

# PITTSBURGH LEGAL JOURNAL

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# PLJ

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## OPINIONS

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**UPMC Senior Communities  
d/b/a Canterbury Place v.  
David M. Ranallo**

*Uniform Fraudulent Transfer Act—Actual Debtor as Indispensible Party*

1. Defendant is the attorney-in-fact for his uncle, a resident in a skilled nursing facility. The facility instituted suit based on transfers of uncompensated value which made uncle insolvent.

2. To proceed under the Uniform Fraudulent Transfer Act, Plaintiff must show a violation or fraudulent conduct by the actual debtor, not by an individual acting as attorney-in-fact for the actual debtor.

3. The actual debtor is an indispensable party to the action under the Uniform Fraudulent Transfer Act, unless there is already a judgment against the actual debtor.

*(Amy R. Schrempf)*

*Livia F. Langton, Marijane E. Treacy, and Bradley F. Schutjer for Plaintiff.*

*Elizabeth A. Beroes for Defendant.*

No. GD 09-21553. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**OPINION**

Friedman, J., April 28, 2010—Plaintiff has appealed this Court’s Order dated February 12, 2010, dismissing both counts of its Complaint. In its Statement of Matters Complained of on Appeal, Plaintiff raises issues only as to Count II. Any grounds for appealing the dismissal of Count I, Breach of Contract, have been waived, presumably intentionally.

Count II purports to state a claim based on Mr. Ranallo’s alleged violation of the Uniform Fraudulent Transfer Act (“the Act”). Plaintiff argues that it has pled sufficient facts to show that Mr. Ranallo is a “first transferee” within the meaning of section 5108(b)(1) of that Act and is therefore properly the Defendant to be named under the facts here for that alleged violation. As we will discuss later herein, there are no facts that support any *violation* of the Act, so Defendant’s status as a “first transferee” is irrelevant.

We must reiterate what was suggested by our Memorandum filed in Support of the Order now complained of: Plaintiff has no recourse against this Defendant under either Breach of Contract or the Act. However, Plaintiff *may* have recourse against Mr. Ranallo via an accounting of Mr. Ranallo’s conduct under the power of attorney given to him by his uncle, Richard LeDonne (“the Uncle”), in Orphans’ Court Division.

**FACTUAL BACKGROUND**

According to the various paragraphs cited in Plaintiff’s Complaint, the Uncle was and still is a resident in Plaintiff’s skilled nursing facility. (¶9.) The Uncle was admitted on or about September 28, 2007. (¶3.) After the Uncle had been in Plaintiff’s facility for somewhat more than a year, he “apparently became insolvent.” (¶4.) On March 9, 2009, the Uncle or Plaintiff applied for Medical Assistance benefits. (¶4.) Those benefits were denied on September 10, 2009, by the Allegheny County Assistance Office (“CAO”). (¶5.) The basis for denial was that, between June 1, 2006 and November 21, 2008, the Uncle had disposed of assets with a total value of \$168,779.82, supposedly without having received adequate compensation back. (¶5 and Exhibit B.) According to Exhibit B to the Complaint, the CAO was referring to transfers or gifts (“uncompensated value”) made to Mr. Ranallo by the Uncle (or to Mr. Ranallo by Mr. Ranallo himself, presumably pursuant to a power of attorney the Uncle had given him).

The transfers were of the Uncle’s house on June 1, 2006 and of various amounts of money from June 8, 2006 through November 21, 2008. (In Exhibit B, the CAO also listed payments which appear to have been “for value,” from Mr. Ranallo’s account to Plaintiff of roughly \$6,000 per month for each month from March 21, 2008 through April 21, 2009, a \$12,000 payment to Plaintiff on July 23, 2009, plus two deposits totaling \$5,900, to the Uncle’s account<sup>1</sup> on January 28, 2008 and February 11, 2008. The total of these “for value” payments was \$67,912.05.)

As a result of the “uncompensated value” transfers, the CAO determined that “[a] period of ineligibility has occurred as fair market value was not received for [the transfers of \$168,779.82].” The CAO ruled that the Uncle was “not eligible for payment towards the cost of Medicaid/services in a Long Term Care (‘LTC’) facility, beginning on January 1, 2009 and ending on December 10, 2010.” The CAO noted that the Uncle was “eligible for all other Medicaid benefits.” (Exhibit B.)

The CAO also states, in Exhibit B to Plaintiff’s Complaint, that the Uncle “can request an undue hardship waiver if the denial of payment of Medicaid/services in an LTC facility would deprive [him] of medical care which would endanger [his] health or life or...would deprive him of food, clothing, shelter, or other necessities of life.” The Complaint is silent regarding whether or not the Uncle asked for the “undue hardship waiver.”

According to the Complaint, *Plaintiff’s* appeal of the CAO’s ruling is still pending. (¶7.)

Plaintiff does not plead (and has not offered to plead in an amendment) that it has any kind of judgment (e.g. on a verdict or by consent) against the Uncle. Plaintiff relies strictly on the CAO’s ruling for its contention that the transfers to Mr. Ranallo were *fraudulent* as to creditors of the Uncle. However, the CAO’s decision as set forth in Exhibit B contains no suggestion that either the Uncle or Mr. Ranallo acted fraudulently. The CAO simply refers to the requirement that it “evaluate” any transfer in the three years before the date of the application for assistance (here, March 9, 2009).<sup>2</sup>

In paragraph 24 of the Complaint, Plaintiff alleges that Mr. Ranallo “accepted” the transfers “with full knowledge that said transfers were being made at a time when [the Uncle] would be rendered insolvent by the transfers.” The largest transfer, of the Uncle’s house on June 1, 2006, was more than 15 months *before* the Uncle is alleged to have entered Plaintiff’s facility on or about September 28, 2007, and more than 33 months before the Uncle filed for the assistance payments at issue. There is no attempt to plead with any particularity how the transfer of the house in 2006 rendered the Uncle insolvent or even near insolvent in 2006, nor has Plaintiff pled with particularity when (or even, if) the Uncle became insolvent, except to say it was “apparently” by March 2009. Nevertheless, we accepted that conclusory and insufficient allegation of the Uncle’s insolvency as true for purposes of our analysis of Count II and would have allowed amendment for greater particularity had the other elements of Count II existed. They did not.

Lastly, Plaintiff claims that the Uncle’s outstanding balance is \$22,006.81. (¶8.) (This would presumably be as of November 13, 2009, the date the Complaint was signed by Plaintiff counsel.) The balance is growing monthly by an unspecified amount. (¶9.)

## ISSUES RAISED ON APPEAL

Plaintiff raises the following issues in its Statement of Matters Complained of on Appeal:

1. The court erred in misinterpreting the holding in *Presbyterian Medical Center v. Budd*, 832 A.2d 1066 (Pa.Super. 2003), and applying it in a manner that contravenes the plain language of the statute, which expressly authorizes causes of action against first transferees.
2. The court erred in determining that a claim against a first transferee was not a claim for which relief may be granted, as numerous cases exist demonstrating that claims against first transferees are claims for which relief may be granted.
3. The court erred in dismissing the claim with prejudice, as the facts plead in the complaint are sufficient to support a cause of action against Appellee, who was sued in his status as first transferee.

These can be combined into one issue, whether a claim can lie against a purported “first transferee” if the actual debtor has not violated the Act.

**1. The debtor’s conduct, not Mr. Ranallo’s is what must be examined under the Act.**

Plaintiff’s contract, by its terms and as we explained in our earlier Memorandum, was only with the *Uncle*. Plaintiff has conceded this point on appeal. Mr. Ranallo has the Uncle’s power of attorney, but it is the Uncle who has received the services from Plaintiff and it was on behalf of the Uncle that Plaintiff was paid by Mr. Ranallo (according to the CAO in Exhibit B to the Complaint). The *Uncle*, not Mr. Ranallo, is the person who, at most, is a *potential* judgment debtor of Plaintiff, if we accept all the allegations of the Complaint as true.

Plaintiff alleges that it was a “foreseeable creditor” and that the Uncle is its debtor as defined in §5101(b) of the Act. We do not disagree. Plaintiff also alleges that Mr. Ranallo is a “first transferee” under §5107 of the Act. Again, we concede that he may very well be. Lastly, Plaintiff relies on §5108 for the relief it seeks. However, Plaintiff has not addressed §5102, “Insolvency,” §5103, “Value,” and §5104, “Transfers Fraudulent as to Present and Future Creditors.” Those sections describe the elements of Count II that are critical to the liability of the Uncle, and the Uncle’s liability is critical to Plaintiff’s ability to proceed, under the Act, against Mr. Ranallo. We quote §§5102, 5103 and 5104 in full, below.<sup>3</sup>

**12 Pa. C.S.A. §5102. Insolvency**

(a) **General rule.**—A debtor is insolvent if, at fair valuations, the sum of the debtor’s debts is greater than all of the debtor’s assets.

(b) **Presumption of insolvency.**—A debtor who is generally not paying the debtor’s debts as they become due is presumed to be insolvent. This presumption shall impose on the party against whom the presumption is directed the burden of proving that the nonexistence of insolvency is more probably than its existence.

(c) **When partnerships are insolvent.**—A partnership is insolvent under subsection (a) if, at fair valuations, the sum of the partnership’s debts is greater than the aggregate of all of the partnership’s assets and the sum of the excess of the value of each general partner’s nonpartnership assets over the partner’s nonpartnership debts.

(d) **Exclusion of certain assets.**—Assets under this section do not include property that has been transferred, concealed or removed with intent to hinder, delay or defraud creditors or that has been transferred in a manner making the transfer fraudulent under this chapter.

(e) **Exclusion of certain debts.**—Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

**12 Pa. C.S.A. §5103. Value**

(a) **General rule.**—Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor’s business to furnish support to the debtor or another person.

(b) **Reasonably equivalent value.**—For the purposes of sections 5104(a)(2) (relating to transfers fraudulent as to present and future creditors) and 5105 (relating to transfers fraudulent as to present creditors), a person gives reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or the exercise of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust or security agreement or pursuant to a regularly conducted, noncollusive execution sale.

**12 Pa. C.S.A. §5014. Transfers fraudulent as to present and future creditors.**

(a) **General rule.**—A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

- (1) with actual intent to hinder, delay or defraud any creditor of the debtor; or
- (2) without receiving a reasonable equivalent value in exchange for the transfer or obligation, and the debtor:
  - (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
  - (ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor’s ability to pay as they became due.

(b) **Certain factors.**—In determining actual intent under subsection (a)(1), consideration may be given, among other fac-

tors, to whether:

- (1) the transfer or obligation was to an insider;
- (2) the debtor retained possession or control of the property transferred after the transfer;
- (3) the transfer or obligation was disclosed or concealed;
- (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- (5) the transfer was of substantially all the debtor's assets;
- (6) the debtor absconded;
- (7) the debtor removed or concealed assets;
- (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
- (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

From the above portions of the Act we can see that, in order to withstand Mr. Ranallo's Preliminary Objections, Plaintiff must plead the following allegations concerning *the Uncle* before a Court can consider any limited right Plaintiff may have against Mr. Ranallo as a first transferee. We note also that, under the Act, the Uncle would be an indispensable party to this action, unless there were already a judgment against the Uncle. We have noted the section or sub-section of the Act that calls for each allegation:

- 1) That the debtor, the *Uncle*, is insolvent, §5102(a)  
or  
that the debtor *Uncle* is not paying his debts as due and is therefore *presumed* insolvent. §5102(b)
- 2) That the transfer at issue was not made for "reasonably equivalent value." §5103
- 3) That each transfer by the debtor *Uncle* was fraudulent as to Plaintiff because
  - (a) it was made with actual intent to hinder, delay or defraud any creditor of the debtor. §5104(a)(i) or
  - (b) that the debtor *Uncle* intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.
- 4) That the actual intent of the debtor *Uncle* is shown by factors such as those listed in §5104(b), in particular, that the transfer was of substantially all the debtor's assets. §5104(b)(5).

None of these elements has been pled as to the debtor *Uncle*. Therefore, the question of whether or not Plaintiff is entitled to relief under §5107 against Mr. Ranallo as a "first transferee" does not even arise. Plaintiff's argument rests solely on the *remedies* available under the Act if there is a violation. Plaintiff does not cite any portion of the Act that either Mr. Ranallo or the *Uncle* has violated.<sup>4</sup> As we said above, we have assumed that the *Uncle* is indeed Plaintiff's debtor and that Mr. Ranallo is a first transferee. The point we intended to make in our earlier Memorandum is that those two facts, accepted as true, do not make out a *violation* of the Act by Mr. Ranallo.

In our earlier Memorandum we dealt mainly with Plaintiff's insistence that it had stated a valid Breach of Contract claim against Mr. Ranallo. Regarding the violation of the Act, we focused more generally on the absence of any claim having been made against the *Uncle*, the actual debtor. Without an allegation that the *Uncle* intended to defraud creditors when he transferred his house to Mr. Ranallo 15 months before he entered Plaintiff's facility (and that he had a similar intent for each of the transfers listed as having been for "uncompensated value" by the CAO), there is *no* basis *under the Act* for relief against Mr. Ranallo.

## **2. Plaintiff may proceed against Mr. Ranallo alone only in Orphans' Court, for an accounting of his handling of the Uncle's property pursuant to the power of attorney.**

As discussed above, in order to state a claim under the Act against Mr. Ranallo as a "first transferee," Plaintiff must first allege facts sufficient to show that the *Uncle's* conduct was *fraudulent*. The conduct of Mr. Ranallo, acting pursuant to the power of attorney, is *not* sufficient to make out *fraud* by the *Uncle*. Even if we were to assume that Mr. Ranallo had only bad motives when he acted pursuant to his *Uncle's* power of attorney, this does *not* imply that the *Uncle* himself had those same bad motives for purposes of the Act. *See also Presbyterian Medical Center v. Budd*, 832 A.2d 1066 (Pa.Super. 2003), especially 832 A.2d at 1074, where the applicability of the Act is discussed.

Plaintiff has suggested that we have misread *Budd*. However, *Budd* is squarely on point. As we noted in our earlier Memorandum, the Superior Court has held that the liability of persons such as Mr. Ranallo who are alleged to have made "improper or fraudulent transfers [pursuant to powers of attorney] is an issue properly raised in Orphans' Court during an accounting of the [Uncle's] Estate." Superior Court also stated that "[t]his Commonwealth has not recognized a UFTA claim targeting the attorney-in-fact of a debtor" and expressly declined to do so in *Budd*. We, as a lower court, *must* follow *Budd*.

We note that the word "Estate" is not limited to property of decedents, but also includes property owned by a living person, usually under a level of control by a third party via a trust or a guardianship or a bankruptcy or a power of attorney, to name the instances that come most readily to mind. We must also state, once again, the obvious, that Plaintiff's *contract* was with the *Uncle*, so Plaintiff's recourse is to have restored back to the *Uncle's* "estate" any property Mr. Ranallo is alleged to have misappropriated. This restoration can only be done in *this* case by an Orphans' Court proceeding against Mr. Ranallo as the *Uncle's* attorney-in-fact.

### CONCLUSION

Any fraud by Mr. Ranallo cannot be attributed to the *Uncle*. Under the Uniform Fraudulent Transfers Act, the *Uncle* is the “debtor” under his contract with Plaintiff. Also, under the Act, it is the *debtor* whose conduct must be scrutinized to determine whether that conduct was fraudulent as to creditors. Lastly, allegations of fraud must be pled “with particularity” (Pa. R.C.P. 1019(b)) and must be proven by clear and convincing evidence. Plaintiff attached the evidence upon which it relies for the supposed fraud, the decision of a County agency, the CAO, which Plaintiff itself has appealed, Exhibit B to its Complaint. That evidence does not suffice for fraud. Plaintiff has pled no other material facts supportive of fraud, whether by the Uncle or by Mr. Ranallo, nor has Plaintiff suggested in any way that other material facts supportive of the Uncle’s fraud (or Mr. Ranallo’s) do exist.

It is unclear why Plaintiff declines to go to Orphans’ Court where, according to *Budd*, Mr. Ranallo’s conduct pursuant to the Uncle’s power of attorney, could be scrutinized and the transferred assets could be restored, if appropriate, to the Uncle’s estate and made available to the Uncle’s creditors, including Plaintiff. However, it is very clear that the facts of this case do not support Count II of Plaintiff’s Complaint, the only count of its Complaint that Plaintiff continues to assert.

The captioned action, seeking relief under the Act, was properly dismissed. Plaintiff’s recourse against Mr. Ranallo is in an Orphans’ Court proceeding in accordance with the Superior Court’s ruling in *Budd*.

BY THE COURT:  
/s/Friedman, J.

Dated: April 28, 2010

<sup>1</sup> It is unclear from Exhibit B if the Uncle’s “account” was at Plaintiff’s facility or elsewhere, such as a bank.

<sup>2</sup> The fact that the Plaintiff has appealed the CAO ruling could even be regarded as an indication that Plaintiff does *not* regard those questioned transfers as “fraudulent.” However, we did not make this inference when ruling on Defendant’s Preliminary Objections since it was unfavorable to Plaintiff.

<sup>3</sup> Section 5105 does not apply as Plaintiff’s claim against the Uncle did not arise “before the transfer was made.” Section 5106 deals with how a date of transfer can be determined if not self-evident. Here, the CAO list specifies the dates. Section 5109 states a four-year statute of limitations and the last section of the Act, §5110 states that “the principles of law and equity...supplement [the Act’s] provisions.”

<sup>4</sup> In its Petition for Reconsideration, Plaintiff refers to §5104 and related cases for the proposition that a transferee may be sued “for the return of property that had been *fraudulently* conveyed by the debtor during his lifetime.” (Plaintiff’s Petition for Reconsideration, ¶7, emphasis added.) The mere possibility of a suit against a transferee does not create a violation by a debtor.

## US Bank, N.A. v. Donn K. Butkovic and Jessie Butkovic

### Summary Judgment—Questions of Material Fact—Fair Credit Reporting Act

1. Plaintiff Bank, when asked to provide credit information to Credit Responding Agency, responded by reiterating without further clarification, Bank’s original report that Defendants’ loan to secure purchase of boat, had been “charged-off.” Plaintiff sued Defendants on the underlying loan and Defendants counterclaimed, alleging that the Bank violated its duties to them under the Fair Credit Reporting Act (15 U.S.C.A. Section 1681 s-2(b)) by not conducting a “reasonable investigation” of its dispute with Defendants prior to responding to the Credit Reporting Agency.

2. The trial court denied the Bank’s motion for summary judgment on Defendants’ counterclaim and ruled that, as a matter of law, the question of whether a reasonable investigation was conducted would be one of fact for the jury.

3. Claiming that the Bank’s records were consistent before responding to a Credit Responding Agency is not enough to satisfy a Bank’s duties to conduct a “reasonable investigation” under the Fair Credit Reporting Act.

4. Where material disputes of facts can be gleaned from a review of the evidence Plaintiff Bank relied on in support of its motion for summary judgment on Defendants’ counterclaim, motion for summary judgment would be denied so that jury could resolve fact questions of how underlying loan for boat was secured, whether a security lien was ever perfected and whether an investigation was conducted and then intentionally concealed from Defendants and Credit Responding Agency.

(Peter Clyde Papadakos)

K. Isaac deVyver for Plaintiff.

Jeffrey B. Balicki for Defendants.

No. GD 06-20165. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

### MEMORANDUM IN SUPPORT OF ORDER

#### INTRODUCTION

Friedman, J., May 5, 2010—Plaintiff filed a Motion for Summary Judgment on Defendants’ Amended Counterclaim under the Fair Credit Reporting Act, 15 U.S.C. §1681 ff. (“the Act” or “FCRA”).<sup>1</sup> We have denied this Motion by an earlier Order and now write to explain our reasons.

Plaintiff is a “furnisher” of information under the Act and has duties to Defendants, its debtor, under §1681s-2(b). It also has duties under §1681s-2(a), although there is no private cause of action thereunder.

Defendants’ Counterclaim under the Act is based on Plaintiff’s failure to note that there was a major dispute regarding the status of Defendants’ loan (“the Loan”) with Plaintiff when Plaintiff responded to an inquiry by a credit reporting agency (“CRA”) by

merely reiterating, without further clarification, Plaintiff's original report that the Loan had been "charged-off."

Plaintiff says that it was required to charge-off the loan by the Office of the Comptroller of the Currency ("OCC") but admits that there is no regulatory requirement that it also report the charge-off to CRAs.

Plaintiff purports to rely on Third Circuit precedent for its contention that it has, as a matter of law, done all that was required of it by the Act when it reported the charge-off and when it later responded to the CRA's request for details of a dispute.

#### DISCUSSION

A critical dispute of fact for the jury will be whether or not US Bank "conducted a *reasonable* investigation of Defendant's dispute" *before* it responded to Trans Union's notice to it of Defendant's dispute, as is asserted in ¶16 of Plaintiff's instant Motion for Summary Judgment.

#### 1. The case law cited by Plaintiff in support of the instant motion is inapposite.

Plaintiff relies on *Krajewski v. American Honda Finance Corp.*, 557 F.Supp. 2d 596 (E.D. Pa. 2008) for the proposition that all that is required under §1681s-2(b)(1) is a "reasonable investigation" and "verif[ication] that the reported information is consistent with the information in its records." According to Plaintiff, *Krajewski* holds that, as a furnisher, it cannot be held liable under §1681s-2(b)(1) "even if *the information it reports turns out to be inaccurate.*" (Plaintiff's Motion ¶17. Emphasis is Plaintiff's.) However, a careful reading reveals that the *Krajewski* court *denied* the portion of that furnisher's motion for summary judgment that is on all fours with the instant motion – liability under the Act based on the response to the CRA's notice of dispute.

In *Krajewski*, the furnisher's initial report to the CRA was based on an incorrect police report of why the borrower's car had been impounded. The car was later repossessed from the pound by the furnisher's agent. The consumer's first version of the dispute was unclear, so the furnisher's *first* response to the CRA was held to be "reasonable as a matter of law given the information" it had at the time. However, the furnisher's reasonableness regarding the investigation conducted in response to the *second* "automated consumer dispute verification" from the CRA was held to be a question for the jury. The consumer's second explanation of the dispute was clear by this time. The *Krajewski* court therefore denied summary judgment because "upon receiving such notice [of the disputed information], the furnisher of information *must conduct an investigation* with respect to the disputed information." An investigation would have revealed that the police report *was* incorrect and that, despite the repossession, there had been no default.

Mere "consistency" with the furnisher's records is *not* enough, under *Krajewski*, to excuse Plaintiff here from liability. Furthermore, as will be discussed later herein, Plaintiff's own records attached to its instant Motion show that its response to the CRA's inquiry was *not* consistent with Plaintiff's records. Whether Plaintiff's investigation and response to the CRA's inquiry was *reasonable* is for a jury.

At argument, Plaintiff also cited *Westra v. Credit Control of Pinellas*, 409 F.3d 825 (7th Cir. 2005) and *Farren v. RJM Acquisition Funding, LLC*, No. CIV. A. 04-995 (E.D. Pa. 2005) (Westlaw, 2005 WL 1799413). *Westra* involved a CRA, not a furnisher of information, and is not on point here.

*Farren* has only the Westlaw citation available. It has not been reported in the 2005 volumes of F.Supp. 2d. We believe this means it cannot be cited under the rules of the federal district courts. Nevertheless, we will discuss it. *Farren* involved a furnisher of information that was a *purchaser* of "delinquent charge-off consumer debt." One of the charged-off debts the furnisher purchased was a debt that the debtor, Mr. Farren, said resulted from an identity theft. The CRA notified the furnisher of this dispute. The furnisher actually found a discrepancy in the address of Mr. Farren and the address used in connection with the debt. However, instead of reporting the discrepancy, the furnisher "updated" the address information. Needless to say, consternation ensued. The *Farren* court held

that genuine issues of material fact do exist as to whether RJM [the furnisher of information] followed its procedure in its investigation concerning Mr. Farren's account. Specifically, RJM did not investigate an address that did not appear previously in Mr. Farren's record; nor did RJM look into a missing date of birth. RJM's second step in its procedure required a comparison of the information provided and notification to the credit reporting agency of any ambiguities or inaccuracies. A reasonable jury could find that RJM did not follow its own reasonable procedures in this case by failing to investigate the address conflict or missing date of birth further. It is also unclear whether RJM notified the credit reporting agencies of the potential conflict over the address or merely modified the CDV to reflect the address provided by the credit reporting agencies.

(*Farren*, section IV. A, page 6 of Westlaw printout.)

Whatever *Farren* stands for, it does not mandate granting Plaintiff's Motion for Summary Judgment on Defendant's counterclaim.

Plaintiff also cites another "unreported" case, *Fino v. Key Bank of New York*, No. CIV. A. 00-375E (W.D. Pa. July 27, 2001) (Westlaw, 2001 WL 849700), which it says (Brief p. 11) is a federal district court case. In fact, *Fino* is reported only as a Magistrate Judge's Report and Recommendation, with the notation that "Only the Westlaw citation is currently available." *Fino* is dated July 27, 2001. There is no order of a federal district court judge acting on the recommendation at all. It is of no precedential or analytical value whatsoever and should not have been cited at all, must less relied on. It merits no further discussion.

#### 2. The evidence cited by Plaintiff in support of its instant motion, taken in the light most favorable to Defendants, does not support the motion at all.

Plaintiff says that the declaration of Sarah Knapschaefer (Exhibit C to Motion) demonstrates, *as a matter of law*, that its response to the CRA's notice constituted a "reasonable investigation." Ms. Knapschaefer says that she reviewed "Defendants' Loan Agreement, Defendants' Loan Statement, History Statement" and U. S. Bank's computer notes for Defendants' loan." She also says that true and correct copies of those items are attached to her Declaration. Knapschaefer also notes that Firststar (the lender with whom Defendants originally dealt) merged with Plaintiff in 2001. (¶4 of Declaration.) Her Declaration begins on the 46th page of the 148-page Brief in Support of Plaintiff's Motion as shown in the electronic version on the website of the Department of Court Records, Civil Division.

Ms. Knapschaefer merely states her general conclusion that Plaintiff's original report was "accurately and completely reported," without describing at all what she believes the attachments contain. We therefore reviewed the attachments ourselves, primarily to be sure we would know all the items that Defendants might need to have addressed in their Response to the

Motion. After a review that unexpectedly took several hours going over the entries in “U.S. Bank’s computer notes,” we found substantial disputes of material fact pertinent to Defendant’s Counterclaim. The “computer notes” go from Bates No. 00083 to Bates No. 00141 (pp. 81 to 139 of the on-line version of Plaintiff’s Brief in Support). What we found pertinent to the Motion in Plaintiff’s “computer notes” is so extensive and so favorable to Defendants, the non-movants, that we have attached our list and comments as a separate Appendix to this Memorandum. The appendix lists everything that Ms. Knapschaefer would have seen had she reviewed the documents she attached. We also have added our comments on what a jury could conclude based on some of the entries.

The very first computer notes that are attached to the Declaration show that Plaintiff was aware no later than August 25, 2005 that there was a problem with the way Firststar had secured the loan at issue and also show that Plaintiff was trying to figure out how to correct that mistake and undo the damage. Later notes show that Plaintiff and Mr. Butkovic were both very concerned about the consequences of the mistake and cooperated literally for months to try to get things right.

The notes also reflect that no employee at Plaintiff blamed Defendants in any way for Firststar’s error nor did any note suggest that perfecting the security lien on the boat, given the size of Defendant’s loan, was at all optional, as Plaintiff had argued in its earlier motion for summary judgment.

Because the notes relate to the Declaration of Plaintiff’s employee, we must take them in the light most favorable to Defendants. In that light, a jury could conclude either that a reasonable investigation was not done at all, as required by §1681s-2(b), or that the investigation was done and the result was intentionally concealed by Plaintiff. In either case, a jury could easily find in favor of Defendants on their counterclaim under the Act and could award compensatory and even punitive damages.

Plaintiff also attached a one-page excerpt (p. 78) of a deposition of one Sackmaster. It is unclear what aspect of this page is favorable to Plaintiff. It relates to the issue *not* immediately before us, that of “charge-off.” The gist of Sackmaster’s testimony on the page attached is that taking a charge-off by a bank means “the bank takes a large loss. It’s not a good thing,” and that banks still have the option to sue the debtor to recover the charge-off loan. The excerpt is relevant to Plaintiff’s motives in pursuing Defendants after Firststar had impaired the security for the loan.

Plaintiff’s Motion for Summary Judgment on Defendants’ FCRA counterclaim must be denied. See Order filed separately.

BY THE COURT:  
/s/Friedman, J.

Dated: May 5, 2010

<sup>1</sup> Plaintiff had filed at least one earlier Motion for Summary Judgment which was also denied.

<sup>2</sup> The Loan Statement and History Statement are joint labels for one type of document, not two as the punctuation used by Plaintiff suggests.

<sup>3</sup> The website for the Department of Court Records has a copy of the Motion but seemingly without the pages designating each exhibit number. The hard copy of the Court file does have this item designated as Exhibit C.

<sup>4</sup> All quotes from those Bates Numbers will have abbreviations expanded where we were able to discern what they stood for.

#### APPENDIX

The Exhibits to Plaintiff’s Memorandum in Support of the Motion for Summary Judgment, as verified by the Knapschaefer Declaration (Exhibit C to the Memo), clearly refer to the instant dispute.<sup>3</sup> The most obviously significant is Exhibit I, which consists of printouts of U.S. Bank’s computer records referred to in Exhibit C and having Bates Numbers 00083 – 00141. We will refer to each page of Exhibit I by its Bates Number. The records were printed out around December 7, 2006 via a “Recovery Management System.” There are references to “Old Data” which we first understood to have come from the records of the original lender, Firststar. However, the content, discussed below, makes it clear that it was generated by Plaintiff itself, *not* by the original lender. The “status” is given as LGL, by which we understood Legal. Each page has also been stamped “Redacted,” contrary to the statement in the Declaration that the exhibits are true and correct copies, and contrary to the implication that the copies are complete. It is possible that only social security numbers and similar confidential information of the Defendants are all that have been redacted, and we have assumed this, *arguendo*. The obviously significant entries begin with August 25, 2005 at different times.

We found the first easily understandable and relevant entry on Bates No. 00087; it includes some abbreviations which we have expanded,<sup>4</sup> and says, “check with his [presumably, borrower’s] attorney that specializes in marine litigation and see if we can get a preferred marine mortgage placed on the loan in U.S. Bank’s [sic] name.

The next entry, by the same user (RMSBZOC2) on the same date says “36DPD-IC from Jim at custom recovery. Spoke with him yesterday and today. He has determined that the owner of the boat storage facility, Goldman, has improperly [sic] filed a lien sale document to get a State of Florida lien title. In response Jim was able to get customers to sign a certificate...” Page 00087 stops here.

Bates Number 00088 picks up (at the bottom of the entries) with another unfinished sentence, “36 DPD – per Jim at custom he is going to...”

Moving up the entries on page 00088, it appears that on September 12, 2005, U.S. Bank was told that Larry Goldman claimed to be owed around \$100,000 in storage fees, etc. “but [Goldman] doesn’t think he’ll get much if he sells the boat. Will wait for Jim to contact him and fill me in on the IR [sic] discussion.”

Bates No. 00089 has other entries for September 12, 2005 and also for September 13, 2005. Apparently, the same user, RMSE-ZOC2 had a call from or made one to Larry Goldman and was unable to conference in “Jim from custom recovery.” The September 13, 2005 entry says “he [Butkovic?] had an agreement with the banker that we would lend him the money to purchase the boat but if he was unhappy with it we would simply take possession and he would not owe any more money. Jim referred him to his contract and provided my name and number as a contact informing P that he [unclear who] is acting as a recovery agent. Jim also provided P’s cell. [We figured out, much later in our review, that “P” seems to refer most of the time to Mr. Butkovic; it was used on at least one occasion to refer to someone else.]

Bates Number 00090 has entries only for September 13, 2005. The gist of those entries is that the same user “spoke with Jessica at the branch [by which we understand the branch office of the original lender]. There is no one there that has spoken with customer [Butkovic]. They currently have no manager. She couldn’t give me any information on how boats are secured in TN [sic

Tennessee?] Jim in custom recovery **is checking UCC filings to see if one was filed by the banker who may not have realized the requirements of such a large boat.**" (Emphasis added.)

The above entry, even standing alone, suggests that Plaintiff's predecessor did make a mistake regarding perfecting its security interest (as opposed to making a conscious and reasonable choice not to perfect), and also suggests that perfecting the interest would not be "optional" under standard business practices, as Plaintiff has contended regarding the impairment of security issue.

Furthermore, just the few pages cited above could lead a jury to conclude that Plaintiff intentionally withheld information when it suggested to the CRA that there was no dispute discovered by its investigation.

Bates No. 00091 involves attempted phone calls on two dates, September 14 and September 26, 2005, apparently to Defendants' home and work phones, as well as a cell phone.

Bates No. 00092 contains entries dated September 30, 2005 (short and undecipherable), October 10, 2005 and October 21, 2005 (also short and undecipherable). The October 10, 2005 entries say "status report from Jim at custom; reads in part we have requested an attorney, Stan Loosemore, who specializes in admiralty law to proceed with preparing the necessary documents for a marine preferred mortgage from Butkovic to USB [Plaintiff]. Spoke with Butkovic again." We saw no entry regarding an earlier call with Defendants between September 13, 2005 and October 10, 2005, so we do not understand the use here of "again." The entry continues, "He [Butkovic] is also demanding the Coast Guard unwind the undocumented of the boat."

Bates No. 00093 involves entries by the same user on October 28, 2005, November 4, 2005, November 9, 2005 and November 10, 2005. On October 28, 2005, there was an unsuccessful attempt to contact P. On November 4, 2005 and on November 9, 2005, unsuccessful attempts to call Jim. On November 10, 2005, the entry says "Attorney is proceeding with a money judgment because customer made no payments and securing the collateral is moving slowly." This entry is another suggestion that Plaintiff knew the lien on the boat should have been perfected by the original lender and that its failure to do so had indeed impaired the collateral. This information was not filed with the CRA, after its inquiry, which would permit a jury to find that the CRA was led to believe that Defendants were deadbeats; the jury could also find that Plaintiff had concealed the existence of a valid dispute, whether negligently or intentionally.

Bates No. 00094 relates to a dispute regarding a settlement offer Defendants claimed Plaintiff sent it but which the user could not find in Plaintiff's records.

Bates No. 00095 deals with entries on November 17, 2005. The gist is that "Attorney will be serving P [*sic* - must mean instant Defendants] with money judgement [*sic*] on Monday." (By this we understand, and a jury could find that Plaintiff had decided to sue Defendants on the note, and to file the instant civil action.) "Paperwork has been completed so that the boat is legally in the name of our customer." (By this we understand, and a jury could find, that the original lender had not caused or required Defendants to have title to the boat at the time it undisputedly lent Defendants the money to repair it.) "Continuing efforts to secure US Bank as lien holder. Will move to repossess after papers are served on Monday. Willing to discuss settlement suggested by P [Butkovic, presumably] of 75% of balance. Continue [*sic*] to call customer at all available numbers and request up-to-date payment."

Bates No. 00096 deals with entries on November 17, 2005, November 23, 2005, and November 29, 2005. The gist is that on November 17, 2005, the same user "reviewed matter with Jim at custom [recovery]. Located local counsel in Pennsylvania to work in tandem with custom and their [i.e. Custom's/Jim's] attorney." By this we understand that Plaintiff was preparing to act in an adversarial manner towards Defendants. It also does not appear from the notes to this point that Defendants had yet been made aware by Plaintiff of its plan to sue them. On November 23, 2005, the user left a message for Jim at custom recovery. "Want to verify we are moving to pick up collateral." On November 29, 2005, the entry says simply "NTS is the best thing to do." The meaning of NTS is not obvious here and may or may not be significant for a factfinder.

Bates No. 00097 has entries for November 25, 2005 and November 30, 2005. The gist is that, on November 29, 2005, the same user "spoke to Bob Gibson in remarketing. He spoke with Jim at custom recovery. They are moving to repossess the boat, but he feels they have P [Butkovic] convinced that making at least two payments..." (The entry stops there.) On November 30, 2005, the entry says "Follow through with proper titling. Explained that the loan would charge-off today if a payment isn't made." (This suggests the charge-off was harsh enough to be used as a threat against Defendants, not just a standard banking procedure that was innocuous in nature.) The entry goes on, "Suggested a pay by phone. Said he would go home to get account info and call back within the hour."

Bates No. 00098 contains more entries on November 30, 2005. The gist is that when Butkovic called back "he said he wasn't necessarily calling back to make a payment. He said the bank (Firststar) hadn't followed through on contract, and that was why he stopped making payments. Also he said he is strapped financially because he is working for a bankrupt company. [Probably an airline as Butkovic is later said to be an international pilot.] He said Goldman has title to the boat because the bank did not..." The entry stops here.

Bates No. 00099 has entries from November 30, 2005 and December 2, 2005. The gist is that someone would or had "set up IAC [meaning is not obvious] for one payment to save from charge-off" followed by information that seems to be related to a checking account. The entry for December 2, 2005 begins "Requires Butkovic to sign off. The hull number is [specified]. The party, Larry Goldman, is a racer, has a business, Extreme Marine [at a specified address in Florida]. We should have the copies of..." (The entry ends here.) The notes up to this point still could suggest to a jury that Plaintiff is trying to get more payments from Defendant while also preparing to attack.

Bates No. 00100 has more entries for December 2, 2005. It says "Property. The following sentence, I agree to do whatever you require to perfect your interest and keep your priority." The entry then goes on "Sounds like power of attorney to me. The name of the boat is Hard Candy. The Coast Guard official number is [specified]. The registration was removed April 2005. We have ordered the documents allowing removal of the documentation [*sic* - probably means registration]. The procedure to allow this..." The entry ends here.

Bates No. 00101 also consists of entries from December 2, 2005. These seem to discuss documents related to the boat that the U. S. Coast Guard does not have that it should have had, presumably from Firststar. There is a mention of what is probably the note at issue here, "our note is dated 3/30/2002, Loan # \_\_\_\_\_ [omission in original] makes reference on page three [to] additional terms of the security agreement, Ownership and Duties Toward..." The entry ends here.

Bates Nos. 00102 - 107 have more entries on December 2, 2005 which reflect Plaintiff's increasing awareness of the difficulty of having the boat as security for the loan and thoughts about how to do in 2005 what Firststar failed to do in 2002. On page 00104 the same user states, "We have a signed letter from Butkovic. He did not sell or agree to sell or transfer the boat to anyone." On

page 00105 the user notes that the charge for repairs was \$39,583.17, that Butkovic disputes the amount and the balance of Extreme Marine's bill was interest storage etc. There is also a note that "Butkovic also claims the boat was taken to Cobra Marine, not Extreme Marine."

Bates No. 00107 has final entries for December 2, 2005 and then moves to December 21, 2005. The gist of the December 21, 2005 entries is that Plaintiff was going to document that Defendant "doesn't want to make payment" and that someone "advised [or Butkovic was advised] that account will charge-off end of December."

Bates No. 00108 has final entries for December 21, 2005 and also for December 23, 2005 and December 27, 2005. The gist is that by December 27, 2005, "Goldman is still asking for around \$30,000 in fees to release the boat. Paying this much is too risky given the uncertainty of the title situation." There is also an entry on December 27, 2005 referring to "an unfriendly court in our attempts to get cust [customer, i.e. Butkovic? custom recovery?] back in title and a subsequent marine mortgage." The entries to this point from August 25, 2005 to December 27, 2005 could suggest to a jury that Plaintiff and Defendant were still both working to try to correct Firststar's errors and retrieve the boat for Defendants, after which a proper marine mortgage would be executed, and Defendants would recommence payments on the loan. Nothing up to here suggests Plaintiff was inclined in any way to report Defendants to a CRA or that Plaintiff regarded Defendants as the source of the problem with Plaintiff's security interest in the boat.)

Bates No. 00109 has final entries for December 27, 2005 and also entries for December 30, 2005. The gist is that Butkovic "is out of town (pilot routes take him to Europe and back) possibly until the 29th. Also confirmed that the attorney will have him served with money judgment as soon as he is back. Jim states we are dealing...." The December 27, 2005 entry ends here. On December 30, 2005, the same user states "Rney [attorney?] draw up a letter, have P [Butkovic] sign disputing Goldman actions and current status as title holder. They can have this ready within 7-10 days if P [Butkovic] makes payment. Will call P [Butkovic] for IAC."

Bates No. 00110 also has entries for December 30, 2005, which are also related to trying to get boat back from Goldman.

Bates No. 00111 has entry saying Butkovic "wants to sell [the boat] because he and spouse can no longer use it due to her [unspecified] condition. Another entry seems to say that Butkovic made (or would make) another payment to save the account from charge-off.

Bates No. 00112 has an entry describing Mrs. Butkovic's condition after a very bad auto accident earlier in the year and the recent death of her father. The entry then goes on, "P [Butkovic] is still upset that USB [Plaintiff or Firststar] did not secure his loan and prevent Goldman from taking title. He agreed to another IAC to give us more time to work on the title and our lien. Advised when he makes another payment we can cure and give him...." The entry ends here.

Bates No. 00113 has entries for January 9, 2006. The suggestion is that everyone is still working together to get the boat back from Goldman.

Bates No. 00114 has entries for January 9, 2006, January 11, 2006, and January 21, 2006. The suggestion is that Plaintiff is still trying to figure out how to correct and recover from Firststar's mistake.

Bates No. 00115 has notes for January 21, 2006, January 26, 2006, and January 27, 2006. The gist is that Plaintiff has paper for Mr. Butkovic to sign but he is hard to reach because he is an international pilot.

Bates Nos. 00115 - 00127 have entries from January 27, 2006 to April 26, 2006 regarding Plaintiff's efforts to contact Mr. Butkovic so he can sign the papers Plaintiff drafted regarding a "cure."

Bates Nos. 00128-129 mostly concern entries on April 28, 2006. This seems to be the point at which Plaintiff realized Defendants probably were not going to agree to sign the papers needed for the "cure." A jury could conclude that up to this time Plaintiff was hoping to bury Firststar's mistake and was trying to get Defendants to sign papers that were against Defendants' interest, given that Firststar's mistake impaired the security for Defendants' loan and caused Defendants to lose the boat.

Bates Nos. 00130-131 reflect that Plaintiff continues to have trouble reaching Mr. Butkovic and that by the end of May, the same user is waiting to hear back from Jim [custom recovery] because "I need [Jim] to tell me in June for sure what he wants to do with this [presumably meaning filing the instant lawsuit vs. Defendants]."

Bates No. 00132 has entries for May 31, 2006, June 6, 2006, June 13, 2006, and June 19, 2006. The gist is that Plaintiff still prefers that Defendants sign the cure. Plaintiff notes on June 13, 2006 that Defendants "will need to pay up-to-date or return cure paperwork this month or account will be charged-off." (This indicates that the many prior threats to "charge-off" the account were not carried out. It may be a jury question *why* that was so.)

Bates No. 00133 has entries for June 30, 2006. The same user left Defendants a "machine reminder of what he has to do" to avoid the charge-off.

Bates No. 00134 has several lines whose meanings are not obvious. However, it is clear that something changed radically on July 3, 2006. There are new user i.d.s for the entries and there is a first reference to "Credit Bureau." On July 5, 2006, a note says simply "Jim is handling this account."

Bates No. 00135 covers July 12, 2006 through July 17, 2006. The notes of user "KJHOLGU" involve Defendants' assets and that user's attempts to contact others inside Plaintiff's organization.

Bates No. 00136 has entries on July 17, 2006 where "KJHOLGU" recaps that the bank has no lien on the boat.

Bates No. 00137 has entries by various other users from July 19, 2006 through September 1, 2006. The gist is that the account was closed and was "being handled in Recovery Department in Cincinnati." For August 1, 2006, there is an entry "Credit Bureau." For August 3, 2006, the entry says "account verification to wwr [*sic* - the meaning is not obvious, perhaps a law firm's initials]."

For September 1, 2006, the entry says only "to serve." This appears to be the ending of the September 1, 2006 entry on Bates No. 00138 "Complaint sent August 16, sheriff has 30 days to serve."

Bates No. 00138 has other entries after the one on September 1, 2006, for September 14, 2006, September 28, 2006, and October 2, 2006. These indicate that service had not been made as of September 28, 2006 and that Plaintiff was still looking into Defendants' assets.

Bates No. 00139 has entries for October 4, 2006, November 2, 2006, November 7, 2006 and December 2, 2006. There are recurring entries saying only "Credit Bureau" on November 2, 2006 and December 2, 2006. The entry for November 7, 2006 indicates that Defendants "have retained an attorney and both attorneys are getting together by the end of the month to see if we can work out the problem."

Bates No. 00140 has entries for December 4, 2006 through December 7, 2006, related to the instant litigation and noting that defendants filed a counterclaim. (The instant motion relates to Defendants' *amended* counterclaim.)

Bates No. 00141 has entries only for December 7, 2006, mostly related to the counterclaim and Goldman's conduct as related to Plaintiff by Mr. Butkovic. This is the last page of the Computer Notes referred to in Ms. Knapschaefer's deposition.

**Amy Walsh v.  
Natalie Furgiuele-Iracki, M.D.**

*Jury Verdict—Inconsistent Verdict*

1. Plaintiff commenced action against doctor, alleging negligence in failure to diagnose cancer in her left breast.
2. Plaintiff argues that when the jury found the Defendant negligent and the negligence was not the factual cause of the harm, the jury rendered an inconsistent verdict.
3. A jury is entitled to find “negligence” but not “factual cause” since they are in essence separate issues and therefore not inconsistent.

(Amy R. Schrempf)

Monte J. Rabner for Plaintiff.

Lynn E. Bell for Defendant.

No. GD 05-32598. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**MEMORANDUM**

Folino, J., April 28, 2010—In this medical malpractice case, the jury found for the Defendant; specifically, the jury found that the defendant was negligent, but that the negligence was not a factual cause of Plaintiff’s harm. Plaintiff then filed a Motion for Post-Trial Relief, arguing: 1) that the jury verdict was incorrect and 2) that this Court erred in a few of its rulings. I denied the Post-Trial Motion; now I explain the reasons underlying that denial.

Facts

In the year 2000, Plaintiff Amy Walsh became pregnant and, during this pregnancy, Ms. Walsh began experiencing abnormalities in her left breast, including “left nipple drainage and repeated left nipple bloody discharge.” “Amended Complaint,” filed on behalf of Plaintiff Amy Walsh, docketed July 25, 2006 (hereinafter “Plaintiff’s Complaint”), at ¶ 16.

Ms. Walsh’s son, Patrick, was born later in 2000; yet, Plaintiff continued to experience the intermittent bloody discharge coming from her left nipple. Troubled about the drainage – as well as a newly discovered lump in her right breast – Plaintiff went to have a mammogram and sonogram performed on her breasts; these procedures were carried out on May 2, 2001. Trial Testimony of Plaintiff Amy Walsh, given November 4, 2009, at 164.

According to Ms. Walsh, the tests revealed that the right breast was fine: the lump was simply an inflamed milk duct. *Id.* at 164. The left breast, however, was of far greater concern. As Ms. Walsh explained, the sonogram revealed a “tight cluster...of [micro]calcification[s]...in [the] inner lower quadrant...[of her] left breast.” *Id.* at 169-70. As to how alarming these microcalcifications were, the doctor referred Ms. Walsh to a categorization system known as the “Breast Imaging Reporting and Database System,” or “BIRADS”; the doctor gave the microcalcifications a BIRADS score of 5 – the highest BIRADS score – signifying “a very highly suspicious area that some people might interpret as highly malignant...[u]ntil proven otherwise...[through a] biopsy [of] that area.” *Id.* at 167; Trial Testimony of Dr. Thomas Julian, given November 6, 2009, at 509.

Therefore, five days later, Plaintiff Walsh received a stereotactic biopsy<sup>1</sup> of the microcalcifications that were seen in the left breast; when the biopsy results came back, however, they showed the microcalcifications as benign. Trial Testimony of Plaintiff Amy Walsh, given November 5, 2009, at 179.

Even with the favorable biopsy result, Ms. Walsh was still worried about her left breast. Hence, she received a referral to see Dr. Natalie Furgiuele-Iracki<sup>2</sup> – a breast surgeon and the defendant in this action. *Id.* at 177-78.

On May 23, 2001, Plaintiff Walsh had her first appointment with Dr. Furgiuele; during this appointment, Dr. Furgiuele performed a breast exam on Ms. Walsh, aspirated the lump on Ms. Walsh’s right breast and scheduled Ms. Walsh for an excisional biopsy<sup>3</sup> - in which all of the problematic “microcalcifications” would be removed and their substance analyzed. *Id.* at 180-83.

The excisional biopsy was done on May 28, 2001. *Id.* at 187. And, as was shown by a later, November of 2002 mammogram, the biopsy successfully removed all of the microcalcifications in the left breast; moreover, when the microcalcifications were lab-tested, they showed only benign growth. Trial Testimony of Dr. Thomas Julian, given November 6, 2009, at 527; Trial Testimony of Defendant Dr. Natalie Furgiuele-Iracki, given November 10, 2009, at 844.

Two years later, in the spring of 2003, Ms. Walsh again noticed a lump on one of her breasts: this time, the lump was localized in “the 7 o’clock area of [her left] breast.” In response, Plaintiff once again contacted Dr. Furgiuele-Iracki; the doctor then scheduled Ms. Walsh for a June 16, 2003 mammogram and sonogram. Trial Testimony of Plaintiff Amy Walsh, given November 5, 2009, at 200-01.

According to the June 16, 2003 sonogram results, Plaintiff’s left breast contained not one, but three solid nodules: one at “7 o’clock,” another at “9 o’clock” and the last at “10 o’clock.” Specifically, Dr. Furgiuele testified:

At 7 o’clock there is a well-defined 7 by 4 millimeter solid oval density which does correspond to the palpable abnormality...There is a smaller 4 by 3 millimeter similar solid nodule in the left breast at the 9 o’clock, and at 10 o’clock there is a suggestion of a similar 8 by 3 millimeter solid oval density.

Trial Testimony of Defendant Dr. Natalie Furgiuele-Iracki, given November 10, 2009, at 848-49.

On July 2, 2003, Plaintiff had a “follow-up” appointment with Dr. Furgiuele-Iracki; this appointment was scheduled so that the two could discuss not only the results of the June 16, 2003 sonogram but also any further course of action Ms. Walsh should take. And, as is important to the current post-trial motion, what transpired during this July 2, 2003 “follow-up” was hotly disputed at trial. According to Ms. Walsh, Dr. Furgiuele was completely unconcerned about the palpable, surface mass located at the 7 o’clock level. Trial Testimony of Plaintiff Amy Walsh, given November 5, 2009, at 204. Indeed, according to Plaintiff’s testimony, Plaintiff told Dr. Furgiuele that she wished to have the 7 o’clock mass biopsied; Dr. Furgiuele, however, ignored this request. *Id.* at 205-06. Instead, Dr. Furgiuele only prescribed a biopsy for the nodules located in the “9” and “10 o’clock” areas of her left breast. *Id.* at 212.

Dr. Furgiuele remembered the July 2, 2003 appointment differently. As Dr. Furgiuele told the jury, she discussed the 7 o’clock mass with Plaintiff and the two agreed that the mass would be completely removed during a later surgery. Trial Testimony of Defendant Dr. Natalie Furgiuele-Iracki, given November 10, 2009, at 864 & 866. Yet, to minimize the required number of surger-

ies Plaintiff would be forced to endure, Dr. Furgiuele first wanted to see whether the 9 and 10 o'clock masses also needed to be taken out. *Id.* at 859-61. Thus, Dr. Furgiuele testified, there was simply no need to biopsy the 7 o'clock nodule: that mass was going to be removed and tested no matter what occurred; the only thing Dr. Furgiuele needed to find out was whether the 9 and 10 o'clock nodules would be removed at the same time as the 7 o'clock nodule. *Id.*

Moreover, at trial, the two disagreed as to what was said towards the end of the July 2, 2003 appointment: this, in regard to the course of action they would take after the biopsy. According to Dr. Furgiuele, at the end of that July 2, 2003 appointment, she told Plaintiff "to call the office after she has her core biopsies, set up her follow-up appointment, and we'll go from there." *Id.* at 875. At trial, however, Plaintiff denied that Dr. Furgiuele ever told her to call the office and "set up [the] follow-up appointment." Trial Testimony of Plaintiff Amy Walsh, given November 5, 2009, at 219-20. Instead, as was discussed above, Plaintiff testified that Dr. Furgiuele was not interested in any "follow-up" because Dr. Furgiuele did not care about the 7 o'clock nodule and did not feel the mass should be removed. *Id.*

At any rate, Dr. Furgiuele prescribed a July 16, 2003 biopsy for the "9 o'clock and 10 o'clock" nodules – specifically writing on the prescription pad "Not 7 o'clock." *Id.* at 213. The biopsy then took place and the 9 and 10 o'clock masses tested benign. *Id.* at 216.

As to what occurred next, there was – again – contradiction at trial. As Plaintiff Walsh testified, post-biopsy she made an unsolicited stop in Dr. Furgiuele's office; according to Plaintiff, during this unscheduled appointment, Plaintiff learned that the biopsy results had come back negative, was told that she was being "paranoid" about the 7 o'clock mass and that the next step was for Plaintiff to merely have a mammogram six months later. *Id.* at 216. Dr. Furgiuele, however, contested this testimony. In fact, according to Dr. Furgiuele, Plaintiff never even made this unsolicited stop in her office. Trial Testimony of Defendant Dr. Natalie Furgiuele-Iracki, given November 10, 2009, at 874. Instead, Dr. Furgiuele testified, she continued to wait for Plaintiff to call her office – as discussed during the July 2, 2003 appointment – and set up the "follow-up" appointment. *Id.* 874-75.

The next time Plaintiff saw a doctor was in November of 2003: this time, Ms. Walsh went to see her plastic surgeon, Dr. Robert Bragdon. Trial Testimony of Plaintiff Amy Walsh, given November 5, 2009, at 221. According to Plaintiff, the main reason she went to see Dr. Bragdon was to have the palpable "7 o'clock" lump removed from her left breast. *Id.* at 222. However, at the same time, she said she also wished to have other procedures done on her breasts, including: a "scar revision" procedure (to lessen the scarring from her first biopsy) and new breast implants (to replace the implants that she had originally received in 1994). *Id.* at 222-23. Dr. Bragdon, thus, scheduled Ms. Walsh for surgery and, on December 18, 2003, Dr. Bragdon performed all of the above procedures.

In January of 2004, Plaintiff had her follow-up appointment with Dr. Bragdon. It was at this time that Ms. Walsh learned some overwhelming news: her 7 o'clock lesion had tested cancerous. Moreover, Dr. Bragdon explained, the cancer was "ductal invasive" – meaning that the cancer cells had spread from their point of origin – and the cancer was "PR and ER negative" – meaning that the cancer would not respond to estrogen therapy. *Id.* at 228-29.

The finding was horrific. However, given that the tumor was about one centimeter in diameter, Plaintiff was given two options: a mastectomy of the breast or a lumpectomy along with irradiation of the area. *Id.* at 240-41. Ms. Walsh chose to have her left breast removed. Further, and as a preventative measure, Ms. Walsh also decided to have a right breast mastectomy. *Id.* at 241-42.

Following her double mastectomy, Plaintiff instituted the current medical malpractice action, naming Dr. Furgiuele-Iracki and a host of other doctors and hospitals as defendants. According to Plaintiff, the doctors and institutions negligently "failed to diagnose" her breast cancer. See "Plaintiff's Complaint." In the years leading up to trial, however, many of the defendants were dismissed from the case. And, when it came time for trial, only Dr. Furgiuele-Iracki remained as a defendant. See, e.g., Trial Transcript, November 4, 2009, at 71.

On November 4, 2009, jury trial began in Plaintiff's case against Dr. Furgiuele-Iracki. Essentially, Plaintiff attempted to prove that Dr. Furgiuele-Iracki was negligent by failing to diagnose the cancer either in May of 2001 or on July 2, 2003. The trial was fairly lengthy and, given the cause of action, expert-laden.

As to the standard of care, Plaintiff introduced the expert testimony of Dr. Howard F. Floch, a "board certified surgeon." Trial Testimony of Dr. Howard F. Floch, given November 5, 2009, at 332. And, according to Dr. Floch, Dr. Furgiuele breached the standard of care when she failed to diagnose Ms. Walsh's breast cancer both in May of 2001 and on July 2, 2003. *Id.* at 365 & 401-03. As Dr. Floch testified, Dr. Furgiuele should have taken more heed of the bloody nipple discharge that was documented in Ms. Walsh's medical history. Thus, Dr. Floch opined, during the initial, May of 2001 appointment, Dr. Furgiuele should have at least "elicited" the bloody discharge or, done the "gold standard" of either biopsying the breast tissue or removing the ducts altogether. *Id.* at 365-66 & 377-78.

Dr. Floch was also of the opinion that Dr. Furgiuele breached the standard of care on July 2, 2003: according to Dr. Floch, Dr. Furgiuele should have biopsied the "7 o'clock" lesion in Ms. Walsh's left breast. *Id.* at 387. By failing to do this, Dr. Floch declared, Dr. Furgiuele allowed the tumor to grow – maybe allowing the cancer to spread from its point of origin – and lessened Ms. Walsh's long-term survival rate. *Id.* at 392 & 404-05.

Dr. Furgiuele, however, introduced her own experts; moreover, these experts told the jury that Dr. Furgiuele satisfied the standard of care at all times throughout Ms. Walsh's treatment. See, e.g., Trial Testimony of Dr. Thomas Julian, given November 6, 2009, at 504. First, defense expert Dr. Thomas Julian looked to Ms. Walsh's medical records and found that Ms. Walsh experienced bloody nipple discharge only during a limited time frame. Moreover, this time frame was limited to Ms. Walsh's pregnancy and the pregnancy's immediate aftermath; in other words, Ms. Walsh was no longer having the nipple drainage when she saw Dr. Furgiuele. *Id.* at 504-05 & 512-13. Dr. Furgiuele, therefore, was not required to "elicit" the bloody discharge from the breast: it did not exist at that point in time. Further, Dr. Julian testified that such drainage could have been caused by many different, benign factors – not the least of which was Ms. Walsh's pregnancy. *Id.* at 513. Only "on a rare event," Dr. Julian said, would the drainage "be associated with a cancer." *Id.*

As to the BIRADS score of "5", Dr. Julian explained that this score simply meant that a mammogram showed "a very highly suspicious area" and that further tests were needed. *Id.* at 509. Yet, Dr. Furgiuele did schedule Plaintiff for these "further tests": she prescribed an excision biopsy – which then removed all of the suspicious areas. *Id.* at 521-22. Moreover, when the masses were tested, they showed benign growth: they tested as "[b]enign breast tissue with focal lactational change, fibrosis and duct ectasia." *Id.* at 525.

Dr. Julian also opined that Dr. Furgiuele did not breach the standard of care on July 2, 2003 – when, Plaintiff alleged, Dr. Furgiuele "failed to" biopsy or excise the "7 o'clock" mass. According to Dr. Julian, the records showed that Dr. Furgiuele was going to remove the "7 o'clock" – but was simply waiting for the "9" and "10 o'clock" masses to be biopsied and tested. *Id.* at 528-

29. Additionally, Dr. Julian found, it was Ms. Walsh who was at fault for failing to “follow up” with Dr. Furgiuele and have the 7 o’clock lesion removed. *Id.* at 532-33 & 609-10.

The experts competed, as well, on the question of whether any “breach” of the standard of care was a “factual cause” of Plaintiff’s harm. According to Plaintiff expert Dr. James Arseneau, Dr. Furgiuele should have diagnosed the breast cancer in May of 2001. Trial Testimony of Dr. James Arseneau, given November 9, 2009, at 664-65 & 681. And, given that Ms. Walsh was first diagnosed with cancer in January of 2004, Dr. Arseneau opined that this two-and-a-half year delay in diagnosis could have caused the cancer to become invasive and spread from its point of origin. *Id.* at 681. When it did this, Dr. Arseneau declared, the “[l]ocal treatments like surgery and radiation [were] no longer relevant”; it was then that Plaintiff, basically, was forced to have a mastectomy. *Id.* at 683.

Plaintiff’s expert, Dr. Howard Floch, believed that Dr. Furgiuele breached the standard of care on July 2, 2003: according to Dr. Floch, it was at this time that Dr. Furgiuele should have diagnosed the “7 o’clock” mass as cancerous. Further, although the “7 o’clock” nodule was removed in December of 2003 – and Plaintiff’s cancer was diagnosed in January of 2004 – Dr. Floch believed that even this “six-month” delay in diagnosis (from July 2, 2003 until January of 2004) harmed Plaintiff. Dr. Floch testified that the six months: allowed the tumor to grow, gave the tumor time to spread from its point of origin and increased the likelihood the cancer would reoccur. Trial Testimony of Dr. Howard Floch, given November 5, 2009, at 405.

It then came time for Defendant to introduce her own evidence on “factual cause.” On this issue, Defendant’s experts concentrated their testimony around the alleged “six-month” delay in diagnosis: or, the time from July 2, 2003 (when Plaintiff met with Dr. Furgiuele) until either December of 2003 (when the “7 o’clock” tumor was removed from Plaintiff’s left breast) or January of 2004 (when Plaintiff was finally diagnosed with cancer). Thus, the defense experts were mainly concerned with whether Plaintiff was harmed – at all – by the alleged July 2, 2003 “failure to diagnose.” And, on this issue, the defense experts were unanimous in their answer of “no.”

First, defense expert Dr. Thomas Julian testified that, as to Ms. Walsh, any six-month “delay in diagnosis” did not: cause the tumor to grow any more than .05 millimeters; cause a change in the tumor’s “receptor status”; cause the cells to become “more differentiated”; cause any change in Ms. Walsh’s long-term prognosis or limit, in any way, Ms. Walsh’s options when it finally came time for her to decide whether to have “a lumpectomy with radiation therapy” or a mastectomy. Trial Testimony of Dr. Thomas Julian, given November 6, 2009, at 539-40 & 619-20; 542-43; 543-44; 546-47, 544 & 619-20.

Dr. Adam Brufsky also testified as a defense expert; moreover, Dr. Brufsky agreed with many of Dr. Julian’s conclusions. Indeed, according to Dr. Brufsky, any alleged “six-month delay” did not change: the biology of the tumor; Plaintiff’s long-term prognosis; the options Plaintiff had to rid her body of the cancer or Plaintiff’s long-term prognosis *even if* Plaintiff chose to have a “lumpectomy with radiation” rather than a double mastectomy. Trial Testimony of Dr. Adam Brufsky, given November 12, 2009, at 985; 986; 986-87 & 1024.

Dr. Brufsky also told the jury how, in his experience, cancer patients choose between having a mastectomy or a lumpectomy with radiation treatment. If the option is available, Dr. Brufsky explained, most patients who choose a mastectomy do not really care about “how long” the cancer has been in their body as much they care about the fact that cancer is in their body. This opinion was elicited during the following exchange:

Q: Okay. But if [Ms. Walsh] believes the cancer was in her body from 2001 and then it had gone from in situ to invasive, that would be something that a patient would have to consider, as well, in their determination [of whether to choose a mastectomy or a lumpectomy with radiation treatment]...?

A: In my experience, that’s not usually how patients make that decision.

Q: Well, isn’t fear something patients have?

A: It is, but generally – generally patients don’t make a decision on that basis. They make a decision generally that they don’t want to have to worry about cancer coming back in their breast ever again. That’s generally – in my experience, when patients make that decision, it’s never that, “There was cancer in my breast and it grew suddenly.” That’s usually not the decision.

Q: Well, what if they felt that the cancer was present for 30 months and they had a feeling that it was there for 30 months? Would you maybe take a more extreme measure?

A: Most surgeons when they discuss this and most medical oncologists when they discuss this with women generally give them the facts that, “The cancer, it’s been there. Whether it was there in the beginning or not, it’s still a centimeter. It can be removed.” The fact that whether you do a lumpectomy or a mastectomy...that it doesn’t really matter which one you do, your prognosis is the same. And most surgeons will do that. And the bottom line is that that’s how generally most women in my practice make their decisions.

Trial Testimony of Dr. Adam Brufsky, given November 12, 2009, at 1023-24.

The case then went to the jury; the jury found that, although Dr. Furgiuele was “negligent,” any negligence was not a factual cause of Plaintiff’s harm. Plaintiff’s Post-Trial Motion followed.

Within her Post-Trial Motion, Plaintiff basically raises six issues. She contends: 1) the verdict was “against the weight of the evidence” because it was “inconsistent”; 2) the verdict was against the weight of the evidence, as “the evidence of record clearly established that the left breast cancer was in existence as of 2001, but that Dr. Furgiuele-Iracki failed to take the action necessary to detect the same”; 3) the verdict was against the weight of the evidence, since “the evidence of record clearly established” that Defendant failed to biopsy the “7 o’clock” lesion; 4) this Court erred in failing to grant a mistrial when “opposing counsel alleged that [Plaintiff’s expert] had been discharged from his last position due to an alleged act of medical malpractice”; 5) this Court erred in failing to grant a mistrial when Defense Counsel “made repeated use of a calendar to support the contention that [Plaintiff] ha[d] missed one or more appointments and/or had failed to follow up concerning her treatment and evaluation” and 6) this Court erred in failing to allow Plaintiff to introduce “photograph[s] of the Plaintiff’s breast in rebuttal to those offered by the Defendant.” “Amended/Supplemental Motion for Judgment Notwithstanding the Verdict/Motion for a New Trial,” filed on behalf of Plaintiff Amy Walsh (hereinafter “Plaintiff’s Post-Trial Motion”), at 8-11. The arguments will be discussed in the order raised above; all, however, are meritless.

## Analysis

**1) Plaintiff's First Argument:** the jury's verdict was "against the weight of the evidence" because it was "inconsistent"

For her first argument, Plaintiff generally states: "the verdict was inconsistent in that [the jury] found Dr. Furgieue-Iracki was negligent in her treatment and care of Ms. Walsh in that she failed to timely diagnose the existence of left breast cancer." Plaintiff's Post-Trial Motion, at 8. There are, however, several problems with this statement.

The first problem with the argument is that it is waived. As our Supreme Court has held, a challenge to the verdict's "consistency" must be made at trial: the party must object "when the verdict [is] rendered" – so as to give the jury a chance to correct the alleged inconsistency. *City of Phila., Police Dep't v. Gray*, 633 A.2d 1090, 1095 (Pa. 1993). Plaintiff did not do that here; rather, the first time Plaintiff challenged the verdict as "inconsistent" was in her post-trial motion. Therefore, the issue is waived. *Id.*

The issue is waived for a second reason: Plaintiff's Post-Trial Motion fails to explain how the jury verdict could be construed as inconsistent. In fact, this Court can see no inconsistency in the jury verdict: the jury simply found that the defendant was "negligent," but that any negligence was not a "factual cause" of Plaintiff's harm.

Finally, the argument fails because it has no merit. At oral argument on Plaintiff's Post-Trial Motion, it appeared as if Plaintiff was arguing the following: the verdict was inconsistent, Plaintiff contended, because "negligence" law concerns itself with "duty, breach, causation and damages"; thus, Plaintiff argued, when the jury found that the Defendant was "negligent," the jury necessarily found that all four elements of the "negligence" cause of action were satisfied; at that point, Plaintiff declared, the jury was required to find that the Defendant's "negligence" was a "factual cause" of Plaintiff's harm – and, when the jury found that the "negligence" was not a "factual cause" of Plaintiff's harm, the jury rendered an inconsistent verdict. The argument is, however, simply incorrect.

When a "negligence" claim reaches the jury, courts routinely divide the legal issues – both in the court's jury instruction and on the verdict slip – into three main categories: 1) "negligent conduct" – meaning "duty" and "breach of duty"; 2) "causation" – meaning both "proximate" and "factual" causation and 3) damages. This is done, primarily, to "permit a jury unlearned in the law to frame and structure their deliberations, if they so choose." *Fritz v. Wright*, 907 A.2d 1083, 1093 (Pa. 2006). And, that is exactly what this Court did here: in my instructions to the jury, I separately explained the concepts of "negligent conduct," "causation" and "damages" and, in the verdict slip, I also broke the issues down into "negligent conduct," "causation" and "damages." See, e.g., Trial Transcript, November 12, 2009, at 1122-37; Verdict Slip, dated November 13, 2009, at 1-2. Thus, the jury was perfectly entitled to find "negligence" but not "factual cause."

**2) Plaintiff's Second Argument:** the verdict was against the weight of the evidence, as "the evidence of record clearly established that the left breast cancer was in existence as of 2001, but that Dr. Furgieue-Iracki failed to take the action necessary to detect the same"

Next, Plaintiff argues that the verdict was "against the weight of the evidence" because the evidence "clearly established" that Plaintiff had breast cancer in 2001 and that Defendant failed to detect the cancer at that time. Plaintiff's view of the facts is incorrect; moreover, even if Plaintiff's above statement were true, it would not entitle Plaintiff to any relief.

To start, Plaintiff is incorrect to state: "the evidence of record clearly established that the left breast cancer was in existence as of 2001." Plaintiff's Post-Trial Motion, at 8. Indeed, defense expert Dr. Adam Brufsky repeatedly testified that no cancer was present in 2001. For example, Dr. Brufsky testified:

Q: Now, you made, essentially, a couple of opinions that you've shared with the jury, and one of them was that in 2001, when Miss Walsh was in front of Dr. Furgieue, there was no cancer in her body. Was that one of your opinions?

A: Absolutely. I still believe that today, yes.

Trial Testimony of Dr. Adam Brufsky, given November 12, 2009, at 998.

Q: And [in your expert report you state] "It is therefore my opinion with a great degree of medical certainty that there was no evidence of cancer in Miss Walsh's breast in 2001." Correct?

A: Correct.

*Id.* at 999.

Q: It's your strong opinion that the cancer wasn't present in 2001, correct?

A: Yes.

*Id.* at 1008.

Thus, although at trial there was testimony that Plaintiff had cancer in 2001, there was also competing, expert testimony demonstrating that Plaintiff *did not* have cancer in 2001. Therefore the evidence did not, as Plaintiff states, "clearly establish[]" that Plaintiff had breast cancer in 2001; rather, the various experts gave conflicting testimony regarding the time when Plaintiff's cancer first came into existence.

Moreover, even if such evidence were "clearly established," Plaintiff would still not be entitled to any relief on this point. As Dr. Thomas Julian stated, there is a big difference between "whether cancer cells exist versus whether they are diagnosable." Trial Testimony of Dr. Thomas Julian, given November 6, 2009, at 631. Dr. Julian explained:

Even with the most sophisticated imaging that we have today, you cannot detect lesions that are under, probably, a half a centimeter. And signs, in most situations we're down to 2 or 3 millimeters. And it's only with the more sophisticated imaging that we have today that we can identify those smaller lesions.

*Id.*

Hence, even if Plaintiff did have cancer in 2001, the question still remained as to whether Defendant "breached" the standard of care when she "failed to diagnose" the cancer at that time: and, according to Dr. Julian, even if the cancer was present in 2001, Defendant did not breach any standard of care – at that time, the cancer cells would have been "undetectable." *Id.* at 504 & 630-31.

**3) Plaintiff's Third Argument:** the verdict was against the weight of the evidence, since "the evidence of record clearly established" that Defendant failed to biopsy the "7 o'clock" lesion

In Plaintiff's third "weight of the evidence" claim, Plaintiff contends that the "evidence of record clearly established" that Defendant failed to biopsy the "7 o'clock" lesion. Again, however, Plaintiff fails to explain "why" this would cause the verdict to be "against the weight of the evidence." The claim should therefore be held waived.

Also – and again – this Court cannot understand how such a finding would make the verdict against the weight of the evidence. First, as Dr. Furgiuele explained, she did not biopsy the "7 o'clock" lesion on July 2, 2003 because the lesion was going to be removed no matter what – she was simply waiting for the "9" and "10 o'clock" masses to be biopsied and tested before surgery was scheduled. Trial Testimony of Defendant Dr. Natalie Furgiuele-Iracki, given November 10, 2009, at 859-61, 864 & 866.

Moreover, as was explained above, the "7 o'clock" lesion was removed in December of 2003 and Plaintiff's cancer was then diagnosed in January of 2004. And, according to Defendant's experts, even if Dr. Furgiuele did breach the standard of care and even if she should have biopsied the lesion on July 2, 2003, that "six-month" delay in diagnosis *did not harm Plaintiff at all*. According to Defendant's experts, this "six-month" delay did not: cause the tumor to grow any more than .05 millimeters; cause a change in the tumor's "receptor status"; cause the cells to become "more differentiated"; cause any change in Ms. Walsh's long-term prognosis or limit Ms. Walsh's options when it finally came time for her to decide whether to have "a lumpectomy with radiation therapy" or a mastectomy. Trial Testimony of Dr. Thomas Julian, given November 6, 2009, at 539-40 & 619-20; 542-43; 543-44; 546-47, 544 & 619-20. Further, Dr. Adam Brufsky testified that – *had Plaintiff chosen a "lumpectomy with radiation" over a double mastectomy – Plaintiff's long-term prognosis would have been the same*. Trial Testimony of Dr. Adam Brufsky, given November 12, 2009, at 986-87 & 1024.

Plaintiff's "weight of the evidence" claim must, therefore, fail: the evidence thoroughly supports the jury's finding that, although the Defendant was negligent, the negligence was not a "factual cause" of Plaintiff's harm.<sup>4</sup>

**4) Plaintiff's Fourth Argument:** this Court erred in failing to grant a mistrial when "opposing counsel alleged that [Plaintiff's expert] had been discharged from his last position due to an alleged act of medical malpractice"

For her fourth argument, Plaintiff Walsh contends that she is entitled to a new trial because, during the *voir dire* testimony given by Plaintiff's expert witness, Dr. Howard F. Floch: "opposing counsel alleged that [Dr. Floch,] had been discharged from his last position due to an alleged act of medical malpractice which was currently in litigation." Plaintiff's Post-Trial Motion, at 9. Plaintiff is mistaken.

Here, there was no error because: 1) Dr. Floch "opened the door" to this evidence when, in his direct testimony, Dr. Floch strongly implied – *to the jury* – that his declining health was the *sole reason* he had not practiced medicine in the past two years; 2) after Plaintiff objected to the *voir dire* questioning, I conducted a sidebar and then issued a curative instruction, telling the jury that they could consider the fact that "Dr. Floch...was terminated from his position as a physician with the Department of Veterans Affairs in August of 2007" but that the jury *could not consider* any "underlying facts" regarding that termination; 3) a memorandum issued by the United States Court of Appeals for the Federal Circuit shows that Dr. Floch had, in fact, "been discharged from his last position [at the Department of Veterans Affairs] due to an alleged act of medical malpractice" and 4) at the time Dr. Floch gave his testimony in this case, the Federal Circuit Court of Appeals had already found that Dr. Floch was properly "terminated from his position as a physician with the Department of Veterans Affairs" – moreover, at the time of Dr. Floch's testimony, the only pending issue in the Federal Circuit was Dr. Floch's "petition for rehearing" and this petition was subsequently denied. Therefore, Plaintiff is not entitled to any relief. I will explain.

During Plaintiff's case-in-chief, Plaintiff called Dr. Howard F. Floch to testify as an expert witness. In questioning Dr. Floch as to his credentials, the following exchange took place between Plaintiff's Counsel and Dr. Floch:

Q: Doctor, we're going to get to specifically what it was that you reviewed and what opinions you came to, but first we're going to talk about essentially your experience for a moment before I ask His Honor to consider you an expert in the field that you have trained in. So, we're going to briefly dive into your history...

...

Q: And were there periods of time in your career where you stepped away from practicing medicine?

A: Yes. Actually, I'm going through one of those periods right now.

Q: Tell the jury what's going on there.

A: Unfortunately...[m]y health has not been great in the last two years. I've had two open heart surgeries, and unfortunately I suffered a nerve injury to my right hand as part of the first operation. And I'm in the process now – my heart, thank God, is doing well – of going to various hand surgeons and talking over what the prospects are.

Q: So in the last five years – when is the last time you did surgery?

A: Within the last two years.

Q: But right now you're at this time not?

A: No.

...

Trial Testimony of Dr. Howard F. Floch, given November 5, 2009, at 320-21 & 326-27.

When it came time for Defendant's *voir dire*, Defendant questioned Dr. Floch further in regards to the above statement; specifically, Defendant inquired into Dr. Floch's statement that the reason he had "stepped away from practicing medicine" was because his "health [had] not been great in the last two years." *Id.* at 326. This portion of the transcript reads:

Q: Let's talk about your work history. [Plaintiff's Counsel] gave me your curriculum vitae, and I'd like to talk to you about it.

[talks about his various jobs, beginning in 1996]

...

Q: [After your job in North Carolina ended,] you're off for six months. November 2005, November 2006, 12 months, you're at Samaritan Hospital in Albany, New York; and then you go to Martinsburg, [West] Virginia, November 2006, March 2007 for six months, correct?

A: No. That was until February of 2008.

Q: Is that the last time you have worked?

A: Yes.

Q: Now, that last job at the VA Medical Center in Martinsburg, [West] Virginia, isn't it correct that you were terminated as a physician by the Department of Veterans Affairs based on a March of 2007 intubation of a patient who eventually died? You were relieved of your clinical duties, there was an investigation done by a risk manager and the Inspector General? You were terminated – your employment there was terminated April – or August 2007 with an effective date of February 2008? Is that correct?

A: Not entirely, no.

Q: You appealed this decision through the court process –

[Plaintiff's Counsel]: Your Honor, may we approach?

[The Court]: All right.

*Id.* at 332 & 335-36.

When this Court moved to sidebar, Plaintiff's Counsel objected to the above questioning; according to Plaintiff's Counsel, the questioning was not relevant to Dr. Floch's qualifications and was too prejudicial to be allowed. Moreover, as to the "prejudicial" nature of the questioning, Plaintiff's Counsel asked that I grant a mistrial. *Id.* at 336-37.

After extensive oral argument by counsel, I denied the motion for a mistrial. I then ruled that the "fact of termination" – *by itself* – was admissible for impeachment purposes: Dr. Floch "opened the door" to this evidence when, in his testimony, he implied that the sole reason he had "stepped away from practicing medicine" was because his "health [had] not been great in the last two years." Yet, I did not believe that the jury should hear any of the facts underlying that termination – even if those facts were marginally relevant to Dr. Floch's "experience as a physician," that relevancy was outweighed by both the prejudicial impact upon the jury and the "collateral" nature of the issue. Therefore, when the jury reconvened, I delivered the following curative instruction:

[The Court]: Well, Ladies and Gentlemen, you've heard testimony that Dr. Floch here was terminated from his position as a physician with the Department of Veterans Affairs in August of 2007. I allowed that piece of evidence to come in, but I'm not going to allow defendant to develop that further and explore the details behind it, because I don't want to have a separate trial on that issue in the midst of this trial on a completely different issue.

So the fact that he was terminated, then, I allow because that explains the work history, in part, that was put up on the board. But I don't want her [Defense Counsel] to get into the details because I don't want us to get sidetracked on that, because Dr. Floch will have explanations and will dispute things that occurred in connection with that proceeding, and I don't want us to spend, you know, days or weeks going down that road. So the fact that he was terminated I allow; but other than that, I want her to move on.

[Plaintiff's Counsel]: Your Honor, is it fair to say that the jury should not consider anything else besides the fact that he's terminated?

[The Court]: That's correct. Just the fact that he was terminated is the only thing you should consider.

*Id.* at 350-51.

Now, Plaintiff argues, she is entitled to a new trial because "opposing counsel alleged that [Dr. Floch] had been discharged from his last position due to an alleged act of medical malpractice which was currently in litigation." As stated above, this contention is incorrect – and is so for a number of reasons.

First, as this Court has explained, the evidence was admissible for impeachment purposes. According to Dr. Floch's direct testimony, he had "stepped away from practicing medicine" because his "health [had] not been great in the last two years." Yet, Defendant had evidence – in the form of a Federal Circuit Court of Appeals memorandum opinion – that Dr. Floch did not simply "step[] away from practicing medicine." *Floch v. Dep't of Veterans Affairs*, 348 Fed.Appx. 573, 2009 WL 3260069 (Fed. Cir. 2009)(unpublished memorandum). Instead, as the United States Court of Appeals for the Federal Circuit explained, on March 24, 2007:

Floch was involved in the intubation of a patient who eventually died. He was relieved from his clinical duties, and the medical center's Risk Manager convened an administrative board of investigation. The department's Inspector General also conducted an investigation into this incident. After conducting interviews, the administrative board of investigation recommended disciplinary action. Upon receipt of the administrative board's report, the acting Chief of Surgery requested that a summary review board be convened to review Floch's performance and evaluate his retention in the department.

...

The summary review board recommended termination of Floch's employment, effective August 24, 2007. His termination was held in abeyance, however, and did not become effective until February 2, 2008...

*Id.* at 575.

Following his termination, Dr. Floch appealed to the United States Merit Systems Protection Board; the board allowed Dr. Floch's termination to stand. After this, Dr. Floch appealed to the United States Court of Appeals for the Federal Circuit. And, on October 13, 2009, the Federal Circuit issued an unpublished memorandum, affirming the judgment of the Merit Systems Protection Board; the Circuit Court of Appeals then denied Dr. Floch's "petition for rehearing" on December 22, 2009.

Therefore, and obviously, Dr. Floch was not being entirely truthful when he said that he had "stepped away from practicing medicine" because his "health [had] not been great in the last two years." Rather, as the United States Circuit Court of Appeals explained, Dr. Floch had in fact *been terminated* from his last job; moreover, this termination became effective on February 2, 2008 – *less than two years* before he testified in the current case. And, added to all of this was the fact that the Federal Circuit issued its memorandum decision on October 13, 2009 – one month *before* Dr. Floch testified in this matter. To be sure, at the time of Dr. Floch's testimony, the only pending issue in the federal case was Dr. Floch's "petition for rehearing" – which was denied in December of 2009. There can be no doubt that Defendant was entitled to impeach Dr. Floch with evidence of his termination.

Further, this Court limited the impeachment to *only* the "fact of [Dr. Floch's] termination." Indeed, as quoted above, my curative instruction told the jury that they were allowed to consider only the fact that Dr. Floch "was terminated from his position as a physician with the Department of Veterans Affairs in August of 2007" and that they "should not consider anything else besides the fact that he's terminated." As our Superior Court has held:

Generally, in the absence of extraordinary circumstances, a prompt and effective curative instruction which is directed to the damage done will suffice to cure any prejudice suffered by the complaining party...Moreover, juries are presumed to heed a court's curative instructions.

*Mt. Olivet Tabernacle Church v. Edwin L. Wiegand Div.*, 781 A.2d 1263, 1275 (Pa.Super. 2001)(internal quotations omitted)(internal citations omitted).

In this case, there were no such "extraordinary circumstances." First, Defense Counsel had more than an "adequate" factual basis for her question: the alleged malpractice was recited in a federal court opinion and, at the time of Dr. Floch's testimony, the federal court's decision was more or less final – the only remaining step concerned a "petition for rehearing," which was later denied. Further, the question posed by Defense Counsel even tracked the language of the federal court opinion.

There was no "undue prejudice" here: if Plaintiff did not wish to have this information published to the jury, she should not have allowed Dr. Floch to mislead the jury into believing that the only reason he stopped working two years ago was because of his "health."

**5) Plaintiff's Fifth Argument:** this Court erred in failing to grant a mistrial when Defense Counsel "made repeated use of a calendar to support the contention that [Plaintiff] ha[d] missed one or more appointments and/or had failed to follow up concerning her treatment and evaluation"

In Plaintiff's fifth post-trial argument, she contends that this Court should have granted a mistrial when Defense Counsel "made repeated use of a calendar to support the contention that [Plaintiff] ha[d] missed one or more appointments and/or had failed to follow up concerning her treatment and evaluation." The argument is completely meritless.

To start, Plaintiff never requested a mistrial on this issue. Rather, when the "calendar" was produced during witness questioning, Plaintiff objected and "ma[de] a motion to exclude any talking about it, and [asked] Your Honor...to state some curative instruction." Trial Transcript, November 5, 2009, at 277-78. This Court then *sustained* Plaintiff's objection to the "calendar" and *issued the following curative instruction:*

Ladies and Gentlemen, I'm sustaining the objection about that document because under the law it needs to be authenticated by a person before someone else can be questioned about it. And if it is the doctor's appointment book, then the doctor will need to authenticate it first, and then I'll allow questions of this witness about the book at that time. But not yet.

Trial Transcript, November 5, 2009, at 279.

The calendar was, however, never referenced again at trial.

Thus, on this issue, I did exactly as Plaintiff requested: I sustained the objection and issued a curative instruction. Plaintiff simply cannot argue error here: I did as Plaintiff requested; moreover, I did not rule on any "mistrial" request because no request was ever made. The issue is therefore waived. *Allied Elec. Supply Co. v. Roberts*, 797 A.2d 362, 365 (Pa.Super. 2002)(holding: the failure to request a mistrial waives the issue on appeal).

Further, the issue simply has no merit. First, the curative instruction cured whatever "prejudice" Plaintiff sustained as a result of the quick calendar reference. *Bugosh v. Allen Refractories Co.*, 932 A.2d 901 (Pa.Super. 2007). Second, and regardless, the "calendar" reference did not prejudice Plaintiff at all: Defendant attempted to use the calendar as a "symbol" of the fact that Plaintiff missed appointments with Dr. Furgiuele; however, throughout the trial, *there was continuous and repeated testimony regarding the claim that Plaintiff missed her doctor appointments*. Moreover, with the exception of the "calendar" reference, the testimony regarding Plaintiff's "missed appointments" was given without any objection whatsoever. The "calendar" was just a "symbolic *repetition*" of that trial testimony; the quick reference to the calendar, therefore, did not prejudice Plaintiff in any manner.

**6) Plaintiff's Sixth Argument:** this Court erred in failing to allow Plaintiff to introduce "photograph[s] of the Plaintiff's breast in rebuttal to those offered by the Defendant."

Finally, Plaintiff argues that she should have been allowed to introduce photographs of her breast "in rebuttal to those offered by the Defendant." Yet, given the lack of citation in Plaintiff's Post-Trial Motion, I cannot find where this alleged error occurred. The claim is therefore waived.

Additionally, if Plaintiff is referring to her own "rebuttal" testimony – given after the close of Defendant's case – the issue has no merit. I will explain.

After Defendant's case was presented and immediately before closing arguments were set to begin, Plaintiff's Counsel asked that Plaintiff Walsh be permitted a very short opportunity to rebut Dr. Furgiuele's testimony. As Plaintiff's Counsel informed this

Court, the proposed testimony was limited to the following issues: 1) the “detail” in which Dr. Furguele performed Plaintiff’s breast examination and 2) the place on her breast where the “7 o’clock” lesion “was ultimately found.” Trial Transcript, November 12, 2009, at 1035-36.

Although Plaintiff Walsh had already testified to these two issues, I allowed the further testimony. However, *I did not make any ruling whatsoever* on whether Plaintiff could or could not introduce “photograph[s] of the Plaintiff’s breast in rebuttal to those offered by the Defendant”: *there was no such issue before me*. I simply cannot find any place in the record where I told Plaintiff that she either “could” or “could not” use additional photographs of Plaintiff’s breast.

Further, during the rebuttal testimony, there would have been no need for any “additional” photographic evidence: the photographs would have been completely *unnecessary* if used to explain the “detail” in which Dr. Furguele performed Plaintiff’s breast examination; moreover, the photographs would have been completely *repetitive* if used to tell the “place” where the “7 o’clock” lesion was ultimately found. In fact, everyone agreed: that a cancerous lesion was “ultimately found” on Plaintiff’s breast and that this lesion was found in the “7 o’clock” area of the left breast. The fight was simply about whether Dr. Furguele breached the standard of care she owed to Plaintiff and, if so, whether this breach was a “factual cause” of Plaintiff’s harm. The additional photographs – offered during rebuttal testimony – would not have been probative on either issue.

#### Conclusion

In conclusion, none of Plaintiff’s arguments have merit; the Post-Trial Motion was properly denied.

Date Filed: April 28, 2010

<sup>1</sup> A “stereotactic biopsy” is a “biopsy procedure that uses a computer and imaging performed in at least two planes to localize a target lesion (such as a tumor or microcalcifications in the breast). This provides a 3-dimensional image of the space and guides the removal of tissue for examination by a pathologist.” Definition found in the “Memorial HealthCare Breast Health Institute” Webpage: <http://www.memorialhealthcare.org/?id=586&sid=1>

<sup>2</sup> During trial, counsel alternated between calling Defendant “Dr. Furguele-Iracki” and “Dr. Furguele.” This memorandum carries on that approach.

<sup>3</sup> An “excisional biopsy” is a “surgical procedure in which an entire lump or suspicious area is removed for diagnosis. The tissue is then examined.” Definition found in the “USC Norris Comprehensive Cancer Center” Webpage: <http://uscnorriscancer.usc.edu/glossary/>

<sup>4</sup> Plaintiff also declares that the verdict was “against the weight of the evidence” because “the negligence of Dr. Furguele-Iracki was a substantial factor in the harm suffered by Ms. Walsh.” Plaintiff’s Post-Trial Motion, at 8-9. Plaintiff has provided absolutely no argument in support of this claim. The claim is therefore waived. Moreover, it is a meritless argument: both Dr. Thomas Julian and Dr. Adam Brufsky testified that Plaintiff was not harmed by the alleged “six-month” delay in diagnosis. See *infra*, at \*\*8-10.

## Mark T. Addlespurger and Denise L. Palmer v. Motorists Mutual Insurance Company

### *Bad Faith*

1. Plaintiffs sued Motorists Mutual Insurance Company, alleging bad faith handling of Plaintiffs’ fire loss claim, specifically that payments were unreasonably delayed.

2. Bad faith must be proven by clear and convincing evidence and not merely insinuated.

3. Evidence showing that Insurance Company tendered payment, except for disputed items, within one week of Plaintiffs’ requests establishes that Insurance Company acted reasonably in responding promptly and did not act in bad faith.

(Amy R. Schrempf)

Joshua P. Geist for Plaintiff.

Sharon Z. Hall for Defendant.

No. GD 05-001524. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

#### OPINION

James, J., April 16, 2010—Plaintiffs Mark Addlespurger and Denise Palmer commenced this civil action against Defendant Motorists Mutual Insurance Company, based upon Defendant’s alleged bad faith handling of Plaintiff’s fire loss claim. Plaintiffs asserted a bad faith claim based on 42 Pa. C.S.A. Section 8371. Specifically, Plaintiffs allege that Defendant unreasonably delayed payment of their policy proceeds after they sustained damages to their dwelling and personal property as the result of a fire.

Both parties submitted Proposed Findings of Facts and Conclusions of Law. The Court finds the following:

The Defendant issued a homeowners insurance policy to Plaintiffs, which provided coverage for their condominium located at Gateway Towers, 320 Duquesne Boulevard, Pittsburgh, Pennsylvania 15222. The policy provided \$50,000.00 coverage for the dwelling, \$50,000.00 for the personal property and \$20,000.00 for the loss of use. On March 8, 2002, a fire (a covered loss) occurred. The fire began within or around a laptop computer. While on fire, the laptop melted the glass coffee table, fell through and burned a hole in the rug below and burned the hardwood floor beneath it. A range of surfaces and contents of the condominium were affected by various degrees of soot, smoke and water. The front door to the condominium was also damaged when fire-fighters broke it down to gain entry. Claims specialist, Gary Weber, was assigned to the case. After inspecting the condominium on March 11, 2002, Mr. Weber advised the Plaintiffs that the repairs were not complex and would consist of cleaning, painting and floor replacement. The Gateway Condominium Association contacted Firewater Restoration, but the Plaintiffs would not use

Firewater for repairs. Mr. Weber asked the Plaintiffs to have their chosen contractor contact him. Mr. Weber estimated the time for completion to be one month. Mr. Weber agreed to pay for replacement of the Plaintiffs' television and two couches. The Plaintiffs were living at the Renaissance Hotel at \$4,170.00 per month, without a kitchen. The Defendant offered the Plaintiffs temporary housing through ExecuStay, which was a furnished two bedroom apartment with a full kitchen on Anderson Street within walking distance of Gateway Towers at \$3,100.00 per month. The Plaintiffs refused to sign the lease for ExecuStay. Mr. Weber informed the Plaintiffs that March 19, 2002, would be the last day that he would pay the hotel charges. On March 20, 2002, Mr. Weber faxed an estimate regarding the floor to the Plaintiffs, which they disputed. Mr. Weber suggested they meet on-site to re-measure, but the Plaintiffs did not want to meet until April 1, 2002. On March 26, 2002, the Defendant provided the Plaintiffs with a dwelling loss advance of \$5,000.00 and a contents loss advance of \$5,000.00. On May 1, 2002, the Plaintiffs sent Mr. Weber a cost estimate for repairs totaling \$25,780.98, which exceeded Mr. Weber's estimate by \$10,000.00 due to the difference in flooring prices. On May 6, 2002, Mr. Weber advised the Plaintiffs that costs for the lounge at the hotel were not compensable under the Additional Living Expense Coverage. On May 8, 2002, the Defendant advanced \$10,000.00 to the Plaintiffs under the Contents Coverage and \$5,560.00 under the Additional Living Coverage. On May 30, 2002, Defendant advanced \$8,000.00 to the Plaintiffs under the Dwelling Coverage. By June 24, 2002, according to Mr. Weber, \$18,000.00 had been tendered to the Plaintiffs. As of July, 2002, Mr. Weber was still having difficulty coming to an agreement with Plaintiffs on estimates for the repairs. In August, 2002, the Dwelling claim was concluded with Plaintiffs agreeing to split the difference between their and Defendant's repair estimates. On September 5, 2002, Mr. Weber requested that Plaintiffs provide him with a list of the items that did not clean properly. On September 9, 2002, Defendant tendered a \$2,304.95 payment to Plaintiffs under the Dwelling Coverage representing the difference between the Plaintiffs' and the Defendant's repair estimate. On November 25, 2002, Mr. Weber received list of items that did not clean properly. They indicated items as damaged and/or not salvable and others as ones they would like to keep and attempt to clean. Mr. Weber forwarded the list to NBD, a third party contents valuation company. The parties met in December, 2002, to discuss. The Defendant's contents evaluation came to \$38,941.00 and Plaintiffs' was \$53,000.00. Plaintiffs were paid replacement cost for a large screen television, which they retained and they admitted was in working condition. In August and September 2003, the parties continued to negotiate the contents loss. By this time, the full \$50,000.00 in contents coverage had been paid. Defendant offered one more month of Additional Living Expense to conclude and Plaintiffs accepted. In February, Plaintiffs advised that they believed they were owed an additional \$5,000.00. Except for the disputed items, the Defendant tendered payment within one week of Plaintiffs' requests.

Plaintiffs claim that the Defendant acted in bad faith in refusing and delaying payment of their benefits.

"Bad faith" on the part of an insurer is any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For such purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e. good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith. *Terletsky v. Prudential Property and Cas. Ins. Co.*, 649 A.2d 680, 688 (Pa. 1994) quoting *Black's Law Dictionary* 139 (6th ed. 1990).

42 Pa. C.S.A. Section 8371 is the bad faith states the following:

In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:

- (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
- (2) Award punitive damages against the insurer.
- (3) Assess court costs and attorney fees against the insurer.

42 Pa. C.S.A. Section 8371

"To prove bad faith, a plaintiff must show by clear and convincing evidence that the insurer (1) did not have a reasonable basis for denying benefits under the policy and (2) knew or recklessly disregarded its lack of a reasonable basis in denying the claim. *Condio v. Erie Ins. Exchange*, 899 A.2d 1136, 1143 (Pa.Super. 2006).

Bad faith must be proven by clear and convincing evidence and not merely insinuated. *Cowden v. Aetna Casualty and Surety Company*, 134 A.2d 223, 229 (Pa. 1957).

The Plaintiffs have failed to show with clear and convincing evidence that the Defendant acted unreasonably in delaying payment with ill will or self-interest. The evidence establishes that the Defendant acted reasonably in responding promptly to communication and did not act in bad faith.

## Commonwealth of Pennsylvania v. Edward Lawson

*Reasonable Suspicion—"Pat Down" Search—Plain Feel Doctrine*

1. Defendant alleges that police officer lacked reasonable suspicion to pat him down.
2. Defendant further alleges that during the pat down, the nature of the items seized from his person were not immediately apparent and therefore illegally seized.
3. Passenger's heavy breathing, shaking hands, quiet demeanor and lack of eye contact, together with the driver's aggravated and argumentative behavior, gave rise to the officer's reasonable suspicion that the passenger was armed to justify a "pat down" search.
4. During the "pat down," officer's experience and training made the nature of the contraband in passenger's pocket apparent to him, making seizure of the marijuana package legal.

(Amy R. Schrempf)

*Matthew Rippin* for the Commonwealth.

*Aaron Sontz* for Defendant.

No. CC200716894. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

**OPINION**  
**PROCEDURAL HISTORY**

Borkowski, J., April 27, 2010—Appellant was charged with one (1) count of Possession or Distribution of a Small Amount of Marijuana, 35 Pa. C.S. § 780-113(A)(31). In a hearing on February 18, 2009, this Court denied Appellant’s suppression motion. On the same date, Appellant proceeded to a non-jury trial. This Court found Appellant guilty. On February 18, 2009, Appellant was sentenced to pay the costs of prosecution. No further penalty was imposed.

Appellant filed a timely Notice of Appeal to the Superior Court of Pennsylvania on March 19, 2009. This timely appeal follows.

**STATEMENT OF ERRORS ON APPEAL**

Appellant’s Concise Statement challenges the suppression court’s denial of his pre-trial motion to suppress evidence on the basis of two issues, which are clarified by this Court as follows:

I. The search of Mr. Lawson violated the United States and Pennsylvania Constitutions where the “pat down” was based on the Officer’s claims that Mr. Lawson, a passenger in a motor vehicle, was “shaky,” “failing to make eye contact,” and “remaining extremely quiet” as these observations do not give rise to an objectively reasonable suspicion that Mr. Lawson was currently armed and dangerous.

II. Pursuant to the “plain feel” doctrine, the items taken from Mr. Lawson’s pocket were seized improperly because the nature of those items was not immediately apparent and the officer’s testimony at the suppression hearing was insufficient to establish that what he felt in Appellant’s pocket was marijuana.

**FINDINGS OF FACT**

On August 24, 2007, Pittsburgh Police Officer Justin Simone was working as part of the street response unit, a high impact drugs and firearms unit that focuses on troublesome areas within the City of Pittsburgh. See Hearing Transcript dated February 18, 2009 at pages 3, 18 (hereafter “H.T.”). At that time Officer Simone had been a police officer since September 2005 and had been working in the street response unit for one year. (H.T. 3, 18.) During the course of his three-and-a-half year career with the City of Pittsburgh Police, Officer Simone made approximately 150 arrests per year. (H.T. 3-4, 18.) He was trained to recognize certain drugs, including marijuana. (H.T. 4, 18.) He was trained to recognize these drugs in the context of a “pat down” search. (H.T. 4, 18.)

On August 24, 2007, at approximately 8:00 in the evening, Officer Simone was working a one-person vehicle in the Lawrenceville area of the City of Pittsburgh. (H.T. 4, 18.) He was traveling on 44th Street behind a white Cadillac automobile. (H.T. 4, 18.) He checked the vehicle’s license plate number on his computer. (H.T. 5.) His computer indicated that the license plate was suspended for an insurance violation. (H.T. 5, 18.) Officer Simone stopped the vehicle on 44th Street and determined that the driver was driving with a suspended license. (H.T. 5, 6, 19.) Appellant was a passenger in the vehicle. (H.T. 7.) Officer Simone intended to seize the vehicle’s license plate so the vehicle could not be driven. (H.T. 6.)

During the course of the vehicle stop the driver became very aggravated and argumentative with Officer Simone. (H.T. 6, 19.) Officer Simone was fearful that the driver might “try something” instead of just walking away. (H.T. 6.) He was concerned that the driver and/or passenger were armed, and his priority at that juncture was to make certain that neither was armed. (H.T. 7.) He ordered the driver to exit the vehicle and place both his hands on the vehicle. (H.T. 7.) Officer Simone patted the driver down for a weapon. (H.T. 7.) Appellant was still in the vehicle at that time. (H.T. 7.)

Officer Simone then ordered Appellant to exit the vehicle and place both of his hands on the roof of the vehicle. (H.T. 5, 11, 19.) Upon exiting the vehicle, Appellant was breathing heavily and his hands were shaking. (H.T. 7, 10, 14, 19.) He was extremely quiet and failed to make eye contact with Officer Simone. (H.T. 11, 14, 19.) Officer Simone suspected that Appellant was armed. (H.T. 7, 9.) With an open hand, Officer Simone patted Appellant for weapons and felt a large bulge in his front, left pants pocket, which he recognized by virtue of his experience and his training to be marijuana. (H.T. 8, 20.) He removed the large bulge, which was three (3) individually wrapped bags of marijuana. (H.T. 8, 20.) He confiscated the marijuana and took Appellant into custody. (H.T. 8, 20.)

**DISCUSSION**

Appellant claims that the suppression court erred in denying his pre-trial motion to suppress evidence. Recently, the Supreme Court of Pennsylvania reiterated the standard of review that an appeals court applies when reviewing the denial of a suppression motion as follows:

Our standard of review in addressing a challenge to the denial of suppression motion is limited to determining whether the suppression court’s factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the suppression court’s factual findings are supported by the record, we are bound by these findings and may reverse only if the court’s legal conclusions are erroneous.

*Commonwealth v. Jones*, 988 A.2d 649, 654 (Pa. 2010).

**I.**

**The “Pat-Down” Search**

Initially, Appellant argues that the facts demonstrate that Officer Simone lacked reasonable suspicion to pat down Appellant. This claim is without merit.

The Pennsylvania Supreme Court has concisely stated the law that controls this particular issue as follows:

Review of an officer’s decision to frisk for weapons requires balancing two legitimate interests: that of the citizen to be free from unreasonable searches and seizures; and that of the officer to be secure in his personal safety and to prevent harm to others. To conduct a limited search for concealed weapons, an officer must possess a justified belief that the

individual, whose suspicious behavior he is investigating at close range is armed, and presently dangerous to the officer or to others. In assessing the reasonableness of the officer's decision to frisk, we do not consider his unparticularized suspicion or hunch but rather the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

*Commonwealth v. Zahir*, 751 A.2d 1153, 1158 (Pa. 2000) (citations and quotations omitted).

In this case, Officer Simone was working as part of a high impact drugs and firearms unit that focuses on troublesome areas within the City of Pittsburgh when he stopped a white Cadillac in the Lawrenceville area of the City of Pittsburgh. (H.T. 4, 18.) Officer Simone made approximately 150 arrests per year. (H.T. 3-4, 18.) He stopped the vehicle because his computer indicated that the license plate was suspended for an insurance violation. (H.T. 5, 18.) Subsequently, he determined that the driver was driving with a suspended license. (H.T. 6.) Appellant was a passenger in the vehicle. (H.T. 7.)

Officer Simone asked the driver to step out of the vehicle. (H.T. 6.) The driver became very aggravated and argumentative with Officer Simone when he was informed that Officer Simone intended to seize the vehicle's license plate so the vehicle could not be driven. (H.T. 6, 19.) Officer Simone patted the driver down for a weapon because he feared that, instead of walking away, the driver might "try something." (H.T. 6-7.) Appellant, who was the passenger, was still in the vehicle at that time. (H.T. 7.)

Officer Simone then ordered Appellant to exit the vehicle. (H.T. 6-7.) Upon exiting the vehicle, Appellant was breathing heavily and his hands were shaking. (H.T. 7, 10, 14, 19.) He was extremely quiet and failed to make eye contact with Officer Simone. (H.T. 11, 14, 19.) Given the totality of the circumstances then confronting him, Officer Simone suspected that Appellant was armed, and he asked Appellant to place both of his hands on the roof of the vehicle. (H.T. 5, 7, 9, 11, 19.) Officer Simone reasoned that with Appellant's hands placed on the roof of the vehicle, there was less chance that he could get a firearm out if he was armed. (H.T. 11.) With an open hand, Officer Simone patted Appellant's person for weapons and discovered the marijuana that was the subject of the suppression motion. (H.T. 8.)

Based on the circumstances that confronted Officer Simone at that time, it was reasonable for him to conclude that his safety was potentially in jeopardy, and consequently the "pat down" search of Appellant was justified. *Commonwealth v. Wilson*, 927 A.2d 279, 284-285 (Pa.Super. 2007) (reasonable suspicion existed for officer to conduct protective frisk where defendant made nervous gestures and put his hand into his coat pocket); *Commonwealth v. Powell*, 934 A.2d 721, 724 (Pa.Super. 2007) (it was reasonable for officers to search passenger that had been seated next to driver where officers had retrieved gun from driver and it was late at night in a known crime area).

Appellant's claim in this regard is without merit.

## II.

### The "Plain Feel" Doctrine

Appellant asserts that the nature of the items seized from Appellant's pocket by Officer Simone was not immediately apparent as required by the "plain feel" doctrine. Specifically, he contends that the officer's testimony at the suppression hearing was insufficient to establish that what he felt in Appellant's pocket was marijuana. This claim is without merit.

Pursuant to the plain feel doctrine,

[A] police officer may seize non-threatening contraband detected through the officer's sense of touch during a Terry frisk if the officer is lawfully in a position to detect the presence of contraband, the incriminating nature of the contraband is immediately apparent from its tactile impression and the officer has a lawful right of access to the object.

*Commonwealth v. Pakacki*, 901 A.2d 983, 989 (Pa. 2006), quoting *Commonwealth v. Stevenson*, 744 A.2d 1261, 1265 (Pa. 2000).<sup>1</sup>

If, without further exploration or searching, the officer readily perceives that what he is feeling is contraband, then the nature of the contraband is "immediately apparent." *Pakacki*, 901 A.2d at 989.

Officer Simone was an experienced member of the street response unit, a high impact drugs and firearms unit. (H.T. 3, 18.) He had been trained to recognize certain drugs, including marijuana, in the context of a "pat down" search. (H.T. 4, 18.) When Officer Simone patted Appellant for weapons with an open hand, he felt a large bulge in his front, left pants pocket, which he recognized to be marijuana. (H.T. 8, 20.) He confiscated the marijuana and took Appellant into custody. (H.T. 8, 20.)

Officer Simone recognized, by virtue of his experience and his training, that the bulge in Appellant's pants pocket was marijuana. He testified that he "immediately felt a large bulge consistent with a marijuana package." (H.T. 8.) Thus, the nature of the contraband was immediately apparent to him and the marijuana was properly seized. *Commonwealth v. Parker*, 957 A.2d 311, 316 (Pa.Super. 2008) (finding of suppression court upheld where officer testified that he felt two plastic bags with hard rigid objects that, based on his training and experience, were consistent with the size, shape, and texture of packaged cocaine); *Pakacki*, 901 A.2d at 989 (testimony by state trooper that he felt a pipe that, based on his experience, he recognized as being a drug pipe, sufficient to support suppression court's factual finding that incriminating nature of contraband immediately apparent); *Commonwealth v. Bryant*, 866 A.2d 1143, 1147 (Pa.Super. 2005) (incriminating nature of packaged drugs immediately apparent to officer who had conducted over 100 drug arrests, was very familiar with the packaging and feel of packaged drugs, and where the frisk occurred in an area with a high incidence of drug dealing); *Commonwealth v. Dorsey*, 654 A.2d 1086, 1089 (Pa.Super. 1995) (seizure of contraband proper where arresting officer testified that surrounding circumstances and his tactile impression, combined with his years of training and experience as a police officer, led him to reasonably conclude that what he felt was a controlled substance).

Consequently, the record supports the suppression court's conclusion that Officer Simone's seizure of the marijuana found in Appellant's pocket was proper. Therefore, Appellant's claim as to this issue should be denied.

## CONCLUSION

Based upon the foregoing, the judgment of sentence imposed by this Court should be affirmed.

BY THE COURT:  
/s/Borkowski, J.

Date: April 27, 2010

<sup>1</sup> *Terry v. Ohio*, 392 U.S. 1 (1968), authorizes a police officer to conduct a patdown search of an individual who has been lawfully detained during an investigatory stop to determine whether the individual is carrying a weapon.

**Commonwealth of Pennsylvania v.  
Duane Strong**

*Megan's Law—Waiver of Pre-Sentence Sexually Violent Predator Evaluation*

1. Defendant pled guilty to Corruption of Minors and Sexual Assault and at his plea, waived his right to a Sexually Violent Predator evaluation prior to sentencing.

2. A voluntary waiver of a pre-sentence Sexually Violent Predator evaluation does not invalidate a later Court determination that an individual is a Sexually Violent Predator under Megan's Law.

*(Amy R. Schrempf)*

*Laura Ditka* for the Commonwealth.

*Michelle Collins* for Defendant.

No. CC200806915. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

**OPINION**

McDaniel, P.J., January 27, 2010—The Defendant has appealed from this Court's Order of October 27, 2009, which declared him to be a Sexually Violent Predator (SVP) pursuant to Pennsylvania's Megan's Law III, 42 Pa.C.S.A. §9795.4, *et seq.* A review of the record reveals that the Commonwealth established, by clear and convincing evidence, that the Defendant met the statutory criteria for classification as a SVP and, therefore, this Court's Order must be affirmed.

The Defendant was initially charged with Involuntary Deviate Sexual Intercourse,<sup>1</sup> Endangering the Welfare of a Child<sup>2</sup> and Corruption of Minors,<sup>3</sup> and the Information was later amended to include a charge of Sexual Assault.<sup>4</sup> The Defendant appeared before this Court on April 20, 2009 and, pursuant to a plea agreement with the Commonwealth, the IDSI and Endangering charges were withdrawn and he pled guilty to the remaining Corruption of Minors and Sexual Assault charges. At the plea hearing this Court ordered that the Defendant be evaluated by the Sexual Offenders Assessment Board to determine if he was a Sexually Violent Predator. The Defendant waived the right to have that assessment conducted prior to sentencing and instead elected to proceed immediately with the sentencing portion of the hearing. (Plea Hearing Transcript, p. 5-6). He was sentenced, in accordance with the terms of his agreement, to a term of two and one half (2 ½) to five (5) years at the Corruption of Minors charge and to a consecutive term of two and one half (2 ½) to ten (10) years at the Sexual Assault charge, for an aggregate term of imprisonment of five (5) to 15 years. No Post-Sentence Motions were filed.

On June 17, 2009, the Sexual Offenders Assessment Board returned its evaluation in which it indicated that the Defendant met the criteria of a Sexually Violent Predator. The Commonwealth then petitioned for a Sexually Violent Predator Hearing which was eventually held (after a postponement) before this Court on October 27, 2009. At the conclusion of that hearing, this Court made findings of fact on the record, determined that the Defendant was a SVP and entered an Order to that effect. This appeal followed.

The Defendant initially argues that this Court's classification of the Defendant as a SVP was improper because the SVP hearing was not held *prior* to sentencing. This claim is meritless.

Pursuant to 42 Pa.C.S.A. §9795.4, "after conviction but before sentencing, a court shall order an individual convicted of an offense specified in section 9795.1 (relating to registration) to be assessed by the board." 42 Pa.C.S.A. §9795.4(a). It further states that "a hearing to determine whether the individual is a sexually violent predator shall be scheduled upon the Praeceptum filed by the district attorney," 42 Pa.C.S.A. §9795.4(e)(1), and that "at the hearing prior to sentencing the court shall determine whether the Commonwealth has proved by clear and convincing evidence that the individual is a sexually violent predator." 42 Pa.C.S.A. §9795.4(e)(3).

At the plea hearing, the following occurred:

THE COURT: Mr. Strong, are you pleading guilty because you are guilty?

THE DEFENDANT: Guilty.

THE COURT: Do you have any additions or corrections to the summary as offered by Ms. Ditka?

THE DEFENDANT: No.

THE COURT: You filled out the Guilty Plea Explanation of Defendant's Rights. Did you read, understand and answer every question?

THE DEFENDANT: Yes.

THE COURT: Did you do so while your attorney was available?

THE DEFENDANT: Yes.

THE COURT: You have also completed the Megan's Law requirements, and do you understand you will have to register under Megan's Law for life?

THE DEFENDANT: Yes.

THE COURT: Do you adopt this colloquy as your own? The Megan's Law one?

THE DEFENDANT: Yes.

THE COURT: I find that you understand the proceeding, that your plea is knowingly, intelligently and voluntarily made.

Ms. Collins, as you know, Mr. Strong has the right to be evaluated by the Assessment Board to determine whether or not he is a sexually violent predator prior to the time of sentencing. You may waive that right. We can proceed with sentencing today and if it is determined that we need a hearing, we will have one after sentencing.

MS. COLLINS: Your Honor, he understands and we would like to waive his right to be evaluated by the SOAB prior to sentencing. Additionally, we would like to waive our right to a Pre-Sentence Report and proceed to sentencing.

(Plea Hearing Transcript, p. 4-6).

As the above record reflects, this Court offered the Defendant the opportunity to have the SVP evaluation conducted prior to sentencing, but he chose instead to waive that right and proceed to sentencing immediately, before the evaluation was completed and the hearing held. The Defendant cannot now use his voluntary waiver relating to the timing of his hearing to invalidate this Court's substantive determination and Order made at the conclusion of the hearing. The Defendant is bound by his waiver and his argument to the contrary is meritless. This claim must fail.

The Defendant also challenges the sufficiency of the evidence to support his classification as an SVP. This claim is meritless.

A SVP is defined by statute as

*a person who has been convicted of a sexually violent offense...and who is determined to be a sexually violent predator under section 9795.4 (relating to assessments) due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.*

42 Pa.C.S.A. §9792. The assessment criteria include:

1. *Facts of the current offense, including:*
  - i. *Whether the offense involved multiple victims.*
  - ii. *Whether the individual exceeded the means necessary to achieve the offense.*
  - iii. *The nature of the sexual contact with the victim.*
  - iv. *Relationship of the individual to the victim.*
  - v. *Age of the victim.*
  - vi. *Whether the offense included a display of unusual cruelty by the individual during the commission of the crime.*
  - vii. *The mental capacity of the victim.*
2. *Prior offense history, including:*
  - i. *The individual's prior criminal record;*
  - ii. *Whether the individual completed any prior sentences.*
  - iii. *Whether the individual participated in available programs for sexual offenders.*
3. *Characteristics of the individual, including:*
  - i. *Age of the individual.*
  - ii. *Use of illegal drugs by the individual.*
  - iii. *Any mental illness, mental disability or mental abnormality.*
  - iv. *Behavioral characteristics that contribute to the individual's conduct.*
4. *Factors that are supported in a sexual offender assessment field as criteria reasonably related to the risk of reoffense.*

42 Pa.C.S.A. §9795.4(B). The Commonwealth bears the burden of establishing SVP status by clear and convincing evidence. *Commonwealth v. Feucht*, 955 A.2d 377, 382 (Pa.Super. 2008).

"In reviewing the sufficiency of the evidence regarding the determination of SVP status, [the appellate court] will reverse the trial court only if the Commonwealth has not presented clear and convincing evidence sufficient to enable the trial court to determine that each element required by the statute has been satisfied." *Commonwealth v. Moody*, 843 A.2d 402, 408 (Pa.Super. 2004), internal citations omitted. To do so, the appellate court "will determine whether the record supports the findings of fact made by the trial court and then review the legal conclusions made from them." *Id.*

At the SVP hearing, Dr. Alan Pass testified that, in his medical opinion, the Defendant had a diagnostic classification of "paraphilia not otherwise specified" pursuant to Section 302.9 of the DSM-IV and that his actions met the statutory definition of "predatory behavior." (S.V.P. Hearing Transcript, p. 5-7). He then concluded:

Q. (Mr. Hoffman): Take the finding of the mental abnormality and the fact that you found he had a predatory behavior, were you able to form an opinion as to whether or not he meets the definition of a sexually violent predator under the Megan's Law statute?

A. (Dr. Pass): I did.

Q. What was that opinion?

A. In my opinion, Mr. Dwayne Strong's criminal behavior as captured historically in prior criminal offense as well as the instant case indicates that he does meet the classification criteria for sexually violent predator as set forth in the statute.

Q. And do you offer that opinion within a reasonable degree of professional or forensic and scientific certainty?

A. I do.

(S.V.P. Hearing Transcript, p. 8).

At the conclusion of the hearing, this Court made the following finding:

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THE COURT: Okay. Based on the uncontradicted testimony of Dr. Pass, also based on the defendant's mental abnormality as well as his predatory behavior, this Court finds that the defendant is a sexually violent predator.

(S.V.P. Hearing Transcript, p. 17).

In light of the circumstances of the offense, the medical expert reports and testimony from the SVP Hearing, the Commonwealth certainly established that the Defendant was a sexually violent predator by clear and convincing evidence. This Court's findings of fact were supported by the record and led to a clear finding that the Defendant is a sexually violent predator. This Court did not abuse its discretion in so finding, and, therefore, this Court's Order must be affirmed.

Accordingly, for the above reasons of fact and law, this Court's Order of November 20, 2008, declaring the Defendant to be a Sexually Violent Predator, must be affirmed.

BY THE COURT:  
/s/McDaniel, P.J.

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<sup>1</sup> 18 Pa.C.S.A. §3123(a)(7) and (a)(1)

<sup>2</sup> 18 Pa.C.S.A. §4304(a)

<sup>3</sup> 18 Pa.C.S.A. §6301(a)(1)

<sup>4</sup> 18 Pa.C.S.A. §3124.1