

PITTSBURGH LEGAL JOURNAL

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PLJ

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OPINIONS

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**DeLana Lunsford Shaffer v.
Allegheny General Hospital
and
Marianne Iwankonkiw v.
Bethel Park School District
and Nutrition, Inc.
and
George Haburjak and Donna Haburjak v.
JSMS Partners LP, JJK Holdings, Inc., et al.,
Krebs Chrysler-Jeep, Inc., et al.**

*Misidentified Plaintiff—Amendment of Civil Complaint—
Statute of Limitations—Estoppel by Fraudulent Concealment*

In three unrelated cases, the Court addressed the issue of amendment of a complaint to correctly name the defendant after the plaintiff incorrectly identified the party which the plaintiff intended to sue. In all three cases, the court permitted amendment outside of the limitations period.

1. In the first case, Plaintiff intended to sue her employer, Allegheny Specialty Practice Network, but instead identified the defendant as Allegheny General Hospital. Plaintiff worked for her employer for almost four years and had knowledge of the correct name. In attempting to amend her complaint to correctly identify the defendant outside of a statute of limitations, she alleged that Allegheny General engaged in fraudulent concealment by requesting additional time to respond to the complaint and then filing preliminary objections as to damage claims and pleading deficiencies. Allegheny General argued that estoppel by fraudulent concealment cannot be raised where plaintiff actually knew the correct identity of her employer and where the hospital did nothing to cause her to misidentify her employer. The court found that all that is required is evidence to establish that one party actively misled another party, and permitted the amendment of the complaint.

2. In the second case, Plaintiff worked as a kitchen manager and fell while walking into a freezer. Her attempt to sue the company responsible for custodial and maintenance repairs misidentified the defendant as Nutrition, Inc. This defendant notified its liability carrier who opened a file and communicated with Plaintiff. The court permitted amendment of the complaint after the limitations period because fraudulent concealment applied to the case, since an insurance company whose insured had no involvement with the incident would not be expected to communicate on several occasions with counsel for plaintiff regarding the merits of the claim, to obtain information from plaintiff regarding the extent of plaintiff's injuries, and to interview plaintiff. There would be no reason for these additional activities taken by the insurance company other than to cause plaintiff's counsel to continue to identify the party providing maintenance services as Nutrition, Inc.

3. In the third case, Plaintiff (husband) fell on business premises while having his vehicle serviced. He alleged the fall occurred at Krebs Chrysler-Jeep while, in reality, it occurred at Krebs Motors North, Inc, d/b/a Krebs Dodge, a separate corporation sharing common officers. Service of the complaint was made upon the individual who was pres-

ident of both corporations. The court found that the concealment doctrine applied and allowed amendment of the complaint outside of the limitations period. At the time the complaint was served, Krebs Dodge knew that the fall had occurred at Krebs Dodge as a result of a recorded statement obtained from plaintiff. In addition, the insurance carrier made a statement in a letter designed to mislead plaintiffs' counsel as to the proper defendant. The letter stated, "Our liability investigation of the facts regarding the above referenced claim concluded with the determination that our policyholder is not legally liable for damages to your client." The court stated that if the claim was being denied because the fall occurred at another location, an insurance company protecting the interests of its insured would have informed plaintiff's counsel of this fact so the insured would not be sued. Instead, the letter was a response designed to mislead counsel as to the name of the proper defendant in order to protect the interests of a related company.

(Lynn E. MacBeth)

Christine T. Elzer for DeLana Lunsford Shaffer.
Thomas B. Anderson and *John R. Whipkey* for Allegheny General Hospital.
David I. Ainsman for Marianne Iwankonkiw.
Joseph L. Luvara for Bethel Park School District.
Jeffrey C. Catanzarite for Nutrition, Inc.
Richard G. Talarico for George and Donna Haburjak.
Kenneth T. Newman for JSMS Partners LP; JJK Holdings, Inc., Krebs Chrysler-Jeep, Inc. and Krebs Chrysler-Jeep Leasing.

Nos. GD 08-018974; GD 08-024628; and AR 08-017514. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION AND ORDERS OF COURT

Wettick, J., July 22*, 2009—This Opinion and Orders of Court address motions to amend filed after the statute of limitations has run in three unrelated cases. In each case, the plaintiff incorrectly identified the party which the plaintiff intended to sue and through an amended complaint seeks to correctly name the party that allegedly harmed the plaintiff.

Shaffer v. Allegheny General Hospital (GD08-018974)

In her complaint, plaintiff alleges that she was employed by Allegheny General Hospital ("Allegheny General") from April 2004 until she was discharged on May 14, 2008.

On September 9, 2008, she instituted this lawsuit against Allegheny General through a two-count complaint. In Count I, she raises a violation of the Pennsylvania Whistleblower Law, 43 P.S. §1421 *et seq.* In Count II, she raises a wrongful discharge claim based on a violation of public policy.

On January 19, 2009, Allegheny General filed an answer and new matter in which it alleged that plaintiff was never employed by Allegheny General; she was instead employed from April 2004 through May 14, 2008 by Allegheny Specialty Practice Network ("Allegheny Specialty").

Plaintiff has filed a motion to amend her complaint to identify her employer as Allegheny Specialty.

Defendant does not oppose the request to amend as to Count II which is governed by a two-year limitation period. However, defendant opposes the amendment as to Count I which is governed by a six-month statute of limitations. Defendant relies on Pennsylvania case law holding that a court shall not permit an amendment adding a new party after the statute of limitations has run. See, e.g., *Fredericks v. Sophocles*, 831 A.2d 147, 150 (Pa.Super. 2003); *Ferraro v.*

McCarthy-Pascuzzo, 777 A.2d 1128, 1132 (Pa.Super. 2001).

Plaintiff relies on case law holding that the statute of limitations will be tolled where a defendant (or its agents) has taken action that caused a plaintiff to continue to misidentify the proper defendant until after the statute limitations has expired. See, e.g., *Diaz v. Schultz*, 841 A.2d 546 (Pa.Super. 2004). In *Fine v. Checcio*, 870 A.2d 850, 860 (Pa. 2005) (citations omitted), the Pennsylvania Supreme Court described the doctrine of fraudulent concealment as follows:

In addition to the discovery rule, the doctrine of fraudulent concealment serves to toll the running of the statute of limitations. The doctrine is based on a theory of estoppel, and provides that the defendant may not invoke the statute of limitations, if through fraud or concealment, he causes the plaintiff to relax his vigilance or deviate from his right of inquiry into the facts. The doctrine does not require fraud in the strictest sense encompassing an intent to deceive, but rather, fraud in the broadest sense, which includes an unintentional deception. *Id.* The plaintiff has the burden of proving fraudulent concealment by clear, precise, and convincing evidence. While it is for the court to determine whether an estoppel results from established facts, it is for the jury to say whether the remarks that are alleged to constitute the fraud or concealment were made.

Plaintiff's contention that Allegheny General acted deceptively in order that plaintiff would not learn the name of the proper defendant prior to the expiration of the six-month statute of limitations governing claims under the Whistleblower Law is based on the following facts which are not disputed:¹

The action was filed on September 9, 2008. The defendant was served on September 10, 2008. Pursuant to Pa. R.C.P. No. 1026(a), defendant's responsive pleading was due on September 30, 2008.

Defendant sought, and plaintiff granted, a thirty-day extension in which to file a responsive pleading. On October 28, 2008, defendant filed preliminary objections in which it sought to strike the request for punitive damages under the Whistleblower claim, to strike plaintiff's claims for reasonable attorney fees under her wrongful discharge claim, and to strike plaintiff's request for punitive damages raised in the wrongful discharge claim. Defendant obtained a December 4, 2008 argument date. At the December 4, 2008 argument, the court granted in part and denied in part defendant's preliminary objections. On January 19, 2009, defendant filed its answer and new matter, asserting for the first time that it was not plaintiff's employer.

Plaintiff contends that the concealment doctrine applies because plaintiff had filed her complaint within sufficient time to obtain an answer that would have informed plaintiff, prior to the expiration of the statute of limitations, that plaintiff was employed by Allegheny Specialty. The only apparent reason for the request of Allegheny General for an extension of time in which to file a responsive pleading and its filing of preliminary objections was to prevent plaintiff from learning before the expiration of the limitation period (November 11, 2008) that she had sued the wrong entity.

Allegheny General correctly states that plaintiff should have known that Allegheny Specialty was her employer at the time plaintiff filed her complaint. Plaintiff had been working for Allegheny Specialty for almost four years prior to her discharge. All paperwork between plaintiff and her

employer identified her employer as Allegheny Specialty. The termination letter was, on Allegheny Specialty letterhead and expressly stated:

Due to the seriousness of your actions your employment with Allegheny Specialty Practice Network is being terminated immediately. Please return all Allegheny Specialty Practice Network property, including your employee ID badge and keys by May 23, 2008 (emphasis added).

It is Allegheny General's position that the concealment doctrine can never apply where plaintiff already knew or could have readily ascertained the identity of her employer. According to Allegheny General, a necessary predicate for a finding of concealment is that the correct identity of the proper defendant was, in some form or other, concealed from the eyes of plaintiff. In this case, neither Allegheny General nor Allegheny Specialty did anything to cause plaintiff to name Allegheny General as her employer.

As I will discuss, the case law does not support this position. The application of the concealment doctrine is not limited to the situation in which deceptive conduct played a role in the plaintiff's failure to learn the name of the proper defendant before the complaint was filed. It also applies where the plaintiff has mistakenly identified the defendant and this defendant engages in deceptive practices which interfere with the plaintiff's learning of its mistake prior to the expiration of the statute of limitations.

Plaintiff served Allegheny General almost two months before expiration of the six-month statute of limitations. A misidentified defendant, who does not advise the plaintiff that she has sued the wrong party, should not be seeking a thirty-day extension for filing a responsive pleading. Under the Rules of Professionalism that are generally honored by parties litigating in this Common Pleas Court, counsel is expected to grant requests for extensions of time (see, e.g., Rule 6 of the Pennsylvania Bar Association Rules for Professionalism which provides for attorneys to "[g]rant extensions of time when they are reasonable and when they will not have a material, adverse effect on [the] client's interests"). An underlying foundation of these Rules of Professionalism encouraging attorneys to grant extensions of time is that the party seeking an extension will not be using the extension as a tactic to prevent the plaintiff from learning the proper name of the defendant prior to the expiration of the statute of limitations.

Also, a misidentified defendant who will never be addressing the merits of a plaintiff's claim should not be filing preliminary objections as to damage claims and pleading deficiencies. It is a misuse of judicial resources and the resources of the other litigants for this court to address claims in the complaint raised by a defendant who should not have been sued and very likely would have been voluntarily dismissed from the case simply by notifying the plaintiff's counsel that counsel sued the wrong party. See Pa. R.C.P. No. 1023.1(c).

Our Rules of Civil Procedure require a responsive pleading to a complaint to be filed within twenty days of service (Pa. R.C.P. No. 1026), and for specific denials in an answer to the complaint. One purpose of these rules is to allow a plaintiff to learn from the party that it has sued whether this, in fact, is the party that should have been sued. In order that this purpose is not undermined, the concealment doctrine will apply where the Rules of Civil Procedure have been manipulated in a fashion that delays the filing of the answer until the statute has run.

This case is governed by *Lafferty v. Allan Wexler Agency*,

Inc., 574 A.2d 671 (Pa.Super. 1990). In that case, the plaintiff filed a complaint alleging that the owner of the premises on which the accident occurred was liable for her injuries. *Id.* at 672. The plaintiff named Wexler Agency as the owner. Wexler Agency filed preliminary objections raising a failure to establish an inference of negligence or to allege that Wexler Agency had knowledge of any defective condition. After the court granted the preliminary objections, the plaintiff filed an amended complaint. Wexler Agency responded with new preliminary objections raising similar issues. The trial court sustained the preliminary objections. *Id.*

Thereafter, one month after the statute of limitations had run, the plaintiff filed a second amended complaint. Wexler Agency then filed an answer in which it denied ownership or control. *Id.*

The Superior Court ruled that the trial court had improperly denied the plaintiff's request to amend the complaint to name a new defendant:

While based upon this record we cannot discern whether the Wexler Agency intentionally concealed the identity of the owner of the premises at issue, this need not be established. *DeRugeriis, supra*. See also *McNair v. Weikers*, 300 Pa.Super. 379, 387-88, 446 A.2d 905, 909 (1982) (proof of intentional concealment not required). All that is required is that the evidence establish that one party actively misled another party. *Peaceman, supra*; *DeRugeriis, supra*. The evidence clearly establishes, even more clearly than was the case in *Peaceman*, that the Wexler Agency actively misled Lafferty regarding the identity of the proper defendant. The Preliminary Objections filed by the Wexler Agency attacked only the substance of the litigation. It was not until the Wexler Agency filed its Answer, New Matter and Counterclaim, two months after the expiration of the statute of limitations, that it first articulated that it was not the owner of the premises. 574 A.2d at 675.

Lafferty relied on *Peaceman v. Tedesco*, 414 A.2d 1119 (Pa.Cmwlt. 1980), which it described as factually analogous. In that case, the plaintiffs commenced a malpractice action against a number of healthcare providers including the surgeon who operated on the plaintiff-wife. The surgeon was identified in the complaint as Edwin W. Shearburn, III, M.D.

Edwin W. Shearburn, III, was a resident at the hospital where the surgery was performed. His father, Edwin W. Shearburn, Jr., was the surgeon. An attorney entered an appearance on behalf of Edwin W. Shearburn, III, and filed an answer about ten months before the statute of limitations ran on the plaintiffs' claims. In the answer, the defendant denied that he "performed the surgery as alleged," or that he "performed any of the acts averred" and that "he did not make any warranties as averred." Five weeks after the statute of limitations ran, Edwin W. Shearburn, III, moved for summary judgment alleging that it was his father, Edwin W. Shearburn, Jr., who had performed the surgery and that he (Edwin W. Shearburn, III) did not participate in the care of the plaintiff-wife until after the operation had been performed by his father.

The plaintiffs moved to change the name of the defendant from Edwin W. Shearburn, III, to Edwin W. Shearburn, Jr. The Commonwealth Court, finding there was active concealment; ruled that the amendment should be permitted. The

Court stated that the manner in which Edwin W. Shearburn, III, answered the complaint was susceptible to a reading that the surgery was performed by the pleader but not as alleged and that warranties were made by the pleader but not as averred, rather than as a denial that the pleader had performed the surgery or made the warranties.

Allegheny General contends that *Lafferty* is no longer good law because of a 2001 ruling of the Pennsylvania Superior Court in *Ferraro v. McCarthy-Pascuzzo, supra*, 777 A.2d at 1132-33. In that case, the Court, without citing *Lafferty, Peaceman*, or any other case law, in connection with its ruling described below, rejected the argument that the concealment doctrine should apply where counsel for the defendant obtained additional time for filing a complaint which resulted in an answer not being filed until after the expiration of the statute of limitations:

The Ferraros alternatively contend that their counsel granted McCarthy-Pascuzzo an extension of time to file an answer even though her counsel knew of the misidentification and knew the extension meant that Ferraro would not be informed of his error until after the expiration of the statute of limitations. We see no evidence of record to support this assertion that this was counsel's motivation in seeking the extension which she did upon entering the case. Moreover, this contention does not alter the inescapable fact that the Ferraros had ample time and means to ascertain the proper identity of the driver prior to the expiration of the statute of limitations and to properly name Mr. Pascuzzo as the defendant in the complaint. The Ferraros were on notice as to the identity of the driver, and they failed to use reasonable diligence in correctly naming the defendant in the complaint. Thus, the Trial Court did not abuse its discretion in refusing to allow them to amend their complaint. The entry of summary judgment was therefore also proper since Mrs. McCarthy-Pascuzzo was not the proper party to be sued, and the statute of limitations had run before Mr. Pascuzzo could be added as a defendant. *Finn v. Dugan*, 260 Pa.Super. 367, 394 A.2d 595, 597 (1978). 777 A.2d at 1136.

Subsequent case law shows that the concealment doctrine is governed by *Lafferty*, rather than *Ferraro*. See *Blaine v. York Financial Corp.*, 847 A.2d 727, 730 (Pa.Super. 2004), and *Diaz v. Schultz, supra*, 841 A.2d 546.

Also, in *Ferraro*, the Court said the record did not support the assertion that counsel sought an extension in order to prevent the plaintiff from learning of the misidentification. In the present case, I have found that the evidence will support a finding that Allegheny General's counsel took actions designed to prevent plaintiff from learning that she had sued the wrong party prior to the expiration of the statute of limitations.

Because I find that the only explanation for Allegheny General's behavior is that it sought to prevent plaintiff from naming a related corporation Allegheny Specialty as a defendant prior to the expiration of the statute of limitations, I will grant plaintiff's motion to amend.

Iwankonkiw v. Bethel Park School District and Nutrition, Inc. (GD08-024628)

On December 11, 2006, plaintiff, while working as a kitchen manager, fell while walking into a freezer. She sued

both the Bethel Park School District (“School District”) and Nutrition, Inc., which she identified as the entity hired by the School District to make custodial and maintenance repairs within the school, including the condenser unit inside the freezer. The complaint was filed shortly before the expiration of the statute of limitations, and service was not made on Nutrition until after the statute had expired.

Nutrition filed an answer which alleged that Nutrition was only a food service provider and its contract with the School District had expired before the date of the incident. It had never been hired by the School District to make custodial and maintenance repairs. The School District also filed an answer setting forth the same facts. The School District’s answer averred that pursuant to a contract with the School District, Facilities Maintenance Systems, Inc. (“FMS”), a subsidiary or affiliated business entity with Nutrition, had a contract with the School District for maintenance of the school, including the freezer in question. The School District also filed a complaint joining FMS as an additional defendant.

Upon receipt of the answers of the School District and Nutrition and the complaint of Bethel Park to join FMS as an additional defendant, plaintiff filed a motion to amend the complaint to name FMS as a defendant.

Plaintiff relies on the concealment doctrine to support her request to name FMS as a defendant. Nutrition contends that the facts upon which plaintiff relies do not serve as a basis for invoking the concealment doctrine.

On March 26, 2007, plaintiff’s counsel sent a letter to Nutrition stating that he had been retained by plaintiff to represent her interests in the December 11, 2006 accident. The letter requested that Nutrition refer the letter to Nutrition’s liability insurance carrier so that it may contact counsel. By the end of March 2007, Nutrition’s insurance carrier (“Motorist”) had opened a file.³ A March 26, 2007 notation in the file states that plaintiff used to be employed by Nutrition. Nutrition lost the food service account with the School District on July 1, 2006. Plaintiff now works for a competitor which won the food service contract. The School District has a janitorial contract with FMS, and it has no relationship with Nutrition.

On April 27, 2007, Nutrition sent a letter to plaintiff’s counsel stating that Motorist had received the letter of representation and was still conducting an investigation into the circumstances surrounding this accident. The letter identified the insured as Nutrition, Inc., et al.

Thereafter, plaintiff’s counsel supplied information requested by Motorist, communicated with Motorist, and allowed an adjuster from Motorist to meet with plaintiff on August 8, 2007.

I find that the concealment doctrine applies because an insurance company whose insured had no involvement with the incident would not be expected to communicate on several occasions with counsel for plaintiff regarding the merits of the claim, to obtain information from plaintiff regarding the extent of plaintiff’s injuries, and to interview plaintiff. To the contrary, an insurance company protecting the interests of its insured would be expected to avoid litigation by promptly advising counsel for the injured party that Nutrition was not providing any services to the School District at the time of the incident. There is no reason for these additional activities taken by the insurance company other than to cause plaintiff’s counsel to continue to identify the party providing maintenance services as Nutrition.

Nutrition/FMS contend that this litigation is governed by *Lange v. Burd*, 800 A.2d 336 (Pa.Super. 2002). In that case, on June 20, 1996, the plaintiff and Donald Burd were involved

in an auto accident. *Id.* at 338. Mr. Burd died on December 18, 1996. On June 5, 1998, the plaintiffs instituted this action against Mr. Burd unaware that he had died a year and a half earlier. *Id.*

The plaintiffs asserted that the insurance adjuster from Mr. Burd’s insurance carrier concealed his death so that the statute of limitations would run. *Id.* at 339. They based this contention on two letters written by the insurance carrier prior to the expiration of the statute of limitations. Both letters contained a heading stating *Our Insured: Donald Burd. Id.* The Court rejected the argument that these letters constituted affirmative independent acts of concealment. The Court, citing *Montanya v. McGonegal*, 757 A.2d 947 (Pa.Super. 2000), stated that the plaintiffs’ assumption that the decedent was alive based on this language was unreasonable. *Id.* at 339-40.

Lange does not apply. In this case, it was reasonable for plaintiff’s counsel to believe that Nutrition was the proper defendant because of the involvement of the insurance carrier in negotiations with plaintiff’s counsel. See *Blaine v. York Financial Corp.*, *supra*, 847 A.2d at 730:

In this case, York Financial Corporation admits that Chubb’s employees acting on its behalf knew that York Financial Corporation was not a proper defendant when they engaged in negotiations with the Blaines. We can ascertain no other reason for these negotiations, undertaken on behalf of York Financial Corporation, other than to mislead the Blaines as to the identity of the proper defendant in this matter...[t]hat Chubb did not inform the Blaines that its insured, York Financial Corporation, was not the owner leads to the conclusion that Chubb had ulterior motives in its communications with the Blaines.

For these reasons, I will grant plaintiff’s motion to amend.

Haburjak v. JSMS Partners LP, et al. (AR08-017514)

This lawsuit arises out of a February 8, 2007 incident in which plaintiff-husband fell on business premises while having his vehicle serviced. The complaint alleged that the fall occurred at Krebs Chrysler-Jeep located at 1015 William Flynn Highway, Glenshaw, where the plaintiff-husband was an invitee. After the statute of limitations had run, defendants filed an answer stating that plaintiff-husband’s accident did not occur at Krebs Chrysler-Jeep.

Plaintiffs seek to file an amended complaint alleging that plaintiff-husband’s fall occurred at Krebs Motors North, Inc. d/b/a Krebs Dodge.⁴ Defendants oppose the amendment on the ground that plaintiffs are seeking to add a new party after the statute of limitations has run. Plaintiffs, on the other hand, contend that the amendment is governed (i) by the case law allowing a plaintiff, after the statute of limitations has run, to correct the identity of the party whom the plaintiff has already sued, and (ii) by the case law governing the concealment doctrine.

In this case, service was made on James Krebs who is the president of both Krebs Chrysler-Jeep, Inc. and Krebs Dodge. Thus, service made on Mr. Krebs would be good service on Krebs Dodge.

Since personal service on Mr. Krebs is good service on Krebs Dodge, plaintiffs contend that this case is governed by *Clark v. Wakefern Food Corp.*, 910 A.2d 715 (Pa.Super. 2006). In *Clark*, the plaintiff fell on snow and ice outside the entrance to a Shop Rite supermarket at 310 West Cheltenham

Avenue. *Id.* at 717. The plaintiff sued Wakefern Food Corp. t/a Shop Rite #411. The complaint was served on the person in charge of the store where the fall took place. It turned out that the Shop Rite was not owned by Wakefern Food Corp. but, instead, by an entirely different identity. *Id.*

After the statute of limitations had run, the plaintiff filed a motion to amend the complaint to correctly identify the owner of the store. The trial court denied the motion to amend, and the Superior Court reversed. *Id.* at 716-17.

The Court stated that the issue before it was whether “the motion to amend the complaint is to correct the name of a party or to bring a new party that is separate from the party named.” *Id.* at 717. It concluded that the plaintiff was only correcting the name of the defendant because through the amendment the plaintiffs sought to reach the assets of the store where the fall occurred and the service that was made was good service on the owner of the store where the fall occurred. *Id.* at 718.

Plaintiffs contend that *Clark* applies to the present case because in this case through the amended complaint, plaintiffs are seeking to reach the assets of the dealership where the fall occurred, and service on Mr. Krebs is proper service on the corporation owning the property where the fall occurred. However, in *Clark*, the complaint correctly identified the location where the plaintiff fell and in the present case plaintiffs misidentified the location. Plaintiffs contend that this is a distinction without a difference because plaintiffs are seeking to recover from the entity where the fall occurred and it served the president of the entity. Defendants rely on *Fredericks v. Sophocles*, *supra*, 831 A.2d 147. However, in *Fredericks*, the Court did not address the issue of whether a plaintiff is only correcting the name of the defendant when service of the original complaint was good service on the party the plaintiff seeks to name.

I need not decide the reach of the Superior Court’s ruling in *Clark*, because plaintiffs correctly state that the concealment doctrine applies. At the time the complaint was served, Krebs Dodge knew that the fall had occurred at Krebs Dodge as a result of a July 3, 2007 recorded statement that defendants’ insurance carrier had obtained from plaintiff-husband. In addition, a November 26, 2007 letter from the adjuster for the insurance company contained an incomplete response designed to mislead plaintiffs’ counsel as to the proper defendant. In this letter, the insurance carrier stated: “Our liability investigation of the facts regarding the above referenced claim concluded with the determination that our policyholder is not legally liable for damages to your client.” Exhibit 4 to Plaintiffs’ Motion to Substitute Parties. This response is similar to the answer filed by the defendant in *Peaceman v. Tedesco*, *supra*, 414 A.2d 1119. If the claim was being denied because the fall occurred at another location, an insurance company protecting the interests of its insured would have informed a plaintiff’s counsel of this fact so the insured would not be sued. Instead, the November 26, 2007 letter was a response designed to mislead plaintiffs’ counsel as to the name of the proper defendant in order to protect the interests of a related company—Krebs Dodge.

For these reasons, I will grant plaintiffs’ motion to amend⁵ and deny defendants’ motion for summary judgment.

SUMMARY

The applicability of the concealment doctrine frequently arises in connection with dealings between attorneys and between attorneys and insurance adjusters. These dealings should be based on standards of fair dealing and good faith. While these standards do not require a participant to volun-

tarily disclose relevant information, they do prohibit conduct that is designed to mislead or to otherwise cause a participant to relax his or her vigilance.

Conduct which violates the standards of fair dealing and good faith includes: making a request to an opposing party to grant an extension where the requesting party knows that the opposing party would never do so if this party knew why the requesting party was seeking a continuance; filing legal papers and seeking judicial rulings that are unnecessary to protect the interests of the client; and engaging in negotiations on behalf of a party that has no responsibility for the plaintiff’s injuries in an effort to conceal the identity of the party who may be responsible for the plaintiff’s injuries.

With respect to dealings between attorneys and between attorneys and insurance adjusters, the scope of the concealment doctrine should be based on standards of fair dealing and good faith in order that (i) a participant whose conduct falls below the standards of fair dealing and good faith will not benefit from his or her misconduct and (ii) relief will not be provided where a party seeks to base the concealment doctrine solely on a failure to voluntarily furnish information.

ORDER OF COURT

On this 22nd day of July, 2009, it is hereby ORDERED that plaintiff’s Motion to Amend her complaint is granted and an amended complaint may be filed within twenty (20) days.

BY THE COURT:
/s/Wettick, J.

ORDER OF COURT

On this 22nd day of July, 2009, it is hereby ORDERED that:

- (1) plaintiff’s Motion to Amend Complaint is granted; and
- (2) plaintiff may file an amended complaint within twenty (20) days.

BY THE COURT:
/s/Wettick, J.

ORDER OF COURT

On this 22nd day of July 2009, it is hereby ORDERED that plaintiffs’ Motion, for Leave to Substitute Parties is granted, and plaintiffs may file an amended complaint within twenty (20) days. Defendants’ Motion for Summary Judgment is denied.

BY THE COURT:
/s/Wettick, J.

¹ A court should not grant a motion to amend to add a new party after the statute of limitations has run based on the discovery rule or the concealment doctrine unless the plaintiff’s motion to amend includes allegations that, if established, will support the application of one or both of these doctrines to toll the statute of limitations. The court should base its decision as to whether to allow the amendment on the sufficiency of the allegations. A defendant will have the opportunity to challenge these allegations at a later stage of the proceedings (summary judgment or trial) by raising the statute of limitations as a defense in new matter.

² See Attachment 1.

³ Nutrition and FMS are related companies. Nutrition and FMS have the same registered office address and officers. Motorist

Insurance Company insures both Nutrition and FMS.

⁴ Krebs Dodge and Krebs Chrysler-Jeep are separate corporations sharing common officers.

⁵ Plaintiff captioned its motion as a Motion to Substitute Parties.

ATTACHMENT 1

Professionalism Committee—Working Rules

PUBLIC RESOURCES

1. Treat with civility the lawyers, clients, opposing parties, the Court, and all the officials with whom we work. Professional courtesy is compatible with vigorous advocacy and zealous representation.
2. Communications are life lines. Keep the lines open. Telephone calls and correspondence are a two-way channel; respond to them promptly.
3. Respect other lawyers' schedules as your own. Seek agreement on meetings, depositions, hearings and trial dates. A reasonable request for a scheduling accommodation should never be unreasonably refused.
4. Be punctual in appointments, communications and in honoring scheduled appearances. Neglect and tardiness are demeaning to others and to the judicial system.
5. Procedural rules are necessary to judicial order and decorum. Be mindful that pleadings, discovery processes and motions cost time and money. They should not be heedlessly used. If an adversary is entitled to something, provide it without unnecessary formalities.
6. Grant extensions of time when they are reasonable and when they will not have a material, adverse effect on your client's interest.
7. Resolve differences through negotiation, expeditiously and without needless expense.
8. Enjoy what you are doing and the company you keep. You and the world will be better for it.

Beyond all this, the respect of our peers and the society which we serve is the ultimate measure of responsible professional conduct.

I hereby endorse the PBA Working Rules for Professionalism.

Signature _____

Date _____

Attorney ID Number _____

Firm/Office _____

Address _____

Are you a PBA Member? yes no

<http://www.pabar.org/public/committees/proflism/about/pbaworkingrules.asp>

**National Rifle Association,
Shawn Lupka, Curtis Reese,
Richard Haid and Jeffrey Armstrong v.
City of Pittsburgh, et al.**

Uniform Firearms Act 18 Pa.C.S. §6120—City of Pittsburgh Ordinance No. 2008-0831—Standing to Challenge Legality of City Ordinance

Plaintiffs challenged city ordinance imposing a penalty of fine and imprisonment for failure to report a firearm that is lost or stolen within 24 hours after discovery of the loss or theft. The challenge was based on the state Uniform Firearms Act prohibiting local governments from regulating firearms. The court found that Plaintiffs lacked standing to challenge the ordinance because they have not been and may never be charged with violating the ordinance, and a court may only intervene where there is actual harm to plaintiffs. Plaintiffs argued that one of them had actually lost a firearm. The court ruled that the question was not justiciable and was governed by *Cherry v. City of Philadelphia*, 692 A.2d 1082 (Pa. 1997), in which the Supreme Court of Pennsylvania ruled that an attorney whose office was outside of Philadelphia who failed to pay taxes and had been notified by the city, could not challenge the tax ordinance because he had not been harmed because no steps were taken by the city to collect the taxes or enforce the ordinance.

(Lynn E. MacBeth)

Daniel C. Lawson, Meghan E. Jones-Rolla, and James D. Miller for Plaintiffs.

George R. Specter and John F. Doherty for City of Pittsburgh.

No. GD 09-007912. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION AND ORDER OF COURT

Wettick, J., July 21, 2009—The preliminary objections of defendants (“Pittsburgh”) seeking dismissal of plaintiffs’ complaint on the ground of a lack of standing are the subject of this Opinion and Order of Court.

Plaintiffs instituted these proceedings through a Complaint for Declaratory Judgment and Injunctive Relief. The complaint alleges that plaintiff National Rifle Association is a 501(C)(4) corporation which members include residents of Pittsburgh. It supports the right of its members, as secured by the United States Constitution and the Constitution of the Commonwealth of Pennsylvania, to keep and bear arms and it promotes firearm ownership rights.

The other plaintiffs are four residents of the City of Pittsburgh. Each alleges that he owns firearms and has a concealed carry permit for his firearms issued by the Commonwealth of Pennsylvania. Each alleges that he carries firearms for personal protection. Three of the four individual plaintiffs allege that they live in an area where residential burglaries are common. One of the individual plaintiffs alleges that a firearm belonging to him was stolen.¹ None of the defendants has alleged that he would not report the theft or loss of a firearm to law enforcement officials.

This litigation arises out of an Ordinance (“Reporting Ordinance”) enacted by the Council of the City of Pittsburgh (Ordinance No. 2008-0831) in December 2008. The Ordinance provides that “[n]o person who is the owner of a firearm that is lost or stolen shall fail to report the loss or theft to an appropriate local law enforcement official within 24 hours after discovery of the loss or theft.”

The penalty provision for failure to report a firearm that

is lost or stolen within 24 hours after discovery of the loss or theft reads as follows:

624.03 Penalty

1. Any person who violates Section 623.01:

a. For the first violation such person shall be subject to a fine of not more than \$500.

b. For the second and subsequent violations thereafter such person shall be subject to a fine of not more than \$1000, or imprisonment for not more than 90 days, or both.

Plaintiffs are requesting this court to declare that the City of Pittsburgh had no authority to enact this Reporting Ordinance and to enjoin the City from enforcing the Ordinance.

Plaintiffs seek this relief on the ground that the Uniform Firearms Act enacted by the Pennsylvania General Assembly preempts all local rules and ordinances concerning the regulation of firearms. Plaintiffs correctly state that the General Assembly may enact legislation which prohibits local governments, including the City of Pittsburgh, from enacting laws concerning firearms. It is plaintiffs' position that the General Assembly did so through §6120 of the Uniform Firearms Act, 18 Pa.C.S. §6120, which reads as follows:

No county, municipality or township may in any manner regulate the lawful ownership, possession, transfer or transportation of firearms, ammunition or ammunition components when carried or transported for purposes not prohibited by the laws of this Commonwealth.

The City of Pittsburgh takes the opposite position that this Reporting Ordinance does not conflict with any state laws; the reporting of lost or stolen firearms is a matter that cities are permitted to regulate.

The preliminary objections of the City of Pittsburgh seeking dismissal of this lawsuit are not based on its claim that City Council had the authority to promulgate the Reporting Ordinance and that plaintiffs are misreading state law. Instead, it is Pittsburgh's position that this court is barred from considering the merits of the dispute over whether Pittsburgh had authority to adopt the Reporting Ordinance because plaintiffs lack standing to contest the legality of the Ordinance.

The principle underlying the defense of a lack of standing is that persons cannot ask courts to consider the legality of laws promulgated by elected bodies simply because they disagree with these laws. Courts may be involved only when a ruling on the legality of a law is necessary to protect the interests of persons who are actually being harmed by a law that may be illegal. Furthermore, the lawsuit must be brought by the persons who are actually being harmed.

An easy example: Assume this lawsuit is brought in the Allegheny County Common Pleas Court by a California resident. She alleges that she owns firearms; she has applied for a job with Google; and if she gets the job, she may be assigned to Google's Pittsburgh Office, in which event she will relocate to Pittsburgh. If she relocates to Pittsburgh, her firearms may be stolen; she may forget to report the theft within 24 hours after discovery of the theft; and she may be prosecuted for failure to report.

This plaintiff's lawsuit will be dismissed on the ground of a lack of standing. In all likelihood, she is never going to be harmed by the Reporting Ordinance and courts may not consider requests to invalidate laws in the absence of actual

harm to the person bringing the lawsuit.

The present case differs from the hypothetical suit brought by the California resident. Plaintiffs are gun owners who live in the City of Pittsburgh; so, in comparison to the California resident, it is more likely that they will be harmed by the Ordinance. But the likelihood of harm is still very remote: this would require that their firearms be lost or stolen, they fail to report once they are aware of the theft or loss, and a decision is made by law enforcement officials to proceed against these persons who do not appear to be traffickers of firearms.

This case is governed by the June 18, 2009 ruling of the Pennsylvania Commonwealth Court in *National Rifle Ass'n v. City of Philadelphia*, No. 1305 C.D. 2005, 2009 WL1692390 (Pa.Cmwlt. 6/18/09), which considered an almost identical fact situation. In that case, the National Rifle Association and gun owners challenged five ordinances relating to firearms promulgated by the City of Philadelphia. The ordinance relevant to this litigation required gun owners to report their lost or stolen firearms to law enforcement officials within twenty-four hours after discovery of the loss or theft. The trial court judge (Judge Jane Cutler Greenspan)² dismissed the challenges to this ordinance on the ground that the plaintiffs lacked standing. The Commonwealth Court's Opinion adopted the portion of the Opinion of Judge Greenspan dismissing the challenge for lack of standing. The Commonwealth Court stated, slip op. at 6 (footnote omitted):

Because we agree with the trial court's determination that the Plaintiffs failed to establish any injury sufficient to confer standing with respect to these three Ordinances, we affirm and adopt that portion of the opinion of then Judge Jane Cutler Greenspan, entered in *National Rifle Association v. City of Philadelphia*, (April Term, 2008, No. 1472, filed June 30, 2008).

The portion of Judge Greenspan's Opinion which the Commonwealth Court adopted stated that "[t]o sustain an action under the [Declaratory Judgment Act], a plaintiff must demonstrate 'actual controversy indicating imminent and inevitable litigation, and a direct, substantial and present interest.' *Stilp v. Commonwealth*, 910 A.2d 175, 782 (Pa. Commw. Ct. 2006) (citation omitted)." *NRA v. Philadelphia*, *supra*, slip. op. at 3 (C.P. Phila. 6/30/08). She cited case law holding that the plaintiffs cannot rest on a potential harm, they must describe an actual harm, citing *Pennsylvania State Lodge v. Commonwealth*, 909 A.2d 413 (Pa.Cmwlt. 2006). They must have a substantial, direct, and immediate interest in the subject matter of the litigation, citing *In re: Hickson*, 821 A.2d 1238 (Pa. 2003). *NRA v. Philadelphia*, *supra*, slip op. at 10. Requests for declaratory or injunctive relief are not appropriate where courts are asked to determine rights in anticipation of events which may never occur. A challenge by a litigant who cannot allege actual harm would require this court to render an advisory decision as to the validity of the Ordinance. *Id.*, slip op. at 10-11.

Judge Greenspan ruled that the plaintiffs had failed to establish the type of injury required to confer standing to challenge Philadelphia's Reporting Ordinance because the fact that any one of these plaintiffs may lose a gun or have a gun stolen from his possession in the future is too remote and too speculative. *Id.*, slip op. at 12.

Plaintiffs seek to distinguish this case from the Commonwealth Court and Greenspan rulings on the ground that in the present case one of the plaintiffs had a firearm stolen. However, I fail to see how this shows that there is a significant likelihood that this plaintiff will have another firearm stolen, will fail to report the theft and will be prose-

cuted for his failure to report.³

In summary, any person who is being prosecuted under this Reporting Ordinance may raise the argument that plaintiffs seek to raise in this litigation, namely that Pittsburgh did not have authority to enact this Ordinance. But a challenge by persons who have not been and may never be charged with violating the Reporting Ordinance will not be considered because a court may intervene only where there is actual harm.

In *Cherry v. City of Philadelphia*, 692 A.2d 1082 (Pa. 1997), an attorney whose office was located outside of Philadelphia challenged the legality of a provision in the Philadelphia Code requiring all nonresidents to obtain a business privilege license and to pay an annual City tax on the profits they earned as a result of doing business in Philadelphia. The plaintiff had failed to pay taxes on legal work conducted in Philadelphia or to obtain a business privilege license and Philadelphia had notified him that he was in violation of the tax and license provisions of the Philadelphia Code.

The Pennsylvania Supreme Court upheld the lower court's dismissal of the lawsuit on the ground that the plaintiff-attorney had not yet been harmed by the Code provisions that he was challenging:

This Court need not reach the constitutional issue raised by appellant because his claim is not justiciable. Because appellant filed his declaratory judgment action before the City took any steps to assess or collect taxes or enforce the license provision, there is no actual controversy. Appellant has not suffered any damage nor is there an actual potential for damage as a result of the City's letter to him notifying him of his violations. Where no actual controversy exists, a claim is not justiciable and a declaratory judgment action cannot be maintained. See *Gulnac v. South Butler County School District*, 526 Pa. 483, 488, 587 A.2d 699, 701 (1991) ("Only where there is a real controversy may a party obtain a declaratory judgment"); *Zinc Corp. of America v. Department of Environmental Resources*, 145 Pa. Commw. 363, 361-68, 603 A.2d 288, 290-91 (1992), *aff'd without op.*, 533 Pa. 319, 623 A.2d 321 (1993) (declaratory judgment action seeking pre-enforcement review of environmental regulation does not present justiciable issue); *Allegheny County Constables Association v. O'Malley*, 108 Pa. Commw. 1, 5-6, 528 A.2d 716, 718 (1987) (declaratory judgment is not appropriate to determine rights in anticipation of events that may never occur; generally, the presence of an actual controversy is required). 692 A.2d at 1085.

The Pennsylvania Supreme Court's ruling in *Cherry* governs this litigation because it was far more likely that the Philadelphia Code provisions would be enforced against the plaintiff-attorney in *Cherry* as compared to the likelihood that plaintiffs in this case will ever be charged with violating the Reporting Ordinance.

For these reasons, I enter the following Order of Court:

ORDER OF COURT

On this 21st day of July, 2009, it is hereby ORDERED that defendants' preliminary objections are sustained, and plaintiffs' complaint is dismissed on the ground of a lack of standing.

BY THE COURT:
/s/Wettick, J.

¹ He has not alleged that the theft occurred after the enactment of Ordinance No. 2008

² The Honorable Jane Cutler Greenspan is currently a Justice of the Pennsylvania Supreme Court.

³ Plaintiffs also seek to distinguish Judge Greenspan's ruling on the ground that she held a hearing before making her rulings. However, in making my ruling, I assume that the facts alleged in plaintiffs' complaint are true and correct.

Allegheny Specialty Practice Network and The West Penn Allegheny Health System v. Joseph J. Colella, M.D.

*Preliminary Injunctive Relief—Employment Agreement—
Non-Competition Restrictive Covenants*

1. Moving party must establish all six essential pre-requisites to obtain preliminary injunctive relief.

2. Restrictive covenants not to compete are enforceable if the restrictive covenants are ancillary to employment, enforcement of the restrictive covenants is reasonably necessary to protect legitimate business interests and the geographic and temporal limitations of the restrictive covenants are reasonable.

(Meg L. Burkardt)

Joseph Leibowicz and Matthew J. Fader for Plaintiffs.
David J. Porter and Brendan G. Stuhan for Defendant.

GD 09-006813. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM

INTRODUCTION

Ward, J., June 9, 2009—Plaintiffs, Allegheny Specialty Practice Network ("ASP") and The West Penn Allegheny Health System ("WPAHS"), have filed the above captioned action against Defendant, Joseph J. Colella, M.D. ("Dr. Colella"). On April 7, 2009, ASP presented its Motion for Special Injunction to the Court. ASP sought immediate injunctive relief enjoining Dr. Colella from providing medical services for any hospital outside the WPAHS system for two years. When ASP presented this Motion, the parties agreed to the entry of a Consent Order ("Consent Order") under which Dr. Colella would be temporarily allowed to practice medicine at Magee-Women's Hospital, a hospital outside the WPAHS system, and be employed by University of Pittsburgh Physicians ("UPP"), a subsidiary of University of Pittsburgh Medical Center ("UPMC"). During the term of the Consent Order, Dr. Colella agreed not to provide services to patients he had served while at ASP or who had been referred to him by a WPAHS physician.

On April 17, 2009, ASP moved for leave to amend its Complaint, primarily for the purpose of adding WPAHS as an additional plaintiff. In the First Amended Verified Complaint, Plaintiffs, ASP and WPAHS, allege that WPAHS is an intended beneficiary of the Employment Agreement between ASP and Dr. Colella ("Employment Agreement"). In their Amended Motion for Preliminary Injunction, Plaintiffs seek the same injunctive relief that

ASPEN had sought, namely enforcement of the non-competition restrictive covenant under the Employment Agreement. Also, Plaintiffs allege that Dr. Colella exploited confidential information, while still employed by Plaintiffs, by: (a) removing without Plaintiffs' knowledge or permission confidential patient lists with the intent of soliciting those patients to follow him to UPMC; (b) attempting to solicit and recruit key employees of Plaintiffs to UPMC; and (c) engaging in activities that were competitive with Plaintiffs, all of which demonstrated the need to protect Plaintiffs' interests by enforcing the non-competition restrictive covenant.

On April 30, 2009, the Court held the hearing on Plaintiffs' Amended Motion for Preliminary Injunction. The preliminary injunction hearing was transcribed to create the notes of transcript of the courtroom proceedings ("Transcript"). Plaintiffs elicited testimony from Dr. Colella, Kim Sperring, Jeffrey Bushong, Debbie Auth and Dawn Gideon, Esq. Defendant elicited testimony from Dr. Colella, Ed Kabala, Esq., Dana Macklin, Dr. David Medich, Janet Troff, Dr. Marshall Webster and Suzie Mercadante. At the conclusion of the April 30, 2009 hearing, the parties agreed to have the Consent Order remain in place until further Order of Court.

Based upon the testimony and evidence presented at the preliminary injunction hearing and pre-hearing depositions, along with the respective exhibits, briefs and other submissions of the parties, this Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT¹

I. FACTUAL BACKGROUND

A. NON-PROFIT HOSPITAL SYSTEMS AND THEIR AFFILIATE RELATIONSHIPS IN WESTERN PENNSYLVANIA

1. WPAHS health care system, a non-profit corporation, has as its affiliate several other non-profit corporations, such as ASPN, whose sole purpose is to employ physicians on behalf of hospitals within the WPAHS system. Transcript at 228-229; Plaintiff's Exhibits 137, 151.

2. ASPN, a physician practice network, is one of several non-profit corporations within the WPAHS system that, according to its Bylaws as revised September 18, 2008, was "formed and is to be operated exclusively for the following charitable, scientific, and educational purposes...: supporting, benefiting and carrying out the functions of a regional health care system, comprised of corporations, each of which" has a common "sole corporate member," which is WPAHS. Transcript at 227-228; Plaintiff's Exhibit 137, Art. II. §1.

3. A "sole corporate member" is, in essence, the Pennsylvania non-profit analogue to the sole shareholder in a for-profit corporation. WPAHS is "the sole voting member" of ASPN, with substantial rights and governance powers over it. Plaintiff's Exhibit 137, Art. III. §§1-2.

4. As such, according to its Bylaws, ASPN "is a constituent entity of the health care system serving western Pennsylvania known as [WPAHS] which, as of the date of the adoption of these Bylaws, is comprised of affiliated hospitals and certain other affiliated organizations." Plaintiff's Exhibit 137, Art. II. § 2.

5. According to the Articles of Incorporation of WPAHS, the purposes of WPAHS include:

(a) To provide, maintain, operate, and support, directly and through its controlled affiliates, the provision, maintenance, management, and operation of, on a not-for-profit basis, in-patient and out-patient hospital facilities and health care services for the benefit of persons who

require medical care and services of the kind customarily furnished most effectively by hospitals....

(b) To support and manage a regional health care system, comprised of the Corporation and its controlled affiliates, each of which (i) operates, raises funds for, or conducts activities otherwise ancillary to the operation of, health care facilities in order to extend health care to sick, injured and disabled persons....

Plaintiff's Exhibit 151, pp. 1-2.

6. ASPN, then, as one of the "controlled affiliates," exists for the purpose to employ physicians for research and academic purposes to support the operation of the regional health care system known as WPAHS, and the provision of medical, clinical and health care services by WPAHS hospitals. Transcript at 227-228; Plaintiff's Exhibit 137, Art. II. §1.

7. ASPN acts as the employer of physicians and non-physician health care providers of hospital and clinical care to patients of Allegheny General Hospital ("AGH"), a licensed hospital facility within the WPAHS system. ASPN also provides certain administrative, faculty and research services to AGH. Transcript at 227, 229-230; Plaintiff's Exhibit 2.

8. WPAHS is the successor to AGH by merger effective December 31, 2007.² Since the merger, AGH is no longer a separate corporate entity. As a result of the merger, WPAHS generally has succeeded to the liabilities and rights of AGH. Transcript at 229-230.

9. The far larger UPMC, another so-called non-profit health care system, also provides hospital and clinical care in western Pennsylvania. Transcript at 282-283.

10. UPP is an affiliate of UPMC. UPP employs physicians who practice in the UPMC system. *Id.*

B. DR. COLELLA

11. Dr. Colella currently resides in Wexford, Pennsylvania. After graduating from the University of Pittsburgh School of Medicine, Dr. Colella entered a residency training program in general surgery at AGH, which he completed in 1991. Transcript at 32, 125.

12. After completing his residency, Dr. Colella's practice for several years was primarily general surgery, vascular surgery and trauma surgery. Dr. Colella was in private practice from 1991 until 1997. Transcript at 33, 125.

13. In early 1997, Dr. Colella entered into an employment contract with a physician network affiliated with AGH. That employment contract was transferred to ASPN in 1999. Transcript at 33.

14. Dr. Colella began learning bariatric surgery from Dr. Reuben Zemel who operated a private practice in Pittsburgh, Allegheny County, Pennsylvania. Dr. Zemel's private practice was substantially bariatric surgery. Although he was in private practice, Dr. Zemel had operating privileges at AGH and performed his work physically on the premises of AGH. Dr. Colella took over Dr. Zemel's AGH-based bariatric surgery practice in 2001. Transcript at 35, 125-127.

15. At all times from 1997 through April 2009, Dr. Colella considered AGH (now WPAHS) to be his employer. Transcript at 33-34.

16. From the beginning of his residency until his April 5, 2009 departure, Dr. Colella's medical practice was at all times based at AGH. Transcript at 32-33.

C. ELECTIVE BARIATRIC SURGERY

17. Bariatric surgery is a specialized weight loss surgery for obese individuals that have a Body Mass Index ("BMI")

of over 40, whose weight cannot be reduced to healthy levels by non-surgical means. Defendant's Exhibit 21.

18. As Dr. Colella testified, bariatric surgeries are "...elective surgeries, number one. It is not like anybody is going to die if I don't operate on them that day." Transcript at 74.

19. As Dr. Medich, also a surgical specialist and a former co-worker of Dr. Colella when employed by ASPN, commented on Dr. Colella's chosen specialty of bariatric elective surgery, by stating: "Neither of us take un-referred calls from the emergency department because it is not something we need to do or choose to do only wish other people would do." Transcript at 263.

20. Bariatric patients must undergo an arduous, emotional path, often lasting six to ten months, involving pre-operative medical assessments by cardiologists, dieticians, and psychologists or psychiatrists, as well as sustained non-surgical weight loss efforts through diet and exercise, before they can qualify for surgery. The experience can be very traumatic for the patients, and involves substantial contact between each patient and the bariatric center staff. Transcript at 75, 173-174, 181-182; Defendant's Exhibit 21.

21. To assure that bariatric patients receive appropriate care in all necessary respects, standard setting bodies have created the "Center of Excellence" certification, which certifies surgeons, hospitals and bariatric programs as Centers of Excellence based on factors including the skill of the surgeons, the quality of facilities, the qualifications of staff, and the overall resources devoted to the bariatric program, as well as a commitment to participate in studies to determine outcomes. Certain insurers and Medicare, in turn, require that bariatric surgical programs attain the Centers of Excellence designation as a condition of reimbursement. Transcript at 41-42, 45-47, 310.

22. WPAHS's bariatric program at AGH in Pittsburgh, Allegheny County Pennsylvania is certified as a Center of Excellence. UPMC's bariatric program at Magee-Women's Hospital in Pittsburgh, Allegheny County, Pennsylvania is certified as a Center of Excellence. UPMC's bariatric program at UPMC Horizon in Greenville, Mercer County, Pennsylvania is also a certified as Center of Excellence. Transcript at 42, 309-310; Plaintiff's Exhibit 77.

23. A majority of patients treated by Dr. Colella while employed by ASPN came from Allegheny County. Transcript at 50.

24. Dr. Colella is familiar with and knows of other full-time bariatric surgeons within the WPAHS system who are employed by ASPN. Transcript at 127.

25. Dr. Colella has performed bariatric surgical procedures on more than a hundred high-risk patients who had a BMI of over 60. Transcript at 152.

26. Dr. Colella is not the only bariatric surgeon in Allegheny County to have operated on morbidly super-obese or bariatric patients with BMIs greater than 60. Another bariatric surgeon, Dr. Gagne, who practices at the West Penn Hospital in Allegheny County, operates routinely on patients with BMIs greater than 60, having performed over a hundred of such procedures. Two other bariatric surgeons in private practice in Allegheny County, Dr. Felix and Dr. Wilcox, also operate on patients with BMIs greater than 60. Two other bariatric surgeons based at Magee-Women's Hospital in Allegheny County, Dr. Courcoulas and Dr. Ramanathan, also operate on patients with BMIs greater than 60. Transcript at 164-166, 277-278.

27. In order for Dr. Colella and other physicians to perform these high-risk bariatric surgeries on patients with BMIs greater than 60, the facility where the surgeries are performed must have specialized equipment and the full gamut of specialty care services that are only available at a

tertiary care hospital. Transcript at 150-153, 277-278; Defendant's Exhibit 21.

28. UPMC requires most bariatric surgery patients with a BMI of over 60 to lose weight until their BMI is below 60 before they are generally eligible for bariatric surgery. However, some patients who cannot lose enough weight to reach a BMI below 60 may undergo bariatric surgery, if the bariatric surgery is considered to be a safe procedure. Transcript at 275-278.

29. UPMC's practice of refraining from operating on super-obese patients with a BMI of over 60 except in extraordinary circumstances is borne out by the numbers for its program: during the past year, eighty-four patients in the UPMC Magee-Women's Hospital bariatric surgery program had BMIs of over 60. Of those eighty-four patients, only four (<5%) have had surgeries, about forty are attempting to lose weight so that they qualify for a surgical procedure, and the others are not currently candidates for surgery. Transcript at 276.

II. EMPLOYMENT AGREEMENT BETWEEN ASPN AND DR. COLELLA IN 2002

A. ASPN AND DR. COLELLA ACTIVELY NEGOTIATE TERMS OF AN EMPLOYMENT AGREEMENT

30. In late 2001, ASPN and Dr. Colella began to negotiate a new employment. During the negotiations, Dr. Colella was represented by an experienced attorney, Ed Kabala, Esq. Transcript at 197, 238.

31. At his counsel's suggestion, Dr. Colella negotiated the new employment agreement directly with Kim Sperring, then AGH's vice-president for surgery and perioperative services. Transcript at 36, 167-168, 239.

32. At the time of the contract negotiations, AGH had decided to build the bariatric program around Dr. Colella. In order to protect its investment in its program and in Dr. Colella, AGH sought to include restrictive covenants of "Loyalty and Non-competition" in Section 9 of the initial proposed agreement it gave to Dr. Colella. Transcript at 76, 170; Plaintiff's Exhibit 139.

33. The negotiation of the terms of the Employment Agreement involved a give-and-take process in which AGH/ASPN agreed to a number of changes to their initial proposal based on requests made by Dr. Colella, including:

- (a) increasing the term from 4 years to 5 years, early in the process, Plaintiff's Exhibit 138;
- (b) increasing the term from 5 years to 7 years, later in the process, Plaintiff's Exhibit 3;
- (c) adding a provision permitting Dr. Colella to engage in a certain amount of medico-legal consulting, Plaintiff's Exhibit 1, § 3(a);
- (d) adding a provision requiring consultation with Dr. Colella before setting his schedule, Plaintiff's Exhibit 1, § 3(c);
- (e) adding a provision permitting mutual termination on 180 days' notice, Plaintiff's Exhibit 1, § 6(e);
- (f) a handwritten modification of Section 9(e) to avoid any conflict with the added Section 9(h). Plaintiff's Exhibit 3.

Transcript at 169, 192-197; Plaintiff's Exhibit 1 (redline showing certain changes); Plaintiff's Exhibit 3 (final agreement); Plaintiff's Exhibit 139 (original draft provided to Dr. Colella).

34. The non-competition covenants in the proposed agreement were discussed with Dr. Colella prior to and in a letter

of intent that Ms. Sperring sent to Dr. Colella on December 21, 2001. Transcript at 169-170; Plaintiff's Exhibit 138.

35. The non-competition covenants initially proposed to Dr. Colella underwent changes at his request. The original draft sent to Dr. Colella included AGH's then-standard covenants, including Section 9(b), which was a generally-applicable non-competition covenant that prohibited Dr. Colella from practicing medicine in Allegheny County for the term of the Employment Agreement plus an additional two years. Transcript at 171; Plaintiff's Exhibit 139.

36. In his discussions with Ms. Sperring, Dr. Colella objected to Section 9(b)'s broad non-competition covenant, but expressed an understanding of AGH's desire to protect the bariatric surgery program and told Ms. Sperring that he had no interest in doing anything that would jeopardize AGH's program or harm the hospital. Transcript at 171-173.

37. Dr. Colella told Ms. Sperring that he wanted an alternative to Section 9(b)'s complete prohibition on his practicing medicine in Allegheny County for two years and specifically suggested that he be permitted the option of entering private practice in Allegheny County at the end of the term, which he knew other physicians who had left AGH in the past had done. Transcript at 171-172.

38. AGH responded to Dr. Colella's request by adding Section 9(h) to the proposed Employment Agreement. Transcript at 171-172; Plaintiff's Exhibit 1.

39. Section 9(h) of the Employment Agreement applied in the event that ASPN decided to terminate the Employment Agreement prior to the end of the term by not renewing it (the option that ASPN ultimately chose):

If ASPN, however, does not offer to renew this Agreement prior to the end of the Initial term or any Renewal Term, Section 9(b) above shall not apply. Instead, Physician hereby agrees that for a period of two (2) years following the expiration of this Agreement, Physician shall not accept employment or enter into a contract of any type to provide clinical, administrative or any type of medically-related service within a hospital or health care provider, or subsidiary, affiliate of affiliated physician organization thereof, and shall not provide clinical services at any non-WPAHS hospital or affiliated ambulatory surgery center during the two (2) year period of restriction. This restriction shall not preclude Physician from establishing a private medical practice at any location in Allegheny County Pennsylvania or elsewhere, and shall not preclude Physician from performing clinical services at any WPAHS hospital or affiliated surgery center (currently [AGH], the Western Pennsylvania Hospital, Alle-Kiski Medical Center, Canonsburg General Hospital, Forbes Regional Hospital and Suburban General Hospital).

Plaintiff's Exhibit 3.

40. Thus, under the express terms of Section 9(h), the only options available to Dr. Colella in order to comply with Section 9(h) were to (1) establish a private practice and perform clinical services at a WPAHS facility (relying on WPAHS to allow him privileges to use its facilities exclusively to provide clinical services); or (2) establish a private practice in Allegheny County or elsewhere which did not require him to perform clinical services. *Id.*

41. Section 9(h), which by its terms is applicable only in the event ASPN were to decide not to renew the Employment Agreement, was expressly designed as a substitute for the

broader Section 9(b). Section 9(h) is a more permissive provision that only prohibits Dr. Colella from becoming employed by, or providing clinical services for, non-WPAHS entities in Allegheny County during the two-year period, but otherwise permits him to enter private practice in Allegheny County. It imposes no limits of any kind on him outside of Allegheny County. Transcript at 172, 175-177; Plaintiff's Exhibit 3.

42. Everyone who read, discussed, or interpreted Section 9(h) prior to the filing of this Action (including Dr. Colella; Dr. Colella's lawyer, Mr. Kabala; and Dr. Colella's new employer, UPP/UPMC) understood that the geographic scope of Section 9(h) was limited to Allegheny County. Transcript at 105, 176-177, 249-251, 293-294, 298-300, 308-309. Plaintiff's Exhibits 14, 17, 78, 142.

B. ASPN AND DR. COLELLA REACH TERMS OF THE 2002 EMPLOYMENT AGREEMENT EXECUTED BY THE PARTIES

43. Dr. Colella executed the Employment Agreement with ASPN on February 25, 2002 with an initial term that continued through March 31, 2009 ("Employment Agreement"). At that time, Dr. Colella and his counsel understood that Section 9(h) applied specifically to the circumstance of ASPN deciding not to renew the Employment Agreement. Transcript at 77-78, 253; Plaintiff's Exhibit 3.

44. At the time he entered into the Employment Agreement, Dr. Colella claims to have believed that he was entering into an agreement with AGH (now WPAHS). Transcript at 37.

45. The Employment Agreement contains a number of provisions demonstrating a specific intent to benefit and protect ASPN and/or AGH (now WPAHS). These include:

(a) The first "Whereas" clause of the Employment Agreement explains that "ASPN was formed to facilitate the provision of clinical services to patients of Allegheny General Hospital ("Hospital") and to provide certain administrative, faculty, and research services to Hospital;"

(b) Article 9(a) prohibits Dr. Colella from directly or indirectly engaging in "any activity competitive with or adverse to the business, practice, management, administration, or affairs of ASPN, Hospital, or their affiliates;"

(c) Article 9(c) prohibits Dr. Colella from soliciting "patients or employees of ASPN, Hospital, or their affiliates;"

(d) Article 9(h) prohibits Dr. Colella from providing services within Allegheny County except at WPAHS facilities;

(e) Article 10(a) prohibits Dr. Colella from disclosing confidential information "relating to ASPN, Hospital or their affiliates;"

(f) Article 11 expressly provides for remedies, including injunctive relief, to enforce breaches of Article 9 or 10 based on "adverse harm on ASPN and Hospital."

Plaintiff's Exhibit 3.

46. Section 11 of the Employment Agreement provides:

Physician acknowledges that a breach of any of the covenants set forth in Article [Section] 9 or 10 of this Agreement will have irreparable, material, and adverse harm on ASPN and Hospital, that damages

arising from such harm may be difficult to ascertain, and that damages alone shall not be an adequate remedy for any breach by Physician of the covenants contained in Article 9 or 10 of this Agreement. Physician agrees that in addition to any other remedies that ASPN may have, ASPN shall be entitled to injunctive relief in any court of competent jurisdiction for any breach or threatened breach of any such covenants by Physician....

Id.

III. EFFORTS TO NEGOTIATE A NEW EMPLOYMENT AGREEMENT BETWEEN ASPN AND DR. COLELLA IN 2008-2009

A. ASPN SEEKS A NEW EMPLOYMENT AGREEMENT

47. Around the time that AGH appointed Dr. Colella to be Director of the Bariatric Surgery Center, Dr. Colella's Employment Agreement with ASPN was amended effective July 1, 2004. The principal effect of the 2004 amendment was to increase Dr. Colella's base salary from \$350,000 a year to \$550,000 a year. All of the other terms of his Employment Agreement, except for his base compensation, remained in full force and effect. Transcript at 38, 43; Plaintiff's Exhibit 4.

48. As the end date of Dr. Colella's Employment Agreement was approaching, ASPN determined that nationally recognized data tracking the productivity and compensation of bariatric surgeons by Medical Group Management Association, known as MGMA standards, did not support the \$550,000 base compensation amount he was receiving under his Employment Agreement. Transcript at 202-204, 212; 355-358; Plaintiff's Exhibit 114.

49. Plaintiffs' ultimate goal and intention was to retain Dr. Colella and enter a new employment agreement with him that would more directly align his salary with productivity targets to provide additional incentives for him to further grow the AGH bariatric practice. Transcript at 55, 200-201, 357-358; Colella Deposition at 143-146.

50. In order to facilitate the process of negotiating a new employment contract, and to prevent the old employment contract from automatically renewing on the same terms, ASPN was contractually required to provide Dr. Colella with 180 days' notice of non-renewal. Consequently, on September 29, 2008, ASPN hand delivered to Dr. Colella the requisite notice of non-renewal. In the notice, as well as in a personal message conveyed by ASPN's Vice President, Suzie Mercadante, ASPN informed Dr. Colella that it wanted "to discuss the framework of a new employment agreement." Transcript at 53-55; Plaintiff's Exhibits 3, 7.

51. After sending the notice of non-renewal in September 2008, Ms. Mercadante met with Dr. Colella to review the MGMA survey information, as well as his productivity statistics, and solicited any additional information Dr. Colella might be able to provide to support a higher market value for his compensation. Dr. Colella never provided any such information. Transcript at 202-203; Mercadante Deposition at 34.

B. ASPN MAKES INITIAL OFFER TO DR. COLELLA

52. After initial discussions that focused on the productivity guidelines ASPN was using to create the terms of an offer, ASPN provided Dr. Colella with its first term sheet offer. The first offer was heavily weighted toward incentives, proposing a lower initial base salary of \$350,000 for an initial term of three years. The initial salary would be guaranteed for the first year, and guaranteed for the last two years provided Dr. Colella met at least 90% of a physician productivity threshold measured in worked relative value units ("WRVU's"). Transcript at 56; Plaintiff's Exhibit 20.

53. The productivity threshold in the first term sheet

offer was set at 8,000 WRVU's, meaning that Dr. Colella's base salary of \$350,000 would have been guaranteed as long as Dr. Colella achieved at least 7,200 WRVU's each year. By comparison, Dr. Colella's WRVU totals in fiscal years 2006, 2007 and 2008, respectively, had been 9375, 8524 and 7741, all well in excess of the minimum required to meet the base salary in the first offer. Transcript at 356-357, 360; Plaintiff's Exhibits 20, 114.

54. In addition to the base salary, the first term sheet offered numerous opportunities to increase Dr. Colella's compensation beyond the \$350,000, including:

- (a) \$20,000 per year for maintaining the Center of Excellence designation;
- (b) \$20,000 per year for engaging in community outreach and meeting or exceeding practice budget;
- (c) \$15,000 for being on call during evenings and weekends; and, most significantly
- (d) payment of 90% of the actual practice value of each WRVU attained above the target of 8000.

The final element in this list offered the opportunity for significant increases in compensation based on additional productivity. Plaintiff's Exhibit 20.

C. ASPN MAKES SECOND OFFER TO DR. COLELLA

55. After Dr. Colella rejected the first term sheet offer, ASPN made a second offer in January 2009. The second offer, which was also based on MGMA survey data, began with a significantly higher base salary of \$500,000. Of that amount, \$100,000 was guaranteed income for performing administrative duties. The remaining \$400,000 was guaranteed for the first year, and guaranteed for the second and third year if Dr. Colella achieved 8,055 WRVU's, which is 90% of a WRVU target of 8,950. The second term sheet also offered additional incentive opportunities, including payment of 90% of the actual practice value of each WRVU attained above the target. Transcript at 60, 356-357; Plaintiff's Exhibits 28, 114.

56. Ms. Mercadante presented both of these first two offers to Dr. Colella in person, going through the terms and explaining the basis for the salary and productivity incentive targets based on Dr. Colella's historical WRVU numbers. Dr. Colella also rejected the second offer and then ceased communicating with Ms. Mercadante, instead telling her to communicate with his attorney. Transcript at 56-58, 60, 62.

D. NEGOTIATIONS CONTINUE THROUGH AND BEYOND THE INITIAL TERM OF THE EMPLOYMENT AGREEMENT

57. As the March 31, 2009 end date of Dr. Colella's Employment Agreement approached, Dr. Colella and his lawyer met with higher and higher representatives of ASPN and WPAHS, including Duke Rupert, Vice-President of Operations of AGH, Janice James, Interim CEO and President of AGH, Jeff Bushong, interim Chief Operating Officer for the WPAHS physician network (which includes ASPN), and Roy Santarella, the Chief Administrative Officer for WPAHS. Transcript at 63.

58. During a meeting on March 31, 2009, Mr. Bushong and Mr. Santarella both stressed to Dr. Colella how much WPAHS wanted to retain Dr. Colella and how important he was to AGH's program. They also explained the principles that were guiding their approach to physician contracts, including Dr. Colella's, particularly the goal to match productivity measured primarily by MGMA standards to physician compensation. Transcript at 200-201.

59. During this meeting, Mr. Bushong and Mr. Santarella

also explained to Dr. Colella that WPAHS was striving to limit physician contracts to three-year terms, but that exceptions would be considered on a case-by-case basis. Transcript at 200-202.

60. On Tuesday, March 31, 2009, ASPN informed Dr. Colella that ASPN was planning on making an additional offer and asked Dr. Colella to continue to work past March 31, 2009. Dr. Colella agreed to perform the surgeries scheduled for that week. Transcript at 89.

61. On April 1, 2009, Dr. Colella met with Roy Santarella, ASPN's interim President, and Jeffrey Bushong, ASPN's interim Chief Operating Officer, to discuss the status of ASPN's offer. Santarella and Bushong informed Dr. Colella that ASPN would provide its last, best offer on April 2, 2009, and asked Dr. Colella to consider a 10-day extension. Dr. Colella, now working without an employment agreement, agreed to consider the offer and continued to negotiate a new employment agreement with ASPN. Transcript at 87-89, 203-205.

E. ASPN MAKES THIRD OFFER TO DR. COLELLA

62. Mr. Bushong and Dr. Colella met again on April 2, 2009 to go over a slight revision to ASPN's second term sheet offer. ASPN gave Dr. Colella its third and final term sheet on April 2, 2009. This third sheet was not materially different from ASPN's second term sheet (January 2009) offer. This third term sheet contained the same base salary and productivity targets, but introduced cash collections for the practice as an alternate measure of productivity. During the April 2, 2009 meeting, Dr. Colella objected to the base salary, the three-year term, and the productivity targets in the offer. Transcript at 143, 205-208, 359-360; Defendant's Exhibit 15.

63. The next day, April 3, 2009, Dr. Colella called Mr. Bushong to reject ASPN's most recent offer. Dr. Colella proceeded to set forth four "very important" demands that he insisted must be contained in any employment agreement: (a) a \$600,000 guaranteed base salary; (b) a five-year term; (c) reduced productivity requirements, at least in the initial years; and (d) the termination of AGH's other bariatric surgeon, Dr. Miro Ucha, so that the productivity requirements could be achieved. Transcript at 66-67, 208-209.

64. Later that day, Mr. Bushong called Dr. Colella and told him that Dr. Colella's package of demands was not acceptable to ASPN, but that ASPN's most recent offer was still on the table. Dr. Colella told Mr. Bushong that he wanted to take the weekend to think about it. Transcript at 209-210.

65. During the discussions from March 31, 2009 through April 3, 2009, Mr. Santarella and Mr. Bushong offered to extend Dr. Colella's Employment Agreement for an additional 90 days, or any shorter period of time, to permit the parties to continue negotiating a new contract. Dr. Colella never accepted or rejected these proposals, but he continued to come to work through April 3, 2009. Transcript at 87, 204-205.

66. On Friday, April 3, 2009, Dr. Colella told Mr. Bushong about the terms of the UPP/UPMC offer that he had been simultaneously negotiating. Dr. Colella asked Mr. Bushong for ASPN yet again to reconsider its third term sheet offer. Mr. Bushong replied that ASPN would not make any offers other than what was set forth in the third (April 2, 2009) term sheet. Transcript at 209; Defendant's Exhibit 16.

67. On Sunday, April 5, 2009, Dr. Colella decided to reject ASPN's third term sheet offer and signed an employment agreement with UPP/UPMC ("UPP/UPMC employment agreement"). Later that day, Dr. Colella notified Mr. Bushong of his decision and that he would not be returning to work at AGH on April 6, 2009. Transcript 71-72, 216; Plaintiff's Exhibit 78.

IV. DR. COLELLA'S NEGOTIATIONS AND ACCEPTANCE OF EMPLOYMENT WITH UPP/UPMC

A. DR. COLELLA INITIATES NEGOTIATIONS WITH UPP/UPMC

68. Unknown to Plaintiffs until the latest stages of the negotiations described above, Dr. Colella had initiated discussions to join UPMC in early November 2008 by contacting UPMC's Dr. Marshall Webster. Plaintiff's Exhibit 12.

69. Dr. Webster is the President of UPP, the Chief Medical Officer of UPMC, and the Executive Vice-President of the Physician Division of UPMC. As such, Dr. Webster occupies the second highest management position in the UPMC system, reporting directly to Jeffrey Romoff, UPMC's President and Chief Executive Officer. Transcript at 282, 307-308, 318.

70. Although UPP employs approximately 2,000 physicians and recruits hundreds of physicians a year, Dr. Webster gets involved in physician recruitment only occasionally. Transcript at 282, 320.

71. Dr. Webster, the UPMC person most involved in the recruitment of Dr. Colella from the beginning to the end, kept Mr. Romoff apprised of the status of the negotiations throughout that timeframe. Transcript at 291, 305-306.

72. UPMC agreed to indemnify Dr. Colella for up to \$250,000 in legal expenses incurred if ASPN threatened or filed any action of any nature against Dr. Colella to enforce the loyalty and non-competition covenants in his Employment Agreement with ASPN. Plaintiff's Exhibit 78 at Exhibit C.

B. UPMC OFFERS DR. COLELLA THE OPTION OF COMPLYING WITH THE TERMS OF HIS NON-COMPETITION COVENANT

73. From the outset and throughout the negotiations, Dr. Colella and UPMC considered how Dr. Colella might be able to join UPMC in ways both consistent and inconsistent with the non-competition covenant in his Employment Agreement with ASPN. Transcript at 78-84, 293-300; Plaintiff's Exhibits 14, 17, 22, 27, 32, 78.

74. Dr. Colella did not seriously consider the private practice option, and claimed doing so was not a feasible option in Allegheny County. His negotiations with UPMC subsequently focused on whether his employment would be within or outside of Allegheny County. Transcript at 81-84, 107-108, 156-159, 298-300, 320-323; Plaintiff's Exhibit 27, 32, 37, 78.

75. As late as January 2009, UPMC believed that Dr. Colella would be willing to enter an employment relationship pursuant to which he would practice medicine for UPMC for two years outside of Allegheny County, at either UPMC Cranberry or at its Horizon facility in Greenville, Pennsylvania. UPMC currently performs bariatric surgeries at its Horizon facility in Greenville, Pennsylvania, a bariatric surgery Center of Excellence, and was apparently open to having Dr. Colella perform them in Cranberry as well. Transcript at 309-310; Plaintiff's Exhibit 27.

76. From the earliest drafts of the proposed employment agreement with UPP/UPMC, an Exhibit C was included that required Dr. Colella to make a representation that the loyalty and non-competition provisions in his ASPN Employment Agreement were not enforceable. This representation was allegedly based on the advice of Dr. Colella's "personal legal counsel." Exhibit C provided UPMC with the right to have Dr. Colella perform his medical services outside of Allegheny County if ASPN threatened or filed litigation. Transcript at 319-322; Plaintiff's Exhibits 44, 78.

77. Toward the end of negotiations with UPP/UPMC, at Dr. Colella's request, an extra provision to Exhibit C was added that extended the term of employment by two years,

with all other terms (including compensation) remaining the same, in the event UPMC exercised its right to have Dr. Colella provide medical services outside of Allegheny County. Transcript at 107-108; 323; Plaintiff's Exhibit 78.

78. At Dr. Colella's request, a new non-competition covenant at Section 8.8.1.2 was added to his UPP/UPMC employment agreement. This new provision, which Dr. Colella has described as "exactly similar" to Section 9(h) of the ASPN Employment Agreement, is meant to apply if UPP decides not to renew that employment agreement and permits Dr. Colella to engage in a limited form of private practice in Allegheny County for two years following termination of the agreement. Dr. Colella represented in the UPP/UPMC employment agreement, which he signed on April 5, 2009, that the restrictive covenant at Section 8.8.1.2 was "reasonable and necessary to protect the legitimate business interests of UPP." Transcript at 104, 106; Colella Deposition at 99; Plaintiff's Exhibit 78.

V. DR. COLELLA'S HARDSHIP AND THREATS OF HARM TO PLAINTIFFS

A. PLAINTIFFS' INVESTMENT IN AND PROMOTION OF DR. COLELLA AS THE FACE OF ITS BARIATRIC SURGERY CENTER

79. During the decade that Dr. Colella was employed by ASPN, Plaintiffs invested in developing the goodwill of the Bariatric Surgery Center at AGH by:

- (a) giving Dr. Colella the title of Director of the Bariatric Surgery Center and Director of the Division of Bariatric Surgery, titles that increased Dr. Colella's visibility in the community;
- (b) promoting him as the face of the Bariatric Surgery Center at AGH;
- (c) promoting him in publications to the AGH community;
- (d) purchasing television advertisements to promote him and the Bariatric Surgery Center; and
- (e) making efforts to ensure that all referring physicians in the community were aware of his work with the Bariatric Surgery Center, and promoted him through physician outreach efforts.

Transcript at 43-44, 174.

80. AGH also devoted the resources and staff to enable the bariatric program at AGH to qualify as a Center of Excellence, and for Dr. Colella to qualify as its Center of Excellence Certified Surgeon. In effect, Dr. Colella became synonymous with AGH's bariatric program itself. Transcript at 42, 47, 179.

81. During the winter of 2008-2009, while ASPN and Dr. Colella were negotiating towards a new employment agreement, Dr. Colella became the first surgeon in Allegheny County to perform bariatric surgery employing robotic techniques. During a time when Dr. Colella now asserts Plaintiffs were attempting to usher him out the door, WPAHS promoted this achievement and Dr. Colella with press releases and radio spots. Dr. Colella's achievement with robotic bariatric surgery subsequently ended up being a major promotional point included in UPMC's press release announcing his recruitment. Transcript at 48-49; Plaintiff's Exhibit 77.

B. POTENTIAL HARM TO PLAINTIFF IF DR. COLELLA IS PERMITTED TO WORK FOR A COMPETITOR IN ALLEGHENY COUNTY

82. Dr. Colella's compliance with the non-competition provisions of the ASPN Employment Agreement, either by practicing medicine outside of Allegheny County or by entering private practice in Allegheny County without any affiliation with a competing health system or hospital, would provide Plaintiffs the opportunity to attempt to protect their goodwill, patient relationships and patient referral network while rebuilding, or restructuring, their bariatric program. Transcript at 173-179.

83. The majority of the AGH Bariatric Surgery Center's patients come from Allegheny County. As a specialty medical practice, in which the central surgical procedure is usually done only once, bariatric surgeons are heavily dependent on referrals for their business. Most of those referrals come from previously treated patients and referring physicians. Dr. Colella believes that the reputation he developed while an employee of ASPN and the Director of the Bariatric Surgery Center at AGH is a significant source of new patient referrals. Transcript at 50-53, 173-174.

84. Dr. Colella's patient-to-patient referrals developed as a result of the close bond he formed with patients while treating those patients as an employee of ASPN and as the Director of the Bariatric Surgery Center at AGH. Transcript at 117-118.

85. At the time of his departure from AGH, Dr. Colella had significantly more than a hundred patients at various stages of preoperative preparation. In addition to providing new referrals, postoperative patients are also a direct source of future business for Plaintiffs, since they often require follow-up procedures with other specialists. Transcript at 124-126.

86. If Dr. Colella works for UPP outside of Allegheny County, even for a limited amount of time, he would be less likely to capture patients or referrals from former patients and referring physicians than if he went to work for UPP at UPMC's Magee-Women's Hospital in Allegheny County. Transcript at 118, 179, 336.

87. If Dr. Colella is permitted to practice bariatrics within Allegheny County at Magee-Women's Hospital, it could be devastating to the AGH bariatric surgery program, even if he was precluded from treating existing ASPN and WPAHS patients, given the importance of the referral base to future patient referrals. Transcript at 179, 185-186.

C. EFFORTS BY DR. COLELLA TO MARKET UPMC AND TO SOLICIT PATIENTS AND EMPLOYEES OF AGH

88. During a ninety-minute private meeting with Ketul J. Patel, the Chief Operating Officer of Magee-Women's Hospital, on March 26, 2009, Mr. Patel and Dr. Colella discussed a plan to provide patients who were already scheduled for surgery at AGH with Dr. Colella's cell phone number so that he could attempt to "push" those patients to Magee-Women's Hospital. Plaintiff's Exhibit 53.

89. On March 26, 2009, UPMC produced its comprehensive marketing plan "to announce the arrival" of Dr. Colella at UPP/UPMC, born out of the marketing meetings Dr. Colella began attending in February 2009. This UPMC marketing plan was expressly designed to target Dr. Colella's "prospective, current, and former patients." Plaintiff's Exhibit 52.

90. Among other key points, the UPMC marketing plan:

- (a) noted UPMC's intent to take advantage of "Dr. Colella's strong reputation among patients, referring physicians, and the community at-large;"
- (b) stated as a goal for "Phase I" of the marketing campaign ensuring that Dr. Colella's

“prospective, current, and former patients are aware that Dr. Colella has joined UPMC;”

(c) stated as another goal using Dr. Colella’s reputation to “[b]uild awareness and preference” for the competing bariatric surgery program at Magee;

(d) planned an advertising campaign that would enable “former, current and prospective patients... to schedule appointments” with Dr. Colella;

(e) proposed initiating a “[v]iral [m]arketing” campaign by enlisting Dr. Colella’s former patients “to post word of the announcement on obesity blogs and websites;”

(f) on the assumption that Dr. Colella would start working at Magee on April 1, 2009, planned an aggressive advertising campaign involving the placement of a significant number of advertisements in three different publications to run on dates between April 1 and April 19, 2009.

Id.

91. On April 5, 2009, the same day Dr. Colella informed Mr. Bushong that he would not be coming to work the following day, UPMC issued a press release, entitled “Prominent Bariatric Surgeon, Joseph J. Colella, M.D., Joins UPMC,” announcing Dr. Colella’s new practice coming to Magee-Women’s Hospital and inviting patients to schedule appointments to see him. Plaintiff’s Exhibit 77.

92. On April 5, 2009, Mr. Romoff, the Chief Executive Officer of UPMC, reacting to news of Dr. Colella’s signing his employment agreement with UPP/UPMC stated:

The recruitment of Dr. Joe Colella, a prominent AGH non-invasive bariatric surgeon, after many months will likely have symbolic value as well as giving us the vast majority of cases as joins [sic] our successful program at Magee. He has been a “feature surgeon” for them....

Plaintiff’s Exhibit 84.

93. On April 6, 2009, Dr. Webster stated in an e-mail he sent to Mr. Romoff that “We are already getting calls from [Dr. Colella’s] patients, and I bet that within a month Colella will be going nearly full steam.” Plaintiff’s Exhibit 95.

94. In mid-March 2009, while in the midst of his marketing discussions with Mr. Patel about pushing patients to UPMC, Dr. Colella removed from AGH about five months’ worth of confidential patient schedules containing names, social security numbers and contact information of every patient he had been scheduled to see from September 2008 through early March 2009. Dr. Colella admits that he took the list of patient schedules so he could have the means to contact the patients identified on them to inform them that he had joined UPMC. Many of the patients on the list would have been in various stages of preoperative preparation, thus making them candidates to be “push[ed]” to UPMC for their surgeries. ASPN was aware that Dr. Colella had generated the list. Dr. Colella did not use, disclose or give the list to anyone. Dr. Colella returned the list to ASPN prior to the preliminary injunction hearing. Transcript at 96-100.

95. UPP/UPMC employees made phone calls to ASPN employees for whom Dr. Colella had provided contact information for possible positions at UPMC if Dr. Colella began practicing at UPMC, but no AGH staff members left AGH as a result of these phone calls. Transcript at 224-225.

VI. ENFORCING THE RESTRICTIVE COVENANTS WILL NOT HARM DR. COLELLA OR THE PUBLIC INTEREST

96. On April 5, 2009, Dr. Colella signed the five-year UPP/UPMC employment agreement providing a total base, administrative and faculty compensation of \$650,000 per year, along with \$125,000 worth of retention bonuses to be paid out in subsequent years. Transcript at 109-110; Plaintiff’s Exhibit 78 at Exhibit A.

97. Exhibit C of the UPP/UPMC employment agreement provides for a contingency plan in the event an Action is threatened or filed to enforce the loyalty and non-competition restrictive covenants in the ASPN Employment Agreement. The contingency plan allows UPP to relocate Dr. Colella to a hospital facility that provides medical services on behalf of UPP/UPMC outside of the geographic restrictions in the ASPN Employment Agreement. In the event that UPP requires Dr. Colella to relocate his practice outside of Allegheny County, the UPP/UPMC employment agreement is to be extended for an additional two years, with all of the other terms, including Dr. Colella’s lucrative compensation terms, remaining the same. Plaintiff’s Exhibit 78 at Exhibit C.

98. There is no shortage of bariatric surgeons in Allegheny County. If one had to stop working in Allegheny County, the population would not suffer. Transcript at 28 (Defendant’s Opening Statement).

DISCUSSION

On appeal from the grant or denial of a preliminary injunction, the appellate court examines the record to determine if there were any apparently reasonable grounds for the action of the court below. *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 573 Pa. 637, 645-646, 828 A.2d 995, 1000 (2003). As the *Summit Towne Centre* appellate court stated, “Only if it is plain that no grounds exist to support the decree or that the rule of law relied upon was palpably erroneous or misapplied will we interfere with the decision of the trial court.” *Id.*

The Supreme Court of Pennsylvania in *Warehime v. Warehime*, 580 Pa. 210, 860 A.2d 41 (2004) set forth the six essential prerequisites that a moving party must establish prior to obtaining preliminary injunctive relief:

The party must show 1) that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; 2) that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings; 3) that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; 4) that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits; 5) that the injunction it seeks is reasonably suited to abate the offending activity; and, 6) that a preliminary injunction will not adversely affect the public interest.

Id. at 46-47 (citations omitted)

A preliminary injunction may properly issue only when all of the necessary elements are established. *Id.* The burden of proof is on the party who requested the preliminary injunctive relief. *Id.*

As fully discussed below, Plaintiffs have established all of the necessary elements, and thus are entitled to a prelimi-

nary injunction.

I. ABSENT AN INJUNCTION, PLAINTIFFS WILL SUFFER IMMEDIATE AND IRREPARABLE HARM

An analysis of the existence of irreparable harm in the context of a preliminary injunction enforcing a physician non-competition covenant has been set forth in *West Penn Specialty MSO, Inc. v. Nolan*, 737 A.2d 295 (Pa.Super. 1999):

An injury is regarded as “irreparable” if it will cause damage which can be estimated only by conjecture and not by an accurate pecuniary standard. Our courts have held, accordingly, that it is not the initial breach of the covenant which necessarily establishes the existence of irreparable harm but rather the unbridled threat of the continuation of the violation, and incumbent disruption of the employer’s customer relationships.

Thus, grounds for an injunction are established where the plaintiff’s proof of injury, although small in monetary terms, foreshadows the disruption of established business relations which would result in incalculable damage should the competition continue in violation of the covenant. The effect of such disruption may manifest itself in a loss of new business not subject to documentation, the quantity and quality of which are inherently unascertainable.... Consequently, the impending loss of a business opportunity or market advantage also may be aptly characterized as an “irreparable injury” for purposes of equitable relief.

Id. at 299. (citations omitted)

For healthcare employers, irreparable damage includes disruption of current or future patient relationships; damage to the employer’s referral base, goodwill, business opportunities or market advantage; and loss of the employer’s investment in the physician’s training or practice. *See, Id.* at 298 (referring to the “disruptive effect of [a doctor’s] departure on [the employer’s] current or future patient relationships”); *Einstein Cmty. Health Assocs. v. Shortridge, No. 1814*, 2000 WL 35496540, at *12 (Pa. Cm. Pls. Dec. 13, 2000) (a doctor’s “[k]nowing solicitation” of patients “in violation of a restrictive covenant” constitutes irreparable harm) (quoting *John G. Bryant Co. v. Sling Testing & Repair, Inc.*, 369 A.2d 1164, 1168 (Pa. 1977)); *WellSpan Health v. Bayliss*, 869 A.2d 990, 998-99 (Pa.Super. 2005) (holding that a medical institution’s referral base is a protectable interest that can justify an injunction); *Id.* at 997 (goodwill and positive business reputation) (citing *Hess v. Gebhard & Co.*, 808 A.2d at 912, 922 (Pa. 2002)). “The injury caused by a violation of a covenant not to compete is particularly difficult to quantify for damages purposes.” *Medical Wellness Assocs, P.C. v. Heithaus*, 2001 WL 1112991 at *26, 51 Pa. D. & C.4th 1 (Pa. Com. Pl. Feb. 13, 2001). “It is not the initial breach of a covenant which necessarily establishes the existence of irreparable harm but rather the threat of the unbridled continuation of the violation and the resultant incalculable damage to the former employer’s business that constitutes the justification for equitable intervention.” *Sling Testing*, 369 A.2d at 1167. “The covenant seeks to prevent more than just the sales that might result by the prohibited contact but also the covenant is designed to prevent a disturbance in the relationship that has been established between appellees and their accounts through prior dealings. It is the possible consequences of this unwarranted interference with customer

relationships that is unascertainable and not capable of being fully compensated by money damages.” *Id.*

If Dr. Colella is permitted to practice medicine at Magee-Women’s Hospital, a hospital outside the WPAHS system, and be employed by UPP/UPMC, he will likely cause significantly more disruption to Plaintiffs’ relationships with their current patients and even more disruption to relationships with their patient referral base, which depends on referrals from referring physicians (both employed and private) and patients they have previously treated. The risk of immediate, irreparable harm is demonstrated by the facts in this case. An injunction requiring Dr. Colella to comply with his restrictive covenants is thus reasonably necessary to protect Plaintiffs from that harm.

Therefore, we find that the first prerequisite to the issuance of a preliminary injunction has been satisfied because Plaintiffs have adequately demonstrated imminent irreparable harm that cannot be adequately compensated by damages.

II. GREATER HARM WOULD RESULT IF AN INJUNCTION WERE NOT GRANTED

Once the employer has articulated protectable business interests that are at risk of immediate and irreparable harm, the “the next step in analysis of a non-competition covenant is to apply the balancing test defined by our Supreme Court. First, the court must balance the employer’s protectable business interest against the employee’s interest in earning a living. Then, the court balances the employer and employee interests with the interests of the public.” *WellSpan*, 869 A.2d at 999 (citing *Hess*, 808 A.2d at 920). Dr. Colella bears the burden of proving that the hardships imposed by the non-competition provisions in Section 9(h) of the Employment Agreement are unreasonable. *WellSpan*, 869 A.2d at 999 (“In weighing the competing interests of employer and employee, the court must engage in an analysis of reasonableness...with the party claiming unreasonableness as a defense against enforcement of the covenant bearing the burden of proof.”). *See, Sling Testing*, 369 A.2d at 1169 (same).

A. The Injunction Would Impose Minimal Hardship on Dr. Colella

Enforcing the Section 9(h) non-competition restrictive covenants through an injunction would not impose any serious hardship on Dr. Colella. Not only would he be perfectly capable of earning a living while abiding by the terms of the restrictive covenants, but he has already negotiated a lucrative contract that would actually reward him with greater job security if he is required to abide by the restrictive covenants. In “weighing...the employer’s need for protection...against the hardship of the restriction to be imposed upon the employee[,]” undue hardship to the employee may be found where, for example, he would “encounter difficulty in transferring his particular experience and training to another line of work,... [or would] find it difficult to uproot himself and his family in order to move to a location beyond the area of potential competition with his former employer.” *Insulation Corp. of America v. Brobston*, 667 A.2d 729, 734 (Pa.Super. 1995) (quoting *Morgan’s Home Equipment Corp. v. Martucci*, 136 A.2d 838, 846 (Pa. 1957)). Such considerations are absent here.

Dr. Colella contends that working outside of Allegheny County might be inconvenient for him and might not permit him to perform the high-risk bariatric surgeries. The Court finds this perceived harm to be minimal under the facts of this case. In balancing the equities, the irreparable harm to Plaintiffs clearly outweighs any temporary inconvenience that might accompany Dr. Colella earning potentially in

excess of \$650,000 employed by UPP for two years at hospitals within western Pennsylvania, but outside of Allegheny County.

Therefore, under these facts, it is reasonable to conclude that the balance of hardships tips in favor of granting preliminary injunctive relief.

III. THE INJUNCTION WILL RESTORE THE PARTIES TO THEIR STATUS PRIOR TO DR. COLELLA'S WRONGFUL CONDUCT

"A preliminary injunction operates to maintain affairs between the parties as they existed prior to the underlying dispute and 'to compel a wrongdoer to give up the status he appropriated before an action could have been instituted against him.'" *West Penn Specialty*, 737 A.2d at 298 (quoting *Herman v. Dixon*, 141 A.2d 576, 577 (Pa. 1958)). Plaintiffs request an injunction returning the parties to the status quo before Dr. Colella entered an employment relationship to perform medical services for UPP/UPMC in Allegheny County in violation of the loyalty and non-competition restrictive covenants in his Employment Agreement.

Therefore, under these facts, the issuance of a preliminary injunction will properly restore the parties to their status, as it existed immediately prior to the alleged wrongful conduct.

IV. PLAINTIFFS ARE LIKELY TO PREVAIL IN THEIR BREACH OF CONTRACT CLAIMS REGARDING DR. COLELLA'S VIOLATION OF THE RESTRICTIVE COVENANTS IN HIS EMPLOYMENT AGREEMENT

Plaintiffs are likely to prevail in their claim that Dr. Colella's acceptance of employment with UPP/UPMC within Allegheny County violated the duty of loyalty and non-competition covenants of his Employment Agreement. Giving the former employer time to rebuild its customer and business relationships free from competition by the departing employee is the very purpose of non-competition covenants, which Pennsylvania courts clearly and regularly enforce. *See, Sling Testing*, 369 A.2d at 1170. (purpose is not a permanent protection from competition, or even from fair competition at all, but protection for a reasonable period of time to protect an employer's legitimate relationships and investment in the short term)

A. WPAHS IS AN INTENDED BENEFICIARY OF THE EMPLOYMENT AGREEMENT

A party is a third-party beneficiary of a contract when the parties to a contract express an intention to benefit the third-party in the contract or when the circumstances are so compelling "that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." *Hay Acquisition Co. v. Schneider*, No. Civ.A. 2:04-CV-1236, 2005 WL 1017804, at *8 (E.D. Pa. April 27, 2005) (quoting *Scarpitti v. Weborg*, 609 A.2d 147, 150 (Pa. 1992). *See, Burks v. Federal Ins. Co.*, 883 A.2d 1086, 1088 (Pa.Super. Ct. 2005) (even an unnamed party can be a third-party beneficiary of a contract if both "parties to the contract so intended....").

It is clear that a contracting party may enforce the contract to protect the interests of a third-party beneficiary. *See, Barium Steel Corp. v. Wiley*, 108 A.2d 336 (Pa. 1954) ("a person with whom or in whose name a contract has been made for the benefit of another" may sue to enforce that contract).

It is also clear that a third-party beneficiary of a contract can bring an action to enforce that contract, including in the

context of enforcing restrictive covenants. *See, Omicron Sys., Inc. v. Weiner*, No. 669 Aug. Term 2001, 2002 WL 452238, at *1 n.2, *7 (Pa. Com. Pls. March 14, 2002) ("At the least, [employer's affiliate] could be considered a third-party beneficiary under the Restrictive Covenant Agreement and would therefore be entitled to enforce the Agreement's terms against [employee].") (citing *Scarpitti*, 609 A.2d at 150-51); *Hay Acquisition*, 2005 WL 1017804 at *2 n.2, *9 (party is a third-party beneficiary where an employment contract creates a right in a third-party "to benefit from [the employee's] services" and imposes on the employee the duty to perform services for that third-party).

As a result, ASPN and WPAHS may seek to protect WPAHS's third-party beneficiary interests in this Action to enforce the restrictive covenants. The facts and circumstances in this case, demonstrate that the parties to the Employment Agreement (i.e. ASPN and Dr. Colella) manifested an express intention that Allegheny General Hospital (now WPAHS), would be an intended third-party beneficiary of the Employment Agreement.

B. ASPN HAS THE RIGHT TO ENFORCE ITS OWN INTERESTS AND THE INTERESTS OF WPAHS

Notwithstanding WPAHS's right to enforce the restrictive covenants, ASPN clearly has the independent right to protect its own interests and the interests of WPAHS as the intended beneficiaries of the restrictive covenants. This right arises both from the common law right of a party to a contract to enforce the agreement for the benefit of an intended beneficiary and the language of the Employment Agreement itself. Section 11 of the Employment Agreement, expressly contemplates and authorizes ASPN to bring this Action for an injunction based on harm to ASPN and Allegheny General Hospital (now WPAHS), resulting from a breach by Dr. Colella of the loyalty, non-competition or confidentiality covenants of Sections 9 or 10 of the Employment Agreement. That is precisely the Action that Plaintiffs have brought here.

C. THE CIRCUMSTANCES OF DR. COLELLA'S DEPARTURE DO NOT PRECLUDE ENFORCEMENT OF THE RESTRICTIVE COVENANTS

Dr. Colella argues that this Court must disregard his non-competition covenant, and in support of that position, Dr. Colella relies primarily on our Superior Court's decision in the *Brobston* case. In *Brobston*, the employer fired the employee, a salesman, for poor performance and then sought to enforce a two-year, 300-mile restrictive covenant against him. *Brobston*, 667 A.2d at 738. The *Brobston* court found that the employer had essentially deemed the employee to be worthless, and reasoned:

Where an employee is terminated by his employer on the grounds that he has failed to promote the employer's legitimate business interests, it clearly suggests an implicit decision on the part of the employer that its business interests are best promoted without the employee in its service. The employer who fires an employee for failing to perform in a manner that promotes the employer's business interests deems the employee worthless. Once such a determination is made by the employer, the need to protect itself from the former employee is diminished by the fact that the employee's worth to the corporation is presumably insignificant. Under such circumstances, we conclude that it is unreasonable as a matter of law to permit the employer to retain unfettered control over that which it has effectively discarded as

worthless to its legitimate business interests.

Id. at 735.

A trial court in deciding a request for preliminary injunctive relief should consider the circumstances surrounding the former employee's termination, a factor which affects both the legitimacy of the employer's interests and the degree of hardship imposed upon the departing employee. *Id.* at 737. Noting that the reasonableness of a restrictive covenant must be "determined on a case-by-case basis," the *Brobston* court found that the trial court erred in not considering the fact that the employee had been fired as a factor in its determination of reasonableness. *Id.* at 735, n.6, 737. In the few cases in which courts have found the circumstances of termination to favor disregarding a non-competition covenant, the employer's actions evidenced an intent to completely sever ties with the employee. *See, Brobston*, 667 A.2d at 735 (employee fired as "worthless"); *Nephrology Assocs. of Central Pa. v. Elnour*, No. 07-0648 Civil Term, 2007 WL 5770086, at *35-37 (Pa. Com. Pl. Mar. 9, 2007) (one partner in medical practice voted out by the other partners). There is no Pennsylvania case cited by either party where a court has disregarded a non-competition covenant based on the failure of an employer and employee to come to agreement on the terms of a new employment agreement.

The ability to enforce restrictive covenants does not require the employer to be willing to meet whatever terms are demanded by the employee. *Hayes v. Altman*, 225 A.2d 670 (Pa. 1967). In *Hayes*, the employment agreement between an optometrist and his employer terminated on December 31, 1963. *Id.* at 671. The parties did not enter a new agreement, but continued to work under terms consistent with the prior agreement until March 13, 1964, when the employer "discharged" the employee. *Id.* Notwithstanding that the employer in that case had actually fired the employee, the *Hayes* court enforced the non-competition agreement where the employer discharged the employee after the parties failed to come to agreement on the terms of a new contract of employment. *Id.* A non-competition covenant is not to be disregarded based on the failure of an employer and employee to come to agreement on the terms of continued employment. *Id.*

This Court has thoroughly considered the circumstances surrounding Dr. Colella's departure from his former employer as a factor in its determination of reasonableness of enforcing the restrictive covenant by issuing a narrowly tailored preliminary injunction in this case. The facts of this case do not indicate that ASPN regarded Dr. Colella's value as an employee to be worthless or that ASPN unilaterally terminated Dr. Colella's employment for economic reasons.

Plaintiffs have a clear right to injunctive relief under the express terms of the Employment Agreement. The issuance of a preliminary injunction is appropriate because Plaintiffs have demonstrated, at least, a reasonable probability of success on the merits of a breach of contract claim.

V. THE PRELIMINARY INJUNCTION IS REASONABLY SUITED TO ADDRESS THE WRONG PLED AND PROVEN

An injunction prohibiting Dr. Colella from providing medical services in violation of the non-competition covenants of his Employment Agreement is reasonably suited to address his improper conduct. Covenants not to compete are enforceable if: (a) they are incident or ancillary to employment; (b) the restrictions imposed by the covenant are reasonably necessary to protect a legitimate business interest of the employer; and (c) the restrictions are reasonably limited in duration and geographic extent. *Hess*, 808 A.2d at 917, 920.

A. THE RESTRICTIVE COVENANTS ARE ANCILLARY TO EMPLOYMENT

The restrictive covenants in the Employment Agreement are ancillary to employment in that they were negotiated as part of the Employment Agreement, which provided Dr. Colella with, *inter alia*, a guaranteed term of employment and salary.

B. ENFORCEMENT OF THE RESTRICTIVE COVENANTS IS REASONABLY NECESSARY TO PROTECT LEGITIMATE BUSINESS INTERESTS

The Employment Agreement's restrictions on competition are reasonably necessary to protect Plaintiffs' legitimate business interests. The business interests that Plaintiffs seek to protect are those which Pennsylvania courts have long recognized as protectable through use of restrictive covenants and that nearly always lend themselves to injunctive relief. These legitimate business interests include goodwill, patient relationships, patient referral base, competitive information as well as the investment in Dr. Colella and the Allegheny General Hospital Bariatric Surgery Center built around him. *See, West Penn Specialty*, 737 A.2d at 299 (affirming an injunction enforcing oncologist's non-competition covenant in order to protect medical clinic's "existing patient relationships" and "market advantage"); *WellSpan*, 869 A.2d at 997-999 (protectable interests include a healthcare provider's patient referral base and "efforts and moneys" expended on the employee's training).

Goodwill developed by an employee in the context of the employment relationship belongs to the employer and is protectable through use of non-competition covenants. *Sidco Paper Co. v. Aaron*, 351 A.2d 250, 252-53 (Pa. 1976) ("An employer's right to protect, by a covenant not to compete, interest in customer goodwill acquired through the efforts of an employee is well-established in Pennsylvania."); *WellSpan*, 869 A.2d at 997 (customer goodwill is protectable "even when the goodwill has been acquired through the efforts of an employee"); *Einstein Cmty. Health Assocs. v. Shortridge*, No. 1814, 2000 WL 35496540, at *9-10 (Pa. Com. Pl. Dec. 13, 2000).

Similarly, Pennsylvania courts have recognized a protectable interest in an employer's patient referral base, especially in connection with the provision of specialized medical care such as bariatric surgery. *WellSpan*, 869 A.2d at 997. In *WellSpan*, the Superior Court formally recognized a protectable interest in a patient referral base, noting that an investment in building such a base around a physician "is not truly compensable through monetary damages when the referral base depends on the network of professional relationships that have developed over time between referring physicians and the particular subspecialist physician." *Id.* at 998. Bariatric surgeons, like the perinatologist at issue in *WellSpan*, fit squarely within the type of subspecialist medical practice dependent on referrals that can be protected by restrictive covenants. *Id.* at 997. Plaintiffs have established a protectable interest in their patient referral base, built both with respect to physician referrals and referrals from other patients treated by Dr. Colella at Allegheny General Hospital.

The protection of confidential information obtained during employment is also an interest that courts have recognized as protectable by enforcement of restrictive covenants. *Id.* at 996. Here, Dr. Colella was the Director of Allegheny General Hospital's Bariatric Surgery Center and, as such, had access to confidential information including patient names and contact information, information about marketing strategies and information about the operation of the Bariatric Surgery Center generally, all of which he could readily exploit as an employee of a rival program in

Allegheny County.

C. THE GEOGRAPHIC AND TEMPORAL LIMITATIONS OF THE RESTRICTIVE COVENANTS ARE REASONABLE

The interpretation of a contract is a matter of law for the Court to decide. *Quinn v. Bupp*, 955 A.2d 1014, 1017 (Pa.Super. 2008). The only reasonable interpretation of the restrictive covenants limits its applicability to Allegheny County. Section 9(h) of the restrictive covenants applies only in the limited circumstance in which ASPN does not offer to renew the Employment Agreement, which happens to be precisely the scenario at issue in this litigation. In context, Section 9(h) of the restrictive covenants only limits Dr. Colella's practice of medicine in Allegheny County. He is free to engage in the practice of medicine without restriction outside of Allegheny County, and to refer patients to any hospital or surgery center outside of Allegheny County, without violating the non-competition covenant.

The non-competition covenants negotiated by the parties are reasonably limited in duration and geographic scope, in that they restrict Dr. Colella's medical practice only within Allegheny County, where the majority of Plaintiffs' bariatric surgery patients originate, and only for two years. "Pennsylvania courts have consistently affirmed covenants not to compete for terms between two and three years after employment ends." *Medical Wellness Assoc.*, 2001 WL 1112991 at *25 (enforcing a two-year covenant; citing cases); *See, Hayes*, 225 A.2d at 671 (three-year restriction on an optometrist); *WellSpan*, 869 A.2d at 995 (two-year restriction on perinatologist); *Geisinger Clinic v. W. DiCuccio, M.D.*, 606 A.2d 509, 514 (Pa.Super. Ct. 1992) (upholding a restrictive covenant that placed a two-year restriction on physician) *appeal denied*, 536 Pa. 625, 637 A.2d 285 (1993), *cert. denied*, 513 U.S. 1112, 115 S. Ct. 904 (1995); *West Penn Specialty*, 737 A.2d at 296-297 (more than five years including the remaining term and an additional year); *Sling Testing*, 369 A.2d at 1170 (enforcing a three-year covenant not to compete where the employee had been the employer's principal representative for a decade and three years was "reasonably necessary for...the employers to strengthen and reaffirm their business contacts" in the wake of his departure).

A one-county restriction on a medical practice is likewise well within what has been approved in other cases. *See, Medical Wellness Assoc.*, 2001 WL 1112991 at *25 (45 mile radius); *WellSpan*, 869 A.2d at 995 (two county area); *Geisinger Clinic*, 606 A.2d at 514 (50 mile radius). Plaintiffs have, over the more than decade-long course of Dr. Colella's employment, built their bariatric surgery program around him. Two years is a relatively brief period of time to provide an opportunity to build the program around other physicians, and to attempt to secure Plaintiffs' interests in their patient relationships, referral base and program investment, before Dr. Colella can be permitted to use those relationships and that referral base to compete as an employee of a rival health care system in Allegheny County.

Accordingly, we find, under these facts, that the grant of preliminary injunctive relief is reasonably suited to address the offending activity.

VI. THE PRELIMINARY INJUNCTION WILL NOT BE ADVERSE TO THE PUBLIC INTEREST

Where a covenant not to compete "seeks to limit the professional practice of a physician," courts must evaluate the covenant's effect, if any, on the public interest. *West Penn Specialty*, 737 A.2d at 298 (affirming the granting of a preliminary injunction against the doctor). "In the context of non-compete agreements amongst physicians, our Supreme Court

has defined the public interest as a function of the availability of appropriate medical service to the community should an injunction be imposed." *West Penn Specialty*, 737 A.2d at 300 (citing *New Castle Orthopedic Assoc.*, 392 A.2d 1383, 1387-88 (Pa. 1978)). In *West Penn Specialty*, the Superior Court followed Supreme Court of Pennsylvania's holding in *New Castle Orthopedic Assocs. v. Burns*, 392 A.2d 1383, 1387 (Pa. 1978) that the "public interest" is defined not in terms of a particular physician, but the general availability of physicians to treat patients. *Id.* at 298. In doing so, the Superior Court noted that "no jurisdiction has recognized a public interest in assuring the unrestricted ability of a particular patient in continuity of care with a single physician." *Id.*

Just as in Pennsylvania, courts in nearly every state continue to enforce restrictive covenants involving physicians as they would other restrictive covenants and to define the public interest in terms of lack of availability of medical care rather than lack of availability of a particular physician. *See, Herman v. Dixon*, 141 A.2d 576, 578 (Pa. 1958) (applying general contract rules to enforce restrictive covenant involving physician); *Geisinger Clinic*, 606 A.2d at 512 *et seq.* (same); *Concord Orthopaedics Professional Ass'n. v. Forbes*, 702 A.2d 1273, 1275-77 (N.H. 1997) (normal test of reasonableness applicable to physician covenants; no shortage as a result of restriction on physician); *Wall v. Firelands Radiology, Inc.*, 666 N.E.2d 235, 246-248 (Ohio Ct. App. 1995) (general contract principles govern; court will not rewrite parties' agreement; community not under-served), *appeal not allowed*, 659 N.E.2d 1289 (Ohio 1996); *Medical Specialists, Inc. v. Sleweon*, 652 N.E.2d 517, 526 (Ind. Ct. App. 1995) (no shortage of specialists in same field); *Fumo v. Medical Group of Michigan City, Inc.*, 590 N.E.2d 1103, 1109 (Ind. Ct. App. 1992) (consider availability of other physicians).

Accordingly, in the rare cases in which Pennsylvania courts have invoked the public interest in declining to enforce covenants not to compete on a physician, the evidence showed that there was a legitimate shortage of practitioners in the relevant area. *See, WellSpan*, 869 A.2d at 1000 (enforcement of the covenant would have deprived the county at issue of its only perinatologist); *New Castle Orthopedic*, 392 A.2d at 1388 (demand for orthopedic physicians was significantly greater than supply, leading to long wait times for a "desperately needed service").

Under the facts of this case, the public interest will not be adversely affected by enforcement of the non-competition restrictive covenants of the Employment Agreement. Therefore, we find the final prerequisite required for a grant of preliminary injunctive relief to be satisfied.

CONCLUSIONS OF LAW

1. Plaintiffs have established the immediate and irreparable harm requirement for preliminary injunctive relief.
2. Greater injury would result from refusing the injunction than from granting it, and the issuance of an injunction will not substantially harm Defendant.
3. A preliminary injunction will properly restore the parties to the status quo as it existed immediately prior to the wrongful conduct.
4. Plaintiffs are likely to prevail on the merits regarding a claim of breach of contract to enforce restrictive covenants in the Employment Agreement.
5. A preliminary injunction is reasonably suited to address the wrong pled and proven.

6. A preliminary injunction will not adversely affect the public interest.

BY THE COURT:
/s/Ward, J.

Dated: June 9, 2009

ORDER OF COURT

AND NOW, to wit, this 9th day of June, 2009 upon consideration of Plaintiffs' Amended Motion for Preliminary Injunction, Plaintiffs' and Defendant's Proposed Findings of Fact and Conclusions of Law, and respective briefs and responses thereto and after hearing, it is hereby ORDERED, ADJUDGED and DECREED that Plaintiffs' Amended Motion for Preliminary Injunction is GRANTED.

1) Defendant Joseph J. Colella, M.D., pending a final order after a trial on the merits, is hereby:

a) preliminarily enjoined from entering into or fulfilling the terms of any employment agreement or other contract of any type to provide clinical, administrative, or any medically-related services within Allegheny County, Pennsylvania for any other hospital, health care provider or surgery center outside the West Penn Allegheny Health System for a two (2) year period beginning April 1, 2009, further extended by the amount of time Defendant is found to be in breach of his restrictive covenants under the Employment Agreement with Allegheny Specialty Practice Network;

b) preliminarily enjoined from directly or indirectly soliciting Plaintiffs' employees or patients for a two (2) year period beginning April 1, 2009, further extended by the amount of time Defendant is found to be in breach of his restrictive covenants under the Employment Agreement with Allegheny Specialty Practice Network; and

c) preliminarily enjoined from accessing, obtaining, copying, using or sharing with any third parties any confidential information obtained during his employment with Allegheny Specialty Practice Network.

2) It is further ORDERED that Plaintiffs are to file a bond in the amount of \$250,000 by the 19th day of June 2009, pursuant to Pa.R.Civ.P. 1531(b), pending the final determination of this matter.

3) It is further ORDERED that the injunction shall not take effect until Plaintiffs file the required bond with security approved by the Court.

BY THE COURT:
/s/Ward, J.

Dated: June 9, 2009

¹ Plaintiffs have objected to Defendant's Proposed Exhibit 22. Defendant's proposed Exhibit 22 is an Affidavit of John G. Krah purporting to authenticate a statement by the Allegheny County Medical Society entitled "Ethical Responsibilities in Change in Affiliation of Medical Practices or Separation of Employment." Defendant's Exhibit 22 does not constitute competent evidence in this proceeding. Moreover, Defendant's Exhibit 22 is not relevant to the issues in this litigation. The objection to Defendant's Proposed Exhibit 22 is sustained.

Plaintiffs have also objected to Defendant's Proposed Exhibit 27. The first page of Defendant's Proposed Exhibit 27 is a one-page document that purports to be a "comparison of statements made by plaintiffs about Dr. Colella with statements made by UPMC about Dr. Colella." The source documents for these statements comprise a total of 12 one-page e-mails, all of which are actually contained in Defendant's exhibit binder following the proposed "summary." The first page of Defendant's Proposed Exhibit 27 does not qualify as a summary exhibit under Pennsylvania Rule of Evidence 1006 because, it does not summarize writings that are voluminous; and the writings can be easily reviewed themselves by the Court to the extent, if any, they are found relevant. The objection to Defendant's Proposed Exhibit 27 is sustained as to the first page of Defendant's Proposed Exhibit 27, and overruled as to following 12 e-mails.

² As described in the "Articles/Certificate of Merger" effective December 31, 2007 obtained from the Pennsylvania Department of State Corporation Bureau (Exhibit A to Plaintiff's Response to Defendant's Post-Hearing Memorandum of Law Addressing West Penn Allegheny Health System's Relationship to Allegheny Specialty Practice Network), the merger involved three entities, West Penn Allegheny Health System, Inc., Allegheny General Hospital and The Western Pennsylvania Hospital. The surviving corporate entity, which succeeded to the rights and liabilities of all three of the prior corporate entities, was the entity formerly named The Western Pennsylvania Hospital. *Id.* The surviving entity, which is one of the Plaintiffs in this Action, then changed its name to West Penn Allegheny Health System, Inc. *Id.*

Viking Insurance Company v. Ned Spells, Timothy E. Johnson, Bradley A. Steigerwalt, Carole L. Steigerwalt and State Farm Mutual Automobile Insurance Company

Insurance Policy—Plain Language

1. Plaintiff sued Defendant Ned Spells claiming that the language of the insurance policy regarding an "insured person" did not require Plaintiff to cover an accident involving a rental car leased by Plaintiff, but driven by another party.

2. Plaintiff relied on language that stated, "No person shall be considered an insured person if the person uses a car or utility trailer without the permission of the owner."

3. The Court determined Spells was the owner or lessee of the car and had permission to drive it. The language relied upon by Plaintiff would be sufficient to deny coverage to the person operating the car at the time of the accident, but not Plaintiff.

(Rhoda Shear Neft)

Robert W. Deer for the Plaintiff.
Thomas A. McDonnell for State Farm.
Ned Spells, *pro se.*

No. GD 012927. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION OF THE COURT

Colville, J., May 29, 2009—This appeal follows this court's non-jury verdict of March 19, 2009. Plaintiff appeals those portions of the March 19, 2009 verdict wherein this court found against the Plaintiff, Viking Insurance Company of Wisconsin (hereinafter "Viking") and for the Defendant, Ned Spells, as to coverage issues related to Ned Spells.¹ Specifically, this court found that the Viking owed the coverage to Ned Spells as an "insured person" under the policy relying upon the second paragraph of Part I – Liability Coverage and the definition of "insured person" under Part I; notwithstanding the bolded language following Part I's definition of "insured person," which states:

NO PERSON SHALL BE CONSIDERED AN INSURED PERSON IF THE PERSON USES A CAR OR UTILITY TRAILER WITHOUT THE PERMISSION OF THE OWNER.

The factual background giving rise to this case is as follows, Viking issued policy number 385502449 covering Ned Spells as the "Insured" and a 1987 Dodge Mini Ram Van as the "insured car" on October 22, 2004 for a one year term. On February 22, 2005, Ned Spells drove the subject insured 1987 Dodge Mini Ram Van to an Enterprise Rent-A-Car (hereinafter, "Enterprise") where he rented a silver 2004 Chevrolet Malibu for himself and for "no other driver permitted." Enterprise Rent-A-Car was the owner of the vehicle and the contractual terms of the rental were set forth in a rental car contract signed and initialed by Spells.

On February 23, 2005, Johnson was driving the 2004 Chevrolet Malibu, when he fled from police, drove through a red traffic light without stopping and crashed into a car driven by Bradley Steigerwalt (hereinafter, "Steigerwalt"). Thereafter, Spells reported that the Chevrolet Malibu had been stolen. At the time of the accident, Johnson did not have a valid driver's license. Steigerwalt suffered serious injuries as a result of the car crash.

On January 26, 2006, Steigerwalt filed suit against Johnson and Spells in the Court of Common Pleas of Allegheny County seeking compensation from Spells and Johnson for injuries, damages and losses suffered during the crash. Neither Spells nor Johnson reported the accident to Viking until after a default judgment was entered against both Spells and Johnson on September 29 2006.

Steigerwalt notified Viking of his claim and Viking denied coverage for Johnson and Spells under the policy. Viking then undertook the defense of Ned Spells under a reservation of rights, reserving the right to challenge coverage for the individuals and vehicle involved in the accident. Viking opened the judgment against Spells and offered the full \$15,000.00 policy limits to the Steigerwalts to resolve the claim, which the amount was rejected by the Steigerwalts. Viking then filed this declaratory judgment action seeking a declaration of the rights, duties and obligations of Viking under the policy of insurance related to the car crash of February 23, 2005. A default judgment was entered in the declaratory judgment action against the insured, Spells, on August 20, 2007. Johnson and Steigerwalt continued to pursue the declaratory judgment action seeking coverage for the claims made by Steigerwalt against Johnson and Spells.

The personal injury case at GD 06-002130 was tried before a judge, without a jury, on March 9, 2009, and a finding was made against both Johnson and Spells under separate theories of liability. Johnson's liability was based upon his negligent operation of a vehicle. Spells' liability was founded upon his statutory responsibility for allowing an unlicensed driver to operate the rental car. On February 27, 2009, Steigerwalt entered judgment on the non-jury verdict

in the personal injury action against Johnson and Spells in the amount of \$522,924.80. On March 9, 2009, the parties presented the declaratory judgment action to the undersigned by stipulation of facts and documents offered and received into evidence. This court's March 19, 2009, non-jury verdict in favor of Viking and against Johnson and against Viking and in favor of Spells was entered on the docket on March 23, 2009.

This court's analysis begins and ends with a review of the relevant policy language. The definitions section of the policy states:

"You" and **"Your"** means the person shown as the named insured on the Declarations Page...

Accordingly, the term "you" or "your" refers to Ned Spells, as the named insured on the Declarations page of the policy.

As discussed above the "Part I – Liability Coverage" section of the policy states in pertinent part:

We will pay damages for which any insured person is legally liable because **bodily injury and/or **property damage** caused by a **car accident** arising out of the ownership, maintenance, or use of a **car or utility trailer**....**

Additional Definitions Used in This Part Only

As used in this part, **"insured person"** or **"insured persons"** means:

(1) **You.**

NO PERSON SHALL BE CONSIDERED AN INSURED PERSON IF THE PERSON USES A CAR OR UTILITY TRAILER WITHOUT THE PERMISSION OF THE OWNER.

Based upon the policy language set forth above, and under the circumstances presented by the instant case, this court concluded that Viking owed coverage to Spells pursuant to the plain language of the insurance policy. Spells is the named insured on the Declaration Page of the policy. Accordingly, Spells is an insured person. The policy plainly states that "[Viking] will pay damages for which any insured person is legally liable because of bodily injury...caused by a car accident arising out of the ownership, maintenance or use of the car..." There can be no question that Steigerwalt suffered bodily injury caused by a car accident arising out of the use a car for which legal liability has been imposed upon Spells by virtue of the February 27, 2009 judgment.

Counsel for Viking has vigorously argued that the language "NO PERSON SHALL BE CONSIDERED AN INSURED PERSON IF THE PERSON USES A CAR OR UTILITY TRAILER WITHOUT THE PERMISSION OF THE OWNER," somehow excludes Spells from coverage that is otherwise plainly available to him under the policy. However, the facts of this case do not warrant such a finding. No reasonable interpretation of the facts of this case permits a finding by this court that Spells used a car without the permission of the owner. Spells was the lessee of the vehicle and had permission to utilize the vehicle by its owner. While the vehicle was not being used at the time of the accident by Spells, and quite arguably (or perhaps, plainly) was being used by Johnson without the permission of the owner, those facts (while certainly sufficient to deny coverage to Johnson) do not operate to deny coverage to Spells under the policy's non-permissive user exclusion language, as Spells, himself, was not using the vehicle without the permission of the owner, at any time, let alone at the time of the accident.

Counsel for Viking further argues that the terms and conditions of the rental policy prohibited Spells from permitting

Johnson to utilize the vehicle. This is true, and while creating duties between Spells and the rental car company, the terms and conditions of the rental policy have no direct bearing on the obligations of the parties under the insurance policy. Viking contends that Spells, a named insured under the policy, is somehow rendered a non-permissive user by virtue of the allegation that he allowed another non-permissive user to operate the vehicle. This position is simply not supported by the policy language.

In essence, Viking argues that when Spells (allegedly) decided to permit Johnson, a non-permissive user, to operate the vehicle, Spells was “using the vehicle” in a non-permitted way and thereby became a non-permitted user himself. If this interpretation were accepted and applied it would result in wildly unreasonable results in this and other cases. Suppose the rental agreement required the renter of the vehicle to “wear their seat belts,” or to operate the vehicle “in conformity with all applicable local and state laws,” and/or “in a safe and prudent manner.”² The allegation that any named insured driver of such a rental vehicle who did not wear their seat belts, exceeded the speed limit, or otherwise failed to operate their vehicle in a safe and prudent manner would result in the insurer denying coverage because the “use” of the vehicle under those conditions was violative of the rental policy and therefore a “non-permitted use” rendering the named insured without coverage by virtue of the non-permissive driver exclusion language of the insurance policy.

While the rental agreement language establishes Viking’s assertion that Spells did not have permission to permit Johnson to utilize the vehicle, even if this court concludes that there is competent evidence that Spells did improperly permit Johnson to utilize the vehicle, it remains the case that Johnson was using the vehicle at the time of the accident not Spells, and under any reasonable interpretation of the policy language only the actual operator of the vehicle is properly denied coverage under the non-permissive user exclusion, not the named insured.

For all the reasons set forth above, this court entered its March 19, 2009 Order of Court.

BY THE COURT:
/s/Colville, J.

¹ The March 19, 2009 verdict was in favor of the Plaintiff as to coverage issues related to Defendant Timothy E. Johnson.

² Indeed, the Enterprise policy at issue in this case includes several similar restrictions on the use of the subject rental vehicle requiring that: “The Vehicle will not...be used for transporting persons or property for hire, ... in any illegal or reckless manner, in a race or speed contest, or to tow or push anything, ... be driven by any person impaired by the use of narcotics, intoxicants or drugs, whether taken with or without a prescription, ... be driven or taken outside of the States authorized, ... be driven on an unpaved road or off-road, ... be used to transport explosives, chemicals, corrosives or other hazardous materials or pollutants of any kind or nature,” among other limitations.