

PITTSBURGH LEGAL JOURNAL

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PLJ

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OPINIONS

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**Sanjay Chopra v.
Amit Govil, Asit Govil, and Google, Inc.**

Opening and/or Striking Default Judgment—Preliminary Objections as “Meritorious Defense”—Requirements of Schultz v. Erie Insurance Exchange

1. Plaintiff sued Defendants, two individuals and Google, Inc. for Defamation, Interference with Existing Contractual Relations, and Interference with Prospective Contractual Relations.

2. The individual defendants (“Govils”) failed to timely respond, and a default judgment was entered. They filed a Petition to Strike/Open Judgment within ten days of entry of the default judgment.

3. The court denied the petition because Govils could not fulfill all of the requirements for opening and/or striking a default judgment.

4. For a court to strike a judgment, there must be a defect on the face of the record. Govils asserted that lack of personal jurisdiction over them was such a defect, but the court found that such an alleged fact could not be considered a defect on the record.

5. For a court to open a default judgment, the test of *Schultz v. Erie Insurance Exchange* must be satisfied. Govils could satisfy the first two prongs of the test—that the petition was promptly filed and that a meritorious defense could be asserted. Prompt filing did not appear to be in contention. A meritorious defense in the form of preliminary objections raising lack of personal jurisdiction satisfied the second prong because the complaint alleged Govils acted as officers of a Pennsylvania corporation, while Govils alleged in their petition that their place of business was New Jersey. The third prong of *Schultz* could not be satisfied, however, because the only excuse offered for Govils’ failure to appear was that they did not have enough time, an excuse not found by the court to be reasonable as a matter of law.

(Lynn E. MacBeth)

Shawn T. Flaherty and William F. Rogel for Plaintiff.
Roy S. Cohen & A. Michael Gianantonio for Amit & Asit Govil.
Shana Stanton for Google, Inc.

No. GD 08-27077. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION OF THE COURT

Wecht, A.J., June 11, 2009—Defendants Amit Govil and Asit Govil [“Govils”] appeal Orders of this Court dated March 23, 2009 and April 20, 2009. The March 23 Order denied Govils’ Petition to Strike/Open a Judgment. The April 20 Order denied Govils’ Emergency Petition to Open Default Judgment.

Background and Procedural History

On December 17, 2008, Plaintiff Sanjay Chopra [“Chopra”] filed a Complaint for Defamation, Interference with Existing Contractual Relations, and Interference with Prospective Contractual Relations, seeking both damages and equitable relief. On February 10, 2009, Chopra filed a Praecipe to Enter Default Judgment as to Defendants Amit and Asit Govil.

Govils presented a Petition to Strike, or in the Alternative, Petition to Open, Default Judgment. On March 4, 2009, the undersigned heard argument.¹ On March 23, this Court denied the petition to strike and the petition to open. This Member of the Court relinquished jurisdiction to the next-assigned Motions Judge, as the undersigned would soon complete his annual Civil Division rotation, and would return to the Family Division.

Govils then attempted to present a new Petition to Open, seeking leave to file an Answer, before the Honorable Timothy P. O’Reilly, Judge O’Reilly, believing that the undersigned should hear the new Petition after having made the initial ruling, did not hear the petition.

Then, on April 17, 2009, Govils provided this Court a copy of an Emergency Petition to Open. Chopra responded to the

Emergency Petition. On April 20, 2009, this Court denied the Emergency Petition after reviewing the papers.

On April 21, 2009, Govils filed a Notice of Appeal of the March 23 Order. On April 22, 2009, this Court ordered Govils to file a concise statement of errors complained on appeal pursuant to Pa.R.A.P. 1925(b). On May 5, 2009, Govils filed a second Notice of Appeal, this time of the April 20 Order. On May 7, 2009, this Court ordered Govils to file a second concise statement.

On May 11, 2009, Govils filed the first Concise statement. On May 21, 2009, the Superior Court consolidated the appeals. On May 27, 2009, Govils filed a second Concise statement and then, later in the day, an amended second Concise statement.

Issues Raised on Appeal

In their first Pa. R.A.P. 1925 (b) Statement, Govils averred as follows:

1. The Court erred in concluding that [Govils’] Petition to Strike must be denied because it raised a question of jurisdiction that could only be raised by Preliminary Objections. [Govils] Petition to Strike challenged the validity of a default judgment entered on a complaint that was not self-sufficient, and, therefore, voidable. As such, the default judgment may be directly attacked as invalid as the Court did not have jurisdiction to enter the judgment.

2. The Court erred in concluding that a Petition to Open Judgment filed within ten (10) days of the entry of default (forty-six (46) days after the service of the Complaint) should not be opened for the purpose of filing Preliminary Objections when a reasonable excuse for delay was presented. While the Court concluded that the Govil Defendants timely filed their Petition to Open and presented a meritorious defense, the Court erred when it determined that a reasonable excuse for the delay in filing a responsive pleading was not presented. Alternatively, the Court should have granted leave to [Govils] to file an Answer upon their request at oral argument.

In their amended second Pa. R.A.P. 1925 (b) Statement, Govils averred as follows

1. The Court erred in ruling on the Emergency Petition to Open Default Judgment without first holding oral arguments and/or evidentiary hearing.

2. The Court erred in denying the Emergency Petition to Open Default Judgment when it was timely filed, presented a meritorious defense, and provided a reasonable excuse for delay.

Discussion and Analysis

Striking and opening default judgments are two separate and distinct remedies. *PennWest Farm Credit, ACA v. Hare*, 600 A.2d 213, 217 (Pa.Super. 1991). A petition to strike “operates as a demurrer to the record” and is appropriate when defects appear on the face of that record. *Id.* Whether a petition to open is granted or denied is within the discretion of the trial court, and will not be reversed absent an abuse of discretion. *Academy House Council v. Phillips*, 458 A.2d 1002, 1005 (Pa.Super. 1983).

On March 4, 2009, Chopra and Govils appeared on a Petition to Strike and/or Open Default Judgment. Govils sought to have the default judgment stricken, or, in the alternative, to have the judgment opened and to obtain leave to file preliminary objections.

For a court to strike a judgment, there must be a defect on the face of the record. In determining whether it should strike a judgment, the court is limited to reviewing that record. *Resolution Trust Corp. v. Copley Qu-Wayne Assoc.*, 683 A.2d 269, 273 (Pa. 1996). If factual averments in the record are disputed, the court should open the judgment, rather than strike it. *Id.* Before a court will grant a petition to open a judgment, it must decide that the petition presents sufficient evidence that, in a jury trial, would require the issues to be submitted to the jury. *Ohio Pure Foods, Inc. v. Barbe*, 697 A.2d 252, 253 (Pa. 1997). The evidence presented in the petition must be credible. *Iron Worker’s Savings & Loan*

Ass'n v. IWS, Inc., 622 A.2d 367, 371 (Pa.Super. 1993). The evidence is viewed under a directed verdict standard: all evidence is viewed in the light most favorable to the party seeking to open the judgment, and that party enjoys the benefit of all reasonable inferences from that evidence. *Fleetway Leasing Co. v. Block*, 26 Pa D&C 4th 230, 233 (C.P. Montgomery 1995).

On the issue of striking the judgment, the complaint and confession of judgment are read together to determine whether there are defects on the face of the record. *Parliament Industries, Inc. v. William H. Vaughan & Co.*, 459 A.2d 720, 726 (Pa. 1983). Govils argued that there were no allegations that they were subject to Pennsylvania's personal jurisdiction, and that this omission rendered the complaint defective on its face. Chopra replied that the facts alleged by Govils in contesting personal jurisdiction are not of record and therefore cannot create a defect on the face of the record. Chopra was correct. In a similar case, where the appellee alleged lack of jurisdiction due to improper service, the Superior Court held that striking the judgment was inappropriate and that, instead, preliminary objections should have been filed. *Goldenberg v. Holiday Inns of America Inc.*, 323 A.2d 176, 177-78 (Pa.Super. 1974). In accord with this authority, this Court denied Govils' Petition to Strike.

On the issue of opening the judgment, Govils argued that they filed their Petition to Open and their preliminary objections within ten days after the judgment was entered. Further, Govils argued that Rule 237.3, while not wholly applicable, should be read to suggest that the judgment should be opened because the petition was filed within ten days and a meritorious defense was raised. Govils acknowledged that the test of *Schultz v. Erie Insurance Exchange*, 477 A.2d 471 (Pa. 1984) must be satisfied, including a showing that the failure to appear can be excused. Govils claimed that their failure to appear arose from their delay in finding a local attorney because Govils both were outside the jurisdiction.

Chopra replied that Rule 237.3 is irrelevant, because it applies when the defendants wish to file an Answer. See Pa. R.C.P. 237.3 Note. Chopra agreed that *Schultz* is on point, and that it imposes three requirements on the petitioner: a showing that the petition was promptly filed, a meritorious defense, and an excuse for the failure to appear. 477 A.2d at 472. Chopra argued that lack of personal jurisdiction cannot be a meritorious defense because, by definition, it is not a defense, but a preliminary objection. Chopra also argued that Govils did not show that their failure to appear was excusable; Govils were aware of the suit, yet did not file a responsive pleading. Further, Chopra argued that he continues to be harmed by Govils' action and that any delay in the litigation will only do further harm to him.

This Court found that Govils met two of the *Schultz* requirements, but not the third. Therefore, this Court denied the petition.

The first requirement of the *Schultz* test—prompt filing of the petition—does not appear to be in contention. Chopra did not seem to question this element, other than to assert that the ten-day rule in Rule 237.3 does not apply. The Petition was filed within ten days of the default judgment. That appears to satisfy the first element of *Schultz*.

On the second element of the *Schultz* requirements (*i.e.*, that a meritorious defense can be shown) the Superior Court has held that preliminary objections can serve to establish a meritorious defense. *Atlantic Credit & Finance, Inc. v. Giuliana*, 829 A.2d 340, 343 (Pa.Super. 2003). In that case, the preliminary objections raised the issue of lack of verification and of failure to attach the contract upon which the complaint was based. Although the instant case involved preliminary objections based on personal jurisdiction, the *Giuliana* case did not limit itself to the specific preliminary objections filed there. If the facts Chopra alleged in his response are true, *i.e.* Govils acted as officers of a Pennsylvania Corporation, then Govils are subject to personal jurisdiction. Govils alleged that their place of business is New Jersey. Using the directed ver-

dict standard, and viewing all evidence in the light most favorable to the petitioner, Govils raise a meritorious defense.

The third element of the *Schultz* requirements is that the failure to appear can be excused. A failure to appear was found to be reasonable in a case where an attorney believed an extension had been granted to all defendants for filing their answer, but the plaintiff believed the extension only applied to one defendant. *MidAtlantic Bank, N.A. v. Accu-Tech Tool, Inc.*, 33 Pa. D&C 4th 357, 361-63 (C.P. Monroe 1996). The failure to appear also was excused where the complaint was not effectively served because it was given to an unidentified person in City Hall, instead of someone who was authorized to receive service of process. *Comyn v. SEPTA*, 594 A.2d 857, 859 (Pa. Commw. 1991). However, when the attorney believed his entry of appearance was sufficient to stop a default judgment, the excuse was not reasonable. *Davis v. Burton*, 529 A.2d 22, 24 (Pa.Super. 1987). The *Davis* Court gave examples of reasonable excuses, such as clerical oversight or misplacement of papers through no fault of the attorney. *Id.* at 23.

In this case, Govils alleged that they believed they would be able to retain local counsel in time and that judgment was entered 35 days after service was sent to the wrong address. However, Govils failed to allege that there was no actual notice or that they were unaware of the lawsuit or the deadline for filing. They did not seem to offer any excuse except that they did not have enough time. This Court found that Govils' excuse for their failure to appear was not reasonable, and that it did not meet the third *Schultz* requirement. Therefore, the Petition to Open was denied. This Court did not permit Govils to file an Answer because they had not met the burden to open the judgment.

Govils' emergency petition requested that judgment be opened and that the Govils be given leave to file an Answer. Govils advanced the same arguments for opening the judgment in their emergency petition as they did in their original petition and in their oral argument before this Court on March 4. Since the same test applied, this Court denied the petition. The third *Schultz* requirement still had not been satisfied.

Govils offered nothing new in their Emergency Petition. Govils also were extremely concerned with receiving a ruling on the Emergency Petition immediately so that they could file a Notice of Appeal as to the March 23 Order if the Emergency Petition were denied. Govils' attorney called the undersigned's chambers multiple times in the couple of days that the Emergency Petition was under advisement and insisted that the April 20 Order be faxed to his office. For all of these reasons, this Court ruled on Govil's papers rather than scheduling a hearing on the Emergency Petition.

BY THE COURT:
/s/Wecht, A.J.

¹ The other defendant, Google, Inc., has not appeared for any of the arguments and has not filed any papers in this case.

Christina M. Mossburger v. Kevin A. Eiler

Custody—Contempt

1. Custody of the parties' eight year old child rests with the father in Allegheny County, Pennsylvania, subject to partial custody enjoyed by the mother, who resides in Alaska. Pursuant to the current custody order, the father was to take the child to Alaska to be with her mother over Christmas of 2008.

2. On December 23, 2008, the father took the child, then seven years of age, to the airport to travel to Alaska. His flight from Pittsburgh to Chicago was delayed so that he missed his connecting flight from Chicago to Alaska. He was not advised

by the airline of any likelihood of missing this connecting flight. He was, however, told that he could stay in Chicago and attempt to travel standby on December 26, 2008 or buy a new ticket entirely to travel on December 28, 2008. Rather than stay in a hotel in Chicago over the Christmas holiday, the father returned with the child to Pittsburgh, although he had to fly through Philadelphia where he was again delayed. The father and the child spent Christmas Eve in a hotel in Philadelphia, returning to Pittsburgh on Christmas Day. Following a number of hours on the telephone with airline personnel, the father was able to rebook a flight for December 28, 2008.

3. The mother filed a petition for contempt alleging that the father had willfully failed to transport the child to Alaska for the Christmas holiday. The court found that the father had not willfully failed to comply with the order but that he had diligently attempted to comply. The trial court compensated the mother by adding four days to her summer 2009 custody time, two at the beginning and two at the end.

4. The court raised a concern as to what would have happened in this situation had the child been slightly older and flying alone.

(Christine Gale)

Timothy G. Uhrich for Plaintiff/Mother.

Jan Ira Medoff for Defendant/Father.

No. FD 01-3198-003. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

MEMORANDUM

Wecht, A.J., May 1, 2009—Here lies yet another sad tale of a broken family whose contentious, long-distance custody dispute has been aggravated and intensified by our essentially unregulated, unaccountable, and uncaring airline industry. It is not the first such episode. Sadly, there is every reason to suspect that it will not be the last.

Pursuant to an Order of Court dated July 25, 2008, Defendant Kevin A. Eiler [“Father”] exercises primary custody of the parties’ eight-year-old child, Lita [d.o.b. 2/12/01], in Allegheny County, Pennsylvania, while Plaintiff Christina M. Mossburger [“Mother”] exercises partial custody in Fairbanks, Alaska. In compliance with that Order, Father purchased airline tickets to travel with Lita from Pittsburgh to Fairbanks (via Chicago and Anchorage) on December 23, 2008. The reason for Father’s traveling with the child was that the child was too young to travel unaccompanied.

On December 23, 2008, Father and Lita arrived at the Pittsburgh Airport at 12:30 p.m. or 1:00 p.m. for a 3:45 p.m. flight. American Airlines rewarded them for their diligence in arriving early by consigning them to wait until approximately 7 p.m.

Because of Father’s and Lita’s delayed departure from Pittsburgh, they arrived too late in Chicago to catch their connecting flight to Anchorage on American Airlines’ “partner” Alaska Airlines.

When Father and child left Pittsburgh, the airline must (or should) have known that there was no way Father and Lita could make their connecting Chicago to Anchorage flight, and that the “weather” in Chicago (Chicago weather being a new discovery for the airline) would not allow for any other flights that evening. Had any airline employee advised Father of these facts before he left Pittsburgh, Father could have stayed in Pittsburgh, tried to make other arrangements immediately, and avoided the rest of the expense, delay, stress and inconvenience he and the then seven-year-old Lita encountered.

When Father and Lita arrived in Chicago on the night of December 23, they were met by enormous milling crowds in the airport terminal. While there was an airline employee waiting near the gate, that employee merely directed the passengers to a line of several hundred people waiting to speak with a ticketing agent. Father faithfully waited in line for two to three hours with his seven-year-old child to gain information about how and when he could connect to Fairbanks via Anchorage. After finally reaching the counter, Father displayed this Court’s Order to the airline clerk because Father knew that he was

required to deliver Lita to Mother. The clerk told Father that he could try to stand-by for a flight on December 26, but that his chances of actually getting on that flight were not good, and that Father could elect to wait for the privilege of purchasing new tickets for seats on flights scheduled for December 28.

Faced with the prospect of staying in Chicago, with all the attendant expenses, for several days, at Christmas, with a seven-year-old child, or returning home and trying again, Father reasonably decided to try to return to Pittsburgh. Father then was forced to overnight with the child in Chicago at a cost of \$90.00 for the hotel room (not including meals and other expenses; the airline could only spring for a portion of the room), and then catch a flight to Philadelphia the next morning (Christmas Eve) (Pittsburgh being unavailable for some unknown reason) with the intention to return to Pittsburgh the same day.

Father was met in Philadelphia with yet another “weather” delay. He and Lita then were forced to spend Christmas Eve in Philadelphia and return to Pittsburgh on Christmas Day. While the airline did pay for the hotel in Philadelphia, Father was forced to incur expenses for meals. More importantly, Lita was forced to incur a Christmas Eve spent in an airport hotel. A casual observer might wonder how this situation would have played out if the child had been a year or two older and had been traveling alone in this wintry ordeal. Would the airline have let a minor wait in the Chicago airport for four or five days until the next available flight? Does the airline even care?

Upon his eventual return to Pittsburgh on Christmas Day, Father (who is a cook, not a lawyer) was compelled to spend hours of the family’s remaining holiday time making several telephone calls to the airline trying to get the child and himself to Alaska on a different flight. After many calls, Father finally was able to book December 28 travel. During these telephone calls, Father initially was put on hold for hours, and initially was told that he would have to buy an entirely separate ticket for an additional \$2,000.00¹ for the Pittsburgh to Chicago and Chicago to Pittsburgh portions of his original tickets that he and the child had used.²

Mother presented a Petition For Contempt, alleging that Father had willfully failed to comply with the Order’s requirement that the child travel on the first flight available after school recesses for winter break pursuant to the July 25, 2008 Order. Father opposed the Petition, and this Court scheduled a hearing.

At the hearing, there was no proof that Father had willfully failed to comply. To the contrary, Father diligently had attempted to comply. He had been thwarted by the airlines’ misfeasance, incompetence, and utter callousness.

Because Father was not in contempt, the Court did not hold him in contempt. The Court will order that Mother obtain two extra days on both ends of the summer this year. Currently, Mother obtains custody of the child the seventh day after school recesses for the summer, and returns custody the seventh day before school begins. This coming summer, she will obtain custody the fifth day after school ends, and return custody the fifth day before school begins. The Court is aware that Father may already have purchased tickets for the child and that this may, unfortunately, cause additional expense for changing the tickets. In such case, we once again see proof that, regardless of responsibility for causing a problem, the airline always profits in the end.

An Order in accordance with this Memorandum follows.

ORDER OF THE COURT

AND NOW, this 1st day of May, 2009, in accordance with the foregoing Memorandum, and following record hearing on April 30, 2009, it is hereby ORDERED that:

1. Mother’s Petition for Contempt is DENIED. Father is not in contempt of the July 25, 2008 Order, because Father did not willfully fail to comply.

2. Mother is entitled to make-up time with the child. For the summer of 2009, Mother’s custody shall begin on the

fifth day after school ends and shall end on the fifth day before school begins.

SO ORDERED.
BY THE COURT:
/s/Wecht, A.J.

¹ Father paid \$3,700.00 for his initial Pittsburgh to Fairbanks tickets, yet the airline stated that the single leg Pittsburgh to Chicago flight would cost \$2,000.00.

² Father was able to get this additional fee waived, but only after a four-hour phone call with the airline.

Barbara A. Clark v. Richard P. Shannon

Discovery—Motion to Compel—Pa. R.C.P. 4009.1—Online Access to Bank Records

1. The court issued a memorandum opinion in response to Husband's Motion to Compel Wife's discovery responses for banking and bill paying records.

2. The court denied Husband's request that Wife access these materials online, which Husband argued would have obviated the need for Wife's authorization and his need to spend money to secure the copies.

3. Online records are not in Wife's possession or custody pursuant to Pa. R.C.P. 4009.1.

4. The court also held that the records were not in Wife's control, where there was no evidence that Wife banked online or paid bills online. There is no way to know whether Wife knew how to secure records online. The court will not yet presume "online fluency."

(Hilary A. Spatz)

Melaine Shannon Rothey for Plaintiff.

Deborah Luteran Iwanyshyn for Defendant.

No. FD 08-007937. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

MEMORANDUM

Wecht, A.J., April 20, 2009—Defendant Richard P. Shannon ["Husband"] has filed a Motion to Compel Discovery. Husband asserts that Plaintiff Barbara A. Clark ["Wife"] has failed fully to comply with his discovery request by choosing not to provide all the requested documents. In her Response, Wife answers that she provided all the documents she has, and that she will provide an authorization so that Husband can get the additional documents from Wife's banks and credit card companies. Wife also avers that Husband did not fully respond to Wife's discovery request and that Wife was forced to get authorizations. Husband in turn responds that Wife has access to the requested materials on-line and would be able to print the requested material through this on-line access, thus obviating the need for an authorization or the need for Husband to spend the money to get the materials from the banks.

The dispute implicates Pa. R.C.P. 4009.1. The question is whether the material is within Wife's "possession, custody or control." There appears to be no case law directly on point, nor are the notes to the Rule helpful. The information is not in Wife's possession or custody. The question is whether it is within her control. This Court believes it is not. The situation is both similar to, and different from, that of paper bank records. If a party does not have copies of his or her bank records, the records might be viewed as within his or her control because the party could obtain them from the bank. However, the Court generally would not put the burden on the party. Instead, the Court would have the party provide an authorization. The difference here is that Wife could more easily obtain the comput-

er records since they are accessible electronically. If there were evidence or averments that Wife banked online or paid bills online, the Court might be more inclined to say that the records are in her control. Without that, there is no way to know whether Wife even knows how to obtain the records online. The burden should not be on her, in effect, to educate herself about how she can take steps to save Husband a few dollars and an hour or two. Perhaps, in the near future, online fluency can be assumed. But we are not there yet.

Ideally, the parties would be able to cooperate and lessen the expense of obtaining the records directly from the bank. But this is a family law case, not a cooperative endeavor. It appears that Wife believes Husband was less than forthcoming with his discovery, and now Wife is not inclined to cooperate further by affirmative steps online. Since the records are not within Wife's possession, custody or control, this Court will not compel her to make them so. Wife will, however, be held to her promise to provide authorizations if requested.

An Order follows.

ORDER OF THE COURT

AND NOW, this 20th day of April, 2009, in accordance with the foregoing Memorandum, it is hereby ORDERED that Husband's Motion to Compel is DENIED. Wife shall provide requested authorizations as volunteered in her Response to Husband's Motion.

SO ORDERED.
BY THE COURT:
/s/Wecht, A.J.

Lori A. Marasco, Administratrix and/or Guardian Ad Litem of the Estate of John R. Marasco, Sr. v. Giant Eagle, Inc., Eckerd Corporation d/b/a Eckerd Drugs, and/or Rite Aid Corporation and Robert Dean, M.D.

Connor Objections—Sufficient Specificity

1. Plaintiff claimed the Defendants were negligent because they enabled the deceased to assemble a substantial quantity of prescription drugs via prescriptions written by Dr. Dean and filled by Giant Eagle and Thrift. Plaintiff alleged that the quantity of pills issued and their frequency was negligence.

2. The Court finds the allegations of the Complaint are sufficient to place Thrift Drug on notice that Thrift's employees did not exercise the reasonable care of a pharmacy. Additional evidence need not be pleaded nor is Plaintiff required to set forth the expert testimony it will offer to support its allegations.

3. Thrift also argued it had no duty of care to Plaintiff's deceased. The Court finds that the issue is whether a pharmacist seeing narcotic drugs being provided in large quantities over short periods of time had an obligation to question the same, and exercise some "modified brother's keeper" role. See *Riff v. Morgan Pharmacy*, *infra*.

4. The Complaint is found to be sufficiently specific.

(Diane Barr Quinlin)

Charles A. Frankovic for Plaintiff.

Judith A. Moses for Thrift Drug, Inc.

Tyler J. Smith for Robert Dean, M.D.

Stephen S. Zubrow for Giant Eagle.

No. GD 08-027789. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM ORDER

O'Reilly, J., April 27, 2009—This case involves Preliminary Objections filed by one of the Defendants, Thrift Drug, (“Thrift”) to the claim of professional negligence alleged by Plaintiff, Lori A. Marasco, Administratrix and/or Guardian Ad Litem of the Estate of John R. Marasco, Sr., (“Marasco”), which resulted in her son’s death. In essence, the deceased was able to assemble a substantial quantity of prescription narcotic drugs via prescriptions written for him by Defendant, Dr. Robert Dean, M.D. (“Dean”), and filled by Defendant, Giant Eagle (“Giant Eagle”), and Thrift.

The gist of the negligence claim is that Dean should not have issued the prescriptions, and Giant Eagle (via its pharmacy), and Thrift should not have filled them. Marasco alleges that the quantity of pills issued, and their frequency was negligence.

Thrift has filed Preliminary Objections relying on that Iodestar for Preliminary Objections; *Connor v. Allegheny General Hospital*, 461 A.2d 600 (1983). Connor suffered complications from a barium enema, which had leaked into her abdominal cavity. Initially, she alleged that the procedure in administering the barium enema was faulty, and it had caused a perforation of her colon, precipitating the leak, which led to other complications. On the eve of the trial, her expert was not sure whether the conduct of defendants there had actually perforated her colon, but he did opine that defendants re-action to the presence of barium in her abdominal cavity was too slow, as was the diagnosis.

Connor’s counsel then sought to Amend the Complaint to add this additional element of negligence. The Amendment was denied, and such denial ultimately reached our Supreme Court, where the action of the Trial Judge was reversed. The Court noted that the Amendment did not add a new cause of action, and, therefore, was appropriate even though the Statute of Limitations had run. It noted that in the original complaint, plaintiff had averred that defendants were negligent, “...in otherwise failing to use due care and caution under the circumstances,” and concluded the Amendment was within the scope of that “otherwise” averment. The Court also dropped a footnote to the effect that if the defendants did not understand the “otherwise” averment, they could have filed Preliminary Objections to it. Therein lies the seed for this niche in the litigation industry.

In the case before me, Marasco has alleged in paragraphs 123, sub-sections (a) through (n), a variety of acts, which it contends were negligent. Those acts are alleged with sufficient specificity to let Thrift know that its employees did not exercise the reasonable care of a pharmacy because of the facts allege in the preceding paragraphs—i.e. the too frequent providing of too many pills based on questionable prescriptions. Marasco need not plead evidence. Further, the Preliminary Objections to subparagraphs (a) through (g), in essence, ask Marasco to set forth the expert testimony it will offer to support those allegations. I do not believe Connor requires that degree of evidence pleading.

Thrift has also asserted that the allegations of paragraphs 123 (c)(h)(l)(j)(ck) and (I) fail to conform to Law or Rule of Court. In essence, this is Thrift’s way of saying that it had little or no duty of care owed to Marasco. In an excellent brief on this point, counsel cites a variety of cases addressing the obligation *vel non* of advising the public about side effects of drugs. I do not believe that is the issue here, but rather whether a pharmacist seeing narcotic drugs being provided in large quantities over short periods of time, had an obligation to question the same, and exercise some “modified brother’s keeper” role toward the deceased. This is the holding of *Riff v. Morgan Pharmacy*, 508 A.2d 1247 (1996), a case conspicuously absent from Thrift’s brief.

At argument defense counsel also suggested that Thrift had no knowledge of what Giant Eagle was doing, and, thus, a major element of Marasco’s claim is missing. This assertion is not relevant at this stage of the proceedings, and may be developed in discovery, and, indeed, at trial.

In conclusion, I am satisfied that the Complaint herein is sufficiently specific, and otherwise proper so as to warrant OVERRULING of the Preliminary Objections of Thrift Drug. They are OVERRULED and Thrift is to answer within 30 days.

BY THE COURT:
/s/O’Reilly, J.

Date: April 27, 2009

Commonwealth of Pennsylvania v. Marlynn Bryant

Bond Forfeiture—Notice

The issue was whether Mr. Bryant received proper notice that his bond was forfeited. Section 6802(e) provides that notice provisions are automatically waived when the owner, after receiving a subpoena to appear in court, fails to appear and does not provide good cause for his absence within 45 days. Since Mr. Bryant failed to appear at his scheduled trial and allowed 45 days to elapse without explanation, his bond money was properly seized.

(Diane Barr Quinlin)

Michael Streily for the Commonwealth.

Carrie L. Allman for Defendant.

No. CC 200402445. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Cashman, J., April 30, 2009—The instant case was remanded to this Court to make a determination as to whether or not the appellant, Bryant and/or his counsel, received notice of the forfeiture of the monies that allegedly belonged to him. A hearing was held on January 23, 2009, at which hearing it was determined that the funds seized from Bryant were forfeited pursuant to 42 Pa.C.S.A. §6802(e). That Section specifically provides for the forfeiture of property seized from the defendant and waives the notice requirement.

(e) **Notice automatically waived.**—The notice provisions of this section are automatically waived when the owner, without good cause, fails to appear in court in response to a subpoena on the underlying criminal charges. Forty-five days after such a failure to appear, if good cause has not been demonstrated, the property shall summarily forfeit to the Commonwealth.

In the instant case at the time that Bryant’s case was originally scheduled for trial, he did not appear and, accordingly, his bond was forfeited. Forty-five days following the forfeiture of his bond, the Commonwealth submitted a petition seeking to forfeit the monies that were seized from Bryant. In that petition, specifically paragraph eight, the Commonwealth set forth the basis for its forfeiture, that being 42 Pa.C.S.A. §6802(e).

8. More than Forty-five days have elapsed since the defendant’s failure to appear on June 25, 2004, permitting the forfeiture of the property seized in paragraph 1, pursuant to 42 Pa.C.S.A. §6802(e).

Although the Order makes reference to Section 6802, it does not specifically designate Subsection (e); however, the petition filed in support of that Order specifically makes reference to Section 6802(e) and sets forth that Section is the basis which would permit the forfeiture of the monies seized without notice to Bryant and his attorney.

Cashman, J.

Dated: April 30, 2009

CAPSULE SUMMARIES

Andrew F. Andros v. Laurie Ann Waltz

Property Settlement Agreement—Enforcement—Doctrine of Implied Duty of Good Faith and Fair Dealing

1. The parties entered into a Property Settlement Agreement resolving economic issues attendant to divorce. Wife initiated proceeding to enforce portions of Agreement relating to Husband's obligations with respect to two pieces of real estate. The court affirmed the Hearing Officer's determination that Husband owed Wife approximately \$16,600.00 for expenses related to the properties including mortgage, taxes, and upkeep. Neither party filed exceptions to this portion of the recommendation.

2. Pursuant to the agreement, Wife owned Ashlyn Street, but, until such time as the current tenant vacated the premises, Husband would receive the rents and be responsible for mortgage, taxes, insurance, and maintenance. The issue on appeal was whether or not the tenant was in fact the "current" tenant.

3. The court revised its initial determination with regard to this property and held that the record did support a finding that the "current tenant," the tenant who leased the property at the time of the execution of the Agreement, continued her occupancy of the property. The court found, therefore, that Husband had a continuing responsibility for all of the economic obligations on the property under the Agreement.

4. As to the Celtic Street property, which was transferred to Wife, Husband was entitled to collect rents and was required to pay all of the related expenses, until the property was sold.

5. The court affirmed the Hearing Officer's determination and relieved Husband of any future responsibility for the expenses on this property. Wife was the titled owner and had obligated herself under the terms of the agreement to list the property for sale and make reasonable efforts to sell the property.

6. Wife's actions demonstrated her understanding that she had an affirmative obligation to timely list the property. Wife informed the tenant that a realtor would contact her and that she would have to leave the premises. Wife also testified at the hearing that she knew that she was obligated to sell the property.

7. Although the agreement did not specify when Wife was to list the property for sale, the court found that every contract imposes a duty of good faith and fair dealing in its performance. While the contract was silent on this duty, the doctrine of implied duty of good faith and fair dealing implies a provision to avoid an injustice and effectuate the parties' intent. The court may supply reasonable terms where the intention is known. In this case, where no time was agreed upon for the completion of the contract, it must be completed within a reasonable time under the circumstances. *Janson v. Frost*, 618 A.2d 1003 (Pa.Super. 1993)

8. Wife's decision to delay listing the property for almost two years from date of the agreement while spending \$60,000.00 remodeling the home (appraised at \$50,000.00

several years earlier) was not reasonable. Wife unreasonably failed to exercise diligence, and Husband was, therefore, relieved from further obligation on the property.

(Hilary A. Spatz)

Lois E. Glanby for Plaintiff.

Jennifer L. Jackson for Defendant.

No. FD 06-009047. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

Hens-Greco, J., April 20, 2009.

Doreen Speer v. David Speer

Child Support—Social Security Offset

1. The parties were married in June of 1981 and are the parents of two children. The parties separated in 1997 and in 1999 entered into a property settlement agreement and divorce. Their agreement provided that the father would pay \$1,100 per month in child support for twenty years, well beyond the children's majority.

2. The father then became disabled and was approved for Social Security disability with a \$303 per month derivative benefit for the one remaining minor child. During enforcement proceedings regarding support, the father was given full credit for Social Security derivative benefits for the younger child.

3. The mother complained that this was an improper modification of the parties' agreement regarding child support. The court disagreed, however, stating that there is a presumption that a child support obligation will be reduced by the amount of disability benefits paid directly for the child. The spirit of the agreement was defined by the amount that the mother was to receive rather than the specific source. Failure to credit the father would actually modify the agreement as it would significantly increase the amount that the mother would receive.

4. The mother also complained that the court should not have given a dollar for dollar credit as this is not consistent with the application of such benefits as prescribed by the child support guidelines. The court disagreed, however, stating that the formula was not applicable because the amount of support was based on an agreement and not on guidelines.

5. The mother finally complained that it was improper to reduce the father's financial obligation per month as the derivative benefit is a benefit for the child and not for the father. The court disagreed, stating that Social Security is a form of insurance into which the father paid through taxes. The court pointed out that the mother was overlooking the fact that receipt of additional money would result in a windfall to her.

(Christine Gale)

Timothy Uhrich for Plaintiff/Mother.

Dennis DelCotto for Defendant/Father.

No. FD 98-8838-001. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

Hertzberg, J., April 27, 2009.