

# PITTSBURGH LEGAL JOURNAL

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# PLJ

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## OPINIONS

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## **Carnegie Mellon University v. Zoning Board of Adjustment of the City of Pittsburgh, and the City of Pittsburgh, and Museum Park Hotel, L.P.**

### *Zoning—Variances*

1. This appeal arises from a decision of the Zoning Board of Adjustment of the City of Pittsburgh, concerning the approval of a special exception and the granting of dimensional variances for height and floor area ratio to Museum Park Hotel, L.P., Intervenor and Owner of the subject property located in the OPR-B (Oakland Public Realm, Craig Street) District.

2. Museum Park Hotel sought to redevelop the subject property, which had formerly been used as a gasoline station, into a 225-room, 11-story hotel.

3. The OPR-B District permits hotels as a special exception to the Zoning Code.

4. The subject property is bounded by property belonging to Appellant, Carnegie Mellon University as well as by the B&O Railroad.

5. The property is 27,080 feet in size and oblong-shaped. There is also a presence of rock just below grade level that would limit the building of an underground parking or storage structure. The property also suffers from contamination that occurred as a result of the prior operation of a gasoline station on the property.

6. Pursuant to the Zoning Code, hotels are permitted by special exception to reach a height of up to 85 feet and a floor ratio of 4:1. The Zoning Board approved two special exceptions and granted two variances to Museum Park Hotel, permitting it to build a hotel with a height of 135 feet and a 6.13:1 floor area ratio.

7. Museum Park Hotel contended that the additional 50 feet in height beyond the special exception would make the hotel economically feasible. However, in reviewing the Zoning Board's decision, the court noted that when seeking a dimensional variance, the owner may only ask for a reasonable adjustment of the zoning regulations.

8. Museum Park Hotel contended that due to the unique features of the land it would not be able to use the property for any permitted use without prohibitive expense.

9. In reversing the Zoning Board's decision, the court reasoned that while the property has unique features, it is not so unique that no OPR-B District permitted use can be made and that the variance must be the minimal amount needed to afford relief. The court also explained that a variance is only appropriate where the property, not the person, is subject to hardship and therefore Museum Park Hotel could develop the property into another profitable use.

*(Amy L. Vanderveen)*

*Jeremy A. Mercer* for Carnegie Mellon University.

*Lawrence H. Baumüller* for Zoning Board of Adjustment of the City of Pittsburgh.

*William R. Sittig, Jr.* for City of Pittsburgh and Museum Park Hotel, L.P.

No. S.A. 08-000312. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

### **OPINION**

James, J., June 25, 2009—This appeal arises from the decision of the Zoning Board of Adjustment of the City of Pittsburgh, Allegheny County, Pennsylvania (hereinafter “Board”) concerning the approval of a special exception and the granting of dimensional variances for height and floor area ratio to Museum Park Hotel, LP who seeks to redevelop an abandoned gasoline station and erect a 225-room 11-story hotel. The property (hereinafter “Subject Property”) is located at 4655 Forbes Avenue and is in an OPR-B (Oakland Public Realm, Craig Street) District, which permits hotels as a special exception subject to specific criteria.

The Intervenor and owner of Subject Property is Museum Park Hotel, LP (hereinafter “MPH”). The Subject Property abuts Flossie Way, an R1A-H (One-Family Residence, High Density) District, to the north and Forbes Avenue, an EMI (Educational/Medical/Institutional) District to the south. The Subject Property is bounded by property belonging to Appellant, Carnegie Mellon University (hereinafter “CMU”) on the west and south. To the immediate east, Subject Property is bounded by the B&O Railroad, which has active railroad tracks that are significantly lower in grade than Subject Property and is known as Junction Hollow. Immediately to the east of Subject Property and above the B&O Railroad tracks is a bridge that spans along Forbes Avenue which then abuts an adjacent property belonging to CMU. The Subject Property is 27,080 square feet in size and is oblong shaped. There is a presence of rock just below grade level that would limit the building of an underground parking or storage structure.

MPH intends to remediate Subject Property from contamination that occurred as a result of the operation of a gasoline station at this site. Testimony was entered at the hearing that supports development in the Oakland Institutional area and it was noted that there is a shortage of hotel rooms nearby. MPH wishes to build a 225-room 11-story hotel on Subject Property and they have done extensive research and study in order to comply with the demands on commercial uses in a community such as OPR-B that is within 100 feet of a residential zone. Throughout a process that stretched over a year, MPH has altered the original design of the hotel from an H-shape to an L-shape in an effort to accommodate comments from the City Planning Department, residents, and several interested groups.

The Board, in its Findings of Fact and Conclusions of Law dated February 14, 2008, approved two special exceptions and granted two variances to MPH. Hotels are permitted by special exception up to a height of 85 feet. The Board found that the conditions for the special exceptions were met. One dimensional variance allows for a floor area ratio of 6.13:1 and the other dimensional variance allows for a height of 135 feet. The Board concluded that MPH submitted substantial evidence to warrant special exceptions and dimensional variances.

The Zoning Code provides for a height of 60 feet as of right, with a height of 85 feet permitted by special exception in the OPR-B District. The Code also provides for a floor area ratio of 4:1. MPH has requested a variance in height of 50 feet, which is approximately 59 percent, and an increase in floor ratio of approximately 53 percent. It appears that the Board has based its decision on MPH's argument that the variances are necessary to make the property economically viable for MPH. Because a hotel is a permitted use by special exception, the major issue to be resolved is the Board's approval of dimensional variances to build a hotel at 135-foot height and at a 6.13:1 floor area ratio.

Where the trial court takes no additional evidence beyond that heard by the Zoning Board of Adjustment, its scope of review is limited to determination of whether the Board committed an error of law, abused its discretion or made findings not supported by substantial evidence. *Mars Area Residents v. Zoning Hearing Board*, 529 A.2d 1198, 1199 (Pa. Cmwlth. 1987). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Valley View Civic Association v. Board of Adjustment*, 462 A.2d 637, 640 (Pa. 1983).

No variance in the strict application of any provisions of this Zoning Code shall be granted by the Zoning Board of Adjustment unless it finds that all of the following conditions exist:

- 1) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that the unnecessary hardship is due to the conditions, and not the circumstance or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located;
- 2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provision of the zoning ordinance and that the authorization of a variance is, therefore, necessary to enable the reasonable use of the property;
- 3) That such unnecessary hardship has not been created by the appellant;
- 4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare; and
- 5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

In granting any variance, the Board may attach such reasonable conditions and safeguards as it may deem necessary to implement to purposes of this act and the zoning ordinance.

The applicant shall have the burden of demonstrating that the proposal satisfies the applicable review criteria.

Pittsburgh Zoning Code Section 922.09.E.

In this case, the Zoning Code permits a height of 60 feet by right and 85 feet permitted by special exception. MPH argues that an additional 50 feet beyond the special exception would make the hotel economically feasible. "A variance will not be granted solely because the petitioner will suffer an economic hardship unless he receives one." *O'Neill v. Zoning Board of Adjustment of Philadelphia County*, 254 A.2d 12, 15 (Pa. 1969).

"When seeking a dimensional variance within a permitted use, the owner is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations." *Hertzberg v. Zoning Board of the City of Pittsburgh*, 721 A.2d 43 (Pa. 1989). A dimensional variance has a more relaxed quantum of proof required to prove unnecessary hardship because a dimensional variance is of a lesser change within the zoning regulations as opposed to a grant for a usage outside the zoning regulation. *Id.* at 47. To justify the grant of a dimensional variance, courts may consider multiple factors:

- 1) The economic detriment to the appellant if the variance was denied;
- 2) The financial hardship created by any work necessary to bring the building into strict compliance with zoning requirements; and
- 3) The characteristics of the surrounding neighborhood.

*Id.* at 50.

MPH contends that they do not need to reach the relaxed standards of *Hertzberg* for the approval of a variance. MPH argues that they have met the burden of proof to be granted a variance based on hardship pre-*Hertzberg* due to the unique physical features of the Subject Property and that they would not be able to use Subject Property for any permitted use without prohibitive expense. MPH cites *Allegheny West Civic Council, Inc. v. Zoning Bd. of Adjustment of City of Pittsburgh*, 689 A.2d 225 (Pa. 1997) that states "unnecessary hardship is established by evidence that the physical features of the property are such that it cannot be used for a permitted purpose or that the property can be conformed for a permitted use only at a prohibitive expense." *Id.* at 227-228. While Subject Property has unique physical features, it is not so unique that no OPR-B District permitted use can be made of the property, including uses permitted by special exception. The Subject Property at one time contained a permitted use that was not a hotel. The Record does not show that MPH presented studies for any use within the Code other than an office building or hotel. Therefore, there is no proof that prohibitive expense is needed to bring Subject Property in conformance with a permitted use.

MPH has confused prohibitive expense with profitability. As evidenced in the Record, MPH has based its prohibitive expense argument on what they believe would be the minimum size of structure they could build for maximization of profit, or "to make the project work." MPH determined that either an office building or a hotel would be the best use of Subject Property, and that a hotel would best meet most zoning, parking, and traffic requirements of the District. This brings us again to the premise that variances are not to be granted based on economic profitability only. See *O'Neill, supra*. "A variance, whether labeled dimensional or use, is appropriate only where the property, not the person, is subject to hardship." *One Meridian Partners, LLP v. Zoning Bd. of Adjustment of the City of Philadelphia*, 867 A.2d 706, 710 (Pa. Cmwlth. 2005).

Additionally, a variance, if authorized, must be the minimum variance needed that will afford relief and represent the least modification possible. Relative to the surrounding property and its proximity to the Residential District, an increase in height of 59 percent above the 85 feet allowed by special exception and an increase of 53 percent of floor area ratio are variances that do not appear to be the minimum amount needed to afford relief, even had the Intervenor shown that a hardship existed.

A review of the record shows that while there was substantial evidence taken and reviewed, the Board's grant of the variances was an abuse of discretion and an error of law. The Board erroneously applied the definition of hardship. There is no evidence that without the variances, Intervenor, MPH, could not develop the property into some other profitable use allowable within the Zoning Code of an OPR-B District. While Subject Property does have some uniqueness in shape, the property is not precluded from any use at all. It is not enough to state that MPH would experience some economic hardship.

The Record does not show substantial evidence that the requested dimensional variance is the minimum required for the Subject Property, nor has the record shown that the surrounding community would not be affected by such variances. Therefore, for the reasons stated above, the February 14, 2008 decision of the Zoning Board of Adjustment for the City of Pittsburgh is Reversed.

ORDER OF COURT

AND NOW, to-wit, this 29th day of June, 2009, the decision of the Zoning Board of Adjustment of the City of Pittsburgh dated February 14, 2008, is reversed.

BY THE COURT:  
s/James, J.

**In Re: Appeal of the First Baptist Church of Crafton v.  
Borough of Crafton Zoning Hearing Board and Borough of Crafton**

*Zoning—Variances*

1. Appellant, the First Baptist Church of Crafton, owns property located in an R-1 District. Located on the property in question is a former parish house which had been constructed on the Church grounds in 1924.
2. The Appellant sought a variance of the property from the 35-foot conditional use minimum front yard setback and a 13-foot conditional use minimum side yard setback.
3. There is a distance of 25 feet from the front of the house to the front yard boundary line of the property, not including the porch. Thus, the front yard setback is 10 feet less than the required minimum of 35 feet for conditional use.
4. The submitted plan shows a distance of 2.67 feet from the house to the side yard boundary line of the property and therefore the side yard setback is 10.33 feet less than the required minimum of 13 feet for the conditional use.
5. Furthermore, there is a distance of 10 feet between the house and the sanctuary.
6. Since its construction, the house has been used as a program center for the church, providing the community with services such as counseling and education.
7. The court found that the variances requested were dimensional and those dimensions have never changed and that the grant of these variances would not change the character of the neighborhood. Most importantly, the court found that the variances were reasonably necessary to enable Appellant to continue to serve the community.
8. Therefore, the decision of the Borough of Crafton Zoning Board was reversed and the court granted the dimensional variances.

(Amy L. Vanderveen)

*Rebecca A. Bowman* for First Baptist Church of Crafton.

*Daniel P. Carroll* for the Borough of Crafton Zoning Hearing Board.

*Thomas H. Ayooob, III* for the Borough of Crafton.

No. S.A. 08-000922. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**OPINION**

James, J., May 26, 2009—This appeal arises from the decision of the Borough of Crafton (hereinafter “Board”) dealing with property known as The First Baptist Church of Crafton (hereinafter “Appellant”), 1 through 7 Oregon Avenue, Crafton (hereinafter “Subject Property”). The Subject Property is located in a R-1 District. Located on the Subject Property is a former manse or Parish House (hereinafter “House”) constructed on the Church grounds in 1924.

Whether additional evidence is permitted in a zoning case rests within the trial court’s discretion. *Kossmann v. Green Tree Zoning Board*, 597 A.2d 1274, 1278 (Pa.Cmwlt. 1991). This Court took additional testimony on March 23, 2009. Where the Court takes additional testimony the Court acts appropriately in making its own findings. *Koutrakos v. Zoning Hearing Bd.*, 685 A.2d 639, 641 (Pa.Cmwlt. 1996).

Section 225-118(M)(5) of the Ordinance requires that a minimum front, rear, and side yards otherwise required in the Zoning District each shall be increased by ten (10) feet. Section 225-45(D) of the Ordinance requires that the minimum front yard be 25 feet. Section 225-45(F)(3) of the Ordinance requires that the minimum side yard be 3 feet for accessory structures. The Appellant is seeking a variance for the Subject Property from the 35-foot conditional use minimum front yard set back and 13-foot conditional use minimum side yard set back as found in Section 225-118(M)(5) of the Zoning Ordinance of the Borough of Crafton (hereinafter “Ordinance”).

According to the Record, there is a distance of 25 feet from the front of the house to the front yard boundary line of the Subject Property, not including the porch. Thus, the front yard set back is 10 feet less than the required minimum of 35 feet for the conditional use.

The plan submitted shows a distance of 2.67 feet from the house to the side yard boundary line of the Subject Property. Therefore, the side yard set back is 10.33 feet less than the required minimum of 13 feet for the conditional use. Furthermore, according to the plan submitted, there is a distance of 10 feet between the House and Sanctuary.

To justify the grant of a dimensional variance, courts may consider multiple factors:

- 1) the economic detriment to the appellant if the variance was denied;
- 2) the financial hardship created by any work necessary to bring the building into strict compliance with zoning requirements; and
- 3) the characteristics of the surrounding neighborhood.

*Hertzberg v. Zoning Board of the City of Pittsburgh*, 721 A.2d 43, 50 (Pa. 1989).

Since its construction the House has been continuously used as a program center for the Church, including day and evening

bible classes, Sunday School, offices, chapel, youth group meetings, Vacation Bible School, pastoral housing, and temporary housing for guests of the church. The House has served as a workplace for Abraxas Workbridge, a community service outlet for youth defendants appearing before Magistrate Dennis Joyce, for service projects for students of the Carlyton School District and for St. Philip's School. The House has been utilized for programs such as the Rankin Christian Center and the location for the Children's of Hope Program, providing pre-natal care and parenting classes for low-income mothers with young children.

In 2007, the Subject Property was used as a counseling center for a program called Interfaith Hospitality Network of the South Hills (IHN). The IHN offered programs and counseling between the hours of 6:30 a.m. and 5:30 p.m. with a social worker onsite at all times with the families. All participating families are required to clear criminal background checks and alcohol and drug screening.

This Court makes the following findings:

1. The House has been used as a counseling and educational center since its construction in 1924.
2. The variances requested are dimensional and these dimensions have never changed.
3. The grant of these variances will not change the character of the neighborhood.
4. The variances are reasonably necessary to enable the Appellant to cater its services to the community.

ORDER OF COURT

AND NOW, this 29th day of May, 2009, the decision of the Borough of Crafton Zoning Board is reversed and the dimensional variances are granted.

BY THE COURT:  
/s/James, J.

**The Friendship Preservation Group, Inc., a Pennsylvania Corporation,  
and AZ, Inc., a Pennsylvania Corp. d/b/a Café Sam v.  
Zoning Board of Adjustment of the City of Pittsburgh and UPMC Shadyside**

*Zoning—2 Pa.C.S. § 754*

1. Appellants, the Friendship Preservation Group, Inc., filed for a Preliminary Injunction to enjoin Intervenor UPMC Shadyside from providing access to Herberman Conference Center to anyone who is not a regular day-to-day UPMC Shadyside campus employee. The Court denied the Appellants' request for a Preliminary Injunction.

2. Appellants then filed a Statement of Matters Complained of on Appeal, asserting that the trial court had the power to approve the Appellants' Motion for Preliminary Injunction and that the trial court erred by not approving the same.

3. The court noted that an appellate court has the power to do what a lower tribunal ought to have done, but that court does not have the power to create or manufacture a remedy outside the capabilities of the lower tribunal. The court explained that the power to enforce the Zoning Code is not expressly conferred upon the Board, but enforcement powers are implied and allows the Board the power to make orders it finds to be proper.

4. The court further reinforced that the Board's power to issue enforcement is dependent on the officers' power to issue enforcement.

5. Thus, because the officers or designees of the Board did not have the power to issue an injunction, the court determined the Board did not have the power to issue an injunction.

6. Consequently, the court determined that the Court of Common Pleas, acting as an appellate tribunal on a zoning appeal, does not have the power to grant an injunction, and therefore cannot address the question of whether Appellants properly met the burden of proving the necessary elements for injunctive relief.

(Amy L. Vanderveen)

*Kenneth R. Stiles* for the Friendship Preservation Group, Inc.

*Andrew Zins* for AZ, Inc.

*Lawrence H. Baumiller* for Zoning Board of Adjustment of the City of Pittsburgh.

*William R. Sittig, Jr.* for UPMC Shadyside.

No. SA 08-000246. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**OPINION**

James, J., June 5, 2009—The issue at hand arises out of the statutory appeal of The Friendship Preservation Group, Inc., a Pennsylvania Corporation, AZ Inc., a Pennsylvania corporation, d/b/a Café Sam (hereinafter "Appellants") from the decision of the Zoning Board of Adjustment of the City of Pittsburgh (hereinafter "Board").

While the zoning appeal was pending the Appellants, The Friendship Preservation Group, Inc., a Pennsylvania Corporation and AZ Inc., a Pennsylvania Corporation, d/b/a Café Sam, filed a Motion for Preliminary Injunction seeking to enjoin Intervenor UPMC Shadyside from providing access to the Herberman Conference Center to anyone who is not a regular day-to-day UPMC Shadyside campus employee. Following a hearing on March 9, 2009, the Court denied the Appellants request for Preliminary Injunction. On March 27, 2009, the Appellants filed a Notice of Appeal and on April 15, 2009 this court received the Appellants' Statement of Matters Complained of on Appeal.

In the Appellants' Statement of Matters Complained of on Appeal, Appellants complain that the trial court had the power to approve Appellants' Motion for Preliminary Injunction and that the trial court erred by not approving Appellants' Motion for Preliminary Injunction because Appellants properly met their burden of proving the necessary elements for the injunctive relief requested.

Under Pennsylvania law:

[T]he powers of the court of common pleas when considering a zoning appeal are governed by the Administrative Agency Law, which requires that when an adjudication is affirmed the court may only enter an order authorized by the Judicial Code. *See* 2 Pa.C.S. § 754. The relevant section of the Judicial Code provides: An appellate court may affirm, modify, vacate, set aside or reverse any order brought before it for review and may remand the matter and direct the entry of such appropriate order, or require such further proceedings to be had as may be just under the circumstances 42 Pa.C.S. § 706. (emphasis added.) This section limits the power of an appellate court to award relief which could have been entered by the tribunal from which the appeal was taken. Thus an appellate court has the power to do what the lower tribunal ought to have done; but that court has no power to create or manufacture a remedy which would have been outside the capabilities of that lower tribunal.

*In re Leopardi*, 532 A.2d 311, 315 (Pa. 1987).

In the issue at hand, the powers of the Board are set forth in Section 923.02.B of the Pittsburgh Zoning Code (hereinafter “Zoning Code”). The specific powers delegated are: to hear and decide appeals from decision or determination by the Zoning Administrator or the Chief of the Bureau of Building Inspection (Section 923.02B(1)); upon appeal, to interpret any provision of the Zoning Code where its meaning or application is in question (Section 923.02.B(2)); to hear and decide challenges to the validity any provision of the Zoning Code (Section 923.02.B(3)); and to hear and decide requests for special exceptions to the provisions of the Zoning Code (Section 923.02B(1)). In addition, the Board “may affirm or reverse or modify, wholly or partly, any order, requirement, decision or determination appealed, and may make such order as it finds to be proper, as if acting with all the powers of the officer from whom the appeal has been taken.” (Section 923.02B(5)).

The Zoning Code expressly confers the power to issue enforcement upon the “Chief of the Bureau of Building Inspection or Code Official or such other officer the City as may from time to time be designated by the City Council or its designee.” Section 924.01 of the Zoning Code. The officers or designees means of enforcement under the Code are: withholding permits of approval (Section 924.04.A); revoking permits or approval (Section 924.04.B); stopping work (Section 924.05.C); revoking plans or other approval (Section 924.05.D); seeking injunctions and equitable relief in court to restrain violations (Section 924.05.E); seeking abatement in court to restore premises to its condition prior to the violation; and imposing penalties (Section 924.05.F). There is no provision conferring the power to grant an injunction as a means of enforcement.

While the power to enforce the Zoning Code is not expressly conferred upon the Board, enforcement powers are implied by (Section 923.02.B(5)), which gives the Board the power to “make such order as it finds to be proper, as if acting with all the powers of the office from whom the appeal has been taken.” (Section 923.02.B(5)). Therefore, the Board’s power to issue enforcement is dependent on the officers’ power to issue enforcement. Since the officers or designees do not have power to issue an injunction, the Board, likewise, does not have the power to issue an injunction. Consequently, the Court of Common Pleas, as an appellate tribunal on a zoning appeal, does not have the power to grant an injunction and, therefore, cannot address whether or not the Appellants properly met their burden of proving the necessary elements for the injunctive relief requested.

## **Merchants Insurance Company v. Lawrence Paul Blakeley a/k/a Larry Blakeley t/d/b/a Blakeley Tile & Marble**

*Pa. R.C.P. 4014(a) and (d)—Summary Judgment—Rule to Show Cause*

1. Plaintiff issued a Workers’ Compensation Audit Premium Policy to Defendant. Under the policy, initial premiums were based upon an estimate of Defendant’s expected annual payroll. At the end of each year, an audit was to be performed to determine the actual payroll for that policy year and the premiums adjusted accordingly.

2. Plaintiff filed a complaint against Defendant alleging that as a result of the audit for the policy period in question, Defendant owed Plaintiff additional premium payments.

3. In the course of discovery, Plaintiff served Requests for Admission on Defendant. The Requests for Admission addressed the material factual issues that Defendants had no basis for disputing Plaintiff’s assessment of additional premiums due and owing for four (4) floor installers which were reclassified as “employees” by the auditor and that Defendants owed Plaintiff the principal sum of \$13,818.934 for the additional premiums due plus \$1,900.10 in interest.

4. Defendant never responded to the Requests for Admission and they were deemed admitted pursuant to Pa. R.C.P. 4014(a) & (d).

5. Plaintiff was granted leave of court to present its Motion for Summary Judgment on Admissions. The motion was scheduled and written notice was sent to the relevant parties, including Defendant.

6. Defendant did not appear at the motion and in light of the admissions of record, the court determined that no material issues of fact remained and granted summary judgment in favor of Plaintiff and against Defendant for \$15,719.04, or the amount of additional premiums due plus interest.

7. The court received a phone call that Defendant, who claimed to be unrepresented by counsel, had never received a schedule of the argument. Defendant’s newly acquired counsel then delivered a Petition to Open and/or Strike Judgment to the judge’s chambers, requesting the court to issue a Rule to Show Cause why the judgment should not be opened. As the Plaintiff did not oppose the entry of the order within one week, the court issued a rule to Show Cause on Plaintiff.

8. Immediately upon receipt of the order, Plaintiff’s counsel advised that it did oppose entry of a Rule to Show Cause, but had been unaware of Defendant’s Petition for Rule to Show Cause, as counsel for Defendant never filed the petition nor served Plaintiff with a copy nor given notice to Plaintiff that Defendant had delivered the petition to the court.

9. Defendant admitted that he had never served Plaintiff with the Petition nor given him notice and that the petition had been left with the court only because a member of the Court had instructed him to do so. Thus, the Court vacated the Rule to Show Cause.

10. Defendant then properly filed a Petition for Rule to Show Cause to Open and/or Strike Judgment with the appropriate Certificate of Service to opposing counsel attached.

11. The court denied the Petition for the following reasons: 1) because Defendant did not respond to the Requests for Admission, the court deemed Defendant as having admitted he owed Plaintiff the amount of \$15,719.04 and summary judgment against him was therefore unavoidable; and 2) the trial court is not permitted to disturb such a judgment after it becomes final.

12. The court noted that a judgment entered in adverse proceedings becomes final if no appeal is filed within 30 days and that Defendant would need extraordinary cause to permit the court to open the judgment. The court reasoned that even if the Defendant did not have notice of the summary judgment argument, he had notice of entry of summary judgment itself within the appeal period. Thus, the court denied Defendant's Petition for Rule to Show Cause to Open and/or Strike Judgment.

(Amy L. Vanderveen)

Donald L. Phillips and Ann E. L. Shapiro for Plaintiff.

Thomas W. Brown for Defendant.

No. AR 08-010523. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

## MEMORANDUM

### I.

Folino, J., October 23, 2009—This is a commercial civil action. Plaintiff, Merchants Insurance Company, issued a Workers Compensation Policy to Defendant. The policy was known as an Audit Premium Policy, meaning that the initial premiums were based upon an estimate of the payroll Defendant expected to have for that policy year, and that an audit was to be performed at the end of the year to determine the actual payroll for that policy year, so that premiums could then be adjusted accordingly.

On August 8, 2008 Plaintiff filed a complaint against Defendant claiming that, as a result of the audit for the policy period in question, Defendant owed Plaintiff additional premium payments.

On May 20, 2009, in the course of discovery, Plaintiff served Requests for Admission on Defendant.

The Requests for Admission addressed the material factual issues at the heart of the case, such as:

37. Defendants have no basis for disputing Plaintiff's assessment of additional premiums due and owing for the four (4) floor installers, reclassified as "employees" by the auditor.

38. Defendants now owe to Plaintiff:

- a) the principal sum of **\$13,818.94** for the additional premiums due and owing under the Policy,
- b) plus **\$1,900.10** in interest, calculated at the legal rate of 6%, from June 5, 2007, the original date that payment was due under the Premium Adjustment Statement, to the scheduled date of trial, or until September 18, 2009 (*i.e.*, 27 1/2 months);
- c) for a total due and owing of **\$15,719.04**.

"Plaintiff's Requests for Admissions, Interrogatories, and Requests for Production of Documents Directed to Defendants," filed on behalf of Plaintiff Merchants Insurance Company, attached as "Exhibit 'A'" to Plaintiff's "Motion for Summary Judgment on Admissions" (hereinafter "Plaintiff's Requests for Admission"), at ¶¶ 37 & 38.

Defendant has never responded to the Requests for Admission. Therefore, they are deemed to be admitted. Pa. R.C.P. 4014(a) & (d).

In due course, the case was listed for trial on the Allegheny County September 18, 2009 jury trial list. *See* Plaintiff's "Motion for Summary Judgment on Admissions," at ¶ 4.

On July 13, 2009, Plaintiff presented to the Calendar Control Judge of the Court of Common Pleas of Allegheny County (the Honorable Gene Strassburger), Plaintiff's "Motion for Leave of Court to Present Plaintiff's Motion for Summary Judgment on Admissions." By order of the same date (July 13, 2009) Judge Strassburger granted that motion, giving Plaintiff leave to present the "Motion for Summary Judgment on Admissions" on August 24, 2009.

The summary judgment argument was then re-assigned to this Court for this Court's summary judgment list on August 6, 2009. *See* Electronic Docket Entry, dated July 21, 2009. Accordingly, this Court, on July 20, 2009, sent out written notice to Ann Shapiro (counsel for Plaintiff) and to Mr. Lawrence Paul Blakeley, who was then representing himself *pro se*, at his address as listed in his court papers: 527 Somerville Drive, Pittsburgh, PA 15243, notifying them of the argument.<sup>1</sup>

Defendant did not appear at the argument before me. And, in light of the admissions of record, I determined that there were no material issues of fact remaining, and therefore entered an order dated August 6, 2009 granting summary judgment in favor of Plaintiff and against Defendant in the amount that Defendant admitted to owe Plaintiff, \$15,719.04.

This Court's internal office records show that after receiving this order granting summary judgment against him, Defendant telephoned this Court's chambers and reported that: (a) he was not represented by counsel; (b) he did not receive the scheduling notice for the argument; but (c) the address we had for him (where we had sent the notice) was correct.

Sometime later, on August 24, 2009, Defendant's counsel (Defendant had apparently by this time retained counsel) delivered to this Court's chambers a Petition to Open and/or Strike Judgment, requesting that this Court issue a Rule to Show Cause why the judgment should not be opened. *See* "[Memorandum] in Support of Defendant's Petition for Rule to Show Cause to Open and/or Strike Judgment," filed on behalf of Defendant Lawrence Paul Blakeley (hereinafter "Defendant's Memorandum in Support of Petition for Rule to Show Cause"), at 2.

As a Rule to Show Cause is essentially a case management/scheduling order, I waited one week to see if Plaintiff intended to oppose the entry of the order, and not receiving any opposition, entered an order dated August 31, 2009 wherein I issued a Rule to Show Cause on Plaintiff.<sup>2</sup>

Almost immediately upon Plaintiff's counsel's receipt of the August 31, 2009 Rule to Show Cause, I received a telefacsimile from Plaintiff's counsel advising that Plaintiff did indeed strongly oppose the entry of a Rule to Show Cause, but that counsel for Plaintiff was unaware of the Petition for Rule to Show Cause, as counsel for Defendant had never filed the Petition, had never served Plaintiff with a copy of the Petition, and had never given notice to Plaintiff that Defendant had delivered to the Court on August 24, 2009 a Petition for Rule to Show Cause.

Accordingly, I arranged a conference with both counsel wherein counsel for Defendant acknowledged that he had not served Plaintiff with a copy of the Petition, and acknowledged that he had never provided notice to Plaintiff that he (Defendant's counsel)

had delivered the Petition to the Court on August 24, 2009. Counsel for Defendant stated that he did not intend to have the Court review the Petition for Rule to Show Cause when he brought it to the Court's chambers on August 24, 2009, and that he left it with the Court at that time only because a member of this Court's staff instructed him to do so. See "Defendant's Memorandum in Support of Petition for Rule to Show Cause," at 2.

Accordingly, as Defendant admitted that he had never served Plaintiff with the Petition and admitted that he never gave Plaintiff notice that the Petition had been left with the Court, I entered my Order dated September 4, 2009 vacating the August 31, 2009 Rule to Show Cause. In my order of September 4, 2009, I specifically informed Defendant that, if he intended to pursue a Petition to Open or Strike the August 6, 2009 judgment, he was of course required to serve a copy of the Petition on opposing counsel.

Thereafter, on September 9, 2009, counsel for Defendant did file a "Petition for Rule to Show Cause to Open and/or Strike Judgment" (with appropriate Certificate of Service to opposing counsel). Accordingly, I entered an Order dated September 10, 2009, scheduling the Petition for argument. It is that Petition that is currently before me, and which is the subject of this memorandum.

## II.

I must deny Defendant's Petition for two independent reasons. First, in light of the binding admissions against Defendant on the central issues of this case, it would be futile to open the judgment of August 6, 2009 and re-do the argument on Plaintiff's "Motion for Summary Judgment on Admissions." In light of the state of the record and the binding admissions against Defendant, summary judgment against him is unavoidable.

As noted above, Defendant has admitted, among other things, that he has "no basis for disputing Plaintiff's assessment of additional premiums due and owing." Defendant has also admitted that he "now owe[s] to Plaintiff...\$15,719.04." "Plaintiff's Requests for Admission," at ¶¶ 37 & 38.

It is settled law that by Defendant's failing to respond to the requests for admission, either through answers or objections, those matters were conclusively established. See Pennsylvania Rule of Civil Procedure 4014(b), which provides:

The matter is admitted unless, within thirty days after service of the request...the party to whom the request is directed serves upon the party requesting the admission an answer verified by the party or an objection, signed by the party or by the party's attorney.

Pa.R.C.P. 4014(b).

Further, under Rule 4014(d): "Any matter admitted under this Rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission."

It is undisputed in this case that: Defendant was served with Requests for Admission on or about May 20, 2009; Defendant never answered or objected to those Requests; and, in the five months since being served with the Requests, Defendant never obtained an order from the court, after motion, allowing the withdrawal of the admissions.

Thus, even if I were to vacate my order granting summary judgment and allow for re-argument next week, the result would be the same: summary judgment is appropriate on the record in this case.

The second, and perhaps conclusive, reason that I must deny Defendant's Petition is that the trial court is not permitted to disturb such a judgment after it becomes final. The law on this subject is likewise well-settled:

Unlike a judgment entered by confession or by default, which remains within the control of the court indefinitely and may be opened or vacated at any time upon proper cause shown, a judgment entered in an adverse proceeding ordinarily cannot be disturbed after it has become final. A judgment entered in adverse proceedings becomes final if no appeal therefrom is filed within thirty days. Thereafter the judgment cannot normally be modified, rescinded or vacated. Similarly it cannot be "opened."

*Simpson v. Allstate Ins. Co.*, 504 A.2d 335, 337 (Pa.Super. 1986) (internal citations omitted) (internal brackets omitted).

In *Simpson*, the Superior Court also noted:

Although the inability of a court to grant relief from a judgment entered in a contested action after the appeal period has expired is not absolute, the discretionary power of the court over such judgments is very limited. Generally, judgments regularly entered in adverse proceedings cannot be opened or vacated after they have become final, unless there has been fraud or some other circumstance so grave or compelling as to constitute 'extraordinary cause' justifying intervention by the court.

*Id.* at 337 (internal quotations omitted).

In *Simpson*, the judgment "was not entered by confession pursuant to warrant of attorney, nor was it entered by default upon praecipe. Instead, it was entered by the trial court in a contested civil action because of [defendant's] willful refusal to comply with the court's discovery order." *Id.* at 337. The Superior Court held in that case:

The judgment in this case was entered on October 14, 1982. [Defendant's] petition, whether we deem it a petition to open or a petition to reconsider the judgment, was filed five days after the judgment had been entered. However, the trial court did not act on the petition within thirty days, and no appeal was ever taken from the judgment. At the end of thirty days, therefore, the judgment became final. When the trial court subsequently attempted to open the judgment without any showing of fraud or extraordinary cause, it erred.

*Id.* at 338.

The Superior Court also noted in *Simpson* that "[a]n oversight by counsel in failing to appeal does not constitute 'extraordinary cause' which permits a trial court to grant relief from a final judgment entered in a contested action." *Id.* at 337 & 38.

In *Orie v. Stone*, 601 A.2d 1268 (Pa.Super. 1992), the judgment in question arose as follows: Plaintiff garnishor had obtained a confession of judgment against defendant debtor and sought to collect. Plaintiff garnishor then issued a writ of execution naming a bank where defendant debtor held funds as garnishee. Plaintiff garnishor presented to the court a "Motion to Compel Payment" directed to the garnishee, and obtained an order from the trial court on September 11, 1990, directing entry of judgment in favor of plaintiff garnishor and against the bank garnishee. No appeal was ever taken from the September 11, 1990 judgment. "Instead, on September 27, 1990, [the defendant debtor] presented a Motion to Vacate the September 11, 1990, Order of the court alleging *inter alia* that he did not receive notice of the presentation of the Motion to Compel Payment to Garnishee" that gave rise to the

entry of the September 11, 1990 judgment. *Id.* at 1270.

The defendant debtor argued that “he did not receive notice of the Motion to Compel Payment directed to garnishee [bank] and that without notice, [defendant debtor] was unable to appear and inform the court as to the true nature of the funds in [bank’s] possession.” *Id.* at 1271. On October 19, 1990, thirty-eight days after judgment was entered, the trial court entered an order vacating the September 11, 1990 judgment. The Superior Court reversed the trial court. The Superior Court held “that the trial court was without power to vacate its September 11, 1990 order” because “at the end of the 30-day appeal period, the judgment became final.” *Id.* at 1270 & 1271.

The Superior Court concluded that the defendant debtor’s lack of notice of the motion to compel did not constitute extraordinary cause. The Superior Court noted that: “[t]he extraordinary cause referred to in *Simpson* and other cases is generally an oversight or action on the part of the court or the judicial process which operates to deny the losing party knowledge of the entry of final judgment so that commencement of the running of the appeal time is not known to the losing party. *Id.* at 1272 (emphasis in original).

The Superior Court in *Orie* concluded that where defendant debtor had knowledge of the judgment in question well within the appeal period, the Court was unable to find “extraordinary cause,” and therefore the trial court lacked authority to disturb the judgment. *Id.* at 1272.

In *Orie*, the Superior Court also cited with approval the case of *Luckenbaugh v. Shearer*. 523 A.2d 399 (Pa.Super. 1987). The Superior Court described the *Luckenbaugh* case as follows:

In *Luckenbaugh*, the trial court entered an order on March 20, 1985 dismissing the plaintiffs’ case for failure to answer interrogatories. On April 1, 1985, Plaintiff filed a petition to strike the dismissal. Following the expiration of the thirty-day appeal period, no appeal having been taken, the judgment became final. However, on August 8, 1985, the trial court entered an order striking the dismissal and opening the judgment that it had previously entered.

When the trial court entered its order and opinion, it referred to ‘extraordinary cause’ and stated that the same existed by finding that there was a possibility of a ‘postal mishap’ in that the answers to interrogatories were mailed by plaintiffs’ counsel to defense counsel but were not delivered. On appeal from the August 8, 1985 order, this court held that while the ‘postal oversight’ may have been a sufficient reason to act to open the judgment within thirty days from its entry, this type of failure does not rise to the level of ‘extraordinary cause’ contemplated by the cases which permit a trial court to act once the judgment has become final and the appeal time has expired.

*Id.* at 1272 (internal citations omitted) (emphasis in original).

Accordingly, as the defendant in *Luckenbaugh* was aware of the **judgment** well within the time prescribed for filing an appeal, there could be no “extraordinary cause.”

In the case before me all parties are agreed that Defendant was well aware of this Court’s August 6, 2009 Order granting summary judgment well within the appeal period. Thus, there can be no extraordinary cause to permit me now to open the August 6, 2009 judgment.

Even if I accept Defendant’s contention that, owing to some postal mishap, he never received the July 20, 2009 notice from the Court scheduling the August 6, 2009 argument, “this type of failure does not rise to the level of ‘extraordinary cause.’” *Orie*, 601 A.2d at 1272. Irrespective of whether Defendant had notice of the summary judgment argument, Defendant had notice of the entry of summary judgment itself well within the appeal period.

Indeed, counsel for Defendant acknowledges that he had notice of the judgment as of August 11, 2009. *See* “Defendant’s Memorandum in Support of Petition for Rule to Show Cause,” at 2. And, counsel for Defendant further acknowledges that the summary judgment order of August 6, 2009 is a final order. *See* “Letter Brief,” filed on behalf of Defendant Lawrence Paul Blakeley, dated October 21, 2009 (hereinafter “Defendant’s Letter Brief”), at 2. Under these circumstances, this Court lacks the authority to disturb the final order entered August 6, 2009: more than thirty days have elapsed since its entry.

In his Letter Brief, Defendant seems to imply that his mere filing of his petition for reconsideration<sup>3</sup> on September 9, 2009 tolled the thirty-day appeal period. *See*, Defendant’s “Letter Brief,” at 2. The law, however, is well-settled to the contrary. The thirty-day appeal period is tolled only if the Court expressly grants reconsideration during the thirty-day period. *Cheatem v. Temple Univ. Hosp.*, 743 A.2d 518, 520 (Pa.Super. 1999). In the instant case, I never expressly granted the September 9, 2009 petition for reconsideration.

Accordingly, for these two reasons I am denying Defendant’s Petition: (a) because it would be futile to open the summary judgment order of August 6, 2009 only to re-enter it and (b) because, there being no fraud or extraordinary cause, I lack the authority to disturb the August 6, 2009 order.

Finally, a word is in order regarding Defendant’s attempt to schedule his Petition for argument before this Court.

What we are discussing here is the procedure by which counsel should schedule a motion (or petition) to be heard by the Court.<sup>4</sup> Defendant states:

As the Court did not have any regularly scheduled time for motions, it was necessary to obtain a date for presentation of the Petition to Open and/or Strike Judgment. Counsel’s practice to obtain the date for presentation first and then serve the Petition on opposing counsel is **in perfect conformity with usual practice in our courts**. That the Petition was not executed by either Petitioner or counsel supports the contention that Petitioner’s counsel sought only to obtain a date for presentation and had **not intended the same for review by the Court** without notice to opposing counsel.

“Defendant’s Memorandum in Support of Petition for Rule to Show Cause,” at 4 (emphasis added).

I have no doubt that counsel’s intentions were innocent regarding his efforts to get his Petition scheduled for argument before me, but I shall explain some of the reasons why his approach is not in any way the practice of this Court.

Under counsel’s suggested approach:

- (a) He arranges for his clerk to appear unannounced at the chambers of the judge, without notice to the opposing party of the visit;
- (b) Counsel arranges for the clerk to take with him an unsigned copy of the petition in question, but never intends for the

court to view the petition at that time;

(c) Presumably, then, since the court is not to view the petition at that time, the clerk describes in general terms to some member of the court's staff the nature of the petition or motion to be presented. It is necessary for the court to know something about the petition or motion so that the court can determine: whether a court reporter is necessary, the length of time required for the argument, whether the matter is opposed or unopposed, etc.;

(d) While the petitioner's clerk waits in the court's reception area, the court's staff member then goes into chambers to speak with the judge to convey to the judge all of the information that has just been conveyed to the staff member by petitioner's clerk;

(e) The court then reviews his or her calendar with the court's staff member, makes the determinations regarding time to be allotted, necessity of court reporter etc., and informs the staff member when the matter should be scheduled;

(f) The court's staff member then returns to the court's reception area and tells petitioner's clerk the date on which the court will hear argument on the petition;

(g) The petitioner's clerk then returns the unsigned petition to the petitioner's counsel who then signs the petition, arranges for the petitioner himself to sign the petition, and fills in the date of presentation on the petition;

(h) Counsel for petitioner then mails the petition to opposing counsel.

This procedure seems to me to be unnecessarily cumbersome, predicated on too much verbal communication, and prone to miscommunication. In addition, it understandably puts the opposing party in a position of wondering whether any *ex parte* communications were made to the Court either directly or through the Court's staff.

The procedure that practitioners before me have always used is much simpler, and I think better: if counsel would like to present a motion before this Court, simply file the motion, serve a copy on opposing counsel and on the Court, and in your cover letter ask that the matter be scheduled for argument.

#### ORDER OF COURT

AND NOW, this 23rd day of October, 2009, upon consideration of the Petition for Rule to Show Cause to Open and/or Strike Judgment filed on behalf of Defendant, Lawrence Paul Blakeley, a/k/a Larry Blakeley, t/d/b/a Blakeley Tile & Marble, it is hereby ORDERED, ADJUDGED and DECREED as follows:

Said Petition is DENIED.

BY THE COURT:

/s/Folino, J.

<sup>1</sup> The full text of this Court's July 20, 2009 notice, as set forth in a letter from this Court to Ann E. L. Shapiro, Esquire and Lawrence Blakeley is as follows:

Donald L. Phillips, Esquire  
Ann E. L. Shapiro, Esquire  
DONALD L. PHILLIPS, P.C.  
Suite 800, Lawyers Building  
428 Forbes Avenue  
Pittsburgh, PA 15219

Mr. Lawrence Paul Blakeley a/k/a Larry Blakeley  
t/a/d/b/a Blakeley Tile & Marble  
527 Somerville Drive  
Pittsburgh, PA 15243

RE: *Merchants Insurance Co. v. Lawrence P. Blakeley, a/k/a Larry Blakeley i/a/d/b/a Blakeley Tile & Marble* AR08-10523

Ladies and/or Gentlemen:

An argument in the above-captioned case is scheduled before the undersigned on Thursday, August 6, 2009 at 11:00 a.m., 704 City-County Building, Pittsburgh, Pennsylvania.

Allegheny County Court Rule 249 \*VII(F) requires that *responsive briefs must be filed at least seven (7) days* prior to argument. If you can, please file well before even this deadline. Failure to conform with the provisions of the Rule concerning timely filing of Response Briefs may result in refusal of the Court to consider arguments posed therein, and denial of oral argument. Response Briefs must be filed with Calendar Control, 734 City-County Building, Pittsburgh, Pennsylvania, with a copy served on the undersigned and all other counsel.

<sup>2</sup> The full text of this Court's Order of August 31, 2009 is as follows:

AND NOW, this 31st day of August, 2009, it is hereby ORDERED, ADJUDGED and DECREED as follows:

- (1) A rule is issued upon the Respondents to show cause why the Petitioner is not entitled to the relief requested in its Petition;
- (2) The Respondent shall file an Answer to the Petition within seven (7) days of service upon the Respondent;
- (3) The Petition shall be decided under Pa.R.C.P. No. 206.7;
- (4) Depositions shall be completed within sixty (60) days of this date;
- (5) Argument shall be scheduled by praecipe requesting argument (a copy of which shall be served on this Court) upon completion of depositions (*i.e.* depositions must be transcribed and filed with the Department of Court Records of

Allegheny County).

<sup>3</sup> In this Letter Brief, Defendant refers to his Petition for Rule to Show Cause to Open and/or Strike Judgment as a Petition for Reconsideration.

<sup>4</sup> Strictly speaking, what we are discussing here is the manner in which counsel should schedule a motion (or petition) to be heard by the Court during that part of the court calendar when that particular judge is not sitting as motions judge. The procedure for scheduling a motion before the Motions Judge is set forth in Allegheny County Local Rule 249.

## **Wayne M. Chiurazzi Law Inc., d/b/a Chiurazzi & Mengine, LLC v. UPMC Presbyterian Shadyside**

*Medical Records Act—42 Pa.C.S. §6152(a)(1) and (2)(i)—Breach of Contract*

1. UPMC filed Preliminary Objections seeking dismissal of each count of Plaintiff's class action complaint for Breach of Contract, Restitution, Constructive Trust, Unjust Enrichment, and Relief Pursuant to the Declaratory Judgments Act respectively.

2. Each count was based on allegations that UPMC charged Plaintiff for copies of medical charts and records an amount in excess of the maximum charges permitted by the Medical Records Act.

3. Initially, the court noted that plaintiff may bring a breach of contract action to recover charges that exceed the amounts permitted by the Medical Records Act, but all other counts must be dismissed.

4. Plaintiff contended that the use of computers, electronic records, and the Internet has substantially reduced the costs to hospitals to store and reproduce medical records and that the Medical Records Act requires health care facilities to charge only their actual and reasonable expenses for producing records or charts. Plaintiff further argued that the Act does not permit health care facilities to charge the full amount set forth in §6152(a)(2)(i) where those charges exceed actual and reasonable expenses.

5. UPMC sought dismissal of the breach of contract claim on the ground that any charges that do not exceed the rate are permitted under the Medical Records Act, and therefore Plaintiff's Complaint should be dismissed because it is based on a misreading of the Medical Records Act.

6. The court noted that the amount that a health care facility may charge for furnishing paper copies of medical records is addressed in the Act which requires health care providers to notify persons seeking copies of medical records of the estimated "actual and reasonable expenses." However, the court noted that the issue of whether a health care provider may charge the rate D has never been considered by the Pennsylvania Supreme Court.

7. UPMC also contended that the court should dismiss the complaint on the basis of the voluntary payment defense.

8. The court ruled that the voluntary payment defense is an affirmative defense that must be raised in UPMC's Answer. Thus, the court dismissed each count of Plaintiff's class action complaint except the breach of contract count, and held that Defendant's Preliminary Objections were otherwise overruled.

*(Amy L. Vanderveen)*

*Paul A. Lagnese, David M. Paul, and James M. Pietz for Plaintiff.*

*Howard A. Chajson and Jeffrey J. Wetzel for Defendants UPMC Presbyterian Shadyside and Magee-Womens Hospital of University of Pittsburgh Medical Centers.*

*David Smith, John K. Gisleson, and Jennifer A. Callery for Defendant MRO Corporation.*

*Don P. Foster, Glenn A. Weiner, and Patrick J. Troy for Defendant IOD, Inc.*

No. GD 09-012919. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

### **OPINION AND ORDER OF COURT**

Wettick, J., February 4, 2009—UPMC's preliminary objections seeking dismissal of each count of plaintiff's class action complaint (Count I—Breach of Contract/Implied Contract; Count II—Restitution; Count III—Constructive Trust; Count IV—Unjust Enrichment Quasi-Contract; and Count V—Relief Pursuant to Declaratory Judgments Act) are the subject of this Opinion and Order of Court.<sup>1</sup>

Each count is based on allegations that UPMC charged plaintiff law firm for copies of medical charts and records an amount in excess of the maximum charges permitted by the Medical Records Act. The relevant provisions of the Act (42 Pa.C.S. §6152(a)(1) and (2)(i)) read as follows:

**(a) Election.—**

(1) When a subpoena duces tecum is served upon any health care provider or an employee of any health care facility licensed under the laws of this Commonwealth, requiring the production of any medical charts or records at any action or proceeding, it shall be deemed a sufficient response to the subpoena if the health care provider or health care facility notifies the attorney for the party causing service of the subpoena, within three days of receipt of the subpoena, of the health care provider's or facility's election to proceed under this subchapter and of the estimated actual and reasonable expenses of reproducing the charts or records. However, when medical charts or records are requested by a district attorney or by an independent or executive agency of the Commonwealth, notice pursuant to this section shall not be deemed a sufficient response to the subpoena duces tecum.

(2)(i) Except as provided in paragraph (ii), the health care provider or facility or a designated agent shall be entitled to receive payment of such expenses before producing the charts or records. The payment shall not exceed \$15 for searching for and retrieving the records, \$1 per page for paper copies for the first 20 pages, 75¢ per page for pages 21 through 60 and 25¢ per page for pages 61 and thereafter; \$1.50 per page for copies from microfilm; plus the actual cost

of postage, shipping or delivery. No other charges for the retrieval, copying and shipping or delivery of medical records other than those set forth in this paragraph shall be permitted without prior approval of the party requesting the copying of the medical records. The amounts which may be charged shall be adjusted annually beginning on January 1, 2000, by the Secretary of Health of the Commonwealth based on the most recent changes in the consumer price index reported annually by the Bureau of Labor Statistics of the United States Department of Labor.

The question of whether claims may be raised in a civil action to recover payments in excess of the amounts permitted by the Medical Records Act was recently answered by the Pennsylvania Supreme Court in *Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 983 A.2d 652 (Pa. 2009).

In a class action complaint, the Liss & Marion law firm sought recovery for itself and all other individuals and entities who were billed and charged for copies of records greater than the amount permitted by the Medical Records Act, as adjusted annually by the Secretary of Health based on the most recent change in the consumer price index. Recovery was sought through a four-count complaint. The trial court permitted the members of the class to pursue common law breach of contract claims based on the existence of a contract implied in fact that both parties expected the Medical Records Act to control the pricing of their contract. The trial court did not permit the class to pursue any other causes of action raised in the complaint.

Both the Pennsylvania Superior Court and the Pennsylvania Supreme Court affirmed the rulings of the trial court that a breach of contract action may be brought to recover charges that exceed the amounts permitted by the Medical Records Act and that the trial court correctly dismissed the remaining causes of action.<sup>2</sup>

Under the second sentence of §6152(a)(2)(i) of the Medical Records Act, charges may not exceed \$1.50 per page for copies from microfilm and for copies not from microfilm charges may not exceed the following amounts: \$1 per page—pages 1-20, 75¢ per page—pages 21-60, and 25¢ per page—pages 61 and thereafter.

In *Liss & Marion*, the defendants were charging the plaintiff and the other members of the class the higher charge per page permitted for copies from microfilm. However, the copies were not from microfilm. To the contrary, the defendants were providing copies from electronically stored records while deceptively representing on the invoices that the copies were from microfilm.

A major defense of the defendants was that the second sentence of §6152(a)(2)(i) only covers charges for copies from paper and from microfilm. The case involved copies from electronically stored records. Copies from electronically stored records are not covered by §6152(a)(2)(i). Consequently, copies from electronically stored records may be billed at any reasonable rate and the plaintiff failed to prove at trial that the defendants' rates were unreasonable.

The Pennsylvania Supreme Court rejected this argument. It stated that §6152(a)(2)(i) creates a higher price rate for paper copies from microfilm (rate M) and a lower default rate (rate D) for paper copies from all other media.

On the basis of the rulings in *Liss & Marion*, the following matters can no longer be disputed: (1) plaintiff may pursue a breach of contract action against UPMC based on allegations that UPMC's charges exceeded those permitted under the Medical Records Act; and (2) UPMC cannot impose charges that are in excess of the rate D for the copies of medical records that are the subject of this litigation because these were not copies from microfilm.

In the present case, plaintiff law firm does not contend that UPMC has imposed charges in excess of the rate D. In its complaint, the law firm alleges that the use of computers, electronic records, and the Internet has substantially reduced the costs to the hospitals of storing and reproducing medical records. However, while the actual costs of storing, locating, retrieving, reproducing, and transmitting records has decreased dramatically, UPMC has failed to base its charges for providing copies of medical records on its actual (diminishing) costs. Instead, UPMC continues to charge the maximum ceiling price provided for in §6152(a)(2)(i) for rate D copies (i.e., copies that are not from microfilm).

It is plaintiff's position that the Medical Records Act requires health care facilities to charge only their actual and reasonable expenses for producing records or charts; the Act does not permit them to charge the full amount set forth in §6152(a)(2)(i) where those charges exceed actual and reasonable expenses.

UPMC seeks dismissal of the breach of contract claim on the ground that any charges that do not exceed the rate D are permitted under the Medical Records Act. The purpose of the Act, according to UPMC, was to eliminate the continuing dispute between health care providers and persons seeking medical records from a health care provider by establishing a fixed price to be adjusted annually. Consequently, plaintiff's complaint should be dismissed because it is based on a misreading of the Medical Records Act.

Both parties base their respective positions on the portion of §6152(a)(2)(i) that is set forth at pages 1 and 2 of this Opinion.

The amount that a health care facility may charge for furnishing paper copies of medical records is initially addressed in §6152(a)(1) which requires health care providers to notify persons seeking copies of medical records of the estimated "actual and reasonable expenses of reproducing the charts and records." If given its ordinary meaning, *actual expenses* means expenses existing in fact, and *reasonable expenses* means that the costs are not padded. Consequently, UPMC may charge only its actual and reasonable expenses unless other provisions within §6152(a)(2)(i) modify this provision.

Other provisions do not modify this provision. To the contrary, §6152(a)(2)(i) also provides for charges to be based on actual expenses. The initial sentence states that the health care provider is "entitled" to receive payment of "such expenses before producing the charts or records." The term *such expenses* can only refer to the "actual and reasonable expenses of reproducing the charts or records" because these are the only expenses referred to in earlier provisions of §6152. Thus, the language of the first sentence of §6152(a)(2)(i) that the health care "is entitled to receive such expenses" clearly and unambiguously provides that charges shall be based on actual expenses. UPMC appears to contend that the language of the second sentence of §6152(a)(2)(i) contradicts a reading of the prior provisions referring to charges to be based on actual expenses. I disagree.

The second sentence of §6152(a)(2)(i) does not provide that a health care provider is entitled to receive additional payments in excess of its actual expenses. To the contrary, while the previous provisions of §6152 entitle the health care provider to receive actual and reasonable expenses, this second sentence of §6152(a)(2)(i) places a cap on what may be charged as actual and reasonable expenses by providing that the payment of actual and reasonable expenses "shall not exceed" the amounts set forth in this sentence. Or, in other words, this sentence applies only to health care providers whose actual expenses exceed the amounts set forth in the pricing schedule.

Also see §6152(c), which governs delivery of records; it provides for the health care provider to deliver copies within thirty days "upon payment of its expenses by the party causing service of the subpoena."

I recognize that there can be legislation which provides for charges to be based on reasonable expenses and which thereafter includes a formula to calculate reasonable expenses. However, the Medical Records Act is not such legislation. Nothing in the lan-

guage of the Act suggests that the charges in the second sentence are presumed to be actual expenses. To the contrary, the use of the language “shall not exceed” modifies a health care provider’s entitlement to recover actual expenses by setting the maximum amount that may be charged where the actual expenses exceed this amount.

Finally, even if there could be some merit to UPMC’s contention that the second sentence offers support for its position that health care providers may charge the amounts set forth in the pricing schedule, such a construction cannot be reconciled with the prior provisions within §6152 which require charges to be based on actual and reasonable expenses. See 1 Pa.C.S. §1932 which provides that statutes or parts of statutes are in *pari material* when they relate to the same things and that such statutes or parts of statutes shall be construed together, if possible, as one statute. Also 1 Pa.C.S. §1922(2) provides that the General Assembly intends the entire statute to be effective and certain, while case law holds that there is a presumption in drafting a statute that the General Assembly intended the entire statute to be effective; thus, if possible, a statute must be construed as to give effect to all of its provisions. See *Holland v. Marcy*, 883 A.2d 449, 455-56 (Pa. 2005), and *Galloway v. Pennsylvania State Police*, 756 A.2d 1209, 1213 (Pa. Cmwlth. 2000).

UPMC’s interpretation of the Medical Records Act would require that I substitute the word charges for *actual expenses* so that §6152(a)(2)(i) would provide that the health care provider shall notify the attorney of the estimated “charges” (rather than “estimated actual and reasonable expenses”) and the first sentence of §6152(a)(2)(i) would provide that the health care provider is entitled to receive payment “of such charges” (rather than “of such expenses”). However, the legislation uses the word *expenses*; its use of this word rather than the word *charges* produces a very different result, and I must construe the legislation by using the words which the General Assembly selected.

UPMC contends that the Pennsylvania Supreme Court in *Liss & Marion* has already ruled that under §6152(a)(2)(i) a health care facility may charge the rate D for paper copies that are not from microfilm records. Its contention is based on the following statements within the Court’s Opinion.

In addressing the defendants’ argument that the Medical Records Act does not provide a specific rate for copies from electronic records, the Court stated:

The language of the MRA is clear: when providing paper copies from any medium, Appellants are entitled to receive rate D per page. The only exception is when the copies are made from microfilm; then, Appellants can charge the higher rate M. Here, Appellants made paper copies from electronic records and not from microfilm so the rate “for paper copies,” rate D, applies. We affirm the lower courts’ holdings that the MRA created a higher price rate for copies from microfilm, rate M, and a default rate, rate D, for copies from all other media. *Liss v. Marion*, *supra*, 983 A.2d at 662-63 (footnotes omitted).

UPMC also relies on footnote 9 which reads as follows:

Appellants argue that copies from electronic records need only be billed at a “reasonable” rate because none of the rates enumerated in subsection 6152(a)(2)(i) apply. Because we decide that, in fact, the enumerated rate “for paper copies,” rate D, does apply and should have been charged, we do not reach the issue of what rate may be charged when the MRA does not contain a specific or relevant rate. *Id.* at 663.

UPMC also relies on a provision within footnote 6 which reads as follows:

...Finally, as the trial court recognized, the MRA rates embody the public policy of the Commonwealth regarding the amounts to be charged by the industry for copying medical records. *Id.* at 659 n.6.

In *Liss & Marion*, the law firm and the members of the class were seeking to recover only the difference between what they were charged and the rate D. The law firm and the class never claimed that the defendants could not charge the rate D; it contended only that it could not charge more than the rate D. Thus, the issue raised in the present case was never considered by the Pennsylvania Supreme Court. Instead, the language upon which UPMC relies was in response to the defendants’ contention that the plaintiff was not entitled to the rate D because the rate D does not apply to copies from electronic records.

Next, UPMC contends that I should dismiss the complaint against it on the basis of the voluntary payment defense.

UPMC correctly contends that this case differs from *Liss & Marion* because it does not involve invoices that contain misleading information. However, this means only that the issues that will be addressed in this litigation regarding the voluntary payment defense will differ from the issues presented where the hospital furnished false information to the persons obtaining copies of medical records.

I cannot rule, as a matter of law, that the defense does apply. This is an affirmative defense that must be raised in the UPMC’s Answer.

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

#### ORDER OF COURT

On this 4th day of February, 2010, upon consideration of UPMC’s preliminary objections, it is hereby ORDERED that:

- (1) Counts II, III, and IV of plaintiff’s complaint are dismissed; and
- (2) defendant’s preliminary objections are otherwise overruled.

BY THE COURT:  
/s/Wettick, J.

<sup>1</sup> The Chiurazzi law firm has filed identical class action lawsuits against other entities that have furnished medical records at GD09-012911 (defendant is MRO Corporation), GD09-012922 (defendant is IOD Incorporated), and GD09-014785 (defendant is Magee-Womens Hospital of University of Pittsburgh Medical Center). My rulings in this litigation will govern the preliminary objections filed by the defendants in these three cases.

<sup>2</sup> As a result of the ruling of the Pennsylvania Supreme Court in *Liss & Marion* that a breach of contract action may be pursued, the plaintiff in the present and related cases is no longer pursuing alternative theories raised in Count II (Restitution), Count III (Constructive Trust), and Count IV (Unjust Enrichment).

## Arrow Financial Services, LLC. v. William Metzger

*Credit Card Collections—Preliminary Objections—Pleading Requirements—Pa. R.C.P. 1019 Allegheny County Local Rule 1320*

1. Plaintiff assignee of credit card company, filed an action against the defendant for credit card balance allegedly due. Defendant filed preliminary objections arguing that the complaint should be stricken with leave to amend for noncompliance with pleading requirements of Pa. R.C.P. 1019.

2. The Defendant argued that a complaint must set forth the dates and amounts of the charges due and attach documentation establishing a chain of title for the assigned credit card account.

3. Contrary to Defendant's assertion that Allegheny County Local Rule 1320 does not apply to credit card litigation, the court held the rule only applies to pleading requirements and does not address the evidentiary requirements that must be met in order to prevail at trial.

4. Defendants can still be prepared for trial by serving a request upon the Plaintiff to produce documentation of the dates and amount of charges and chain of title.

5. Allegheny County Local Rule 1320 requires that the complaint include a Notice of Hearing Date, Notice to Defend, Notice of Duty to Appear at Arbitration Hearing, and Notice of Intent to Appear.

6. Plaintiff cannot rely on Local Rule 1320 as the complaint did not include a proper Notice to Defend and failed to provide a Notice of Intention to Appear.

(Colleen L. Becker)

*Frederic I. Weinberg* for Plaintiff.

*Joseph P. Murphy* for Defendant.

No. AR 09-013011. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

### OPINION AND ORDER OF COURT

Wettick, J., January 7, 2010—This is a lawsuit to recover money allegedly due under a credit card that GE Money Bank allegedly issued to defendant. Plaintiff alleges that it is a debt buyer and successor-in-interest to GE Money Bank. The only writing attached to the complaint is an affidavit in which the affiant avers that she is a legal outsourcing clerk for the plaintiff, that she has personal knowledge of the facts and circumstances in connection with this case, and that there is now due and owing the amount of \$1,742.47 plus interest of \$353.28 at the rate of 24.15% totaling \$2,095.75 as of July 5, 2009.

The complaint alleges that there remains a balance due as of September 28, 2009 in the amount of \$2,196.18. In the prayer for relief, plaintiff seeks the sum of \$2,196.18 plus costs, interest, and attorney fees.

Defendant has filed preliminary objections requesting that I strike the complaint with leave to amend for noncompliance with the pleading requirements of Pa.R.C.P. No. 1019. Defendant relies on my opinions in *Worldwide Asset Purchasing, LLC v. Stern*, 153 P.L.J. 111(2004), and *Belmont Financial Services Group, Inc. v. Curtis Hawkins*, 156 P.L.J. 376 (2008), where I ruled that under Rule 1019, a complaint must include the amount of the balance, the dates of the charges, credits for payments, dates and amounts of interest charges, and dates and amounts of other charges. The complaint must contain sufficient documentation and allegations to permit the defendant to calculate the total amount of damages that are allegedly due by reading the documents attached to the complaint. In addition, the complaint must attach documents establishing a chain of title.

Within the past several months, issues concerning the applicability of Allegheny County Local Rule 1320, attached as Attachment 1, to credit card transactions have arisen almost on a weekly basis.<sup>1</sup> In this Opinion, I am addressing these issues.

Defendants have contended that Local Rule 1324 does not apply to credit card litigation because of my rulings that a credit card company cannot prevail without the writings described in my *Worldwide Asset* and *Belmont Financial Opinions*. This contention is without merit because Local Rule 1320 addresses only pleading requirements. Rule 1320 does not address the evidentiary requirements that must be met in order for the credit card company to prevail at trial.

Defendants have contended that they cannot be prepared for trial unless the writings described in *Worldwide Asset* and *Belmont Financial* are attached to the complaint. This contention is without merit because the restrictions on discovery set forth in Local Rule 1320(7) only bar discovery by deposition upon oral examination, upon written interrogatories, and through requests for admissions. There is no prohibition against requests for the production of documents. Consequently, a defendant may prior to trial serve a request upon the credit card company to produce those writings described in *Worldwide Asset* and *Belmont Financial*.

Defendants have contended that a credit card complaint that fails to attach documents establishing a chain of title fails to state a cause of action. I disagree. Under Local Rule 1320, the pleading must only contain allegations establishing a chain of title. The writings establishing a chain of title need not be attached because Local Rule 1320 eliminates the requirement of Rule 1019 that when a claim is based on a writing, the pleader must attach a copy of the writing.<sup>2</sup>

Defendants have contended that credit card companies are not permitted to rely on Local Rule 1320 unless their complaint includes the Notice of Hearing Date, Notice to Defend, and Notice of Duty to Appear at Arbitration Hearing set forth in Form 1320A of Local Rule 1320, and unless the complaints served upon the defendants include a Notice of Intent to Appear as set forth in Form 1320B of Local Rule 1320. I agree.

The *quid pro quo* for the provision in Local Rule 1320, allowing a simplified complaint, is the portion of Local Rule 1320 allowing a simplified answer coupled with a notice advising the defendant that he or she need only complete and file or mail to the Department of Court Records, Civil Division's Office a Notice of Intention to Appear.

In the present case, the complaint served on defendant did not include a notice to defend that met the requirements of Form 1320A. In addition, it appears that plaintiff did not furnish any copies of a Notice of Intention to Appear.

Because of plaintiff's failure to comply with Local Rule 1320, it may not invoke this local rule in response to defendant's preliminary objections.

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

### ORDER OF COURT

On this 7th day of January, 2010, upon consideration of defendant's preliminary objections, it is hereby ORDERED that plaintiff's complaint is stricken. Plaintiff may file an amended complaint within thirty (30) days. If the plaintiff fails to file an amend-

ed complaint within the time set forth above, upon praecipe of defendant, the Department of Court Records, Civil Division; shall dismiss the case with prejudice. The arbitration hearing scheduled, in this matter is continued generally.

BY THE COURT:  
/s/Wettick, J.

<sup>1</sup> Local Rule 1320 governs claims that do not exceed the sum of \$3,000.

<sup>2</sup> At trial, a credit card company cannot prevail without offering documents establishing a chain of title.

**ATTACHMENT 1**

**Civil and Family Rules**

**Local Rule 1320 Small Claims Procedure.**

**Local Rule 1320 Small Claims Procedure.**

The following procedure shall govern Small Claims, which include appeals from Magisterial District Judges where the damages claimed do not exceed the sum of \$3,000 (exclusive of interest and costs), and civil actions where the damages claimed do not exceed the sum of \$3,000 (exclusive of interest and costs).

(1) The Complaint may be simplified to contain only the names and addresses of the parties, a statement indicating concisely the nature and amount of the claim, the signature of the plaintiff or the plaintiff’s attorney (Pa.R.C.P. 1023), an endorsement (Pa.R.C.P. 1025), a Notice of Hearing Date and three copies of a Notice of Intention to Appear as set forth in subparagraph (3) hereof.

(2) Every Complaint filed in Compulsory Arbitration as a Small Claim, whether filed by a plaintiff against a defendant or by a defendant against an additional defendant, shall contain a Notice of Hearing Date, Notice to Defend, and Notice of Duty to Appear at Arbitration Hearing (FORM 1320A) (see subsection (9)(a) below). The Notice of Hearing Date and Notice of Duty to Appear shall immediately follow the Notice (to Defend) which is required by Pa.R.C.P. 1018.1(b).

(3) The filed Notice of Intention to Appear shall be a sufficient answer to the Complaint (FORM 1320B) (see subsection (9)(b) below);

(4) A counterclaim which qualifies as a “Small Claim” as defined herein may be set forth in either the filed Notice of Intention to Appear or a separate pleading, by a statement indicating concisely the nature and amount of same. The counterclaim filed as a separate pleading shall be in substantially the same form as the Complaint, without the Notice of Hearing or Notice of Intention to Appear.

(5) No reply to a counterclaim shall be required. If one is filed, it may be limited to a general denial.

(6) The provisions of Local Rules 212.1, 212.2 and 212.3 shall not apply to actions involving only Small Claims as defined herein.

(7) Except as otherwise provided by order of the Special Motions Judge upon good cause shown, in Small Claims proceedings, there shall be no discovery by deposition upon oral examination or upon written interrogatories under Pa.R.C.P. 4005 and 4007 or requests for admissions under Pa.R.C.P. 4014.

(8) The Prothonotary, on praecipe of the plaintiff accompanied by a certificate as required by Pa.R.C.P. 237.1(a)(2), shall enter judgment against the defendant for failure to file either a responsive pleading or a copy of the Notice of Intention to Appear within twenty (20) days from service thereof, with damages to be assessed in the manner provided by the rules.

(9) (a)

**FORM 1320A Notice of Hearing Date, Notice to Defend and  
Notice of Duty to Appear at Arbitration Hearing**

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA  
CIVIL DIVISION

\_\_\_\_\_  
Plaintiff,  
vs.  
\_\_\_\_\_  
Defendant.

ARBITRATION DOCKET  
No. \_\_\_\_\_  
HEARING DATE \_\_\_\_\_

**NOTICE TO DEFEND**

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the attached copy of the suit papers, YOU MUST complete and detach two of the copies of the attached “Notice of Intention To Appear.” One completed copy of the “Notice of Intention to Appear” must be filed or mailed to the Prothonotary’s Office, First Floor, City-County Building; 444 Grant Street, Pittsburgh, PA 15219 and the other completed copy must be mailed to:

within TWENTY (20) days from the date these papers were mailed. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

LAWYER REFERRAL SERVICE, The Allegheny County Bar Association  
3rd Floor Koppers Building, 436 Seventh Avenue  
Pittsburgh, Pennsylvania 15219  
Telephone: (412) 261-5555

**HEARING NOTICE**

YOU HAVE BEEN SUED IN COURT. The above Notice to Defend explains what you must do to dispute the claims made against you. If you file the written response referred to in the Notice to Defend, a hearing before a board of arbitrators will take place in Room 523 of the Allegheny County Courthouse, 436 Grant Street, Pittsburgh, Pennsylvania, on \_\_\_\_\_, \_\_\_\_ [Insert date and year] at 9:00 A.M. IF YOU FAIL TO FILE THE RESPONSE DESCRIBED IN THE NOTICE TO DEFEND, A JUDGMENT FOR THE AMOUNT CLAIMED IN THE COMPLAINT MAY BE ENTERED AGAINST YOU **BEFORE** THE HEARING.

**DUTY TO APPEAR AT ARBITRATION HEARING**

If one or more of the parties is not present at the hearing, THE MATTER MAY BE HEARD AT THE SAME TIME AND DATE BEFORE A JUDGE OF THE COURT WITHOUT THE ABSENT PARTY OR PARTIES. **THERE IS NO RIGHT TO A TRIAL DE NOVO ON APPEAL FROM A DECISION ENTERED BY A JUDGE.**

**NOTICE: You must respond to this complaint within twenty (20) day's or a judgment for the amount claimed may be entered against you before the hearing.**

**If one or more of the parties is not present at the hearing, the matter may be heard immediately before a judge without the absent party or parties. There is no right to a trial de novo on appeal from a decision entered by a judge.**

(b)

**FORM 1310B Notice of intention to Appear****NOTICE OF INTENTION TO APPEAR**

(Three copies required)

To the Plaintiff or the  
Plaintiff's Attorney

Case Caption \_\_\_\_\_  
Hearing Date \_\_\_\_\_

I intend to appear at the hearing scheduled for the above date and defend against the claim made against me.  
I do not owe this claim for the following reasons:

I certify that I have mailed a copy of this Notice to the Plaintiff or the Plaintiff's attorney.

Date: \_\_\_\_\_ Sign here: \_\_\_\_\_

Address: \_\_\_\_\_

Editor's Note: Adopted October 4, 2006, effective December 4, 2006.

**Jennette M. Blumer, Individually and as Administratrix of the Estate of Joseph A. Blumer v.  
Ford Motor Company and McCrackin Ford, Inc.**

*Manufacturing Defect—Post-Sale Duty to Warn—Admissibility of Similar Incidents—Admissibility of Design Changes*

1. Plaintiff's husband was killed when the parking brake in his tow truck broke. Plaintiff filed a products liability action against the defendants and was granted a jury verdict in her favor.

2. Defendants appealed the jury verdict and raised six errors: 1) Plaintiff failed to meet her burden of proof; 2) Pennsylvania law does not recognize a post-sale duty to warn; 3) The court erred by admitting evidence of other accidents; 4) The court erred by admitting evidence of a post-manufacture design change; 5) The court failed to include comparative negligence in its jury charge; and 4) The court erred by permitting the jurors to assign separate damages for each family members.

3. The trial court properly denied Defendant's motion for judgment notwithstanding the verdict as the Plaintiff's two experts provided an ample foundation from which the jury could find in favor of the Plaintiff.

4. Pennsylvania recognizes a post-sale duty to warn of defects in a product at the time of sale. The court agreed with the jury's determination that the Defendant breached this duty as the product was defective at the time of manufacture and remained defective at the time it left the hands of the defendant.

5. The trial court properly admitted evidence of similar accidents that occurred at substantially the same place and under the same or similar circumstances in order to prove the manufacturers had constructive notice of a dangerous or defective condition.

6. The trial court properly admitted the defendant's design changes for the purpose of showing that alternatives to the braking system were available before the accident occurred.

7. The trial court did not err by failing to provide a jury instruction on comparative negligence, as the defendants did not establish that the decedent was negligent.

8. The trial court charged the jury in accordance with Pennsylvania Suggested Jury Instructions, any error due to the method of itemizing the damages was at most a harmless error.

(Colleen L. Becker)

Shanin Specter and Kila B. Baldwin for Plaintiff.

William J. Conroy and Nancy R. Winschel for Defendant.

No. GD 06-007766. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**OPINION**

Della Vecchia, J., October 30, 2009—This matter comes before the Superior Court on the appeal of Ford Motor Company and McCrackin Ford, Inc., from the denial of the Motions for Post-Trial Relief on June 25, 2009, and the Judgment in favor of Jennette M. Blumer, et al., entered on July 19, 2009, on the Verdict in this matter entered previously on March 20, 2009.

## I. BACKGROUND

On September 9, 2004, Joseph Blumer (hereinafter “Mr. Blumer”), age 43, husband of the Plaintiff, Jennette M. Blumer, was employed as a tow truck driver.

(Jennette Blumer shall be hereinafter referred to as “Plaintiff”). On said date, Mr. Blumer responded to a call requiring roadside assistance to a disabled vehicle stopped at a parking lot located at 5000 Centre Avenue in Pittsburgh, Pennsylvania. The motorist, James Walendziewicz, was experiencing problems with the power steering on his 1993 Ford Ranger pick-up truck and requested that the vehicle be towed to his home.

After attaching the Ranger to his 2002 Ford F-350 tow truck, Mr. Blumer soon realized that he could not tow the Ranger truck up the parking lot ramps. Accordingly, Mr. Blumer placed at least one “chock” behind the rear wheels of the Ranger truck and told Mr. Walendziewicz that he would lower the Ranger and then Mr. Walendziewicz should back the Ranger off the L-arms of the tow truck and down the ramp. Once done, Mr. Walendziewicz could then drive the Ranger to the top of the ramp and Mr. Blumer would tow it from there.

Mr. Blumer then operated the towing machinery located at the rear driver’s side of the tow truck to lower the Ranger to the ground. He did not re-enter the cab of his truck at any point, and the tow truck was completely stationary as the Ranger was lowered to the ground. After the Ranger was lowered, Mr. Walendziewicz got in his vehicle and looked over his right shoulder to back off the L-arms of the tow truck and down the hill. Seconds later, he felt a crash and saw the tow truck impact with the front of his vehicle. Mr. Blumer had been run over by his own tow truck and subsequently died under said vehicle.

The Plaintiff alleged that a defective design of the parking brake by the Ford Motor Company (hereinafter “Ford”) caused the parking brake to disengage. Further, it later was determined that the McCrackin Ford dealership sold the subject Ford F-350 to Edward Butler, Mr. Blumer’s employer. The Plaintiff sought compensatory and punitive damages from the Defendants Ford and its dealer, McCrackin Ford Inc. (hereinafter “McCrackin”).

## II. PROCEDURAL HISTORY

A Complaint was filed April 3, 2006. On July 14, 2008, the case was scheduled to be heard during the November 2008 trial list. Due to delays associated with discovery requests, the case was moved to the March, 2009 trial list. (See Docket Sheet). After a trial lasting six (6) days, the Jury returned a verdict in favor of the Plaintiff and against the Defendants in the amount of \$8,750,000. (See Verdict). On March 20, 2009, the Verdict was molded to add delay damages, which increased the Plaintiff’s recovery to \$10,089,229.45.

A Motion for Post-Trial Relief was filed by the Defendants on March 27, 2009. The parties’ briefs were timely filed. This Court scheduled argument on the Defendants’ Post-Trial Motion for June 23, 2009. (See Order dated May 26, 2009).

In an Order dated June 25, 2009, this Court denied the Defendants’ Motion for Post-Trial Relief. On July 14, 2009, a Notice of Appeal to the Superior Court was filed by the Defendants. On that same date, Judgment on the Verdict in favor of the Plaintiff was entered in the amount of \$10,089,229.45.

On July 24, 2009, this Court Ordered the Defendants to file a Concise Statement of Matters Complained of on Appeal within twenty-one (21) days pursuant to Pa.R.C.P. 1925(b). Said statement was timely filed, raising six (6) matters charging err on the part of this Court. Upon the filing of this Court’s Opinion, the matter shall be properly before the Superior Court of Pennsylvania.

## III. MATTERS COMPLAINED OF ON APPEAL

1. Whether Ford is entitled to judgment as a matter of law because Plaintiff failed to meet her burden of proving that Ford was negligent, that the vehicle was defective, or that any negligence or effect was a cause of the accident?
2. Whether Ford is entitled to judgment as a matter of law on Plaintiff’s “post-sale duty to warn” claim, because Pennsylvania law does not recognize such a claim, and the evidence presented at trial did not support the imposition?
3. Whether the trial court committed reversible error, entitling Ford to a new trial, by admitting evidence of other accidents, and further compounding that error by failing to give the jury a legally adequate instruction limiting their consideration of that evidence?
4. Whether the trial court committed reversible error, entitling Ford to a new trial, by erroneously admitting evidence of a post-manufacture design change implemented in later model year Ford F-350s?
5. Whether the trial court committed reversible error, entitling Ford to a new trial, by failing to include comparative negligence in its jury charge and on the verdict slip?
6. Whether the trial court committed reversible error, entitling Ford to a new trial, by permitting the jurors to assign separate Wrongful Death and Survival damages for each family member instead of two lump sum amounts?

## IV. DISCUSSION

Defendants’ matters complained of shall be addressed *ad seriatim*.

As to the Defendants’ first claim of err; this Court should have ruled as a matter of law that there was an absence of negligence on the part of the Defendants and that the evidence was void of any causation linking said negligence or a potential defect to the harm caused, this Court does not agree with said assertion.

As the Superior Court is well aware, this Court must deny a motion for judgment notwithstanding the verdict if any basis exists upon which the jury could have properly made its award. (See *Griffin v. University of Pittsburgh Medical Center-Braddock Hosp.*, 950 A.2d 996, 999 (Pa.Super. 2008). The jury listened to six (6) days of testimony, which included over a dozen witnesses, both lay and expert witnesses. Not one, but two experts provided extensive testimony as to the defects in the F-350’s parking system, the Defendants’ negligence with regards to those breaking systems and their post-sale failure to warn of the defects associated with that breaking system. The testimony of Plaintiff’s two experts alone provided a more than ample foundation from which a jury could find in favor of the Plaintiff on both the product liability and the negligence claims.

As to the Defendants next matter complained of, i.e. this Court erred by allowing testimony as to a post-sale duty to warn; this Court instructed the jury, “[a] seller or Supplier of a product has a post-sale duty to warn. As such, a seller or supplier has a responsibility to warn of defects in the product even after the product has been sold. If you find that the product was defective, the Defendant is liable for all harm caused to the Plaintiff by such defective condition.” (Tr. at 1377).

The Defendant relies on *DeSantis v. Frick Co.*, 745 A.2d 624 (Pa.Super. 2000) in claiming error with this Court’s decision to

charge on a post-sale duty to warn but fails to differentiate the facts of *DeSantis* with the facts of the present case. In *DeSantis*, the product was not defective at the time of manufacture, but rather became defective as a result of developments in technology. The Superior Court held that a manufacturer did not have a post-sale duty to warn when the product was not defective at the time of sale, “whether the claim is grounded in negligence or strict liability, no post-sale duty to warn about changes in technology existed where the product was not defective at the time of sale.” (*Id.* at 630-31).

Contrary to the facts of *DeSantis*, in the instant case the Plaintiff maintained and the jury found that the product was, in fact, defective at the time of manufacture and remained defective at the time it left the hands of the Defendant. This Court finds parallel the instant case with that of *Walton v. Avco Corp.*<sup>1</sup>

In *Walton v. Avco Corp.*, our Supreme Court addressed the issue of a manufacturer’s post-sale duty to warn about defects existing in a product at the time of sale. There, the manufacturer of a helicopter (Hughes) and the manufacturer of a component engine (Avco) were found liable for the deaths of a pilot and passenger as a result of a defective oil pump in the engine. *Walton*, 530 Pa. 568, 610 A.2d at 454. Before the crash, but after the engine had been sold, Avco had learned that the engine contained a defective oil pump that was defective at the time of sale of the pump. *Id.* at 571, 610 A.2d at 456. Avco had issued a service instruction advising of the defect and providing a detailed procedure for correcting the defect. *Id.* The service instruction had been communicated to Hughes, but Hughes had failed to forward the contents of the service instruction to the owner of the helicopter or to authorized helicopter service centers. *Id.* at 573, 610 A.2d 457. A year after the service instruction had been issued, the engine in the subject helicopter was overhauled but the oil pump was not repaired because the service company had not been advised of the service instruction. *Id.*

The jury found that the engine of the helicopter was defective in design and that the defect caused the deaths of the pilot and passenger. *Id.* at 573, 610 A.2d at 457. The jury also determined that Hughes’ failure to warn was an independent design defect and a substantial contributing factor in the resulting deaths. *Id.* The Supreme Court ruled that Hughes had a post-sale duty to warn of the defective engine manufactured by Avco where the engine was defective from the date of its manufacture and where Hughes had been given prior notice of the defect. *Id.* at 574-75, 610 A.2d at 458.

This Court found *Walton* applicable based on the facts that a parking brake defect was present at the time the tow truck left Ford’s control, Ford’s awareness of similar incidents of parking brake failures prior to the incident causing the death of Mr. Blumer, the fact that Ford maintained buyer’s contact information and Ford had the resources available to contact Mr. Butler (the owner of the subject F-350) and notify him of the defect in the braking system. Pennsylvania recognizes a post-sale duty to warn; accordingly, these facts demand a charging instruction on said duty.

Additionally, the jury found against the Defendants on multiple theories, including negligence (Interrogatory #1) and design defect (Interrogatory #5); it is speculative for the Defendants to assume that the recovery was based solely on the post-sale duty to warn instruction.

The Defendants next claim of error states that this Court committed reversible error by admitting evidence of twenty-eight (28) similar incidents of parking brake failures that were substantially similar to the failure that caused Mr. Blumer’s death.

The Superior Court has recently spoken to this issue, coincidentally enough, in a case involving the same defendant as in the instant matter:

[w]hen we review a trial court’s ruling on the admission of evidence, we must acknowledge that decisions on admissibility are within the sound discretion of the trial court and will not be overturned absent an abuse of discretion or misapplication of the law. In addition, for a ruling on evidence to constitute reversible error, it must have been harmful or prejudicial to the complaining party. (*Gaudio v. Ford Motor Co.*, 976 A.2d 524, 535 (Pa.Super. 2009)).

This Court was originally presented with over one hundred (100) ‘past incidents’ of parking brake failure by the Plaintiff. The Plaintiff withdrew her request for admission of numerous incidents in response to the Defendants’ objections. This Court further thinned the herd by ruling that many incidental reports would not be considered by this Court as substantially similar. (Tr. at 542).

However, the twenty-eight (28) incidents that remained were found to be substantially similar. Out of the twenty-eight (28) similar incidents, the Plaintiff chose to only draw the jury’s attention to eight (8) of those incidents. (Tr. at 539). This Court found that, “[t]hose claims in those documents are identical to the claim here. We’re on an incline...it stopped...we get out...it rolls backwards. That’s what we have here.” (Tr. at 527). This Court found those facts to be substantially similar, if not identical, to the facts in the instant matter.

A product’s “defective condition” may be proven through circumstantial evidence such as the occurrence of similar accidents. (*Cornell Drilling Co. v. Ford Motor Co.*, 359 A.2d 822, 827 (Pa.Super. 1976)). Evidence of similar accidents occurring at substantially the same place and under the same or similar circumstances is generally admissible to prove a manufacturer’s constructive notice of a dangerous or defective condition. (*Whitman v. Riddell*, 471 A.2d 521, 523 (Pa.Super. 1984)).

The Defendant next claims error with this Court’s admission of evidence of a post-manufacture design change implemented in later model Ford F-350s. Pennsylvania Rule of Evidence 407, entitled “Subsequent Remedial Measures” provides as follows:

[w]hen, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove that the party who took the measures was negligent or engaged in culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for impeachment or to prove other controverted matters, such as ownership, control, or feasibility of precautionary measures.

As the Superior Court is well aware, the purpose of Pa. R. E. 407, “is to encourage measures that further necessary or added safety, or at least to avoid discouraging such measures, by removing the concern that they will be employed adversely in an action at law.” (*Duchess v. Langston Corp.*, 769 A.2d 1131, 1140 (Pa. 2001), string citation omitted).

The design changes made by the Defendant were not offered to show that the previous braking system was defective, rather there were alternatives to the subject braking system **before** the accident causing Mr. Blumer’s death, i.e. the feasibility of alternate systems. (emphasis added). By definition, said testimony cannot be contrary to Pa. R. E. 407 entitled “**Subsequent Remedial Measures**” since all testimony elicited concerned a time period previous to the incident. (emphasis added).

The questions were prefaced with, “[p]revious to Mr. Blumer’s accident...” (Tr. at 598). Defense counsel objected to any mention of subsequent design changes, at which time this Court and counsel met at sidebar and this Court reminded counsel of its pre-

vious ruling that any testimony in regards to the subsequent braking system must be focused on information that was available and contemplated prior to Mr. Blumer's death. (Tr. at 597-606).

As previously stated, said testimony was admitted to prove the feasibility of an alternative braking system available prior to the time of the accident and was not admitted to allow the Plaintiff to circumstantially prove a defect with the subject breaking system. (Tr. at 606).<sup>2</sup>

The Defendants' next claim of error is this Court's failure to charge the jury on comparative negligence. The law is clear; the defendant has the burden of establishing comparative negligence on the part of the Plaintiff by a preponderance of the evidence. (PSSJI 3.20). Further, once that burden is met, the defendant must also prove that the negligence on the part of the Plaintiff was the factual cause of harm suffered by the Plaintiff. (PSSJI 3.21)

The Defendants requested a charge on comparative negligence in their requested points for charge. The issue was addressed at the charging conference. It was the Defendants' position that the Plaintiff was negligent in deciding to disconnect the disabled vehicle when he was still on an incline as opposed to backing down the hill.

Additionally, the Defendant alleges negligence in that the Plaintiff brought the stinger so low that it touched the ground. (Tr. at 1238-47). At trial, the Defendants failed to elicit testimony supporting this contention that the Mr. Blumer was himself negligent. (Tr. at 1239-40). Further, the Defendants failed to establish a causal connection between the alleged negligence on the part of Mr. Blumer and his death. (*Id.*)

It is well established that a trial court should not instruct the jury on law that is not applicable to the facts of the case. (*Auerbach v. Philadelphia Transportation Company*, 221 A.2d 163 (Pa. 1966)). Without minimal evidence of a causal connection between the Plaintiffs decedent's own negligent acts and his resulting death, the jury would have no factual basis to find comparative negligence on the part of the Plaintiffs decedent.

During the charging conference, defense counsel was specifically asked by this Court whether there was any inference of negligence on the part of Mr. Blumer alleged by the defense; defense counsel responded, "[t]here was no testimony from somebody who said he was negligent because of what he did." (Tr. at 1239). Based on this absence of an allegation of negligence by Mr. Blumer, the defense now expects the Superior Court to believe that the jury could have found negligence on the part of Mr. Blumer and that this negligence was the factual cause of the harm...despite the absence of so much as an allegation of negligence in the testimony of any witness. This matter complained of is meritless. An instruction on comparative negligence was not warranted and would have only confused the jury.

As to the Defendants sixth and final claim of error, that it was error for this Court to allow the jury to consider separate items of damages for the Plaintiff (wife) and her daughters: interrogatory question numbers eleven (11), twelve (12) and thirteen (13) told the jury to state the amount of damages awarded to the deceased's wife and daughters respectively. The Defendants claim error in the format of the verdict slip, claiming that numbers eleven, twelve and thirteen should have been lumped together as one item of damages.

Despite the format of this item of damages, this Court charged the jury on the Wrongful Death and Survival Act in accordance with the Pennsylvania Suggested Jury Instructions, and in fact, read said charge verbatim. (Tr. at 1382-85). If the structure or format of the interrogatories was in error, this Court is convinced that said error did not diminish nor increase the amount of damages awarded. This method of itemizing said damages should be considered, at most, harmless error.

This Court is astounded that the Defendants make any claim of error regarding damages as this Court granted Defendants' Motions in Limine to prevent the award of punitive damages (Tr. at 1195) and to prevent one of Mr. Blumer's daughters from testifying about her attempt at suicide (Tr. at 91-98). Had this Court not granted the Defendants' aforesaid Motions, the verdict may have well been significantly larger.

## V. CONCLUSION

This Court respectfully submits that the rulings made during trial comply with the laws of this Commonwealth. For the foregoing reasons, this Court respectfully requests that the Superior Court of Pennsylvania affirm this Court's Order of June 25, 2009, denying Defendants' Post-Trial Motions and affirm the judgment entered on behalf of Plaintiff and against Defendants on the verdict of March 20, 2009.

BY THE COURT:  
/s/Della Vecchia, J.

Date: October 30, 2009

<sup>1</sup> 610 A.2d 454 (Pa. 1992)

<sup>2</sup> It must be noted that the Court granted Defendant's Motion in Limine regarding subsequent remedial measures after extensive argument on same (Tr. at 60-75)

## Henry J. Finck v. JA West Corp

### Summary Judgment—Negligence—Agency

1. Plaintiff filed a negligence action against the Defendant for failure to keep and maintain premises in good and safe condition. Plaintiff alleged that the Defendant owned, operated, and maintained the buildings and real estate where his injuries occurred.

2. Defendant filed a Motion for Summary Judgment on the basis of the lack of any dispute that the Defendant did not own the property at the time of the accident. The court granted the Defendant's Motion for Summary Judgment and the Plaintiff appealed.

3. Plaintiff asserts Summary Judgment was improper because the complaint alleges that the Defendant owned, operated, controlled, and maintained the property, therefore a viable theory of liability, independent of ownership, was pled and may be developed through discovery.

4. The court disagreed with the Defendant's assertion because the complaint did not allege any theory of liability independent from ownership of the property, nor did the Plaintiff plead agency.

5. Summary Judgment was proper as the Plaintiff failed to produce evidence of facts essential to the cause of action against the Defendant.

(Colleen L. Becker)

Peter J. Pietrandrea for Plaintiff.

Eric Anderson for Defendant.

No. GD 07-004445. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

#### OPINION

McCarthy, J., November 30, 2009—Plaintiff, Henry J. Finck, appeals in this matter following entry of summary judgment upon the motion of Defendant, JA West Corp. Finck had filed a single-count Complaint in Civil Action solely against JA West Corp on a negligence claim. The Complaint averred that Finck, while visiting his daughter at the Hickory Hills Apartment Complex on March 10, 2005, lost his footing on a stairway due to ice and, upon grabbing a handrail for support, had that handrail disengage from the frame. The Complaint averred that JA West Corp “owned, operated and maintained the buildings and real estate known as Hickory Hills Apartment Complex...” and that “it became and was the duty of Defendant JA West Corp to keep and maintain the premises in good and safe condition...” (Complaint at ¶¶ 3, 4). The Answer and New Matter filed on behalf of JA West Corp specifically denied that it owned operated and maintained the Hickory Hills Complex, and, by way of New Matter, averred that JA West “did not own, operate and/or maintain the premises” identified in the Complaint. Finck replied to that averment contained in the New Matter simply by incorporating the Complaint.

In August 2009, JA West filed its motion for summary judgment, noting the absence of any dispute that JA West did not own the Hickory Hills Complex at the time of the accident that formed the basis for the Complaint. Appended to the motion were, among other things, copies of deeds of record that evidenced title to the subject property from 2001 forward.

Shortly before the scheduled argument date on JA West’s motion, Finck submitted a “Reply to Motion for Summary Judgment” in which Finck asserted, in part:

*Assuming arguendo* that Defendant did not own the property, it is specifically averred in the Plaintiff’s Complaint that the Defendant was responsible for the maintenance and operation of the facilities at Hickory Hills Apartment Complex, that it had a duty to keep the property in a reasonably safe condition and that it breached that duty causing Plaintiff’s injuries and damages. Therefore, the question of ownership of the property is not dispositive of the liability issues in this case.

[Italics and underscoring in original]

Finck had made no effort to confirm ownership and had not undertaken any discovery. Nor had Finck amended the Complaint. The two (2) year statute of limitations applicable to the cause of action had expired.

Following argument, the Court granted summary judgment. Finck timely appealed and, in response to the Court’s direction, submitted a Concise Statement of Matters Complained of on Appeal. That Concise Statement concedes that JA West did not own the subject property at the time of the accident. Finck proffers, however, that ownership of the Hickory Hills Complex is not wholly dispositive of the liability issues in the case. More particularly, Finck maintains that, because the Complaint avers not only that JA West owned the property but also that JA West “operated, controlled’ and maintained” the property, a viable theory of liability, independent of ownership, has been pled and might be developed through discovery. For that reason, Finck contends that the summary judgment motion premised solely upon the undisputed fact that the named defendant did not own the property should not have been granted.

The Complaint alleges that “Defendant owned, operated and maintained...” the property. (Complaint, at ¶13) The averment that JA West “operated and maintained” the property is not stated in the alternative to ownership, but is stated conjunctively with ownership, and as an incident of ownership. The Complaint itself does not assert any theory of liability that is independent from ownership of the property.

The Complaint identifies the duty of care owed to Finck by JA West variously as the duty owed to business invitees or to licensees (Complaint, at ¶¶ 4, 11). That describes a duty of care owed by a possessor of land to one entering upon the land. Under Pennsylvania law, a possessor of land standard of care is not owed exclusively by an owner or possessor of the property, but may also be owed by a party that carries on activity on the property on behalf of the possessor. See, *Felger v. Duquesne Light Company*, 441 Pa. 421, 273 A.2d 738 (1971); adopting Restatement (Second) of Torts, §383); *Craig v. Franklin Mills Associates*, 555 F. Supp. 2d 547 (2008); applying Pennsylvania law in a diversity action involving a slip and fall). Accordingly, if JA West were an agent authorized by the owner or party in possession of the Hickory Hills Apartment Complex and if the negligent actions or omissions alleged by Finck that resulted in his injuries were either within the scope of the agency of JA West or condoned by the owner, then Finck may pursue JA West in its capacity as an agent entrusted with the care and maintenance of the property. Finck, however, has not pled agency. The Complaint provides no inkling that JA West is being pursued as one entrusted by the owner of the Hickory Hills Apartment Complex with the care and maintenance of the area in which the accident occurred.

The purpose of a complaint is to place a defendant on fair notice of the claims upon which it must defend and to provide the defendant with a summary of material facts that support those claims. Pa.R.Civ.P. 1019(a). While it is unnecessary to plead all the various details of an alleged agency relationship, a complainant relying upon a theory of agency must assert, minimally, facts that: (1) identify the agent by name or appropriate description; and (2) set forth the agent’s authority, and how the alleged tortious conduct of the agent either falls within the scope of that authority, or if unauthorized, has been ratified by the principal. *Rachlin v. Edmison*, 813 A.2d 862, 2002 Pa.Super. 387 (2002), citing *Alumni Association v. Sullivan*, 369 Pa.Super. 596, 535 A.2d 1095 (1987). Finck’s Complaint is bereft of allegations that might suggest culpability of JA West as an agent of an unidentified owner or possessor of the property on which the injury occurred. Finck did not amend the Complaint to plead agency or facts material and indispensable to a sufficient allegation of agency. Nor did Finck adduce such facts in response to the motion for summary judgment.

Finck asserts in his Concise Statement that the Court erred in granting summary judgment because “a necessary element of the cause of action (i.e., maintenance and control of the subject real property) could be established through Discovery...” The assertion that discovery might assist Finck in coming forward with evidence sufficient to establish facts essential to his cause of action was not contained in his Reply to Motion for Summary Judgment. Rather, that Reply relied solely upon the allegations of the Complaint, an approach that is ill advised in view of the explicit caution contained in Pa.R.Civ.P. 1035.3 (a) that the adverse party to a motion for summary judgment must draw his response from “evidence in the record.”

In any event, summary judgment may be entered in advance of the date that discovery closes in matters where additional discovery will not aid in the establishment of any fact material to the subject matter of the motion. Pa.R.Civ.P. 1035.2 does not require

either completion of all discovery or that the discovery period be closed in advance of any motion for summary judgment. Rather, Pa.R.Civ.P. 1035.2(1) permits parties to seek summary judgment “after the completion of discovery relevant to the motion.” (Emphasis added). *See, also, Manzetti v. Mercy Hosp. of Pittsburgh*, 565 Pa. 471, 776 A.2d 938 (2001). Moreover, a party may not, in effect, assert its own inactivity as a bar to summary judgment. If substantial time has passed without effort on the part of the responsive party to conduct discovery, summary judgment may be granted. *First Wisconsin Trust Co. v. Strausser*, 439 Pa.Super. 192, 653 A.2d 688 (1995). Having been alerted to the deficiencies of his case more than a year in advance of JA West’s motion for summary judgment and having neither within that time nor since the time the motion was filed either pursued any avenue of discovery or set forth reasons that prevented him from assembling and presenting evidence essential to justify his opposition to the motion, Finck’s assertion that discovery has not yet closed is unavailing.

More fundamentally, because the Complaint as filed does not sufficiently plead that JA West functioned as an agent of the Hickory Hills Apartment Complex and because no amended Complaint has been filed suggesting such agency, the extent to which discovery might reveal agency seems a moot matter. The Court must take the Complaint as it finds it at the time the motion is presented and argued. The Complaint alleges ownership by JA West and predicates liability upon that allegation. Finck at no time availed himself of Pa.R.Civ.P. 1033 to amend his Complaint or to request leave to amend.

The evidence of record establishes that JA West was not the owner and, indeed, Finck acknowledges in his Concise Statement that JA West did not own the subject property at the time of the accident described in the Complaint. Finck failed to produce evidence of facts essential to the cause of action he pled against JA West. For that reason, summary judgment was proper.

BY THE COURT:  
/s/McCarthy, J.

Date: November 30, 2009

<sup>1</sup> In fact, the Complaint contains no explicit mention of “control” of the premises.

## **Karl E. Hohman v. Thomas Dabulski and HDH Development, Inc.**

### *Partition—Interest in Real Property—Failure to Join Defendants*

1. Plaintiff filed suit against the Defendants seeking partition of properties, an accounting, and payment for rents due. The properties in question were first transferred from the Plaintiff’s mother to the Plaintiff and his sister. A second transfer occurred in which the Plaintiff and his sister transferred title to the Plaintiff and the Defendant, allegedly to frustrate creditors. The Defendant corporation was created to manage the properties, and it is alleged that Plaintiff, Plaintiff’s sister, and the Defendant each own one-third of the corporation.

2. Public sales of property are generally a last resort for partition complaints and are not to occur unless it is first determined that the real estate cannot be divided without spoiling the whole. The parties mutually agreed to a public sale after they could not agree on partition or sale.

3. Defendants filed an appeal to the partition. First, Defendants allege that the court erred in determining the interests of the parties by finding that none of the properties were subject to ownership interests of the Plaintiff’s sister. Second, Defendants assert that the court erred by not making the Plaintiff’s mother and sister parties to the action. Third, Defendants dispute the value assigned to the property.

4. The court examined the alleged property interest of the Plaintiff’s sister and found that an individual’s status as a holder of capital stock in a corporation formed to manage real property not owned by that corporation does not vest an ownership in real property managed by the corporation. Further, any assertion that an informal agreement created a property interest is barred by the Statute of Frauds.

5. Defendants cannot prevail on speculation that the testimony of the Plaintiff’s sister would have affirmed her claim because the Defendants failed to proffer proof that she would have presented a cognizable claim.

6. The value was based on appraisals conducted by an independent, certified appraiser. The Defendants did not offer countervailing evidence that would establish different values or impugn the appraisals; therefore, the court proceeded with the appraised value.

(Colleen L. Becker)

*Matthew Pavlovich* for Plaintiff.

*Louis P. Vitti* for Defendant.

No. GD 08-000903. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

### **OPINION**

McCarthy, J., December 18, 2009—This is a partition action brought by Karl E. Hohman (“Karl”) against Defendants, his brother-in-law Thomas Dabulski (“Thomas”) and the corporation (“HDH”). Since May 24, 2007, Thomas has been in exclusive possession of and received rents from three (3) properties owned jointly by Karl and Thomas. The three properties identified in the Complaint are: 916 Coleman Street; 3920 Hoosac Street; and 3927 Hoosac Street, all of which are in the City of Pittsburgh, and all of which the parties collectively refer to as the “Greenfield properties.” At the time the action commenced, Karl and Thomas were jointly the owners of record for each of the Greenfield properties.

The Greenfield properties had been transferred to Karl and his sister, Thomas’ wife, Patricia Hohman Dabulski, from their mother, Elizabeth, early in 1998. Elizabeth alleges that the transfers were made as “part of their inheritance” (Deposition of Elizabeth, at 34). Karl and Elizabeth were, however, to pay Elizabeth \$500 monthly. That payment was to continue either for the life of Elizabeth (Deposition of Elizabeth, at 30) or for fifteen (15) years (Deposition of Karl, at 62’).

Subsequently, Karl and Patricia transferred title to Karl and to Thomas, Patricia’s husband, in joint name, eliminating Patricia

from the Greenfield properties deeds. Allegedly, the transfers were made to frustrate Patricia's creditors. The Greenfield properties are rental properties managed by HDH, a corporation formed by Karl, Thomas, and Patricia.

Karl brought this action for partition of the properties and for accounting and for payment of rents due. Thomas and HDH responded that Karl and Thomas had mutually acknowledged and agreed that the ownership of the real properties was for the actual benefit of themselves and for Patricia Hohman Dabulski, each with an undivided one-third interest as tenant in common. Thus, Thomas and HDH asserted, "the ownership interests are contested and may be contrary to the recorded documents..." (Answer, New Matter and Counterclaim to Plaintiff's Amended Complaint, at ¶¶9, 19; see also, ¶14) Thomas and HDH further asserted that understandings of shared ownership extended to at least four (4) additional parcels: 2250 Hawthorne Avenue; 127 and 129 St. Joseph's Way and 131 and 133 St. Joseph's Way. (Answer, New Matter and Counterclaim at ¶¶34-35). Thomas and HDH have not produced deeds to demonstrate the alleged tenancies-in-common, but instead allege that Thomas, Patricia and Karl share title to such properties "by way of resulting and/or constructive trusts, or other relevant legal bases." (Answer, New Matter and Counterclaim at ¶42).

Complaints in partition are governed by P.R.Civ.P. 1551 through 1574. Generally, public sales of property are a last resort and are not to occur unless it is first determined that the real estate cannot be divided without spoiling the whole (P.R.Civ.P. 1560). Even in that event, an opportunity for private sale should usually be allowed before directing a public sale. Additionally, the values and proportional competing interests of the parties should be determined in advance of a sale.

In this case, because it became apparent during a preliminary conference that the parties could not agree upon a plan of partition or sale, because the properties, apparently intended as investments, were draining funds and might be in poor repair, and because the matter required direct, immediate and skilled oversight to prevent dissipation of assets and to possibly achieve resolution of issues, a Master was appointed pursuant to P.R.Civ.P. 1558. The Master examined records, conducted depositions, sought and received approval of the Court to have appraisals performed, and attended status conferences as directed by the Court.

The parties mutually acknowledged that a public sale was in order, and expressed the same during status conferences held with the Court. (See, also, Proceedings of July 31, 2009; N.T., at p. 7). The Master determined, and the Court concurred, that a division into purparts was feasible given that there were several properties, all with comparable values. A difficulty, however, lay in the fact that, due to the claims of rent and monies owing, the purparts might not be closely proportionate in value to any respective interest of the parties.

The Master filed a report, to which exceptions were taken by Thomas and HDH. Upon consideration of those exceptions and the response submitted on behalf of Karl Hohman, the Court arrived at its findings and decision. An appeal was taken by Thomas and HDH, and at direction of the Court, a "Concise Statement of Errors Complained of on Appeal" was submitted.

### Interests in the Properties

Significant among Defendants' assertions of error is that the Court improperly concluded that none of the various parcels of real estate were subject to purported ownership interests of Elizabeth Hohman or Patricia by reason of resulting or constructive trusts or, less precisely, by reason of "other relevant legal bases."

Among the legal bases suggested by Defendants in support of a determination that Patricia holds a one-third interest in all properties is that Patricia is one-third owner of the issued capital stock of HDH. Patricia's alleged status<sup>2</sup> as a holder of capital stock in a corporation formed to manage real property not owned by that corporation does not vest in her an ownership interest in real properties managed by the corporation. Defendants insist, however, that, coincidental with the formation of HDH, Karl and Thomas "acknowledged and agreed that the ownership of the real properties owned by the two of them, and/or each of them (except for their residences)...resided in themselves and Patricia, each with an undivided one-third interest as tenant in common." (Answer, New Matter and Counterclaim, at ¶34). Thus, Defendants assert that Karl and Thomas informally conveyed ownership interests to Patricia in properties managed by HDH and owned by either or both Thomas and Karl.

Shareholders have no personal interest in the property of a corporation, including the corporation's contract rights. It follows that shareholders are not normally proper parties in an action to redress injury to the corporation's property, including actions for fraud or breach of contract. See, generally, 18A Am. Jur. 2d Corporations § 630. In the case at hand, HDH does not own the properties in question; HDH is an entity that has been established merely to manage properties. Defendants cannot validly assert that Patricia possesses an enforceable ownership interest in corporate property as a shareholder. It follows, therefore, that Defendants cannot successfully advance the even more tenuous claim that Patricia, as a shareholder of HDH, possesses an ownership interest in property that is merely managed by that corporation. Patricia's status as an HDH shareholder does not, *per se*, invest her with title to the properties managed by HDH.

Defendants' assertion that Karl and Thomas informally acknowledged and agreed that, coincidental with or in consequence of the formation of HDH, Patricia would acquire a one-third interest in properties that Karl and Thomas had owned together or individually is, in any event, at odds with the Statute of Frauds. An alleged oral agreement granting an estate in land is unenforceable. See 33 P.S. § 1. The Statute of Frauds generally bars introduction of evidence of an oral agreement modifying a deed that on its face transfers land in fee simple. 33 P.S. § 2. See *Kadel v. McMonigle*, 425 Pa.Super. 253, 624 A.2d 1059, 1061 (1993), *appeal denied*, 539 Pa. 652, 651 A.2d 539 (1994).

In an apparent effort to escape application of the Statute of Frauds, Defendants assert that the properties at 131 and 133 Saint Joseph Way are controlled by a July 1997 agreement that conveyed Thomas' and Patricia's share of properties at 127 and 129 Saint Joseph Way to co-owner Karl, ostensibly to assist Karl in obtaining mortgages on the properties and upon assurances that Karl would reconvey to Thomas and Patricia "their share of the properties upon full payment of the mortgage." Similarly, Defendants assert that the Hawthorne Avenue property continues to be controlled by a written agreement among Karl, Thomas, Patricia and Elizabeth, which provided that Elizabeth would purchase the property, and that the parties would remodel the property "with the intention of selling it at a profit. This profit will be divided equally at such time when the house is sold." (Deposition of Thomas Dabulski, at Exhibit 8).

The July 1997 agreement explicitly and exclusively addressed properties located at 127 and 129 Saint Joseph Way. Defendants' contention that the parties' interests in properties at 131 and 133 Saint Joseph Way are controlled by that 1997 contract relies upon an implausibly elastic construction of that agreement. The properties at 131 and 133 Saint Joseph Way are not mentioned in the 1997 contract, and the circumstances of the acquisition of those properties by Karl are not at all similar to the acquisition of the 127 and 129 addresses. Thomas acknowledged, in fact, that Karl, acting alone, purchased the 131 and 133 properties from the City of Pittsburgh and acknowledged that neither Thomas nor Patricia participated in the sale or ever held title to those properties. (Deposition of Thomas Dabulski, at 77-78).

Similarly implausible and, frankly, disingenuous, is Defendants' contention that the Hawthorne Avenue property continues to be controlled by the written agreement among Karl, Thomas, Patricia and Elizabeth. The Hawthorne Avenue agreement has been

fully performed. Elizabeth acknowledged in deposition testimony that Karl had subsequently separately obtained financing and purchased the Hawthorne Avenue property from her. The proceeds of the sale remaining after closing costs and the payment of Elizabeth's basis were distributed among the parties. (See, e.g. Deposition of Thomas Dabulski, at 75-78; Deposition of Karl Hohman, at 76)<sup>3</sup>

In a further effort to escape application of the Statute of Frauds, Defendants broadly assert that "all the properties involved in this law suit are titled in the individual parties and Patricia by way of resulting and/or constructive trusts..." (Answer, New Matter and Counterclaim, at ¶42). The Statute excludes from its ambit "any conveyance...by which a trust or confidence shall or may arise or result by implication or construction of law." *Silver v. Silver*, 421 Pa. 533, 219 A.2d 659 (1966); *Kadel v. McMonigle*, 425 Pa.Super. 253, 624 A.2d 1059 (1993). The record in this case fails to establish that Karl, by means of fraud, artifice or unfair persuasion induced the execution of deeds absolute unto himself. In fact, as to the Greenfield properties in particular, the record establishes that Patricia wished to convey her titled interest so that the properties could not be reached by her creditors; thus, her husband substituted for her as an owner of record. For that reason, the Master concluded that any claim by Patricia to an interest in the Greenfield properties predicated upon equitable principles—such as a constructive trust—would be barred. Equity will not aid persons to obtain relief from situations that result from conveyances they have made in fraud of creditors. *Vercesi v. Petri*, 334 Pa 385, 5 A.2d 563 (1939).

Moreover, it is difficult to locate artifice in Karl's actions if the consequence of those actions was to diminish rather than enlarge his ownership interests and to produce no income. If Defendants are correct, then the consequence of each of the various conveyances in question—and the consequence that Defendants assert must be enforced through equity—was to place a greater onus of debt and labor on Karl in exchange for which he would disregard title of record upon any sale and receive significantly less proceeds than would accrue to him if those proceeds were apportioned by title. As Plaintiff's counsel rhetorically asked after Thomas acknowledged that the properties managed by HDH generated no profit, and, in fact had never generated a profit:

So what is in it for Karl if the properties that he owes 100 percent of and owns 50 percent of generate revenue that goes with the corporate account and he only gets one-third of the profits?

(Deposition of Thomas Dabulski at 87)

"Oral trusts in real property are not favorites of the law. They must be strictly proved.... Evidence to support a parol trust must be direct, positive, express, unambiguous and convincing." See, *In re Brenneman's Estate*, 360 Pa. 558, 563, 63 A.2d 59, 61 (1949). That burden is not met by Defendants in this case as to the Greenfield properties or 131 and 133 Saint Joseph Way. There is no apparent fraud or artifice by Karl to permit equity to alter title of record on the properties in dispute.

#### **Procedure**

Defendants assert that the Court erred in not making Patricia and Elizabeth parties in this action. More particularly, Defendants state in their 1925B statement: "As a party, Patricia's testimony could have affirmed her claim..." Defendants do not allege that they requested and were denied an opportunity to depose Patricia.<sup>4</sup> Nor was Patricia barred from attending any deposition, meeting or conference. Had Patricia been deposed or had Defendants otherwise assembled and proffered some additional proof that Patricia might present a cognizable claim, Defendants could certainly have requested reconsideration of a petition to join Patricia as a plaintiff in counterclaim or an extension of time in which to join her as a defendant. Having elected to do none of those things, Defendants cannot prevail after the fact on the sheer speculation that, had Patricia been vested with the status of a party, she would certainly have been called to testify and, through that testimony, Defendants would have adduced evidence sufficient to affirm her claim.

Defendants further assert that the Court erred in not directing that hearings be held pursuant to P.R.Civ.P. 1559. By Order dated January 20, 2009, the Court appointed Edward M. Burr, Esquire, as Master in this case "to hear the entire matter and make such examinations and hold such hearing as may be necessary, to employ appraisers and, with the authorization of the Court, to employ such other experts as may be necessary to enable the Master to perform his duties in this matter." Consistent with that Order of Court, the Master, following initial conferences with the parties, instructed the parties that he would assemble testimony and evidence through depositions of any witness the parties called, and that he would attend the depositions. The parties were thus afforded the benefit of a less restrictive process and the opportunity to gather and present such evidence and testimony as they judged appropriate.

Defendants have not identified any witness or proof that was barred by the Master or that would have been offered in a more structured proceeding. On the contrary, Defendants allegation of error is merely that "[a] hearing would have been subject to evidentiary law and rules beyond those for a deposition." That non-specific observation, in the absence of a particular allegation of actual prejudice having resulted to Defendants, is an insufficient basis on which to set aside the findings in this matter or to direct further hearings.

Defendants allege bias on the part of the Master. It may suffice to say that the Master was assigned to this contentious matter for the very reason that he is well regarded within the legal community and well credentialed to make pertinent inquiries of the parties, to direct the prompt gathering of necessary facts and reports, to exert best efforts to preserve the respective interest of all parties pending resolution of the matter and to report timely and objectively to the Court. It might further be noted that, despite open-agenda status conferences and other ample opportunity to make charges of bias to the Court informally or otherwise in advance of the submission of the Master's Report, Defendants expressed no dissatisfaction with the Master.

The Court, in any event, engages in independent scrutiny of a master's report, and, if it appears that a report is incomplete or affected by an improper bias, the Court may, on its own directive, take such action as may be necessary to cure an improper prejudice. The decision and order from which this appeal was taken was not affected by any alleged undue bias toward or against any party.

#### **Valuations and Duty to Account**

Defendants dispute the values assigned to various properties. The Master's valuation of properties was based upon the appraisals conducted by an independent, certified appraiser. Defendants did not proffer countervailing evidence that would establish different values or impugn the appraisals. Further, the record established, and the parties concurred, that a public sale provides the best option in this matter. Actual values will ultimately be determined by the strength of the market. In the interim, values may be responsibly estimated by expert appraisal, and the Court must proceed on the basis of that available credible information.

Defendants demand an accounting from Plaintiff. Yet, Thomas and Patricia removed Plaintiff from any participation in HDH in May 2007. Until that time, Plaintiff had filed tax returns for HDH every year and regularly provided a detailed breakdown of income and expenses of HDH to Thomas in Thomas' capacity as the President of HDH. In contrast, Thomas has not filed tax

returns since displacing Karl. Having neglected to conduct any meaningful examination of funds, expenses, assets or possible tax liabilities, Thomas cannot credibly assert that, as averred in the counterclaim, he is informed and therefore believes that Karl improperly withdrew HDH funds for his own use.

Moreover, the right to an accounting in equity usually depends on a previous demand and refusal. *See*, 1A C.J.S. Accounting §29. Defendants' pleading does not aver that a demand was made upon Karl for an accounting, by or on behalf of HDH or Thomas. Having failed to act seasonably, and having failed to reasonably ascertain whether HDH has any cause to demand an accounting, Thomas cannot now prevail on that aspect of the counterclaim.

Having reviewed all that has been presented and considered the matters complained of on appeal by Defendants, the Court fails to find merit in Defendants' allegations of error. There is nothing of record or in the law that compels setting aside the Order from which the appeal has been taken.

BY THE COURT:  
/s/McCarthy, J.

Date: December 18, 2009

<sup>1</sup> Although the agreement was oral, Karl admits to the existence of an obligation to pay for a period of 15 years. Karl explained that the figure of \$500 monthly for 15 years represented the amount by which the value of the properties exceeded the proportionate share of the estate, and that the reimbursement would preserve the inheritances of three (3) other siblings. Defendants also acknowledge an agreement to pay \$500 monthly, but allege the agreement involved an additional property, 2250 Hawthorne Avenue, transferred to Karl and Patricia from their mother, Elizabeth.

<sup>2</sup> The parties did not produce certificates confirming stock ownership.

<sup>3</sup> Inasmuch as the sale and distribution occurred some ten (10) years ago, however, the question as to whether proceeds had been correctly apportioned has long since been deemed resolved and objections waived.

<sup>4</sup> The deposition of Elizabeth was taken.

**Laminated Glass Company v.  
P.J. Dick Incorporated, Fenestech, Inc., and  
United States Fidelity and Guaranty Company t/a St. Paul Surety**

*Payment for Construction Materials—Pennsylvania Procurement Code—Construction Bond—62 Pa. C.S.A. §3934 and §3939(b)*

1. The Plaintiff brought an action against Defendant, contractor, and Defendant, surety, for failure to pay for construction materials. Plaintiff provided the materials to the subcontractor. The subcontractor failed to fully perform its subcontract, therefore the Defendant, contractor, completed most of the construction work and withheld payment from the subcontractor.

2. Plaintiff's argument that the Defendant, general contractor, violated a Joint Check Agreement was waived as the Plaintiff failed to raise the claim in the complaint.

3. Section 3939 of the Pennsylvania Procurement Code obligates the contractor to pay the Plaintiff and the language of the Bond obligates United States Fidelity and Guaranty Company to pay the Plaintiff. The "safe harbor" provision of the Pennsylvania Procurement Code, 62 Pa. C.S.A., §3939(b) bars claims against the contractor or the contractor's surety by parties owed payment from the subcontractor.

4. Defendants contend that they are protected by the "safe harbor" provision because the contractor's withholding of payment based on the subcontractor's default is the equivalent of payment to the subcontractor.

5. The "safe harbor" provision does not change the clear meaning of "payment" as specified in Pennsylvania's Procurement Code, 62 Pa. C.S.A., §3934. Defendants, therefore, must pay the Plaintiff for the items supplied.

*(Colleen L. Becker)*

*John R. Keating* for Plaintiff.

*David Raves* for Defendant.

No. GD 02-006488. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**DECISION**

Friedman, J., December 22, 2009—This Decision is filed pursuant to Pa. R.C.P. 1038. See also Pa. R.C.P. 227.1(c)(2).

The captioned action was submitted on stipulated facts pursuant to Pa. R.C.P. 1038.1. The question presented is whether two of the named Defendants, P.J. Dick Incorporated ("Dick") and United States Fidelity and Guaranty Company ("USF&G"), are obligated to pay Plaintiff Laminated Glass Company ("Laminated") under §3939 of the Pennsylvania Procurement Code because the third Defendant, Fenestech, Inc. ("Fenestech"), failed to pay for materials supplied by Plaintiff.

According to the Stipulated Facts, Fenestech was a subcontractor of Dick and USF&G provided the Labor and Material Bond. Dick was the general contractor for a garage being constructed for the Pittsburgh Parking Authority ("Authority"). Laminated provided the glass and glazing material that Fenestech needed in order to perform its subcontract. Fenestech ultimately did not perform fully under its subcontract and Dick ended up doing much of that work itself. Dick also withheld payment for most of the contract price from Fenestech, because of the default. There is no contention that anything provided by Laminated was defective or that Laminated contributed in any way to Fenestech's breach. Nevertheless, both Fenestech and Dick failed to pay Laminated for all the material it supplied. Later, USF&G also refused to pay Laminated despite its obligations under the Bond.

Laminated delivered the first order of glass to Fenestech on March 30, 2001. The remainder of the glass was delivered between March 30, 2001 and May 25, 2001. The total amount invoiced by Laminated to Fenestech was \$84,028.10. On February 4, 2002,

Fenestech paid Laminated \$18,000 on account of the oldest invoice (for the first delivery). No other payments have been made to Laminated by any party. The total principal amount due is \$66,028.10. Fenestech filed a Chapter 7 petition in bankruptcy on November 25, 2002. The outcome is unknown, but there is no contention by any of the remaining parties that there remains a viable claim against it. The sole issue is whether Dick and USF&G (hereinafter, sometimes, collectively “the Defendants” must pay what Fenestech did not.

Besides its argument regarding the terms of the bond, which will be discussed later herein, Laminated argues that Dick violated a joint Check Agreement. Defendants contend that this argument has been waived because the Complaint does not assert any breach other than a breach under the Bond. Alternatively, Defendants argue first, that the Joint Check Agreement was limited to the first invoice, part of which was paid by Fenestech; second, that “by the time payments would have been due to Laminated, P.J. Dick had stopped making payments to Fenestech because of the deficiencies in the work...[so that] any payment obligations under the [joint check] agreement were never triggered;” and, third, that the Joint Check Agreement was only “a timing mechanism and does not impose any payment liability on [Dick].” See Defendants’ Brief in Support of Award in Favor of Defendants, p. 7. We conclude that any claim based on the breach of the Joint Check Agreement has indeed been waived since a fair reading of the Complaint does not give any warning that such a claim exists.

However, Laminated’s claim against Defendants under the Bond does have merit. Dick’s obligation arises under the Procurement Code (“the Code”)<sup>1</sup> and the following language of the Bond is what would obligate USF&G to pay Laminated:

[Dick and USF&G] jointly and severally agree with the Authority that every person, co-partnership, association or corporation, who, whether as subcontractor or otherwise, has furnished material...in the prosecution of the work and who has not been paid in full therefore before the expiration of a period of sixty (60) days after the date such payment was due, may sue in assumpsit on this Bond...for such sums of money as may be justly due him, them or it...

Defendants contend that they are protected by the following “safe harbor” provision of the Code:

§3939 Claims by Innocent Parties

....

(b) Barred Claims. Once a contractor has made payment to the subcontractor according to the provisions of this subchapter, future claims for payment against the contractor or the contractor’s surety by parties owed payment from the subcontractor [that] has been paid shall be barred.

62 Pa. C.S.A. §3939(b).

Defendants’ theory is that Dick’s withholding of payment based on Fenestech’s default is the equivalent of “payment to the subcontractor” because another section of the Code, §3934(a) *permits* Dick to withhold payments from Fenestech. Defendants admit that most of the alleged payment is really withholding of payment.

Both subparagraphs of §3934 are quoted in full below; the pertinent portions are highlighted in bold face.

(a) When government agency may withhold payment.—The government agency may withhold payment for deficiency items according to terms of the contract. The government agency shall pay the contractor according to the provisions of this subchapter for all other items which appear on the application for payment and have been satisfactorily completed. The contractor may withhold payment from any subcontractor responsible for a deficiency item. **The contractor shall pay any subcontractor according to the provisions of this subchapter for any item which appears on the application for payment and has been satisfactorily completed.**

(b) Notification when payment withheld for deficiency item.—If a government agency withholds payment from a contractor for a deficiency item, it shall notify the contractor of the deficiency item within the time period specified in the contract of 15 calendar days of the date that the application for payment is received. **If a contractor withholds payment from a subcontractor for a deficiency item, it must notify the subcontractor or supplier and the government agency of the reason within 15 calendar days of the date after receipt of the notice of the deficiency item from the government agency.**

We cannot agree with Defendants that their refusal to pay was and is justified. The portions of §3934 highlighted above use mandatory language (“shall” and “must”) regarding payment for items which have been “satisfactorily completed” and notification of the supplier of a deficiency. In other words, there are clearly conditions on when payment “may” be withheld, but if the materials supplied here by Plaintiff were not deficient in some respect, the mandatory language requires payment therefor. Section 3934 does not change the clear meaning of “payment” in §3939.

Laminated also seeks prejudgment interest and attorneys’ fees “as provided by statute for the Defendants’ wrongful and bad faith reason for failing to pay the claim.” Defendants point out, correctly, that the claim for attorneys’ fees is raised only in its brief and has not been pled in its Complaint and is therefore waived. However, the claim for prejudgment interest has not been waived since it was pled, with an assertion that such interest should run from May 15, 2001, the average due date. In its brief, Laminated states that June 25, 2001 is the correct average due date and we will use that later date for the calculation of pre-judgment interest. There seems to be no dispute concerning the *rate* of pre-judgment interest, said by Laminated to be 6%.

#### CONCLUSION

Laminated is entitled to an award in its favor against both Dick and USF&G in the amount of \$99,702.43.

Pursuant to the Rules of Court cited above, this Decision constitutes the verdict of this Court; there will be no separate verdict slip filed.

BY THE COURT:  
/s/Friedman, J.

Dated: December 22, 2009

<sup>1</sup> The portions of the Code at issue are found in what is often referred to as the Prompt Payment Act.