally, the two-page screenshot is hearsay within hearsay. It is the AOPC's statement based on information that the AOPC received from the magisterial district court where Mr. Miles was allegedly convicted. Therefore, pursuant to Pa.R.Evid. 805, the two-page screenshot is admissible only "if each part of the combined statements conforms with an exception to the rule."

Mr. Miles' attorney objected to the two-page record on the basis that it was hearsay. The Department contends that a statutory hearsay exception, 75 Pa. C.S. § 1550(d)(2), is applicable. Section 1550(d)(2) provides a hearsay exception for documents received by the Department from a court by means of electronic transmission. Section 1550(d)(2) provides that:

> In any proceeding under this section, documents received by the department from any other court or from an insurance company shall be admissible into evidence to support the department's case. In addition, if the department receives information from a court by means of electronic transmission or from an insurance company which is complying with its obligation under Subchapter H of Chapter 17 (relating to proof of financial responsibility) by means of electronic transmission, it may certify that it has received the information by means of electronic transmission, and that certification shall be prima facie proof of the adjudication and facts contained in such an electronic transmission.

The parties agree that the AOPC is not a court. The legislature defined "court" at 75 Pa.C.S. § 102 as

something that "[i]ncludes (when exercising criminal or quasi-criminal jurisdiction pursuant to 42 Pa.C.S. § 1515 (relating to jurisdiction and venue) or concerning the receipt, storage, reproduction, electronic transmission and admissibility of documentation under section 1377 (relating to judicial review) or 1550 (relating to judicial review)) a district justice or issuing authority or the equivalent official from the Federal Government or another state." The AOPC is defined in 42 Pa. C.S. § 1902 as "the Court Administrator of Pennsylvania who shall, either personally, by deputy, by other duly authorized personnel of the system, or by duly authorized agent, exercise the powers and perform the duties by statute vested in and imposed upon the Administrative Office."

The Department does not contend that any rule or statute other than Section 1550(d)(2) provides the authority to admit the two-page record even though the AOPC is not a court. The Department asserts that Section 1550(d)(2) is applicable because the genesis of the information that is included in the two-page record must have come from the magisterial district court in which Mr. Miles was found guilty. The Department argues that the word "indirectly" should be inserted into Section 1550(d)(2) so that it reads as follows: "if the department receives information [indirectly] from a court by means of electronic transmission..., it may certify that it has received the information by means of electronic transmission, and that certification shall be prima facie proof of the adjudication and facts contained in such an electronic transmission." Similarly, the Department submits that the court has implicitly added the word "directly" to Section

1550(d)(2) so that it reads as follows: "if the department receives information [directly] from a court by means of electronic transmission..." Of course, the General Assembly included neither "directly" nor "indirectly" as part of Section 1550(d)(2).

The Department also suggests that Pa. R. Crim. P. 771 supports its position. Rule 771 provides the procedure to be used by courts to transmit information about the disposition of charges to the Department. It specifies that:

> (A) The clerk of courts shall report to the Pennsylvania Department of Transportation all dispositions of charges required by 75 Pa.C.S. § 6323 (relating to reports by courts). The report shall be sent by electronic transmission in the form prescribed by the Department.
>
> (B) The clerk of courts shall sign the report on the form prescribed by the Department by means of an electronic signature as authorized by Rule 103.
>
> (C) The clerk of courts shall print out and sign a copy of the report, which shall include the date and time of the transmission, and a certification as to the adjudication, the sentence, if any, and the final disposition. The copy shall be made part of the record.
>
> (D) Upon the request of the defendant, the attorney for the Commonwealth, or any other government agency, the clerk of courts shall provide a certified copy of the report required by this rule.

Contrary to the Department's suggestion, Rule 771 does not support its position. Rule 771(A), (B) and (C) require

the clerk of court to electronically transmit the disposition of charges to the Department. Rule 771 does not provide that the clerk of court should electronically transmit the disposition of charges to the AOPC, which would then transmit the information to the Department. Additionally, the Comment to Rule 771 notes that the "rule does not address the admissibility of evidence."

The Department finally contends that sustaining the objection to the admission of the two-page record will lead to an absurd result. Section 1922 of the Statutory Construction Act, 19 Pa. C.S. § 1922, provides that "[i] n ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used: 1. That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." The only aspect of this case that is absurd is the Department's decision not to obtain the appropriate document from the court in which Mr. Miles allegedly was convicted that showed his conviction. As noted above, Pa. R. Crim. P. 771(D) provides that the Department could have obtained a certified copy of the applicable report from the clerk of the magisterial district court. If the Department had done so, that document would have been admissible under the terms of Section 1550(d)(2). *See Department of Transportation v. Emery*, 135 Pa. Commonwealth Ct. 274, 580 A.2d 909 (1990) (Certified letter from district justice providing that the defendant was found not guilty of an offense under the Vehicle Code was admissible.)

In enacting Section 1550(d)(2), the General Assembly provided a hearsay exception when "the department

receives information from a court by means of electronic transmission." If the General Assembly had intended or now wishes to provide a hearsay exception for information that the Department receives from the AOPC by electronic transmission, the General Assembly could have done so and can do so by amending Section 1550(d)(2) to add the AOPC. Until it does so, the Department should obtain an electronic transmission from the court before which the motorist was found guilty.[2]

## III. Conclusion

For all of the foregoing reasons, it is respectfully submitted that the Commonwealth Court should affirm

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2. This court also examined other hearsay exceptions to determine if any of them were applicable. Fed. R. Evid. 807 provides a residual exception to hearsay. Rule 807 provides that:

> (a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:
> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
> (2) it is offered as evidence of a material fact;
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
> (4) admitting it will best serve the purposes of these rules and the interests of justice.
> (b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

The court does not doubt the trustworthiness of the two-page record. The Supreme Court of Pennsylvania, however, chose not to adopt a rule of evidence that is equivalent to Fed.R.Evid. 807. If it had, this court may have used such a Rule to admit the two-page screenshot. The issue would have been whether or not under Fed. R. Evid. 807(a)(3), the two-page screenshot is more probative on Mr. Miles' conviction than what the Department could have obtained through reasonable efforts, such as a certified record of the conviction from the magisterial district court.

this court's March 7, 2016 Order because the Department failed to meet its burden of proving that Mr. Miles was found guilty of violating Section 1543 of the Vehicle Code.

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## Hammerquist v. Banka

*Civil procedure — Medical malpractice — MCARE statute of repose — Unnecessary coronary artery stents*

Filing of a complaint against the physician and medical establishment who saw an unnecessary procedure performed on decedent plaintiff came a year too late to be actionable. In this case, where nearly all objections could be traced back to an origin in the surgical procedure itself, the seven-year window from date of the incident under the MCARE statute of repose ran out in 2014. The court, on appeal, reiterated the previous findings and was supported by rulings from similar cases. The replacement plaintiffs' appeal was denied and the previous decision affirmed.

On Aug. 16, 2007, either Dr. Vidya Banka (appellant, with others, in the instant case) or Dr. Sahil Banka performed two stent procedures on the coronary arteries of deceased plaintiff Dolores Shields. On April 2, 2013, Shields received a letter from Pennsylvania Hospital indicating that, based on test results, some of Banka's patients had undergone unnecessary stent procedures. In June 2013 Shields had her catheterization records reviewed by other doctors who told her that her two stents had been unnecessary.

In May 2015, Shields filed suit against Vidya Banka and others, including Pennsylvania Hospital, for battery (lack of informed consent), common law fraud, corporate liability, negligence, recklessness and intentional misconduct, and the Unfair Trade Practices and Consumer Protection Law (UTPCPL). Defendants moved for judgment on the pleadings in November 2015. Shields died on Dec. 3, 2015. In March 2016, the court granted the motions for judgment and dismissed plaintiff's complaint as time-barred under the MCARE statute of repose. Shortly after the ruling, the executors of Shields' estate, appellants Patricia Hammerquist and Susan Pressler, filed a praecipe to substitute plaintiffs and timely appealed.

In their statement of errors complained of, appellants alleged improper application of the statute of repose to the claims of the

UTPCPL violations, that the claims were not "medical professional liability claims" as defined under MCARE and the conduct complained of continued past the initial injury and the hospital failed to supervise their employees and protect the public from harm and fraud.

The court reiterated that all claims were barred by the statute of repose. The court explained that plaintiffs' claims for damages arose from the medical issue of the stent procedure. The court continued, "The broad language of the definition of medical professional liability claim referring to 'any tort or breach of contract' clearly eliminates plaintiffs' cause of action for battery, common law fraud, corporate liability, negligence, and recklessness and intentional misconduct as these claims are all torts." Admitting that the UTPCPL claim, a statutory claim, was less clearcut, the court related its origin back to the injury. The Legislature's intent in creating the MCARE law was to reign in the costs of medical malpractice insurance. The statute of repose was intended to provide a limitation on claims. Opinions by other judges in very similar cases, particularly Judge Massiah-Jackson, had dismissed claims against the physician under MCARE's limitation.

Despite plaintiffs' insistence on the continued misconduct, the statute clearly specified that "no cause of action" could be lodged more than seven years after the date of the alleged tort. The original pleadings made no mention of subsequent care, so that the sur-reply revealing that fact could not be considered. The time-limited argument prevailed for the allegation that the hospital failed to protect the public prior to the complaint's filing. Any failures to supervise after the stent procedure, which might still be valid, would have had no effect on the proximate injury, the stent insertions.

C.P. of Philadelphia County, March Term, 2015 No. 03550

COHEN, *J.*, June 28, 2016—

## A. PROCEDURAL HISTORY

On March 27, 2015, plaintiff, Dolores R. Shields, filed a writ of summons and instituted this litigation against Vidya Banka, M.D., Sahil S. Banka, M.D., Vidya S. Banka, M.D. & Associates, PC., Pennsylvania Hospital, Penn Medicine d/b/a Pennsylvania Hospital, The University of

Pennsylvania Health System, The Trustees of the University of Pennsylvania, Robert Singer, M.D., and Associated Cardiovascular Consultants, P.A. On May 11, 2015, plaintiff filed a complaint with claims for battery (lack of informed consent), common law fraud, corporate liability, negligence, recklessness and intentional misconduct, and Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). On November 11, 2015, Defendants Vidya S. Banka, M.D., Sahil S. Banka, M.D., and Vidya S. Banka, M.D. and Associates, P.C. filed a motion for judgment on the pleadings. Defendants Pennsylvania Hospital, Penn Medicine d/b/a Pennsylvania Hospital, the University of Pennsylvania Health System, and the Trustees of the University of Pennsylvania ("Penn Defendants") also filed a motion for judgment on the pleadings on November 16, 2015. On March 2, 2016, the Honorable Denis P. Cohen, Judge of the Court of Common Pleas, issued two orders granting the motions for judgment on the pleadings and dismissing plaintiff's complaint as barred pursuant to the statute of repose of the Medical Care Availability and Reduction of Error Act ("MCARE"). On March 17, 2016, a praecipe to substitute party was filed indicating that the plaintiff, Dolores Shields, had passed away on December 3, 2015 and that the co-executrices of Dolores Shields' estate, Patricia Hammerquist and Susan Pressler, would be substituted as plaintiffs. The plaintiffs filed a timely notice of appeal on March 21, 2016. On March 24, 2016, this Court issued an Order requiring plaintiffs to serve this Court with an itemized Statement of Errors Complained of on Appeal by April 14, 2016. *Cohen Order, 3/24/16*. On April 12, 2016, plaintiffs filed a Statement of Errors

Complained of on Appeal alleging the following errors:

1. The Court improperly applied the MCARE Act's statute of repose to the Plaintiffs' claims for violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL") and common law fraud because the MCARE Act did not specifically express a clear intent to abrogate those causes of action;

2. The Court improperly failed to consider the dates of Defendants' treatment subsequent to the initial unnecessary stent placement surgery as continuing fraud which gave rise to causes of action within the seven (7) year time period of the MCARE Act's statute of repose;

3. The Court improperly applied the MCARE Act's statute of repose to Plaintiffs' claim for violations of the UTPCPL because such violations are neither torts nor breaches of contracts, as required to be a "medical professional liability claim" under the MCARE Act;

4. The Court improperly applied the MCARE Act's statute of repose to the Plaintiffs' claims in this action because Plaintiffs' claims are not "medical professional liability claims" under the MCARE Act;

5. The Court improperly applied the MCARE Act's statute of repose to Plaintiffs' claims against the Penn Defendants because the claims against the Penn Defendants are based on their failure to properly supervise and monitor their employees to protect consumers and the general public from fraud committed by their employees, which continued well into the

time period within which claims are allowed under the MCARE Act's statute of repose.

## B. FACTUAL HISTORY

According to the Complaint, on August 16, 2007, Dr. Vidya Banka or Dr. Shail Banka performed a coronary artery stent procedures on Dolores Shields' left anterior descending artery and her mid circumflex artery. *Complaint* ¶ 31. On April 2, 2013, Ms. Shields received a letter from Pennsylvania Hospital indicating that they had discovered that a portion of Dr. Vidya Banka's patients had undergone placements of coronary artery stents that may have not been necessary according to test results. *Id.* ¶ 34. In June 2013, Ms. Shields had her cardiac catheterization study performed by Dr. Banka evaluated by other doctors. *Id.* ¶ 39. The doctors told Ms. Shields that the catheterization findings of Dr. Vidya Banka were false and that her two stent procedures were unnecessary. *Id.* ¶ 40. Plaintiffs' complaint includes claims for battery (lack of informed consent), common law fraud, corporate liability, negligence, recklessness and intentional misconduct, and Unfair Trade Practices and Consumer Protection Law ("UTPCPL").

## C. DISCUSSION

1. All of plaintiffs' claims are barred by MCARE's statute of repose.

This Court properly determined that MCARE's statute of repose eliminates all of the plaintiffs' claims. The MCARE statute of repose states "no cause of action asserting a medical professional liability claim may be

commenced after seven years from the date of the alleged tort or breach of contract." 40 Pa. S. § 1303.513. Unlike statute of limitations, there is no tolling of the statute of repose because of the discovery rule or fraudulent concealment. *See Osborne v. Lewis*, 59 A.3d 1109, 1116 (Pa. Super. 2012) (holding that fraudulent concealment does not apply to MCARE's statute of repose); *cf. Altoona Area School Dist. v. Campbell*, 618 A.2d 1129, 1135 (Pa. Commw. 1992) (explaining that because a statute includes statute of limitations and not statute of repose, the claim is subject to discovery rule). Therefore, although Ms. Shields unfortunately did not learn that the stent placements may have been unnecessary until she received the letter from Pennsylvania Hospital in 2013, the applicable date for the statute of repose is August 16, 2007 when Dr. Banka performed the stent placements. To file within the seven year period required by the statute of repose, the plaintiffs needed to have commenced the litigation by August 16, 2014. Plaintiffs, however, began the instant action on March 27, 2015.

Plaintiffs argue, however, that their claims are not "medical professional liability claims" under MCARE. MCARE defines "medical professional liability claims" as "[a]ny claim seeking the recovery of damages or loss from a health care provider arising out of any tort or breach of contract causing injury or death resulting from the furnishing of health care services which were or should have been provided." 40 Pa. S. § 1303.103. All of plaintiffs' claims for damages are against health care providers related to the "furnishing of health care services" as the claims relate to a stent placement. The

broad language of the definition of medical professional liability claim referring to "any tort or breach of contract" clearly eliminates plaintiffs' cause of action for battery, common law fraud, corporate liability, negligence, and recklessness and intentional misconduct as these claims are all torts.[1]

However, less clear is whether plaintiffs' claim under the UTPCPL falls within MCARE's definition of "medical professional liability claim." Plaintiffs claim that defendants violated the UTPCPL by "[k]nowingly misrepresenting services ... are needed if they are not needed," and "[e]ngaging in any other fraudulent conduct which creates a likelihood of confusion or of misunderstanding." *Complaint* ¶ 95. Plaintiffs argue that because the UTPCPL claim is a statutory claim, it is not a tort or breach of contract claim and does not fall within MCARE's definition of "medical professional liability claim." Defendants argue that although UTPCPL is a statutory remedy, plaintiffs' UTPCPL claim is nearly identical to plaintiffs' fraud claim and is considered a "tort" for purposes of MCARE's statute of repose.

Whether the UTPCPL claim fits within the definition

1. Plaintiffs claim that MCARE's statute of repose should not be applied to the common law fraud claim because the MCARE Act did not specifically express a clear intent to abrogate this cause of action. However, "the best indication of the General Assembly's intent is the plain language of the statute. 'When the words of a statute are clear and free from all ambiguity, they are presumed to be the best indication of legislative intent.'" *Allstate Life Ins. Co. v. Commonwealth*, 52 A.3d 1077, 1080 (Pa. 2012) (*quoting Chanceford Aviation v. Chanceford Twp. Bd. of Supervisors*, 923 A.2d 1099, 1104 (Pa. 2007)). Because courts interpret common law fraud as a tort and the fraud claim relates to the furnishing of medical services, the plain language of the statute indicates that plaintiffs' common law fraud claim is a "medical professional liability claim" that is subject to MCARE's statute of repose.

of "medical professional liability claim" is ambiguous. The UTPCPL claim is still a claim seeking the recovery of damages from a health care provider causing injury resulting from the furnishing of health care services. *See* 40 Pa. § 1303.103. Furthermore, something can be a statutory claim and still be a tort or breach of contract claim as well. In *Ash v. Continental Insurance Company*, the Pennsylvania Supreme Court held that the bad-faith insurance statute, 42 Pa. C.S. § 8371, is a statutorily-created tort remedy. 932 A.2d 877, 885 (Pa. 2007). The Superior Court held in *Gabriel v. O'Hara* that the UTPCPL "encompasses an array of practices which might be analogized to passing off, misappropriation, trademark infringement, disparagement, false advertising, fraud, breach of contract, and breach of warranty." 534 A.2d 488, 494 (Pa. Super. 1987). Several courts have analyzed whether claims under the UTPCPL are closer to torts or breach of contract claims. *See e.g.*, *Knight v. Springfield Hyundai*, 81 A.3d 940, 951 (Pa. Super. 2013) (determining that gist of action for UTPCPL claim was in tort and not breach of contract); *Gabriel*, 534 A.2d at 393-394 (discussing cases where Courts analyzed whether claim under the UTPCPL should be subject to the tort or breach of contract statute of limitations). Thus, although it may be possible to view the "UTPCPL" claim as arising of a tort, the statute is ambiguous as to whether a UTPCPL claim should be subject to the statute of repose.

Because the statute is ambiguous as to whether the MCARE statute of repose precludes a claim under the UTPCPL, the intention of the General Assembly can be ascertained by considering "(1) The occasion and

necessity for the statute; (2) The circumstances under which it was enacted; (3) The mischief to be remedied; (4) The object to be attained; (5) The former law, if any, including other statutes upon the same or similar subjects; (6) The consequences of a particular interpretation; (7) The contemporaneous legislative history; and (8) Legislative and administrative interpretations of such statute." 1 Pa. C.S. § 1921; *see Meyer v. Cmty. Coll of Beaver Cty.*, 93 A.3d 806, 814 (Pa. 2014). The Pennsylvania General Assembly passed MCARE in 2002 to address concerns about the rising cost of medical professional liability insurance. *See Osborne*, 59 A.3d at 1112 ("[T]he MCARE Act was a response to a widely publicized perceived health care crisis in Pennsylvania, which included an alleged fear on the part of medical practitioners that malpractice insurance was becoming unaffordable resulting in some medical doctors opting to leave practice in the Commonwealth.") (*quoting Wexler v. Hecht*, 928 A.2d 973, 986 (Pa. 2007) (Castille, J., dissenting)). This is supported by the declarations of policy of MCARE which state "medical professional liability insurance has to be obtainable at an affordable and reasonable cost in every geographic region of this Commonwealth." 40 Pa. S. § 1303.102(3). As the Pennsylvania Superior Court has previously noted, "[o]ne way in which the MCARE Act addressed the crisis of the rising cost of medical professional liability insurance was to institute a seven-year statute of repose on claims that, prior to the act, had no statute of repose at all." *Osborne*, 59 A.3d at 1112. Because the purpose of MCARE's statute of repose was to limit claims against medical providers to make medical professional liability insurance affordable,

this Court should resolve this ambiguity about whether the UTPCPL claim falls within the statue of repose in favor of limiting the plaintiffs' cause of action.

In making its decision, this Court was also guided by the opinions of the Honorable Frederica Massiah-Jackson of the Court of Common Pleas, First Judicial District who addressed nearly identical facts in other cases involving allegations of unnecessary stent placements by Dr. Vidya Banka. *See Yudacufski v. Com., Dep't of Transp.*, 454 A.2d 923, 926 (Pa. 1982) ("It is well-settled that, absent the most compelling circumstances, a judge should follow the decision of a colleague on the same court when based on the same set of facts."); *cf. Castle Pre-Cast Superior Walls of Delaware, Inc. v. Strauss-Hammer*, 610 A.2d 503, 505 (Pa. Super. 1992) ("trial court decision, from a different county, provided no binding precedent for the Delaware County Court in the instant case."). Judge Massiah-Jackson granted several motions dismissing claims against Dr. Vidya Banka pursuant to MCARE's statute of repose and attached opinions explaining her reasoning. *See Deni v. Banka*, No. 131200327, "Exhibit A" to Massiah-Jackson Order (C.P. Philadelphia, October 22, 2015); *Gallagher v. Banka*, No. 131203573, "Exhibit A" to Massiah-Jackson Order (C.P. Philadelphia, October 22, 2015); *Mathai v. Banka*, No. 131102814, "Exhibit A" to Massiah-Jackson Order (C.P. Philadelphia, October 22, 2015); *Wolfberg v. Banka*, No. 131203574, "Exhibit A" to Massiah-Jackson Order (C.P. Philadelphia, October 22, 2015).[2] This Court did not see compelling circumstances

2. However, this Court notes that Judge Massiah-Jackson did not address the issue of a UTPCPL claim in her opinions.

that necessitated issuing an order that conflicted with the orders of a colleague on the same court when the cases involved the same issue. *See Yudacufski*, 454 A.2d at 926.

2. Continuing treatment

The plaintiffs claim that the Court improperly failed to consider the dates of Ms. Shields' treatment with the defendants subsequent to the initial unnecessary stent placement surgery as continuing fraud which gave rise to causes of action within the seven (7) year time period of the MCARE Act's statute of repose. The MCARE statute of repose states "no cause of action asserting a medical professional liability claim may be commenced after seven years from the date of the alleged tort or breach of contract." 40 Pa. S. § 1303.513. The complaint makes clear that the date of the alleged tort is August 16, 2007 when Ms. Shields underwent the stent procedure. *Complaint* ¶ 31. In fact, there is no reference in the complaint to any subsequent treatment by the defendants after the August 16, 2007 stent procedure. The plaintiffs did not raise the issue of subsequent treatment within the seven year period of the statute of repose until Plaintiffs' Sur-Reply in Opposition to the Motion for Judgment on the Pleadings. In deciding the motion for judgment on the pleadings, a court may only consider the pleadings and any documents properly attached to them. *See Integrated Project Servs. v. HMS Interiors, Inc.*, 931 A.2d 724, 732 (Pa. Super. 2007). This Court could therefore not consider the documents attached to Plaintiff's Sur-Reply indicating that Ms. Shields had doctor visits to Dr. Sahil Banka and Dr. Vidya Banka within the seven year period. Instead, this Court correctly decided that the complaint as written

did not include any references to treatment by defendants after August 16, 2007.

3. The Court properly applied the statute of repose to the Penn Defendants.

For the first time, the plaintiffs argue in their Statement of Errors that MCARE's statute of repose should not apply to the Penn Defendants because the Penn Defendants' failure to protect the public from fraud occurred during the seven years before the filing of the complaint. First, this claim is waived because the plaintiffs did not raise this issue until after the notice of appeal. *See* Pa. R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). Furthermore, while the Penn Defendants may have been negligent in properly supervising and monitoring their employees within the seven years period before the initiation of this litigation, the failure of the Penn Defendants to properly supervise and monitor Dr. Vidya Banka *after* Ms. Shields' stent placement could not have caused Ms. Shields' injury, the unnecessary stent placement. As causation is a necessary element in plaintiffs' common law fraud, corporate liability, and UTPCPL claims against the Penn Defendants, plaintiffs' claims against the Penn Defendants must fail. *See* 73 Pa. S. § 201-9.2 ("Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, *as a result of* the use or employment by any person of a method, act or practice declared unlawful by section 31 of this act, may bring a private action"); *Kit v. Mitchell*, 771 A.2d 814, 819 (Pa. Super. 2001) ("To succeed in a fraud case, a plaintiff must establish the following

elements . . . "the resulting injury was proximately caused by the reliance."); *Whittington v. Episcopal Hosp.*, 768 A.2d 1144, 1149 (Pa. Super. 2001) ("In order to present a primia facie case of corporate negligence, appellees were required to introduce evidence of the following: . . . that *the conduct was a substantial factor in bringing about the harm*"). Plaintiffs cannot bring a claim for the Penn Defendants' "failure to protect consumers and the general public" but only for Penn Defendant's failure to protect Ms. Shields from an unnecessary procedure.

## D. CONCLUSION

For the foregoing reasons, the decision of this Court should be affirmed.

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## Scanlon v. Gardens of Green Ridge

*Wrongful death — Binding arbitration agreement — Negligent infliction of emotional distress — Bystander rules*

Plaintiff's claims under the Wrongful Death Act and for punitive damages as well as defendants' objections under Pa.R.Civ.P. 1028(a)(6) were ordered to binding arbitration based on the contract signed when decedent was admitted to the nursing home. The claim for negligent infliction of emotional distress was dismissed for legal insufficiency since plaintiff did not qualify under the bystander rule.

Joan Ruane fell and suffered a severe head injury while a resident at a nursing home owned and operated by defendants The Gardens of Green Ridge and Saber Healthcare Group LLC. When admitted on Dec. 4, 2013, decedent was characterized as a fall risk with impaired balance and dementia. On Jan. 24, 2014, she was found face down with a serious bruise on her forehead. Medical personnel were allegedly not contacted to care for her. Decedent's family was not notified until 12 hours later, when defendants told them to transport Ruane to the hospital, where she was diagnosed with a severe head injury. She died 30 days later from the

injury. Decedent's sister and estate administratrix, plaintiff Ann Scanlon, brought suit under the Wrongful Death Act, 42 Pa.C.S. §8301(d), for negligence, vicarious liability, corporate liability, compensatory and punitive damages, as well as a claim on plaintiff's own behalf for negligent infliction of emotional distress (NIED) for the loss of her sister.

Defendants filed preliminary objections to compel arbitration for the wrongful death and demurrer of the claims for punitive damages and NIED. Since decedent's family were not the statutory beneficiaries of the act, the complaint was required to be submitted to arbitration. They also alleged that plaintiff did not aver acts that supported the allegations of recklessness under punitive damages.

Plaintiff cited *Taylor v. Extendicare Health Facilities Inc.* as authority for her position that the arbitration agreement was "not enforceable against a non-signatory wrongful death beneficiary and survival action litigant," since she could still bring suit as the decedent's personal representative. Plaintiff also argued that she could aver recklessness generally under Pa.R.Civ.P. 1019(b).

The court found that the clear language in the arbitration agreement signed by decedent assigned arbitration for any claims wrongful death, tort or malpractice. In addition to *Taylor*, the court reviewed a 2015 decision where a sibling brought a wrongful death suit under §8301(d). In *MacPherson v. Magee Mem. Hosp. for Convalescence*, the Superior Court found that a wrongful death action for the benefit of the estate, not statutory beneficiaries, was "derivative of and defined by the decedent's rights." It concluded: "personal representatives proceeding pursuant to §8301(d), however, are bound by otherwise enforceable arbitration agreements signed by a decedent." Both the survival and wrongful death claims were deemed subject to the arbitration agreement. Defendants' preliminary objections on this issue were sustained.

The decedent's estate could recover punitive damages under the Survival Act if decedent, alive, could have recovered them, for willful, wanton or reckless conduct. *Archibald v. Kemble* and Pa.R.Civ.P. 1019(b) generally allow for claims of such conduct to survive preliminary objections averring insufficient facts in a complaint. As such, defendants' objections were without merit. In the present case, however, punitive damages were recoverable only under the Survival Act, and thus bound over to arbitration.

Plaintiff asserted her claim for NIED under the bystander rule. Recounting the holdings of recent case law regarding the bystander rule that required contemporaneous witness of the injury by defendant as it happened, the court determined that plaintiff did not witness the fall that caused the injury to her sister, and thus she was excluded from recovering

for NIED under the bystander rule. Defendant's demurrer was sustained.

C.P. of Lackawanna County, No. 15 CV 6600

*James J. Scanlon*, for plaintiff.
*William J. Mundy* and *Nicholas F. Ciccone*, for defendants.

NEALON, *J.*, Aug. 10, 2016—After the decedent allegedly fell while a resident at defendants' nursing home, suffered a severe head injury and died thirty days later as a result of that injury, her sister filed this suit seeking to recover compensatory and punitive damages under the Wrongful Death Act and the Survival Act, 42 Pa.C.S. §§ 8301-8302, and asserting the sister's own claim for negligent infliction of emotional distress. Defendants have filed preliminary objections seeking to compel arbitration of the wrongful death and survival claims pursuant to the parties' arbitration agreement, and demurring to plaintiff's claims for punitive damages and negligent infliction of emotional distress.

Since the decedent was not survived by a spouse, child or parent entitled to recover wrongful death damages under Section 8301(b) of the Wrongful Death Act, and this litigation has been instituted by the decedent's sister pursuant to 42 Pa.C.S. § 8301(d), the wrongful death and survival claims are derivative of the decedent's rights and subject to the arbitration agreement that was executed by the decedent and plaintiff upon the decedent's admission to the nursing home. Consequently, the wrongful death and survival claims must be consolidated and submitted to binding arbitration, and defendants' preliminary objection under Pa.R.C.P. 1028(a)(6) will therefore be sustained.

Although the demurrer to plaintiff's punitive damages claims will be overruled since recklessness may be averred generally under Pa.R.C.P. 1019(b), those damages are recoverable only under the Survival Act, and as such, they must also be submitted to binding arbitration. Last, because plaintiff did not witness the fall that allegedly caused the decedent's head injury, and instead first learned of that traumatic event twelve hours after its occurrence, she did not experience a contemporaneous observance of the traumatic infliction of an injury to her sister so as to be able to recover for negligent infliction of emotional distress under the "bystander" rule. Accordingly, she has not stated a cognizable claim for negligent infliction of emotional distress, and defendants' demurrer to that claim will be sustained.

## I. FACTUAL BACKGROUND

Plaintiff, Ann P. Scanlon ("Scanlon"), has commenced this action against Defendants, The Gardens of Green Ridge ("The Gardens") and Saber Healthcare Group, LLC ("Saber"), which own and operate a nursing home facility at which Scanlon's sister, Joan M. Ruane ("Ruane"), was a resident from December 4, 2013 to January 24, 2014. (Docket Entry No. 7 at ¶¶ 1-2, 5-17). Scanlon avers that on December 4, 2013, Ruane was admitted to The Gardens' "memory care unit" with a history of "Alzheimer's disease, dementia, osteoarthritis and osteoporosis," as well as "an unsteady gait, impaired balance, history of elopement behavior, expressive aphasia, immobility and a fall risk." (*Id.* at ¶¶ 26, 28-29). She maintains that as a result of the negligence and recklessness of The Gardens, Saber and their employees, "[o]n January 24, 2014, Ms. Ruane was

found face down on her bedroom floor at 12:01 a.m. with a severe bruise on her forehead." (*Id.* at ¶¶ 32-34). However, The Gardens and Saber allegedly "failed to call an ambulance, doctor, or any other medical personnel to render care and treatment to Ms. Ruane," and also "failed to contact any of Ms. Ruane's family members, including [Scanlon], until twelve (12) hours after the incident occurred." (*Id.* at ¶¶ 35, 37).

Scanlon contends that when she was first contacted by The Gardens' personnel twelve hours after Ruane's fall, she was "instructed to come in to the facility in order to transport Ms. Ruane to the hospital due to an injury suffered from a fall the night before." (*Id.* at ¶ 38). Scanlon asserts that she transported Ruane to Moses Taylor Hospital where "Ruane was assessed and diagnosed with a severe head injury." (*Id.* at ¶¶ 39-40). She alleges that "[a]s a result of her head injury, Ms. Ruane experienced a rapid decline in her health" and ultimately died on February 24, 2014. (*Id.* at ¶¶ 41-43).

Scanlon has advanced claims against The Gardens and Saber for negligence, (*Id.* at ¶¶ 71-85), vicarious liability, (*Id.* at ¶¶ 87-96), and corporate liability. (*Id.* at ¶¶ 97-102). On behalf of herself and Ruane's brother, Joseph C. Ruane, Scanlon seeks to recover damages under the Wrongful Death Act and the Survival Act. (*Id.* at ¶¶ 103-115). In addition to demanding compensatory damages, Scanlon requests punitive damages from The Gardens and Saber for their alleged willful, wanton and reckless conduct. (*Id.* at ¶¶ 85, 96, 102, 107).

Scanlon has also asserted her own claim for negligent

infliction of emotional distress ("NIED"). (*Id.* at ¶¶ 116-128). She avers that upon being summoned to The Gardens twelve hours after Ruane's fall, she "witnessed her sister, Ms. Ruane, in severe and dire pain as a result of the injury suffered from the fall." (*Id.* at ¶¶ 118-119). She alleges that "[a]s a result of her continued observation of the defendants' negligence, carelessness and recklessness as well as the deleterious effects of such negligence, carelessness and recklessness, [Scanlon] has been caused to suffer and continues to suffer severe fear, anxiety and emotional distress that has manifested itself psychologically, emotionally and physically." (*Id.* at ¶ 125). Scanlon further claims that she "has sustained, is sustaining and will continue to sustain a loss of everyday pleasures and enjoyments of life" due to her NIED that was caused by The Gardens and Saber. (*Id.* at ¶ 127).

On the date of Ruane's admission to The Gardens on December 4, 2013, Ruane and Scanlon, who possessed a durable power of attorney, executed a "Resident and Facility Arbitration Agreement" which contained a heading that read "*NOT A CONDITION OF ADMISSION — READ CAREFULLY*." (Docket Entry No. 10, Exhibit B). That agreement addresses any tort actions or legal disputes involving Ruane and The Gardens, and provides:

> A. Disputes to be Arbitrated
>
> Any legal controversy, dispute, disagreement or claim of any kind now existing or occurring in the future between the parties arising out of or in any way relating to this Agreement or the Resident's stay, shall be settled by binding arbitration, including, but not limited to, all

> claims based on breach of contract, negligence, medical malpractice, wrongful death, tort, breach of statutory duty, resident rights, any consumer relief statute, and any departures from standard of care. This includes claims against the Facility, its employees, agents, officers, directors, any parent, subsidiary or affiliate of the Facility.

(*Id.* at p. 1). The arbitration agreement states "that this Agreement to arbitrate disputes and the arbitration shall be governed in accordance with the Federal Arbitration Act," and that the arbitration will "be conducted by National Arbitration and Mediation ('NAM')" and "in accordance with the NAM Code of Procedure." (*Id.* at pp. 1-2).

The arbitration agreement expressly granted Ruane or her personal representative, Scanlon, "the right to cancel this Agreement" in writing "via certified mail to the attention of the Administrator of the Facility...within sixty (60) days of the date upon which this Agreement was signed." (*Id.* at p. 2). Hence, as of the date of Ruane's fall and hospitalization on January 24, 2014, Scanlon or Ruane possessed the power to cancel the parties' arbitration agreement. Furthermore, under the heading "Resident Understanding & Acknowledgment Regarding Arbitration," the agreement confirms that the "the Resident has the right to seek legal counsel regarding this Agreement and has been advised to retain legal counsel before signing this Agreement," that "the decision whether to sign the Agreement is voluntary and solely a matter for the Resident's determination without any influences," and that "all of the terms of the Agreement have been explained to the Resident and the Resident's Representative." (*Id.*

at p. 3). Finally, it indicates in bold type and capital letters that "THE PARTIES UNDERSTAND THAT BY ENTERING INTO THIS AGREEMENT, THE PARTIES ARE GIVING UP THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY, AS WELL AS ANY APPEAL FROM A DECISION OR AWARD OF DAMAGES." (*Id.*).

The Gardens and Saber have filed preliminary objections based upon the parties' arbitration agreement, and assert that the claims set forth in the complaint must be submitted to binding arbitration since Scanlon and her brother are siblings of Ruane rather than statutorily designated beneficiaries under Section 8301(b) of the Wrongful Death Act.[1] (Docket Entry No. 10 at ¶¶ 6, 8-26). The Gardens and Saber have demurred to Scanlon's punitive damages claims on the ground that "she has failed to assert acts and/or omissions on the part of [The Gardens and Saber] sufficient to support allegations of 'recklessness' as to [their] conduct, so as to sustain a claim for punitive damages." (*Id.* at ¶¶ 28-41). They also

1. Under the wrongful death statute, the recovery of damages for the wrongful death of an individual passes to the limited group of beneficiaries defined in the statute. Subsection (b) of the statute, entitled "Beneficiaries," states that "[e]xcept as provided in subsection (d), the right of action created by this section shall exist only for the benefit of the spouse, children or parents of the deceased...." 42 Pa.C.S. § 8301(b). Subsection (d) addresses a wrongful death action by a personal representative of the decedent, and provides that "[i]f no person is eligible to recover damages under subsection (b), the personal representative of the deceased may bring an action to recover damages for reasonable hospital, nursing, medical, funeral expenses and expenses of administration necessitated by reason of injuries causing death." 42 Pa.C.S. § 8301(d). Scanlon concedes in her submissions that the instant wrongful death claim has been brought pursuant to 42 Pa.C.S. § 8301(d). (Docket Entry No. 11 at p. 7 & n.2).

demur to Scanlon's NIED claim on the basis that she did not observe a discrete and identifiable traumatic event that caused harm to Ruane. (*Id.* at ¶¶ 42-49).

In response to the binding arbitration objection advanced by The Gardens and Saber, Scanlon cites *Taylor v. Extendicare Health Facilities. Inc.*, 113 A.3d 317 (Pa. Super. 2015), *app. granted*, 122 A.3d 1036 (Pa. 2015), and posits that the "decision in *Taylor* held that an arbitration agreement is not enforceable against a non-signatory wrongful death beneficiary and survival action litigant." (Docket Entry No. 11 at p. 6). She contends that the fact that she "is not a wrongful death beneficiary pursuant to the Wrongful Death Act, 42 Pa.C.S. §8301(b), because she is not a child, spouse, or parent of the deceased... is inconsequential because the decedent's personal representative may still bring suit pursuant to subsection (d) of the Pennsylvania Wrongful Death Act, as she has done in this matter, for recovery of damages." (*Id.* at p. 7). Scanlon further asserts that she may aver the defendants' recklessness generally under Pa.R.C.P. 1019(b), and that her NIED claim is cognizable under the "bystander" rule. (*Id.* at pp. 9, 12-13). Following the completion of oral argument on July 5, 2016, the preliminary objections of The Gardens and Saber were submitted for a decision.

## II. DISCUSSION

### (A) STANDARD AND SCOPE OF REVIEW

"'Standard of review' and 'scope of review,' although distinct, are not concepts that are considered in isolation from one another." *Bowling v. Office of Open Records*, 621 Pa. 133, 170, 75 A.3d 453, 475 (2013). "Scope of

review" refers to the confines within which a reviewing court must conduct its examination, "or to the matters (or 'what') the [reviewing] court is permitted to examine." *Samuel-Bassett v. Kia Motors America, Inc.*, 613 Pa. 371, 407, 34 A.3d 1, 21 (2011), *cert. denied*, 133 S. Ct. 51 (U.S. 2012); *Mid Valley School District v. Warshawer*, 33 Pa. D. & C. 5th 272, 281 (Lacka. Co. 2013). "Standard of review" concerns the manner in which (or "how") that examination is to be conducted. *Holt v. 2011 Legislative Reapportionment Commission*, 614 Pa. 364, 392, 38 A.3d 711, 728 (2012); *Brian T. Kelly & Associates v. Northeastern Educational Intermediate Unit*, 36 Pa. D. & C. 5th 300, 310 (Lacka. Co. 2014).

When considering a preliminary objection seeking to compel arbitration based upon an agreement to arbitrate, the scope of judicial review is not confined to the allegations of the complaint, and the trial court may consider facts that are established by the preliminary objection or exhibits attached thereto, provided that the preliminary objections are endorsed with a notice to plead, as they are in the case *sub judice*. *See* Pa.R.C.P. 1028(c)(2), Official Note. The standard of review governing arbitration agreement challenges under Pa.R.C.P. 1028(a)(6) involves the application of a two-part test to determine whether arbitration should be compelled. The reviewing court must first determine whether a valid agreement to arbitrate exists between the parties. *Taylor*, 113 A.3d at 320; *Moses Taylor Hospital v. GSGSB*, 46 Pa. D. & C. 4th 176, 182 (Lacka. Co. 2000). If a valid arbitration agreement exists, the court must then determine whether the dispute at issue is within the scope of the arbitration

provision. *Burkett v. St. Francis County House*, 133 A.3d 22, 27 (Pa. Super. 2016); *Calabrese v. Colonial Insurance Co.*, 45 Pa. D. & C. 4th 228, 233-234 (Lacka. Co. 2000).

With respect to the pending demurrers to the punitive damages and NIED claims under Pa.R.C.P. 1028(a)(4), the scope of review is more circumspect and is limited to an examination of the allegations of Scanlon's complaint and any exhibits attached to that challenged pleading. *Hill v. Ofalt*, 85 A.3d 540, 547 (Pa. Super. 2014); *DeFazio v. Board of Directors of North Pocono School District*, 62 Pa. D. & C. 4th 140, 144 n.1 (Lacka. Co. 2003), *aff'd*, 834 A.2d 714 (Pa. Cmwlth. 2003). Per the standard of review applicable to preliminary objections in the nature of a demurrer, all well-pleaded material facts set forth in the complaint, as well as all reasonable inferences which may be drawn from those facts, must be accepted as true. *Glover v. Udren Law Offices, P.C.*, 2016 WL 3388528, at *1 (Pa. 2016); *Lasavage v. Smith*, 23 Pa. D. & C. 5th 334, 336 (Lacka. Co. 2011). "The question presented by a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible." *Northern Forests II, Inc. v. Keta Realty Co.*, 130 A.3d 19, 35 (Pa. Super. 2015). Preliminary objections which seek the dismissal of a particular cause of action may be sustained only in cases that are clear and free from doubt. *Echeverria v. Holley*, 2016 WL 3268695, at *3 (Pa. Super. 2016). "Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it." *Hill v. Slippery Rock University*, 2016 WL 2337735, at *3 (Pa. Super. 2016); *Eastern Roofing Systems. Inc. v. Cestone*, 24 Pa. D. & C. 5th 394, 403 (Lacka. Co. 2012).

(B) ARBITRATION AGREEMENT

The Gardens and Saber first seek to compel the binding arbitration of Scanlon's wrongful death and survival claims pursuant to the arbitration agreement voluntarily executed by Ruane and Scanlon on December 4, 2013. Scanlon does not dispute that the parties executed an arbitration agreement on December 4, 2013, as a result of which it is not necessary to examine whether a valid agreement to arbitrate exists. Instead, Scanlon denies that the wrongful death claim falls within the scope of the parties' arbitration agreement. The question of whether a given claim is within the scope of an arbitration provision is a matter of contract and subject to principles of contract interpretation. *Elwyn v. DeLuca*, 48 A.3d 457, 461 (Pa. Super. 2012); *Moses Taylor Hospital*, 46 Pa. D. & C. 4th at 181.

The clear and unambiguous language of the parties' arbitration agreement states that any legal controversy relating to Ruane's stay at The Gardens, including any claims for negligence, malpractice, wrongful death, tort, or departures from the standard of care, must be resolved by binding arbitration. It confirms that Scanlon and Ruane voluntarily forfeited "their constitutional right to have any claim decided in a court of law before a judge and a jury." On its face, the arbitration agreement clearly encompasses the wrongful death and survival claims in this case and requires the arbitration of those claims. Nevertheless, Scanlon contends that *Taylor* mandates the consolidation of the wrongful death and survival claims and their litigation in the Court of Common Pleas of Lackawanna County rather than an arbitration forum.

The Superior Court has issued a trilogy of nursing home arbitration rulings that resolve the issue of whether the wrongful death and survival claims in this suit are subject to the parties' arbitration agreement. In *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651 (Pa. Super. 2013), *app. denied*, 624 Pa. 683, 86 A.3d 233 (2014), *cert. denied*, 134 S. Ct. 2890 (U.S. 2014), the decedent's daughter, who executed an arbitration agreement on behalf of her mother pursuant to a power of attorney, later executed a disclaimer and renunciation forfeiting her claim to any wrongful death recovery. *Id.* at 653. After the decedent died at defendant's long-term care nursing facility due to the alleged negligence of its employees, the decedent's son filed a wrongful death action seeking to recover damages on behalf of the decedent's children in accordance with 42 Pa.C.S. § 8301(b). *Id.* at 653-654. The nursing home filed preliminary objections seeking to compel arbitration of the wrongful death claim, but the trial court denied that request on the ground that the children's claims under Section 8301(b) of the Wrongful Death Act were "independent of the decedent's estate's rights to an action against the tortfeasor" under the Survival Act. *Id.* at 654.

On appeal, the Superior Court distinguished between survival actions which "stem[ ] from the rights of action possessed by the decedent at the time of death," and wrongful death actions which "may be brought only by specified relatives of the decedent to recover damages in their own behalf, and not as beneficiaries of the estate." *Id.* at 658-659 (quoting *Frey v. Pennsylvania Electric Company*, 414 Pa. Super. 535, 539, 607 A.2d 796, 798 (1992), *app. denied*, 532 Pa. 645, 614 A.2d 1142 (1992)). It reasoned

"that wrongful death actions are derivative of decedents' injuries but are not derivative of decedents' rights." *Id.* at 660. Since the decedent's statutory beneficiaries seeking wrongful death damages under 42 Pa. C.S. § 8301(b) were not signatories to the arbitration agreement, *Pisano* concluded that "compelling arbitration upon individuals who did not waive their right to a jury trial would infringe upon wrongful death claimants' constitutional rights." *Id.* at 661-662. Thus, it held "that the trial court did not abuse its discretion in determining that decedent's contractual agreement with [the nursing home] to arbitrate all claims was not binding on the non-signatory wrongful death claimants." *Id.* at 663.

In *Taylor*, *supra*, the nursing home defendant sought to bifurcate the wrongful death and survival claims and to thereafter compel arbitration of the survival claim in accordance with the parties' arbitration agreement. Relying upon *Pisano*, the statutory wrongful death beneficiaries under 42 Pa.C.S. § 8301(b) argued that the arbitration agreement was not binding upon non-signatory wrongful death beneficiaries, and that Section 8301(a) of the wrongful death statute, 42 Pa.C.S. § 8301, and Pa.R.C.P. 213(e) required the consolidation of the wrongful death and survival claims for trial. *Taylor*, 113 A.3d at 321-322. In response, the nursing home asserted "that the Federal Arbitration Act ('FAA'), which is 'intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements,' pre-empts state statutes and rules that conflict with that policy, including Pa.R.C.P. 213(e)." *Id.* at 322 (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984)).

Since the FAA "does not contain an express preemption provision," the Superior Court in *Taylor* considered whether a "conflict preemption" existed between Pennsylvania law and the FAA in addressing the arbitration of wrongful death and survival claims. *Id.* at 323. Noting that Rule 213(e) and 42 Pa.C.S. § 8301(a) do not bar the arbitration of all wrongful death and survival claims, *Taylor* found that "the instant case does not mirror the categorical prohibition of arbitration of wrongful death and survival actions that the *Marmet [Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (U.S. 2012)] Court viewed as a clear conflict between federal and state law." *Id.* at 325. To that end, the Superior Court concluded that "[i]n the situation where the decedent or his representative has entered into an enforceable agreement to arbitrate, and the wrongful death action is one brought by the personal representative pursuant to 42 Pa. C.S. § 8301(d) for the benefit of the decedent's estate, there would not appear to be any impediment to the consolidation of the actions in arbitration." *Id.* Consequently, it held:

> The statute and rule at issue are not "aimed at destroying arbitration" and do not demand "procedures incompatible with arbitration." [*AT&T Mobility. LLC v.*] *Concepcion*, [131 S. Ct. 1740], at 1747-48 [(2011)]. Nor are they so incompatible with arbitration as to "wholly eviscerate arbitration agreements." *Id.* On the facts herein, the wrongful death beneficiaries constitutional right to a jury trial and the state's interest in litigating wrongful death and survival claims together require that they all proceed in court rather than arbitration.

*Id.* at 327-328.[2]

*Pisano* and *Taylor* concerned the enforceability of arbitration agreements against non-signatory wrongful death claimants in actions that are brought on behalf of specific statutory beneficiaries (i.e., spouse, children or parents) pursuant to 42 Pa.C.S. § 8301(b). The more recent *en banc* ruling in *MacPherson v. Magee Memorial Hosp. for Convalescence*, 128 A.3d 1209 (Pa. Super. 2015) addressed the arbitration of wrongful death actions that are filed by the decedent's personal representative under 42 Pa.C.S. § 8301(d). (*See* n.1, *supra*). In that case, the decedent's brother commenced a wrongful death action against a nursing home where his deceased sister had resided, and the trial court overruled the nursing home's preliminary objections seeking to compel binding arbitration of the wrongful death and survival claims. *Id.* at 1212-13.

In reversing the trial court, the Superior Court discussed its earlier holdings in *Pisano* and *Taylor*, and confirmed that those rulings only govern wrongful death actions brought pursuant to subsection (b) of 42 Pa.C.S. § 8301. Specifically, it concluded:

> MacPherson, as brother of Decedent, does not fall within the group of beneficiaries designated by the statute under subsection (b) above, and he has not identified any individuals who would be entitled to recover damages under that provision. He is the executor of

2. The Supreme Court of Pennsylvania granted a petition for allowance of appeal on the issue of whether the Superior Court's decision in *Taylor* violates the FAA. *See Taylor v. Extendicare Health Facilities, Inc.*, 122 A.3d 1036 (Pa. 2015).

> Decedent's estate, and as such, he may bring a wrongful death action solely for the benefit of the estate pursuant to subsection (d). A limited claim by a personal representative pursuant to § 8301(d) is derivative of and defined by the decedent's rights. Conversely, an action for wrongful death benefits pursuant to Section 8301(b), although usually commenced by the personal representative on behalf of the beneficiaries, belongs to the designated relatives and exists only for their benefit. *Pisano*, 77 A.3d at 657 (citing *Mover v. Rubright*, 438 Pa. Super. 154, 651 A.2d 1139, 1141 (1994)). Accordingly, we conclude that *Pisano* is applicable only to wrongful death claims brought on behalf of the beneficiaries designated in 42 Pa.C.S. § 8301(b). *Personal representatives proceeding pursuant to § 8301(d), however, are bound by otherwise enforceable arbitration agreements signed by a decedent*.

*Id.* at 1226-27 (emphasis added).

*MacPherson* is dispositive of the preliminary objections filed by The Gardens and Saber under Pa.R.C.P. 1028(a)(6). Ruane was not survived by a spouse, child or parent for purposes of Section 8301(b) of the wrongful death statute, and Scanlon has filed this wrongful death suit pursuant to 42 Pa.C.S. § 8301(d) in an effort to recover damages for health care, funeral and estate administration expenses. As such, the pending wrongful death claim under Section 8301(d) is derivative of Scanlon's rights and governed by the arbitration agreement that was executed by Ruane and Scanlon. Therefore, both the survival and the wrongful death claims in this case are subject to the parties' arbitration agreement that was executed on December 4, 2013. For

that reason, the preliminary objections under Rule 1028(a)(6) will be sustained and the wrongful death and survival claims will be submitted to binding arbitration.

(C) PUNITIVE DAMAGES CLAIM

Scanlon's complaint seeks to recover punitive damages from The Gardens and Saber based upon their allegedly outrageous conduct. *See Sears. Roebuck & Co. v. 69th Street Retail Mall L.P.*, 126 A.3d 959, 983 (Pa. Super. 2015) (stating that punitive damages "are proper only in cases where the defendant's actions are so outrageous as to demonstrate willful, wanton or reckless conduct."). In Pennsylvania, a decedent's estate may recover punitive damages under the Survival Act, 42 Pa. C.S. § 8302, provided that the decedent could have recovered punitive damages if [s]he had lived. *Harvey v. Hassinger*, 315 Pa. Super. 97, 102, 461 A.2d 814, 816 (1983); *Lasavage*, 23 Pa. D. & C. 5th at 336 n.1. The Gardens and Saber have demurred to Scanlon's punitive damages claim on the basis that the complaint does not aver facts indicating willful, wanton or reckless conduct on the part of The Gardens or Saber.

Several trial courts have sustained demurrers to punitive damages claims on the grounds that the complaints lacked factual allegations supporting a potential finding of willful, wanton or reckless conduct. *See, e.g.*, *Green v. Klein*, 16 Pa. D. & C. 5th 144, 154 (Monroe Co. 2010); *Brace v. Shears*, 12 Pa. D. & C. 5th 166, 169 (Centre Co. 2010). However, in 2009, the Superior Court expressly concluded that wanton conduct, recklessness and other conditions of the mind may be averred generally under Pa.R.C.P.

1019(b). *See Archibald v. Kemble*, 971 A.2d 513, 519 (Pa. Super. 2009), *app. denied*, 605 Pa. 678, 989 A.2d 914 (2010). Following *Archibald*, we have consistently held that punitive misconduct may be alleged generally in a complaint and withstand preliminary objections asserting factual insufficiency. *See Rogers v. Thomas*, 29 Pa. D. & C. 5th 544, 567-568 (Lacka. Co. 2013); *Freethy v. Goike*, 2011 WL 7177007, at *6 (Lacka. Co. 2011).

Based upon *Archibald* and Rule 1019(b), the preliminary objections of The Gardens and Saber seeking to dismiss Scanlon's punitive damages claim due to the absence of sufficient factual assertions in the complaint are without merit. Nevertheless, Scanlon's punitive damages claims are governed by the parties' arbitration agreement since those damages are recoverable only under the Survival Act. *See*, *Harvey*, *supra*; *Lasavage*, *supra*. As a consequence, although the demurrer to Scanlon's punitive damages claims will be overruled, those claims will be referred to binding arbitration as part of the Survival Act claims.

(D) NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Last, The Gardens and Saber have filed preliminary objections in the nature of a demurrer to Scanlon's NIED claim. Scanlon contends that she has alleged a viable cause of action for NIED under the "bystander" rule, and that her independent NIED claim is not subject to the parties' arbitration agreement, such that this case should not be submitted to arbitration in its entirety.

In Pennsylvania, a claim for NIED is cognizable under the "physical impact" rule, the "zone of danger" rule,

or the "bystander" rule. *Shumosky v. Lutheran Welfare Services of Northeastern Pennsylvania, Inc.*, 784 A.2d 196, 199 (Pa. Super. 2001); *Yanchick v. Tyler Memorial Hospital*, 101 Lacka. Jur. 331, 335-336 (2000). Originally, under the "physical impact" rule, a plaintiff could recover damages for emotional distress only if it arose from a contemporaneous physical impact or injury. *See Schmidt v. Boardman Company*, 608 Pa. 327, 367, 11 A.3d 924, 948 (2011); *Knaub v. Gotwalt*, 422 Pa. 267, 270, 220 A.2d 646, 647 (1966). In *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970), the Supreme Court departed from the traditional "physical impact" rule, "abandon[ed] the requirement of a physical impact as a precondition to recovery," and adopted the "zone of danger" rule in recognizing a cause of action for NIED "where the plaintiff was in personal danger of physical impact because of the direction of a negligent force against him and where plaintiff actually did fear the physical impact." *Id.* at 413, 261 A.2d at 90 (allowing a claim for NIED by a plaintiff who suffered a heart attack after witnessing his son, with whom he was standing, being struck and killed by defendant's vehicle). The Supreme Court later expanded the tort of NIED further in *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979) where a mother witnessed an automobile strike and kill her child while she was beyond the "zone of danger." In formulating the "bystander" rule, the *Sinn* Court declared that a plaintiff may recover damages for NIED if [s]he establishes that [s]he was located near the scene of the traumatic event, the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of that incident, and [s]he was closely related to the victim. *Id.* at 170-171, 404

A.2d at 685.

More recent appellate case law indicates that the cause of action for NIED is restricted to four factual scenarios: (1) where the defendant owed a contractual or fiduciary duty to the plaintiff; (2) where the plaintiff was subjected to a "physical impact;" (3) where the plaintiff was in a "zone of danger," thereby reasonably experiencing a fear of impending physical injury; or (4) where the plaintiff observed a tortious injury to a close relative. *Weiley v. Albert Einstein Medical Center*, 51 A.3d 202, 217 (Pa. Super. 2012) (citing *Doe v. Philadelphia Community Health Alternatives AIDS Task Force*, 745 A.2d 25, 27 (Pa. Super. 2000), *aff'd*, 564 Pa. 264, 767 A.2d 548 (2001)). Scanlon states in her submissions that she is advancing a claim for NIED under the "bystander" rule. (Docket Entry No. 11 at pp. 11-13). An NIED claim under the "bystander" rule requires the sensory and contemporaneous observance of a discrete and identifiable traumatic event that negligently causes harm to a close relative. *See Huddleston v. Infertility Center of America*, 700 A.2d 453, 462 (Pa. Super. 1997); *Turner v. Medical Center. Beaver, PA, Inc.*, 454 Pa. Super. 645, 651, 686 A.2d 830, 832 (1996), *app. denied*, 548 Pa. 673, 698 A.2d 596 (1997); *Love v. Cramer*, 414 Pa. Super. 231, 233-235, 606 A.2d 1175, 1177 (1992), *app. denied*, 533 Pa. 634, 621 A.2d 580 (1992).

The Supreme Court of Pennsylvania has defined the parameters of the requirement of a "sensory and contemporaneous observance" of the traumatic infliction of injury under the *Sinn* test. In *Mazzagatti v. Everingham*, 512 Pa. 266, 516 A.2d 672 (1986), the Supreme Court was asked "to recognize a cause of action for the negligent

infliction of emotional distress in instances where the close relative does not observe the accident itself, but instead arrives at the scene of the accident and observes the victim a few minutes afterwards." *Id.* at 269, 516 A.2d at 673. *Mazzagatti* involved an NIED claim by a mother who "received a telephone call immediately after the collision informing her that her daughter had been involved in an automobile accident" and "arrived at the scene of the accident a few minutes afterwards" where her "fourteen-year-old [daughter] was struck and fatally injured by a car...as she rode her bike in the residential area near her home." *Id.* at 269, 516 A.2d at 673-674.

Citing the *Sinn* requirements that the plaintiff be located near the scene of the traumatic event and suffer shock from the sensory and contemporaneous observance of it, the *Mazzagatti* Court reasoned that "[t]he corollary of those two criteria is that when a plaintiff is a distance away from the scene of the accident and learns of the accident from others after its occurrence rather than from a contemporaneous observance, the sum total of policy considerations weigh against the conclusion that that particular plaintiff is legally entitled to protection from the harm suffered." *Id.* at 279, 516 A.2d at 679. In affirming the dismissal of the mother's NIED claim, it concluded:

> We believe that where the close relative is not present at the scene of the accident, but instead learns of the accident from a third party, the close relative's prior knowledge of the injury to the victim serves as a buffer against the full impact of observing the accident scene. By contrast, the relative who contemporaneously

> observes the tortious conduct has no time span in which to brace his or her emotional system.

*Id.* The Supreme Court relied upon *Mazzagatti* in later rejecting an NIED claim on behalf of a father who observed "an ambulance pass[ ] him and turn[ ] onto the street where he lived" and "stop[ ] shortly thereafter where a crowd of people had gathered," "noticed a bicycle that belonged to his son," "discovered that [his son] had been the victim of an automobile accident," and "accompanied his son to the hospital in an ambulance," but "did not witness the accident itself." *Brooks v. Decker*, 512 Pa. 365, 367, 370, 516 A.2d 1380, 1381, 1383 (1986).

The Superior Court holding in *Bloom v. DuBois Regional Medical Center*, 409 Pa. Super. 83, 597 A.2d 671 (1991) is likewise instructive concerning the necessity of actually witnessing the traumatic infliction of the injury to a close relative, as opposed to observing the injury after it was inflicted. In *Bloom*, the plaintiff's wife "was voluntarily admitted to the psychiatric unit" of the defendant hospital, and when the plaintiff "came to visit his wife" on the following evening, "[h]e found her hanging by the neck from shoestrings behind a bathroom door adjacent to her hospital room in an evident suicide attempt." *Id.* at 87, 597 A.2d at 673. After the trial court dismissed the plaintiff's NIED claim on the basis that the plaintiff had not "witnessed the tortious act itself," the plaintiff appealed. *Id.* at 91, 597 A.2d at 675.

The *Bloom* court noted that "[t]he *Sinn* test requires that we distinguish between those cases where liability should be allowed and those where it should not by

focusing in part on whether the emotional distress results from the plaintiff's own contemporaneous observance as opposed to hearing about the event from someone else." *Id.* at 102, 597 A.2d at 681. It stated that "[t]he gravamen of the observance requirement is clearly that the plaintiff in a negligent infliction case must have observed the traumatic infliction of injury on his or her close relative at the hands of the defendant." *Id.* at 104, 597 A.2d at 682. Based upon the fact that the plaintiff had witnessed his wife's injury, but not the defendant's traumatic infliction of that harm, the Superior Court held "that Mr. Bloom has not sufficiently pleaded a cause of action for negligent infliction of emotional distress since he has not pleaded the element of contemporaneous observance of traumatic infliction of injury by defendants." *Id.* at 105, 597 A.2d at 683.

In the case at hand, Scanlon did not observe Ruane's fall at The Gardens during which Ruane allegedly suffered a head injury. *See Anthem Cas. Ins. Co. v. Miller*, 729 A.2d 1227, 1228 (Pa. Super. 1999) ("Thus, a claim for negligent infliction of emotional distress does not arise from the injuries sustained by the victim, but rather it arises from the *witnessing* of the *accident*") (emphasis in original), *appeal denied*, 561 Pa. 665, 749 A.2d 464 (1999). Rather, not unlike the close relative in *Mazzagatti*, Scanlon was informed of that traumatic event upon receiving a telephone call after the injury had occurred. Although Scanlon subsequently observed her sister's injury and accompanied her to the hospital, as did the father in *Brooks*, her observation of that harm occurred at least twelve hours after its traumatic infliction. *See Fassett v. Sears Holding Corp.*, 2015 WL

5093397, at *5 (M.D. Pa. 2015) (dismissing NIED claim where "Ms. Fassett arrived at the scene of the accident after the injury had occurred" and "witnessed her injured relative after the accident, but prior to the relative being taken to the hospital."). Therefore, even accepting as true the well-pleaded facts contained in the complaint, it is uncontroverted that Scanlon did not witness the traumatic fall that allegedly caused Ruane's injury.

Based upon the facts averred in the complaint, it is clear and free from doubt that Scanlon cannot recover for NIED under the "bystander" rule as formulated in *Sinn*, *Mazzagatti* and *Brooks*. As a result, the demurrer to Scanlon's NIED claim will be sustained. An appropriate Order follows.

ORDER

AND NOW, this 10th day of August, 2016, upon consideration of the "Preliminary Objections of Defendants to Plaintiff's Complaint," the memoranda of law submitted by the parties, and the oral argument of counsel, and based upon the reasoning set forth in the foregoing Memorandum, it is hereby ORDERED and DECREED that:

1. Defendants' preliminary objection pursuant to Pa.R.C.P. 1028(a)(6) is SUSTAINED, and pursuant to the "Resident and Facility Arbitration Agreement" executed by the parties on December 4, 2013, plaintiff's claims under the Wrongful Death Act, 42 Pa.C.S. § 8301, and the Survival Act, 42 Pa.C.S. § 8302, shall be submitted to binding arbitration to be conducted by National Arbitration and Mediation;

2. Defendants' preliminary objection in the nature of a demurrer to plaintiff's claim for punitive damages is OVERRULED based upon Pa.R.C.P. 1019(b), but inasmuch as any punitive damages in this case are recoverable only under the Survival Act, plaintiff's claims for punitive damages shall likewise be submitted to binding arbitration to be conducted by National Arbitration and Mediation;

3. Defendants' preliminary objection in the nature of a demurrer to plaintiff's claim for negligent infliction of emotional distress is SUSTAINED, and plaintiff's claim for negligent infliction of emotional distress is dismissed on the basis of legal insufficiency; and

4. Since plaintiff's claims have either been referred to binding arbitration pursuant to Pa.R.C.P. 1028(a)(6) or dismissed on the ground of legal insufficiency pursuant to Pa.R.C.P. 1028(a)(4), the Clerk of Judicial Records is directed to close the court file in this matter.

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## McMorran v. Q&D

*Civil procedure — Premises liability — Parties — Pro se defendant — Corporate representation — Post-trial motions*

A bar patron was severely injured while trying to break up a bar fight on the premises. Trial court found in favor of injured party and the president/sole stockholder, but the company was still liable for damages after going through trial without valid representation. President attempted to appeal on behalf of himself and the company. Court recommended quashing the appeal but gave commentary on the issues of why the appeal should be quashed and the issues raised in defendants' Pa. R.A.P. 1925(b) statement.

Plaintiff Moriah McMorran attempted to break up a violent altercation at The Lamplighter. She suffered severe lacerations from a broken bottle that severed five tendons in her forearm. A nonjury trial was held in early October 2015, with the president and sole stockholder of the bar, defendant John Quinn, appearing pro se. The company and owner of the bar, defendant Q&D Inc., was not represented by counsel at trial, despite instructions that it was necessary to have an attorney; therefore, it did not participate in the trial. The trial court found in favor of plaintiff, awarding her substantial damages, and against defendant Q&D; it also found in favor of defendant Quinn individually. Notwithstanding, defendant Quinn signed a post-trial motion on behalf of his company Q&D and himself. The court denied the motion, and a new attorney acting for defendants filed an appeal.

The court argued that the appeal should be quashed because neither defendant was properly a party to the post-trial motion, and there were no issues for appellate review. Although the verdict was in favor of defendant Quinn and awarded damages only against defendant Q&D, Quinn signed the motion pro se and as the president of the company, not acknowledging the "legal separation between a corporation as a legal entity, and its officers and stockholders." Quinn, who was not aggrieved by the verdict, had no standing to sign or file an appeal and was not a proper party to the motion.

As a non-attorney, Quinn was not allowed to file on behalf of his company. The attorney he contacted before trial drafted the post-trial motion signed by Quinn. After the court clerk rejected it for lack of an attorney, the lawyer signed the cover sheet, and it was entered as filed by the attorney, but the attorney's name did not appear on the motion itself. Neither defendant Quinn nor his attorney asked leave to amend and sign the motion, which could have cured the defect. Defendant Q&D was also not a party to the post-trial motion.

The court discussed two threshold issues to determine whether the corporation was a party. First, plaintiff objected that the post-trial motion was untimely; the court explained that the 10-day period in a nonjury trial did not "start to run until the decision and the trial worksheet were placed on the docket," not from the verbal decision. Second, defendant Q&D's lack of participation and failure to make objections at trial had the effect of waiving any post-trial objections. The pretrial conference made it clear to defendant Quinn that he could not represent the corporation, only himself. Quinn argued his case and won, but he could not argue or win for the corporation, and the post-trial motion presented no authority that would allow Q&D to "raise in a PTM or on appeal, the actions and objections by [d]efendant Quinn that were not also objected to by Q&D."

C.P. of Philadelphia County, September Term, 2013, No. 03082

LACHMAN, *J.*, June 28, 2016—

Factual Background

This premises-liability dram-shop case arose when the tendons in Plaintiff Moriah McMorran's forearm were severed by a broken beer bottle while she attempted to prevent a fight between patrons of the defendant bar. During the night of September 15, 2012 and into the early morning hours of September 16, 2012, the Plaintiff was a patron at a restaurant and bar known as the Lamplighter Tavern located in Havertown, PA. The Lamplighter is owned and operated by Defendant Q&D, Inc. Defendant John P. Quinn is the president and sole stockholder of Q&D.[1]

Brian Smarsh, who is not a party to this action, had been permanently barred from the Lamplighter six months before this incident because of altercations he precipitated. N.T. 10/2/15 pp. 51-53, 81. Despite being barred, on the night in question the Lamplighter served alcohol to Mr. Smarsh when he was in a visibly intoxicated condition in violation of the Dram Shop Act. The Lamplighter's inadequate security allowed Mr. Smarsh to engage in several acts of physical violence while inside the Lamplighter. The Lamp-lighter's employees were forced to intercede and break-up violent altercations between Mr.

1. Plaintiff also sued James Naughton, who was Mr. Quinn's former partner in the business. Mr. Quinn bought-out Mr. Naughton years before this incident. Plaintiff's attorney and Mr. Quinn agreed to dismiss Mr. Naughton from this case. N.T. 10/1/15 pp. 4-5.

Smarsh and other Lamplighter patrons. The employees permitted Mr. Smarsh to remain in the Lamplighter.

Plaintiff was with friends in the Lamplighter when Mr. Smarsh got into an argument with a group of Irish Gaelic football players. The Plaintiff, Mr. Smarsh and the football players left the Lamplighter and the argument continued outside but still on the premises of the Lamplighter.

Plaintiff attempted to intercede and prevent a fight between Mr. Smarsh and the football players. Mr. Smarsh smashed a beer bottle over the head of another patron causing the bottle to break. The downward swinging motion of his arm caused the broken bottle to be thrust into the Plaintiffs forearm causing the tendons in her forearm to be severed.

Defendants contended at trial that the Plaintiff was responsible for her injuries because she was intoxicated, and had diminished judgment and reaction times. They claim that by interjecting herself between the two patrons in an attempt to break up the fight, her conduct was the proximate cause of her injuries.

A non-jury trial was held on October 2, 2015 and October 5, 2015. Mr. Quinn was unrepresented and appeared *pro se*. Q&D, Inc. was not represented by an attorney at the trial and did not participate in the trial. On October 5, 2015, this Court entered a verdict in favor of the Plaintiff and against Defendants, Q&D, Inc., and the Lamplighter Tavern in the amount of $210,972.00. The Court found in favor of the Defendant John P. Quinn individually.

Defendant John P. Quinn filed a pro se post-trial

motion (PTM) on behalf of Q&D, Inc., and himself. Brian S. Quinn, Esquire (attorney Quinn) later entered his appearance on behalf of both Defendants. After briefing and a hearing, the Court denied the motion. Attorney Quinn filed a timely notice of appeal. The Court ordered a Pa.R.A.P. 1925(b) Statement of Errors and it was timely filed by the Defendants.

Part One of this opinion discusses why neither Defendant Quinn nor Defendant Q&D, Inc., were proper parties to the post-trial motion. This appeal should be quashed because there are no issues preserved for appellate review. In the event that the Superior Court fails to quash the appeal, Part Two of this opinion discusses the issues raised in the Defendants' Pa.R.A.P. 1925(b) Statement.

Part One. This appeal should be quashed

This appeal should be quashed because the post-trial motion (PTM) was legally defective and did not preserve any issues for appeal. The Court in this non-jury trial found in favor of the individual pro se defendant John P. Quinn, and found in favor of the Plaintiff and against the corporate defendant Q&D, Inc., and awarded damages against Q&D only. The post-trial motion was signed by Defendant Quinn in his individual pro se capacity and as the president of the corporate defendant Q&D. Defendant Quinn was not aggrieved by the verdict and cannot challenge the verdict in his favor. He was barred from filing legal papers on behalf of the corporation because he is not an attorney.

1. Defendant Quinn is not a proper party to the PTM

The Court entered a verdict in favor of Defendant John P. Quinn individually and against the Plaintiff. Despite winning at trial, Defendant Quinn filed a post-trial motion (PTM) claiming that the Court's trial errors require that he receive a new trial where he may be found to have been negligent and liable for monetary damages. Because Defendant Quinn won on all issues at trial, he is not "aggrieved" by the verdict, cannot file the PTM, and is not a proper party to the PTM.

Only a party aggrieved by a decision in a non-jury trial may file a post-trial motion pursuant to Pa.R.Civ.P. 227.1(c)(2). The decision of the trial court in a non-jury trial "is considered to be similar to a verdict in a jury trial from which the aggrieved party must file a motion for post-trial relief." *Ross v. SEPTA*, 714 A.2d 1131, 1133 (Pa. Cmwlth 1998), *quoting McCormick v. Northeastern Bank of Pa.* 522 Pa. 251, 254, 561 A.2d 328, 330 (1989).

> A party is "aggrieved" when the party has been adversely affected by the decision from which the appeal is taken. A prevailing party is not "aggrieved" and therefore, does not have standing to appeal an order that has been entered in his or her favor.
>
> The record reflects the judgment appealed from was entered in favor of Mendel Steel. The trial court found Mendel Steel was not liable for indemnity to either Wheeling-Pitt or P.J. Dick. Since [Mendel Steel] was a prevailing party in the court below, it is not "aggrieved" within the meaning of the rule. It may not, therefore, bring this appeal. Accordingly, we quash Mendel Steel's cross-appeal.

*Ratti v. Wheeling Pittsburgh Steel Corp.*, 758 A.2d 695, 700 (Pa. Super. 2000). *See United Parcel Serv., Inc. v. Pennsylvania Pub. Util. Comm'n*, 574 Pa. 304, 315, 830 A.2d 941, 948 (2003) ("an appealing party must be aggrieved, *i.e.*, adversely affected, by order in order to have standing to appeal"); *Wilson v. Transp. Ins. Co.*, 2005 PA Super 401, 889 A.2d 563, 577 n. 4 ("the judgment in this case was entered in favor of TICO. As the prevailing party, TICO was not 'aggrieved' and therefore, did not have standing to appeal the judgment entered in its favor"); *Hashagen v. Workers' Comp. Appeal Bd.*, 758 A.2d 276, 277 n. 2 (Pa. Cmwlth 2000) ("'[o]nly 'aggrieved' parties may appeal... and a party who prevails simply is not an aggrieved party and has no standing to appeal.'" [Citation omitted.] Accordingly, we must quash Employer's appeal because Employer prevailed before the Board in this matter.").

"Although a prevailing party may disagree with the trial court's legal reasoning or findings of fact, the prevailing party's interest is not adversely affected by the trial court's ultimate order because the prevailing party was meritorious in the proceedings below." *In re Estate of Pendergrass*, 2011 PA Super 165, 26 A.3d 1151, 1154 (case citation omitted) (decedent's son lacked standing to appeal orphan's court order entered in his favor, even if he felt order should have referenced contested will, and he disagreed with dicta of the orphans' court that initials on will satisfied signature requirements).

During the post-trial argument, the Court asked attorney Quinn to file a supple-mental brief addressing the issue of Defendant Quinn's right to proceed in light of the fact that

he had prevailed on all issues at trial. His supplemental brief relied on this portion of *Silfies v. Webster*, 713 A.2d 639 (Pa. Super. 1998):

> In *In re T.J.* 699 A.2d 1311 (Pa. Super. 1997), *appeal granted*, 1998 Pa. Lexis 482 (Pa. Mar. 20, 1998), we reiterated the definition of the terms aggrieved party and substantial interest as used in the standing context. We said:
>
> In order to be 'aggrieved' a party must have: 1) a *substantial* interest in the subject matter of the litigation; 2.) the party's interest must be direct and, 3.) the interest must be *immediate* and not a remote consequence of the action ... A 'substantial' interest means that there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.
>
> *Id.* at 1315-1316 (*quoting South Whitehall Twp. Police Service v. South Whitehall Twp.* 521 Pa. 82, at 86-87 555 A.2d at 793 (1989)) (*emphasis in the original*). [Only the last sentence is from the *South Whitehall* case; the emphasis is from *T.J.*]

*Silfies*, 713 A.2d at 643. He also relied on these principles in *Hospital & Healthsystem Ass'n of Pa. v. Dep't of Pub. Welfare*, 585 Pa. 106, 888 A.2d 601 (2005):

> As this Court explained in *William Penn Parking Garage, Inc., v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975), where a person is not adversely affected in any way by the matter challenged, he is not aggrieved and thus has no standing to obtain a judicial

resolution of that challenge. *Id.* at 280. This Court also noted that "it is not sufficient for the person claiming to be 'aggrieved' to assert the common interest of all citizens in procuring obedience to the law" but that in order to be aggrieved, a party must show that it has a substantial, direct and immediate interest in the claim sought to be litigated. *Id.* at 280-83. In *South Whitehall Township Police Service v. South Whitehall Township*, 521 Pa. 82, 555 A.2d 793, 795 (1989), we further explained that

> [a] "substantial" interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. A "direct" interest requires a showing that the matter complained of caused harm to the party's interest. An "immediate" interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it, and is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or constitutional guarantee in question.

*Hospital & Healthsystem*, 585 Pa. at 115-16, 888 A.2d at 607.[2]

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2. *Silfies* held that prospective adoptive parents had standing to bring a custody and visitation action because they had a reasonable expectation that they would be the future permanent custodians of the child, and this gave them a definite and substantial interest in the future welfare of the child. Furthermore they had visitations and overnight stays of the child and conducted themselves in a manner consistent with that of natural parents to their child.

***T.J.*** held that a county office of mental health/mental retardation did not have standing to appeal the discharge of an involuntarily committed patient because it did not have a substantial, direct, and immediate interest in the outcome. The Supreme Court reversed and held that the county

Attorney Quinn argued that because "John P. Quinn is the President and owner of Q&D, Inc.," "any judgment against Defendant Q&D, Inc., certainly has an adverse effect that is discernable and not abstract, thus he has standing to file post trial motions." That argument ignores the legal separation between a corporation as a legal entity, and its officers and stockholders. Neither a shareholder nor a corporate officer or director is personally liable for a debt, obligation or liability of the corporation. 15 Pa.C.S.A. §1526(a); *Miller v. York Coated Paper Co.*, 39 Pa. Super. 538 (1909). Attorney Quinn is saying that every individual who owns stock in General Motors has standing to appeal a verdict against GM because the adverse verdict affects the value of the stock he holds. Attorney Quinn failed to cite any case authorizing such a result.

Moreover, Defendant Quinn's position is irremediable.

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office had standing because ensuring that an involuntarily committed mental patient was not erroneously discharged was a matter implicating the office's concerns of both providing proper medical treatment to the patient, as well as preventing that patient from harming others. *In re T.J.*, 559 Pa. 118, 739 A.2d 478 (1999).

*South Whitehall* held that the collective bargaining agent for the uniformed police of South Whitehall Township had standing to bring an action in equity challenging a policy instituted by the police chief. The police officers contended that the policy required a particular number of public contacts per month and imposed disciplinary sanctions for noncompliance, in violation of Act 114, which prohibits the establishment of a quota system for the issuance of traffic citations, tickets, or any other citations.

*Hospital & Healthsystem* held that a hospital trade association and three hospitals had standing to challenge the constitutionality of a general appropriations act provision on reimbursement for emergency care provided to medical assistance (MA) recipients. Their interest in the subject matter of the provision was neither remote nor abstract, but rather the challenged provision presently and directly changed the way in which they received payment for emergency services that they were statutorily obligated to provide to MA recipients by preventing hospitals from negotiating for reimbursement for those services and paying hospitals based on a default schedule of payments.

Defendant Quinn is hoping that if he can persuade the court to grant a new trial to *him*, the court will also automatically grant a new trial to Q&D. Not true. Q&D did not ask for a continuance, did not object to its denial, and did not object to anything else at trial. Q&D cannot piggyback on Defendant Quinn's objections for the reasons discussed at page 18 below. It is not possible for Q&D to put forth any valid ground upon which it can be awarded a new trial.

Defendant Quinn prevailed on all the claims asserted against him at trial. He is not an "aggrieved" party and lacked standing to file a motion for post-trial relief. He did not preserve any issues for review.

2. Q&D, Inc., is not a party to the post-trial motion

Plaintiff's answer to the PTM asserted that Q&D, Inc. is not a party to the PTM and sought to strike the PTM as to Q&D, Inc.

> Additionally, judgment was entered against Q&D, Inc., not John P. Quinn. Defendants Motion for Post-Trial Relief was signed and verified by John P. Quinn both as President of Q&D, Inc., and on his own behalf *pro se*. The docket entries indicate the Motion was filed by a Brian S. Quinn, Esquire, however *his name does not appear anywhere on the Motion documents*. The judgment was entered against the corporate defendant, Q&D, Inc. only. As such, [John P.] Quinn's presentation of this Motion amounts to unauthorized practice of law and therefore the Motion for Post-Trial Relief should be stricken. [Emphasis added.][3]

3. Attorney Quinn incorrectly asserted in his supplemental brief

Q&D, Inc. was not a party to the PTM because the PTM was signed only by Defendant John P. Quinn in his pro se individual capacity and as president of Q&D, Inc. Attorney Brian S. Quinn did not sign the motion itself and never sought to amend the PTM.

Defendant John P. Quinn (Defendant Quinn) contacted Brian S. Quinn, Esquire (attorney Quinn) a few days before the start of trial and asked attorney Quinn to enter his appearance and represent Q&D, Inc., and Defendant Quinn at trial. Attorney Quinn declined due to the short time he would have to prepare for trial. He did, however, give Defendant Quinn advice on how to defend the case which Defendant Quinn followed. After the verdict, attorney Quinn drafted a PTM which Defendant Quinn signed on his own behalf as an individual defendant, and on behalf of Q&D, Inc., as president of Q&D.

When Defendant took the PTM to be filed, the clerk rejected it because the corporate defendant — Q&D — was not represented by an attorney. Defendant Quinn brought the PTM back to attorney Quinn who signed the Motion Court cover sheet and the verification to the motion, even though Defendant Quinn was the person who made the verification. Attorney Quinn did not sign the motion itself.

Defendant then took the PTM to the Office of Judicial Records which accepted it for filing on October 19, 2015. The docket indicates that it was filed by attorney Quinn.

> 19-OCT-2015 13:35:00 POST-TRIAL MOTION 19-OCT-2015

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that the PTM "was served on counsel for the Plaintiff without objection."

QUINN, BRIAN S.

36-15106336 MOTION FOR POST-TRIAL RELIEF

The Motion Court cover sheet has the name, address and attorney identification number for attorney Quinn, and his signature appears on the same line as the signature for Defendant John P. Quinn. The line where the filing party is to print his name says "Q&D, Inc./John P. Quinn."

The two-page, 16-paragraph motion itself is signed by Defendant Quinn only and not by attorney Quinn:

These signatures clearly demonstrate that Defendant Quinn attempted to file a post-trial motion on behalf of Q&D, Inc. He cannot act for Q&D, Inc., even though he is the president and sole stockholder of the corporation.

> [W]e hold that it is ... *the law of Pennsylvania that a corporation may appear and be represented in our courts only by an attorney duly admitted to practice*. We further hold that this requirement does not deny corporations due process or the equal protection of the laws. Neither does it deprive corporations or their officers and shareholders of any other constitutional or statutory rights they enjoy as corporate and natural persons, respectively.
>
> * * * * *
>
> The reasoning behind the rule is that "a corporation can do no act except through its agents and that such agents representing the corporation in Court must be attorneys at law who have been admitted to practice, are officers of the court and subject to its control." *This rule holds*

*even if the corporation has only one shareholder*.

*Walacavage v. Excell 2000, Inc.*, 331 Pa. Super. 137, 144 & 142, 480 A.2d 281, 285 & 284 (1984) (emphasis added, case citations omitted).

The Verification bears the hand-printed name of "John P. Quinn" in two places but it is signed on the same line by "Brian S. Quinn J.P. Quinn."

I, John P. Quinn, Defendant, verify that the facts set forth in the foregoing are true and correct to the best of my information knowledge, and belief.

The Certificate of Service bears Defendant Quinn's printed name and signature, and not attorney Quinn's:

I, John P. Quinn, hereby certify that a true and correct copy of the foregoing motion/petition and accompanying papers, was served on the below listed addresses by first-class United States mail, postage pre-paid on October 19, 2015(date).

An attorney's signature on the Motion Court cover sheet and on a verification that is in fact taken by another person, is not sufficient to cause a corporation to be included in a PTM where the *motion* itself does not bear the attorney's name or signature. *First*, attorney Quinn's signature on the verification is a nullity because he is not the person making the verification — Defendant Quinn made the verification.

*Second*, Pa.R.C.P. 1023.1(b) requires that every written *motion* must be signed by the attorney — it does not say that signing the cover page is sufficient:

Rule 1023.1. Scope. Signing of Documents. Representations to the Court. Violation

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(b) *Every* pleading, *written motion*, and other paper directed to the court *shall be signed by at least one attorney of record in the attorney's individual name*, or, if the party is not represented by an attorney, shall be signed by the party. This rule shall not be construed to suspend or modify the provisions of Rule 1024 or Rule 1029(e).

(c) The signature of an attorney or pro se party constitutes a certificate that the signatory has read the pleading, motion, or other paper. By signing, filing, submitting, or later advocating such a document, the attorney or pro se party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law,

(3) the factual allegations have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for

further investigation or discovery; and

(4) the denials of factual allegations are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Pa.R.C.P. 1023.1 (emphasis added).

The Commonwealth Court held that "a violation of Pa.R.C.P. No. 1023 is easily amendable," in a case where a parolee's petition for review seeking removal of a parole violation detainer, was signed by his attorney-in-fact, who was not a lawyer, and was not signed by the parolee himself. *McCain v. Curione*, 106 Pa. Cmwlth. 552, 556, 527 A.2d 591, 593 (1987). The Court held that it was sufficient that the parolee had signed the verified statement accompanying the petition for review.

*McCain* is distinguishable because the petition for review could be signed by the parolee himself — a lawyer was not necessary. A PTM filed on behalf of a corporation *must* be signed by a lawyer. The verified statement was sufficiently connected to the substance of the actual petition for review to make the parolee's signature on the verified statement enough to comply with former Rule 1023. Attorney Quinn's signature on the Motion Court cover sheet and on a verification that he did not make are not related to the substance of the post-trial motion.

Attorney Quinn never sought to amend the *motion* by placing his name and signature on it, despite being put on notice by the Plaintiff's answer to the PTM that the lack of his name and signature was an issue. Attorney Quinn's supplemental brief asserts that the Court "could have

simply handed the Motion in question to counsel in open court and and [*sic*] he could have signed it — curing any supposed administrative defect." It was *attorney Quinn's* duty and responsibility to ask for leave to amend the PTM and he never did so. During the post-trial argument on this issue, the Court gave attorney Quinn the opportunity to ask for leave to amend the motion. After suggesting that the motion was defective as to the corporation, the Court asked attorney Quinn, "how do you wish to proceed?" Attorney Quinn did not mention amending the motion and instead merely stated "I wish to have my motion heard." {pp. 9-10}.

Attorney Quinn's supplemental brief ignored Rule 1023.1 and asserted that it was sufficient that he signed the verification (also ignoring that he was not the person who made the verification). Attorney Quinn instead relied on Pa.R.C.P. 205.1 and 205.2:

> Rule 205.1. Filing Legal Papers. Mailing. Personal Presentation by Attorney Not Necessary
>
> Any legal paper not requiring the signature of, or action by, a judge prior to filing may be delivered or mailed to the prothonotary, sheriff or other appropriate officer accompanied by the filing fee, if any. Neither the party nor the party's attorney need appear personally and present such paper to the officer. *The signature of an attorney on a paper constitutes a certification of authorization to file it*. The endorsement of an address where papers may be served in the manner provided by Rule 440(a) shall constitute a sufficient registration of address. The notation on the paper of the attorney's

> current Supreme Court identification number issued by the Court Administrator of Pennsylvania shall constitute proof of the right to practice in the Commonwealth. A paper sent by mail shall not be deemed fifed until received by the appropriate officer. [Emphasis by Attorney Quinn.]
>
> Rule 205.2. Filing Legal Papers with the Prothonotary
>
> No pleading or other legal paper that complies with the Pennsylvania Rules of Civil Procedure shall be refused for filing by the prothonotary based on a requirement of a local rule of civil procedure or judicial administration, including local Rules 205.2(a) and 205.2(b).[4]

Attorney Quinn asserted that "the Motion was signed by counsel, albeit only on a page identified as a verification, but... the substance and import of that was to encompass the entire document ie. [*sic*] the 'paper', [*sic*] as being *authorized by Attorney Quinn for filing* and that its contents were true and correct." (Emphasis added.) He did not explain how, by adding his signature to a verification taken and signed by another person, he suddenly became the person making the verification or how his signature on the verification complied with Rule 1023.1(b)'s requirement that every *motion* be signed by the attorney. The parolee in *McCain* could legally sign the verified statement; it was his attorney-in-fact's signature on the petition for review that was not legally permitted.

Attorney Quinn's right or authorization to *file* what

4. Attorney Quinn also quoted Pa.R.C.P. 208.2. Motions for post-trial relief are specifically excluded from the scope of Rule 208.2. *See* Pa.R.C.P. 208.1 (b)(1)(v).

purported to be a post-trial motion was never in dispute. Nor was the fact that the Office of Judicial Records properly accepted the document for filing. The dispute was over the *legal effect* of the document he filed. Because attorney Quinn never signed the post-trial *motion* itself and his signature on someone else's verification had no legal effect, Q&D, Inc., was never a party to the post-trial motion.

Q&D, Inc., did not preserve any issues for review.

Conclusion

This appeal should be quashed as to Defendant John P. Quinn, because he prevailed at trial on all claims and is not an "aggrieved" party.

This appeal should be quashed as to Defendant Q&D, Inc., because the post-trial motion was signed by the non-attorney president of Q&D, Inc., and was not signed by an attorney representing Q&D, Inc.

Part Two. None of the Defendants' issues warrant relief

This part of the opinion is necessary only if the Superior Court does not quash the appeal and finds that Defendant Quinn and/or Q&D, Inc., are proper parties. The Court will address two threshold issues before discussing the issues raised in the Defendants' 1925(b) Statement.

1. The PTM was filed timely

Plaintiff's answer to the PTM sought to strike the PTM because it was not timely filed:

Defendants' Motion is untimely, having been filed on

> October 19, 2015, fourteen (14) days after the Court's finding and verdict in favor of the Plaintiff was entered on October 5, 2015. Pa. R.C.P. 227.1(c) states, in pertinent part, that post-trial motions shall be filed within ten (10) days after a verdict. Therefore, Plaintiff requests this Honorable Court strike Defendants' Motion for Post-Trial Relief as untimely.

This was a non-jury trial in which the verdict was announced from the bench with the parties present on Monday, October 5. The verdict and trial worksheet were not placed on the docket until Wednesday, October 7. The PTM was filed on Monday, October 19. Because this was a non-jury trial, however, the ten-day period to file a PTM did not start to run until the decision and the trial worksheet were placed on the docket. *Papalia v. Montour Auto Service Co.*, 452 Pa. Super. 395, 682 A.2d 343, 345 (1996) (holding a post-verdict motion was timely filed because the ten-day period for filing a post-trial motion began upon the actual docketing of the Philadelphia Civil Trial Worksheet indicating the order granting the nonsuit in a ***non-jury case*** and ***not*** upon the announcement of the nonsuit by the court).

The PTM was timely filed on Monday, October 19. The tenth day from Wednesday, Oct. 7 was Saturday, October 17. Saturdays and Sundays are not counted. Pa.R.C.P. 106(b) ("Whenever the last day of any such period shall fail on Saturday or Sunday, or on any day made a legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from the computation.").

2. Q&D, Inc., did not preserve any issues for review,

except the excessiveness of the verdict, because it did not make any objections or participate at trial

At the pre-trial conference the Court made it clear that Defendant Quinn could object on his own behalf at trial, but that Q& D, Inc., could act only through an attorney and that he could not represent the corporation at trial.

> THE COURT: If you are dismissed personally from the case, then you are no longer a party and the only remaining party would be the corporation; and a corporation must be represented by counsel and can only be represented in a courtroom by an attorney-at-law. And unless you are an attorney -
>
> MR. QUINN: Which I'm not.
>
> THE COURT: — you would not be permitted to represent the corporation. If you are a party to the lawsuit and you proceed in the way we call pro se, for yourself, representing yourself, you're entitled to represent yourself. Everybody is entitled to that, to represent themselves if they choose to do so, but a corporation must be represented by an attorney.

NT 10/1/15 pp. 5-7 (emphasis added).

Q&D, Inc., as an unrepresented corporation, did not make any objections at trial or join in any of Defendant Quinn's objections or otherwise participate in the trial. The Defendants failed to cite to any authority that permitted Q&D to raise in a PTM or on appeal, the actions and objections by Defendant Quinn that were not also objected to by Q&D. Because Q&D cannot borrow Defendant

Quinn's objections and conduct, Q&D waived all of the issues in the PTM, except for excessiveness of the verdict, for failure to object to them at trial.

The practice of one party formally joining in the objection of another party at the time it is made constitutes an objection by the joining party. That is not what happened in this case. The rule that a corporation must act through an attorney would be destroyed if an unrepresented corporation is permitted to have the benefit of the objections and actions of other parties who are represented. If the issues were preserved, a corporation that deliberately did not hire an attorney for trial could then hire an attorney and proceed with a PTM and an appeal.

"Under prevailing Pennsylvania law, a timely objection is required to preserve an issue for appeal." *Shelhamer v. Crane*, 2012 Pa Super 250, 58 A.3d 767, 770 quoting *Samuel-Bassett v. Kia Motors Am., Inc.*, 34 A.3d 1, 45 (Pa. 2011). "If no objection is made, error which could have been corrected in pre-trial proceedings or during trial by timely objection may not constitute a ground for post-trial relief." *Shelhamer*, 58 A.3d at 770-771, *quoting* the *Note* accompanying Pa.R.C.P. 227.1(b)(2).

A party's failure to contemporaneously object to the introduction of evidence is not preserved for review by including the issue in a post-trial motion. *Daniel v. Wyeth Pharmaceuticals Inc.*, 2011 PA Super 23, 15 A.3d 909, 923 n.12 ("post-trial relief is not available when the error could have been corrected if it had been raised by timely objection during trial"), *appeal dismissed as improvidently*

*granted at* 623 Pa. 251, 82 A.3d 942 (2013).

3. The issues set forth in Appellants' Pa.R.A.P. 1925(b) Statement

1. The lower court erred and/or committed an abuse of discretion by refusing to grant a continuance to the Appellants/Defendants, both prior to the call of the case for trial as well as on the trial date itself, after Defendant advised both the team leader, Honorable Judge Mark Bernstein, and the trial court that pro bono counsel had been consulted approximately two days earlier, but could not be present and prepared for trial on such short notice.

2. The Honorable trial court erred in permitting the Appellee/Plaintiff to introduce the written operative report of Dr. llyas, despite the prior ruling of the court that all written records and reports were inadmissible.

3. The Honorable trial court erred in failing to allow Appellants/ Defendants to introduce into evidence a police report containing the admitted prior inconsistent statement of the Appellee/Plaintiff.

4. The damages awarded by the trial court were excessive and based upon inadmissible evidence consisting of the operative report of Dr. llyas. The trial court's award was not not [*sic*] otherwise explained in it's verdict.

5. The trial Court erred in refusing to enter a judgment in favor of the Plaintiff [*sic*], notwithstanding the Court's verdict.

6. The trial Court erred in refusing to grant Plaintiff [*sic*] a new trial.

7. The lower court's Order does not contain the reasons for or basis of the court's denial of the Post trial Motions of the Appellants and the lower court has not issued a statement pursuant to Pa.R.A.P. 1925(a). To that extent, if the lower court denied Appellant's Motions as a result of issues raised during oral argument by the court sua sponte, but not raised by Appellee/Plaintiff, said denial constituted error.

8. Appellant/Defendants request leave to supplement this Statement upon review of the record, in particular the transcript of the oral argument on Post Trial Motions conducted before the trial court, Judge Lachman.

Merits Issue 1. Denial of a continuance was not an abuse of discretion

Defendants Q&D and Quinn did not have insurance and were originally represented in this case by private attorneys Frederick W. McBrian, III, and Nicholas R. Montalto of McBrian, Montalto & Stern. The Case Management Order (CMO) of February 3, 2014, placed this case in the January 2015 trial pool. This case was later moved to the May 2015 trial pool when Judge Mark I. Bernstein, the team leader for all of the cases filed in 2013, granted the Plaintiff's motion for extraordinary relief on August 29, 2014. The trial date was changed to the July 2015 trial pool when Judge Bernstein granted the Plaintiff's motion for extraordinary relief on December 24, 2014.

On March 17, 2015, the attorneys for the Defendants

filed a petition to withdraw alleging lack of cooperation from Defendant Quinn and his failure to pay their invoices.[5] After a hearing, Judge Bernstein granted the petition on April 27, 2015. The attorneys filed a praecipe to withdraw on May 15, 2015.

On July 6, 2015, after a pre-trial conference on July 1st, Judge Bernstein entered an order taking this case out of the July 2015 trial pool, and giving it a date-certain trial on October 2, 2015. Date certain trials are normally

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5. 4. Petitioners have repeatedly attempted to meet with Defendant, John P. Quinn, who, in addition to his individual self, is the president of co-Defendant, Q & D, Inc., which owns, operates and maintains the Lamplighter Tavern, to discuss matters relevant to the clients' representation and to obtain the clients' assistance in Petitioners' preparation for ongoing discovery, trial preparation, etc., in this matter. Multiple office conferences over several months have been scheduled by the Petitioners only to be cancelled by Defendant Quinn at the last moment.

5. Defendant Quinn has refused to communicate with the Petitioners.

6. Without Defendant Quinn's assistance, the Petitioners are unable to properly prepare for the trial of this matter and will be unable to appropriately represent the Defendants.

7. After Defendant Quinn's last minute cancellation of an office conference scheduled for March 9, 2015, Petitioners sent Defendant Quinn a letter informing him that the Petitioners would no longer be able to represent the Defendants due to their continued failure to cooperate in the defense of this matter, and that a petition to withdraw would be filed with the court. A copy of Petitioners' letter is attached hereto as Exhibit "A."

8. In addition, the Defendants, despite being sent multiple invoices for legal services rendered and legal costs incurred (deposition costs to date exceeding $1,300.00), have failed to fulfill their obligation to Petitioners regarding Petitioners' services. The Defendants were sent multiple billings and were given multiple warnings that counsel would withdraw if they could not find a way to pay ongoing costs of litigation and make reasonable regular monthly payments of Petitioners' legal fees.

9. Representation of the Defendants has been rendered unreasonably difficult if not impossible by the Defendants refusal to communicate with Petitioners and participate in their own defense.

Petition of Defendants' Counsel for leave to withdraw. Control No. 15032164.

scheduled in cases involving pro se parties.

On September 29, 2015, Defendant Quinn sent a letter and a faxed copy to Judge Lachman's chambers and to Plaintiffs counsel requesting a continuance stating:

> I received the file from the attorney who was working on my case on Sept. 11, 2015
>
> This did not give me time to get an attorney to represent the corporation.
>
> I am asking for a continuance to find an attorney and give him the file to review.

*See* Court Exhibits 1 & 2. Attached to the fax was a copy of a hand-delivered letter dated Sept. 11, 2015, from McBrian, Montalto & Stern stating, "I have delivered our file to you." *Id.*

The Plaintiff's attorney responded within hours with a fax that stated:

> Today, I was copied by Defendant Jack Quinn on a fax to Your Honor requesting a continuance so that Mr. Quinn be given time "to get an attorney to represent the corporation" (Q&D, Inc.). I must inform Your Honor that Mr. Quinn stated to Judge Bernstein at the Pre-Trial Conference that he would not be obtaining an attorney, either for himself or for the corporation, because he did not have money to pay an attorney. The Conference took place on July 1, 2015.

*See* Court Exhibit No. 1.

Judge Lachman gave both faxes to Judge Bernstein to

rule upon, as only the team leader may grant a continuance of a trial.[6] Judge Bernstein returned the papers to Judge Lachman with a yellow Post-It stating "Continuance denied" in Judge Bernstein's handwriting. *See* Court Exhibit 2. That occurred on the afternoon of September 29, 2015.

At 9:30 a.m. on September 30, 2015, Judge Lachman's assistant, Carol Fiorelli, called Defendant Quinn to tell him that Judge Lachman wanted to meet with both parties the next day to go over her trial procedures. Defendant Quinn stated that he had requested a continuance. Ms. Fiorelli told him that Judge Bernstein had denied his request for a continuance. *See* Court Exhibit 3.

At 12:30 p.m. that same day, Judge Lachman's chambers received another fax from Defendant Quinn that stated in relevant part:

> My name is John P. Quinn and am requesting a non jury trial. I don't have the money to pay the lawyers. That's why they dropped me.
>
> * * * * *

6. Requests for the continuance of a trial must be submitted in writing to the appropriate team leader. J. Grugan & M. White, *Philadelphia Court of Common Pleas Civil Practice Manual* § 8.2 (16th ed. 2013). In their PTM brief and at the PTM argument, the Defendants asserted that every trial judge has the inherent power to grant a continuance of a trial and that Judge Lachman erred in deferring the issue to Judge Bernstein. In order to efficiently manage its docket, the Philadelphia Court of Common Pleas established the Day Backward and Day Forward Programs in 1994 and gave the case team leaders the exclusive authority to rule on trial continuances. For a discussion of those programs, *see Wolloch v. Aiken*, 756 A.2d 5, 9 nn. 2 &3 (Pa. Super. Ct. 2000), *reversed on other grounds*, 572 Pa. 335, 815 A.2d 594 (2002).

> P.S. I requested a continuance because I did not receive the file until Sept. 11, 2015. When I found an attorney he said it didn't give him enough time to review the file and talk to witnesses, I [sic] sending a copy of the date of delivery from the original attorney.

*See* Court Exhibit 3. Defendants never gave this information to Judge Bernstein.

At the pre-trial conference on October 1, 2015, Defendant Quinn stated that he had contacted an attorney who would handle the case but for the fact that it was starting in a day or two. Only Judge Bernstein could continue the case and Defendant Quinn never gave that information to Judge Bernstein.

Defendant Quinn also stated at the pre-trial conference, that Plaintiff's attorney had given him copies of portions of his file at the pre-trial conference the previous July. N.T. 10/1/15 p. 9.

Defendant Quinn's correspondence clearly indicates that he actually understood the necessity of obtaining an attorney to represent Q&D, Inc., at trial. What it does not indicate is any explanation as to why he waited until September 11 to get his file from his former attorneys, and why he delayed obtaining a lawyer when:

> He knew since the revised CMO of December 24, 2014, that his case was scheduled for trial in July 2015.
>
> He knew on April 29 that Judge Bernstein had granted his attorneys' petition to withdraw from his case.
>
> He knew on May 15 that his former attorneys had

formally withdrawn from his case.

He knew on July 6 that his case was rescheduled to a date-certain trial on October 2, 2015.

The information presented by Defendant Quinn to Judge Bernstein was insufficient to warrant a continuance. The above facts demonstrate that Defendant Quinn unreason-ably delayed obtaining his file and an attorney, despite knowing of the need for Q&D to be represented by an attorney and of the quickly approaching trial date. "In deciding to grant or deny a continuance, a court also will consider whether the requested delay is due, in whole or in part, to the moving party's lack of diligence." *7 Stand. Penna. Prac.2d* § 38:3 (updated Dec. 2015). *See Simmons v. St Clair Hosp.*, 47 Pa. D. & C.3d 345, 353-54 (C.P. Allegheny) (the trial court denied a continuance where plaintiff's attorney deliberately failed to obtain an expert witness despite knowing of the trial date and that it was quickly approaching).

Defendant Quinn did not present to Judge Bernstein any facts explaining why he waited until the week of trial to obtain counsel. Defendant Quinn also never told Judge Bernstein or Judge Lachman the length of the continuance he was requesting — did he need one week, a month, six months?

"The trial court is vested with broad discretion in the determination of whether a request for a continuance should be granted, and an appellate court should not disturb such a decision unless an abuse of that discretion is apparent. An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not

be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the results of partiality, prejudice, bias or ill-will." *Corrado v. Thomas Jefferson University Hospital*, 2001 PA Super 363, 790 A.2d 1022,1035 (case citation omitted).

A court may deny a request for a continuance under Pa.R.C.P. 216 where lack of diligence on the part of a party necessitated the request for the continuance, or where a continuance would necessitate a long delay in the final adjudication of the case, opposing counsel opposes the continuance, or where valuable judicial time would be wasted by the grant of the continuance. *7 Stand. Penna. Prac.2d* § 38:3 (updated Dec. 2015). All four of those factors were present in this case.

Litigants must present evidence of circumstances beyond their control and which they could not have anticipated in order to obtain the continuance of a trial. The Defendants in this case failed to explain why they did not obtain their file and retain an attorney in the five (5) months before trial, except to say that they had no money. They offered no authority holding that the impecunious circumstances of a corporation or a private litigant require a continuance of a civil trial.

Defendants also contended that as a "result of the trial court's failure to grant a continuance of the trial, defendants were unable to produce at least three witnesses who were present at the time of the alleged incident which forms the basis of this lawsuit, were deposed by the Plaintiff prior to trial and whose testimony could have properly been

introduced or preserved for trial court consideration." PTM ¶ 7. This argument is waived because it is not mentioned in the Defendants' PTM brief. *Jackson v. Kassab*, 2002 Pa. Super. 370, 812 A.2d 1233, 1235 (*en banc*) ("common sense mandates that any issue raised in a motion for post-trial relief must be briefed and argued to the trial court. Failure to set forth an argument in briefs filed in the court in support of post-trial motions constitutes a failure to preserve the issue or issues not argued."). Furthermore, the Defendants knew on July 6 that the trial would begin on October 2. That was more than enough time for the Defendants to procure the attendance of the unnamed witnesses by subpoena or other means.

Merits Issue 2 — Admission of Dr. Ilyas's operative report

The Defendants waived this issue because the issue and Dr. Ilyas were not mentioned in the post-trial motion itself. "If an issue has not been raised in a post-trial motion, it is waived for appeal purposes." *Sovereign Bank v. Valentino*, 2006 PA Super 338, 914 A.2d 415, 426, quoting *Diamond Reo Truck Co. v. Mid-Pacific Industries, Inc.*, 2002 PA Super 272, 806 A.2d 423, 428. "Issues raised in briefs supporting post-trial motions but not in the post-trial motion are waived." *Siculiento v. K & B Amusements Corp.*, 2006 PA Super 380, 915 A.2d 130, 132 n.2. "Moreover, the fact Appellants raised this issue in their court ordered Pa.R.A.P. 1925(b) statement did not relieve Appellants of their duty to raise the issue in their post-trial motion." *Id.*

The issue is also waived because Q&D and Defendant

Quinn never objected to the admission of the operative report by Asif Ilyas, M.D. (Exhibit P-10). On the contrary, Defendant Quinn expressly stated he had no objection to its admission:

> MR. BERNSTEIN:...At this point, I would like to move for the admission of the surgical — the operative report from Dr. Ilyas, not the expert report, the operative report.
>
> THE COURT: Any objection?
>
> MR. QUINN: This is for — are these exhibits? Is that what they are?
>
> THE COURT: Mr. Bernstein is asking to move into evidence the part of the medical — the hospital record that is known as the operative report. That's the report dictated by a doctor after a surgical procedure.
>
> MR. QUINN: Okay. This is not to be read?
>
> THE COURT: He is submitting it for the Court to consider.
>
> MR. QUINN: *Oh. No objection*.
>
> THE COURT: I'm sorry?
>
> MR. QUINN: *No objection*.
>
> THE COURT: Okay.

NT 10/5/15 pp. 32-33 (emphasis added).

Although Defendant Quinn may have been confused as to what he was doing (as his PTM brief suggests), his lack

of understanding is the foreseeable consequence when lay people represent themselves in a trial. A *pro se* litigant '"is not entitled to any particular advantage because [ ]he lacks legal training. Further, any layperson choosing to represent himself in a legal proceeding must, to some reasonable extent, assume the risk that his lack of expertise and legal training will prove his undoing.'" *Kovalev v. Sowell*, 2003 PA Super 432, 839 A.2d 359, 367 n. 7, *quoting Rich v. Acrivos*, 815 A.2d 1106, 1108 (Pa. Super. 2003) (citations omitted).

Merits Issue 3 — Failure to allow cross-examination and introduction of police report

The Defendants waived this issue by failing to cite any legal authority in support of their claim that the Court erred in denying Defendant Quinn's request to introduce the police report into evidence. The Defendants' PTM brief was drafted and filed by an attorney. An argument in a party's post-trial motion brief that cursorily discusses an issue without analysis and citation to relevant authority, does not satisfy the requirement of briefing and arguing an issue envisioned by Pa.R.C.P. 227.1, resulting in waiver of the issue. *Browne v. Commonwealth, Department of Transportation*, 843 A.2d 429,434-435 (Pa. Cmwlth. 2004) (failure to effectively set forth argument on issue in brief in support of post-trial motions results in waiver).

An issue is waived when a party fails to cite any legal authority in support of his position. *Commonwealth v. B.D.G.*, 2008 PA Super 238, 959 A.2d 362, 371-372 (*en banc*); *Lackner v. Glosser*, 2006 PA Super 14, 892 A.2d 21, 29-30 ("[A]rguments which are not appropriately

developed are waived. Arguments not appropriately developed include those where the party has failed to cite any authority in support of a contention."); *Giant Food Stores, LLC v. THF Silver Spring Development, L.P.*, 2008 PA Super 245, 959 A.2d 438, 444 (failure to cite any case law to support an argument causes the issue to be waived and the court will not address the issue).

The Defendants claim that the court erred by (1) preventing Defendant Quinn from cross-examining the Plaintiff with a statement she allegedly made that was contained in a police report, and (2) not allowing Defendant Quinn to introduce the police report into evidence. Neither of these issues has merit. The discussion of these issues at trial is at N.T. 10/2/15 pp. 144-148 and N.T. 10/5/15 pp. 44-46.

Defendant Quinn cross-examined the Plaintiff and attempted to impeach her with a prior inconsistent statement she allegedly made that was contained in a report of the Haverford Township Police Department. Before his questions began, Plaintiff's counsel objected on hearsay grounds. The Court sustained the objection and ruled that "The police report is not admissible. That doesn't mean that it can't be shown to the witness if it refreshes her recollection." N.T. 10/2/15 p. 144. The Court later added that Defendant Quinn could use the report if it had contained a statement by the Plaintiff that was contrary to her trial testimony. *Id.* pp. 145-146.

Defendant Quinn gave the police report to the Plaintiff who read the relevant portion and said that the statement she had given the officer was not reflected in the written

report. She also said, "to answer your question, no, this was not my statement." N.T. 10/2/15 pp. 147-148.

BY MR. QUINN:

Q. Is that your statement?

A. Uhmm, this was a statement that an officer had taken when I arrived at the hospital and I had been intoxicated, blood loss. I was given morphine, and *my statement that was given did not reflect what he had written in his report*. And that was also stated in Brian Smarsh's criminal suit and the statement was retracted; that *what was written in the report did not — was not evident of the statement that I had actually made*.

Q. *So that statement there is wrong; is that correct?*

A. *Yes*.

* * * * *

THE WITNESS: **So** *I guess to answer your question, no, this was not my statement*.

N.T. 10/2/15 pp. 147-148 (emphasis added).

"It is axiomatic that when attempting to discredit a witness' testimony by means of a prior inconsistent statement, the statement must have been made or adopted by the witness whose credibility is being impeached." *Commonwealth v. Simmons*, 541 Pa. 211, 245, 662 A.2d 621, 638 (1995) (case citations, internal quotations and brackets omitted) (written police report which was only summary of words of witness and not verbatim notes from witness cannot be used to impeach witness on cross-

examination).

"A summary of a witness' statement cannot be used for impeachment purposes absent adoption of the statement by the witness as his/her own. The rationale for this rule is: it would be unfair to allow a witness to be impeached on a police officer's interpretation of what was said rather than the witness' verbatim words." *Commonwealth v. Luster*, 2013 PA Super 204, 71 A.3d 1029, 1044 (2013) (*en banc*) (case citations, internal quotations and brackets omitted).

Defendants also assert that the Court erred by failing to allow Defendant Quinn to move the police report into evidence. The request for admission, however, came *after the Plaintiff had given her closing argument* and before Defendant Quinn gave his closing argument. The Court ruled that it was too late to move the admission of the report because the evidentiary record was closed.

> MR. QUINN: .... Now, can I put into the record the police report as an exhibit?
>
> THE COURT: The evidence is closed at this point, Counselor.
>
> * * * * *
>
> MR. QUINN: I thought he just put exhibits up there now. Could I use this as an exhibit for the defense?
>
> THE COURT: You didn't move it into evidence during the trial, counsel — Mr. Quinn.
>
> MR. QUINN: Oh. So not now?

THE COURT: I thought I made that clear before.

MR. QUINN: You probably did. I would assume you did.

N.T. 10/5/15 pp. 44 & 45-46.

Merits Issue 4 — The verdict was not excessive

The Defendants' last issue is that the verdict of $210,972 was not supported by the evidence and was excessive. Q&D and Defendant Quinn waived any issue regarding whether Dr. Ilyas' operative report should have been introduced because they did not object to its introduction.

The Defendants' entire argument on this issue is as follows from page 9 of his PTM brief:

*D. The trial court improperly considered the report of Dr. llyas and did otherwise enter an award of damages that was excessive*

Had the report in question been properly excluded, there would have been no evidence or causal connection between the injury and treatment and no evidence of any need for future treatment or disability, upon which a trier of fact could have found for the plaintiff in the amount of $210,972.00.

The court used the vague, undocumented references to approximate dates of employment and rounded off wages and tips as provided by the plaintiff, it is supposed, to fashion an award. No one else but the plaintiff testified regarding her alleged disability. She was engaged to be married, has a child and there is

nothing in the record concerning any existing trauma or limitations, economic, social or otherwise.

The verdict and judgment were excessive.

The issue concerning Dr. llyas' operative report was waived for the reasons discussed at pages 27-28 of this opinion.

Defendant Quinn's causation issue is without merit. He admitted that Mr. Smarsh hit another man over the head with a beer bottle and the jagged edge of that beer bottle cut the Plaintiff's arm. NT 10/2/15 p. 173.

Plaintiff testified at NT 10/2/15 pp. 114-138, concerning how her injury occurred, the surgery to repair it, her physical therapy and psychological counseling, her past and present pain and suffering and physical limitations, wage loss, and unpaid medical bills. What follows is a summary of that testimony.

She testified that the beer bottle severed five tendons in her right arm. Her friends immediately rushed her to the emergency room of Bryn Mawr Hospital where the doctor told her she was within five minutes of bleeding out and dying. She was in severe pain and could not wiggle the fingers of her right hand. Dr. Ilyas surgically repaired the severed tendons. Her arm was placed in various casts for approximately six months. During that time she was unable to clean herself after using the bathroom or the shower, brush her hair and her teeth or dress herself. Her mother had to help her do all of those things.

She had physical therapy for a number of months.

She became very self-conscious about her arm causing depression and anxiety for which she saw a psychologist.

She was in her last semester at college and her injury prevented her from attending classes and typing her papers. She was forced to take an extra semester to make up the time she lost.

Plaintiff was out of work for approximately eight months and had approximately $20,000 in lost wages. Prior to her injury, she was employed as a waitress and bartender at Cafe San Pietro. She made $200 per night three nights a week. She was unable to work because her arm was in a cast and lost eight months of work. She also was unable to work as a counselor at the summer day camp where she had previously been employed. She would have made $340 per week for twelve weeks. After the cast was removed, she worked at Primavera Pizza Kitchen but had to leave after two and a half months because the strain on her arm was too great.

The injury to Plaintiff's arm hinders her ability to care for her 15 month-old son.

She has an unpaid medical lien of $11,252.38. Exhibit P-9.

Today she has functional limitations with the use of her right arm as a result of her injury. She does not have full range of motion in her arm or her thumb; she is sometimes unable to grasp a bottle and open it; her arm tenses in bad weather; she experiences numbness and tingling in her right arm; and her right arm is cold all of the time.

Plaintiff introduced photographs showing her right arm

as it looked in the hospital emergency room and the open laceration; her arm in the casts; and the scar on her right arm. Exhibits P-7 and P-8. The scar was shown to the court who described it as follows:

> THE COURT: For the record, the Plaintiff has shown the Court a scar that runs about an inch and a half to two inches from the direction of the elbow to the hand and then takes a 90-degree turn, and there's another inch and a half to two inches that is perpendicular and then again across the forearm, and the scar, again, takes a 90-degree turn for about an inch and a half towards the hand.

NT 10/2/15 pp. 119-120.

The Plaintiff's testimony was sufficient to sustain the amount of the verdict because it established:

> she sustained an injury as the direct result of the Defendants' negligence,
>
> she suffered pain and suffering in the past and will continue to do so in the future as a result of her injury,
>
> the existence of a disfiguring scar,
>
> she lost wages and the approximate amount thereof, and
>
> she has unpaid medical bills and the amount thereof.

## CONCLUSION

The Superior Court should quash this appeal because neither John P. Quinn nor Q&D, Inc., had standing to file

the post-trial motion or this appeal.

None of the issues presented in Defendants' Pa.R.A.P. 1925(b) Statement have merit and none warrant relief. The judgment entered on the court's verdict in favor of Plaintiff Moriah McMorran should be affirmed.

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## Pennypacker v. Ferguson Township

*Land use appeal — Planned residential development — Stormwater management — Impermissible use of adjacent lot zoning regulations*

Appeal by adjacent landowners of township approval of the Final Planned Residential Development (PRD) Plan, based on unapproved planned use of land that remained zoned RA. Cited case law was determined inapplicable. Township Board of Supervisors' approval was reversed and vacated.

The PRD was a plan for a 264-unit residential development on about 44 acres of land, a site that it shared with three additional tax parcels. Lots 3 and 4 were each zoned R-4, multifamily residential, while the 5.5 acres of Lot 3 Addition was zoned RA, rural agricultural. Under the PRD, Lot 3 Addition would be subdivided from the parent tract and added to Lot 3 but would remain zoned RA, so that the new Lot 3 would contain land zoned R-4 and RA. The RA land, though not part of the PRD, would serve as an accessory stormwater detention basin under the PRD. However, that proposed use went against the requirements of the zoning regulations.

The tentative PRD was originally submitted to appellee Ferguson Township on Oct. 1, 2014, and was approved March 17, 2015. An application for final approval was submitted on March 5, 2015, and, after comments and revisions, appellee voted and approved the final plan on Nov. 17, 2015. On Dec. 16, 2015, appellants Barbara Pennypacker and 15 others filed an appeal. An equitable owner of the property, Springton Pointe LP, intervened and filed a motion to quash the appeal in January 2016, which was denied in March.

Noting that the appeals court was limited to determining an error of law or abuse of discretion, the court reviewed the RA zoning regulations.

Permitted uses in a district zoned RA did not include high-density residential dwellings. Permitted accessory uses included "customary uses accessory to the above [permitted uses]; essential services." Stormwater management could be an accessory use to an approved primary use in RA. Further, the intent of RA zoning, according to the zoning ordinance, was to preserve the "pastoral nature" of the area, encourage preservation of agriculture, restrict nonagricultural development and "preserve the quality soils for crop and pasture use by limiting the conversion of prime cropland to nonagricultural uses."

By contrast, the PRD specified that the 5.5-acre lot would remain zoned RA and not included in the PRD but would be used for stormwater management for the PRD. In support of their view, appellee and intervenor cited *Sprint Spectrum v. Zoning Hearing Board*, which decision allowed a commercial entity to use an access drive to traverse an agricultural district to reach its properly zoned cell tower. The court found that they missed the point and were using the PRD instead of applying for a zoning variance of zoning change for the RA land. The accessory stormwater facilities under the PRD would be constructed not to serve a permitted RA use, but a use not permitted in the RA. The court found the Board of Supervisors committed an error of law in approving the final plan.

C.P. of Centre County, No. 2015-4887

*Jordan B. Yeager* and *Paul R. Cohen*, for appellants.
*Joseph P. Green*, for appellee.
*Ronald M. Lucas* and *Marc B. Kaplin*, for intervenor.

GRINE, *J*., July 18, 2016—Presently before the Court is a Land Use Appeal, filed by Barbara Pennypacker, et al. ("Appellants") on December 16, 2015. For the reasons set forth below, the Ferguson Township Board of Supervisors' approval of the Final Planned Residential Development Plan ("The Cottages at State College") is REVERSED and VACATED.

## BACKGROUND

This Land Use Appeal challenges the Final Plan approval for a planned residential development ("PRD")

known as "The Cottages at State College." The PRD sets out a plan for two hundred sixty-four (264) residential units on approximately forty-four (44) acres of land.

The underlying site on which the PRD would reside contains the following: "Lot 4" (Tax Parcel No. 24-04-076A), "Lot 3" (Tax Parcel No. 24-04-076), and "Lot 3 Addition" (Tax Parcel No. 24-04-94). Lot 4 consists of 15.180 acres of land which is zoned Multi-Family Residential (R-4). Lot 3 consists of 22.864 acres of land which is zoned R-4. Lot 3 Addition consists of 5.50 acres of land which is zoned Rural Agricultural (RA). The approval of the PRD would subdivide Lot 3 Addition from the parent tract and consolidate it with Lot 3, but it would remain zoned as RA. This consolidation would effectively create a Lot 3 consisting of a total of 28.364 acres of land, 22.864 acres zoned R-4 and 5.50 acres zoned RA.

The PRD contains plans for a stormwater management system consisting of detention basins located primarily on the 5.50 acres of land zoned RA ("RA Land"). The RA Land is explicitly excluded from the PRD, but the stormwater management detention basins on the RA Land would serve as an accessory use to the primary residential use located in the PRD. The accessory use of the RA Land is contingent upon the approval of the PRD.

An application for approval of a Tentative PRD Plan was submitted to Ferguson Township ("Appellee") on October 1, 2014. Appellee's Board held a hearing on the Tentative PRD Plan on March 2, 2015. The Appellee's Board approved the Tentative PRD Plan in a written decision dated March 17, 2015. An application for Final

PRD Plan approval was submitted on March 5, 2015. After Appellee's staff review and comment, a revised Final PRD Plan application was submitted on November 5, 2015. Appellee's Board held a public meeting on November 16, 2015 and voted to approve the Final PRD Plan. Written approval of the Final PRD Plan was issued on November 17, 2015.

Appellants filed a Land Use Appeal on December 15, 2015. Springton Pointe, LP ("Intervenor"), an equitable owner of the property at issue, intervened in the appeal pursuant to a Notice of Intervention filed on January 11, 2016. Intervenor filed a Motion to Quash Appeal on January 26, 2016. The Court issued an Opinion and Order denying Intervenor's Motion to Quash Appeal on March 16, 2016.

Appellants filed a Brief in Support of Appellants' Land Use Appeal on May 27, 2016. Intervenor filed a Brief in Opposition to Appeal on June 24, 2016. Appellee filed a Brief in Opposition to Land Use Appeal on June 27, 2016. The Court heard argument on July 13, 2016.

After reviewing the record and hearing argument, the Court is now ready to render a decision in this matter.

## DISCUSSION

The Pennsylvania Municipalities Planning Code provides as follows:

> In a land use appeal, the court shall have power to declare any ordinance or map invalid and set aside or modify any action, decision or order of the governing

> body, agency or officer of the municipality brought up on appeal.

53 P.S. §11006-A(a).

Where no additional evidence is taken, the reviewing court in a land development appeal is limited to determining whether the local governing body committed an error of law or an abuse of discretion. *Robal Assocs., Inc. v. Bd. of Supervisors of Charlestown Twp.*, 999 A.2d 630 (Pa. Cmwlth. 2010). Whether a proposed use falls within a given category specified in a zoning ordinance is a question of law and subject to review on that basis. *Seipstown Vill., LLC v. Zoning Hearing Bd. of Weisenberg Twp.*, 882 A.2d 32, 38 (Pa. Cmwlth. 2005) (citing *Crary Home v. Defrees*, 329 A.2d 874, 876 (Pa. Cmwlth. 1974)). The reviewing court's inquiry is one of statutory construction and to determine the intent of the legislative body which enacted the legislation. *Id. See Broussard v. Zoning Board of Adjustment of the City of Pittsburgh*, 831 A.2d 764, 770 (Pa. Cmwlth. 2003) (zoning hearing board's interpretation of a zoning ordinance is entitled to great weight); *Residents Against Matrix v. Lower Makefield Twp.*, 845 A.2d 908, 910 (Pa. Cmwlth. 2004) (Board of Supervisors' issuance of approval to develop the land cannot render a decision upon the use of the land).

A PRD replaces the underlying zoning and subdivision ordinances of the included lots, so said ordinances are no longer applicable after the PRD is recorded. *Kang v. Supervisors of Tp. of Spring*, 776 A.2d 324 (Pa. Cmwlth. 2001).

Ferguson Township Zoning Ordinance ("FTZO") § 27-301 sets out the uses permitted in the Rural Agricultural (RA) District. High density residential dwellings are not listed in the RA District Primary Uses. FTZO § 27-301, Table 301. The RA District Accessory Uses includes "[c]ustomary uses accessory to the above; essential services" which can be understood as permitting stormwater management facilities. *Id.* However, it is clear that the Accessory Uses are expressly limited to operating solely in conjunction with a delineated Primary Use. Thus, stormwater management facilities located in the RA District must be serving in an accessory capacity to a permitted Primary Use.

In addition to listing the permitted uses within the RA District, FTZO § 27-301 states the following as the intent of the RA District:

> A. To retain the pastoral nature of the district.
>
> B. To encourage the preservation of agriculture as the most suitable use in rural areas.
>
> C. To limit development to those uses that are compatible with the agricultural environment.
>
> D. To prevent the extension across farmland of public utilities with costly use fees.
>
> E. *To preserve the quality soils for crop and pasture use by limiting the conversion of prime cropland to nonagricultural uses*.

FTZO § 27-301.1 (emphasis added).

In the case at bar, the Final PRD Plan includes the 5.50 acre RA Land with the proposed site use listed as "Stormwater Facilities." The plan explicitly states the following:

> A 5.50 acre portion of Tax Parcel 24-4-94 (Lot 3 Addition) will be subdivided from the parent tract and consolidated with Tax Parcel 24-4-76A. *This area will remain zoned Rural Agriculture (RA), and will not be included in the PRD proposed for The Cottages at State College by Toll Brothers*. This area will remain zoned Rural Agriculture (RA). This area will be utilized for stormwater detention basins.

Final Planned Residential Development Plan, Note 13 (emphasis added).

The sole, pertinent issue before the Court at this juncture is whether the Ferguson Township Board of Supervisors committed an error of law or an abuse of discretion by approving the Final PRD Plan. Specifically, this issue concerns whether stormwater management facilities serving land zoned R-4 can be constructed on land zoned RA. Appellants contend this use is not permitted on land zoned RA. Appellees and Intervenor contend stormwater facilities serving as an accessory to a primary use on land zoned R-4 can be constructed on land zoned RA, if all of the land is located within the same lot. The Court finds land zoned for RA cannot be used as an accessory for stormwater facilities serving a primary use which is not permitted in the RA District, and therefore the Board of Supervisors committed an error of law by approving the

Final PRD Plan.

The basis upon which Appellee and Intervenor rest their argument is essentially an attempted end-run around complying with the zoning ordinance applicable to the RA District. Instead of applying for a zoning variance or a zoning change for the RA Land, Intervenor chose to move forward with the PRD plan under the assumption that the RA Land could be used to serve their lot's primary R-4 residential use. Both Appellee and Intervenor cite *Sprint Spectrum v. Zoning Hearing Board*, 823 A.2d 258 (Pa. Cmwlth. 2003) as support for their contention that land zoned for agriculture use can be used to serve land zoned for residential use. However, Sprint is discernable from the case at bar. In *Sprint*, the Commonwealth Court held that a commercial entity may use an access drive over an agricultural district to reach its cell-tower located in a commercial district. *Id.* at 262-63. The Court reached this conclusion by reasoning that the access drive did not change the character of the agricultural district because the district would permit similar access drives as accessories to uses allowed in that district. *Id.*

The construction of stormwater detention basins in the RA District, which will be used for stormwater management of a non-permitted RA District use, is not analogous to a commercial vehicle using an access road over an agriculture district. FTZO § 27-301 specifically delineates an intent of the RA District as "preserv[ing] the quality soils for crop and pasture use by limiting the conversion of prime cropland to nonagricultural uses." Appellee and Intervenor argue that stormwater facilities

are required for the primary uses permitted in the RA District, and so the use of the RA Land for stormwater facilities in this case is innocuous. However, Appellee and Intervenor fail to grasp the fact that the rub rests not with the construction of stormwater facilities, but with the use the stormwater facilities will be serving after their construction. The zoning ordinance intends to preserve the soil quality for agricultural use and thus stormwater facilities serving permitted RA District uses would subscribe to this intent, but stormwater facilities serving a non-permitted RA District use would not.

The Court finds that stormwater management facilities located in the RA District must be serving in an accessory capacity to one of the RA District's permitted Primary Uses, and thus the Board of Supervisors committed an error of law by approving the Final PRD Plan.

Therefore, the Ferguson Township Board of Supervisors' approval of the Final Planned Residential Development Plan ("The Cottages at State College") is REVERSED and VACATED.

Accordingly, the Court enters the following Order:

ORDER

AND NOW, this 18th day of July, 2016, the Court hereby ORDERS that the Ferguson Township Board of Supervisors' approval of the Final Planned Residential Development Plan ("The Cottages at State College") is REVERSED and VACATED.

## Barany v. Giant Food Stores

*Civil procedure — Venue — Premises liability — Negligent failure to clean spill*

Defendant in slip and fall case sought new trial because their request to have emergency instruction to the jury at trial and an earlier request to change forum were denied. The court recommended that the denial of defendant's motion for post-trial relief be affirmed.

On Sept. 9, 2012 plaintiff Patricia Barany slipped and fell in a puddle of water at the U-Check Out area of a Giant Food Store. Defendant Giant Food Stores, LLC had a policy of stationing an employee at a podium near the U-scan stations, and specifically when an employee discovers a spill, the employee must clean it immediately and not leave it unattended. Joanne Pfeiffer, the employee at the podium on the day in question, saw the spill and was looking for paper towels to clean it up when plaintiff slipped in it.

On July 17, 2014 defendant moved to transfer venue to neighboring Bucks County, which was denied. The case went to trial on Oct. 21, 2015 and the jury found in favor of plaintiff, with a monetary award of $112,500. In November 2015 defendant moved for post-trial relief and a new trial, partially on the basis of the denial of venue change, which was denied in February 2016. Defendant appealed.

Defendant argued that it should receive a new trial because its request to change forum from Philadelphia County to Bucks County was denied. Its main reason was that witnesses had to travel for court appearances. The court summarized the general considerations for changing forum, as not being just for convenience but on showing that the venue was "oppressive or vexatious." Requiring participants to travel the 30 miles or so to Philadelphia County might be an inconvenience, the court conceded, but clearly not oppressive or vexatious; in any case, all witnesses were presented.

Defendant also argued that the court's refusal to recall the supervisor on duty for questioning was improper. Defendant wanted to question the supervisor concerning Pfeiffer's medical condition. The trial courts' denial was determined proper, since anything a supervisor might say about her health was hearsay, and defendants had the opportunity to question Pfeiffer directly but failed to do so.

During the trial, defendant requested two instructions to the jury, which were denied. The first, a "sudden emergency" instruction, it argued was relevant because of the suddenness of the spill. Citing *Lockhart v. List*, the court pointed out that the doctrine was available for a party in an

unforeseeable "perilous situation which permits little or no opportunity to apprehend the situation and act accordingly." The purpose of having an employee stationed at the podium with the express duty of addressing spills meant the accident was foreseeable and therefore the doctrine did not apply. The court was also asked to instruct the jury that defendant was not "an insurer of the safety" of anyone on it premises. The trial court properly denied it, since the duty was encompassed in the regular jury instructions and mentioning this would have caused confusion.

Defendant's final argument that it was entitled to judgment notwithstanding the verdict failed after all the appealed trial court's actions were upheld. The Court of Common Pleas reiterated the trial court's finding of negligence.

C.P. of Philadelphia County, December Term, 2013 No. 03696

BERNSTEIN, *J*., June 30, 2016—Plaintiff, Patricia Barany, filed a negligence complaint against Giant Food Stores on December 30, 2013. She claims she fell on a puddle of water while exiting the U-Scan checkout area at the front of the store. Defendant Giant Food Stores, LLC filed a Motion to Transfer Venue to Bucks County on July 17, 2014. On August 13, 2014, this Court denied Defendant's Motion to Transfer. The case was tried beginning on October 21, 2015 and the jury returned a verdict in favor of Plaintiff and against Defendant Giant Food Stores, LLC in the amount of $112,500. Defense filed a Motion for Post-Trial Relief on November 2, 2015, seeking a new trial for multiple reasons including the denial of their Motion to Transfer. On January 26, 2016, Plaintiff filed an Answer to Giant's Motion for Post-Trial Relief. On February 12, 2016, this Court entered an Order denying Giant's Motion for Post-Trial Relief, from which Defendant filed a timely appeal.

On September 9, 2012, Plaintiff slipped and fell on a

puddle of water exiting the U-Check Out area of a Giant Food Store in Plumsteadville, PA.[1] The U-Check Out area is an option given to customers who wish to scan their own items, as opposed to going to a typical cashier.[2] There is a podium located at the back of this self-check-out area, where an employee is posted to assist customers using the U-Check Out system and to look out for spills.[3] Defendant Giant has a specific policy that if an employee discovers a spill, it cannot be left unattended.[4] The employee is required to clean the spill immediately. Joanne Pfeiffer was the Giant employee who worked at the podium on the day of the incident.[5] Ms. Pfeiffer noticed the puddle of water before Plaintiff slipped, nonetheless she failed to warn Plaintiff about the spill, failed to put up any caution signs and failed to clean the spill before the fall occurred.[6] Instead, Ms. Pfeiffer rummaged for paper towels at the podium to clean the spill up.[7] As Ms. Pfeiffer sifted for paper towels, Plaintiff slipped and fell on the water.[8]

Ms. Pfeiffer's testimony was presented to the jury by videotaped testimony. Ms. Pfeiffer acknowledged that she noticed the spill before Plaintiff slipped.[9] The defense did not ask Ms. Pfeiffer about any medical conditions she had on the day of the incident.

During trial, Defense asked the Court if they could re-

1. N.T. October 2, 2015 a.m., Page 7, Line 5 through 15.
2. N.T. October 2, 2015 a.m., Page 12, Line 12 through 20.
3. N.T. October 2, 2015 a.m., Page 14, Line 4 through 15.
4. N.T. October 21, 2015 p.m., Page 103, Line 6 through 15.
5. N.T. October 2, 2015 a.m., Page 7, Line 16 through 19.
6. N.T. October 2, 2015 a.m., Page 28, Line 2 through 10.
7. N.T. October 2, 2015 a.m., Page 7, Line 9 through 12.
8. N.T. October 2, 2015 a.m., Page 7, Line 11 through 15.
9. N.T. October 2, 2015 a.m., Page 28, Line 8 through 22.

examine Mr. Mawyer, one of the supervisors who was working at the store on the day of the incident, about Ms. Pfeiffer being on disability.[10] Plaintiff's objection to this testimony was sustained by the Court.[11]

Defense counsel asked for a "sudden emergency" instruction to be given.[12] Plaintiff objected to this instruction and the instruction was not given.[13] The defense also asked the Court to instruct the jury that Giant was not "an insurer of safety."[14] The Court responded that this instruction was unnecessary because the duties of a landowner would be part of the instructions.[15]

I. Defendant's Petition to Transfer for Forum Non Conveniens was Properly Denied. Plaintiff's Choice of Forum was not Oppressive or Vexatious.

The defense claims they are entitled to a new trial because this Court should not have denied their Petition to Transfer Venue to Bucks County, Pennsylvania. Defense filed a Petition to Transfer pursuant to Rule 1006(d)(1). They claim that even though venue was proper in Philadelphia, the case should have been moved because witnesses had to travel from Bucks County to Philadelphia County. Rule of Civ. Pro. 1006 (d)(1) governs the doctrine of Forum Non Conveniens: "For the convenience of parties and witnesses the court upon petition of any party may transfer an action to the appropriate court of any other county where the action could originally have been

10. N.T. October 22, 2015 a.m., Page 9, Line 6 through 10.
11. N.T. October 22, 2015 a.m., Page 10, Line 3 through 4.
12. N.T. October 21, 2015 p.m., Page 136, Line 15 through 16.
13. N.T. October 21, 2015 p.m., Page 137, Line 1 through 4.
14. N.T. October 21, 2015 p.m., Page 141, Line 15 through 17.
15. N.T. October 21, 2015 p.m., Page 141, Line 18 through 22.

brought." Defendant has a high bar to meet to have their Petition to Transfer granted, mere inconvenience does not suffice and it must show that Plaintiff's forum was "oppressive or vexatious."[16] Deference should be given to Plaintiff's proper choice of forum.[17]

In the recent *Bratic v. Rubendall* decision, the Pennsylvania Supreme Court relaxed this standard, they said Transfer could be proper when the proposed venue and location of witnesses is a distant county of Philadelphia.[18] Here Defendant wishes to transfer to a neighboring county, Bucks County. Holding the trial in Philadelphia, roughly thirty miles from the venue they wished to transfer to, might be an inconvenience that does not rise to the level of oppressive or vexatious.

Furthermore, as Defendant concedes in their Motion for Post-Trial relief, Defendant was able to present all witnesses despite venue being in Philadelphia County.[19]

## II. The Trial Court Properly Denied Defendant's Request to have Mr. Mawyer Testify about Ms. Pfeiffer's Medical Condition.

On the second day of trial, the defense asked the Court if they could call Mr. Mawyer, who had testified the day before during Plaintiff's case-in-chief, back to the stand.[20] The defense wished to recall Mr. Mawyer to testify in their

16. *Cheeseman v. Lethal Exterminator, Inc.*, 701 A.2d 156, 162 (Pa. 1997).
17. *Wood v. E.I. du Pont de Nemours & Co.* 829 A.2d 707, 715 (Pa. Super. Ct. 2003).
18. *Bratic v. Rubendall*, 99 A.3d 1, 9 (Pa. 2014).
19. Defendant's Motion for Post-Trial Relief, p. 4.
20. N.T. October 22, 2015 a.m., Page 5, Line 20 through 23.

own case-in-chief that Ms. Pfeiffer was on disability.[21] Mr. Mawyer's knowledge about her health condition could only have come from what Ms. Pfeiffer or somebody else had told him. This was pure hearsay. Additionally, Defense had the opportunity to question Ms. Pfeiffer herself about her medical condition during her videotaped deposition. Despite this opportunity, the defense never asked Ms. Pfeiffer about her medical condition or if she was on disability.

Ms. Pfeiffer's medical condition is wholly irrelevant to any questions presented in this case. There is no claim that her medical condition had anything to do with her failure to warn Plaintiff of the dangerous condition.

## III. The Trial Court Properly Denied Defendant's Request to Charge the Jury On "The Sudden Emergency Doctrine."

The defense asked for a "sudden emergency" instruction to be given.[22] The defense claims that the jury should have been charged with the Sudden Emergency doctrine because Ms. Pfeiffer noticed the spill only a few seconds before Plaintiff fell.[23] Plaintiff objected to this instruction and it was sustained by the court.[24]

"The sudden emergency doctrine is available as a defense to a party who suddenly and unexpectedly finds him or herself confronted with a perilous situation which permits little or no opportunity to apprehend the situation

21. N.T. October 22, 2015 a.m., Page 9, Line 6 through 10.
22. N.T. October 21, 2015 p.m., Page 136, Line 15 through 16.
23. N.T. October 21, 2015 p.m., Page 136, Line 15 through 22.
24. N.T. October 21, 2015 p.m., Page 137, Line 1 through 4.

and act accordingly."[25] The doctrine is typically applied to motor vehicle accident cases, where a driver needed to respond quickly to avoid a collision[26]. To apply the doctrine, the situation must be sudden and unforeseeable.[27]

Defendant was not faced with the type of sudden, unforeseeable and perilous situation that warranted this charge. Here, the risk of a substance being spilled on the floor near the checkout area was precisely the danger that Ms. Pfeiffer was supposed to be looking for, did in fact see and failed to take appropriate action.

Ms. Pfeiffer said in her deposition:

> Q: As an associate at Giant Food Store, is one of your general job duties to be on the lookout for potential slipping or tripping hazards on the floor?
>
> A: Yes[28]

Later in the deposition Ms. Pfeiffer testified:

> Q: How long before Ms. Barany walked through the area did you see the water on the floor?
>
> A: A matter of seconds[29]

All Ms. Pfeiffer had to do was warn Plaintiff not to walk into the puddle until it had been dried.

A trial court need only charge the jury with law applicable to the facts in the particular case.[30] The sudden

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25. *Lockhart v. List*, 665 A.2d 1176, 1180 (Pa. 1995).
26. *Lockhart v. List*, 665 A.2d 1176, 1180 (Pa. 1995).
27. *Id.*
28. N.T. October 2, 2015 a.m., Page 14, Line 4 through 9.
29. N.T. October 2, 2015 a.m., Page 28, Line 2 through 5.
30. *Drew v. Work*, 95 A.3d 324, 329 (Pa. Super. 2014) (Citing *Pringle*

emergency doctrine is not applicable in this Slip and Fall case.[31] The instruction was properly denied.

## IV. The Trial Court Properly Denied Defendant's Request to Charge the Jury that a "Possessor of Land is Not the Insurer of Those on its Premises."

During the charging conference, Defense asked the Court to tell the jury that Giant was not "an insurer of the safety."[32]

When analyzing the adequacy of jury instruction, the instruction must be viewed as a whole.[33] "It is only when the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue that error in a charge will be found to be a sufficient basis for the award of a new trial."[34] The instruction that was given to the jury included Pennsylvania Suggested Standard Civil Jury Instruction 18.40. This fully covered the duty of care owed by Occupiers of Land to Invitees generally.[35] This instruction was properly explained as Giant Food Store's duty of care that it owed to its patrons on that day. Pennsylvania's jury instruction regarding the insurer of safety only had potential to mislead, rather than clarify.[36]

## V. Defendant is not Entitled to a Judgment Notwithstanding the Verdict.

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*v. Rapaport*, 980 A.2d 159, 177 (Pa. Super. 2009)).

31, N.T. October 21, 2015 p.m., Page 85, Line 5 through 8.

32. N.T. October 21, 2015 p.m., Page 141, Line 15 through 17.

33. *Chaudhuri v. Capital Area Transit*, 131 A.3d 589, 592 (Pa. Commw. Ct. 2016)

34. *Drew v. Work*, 95 A.3d 324, 329 (Pa. Super. 2014).

35. N.T. October 21, 2015 p.m., Page 137, Line 5 through 21.

36. *Drew v. Work*, 95 A.3d 324, 329 (Pa. Super. 2014).

Defense further seeks a Judgment Nothwithstanding the Verdict (JNOV). To prevail on a JNOV, the evidence needs to be such that no two reasonable minds could disagree that the jury verdict should be set aside.[37] "The trial court may award a judgment notwithstanding the verdict or a new trial only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice." *Brown v. Trinidad*, 111 A.3d 765, 770 (Pa. Super. 2015).

The jury verdict for Plaintiff that found Giant Food Stores negligent in failing to maintain a safe premises was proper. Ms. Pfeiffer's failure to prevent the slip and fall accident by putting up cones or warning the Plaintiff supports the jury verdict that Defendant was negligent.

For the reasons stated, the Denial of Defendant's Motion for Post-Trial Relief should be affirmed.

37. *Rohm & Haas Co. v. Cont'l Cas. Co.*, 781 A.2d 1172, 1176 (Pa. 2001)