IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA

CIVIL DIVISION

GARRETT K. PETTI, Administrator of the Estate of Patrick Petti, Deceased and MARCIA A. KARROW, Administratrix of the Estate of Barbara Warren, Deceased,	:	
Plaintiffs	:	
v.	:	**C-0048-CV-2008-10956**
RIVERVIEW GOLF AND COUNTRY CLUB, INC. d/b/a, a/k/a, t/a RIVERVIEW COUNTRY CLUB, d/b/a, a/k/a, t/a THE SAND TRAP PUB, And JAMES BLACK,	:	
Defendants.	:	

ORDER OF COURT

AND NOW, this _____ day of _____ 2012, it is hereby **ORDERED** and **DIRECTED** that:

STATEMENT OF REASONS

Procedural History

This matter commenced by Writ of Summons on October 14, 2008. On March 8, 2010, Plaintiffs Garrett Petti and Marcia A. Karrow filed a Complaint against Riverview Golf and Country Club, Inc. d/b/a, a/k/a, t/a Riverview Country Club, d/b/a, a/k/a, t/a The Sand Trap Pub, alleging claims of negligence; wrongful death; survivorship and a violation of the Dram Shop Act against Riverview. As the basis for the claims, Plaintiffs allege that on the night of Monday, June 9, 2008, Defendant Black patronized Defendant Riverview, where he imbibed a quantity of alcohol rendering him visibly intoxicated. Complaint, ¶¶ 12-18. They further aver that he then left the establishment in his vehicle, identified elsewhere in the record as a 2001 Ford Ranger

pickup truck, and proceeded to drive down Route 611 South. Minutes later, his vehicle crossed over the double yellow line in the roadway and collided with a motorcycle ridden by driver Patrick Petti ("Petti"), and his passenger, Barbara Warren ("Warren") (collectively "Plaintiffs' Decedents"). Complaint, ¶¶ 20-21. As a result of the impact, Plaintiffs Decedents received multiple injuries to which they ultimately succumbed on the evening of the accident. Complaint, ¶¶ 21, 25.

On August 17, 2011, Defendant Riverview filed a motion for summary judgment as to the claims against it, and a partial motion for summary judgment to strike punitive damages. Both motions were denied by Orders entered by the Honorable Emil Giordano on November 17, 2011 and November 18, 2011, finding that entry of summary judgment was precluded by the existence of issues of material fact. On February 1, 2012, a pretrial conference was held before the undersigned, at which time a date of February 21, 2012 was set for the filing of all motions in limine, with responses thereto due on March 9, 2012. The matter was also listed for Argument Court on April 3, 2012, and for a jury trial during the week of May 21, 2012. On February 20, 2012, the Honorable President Judge F.P. Kimberly McFadden entered an Order granting the matter major case status and assigning it to the undersigned for disposition. The matter is now before the Court for disposition of the parties' motions in limine.

Purpose of Motions in Limine

A motion in limine is a means of challenging evidence either before its presentation to a jury. PA.R.E. 103, cmt. Usually, such a motion is made prior to trial in order to expedite the proceedings. Id. A pretrial ruling on a motion in limine preserves the issue for appeal without requiring that it be raised again at trial. Id.

THRESHOLD MOTION: Defendant Riverview's Motion to Bifurcate or Trifurcate Trial

By the present motion, Defendant Riverview seeks, in the first instance, to trifurcate the trial in this matter, holding trial first on the issue of liability, then proceeding, if necessary, to compensatory damages, and finally to punitive damages. Alternatively, Defendant Riverview seeks to bifurcate the trial into proceedings on liability, followed, if necessary, by damages. Finally, Riverview suggests that as a result of his guilty plea on the criminal charges associated with the accident, Defendant Black will not be contesting liability, and therefore separate trials should be held for each Defendant.

Pursuant to PA.R.CIV.P. 213, entitled "Consolidation, Severance and Transfer of Actions and Issues within a County. Actions for Wrongful Death and Survival Actions,"

> [t]he court, in furtherance of convenience or to avoid prejudice, may, on its own motion or on motion of any party, order a separate trial of any cause of action, claim, or counterclaim, set-off, or cross-suit, or of any separate issue, or of any number of causes of action, claims, counterclaims, set-offs, cross-suits, or issues.

PA.R.CIV.P. 213.

Bifurcation or trifurcation of proceedings is at the sole discretion of the Court in accordance with the principles set forth in the rule. "Bifurcation is encouraged where separation of issues facilitates the orderly presentation of evidence in judicial economy. Where liability and damage issues are not interwoven, bifurcation may be used as a means to ensure against taint of the jury through sympathy occasioned by knowledge of the severity of the injury." Pascale v. Hechinger Co. of Pa., 627 A.2d 750, 756 (Pa. Super. 1993) (internal citation omitted). Conversely, "bifurcation is discouraged in those cases in which evidence relevant to both issues would be excluded in one portion of the trial and would result in prejudice to the objecting party." Coleman v. Philadelphia Newspapers, Inc., 570 A.2d 552, 555 (Pa. Super. 1989).

In support of the motion, Defendant Riverview argues that the questions of liability in the instant case, are not only separate and distinct from the damages issues, they further contend the likelihood that Defendant Black will concede liability, and that Plaintiffs, by their own admission, have no evidence to support a finding of liability against Riverview. Whereas, they argue that the damages portion of the trial, involving a number of factual and expert witnesses, and the subject of multiple motions in limine, will "consume a large amount of time and effort of the parties, this Court or our jury." Defendant Riverview's Motion,[1] ¶12. On the basis of the foregoing, Riverview argues that this matter is appropriate for bifurcation, and the failure to birfurcate it would unduly prejudice Defendants "by permitting Plaintiffs to present evidence in support of their damages claims before liability is established, and quite likely before they present any meaningful liability testimony." Defendant Riverview's Motion, ¶16.[2]

In opposition to the motion, Plaintiffs dispute Defendant Riverview's characterization of the liability issues as an "outright refusal to accept that Plaintiffs have viable claims against it," in spite of the Court's prior denial of Defendant Riverview's motion for summary judgment on the claims against it, per an Order entered by the Honorable Emil Giordano. Plaintiffs' Memorandum of Law at 4-5.[3] In fact, Plaintiffs further note that liability is heavily disputed, as

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[1] Given the sheer number of motions and briefs discussed in this opinion, each motion and brief will be identified merely by party within each section of this opinion. Accordingly, instead of referring to Riverview's present motion as "Defendant Riverview's Motion to Bifurcate, and in the Alternative, to Trifurcate This Matter for Purposes of Trial," it is referred to as "Defendant Riverview's Motion."

[2] In support of the motion for trifurcation, Defendant Riverview initially suggests that Plaintiffs' punitive damages claims are inappropriate and should be stricken. (That argument is the subject of a separate motion, which the Court will address in due course.) Notwithstanding that assertion, Defendant Riverview argues that the presentation of evidence on punitive damages during Plaintiffs' case in chief would cause "further delay, juror confusion and prejudice to defendants" should it be permitted. Defendant Riverview's Motion, ¶21.

[3] Likewise, Plaintiffs disagree with Defendant Riverview's assertion that Defendant Black is likely to admit liability, noting his defense that the accident was a result of distracted, and not drunk driving. While Defendant Black cannot deny causing the accident, it is apparent that he disputes causation, and that dispute is directly and inextricably tied to the question of Defendant Riverview's liability.

evidenced by a greater number of expert witnesses prepared to testify on liability as opposed to damages, and a greater number of motions in limine going to liability. Id. at 5. Further, Plaintiffs argue that instead of the issues of liability and damages being wholly separate in this matter, they are in fact inextricably interwoven, making this matter inappropriate for bifurcation.[4]

Upon consideration, Defendant Riverview's Motion for Bifurcation or Trifurcation is hereby **GRANTED IN PART** and **DENIED IN PART.** While the Court disagrees with Defendant Riverview's characterization of the liability issues in this case as essentially cut and dry, the Court does agree that they are easily distinguished from Plaintiffs' damage claims. Given the Court's finding that the liability and damage issues are not interwoven, we find that bifurcation is appropriate to facilitate the orderly presentation of evidence, ensure against taint of the jury, and to promote judicial economy. Accordingly, the portion of Defendant Riverview's petition seeking bifurcation is hereby **GRANTED.** However, as to Defendant Riverview's request to trifurcate the matter into trials on liability, general damages and punitive damages, their request is **DENIED** as unnecessary and contrary to the promotion of judicial economy.

PLAINTIFFS' MOTIONS IN LIMINE

Decedent Petti: Motion to Preclude Reference to Life Insurance

Per their motion, Plaintiffs note that at the time of his death, Decedent Petti held a life insurance policy. Plaintiffs seek to preclude reference to the same pursuant to the collateral source rule, which provides that a plaintiff's claim for damages against a tortfeasor shall not be precluded or diminished due to compensation from a collateral source such as insurance.

[4] Additionally, subsequent to the time for filing responses to the motions, Plaintiffs submitted the affidavits of several witnesses who urge that the burden of testifying at two separate proceedings would be unnecessarily onerous. At argument, Defendant Riverview questioned whether each of the affiants in fact possess information on both liability and damages, and therefore, whether they in fact would be required to testify at separate proceedings.

Hileman v. Pittsburgh and Lake Erie R.R. Co., 685 A.2d 994 (Pa. 1996). Alternatively, Plaintiffs suggest that the introduction of such evidence pursuant to PA.R.E. 401, 402 and 403, on the basis that it is irrelevant, or to the extent that it is relevant, its' introduction would be more prejudicial than probative.

In response, Defendant Riverview[5] takes no position with regard to the relevance or admissibility of evidence showing that Decedent Petti had a life insurance policy at the time of his death, or that a beneficiary received payment on the same attendant with his death. However, Defendant Riverview contends that to the extent Decedent Petti made premium payments on his policy, that information is relevant and admissible on the issue of his maintenance. Thus, to avoid reference to life insurance, Defendant Riverview suggests that any evidence of a premium payment be referred to not as a life insurance payment, but more generally, as an insurance payment. In the absence of any evidence as to the amount of any premium paid by Decedent Petti going to the calculation of his maintenance, Defendant Riverview's issue appears to be moot. Accordingly, Plaintiffs' motion to preclude evidence of Decedent Petti's life insurance policy at trial pursuant to the collateral source rule is hereby **GRANTED.**

Motion to Preclude Evidence of Plaintiffs' Decedents Credit Card Debt

In discovery, it came to light that at the time of their deaths, Plaintiffs' Decedents both carried outstanding credit card debt. By the present motion, Plaintiffs seek to preclude evidence of the same from admission at trial on the basis that it is not referenced by any expert witness and more prejudicial than probative. In response, Defendant Riverview, joined by Defendant

[5] Defendant Black filed a responsive brief to Plaintiffs' motions in limine which did not specifically address this motion, but to which was attached a proposed order seeking the collective denial of Plaintiffs' motions in limine.

Black, contends that such evidence is relevant to Plaintiffs' Decedents' future economic losses and future maintenance costs, in that it demonstrates their fiscal unreliability.

The purposes of a damages award are to give compensation for harm done; determine rights; punish and deter wrongdoing; and to vindicate parties. Thousand Dollar Club v. Krispinsky, 47 Pa. D.&C. 4th 393 (Pa. Com. Pl. Mercer Co. 2000); Restatement 2d. Torts § 901 (1979).

> [T]he measure of the damages awarded in a survival action includes decedent's pain and suffering, loss of gross earning power from the date of the injury until death, and the loss of earning power, less personal maintenance expenses, from the time of death through the estimated life span.

2 SUMM.PA.JUR.2D TORTS § 25:21.

Personal maintenance expenses, as defined by the Courts, include costs for food, clothing, shelter, medical needs and some recreation. McClinton v. White, 444 A.2d 85, 88 (Pa. 1982). While it stands to reason that if Plaintiffs' Decedents had not passed away, they would remain liable for their outstanding debts, Defendants have failed to cite, and the Court has not found, one scintilla of authority for the inclusion of a decedent's outstanding debts in the calculation of maintenance costs. Accordingly, it rejects Defendants' contention that evidence of the debts of Plaintiffs' Decedents at the time of their deaths are relevant to the calculation of damages relative to the survival actions. As such, Plaintiffs' motion in limine to preclude the introduction of such evidence is hereby **GRANTED.**

Motion to Preclude Reference to Plaintiffs' Decedents History of Bankruptcy

By the present motion, Plaintiffs seek to preclude the presentation at trial of evidence that Decedent Petti filed for Chapter 7 bankruptcy in 2005, and Decedent Warren filed for bankruptcy in 1992, as irrelevant pursuant to PA.R.E. 401 and 402, or alternatively, more

prejudicial than probative under PA.R.E. 403. In response to the motion, Defendants Riverview and Black argue that the bankruptcy history of Plaintiffs' Decedents is relevant to damages, and specifically, the calculation of their maintenance costs.[6] In support of their position, Objecting Defendants contend that the evidence of their bankruptcy goes directly to the issue of Decedents' earning capacity, had they lived. Specifically, Defendant Riverview argues that their bankruptcy histories: would have affected the ability of Plaintiffs' Decedents to secure future employment; go to support the fact that their maintenance expenses exceeded their income; serves as impeachment evidence to counter Plaintiffs' expert calculations estimating the earnings losses of Plaintiffs' Decedents in excess of One Million Dollars ($1,000,000.00); and as to Decedent Warren, it counters Plaintiffs' claim that she provided financial support to her two adult children. In further support of that contention, Defendant Riverview points to the fact that both estates were insolvent when Plaintiffs' Decedents passed. Additionally, Defendant Riverview notes issues with Plaintiffs' Decedents work history and income reporting as relevant to damages. However, the relevance of their bankruptcy histories is its own issue, independent of their work histories or income reporting.

While both positive and negative information relative to ones' financial status may be relevant to damages, the Court is unpersuaded that evidence of the bankruptcy histories of Plaintiffs' Decedents should be admitted at trial. As to Decedent Warren, we note that her bankruptcy occurred in 1992, and per federal law, credit reporting agencies can only retain bankruptcy information for a period of ten years. 15 U.S.C. § 1681c. Thus, to the extent that Defendant Riverview contends that it would or could have affected her employability, we find

[6] In a survival action, damages include pain and suffering and loss of future earnings less maintenance costs. Incollingo v. Ewing, 282 A.2d 206 (Pa. 1971).

that contention not only speculative, but untimely. As to Decedent Petti, his bankruptcy occurred in 2006, and while he was not employed at the time of the accident, there is no evidence of record to suggest that he either lost his employment or was unable to find subsequent employment as a result of his bankruptcy. Nor is the Court inclined to permit evidence of their bankruptcy histories to bolster Defendants' argument that Plaintiffs' Decedents' estates were insolvent at the time of their deaths. Foremost, the Court finds that while their earnings and expenses are relevant to the calculation of damages, the solvency or insolvency of their estates, while perhaps apparent from the "numbers," is not, in and of itself, necessary to the issues of Plaintiffs' damages and maintenance costs. To the extent that Defendants seek to introduce evidence at trial that goes beyond Decedents' assets, liabilities, earning and work history at the time of their deaths, the Court finds such evidence irrelevant to the trial of this matter. Even if the Court were to rule otherwise as to the relevance of such evidence, it would further find it more prejudicial than probative; a mere attempt to cast aspersions on Decedents and unfairly prejudice the minds of the jury, and therefore excluded under PA.R.E. 403.

Decedent Warren: Motion to Preclude Evidence of BAC at Time of the Accident

By their next motion, Plaintiffs seek to preclude the presentation of evidence at trial as to Decedent Warren's blood alcohol content (BAC) at the time of the accident. In post mortem testing, Decedent Warren was found to have a BAC of .07%. However, Plaintiffs argue that such evidence is wholly irrelevant to this matter and would be unduly prejudicial if submitted to the jury. In support of that position, Plaintiffs note that Decedent Warren was not driving at the time of the accident, but was merely a passenger on Decedent Petti's motorcycle. Accordingly, Plaintiffs seek to preclude the introduction of such evidence under PA.R.E. 401-403.

To date, neither Defendant has filed a response to this motion. Nor was it identified in a prior telephone conference between the Court and counsel as a motion to which they have no opposition. Accordingly, the Court will evaluate the motion solely its merits and Plaintiffs' brief in support thereof. By their brief, Plaintiffs contend that such evidence should be excluded as irrelevant under PA.R.E. 401-402, or alternatively, more prejudicial than probative under PA.R.E. 403. Upon review and consideration, we agree. In the absence of any evidence that Decedent Warren was driving or otherwise contributed to the accident in any manner, the motion is hereby **GRANTED** and counsel shall be precluded from introducing any evidence at trial as to Decedent Warren's BAC at the time of the accident.

Decedent Warren: Motion to Preclude Evidence of Her Alleged Drinking Problem While Employed at Michael's On East

Per the present motion, Plaintiffs seek to preclude evidence relative to Decedent Barbara Warren having a drinking problem while working as a waitress at Michael's On East near Sarasota, Florida. As per the report of defense expert Gary Kutay, and as corroborated by documentation attached thereto, Decedent Warren worked as a waitress at Michaels On East, a fine dining establishment, from 1998 until June 30, 2005. Per a "Personnel Action Form/Separation," dated July 21, 2005, the reason for Decedent Warren's termination as of June 30, 2005 is stated as follows:

> Barbra [sic] had some problems with drinking and had been told numerous times to clean up her act . . . she didn't do . . . so the company felt it was time for her to move on.

Plaintiffs' Motion, Exhibit A.

Mr. Kutay references this fact several times in his expert report, and he even notes that drinking may have affected her future employment prospects and her life expectancy.

In the first instance, Plaintiffs seek to preclude the documents from Michael's On East set forth as Exhibit A to the motion as impermissible hearsay. Further, Plaintiffs seek to preclude any evidence in this regard as irrelevant, or alternatively, more prejudicial than probative under PA.R.E. 401-403. As to relevance, Plaintiffs note that evidence of past substance use is only admissible when it establishes a long history, and when it is relevant to the subject's life expectancy, earning capacity or tolerance level. See Kraus v. Taylor, 710 A.2d 1142 (Pa. Super. 1998).

In opposition to the motion,[7] Defendant Riverview, joined by Defendant Black, argue that evidence of Decedent Warren's firing relative to a substance abuse problem is relevant to her ability to obtain and maintain employment, which is pertinent to the assessment of damages. Defendant Riverview further contends that Warren's drinking history is also a proper subject for the impeachment of Plaintiffs' experts, who do not address this information in their reports.

Plaintiffs' formulation of the law with regard to the admissibility of substance use does not come directly from any one authority, but appears to be Plaintiffs' own synthesis of the case law. In Kraus, our Superior Court, passing on the admissibility evidence as to appellant's chronic use of drugs and alcohol at trial, found such evidence relevant and admissible as to appellant's life expectancy and damages. Id. at 1144. Notwithstanding the highly prejudicial nature of the evidence, the Court found that its' probative value outweighed the prejudice and ruled that it had been properly admitted by the trial court. Id.[8] While the appellant in Kraus had a longstanding history of substance abuse, the Court made no pronouncement in that case

[7] Defendant Riverview only opposes the motion in the event that the Court denies Riverview's motion to preclude Plaintiffs from seeking a claim for future loss of earning capacity as to Defendant Warren.

[8] In another case cited by Plaintiffs, the Superior Court once again affirmed the trial court's admission of a plaintiff's history of drug and alcohol abuse as relevant to his life expectancy, finding it more prejudicial than probative. Pulliam v. Fannie, 850 A.2d 636, 640 (Pa. Super. 2004).

requiring that a long history of drug or alcohol abuse is a necessary predicate to the admissibility of evidence in that regard. Nevertheless, a survey of the case law and consideration of the competing interests implicate the Rules of Evidence governing relevancy and prejudice, compel the Court to agree with Plaintiffs' formulation of the law. Certainly, in order to be relevant, evidence of substance abuse must relate to some issue in the case, such as life expectancy, employability or tolerance; and given the undeniably prejudicial effect of such evidence, the Court, guided by the aforementioned Superior Court cases, is disinclined to allow such evidence unless it demonstrates a pattern of substance abuse.

In this case, the evidence subject to the present motion is a reference in an employment record noting that Decedent Warren "had some problems with drinking and had been told numerous times to clean up her act." What troubles the Court is that while the evidence suggests that Decedent Warren's problem was ongoing, it leaves the questions of the extent and duration of her alleged problem completely open and unanswered. As such, neither the Court, nor the jury can possibly ascertain the meaning of this evidence without engaging in pure speculation. Further, the evidence does not suggest that Decedent Warren's drinking had any other effect on her employment or employability. Accordingly, the Court finds the evidence too speculative and too prejudicial to be admissible, and therefore **GRANTS** Plaintiffs' motion to preclude it. However, because of its' relevance with regard to her employment history and damages, counsel may make reference to Decedent Warren's firing from Michael's On East at trial in language to be agreed upon by the parties and the Court prior thereto.

Decedent Petti: Motion to Preclude Reference to Firing After Positive Drug Test

By their next motion, Plaintiffs seek to preclude evidence that just prior to his death, Decedent Petti was fired from his employment with Goodyear Auto after taking a drug test

yielding a positive result for marijuana as irrelevant[9] pursuant to PA.R.E. 401 and 402, and alternatively, more prejudicial than probative per PA.R.E. 403. Whereas, Defendant Riverview, joined by Defendant Black, opposes Plaintiffs' motion on the basis that such evidence is directly relevant to Petti's ability to obtain and maintain employment, and Plaintiffs' claims for damages.

In support of their argument, Plaintiffs point once again to the case law tending to show that evidence of substance abuse is only properly admitted where it demonstrates a long history of abuse. See Kraus v. Taylor, 710 A.2d 1142 (Pa. Super. 1998); Pulliam v. Fannie, 850 A.2d 636, 640 (Pa. Super. 2004). The Court's analysis of the case law appears *supra*. Pursuant to that analysis, the Court finds that the admission of evidence of one failed drug test, would be more prejudicial than probative. In fact, it is the only evidence of Decedent Petti's drug use, and while it resulted on Decedent losing his job, it is insufficient to show that Decedent in fact had a history of drug use from which a jury could infer a deleterious effect on his life expectancy of work life expectancy. Accordingly, Plaintiffs' Motion to Preclude Reference to Patrick Petti Failing a Workplace Drug Test is hereby **GRANTED.** However, because of its' relevance with regard to his employment history and damages, counsel may make reference to Decedent Petti's firing from Goodyear at trial, in language to be agreed upon by the parties and the Court prior thereto.

Decedent Warren: Motion to Preclude Evidence of Prior Arrest

During a telephone conference between counsel and the Court on March 2, 2012, Defendant Riverview withdrew their opposition to this motion, and by his response to Plaintiffs' motions, Defendant Black raised no objection to the same. Accordingly, by agreement of the

[9] As to the irrelevancy of the evidence, Plaintiffs first note that while Defense Expert Olson mentions it in his report, neither he, nor any other expert relies on the evidence in support of their opinions or conclusions. Plaintiffs' Motion at 2; Memorandum of Law at 2.

parties, they are precluded from making any reference at trial to Decedent Warren's arrest in the late 1980's or early 1990's in Daytona Beach, Florida.[10]

Decedent Warren: Motion to Preclude Defense Expert Kutay from Opining that Alcohol Consumption May Be a "Problem" as to Life Expectancy

Plaintiffs' next motion is one to preclude the admission of a portion of the expert report of Defendant Riverview's vocationalist, Gary Kutay. As noted *supra*, Mr. Kutay made reference in his report as to Decedent Warren her firing from Michael's On East in 2005 as a result of an alleged drinking problem. On the basis of that information, Mr. Kutay stated in Section V of his report, relating to life expectancy, that "Mrs. Warren's documented alcohol consumption may be a problem for [a projected] life expectancy [of an additional 33.9 years]." Plaintiffs' Motion, Exhibit B at 8.

As the basis for the motion, Plaintiffs argue that the challenged statement is purely speculative and completely lacking in evidentiary support, and should therefore be precluded from reaching the jury. Pursuant to PA.R.E. 703,

> [t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

PA.R.E. 703.

Here, Plaintiffs argue that because the evidence of record fails to establish that Decedent Warren engaged in a longstanding pattern or problem drinking, it is simply insufficient to support Kutay's challenged conclusion. Moreover, because he is a vocationalist, Plaintiffs argue that he

[10] Per their written response to the motion, Defendant Riverview seeks to reserve the right to renew its' objection at a later time. While the Court will not foreclose the parties from raising objections at trial on issues not already determined by the Court on the merits, the Court notes that it finds evidence of Decedent Warren's one time arrest, without more, properly excludable as irrelevant under PA.R.E. 401 and 402.

is not properly qualified to draw conclusions as to Plaintiffs' life expectancy. Whereas, Defendant Black, noting the effect of a drinking problem on the ability to obtain and retain employment need not be proven by expert testimony, argues that the evidence is admissible under PA.R.E. 701, which permits lay opinion testimony. Defendant Black further asserts the relevance of the evidence as going to the issue of damages. Defendant Riverview develops this argument by contending that as evidenced by the record in this case, Decedent Warren's drinking affected her ability to maintain and obtain employment, thereby directly affecting her maintenance costs.

Upon review of the report, which does not include a copy of Mr. Kutay's curriculum vitae, the Court cannot properly ascertain Kutay's ability to opine as to Decedent Warren's life expectancy. However, upon consideration of the opinion itself and the evidence upon which it is based, which was excluded pursuant to an earlier motion, the Court concludes that the challenged portion of Mr. Kutay's opinion must be precluded as impermissibly speculative and lacking in evidentiary support. As stated *supra*, the evidence relied upon by Kutay in formulating his opinion demonstrates only that Decedent Warren lost one job in 2005 as a result of a "drinking problem."[11] There is absolutely no evidence as to the nature and extent of the problem, and no evidence that it continued beyond 2005. As such, the Court deems such evidence insufficient to support Kutay's opinion that Decedent Warren's life expectancy may have been impacted by drinking. Accordingly, Plaintiffs' motion to preclude Mr. Kutay from testifying that Decedent Warren's alcohol consumption may be a problem in terms of her projected life expectancy is hereby **GRANTED.**

[11] As noted *supra*, the Court found that because evidence of Decedent Warren's alleged drinking problem while employed at Michael's On East does not establish a long history bearing on her life expectancy or earning capacity, it is precluded from admission at trial. See Kraus v. Taylor, 710 A.2d 1142 (Pa. Super. 1998).

Defendant Black: Motion to Preclude Reference to Him Being Sober for Any Amount of Time Since the Accident

In the course of his deposition held April 29, 2011, Defendant Black was questioned with regard to his alcohol consumption habits. In response, he stated that he had been a beer drinker, but at the time of the deposition, had been sober for three years. Plaintiffs' Motion, Exhibit A, Portion of Defendant Black Deposition at 199:18-20. By the present motion, Plaintiffs seek to preclude this testimony from reaching the jury on the basis that it is irrelevant and therefore inadmissible under PA.R.E. 401-402, or alternatively more prejudicial than probative and therefore precluded under PA.R.E. 403. Defendant Riverview initially opposed this motion, but at the telephone conference between the Court and counsel on March 2, 2012, withdrew its' objection thereto. However, the motion is still opposed by Defendant Black.

In opposition to the motion, Defendant Black asserts that such evidence is relevant to the issue of punitive damages. Specifically, because one of the stated aims of punitive damages awards is to deter future conduct, Defendant Black, citing to no legal authority, posits that evidence showing a change in his conduct is therefore relevant.

Punitive damages are damages in addition to compensatory or nominal damages, awarded to punish a tortfeasor for his conduct, and to deter such future conduct. Snead v. Society for the Prevention of Cruelty to Animals of Pennsylvania, 929 A.2d 1169, 1184 (Pa. Super. 2008). Pennsylvania follows the Restatement (Second) of Torts §908(2) governing punitive damages which provides that:

> Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others . . .

Restatement (Second) of Torts § 908(2) (1968). See also Samuel Feld, et al. v. John W. Merriam, et al., 485 A.2d 742,747 (Pa. 1984) *citing* Joseph Chambers v. Charles Montgomery, 192 A.2d 355, 358 (Pa.1963).

In order to state a claim for punitive damages, a plaintiff must prove that the defendant engaged in conduct that was "outrageous," and done with a bad motive, or with "reckless indifference" to the safety of others. Hutchinson ex rel. Hutchinson v. Luddy, 870 A.2d 766, 770 (Pa. 2005). A tortfeasor acts recklessly if he acts in conscious disregard of the potential for harm arising from his conduct, where the risk of harm is so great as to rise above that associated with simple negligence. Junk v. East End Fire Dept., 396 A.2d 1269, 1273 (Pa. Super. 1978); See also Krivijanski v. Union Railroad Co., 515 A.2d 933, 937 (Pa. Super. 1986).

At the outset, we note that the subject matter of the present motion is the uncorroborated, self-serving testimony of a defendant in the present case, who is currently serving a prison sentence on criminal charges arising from these circumstances. However, even notwithstanding the circumstances surrounding the challenged deposition testimony, the Court finds Defendant Black's argument that such testimony should be deemed admissible to counter Plaintiffs' punitive damages claim misguided at best. Defendant Black is absolutely correct that one of the stated purposes of punitive damages awards is to curb future conduct, by both the offender, and the community at large. However, his claim that evidence of his current conduct should be admissible to rebut Plaintiffs' punitive damages claim appears to be unprecedented, wholly unsupported by the law, and in contravention to the aims of punitive damages. See generally G.J.D. v. Johnson, 669 A.2d 378 (Pa. Super. 1995) *aff'd*. 713 A.2d 1127 (Pa. 1998) (Noting that "the deterrent function of a punitive damage award is not affected by the death of [a] tortfeasor," because "[t]he specter of the penalty imposed is intended to deter others from engaging in like

conduct, thereby serving public as well as a private interest.") In consideration of the stated aims of punitive damages claims, and their application in G.J.D. v. Johnson, the Court finds that if Plaintiffs can prove that Defendant Black's conduct rose to the level of conscious disregard for the well-being of others, then an award of punitive damages shall be appropriate to punish Defendant Black and to deter future conduct, whether his own or others', without consideration for his alleged subsequent conduct. In light of the foregoing, Plaintiffs' motion to preclude reference to Defendant Black being sober for any period of time subsequent to the accident is hereby **GRANTED.**

Motion in Limine to Preclude Certain Testimony of Witness Krystal Americus

Fact witness Krystal Americus, who was working as a bartender at Defendant Riverview's Sand Trap Pub on the night of the accident, submitted to a deposition on March 8, 2011. During that deposition, Ms. Americus testified that she had no specific recollection of Defendant Black being in the bar on the night in question, and that she did not recall serving him. Plaintiffs' Motion, Exhibit A, Excerpt of Kristal Americus' Deposition at 63:2-9. Nor did she recall seeing anyone in the bar that night that appeared to her to be visibly intoxicated. Id. at 62:20-63:1. On the basis of this testimony, Plaintiffs seek to preclude Ms. Americus from testifying as to whether or not Defendant Black appeared visibly intoxicated on the night in question.

In response, Defendant Riverview argues that whatever Ms. Americus' recollection and testimony in this regard, the credibility and weight to be accorded to her testimony is a matter for the jury, and to preclude her from testifying in accordance with her recollection would be

improper. Upon review and consideration, the Court is of the opinion that a grant of Plaintiffs' motion would not preclude Ms. Americus from testifying to what she did or observed on the night in question, it would merely preclude her from speculating as to that which she did not observe. Certainly, if she has no recollection of Defendant Black on the night in question, she can testify to that fact, and if she has no recollection of observing anyone appearing visibly intoxicated on that night, she can testify to that as well. However, to allow her to testify to Mr. Black's condition on the night in question, when she has no independent recollection of him, would be speculative and is properly precluded. Accordingly, Plaintiffs' motion is hereby **GRANTED** and Ms. Americus is precluded from offering speculative testimony at trial as to whether or not Defendant Black was visibly intoxicated on the night in question.

Motion to Preclude Reference at Trial to the Fact that Decedents Were Not Wearing Motorcycle Helmets at the Time of the Accident

Next, Plaintiffs seek to preclude any reference at trial to any evidence suggesting that Plaintiffs' Decedents were not wearing motorcycle helmets at the time of the crash.[12] In support of the motion, Plaintiffs argue that neither Petti nor Warren was required, under Pennsylvania

[12] Discovery has been inconclusive, and as such Plaintiffs' motion seeks to preclude the introduction of any evidence in support of the conclusion that Plaintiffs' Decedents were not wearing helmets. There is a reference in a report prepared by Robert J. Pammer of Crawford & Company, a portion of which is attached to Plaintiffs' motion, which states in part that "[a]ccording to the insured [Defendant Black], both riders of the motorcycle were not wearing helmets." Plaintiffs' Motion, Exhibit A, Excerpt of Pammer Report at 3. At argument, there was also reference to a police report which noted no evidence that the Decedents were wearing helmets. However, the alleged report was not attached to either the motion or any response thereto.

law, to wear a helmet,[13] Petti being exempt from the requirement under 75 PA.CONS.STAT.ANN. § 3525(d)(2),[14] and Warren being exempt under 75 PA.CONS.STAT.ANN. § 3525(d)(4). As such, Plaintiffs contend that any evidence suggesting that Decedents may not have been wearing helmets at the time of the crash is irrelevant under PA.R.E. 401 and 402, or alternatively, more prejudicial than probative under PA.R.E. 403.

In response, Defendant Riverview argues that it would be premature for the Court to grant Plaintiffs' motion at this juncture, because it is too early to ascertain whether or not evidence suggesting that Plaintiffs' Decedents were not wearing helmets at the time of the crash is in fact relevant and admissible. In furtherance of that position, Defendant Riverview contends that the relevance of such evidence turns on the Court's ruling on Defendant Riverview's motion to preclude Plaintiffs from going forward with their claims for the Decedents' conscious pain and

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[13] The law provides in pertinent part that:

> Except as provided in subsection (d), no person shall operate or ride upon a motorcycle or a motor-driven cycle (other than a motorized pedalcycle) unless he is wearing protective headgear which complies with standards established by the department.

75 PA.CONS.STAT.ANN. § 3525(a).

Subsection (d) provides:

> The provisions of subsection (a) shall not apply to the following:
> (1) The operator or any occupant of a three-wheeled motorcycle equipped with an enclosed cab.
> (2) A person 21 years of age or older who has been licensed to operate a motorcycle for not less than two full calendar years.
> (3) A person 21 years of age or older who has completed a motorcycle rider safety course approved by the department or the Motorcycle Safety Foundation.
> (4) The passenger of a person exempt under this subsection if the passenger is 21 years of age or older.

75 PA.CONS.STAT.ANN. § 3525(d).

[14] Discovery revealed that Petti had been licensed to drive a motorcycle in the Commonwealth of Pennsylvania as early as 1997.

suffering. That motion is based on Defendant Riverview's assertion that Plaintiffs have no reliable evidence to show that either Decedent ever suffered any period of conscious pain and suffering. The Court's consideration and disposition of that motion appears *infra*.

Assuming for present purposes that the Court finds the evidence of record sufficient to allow the claims for the conscious pain and suffering of both Decedents to reach the jury, Defendant Riverview urges that evidence of whether or not Decedents were wearing headgear at the time of the accident is directly relevant to their abilities to perceive pain prior to their deaths. Accordingly, Defendant Riverview seeks the denial of Plaintiffs' motion.

Upon consideration, the Court finds that any evidence tending to suggest that Plaintiffs' Decedents were not wearing helmets at the time of the crash is irrelevant and therefore excludable evidence under PA.R.E. 401 and 402. Not only is the evidence inconclusive in that regard, but Plaintiffs' Decedents were under no legal duty to wear helmets. Further, the Court finds that whether or not they were wearing helmets is irrelevant to whether or not they experienced conscious pain and suffering. Rather, the relevant facts are the nature of the injuries they sustained, inclusive of the head injuries noted by Defendant Riverview, and any evidence tending to suggest that they were conscious for any time after the accident and did, or were capable of experiencing pain and suffering. Those questions, which are for a jury to decide, remain unchanged irrespective of any proof tending to show that they were or were not wearing helmets at the time of the accident. Accordingly, Plaintiff's motion to preclude reference at trial to whether or not Plaintiffs' Decedents were wearing helmets at the time of the accident is hereby **GRANTED.**

Motion to Preclude Detective Beebe from Opining as to Defendant Black's Fitness to Drive on the Night of the Accident

Plaintiffs' next motion seeks to preclude Detective Christopher Beebe, who processed Defendant Black at the Easton DUI Center on the night of the accident, from testifying as to Defendant Black's fitness to drive a motor vehicle on the night of the accident. Detective Beebe was deposed on July 7, 2011. In response to questioning by Defendant Riverview's attorney, Mr. Balch, Detective Beebe testified in pertinent part as follows:

> Q: Okay. Down below the section entitled General Opinions, in the first category is "Effects of Alcohol." What is the purpose of this section in your report?
>
> A: It's so we can actually note our general opinion, what we think his level of impairment/intoxication are.
>
> Q: Okay. As so is it fair for me to say that this is where you, having observed Mr. Black, were making the call on whether or not alcohol affected him?
>
> A: Yes, to an extent.
>
> MARCIANO: Note my objection . . .
>
> Q: And you marked here under "Effects of Alcohol," unable to determine?
>
> A: Yes.
>
> Q: Okay. And what did you mean by that?
>
> A: Well, I think you need to look at the one below where it says ability to drive in a safe manner, and take the two into consideration together. I'm unable to determine because there's insufficient information. Like I said, the standard—the standard bearer of what really helps us form our opinion is, you know, what we see there in the SFST's. I never do the Horizontal Gaze Nystagmus. I always do the one-legged stand, the walk and turn, because that gives us a chance to see their ability to, to operate their motor functions, their – you know, things like that. That is the standard where I could actually sit there and say okay, yeah, I would believe that this guy is definitely impaired, significantly impaired not to be able to

do operate a motor vehicle. And if you look below I note that, I said unable to determine based solely on strong smell and slight swaying.

Q: And this category it says: Ability to drive in safe manner, you put insufficient information?

A: Yes, that is correct.

Q: Okay. So based on your observations of Mr. Black when he was at the Easton DUI Center and with your experience, you didn't have enough to make a call whether Mr. Black was fit or unfit to drive; correct?

A: No, not based upon the information . . . You know, basically with what here I wouldn't—I wouldn't be able to formulate based solely upon – you know, you wanted an educated guess, or you know, an opinion based on training and experience. Well, we have to base this upon training and experience any, you know, it would have been – I couldn't do it. I couldn't sit here and say yes. Is he – is he yes or is he no? It's insufficient information . . . We've had people that walked in there that have fallen over, they've urinated themselves and they couldn't walk, couldn't stand up, fell over on the desk. I mean something like that, then yes. There's gross actions that I am observing outside of the SFST's, even if they've refused it. then I could sit there and say, well, based upon the things that I'd seen outside the SFST's and yes, I can formulate an educated, you know, based upon my training, experience this individual is, you know, too impaired to operate a vehicle in a safe manner . . . In this case there wasn't enough indicators outside the SFST's where I felt comfortable doing that.

Q: Mr. Black didn't give you any of those signs that he was unfit to drive a vehicle?

A: Other than the slight swaying and the strong smell of alcohol, that was – that was all that was present there at the time.

Defendant Riverview's Response to Plaintiffs' Motion, Exhibit A, 59:8-63:24.

In seeking to preclude Detective Beebe from testifying as to whether or not Defendant Black was fit to drive a motor vehicle on the night of the accident, Plaintiffs assert that such a statement would be impermissibly speculative, given Detective Beebe's deposition testimony that he was without sufficient information to make that determination at the time of Defendant Black's

processing at the DUI Center. Plaintiffs further contend that Detective Beebe's testimony should be excluded under PA.R.E. 701, which permits a lay witness to offer opinion testimony, but only when it is "rationally based on the perception of the witness, helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."[15] PA.R.E. 701. In this regard, Plaintiffs assert the speculative nature of Detective Beebe's testimony as to Defendant Black's fitness to drive, and contend that therefore, it is not rationally based on his perceptions or helpful to a clear understanding or the determination of a fact in issue and must therefore be precluded.

Finally, Plaintiffs seek to exclude the testimony on the basis that it impermissibly goes to an ultimate issue of fact in the case. Plaintiffs concede that under PA.R.E. 704, expert and lay opinion testimony is not automatically excludable when it embraces an ultimate issue of fact. However, they also note that the Court may preclude such testimony where its probative nature is outweighed by any prejudice or confusion that might result from its admission. Plaintiffs' Brief at 4, *citing* McManamon v. Washko, 906 A.2d 1259 (Pa. Super. 2006).

Arguing contra the motion, Defendant Riverview, joined by Defendant Black, asserts that Detective Beebe's testimony is both reliable and admissible, and that therefore, Plaintiffs' motion should be denied. Defendants base their argument on the assertion that no witness was in a better position to offer testimony as to Black's fitness to drive on the night of the accident. In support thereof, Defendants note that Detective Beebe is a trained member of the Bethlehem

[15] PA.R.E. 702 addresses expert testimony.

Police Department with extensive training and experience relative to determining the effects of alcohol. Defendant Riverview's Response to Plaintiffs' Motion, Exhibit A, 12-14, 16, 18-19. That experience, they assert, lends greater reliability to Detective Beebe's testimony, as opposed that of the arresting officer, with only three years on the police force, or the testimony of mere lay witnesses present at the scene of the accident. Additionally, Defendant Riverview notes that Defendant Black's blood draw, revealing a BAC of .16% was taken during the time that Detective Beebe was with him, and as such, his observations of Defendant Black during that time are relevant to the issue of visible intoxication. Finally, Defendant Riverview notes that Detective Beebe's entire encounter with Defendant Black was videotaped, and upon presentation of that videotape to the jury, they will be able to gauge for themselves Detective Beebe's findings in light of what he heard and saw.

Upon consideration of the parties' arguments with respect to the challenged testimony, the Court finds that any clear proclamation by Detective Beebe as to Defendant Black's fitness to drive would run afoul of the documentation produced by Beebe in connection with Black's processing at the DUI Center, and his prior deposition testimony. However, to the extent that Plaintiffs seek to preclude Detective Beebe from testifying as to his inability to formulate an opinion on that issue, consistent with his prior testimony and the documentation he produced in the regular course of his duties at the DUI Center, Plaintiffs' motion must be **DENIED.**

Detective Beebe can certainly testify to what he observed, what he did and what he was able or unable to ascertain as a result. Such evidence is certainly relevant to the issues in this case and given his inability to formulate an opinion as to Defendant Beebe's fitness to drive,

there is certainly no prejudice that can result to either party as a result of the Court admitting the testimony. Finally, to the extent that Plaintiffs wish to probe Detective Beebe's testimony, they may avail themselves of the opportunity to cross examine the witness.

Motion to Preclude the Witness Kristy Parks from Testifying as to Defendant Black Telling Her that He Was Reaching for His Cell Phone Just Prior to the Accident

One of the many witnesses deposed during discovery and scheduled to appear at trial is Kristy Parks, who at the time of the accident, was Defendant Black's recently estranged wife. Ms. Parks submitted to deposition on July 14, 2011. During the course of the questioning conducted by Defendant Riverview's counsel, Mr. Balch, the following exchange occurred:

> Q: Did Mr. Black ever say to you that he was using or reaching or looking for a cell phone before the accident?
>
> MR. MARCIANO: Note my objection. You can answer the question.
>
> A: He might have. I think he did. I'm not sure. I'm not sure . . . I'm pretty sure he talked about a cell phone . . .
>
> Q: . . . So you have some thought that he mentioned a cell phone. Can you tell me anything specifically he said about the cell phone?
>
> MR. MARCIANO: Note my objection. You can answer the question.
>
> A: No. He might have said he was reaching for his phone. He might have said that his phone was ringing. He might have – I don't know.
>
> Q: Do you have a specific memory of him mentioning cell phone involving the accident, whether he said we was looking at it or talking on it?
>
> MR. MARCIANO: Objection. You can answer.
>
> A: He mentioned something about the cell phone, but I can't tell you at this moment in time what the conversation was . . .

The subject of the present motion is somewhat muddled. Per a proposed order attached to the motion, Plaintiffs appear to seek preclusion of any testimony by Ms. Parks to the effect that Defendant Black told her that he was reaching for his cell phone at the time of the accident. The same is reflected in the first page of the motion itself. However, at Paragraph Five (5) of the motion, Plaintiffs posit that "Ms. Parks should be precluded from testifying at trial whether Defendant Black appeared visibly intoxicated on the night in question, as such testimony would be speculative, and thus would not assist the trier of fact." Plaintiffs' Motion, ¶5. The accompanying brief repeats the language at Paragraph Five of the motion, and also seeks the entry of the proposed order. While the focus of the motion is muddled, the legal basis is the preclusion of speculative testimony.

In support of the motion, Plaintiffs cite to PA.R.E. 602, providing that a witness is only competent to testify to that which he or she has firsthand knowledge, and argues that because of the uncertainty of her testimony as to Defendant Black's reference to his cell phone on the night of the accident, Ms. Parks must be precluded from testifying on the subject. Plaintiffs also cite to PA.R.E. 701 governing opinion testimony by lay witnesses, which deems as admissible only those lay opinions that are "rationally based on the perception of the witness" and "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Here, because, Plaintiffs assert, Ms. Parks' memory of the night in question is unclear, she should also be precluded from testifying on the issue of Defendant Black's visible intoxication on the night in question under PA.R.E. 701.

By a brief contra the motion, Defendant Riverview notes that pursuant to the comment to PA.R.E. 602, which, as noted *supra*, precludes a witness from testifying to a fact absent personal knowledge,

> A witness having firsthand knowledge of a hearsay statement who testifies to the making of the statement satisfies Pa.R.E. 602; the witness may not, however, testify to the truth of the statement if the witness has no personal knowledge of the truth of the statement. Whether the hearsay statement is admissible is governed by Pa.R.E. 801 through 805. Generally speaking, the firsthand knowledge requirement of Rule 602 is applicable to the declarant of a hearsay statement. *See, e.g., Commonwealth v. Pronkoskie*, *supra* and *Carney v. Pennsylvania R.R. Co*., *supra*. However, in the case of admissions of a party opponent, covered by Pa.R.E. 803(25), personal knowledge is not required. *See Salvitti v. Throppe*, 343 Pa. 642, 23 A.2d 445 (1942); *Carswell v. SEPTA*, 259 Pa. Super. 167, 393 A.2d 770 (1978).

PA.R.E. 602.

Accordingly, Defendant Riverview argues that Ms. Parks should be able to testify as to what Defendant Black told her regarding his cell phone use just prior to the accident because such testimony is firsthand knowledge of a hearsay statement, otherwise admissible under the hearsay exceptions relevant to party admissions and state of mind, at PA.R.E. 803(25) and PA.R.E. 803(3) respectively.

In resolving this motion, the Court notes that Ms. Parks' deposition is devoid of any reference to whether or not Defendant Black appeared visibly intoxicated on the evening of the accident. However, the failure to ask that question at deposition does not preclude counsel from asking it at trial. Accordingly, the Court finds Plaintiffs' motion to preclude Ms. Parks from testifying as to whether or not Defendant Black appeared visibly intoxicated on the night of the accident must be **DENIED** as premature. Likewise, to the extent that Plaintiffs seek to preclude

Ms. Parks to testifying to what she recalls Defendant Black telling her with regard to his cell phone use purely on the basis of the uncertainty in her deposition response, we note that what she may have been able to recall at deposition is no guarantee of what she may be able to recall at trial. As such, Plaintiffs' motion is **DENIED** insofar as it seeks to preclude this testimony. This ruling is made without prejudice to Plaintiffs' right to raise any relevant objections to Ms. Parks' testimony at the time of trial, or to use her deposition testimony to impeach her, pursuant to PA.R.CIV.P. 4020.

Motion to Preclude Reference of Defendant Black's PBT and Results

Subsequent to the accident, Defendant Black submitted to a PBT[16] administered by the arresting officer at the scene. That test resulted in a reading of .09%. By the present motion, Plaintiffs seek to preclude reference both to the fact that Defendant Black submitted to the PBT and the results thereof.[17] As the basis of the motion, Plaintiff cites to case law for the proposition that given the unreliability of PBT testing, the courts do not allow admission of their results at trial. Commw. v. Brigidi, 6 A.3d 995 (Pa. 2010). Rather, Plaintiffs argue, their purpose is limited to probable cause for arrest. Id. On this basis, and also because they believe that the

[16] A PBT is otherwise known as a portable or a preliminary breath test. It measures a person's level of intoxication.

[17] Officer Arredondo, who arrested Defendant Black, testified to the PBT and the results in his deposition, taken March 8, 2011, and defense expert Dr. Ronald E. Gots referenced the same in his report.

admission of evidence demonstrating both a PBT of .09% and the BAC of .16%[18] would only serve to confuse the jury, Plaintiffs seek to preclude evidence of the PBT from trial.

Defendant Riverview, joined by Defendant Black, opposes the motion. Defendant Black argues that contrary to Plaintiffs' assertion as to the law, in fact there is no preclusion on the admissibility of a PBT result in a criminal proceeding provided calibration and accuracy can be proven, and further, there is absolutely no preclusion as to the admissibility of a PBT in a civil case such as this.[19] Alternatively, Defendant Riverview argues that if the Court determines that the PBT should be excluded from evidence, the BAC should likewise be precluded, given the absence of evidence in this case establishing the reliability of the BAC via proof of authentication and chain of custody.[20] See Commw. v. Dyarman, 33 A.3d 104, 107-108 (Pa. Super. 2011). Defendant Riverview concurs with Defendant Black as to the fact that the law only precludes the admission of PBTs in certain criminal cases, and further argues that contrary to Plaintiffs' assertion, no confusion would result from the admission of both the PBT and the BAC.

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[18] After his arrest at the scene of the accident, Defendant Black was taken to the Easton DUI Center for processing, at which time he submitted to a blood test, the results of which indicated a blood alcohol content of .16%.

[19] Pursuant to the Vehicle Code, "in any summary proceeding or criminal proceeding in which the defendant is charged with a violation of section 3802 (relating to driving after imbibing) or any other violation of this title arising out of the same action, the amount of alcohol or controlled substance in the defendant's blood, as shown by chemical testing of the person's breath, blood or urine, which tests were conducted by qualified persons using approved equipment, shall be admissible in evidence." 75 PA.CONS.STAT.ANN. § 1547(c).

However, it is well-settled that in fact, the courts do not admit evidence of PBT results to prove a violation of 75 PA.CONS.STAT.ANN. § 3802, pursuant to which a driver is subject to mandatory penalties on the basis of his or her blood alcohol level, because while PBT tests are sufficient to demonstrate a persons' consumption of alcohol, they are not considered reliable enough to prove the particular degree of intoxication required by the statute.

[20] The Court addresses this argument in the disposition of a separate motion by Defendant Riverview to prelude the admission of Defendant Black's BAC, appearing *infra*.

A review of the relevant case law reveals that evidence of blood alcohol content is admissible in cases where service to a visibly intoxicated person, visible intoxication, or reckless or careless driving is at issue, and there is other evidence of record as to the conduct of the person "which fairly suggests that he was intoxicated." Ackerman v. Delcomico, 486 A.2d 410, 414 (Pa. Super. 1984). See also Couts v. Ghion, 421 A.2d 1184 (Pa. Super. 1980) (Reversing and remanding dram shop action in part upon the finding that the trial court had erred in denying the admission of breath and blood test results, which along with other evidence, was "relevant circumstantial evidence bearing on the question of whether [defendant driver] was visibly intoxicated when . . . served at [defendant establishment]"); Cusatis v. Reichert, 406 A.2d 787 (Pa. Super. 1979) (While evidence of a defendant's legal intoxication, here by breathalyzer, is the only evidence in support of that finding, it shall not reach the jury because consumption of alcohol may not be the only reason for a positive test. However, where there is independent evidence of intoxication, breath test admissible to bolster that evidence).

> The theory behind allowing a blood alcohol level to be admitted into evidence in a civil case is that it is relevant circumstantial evidence relating to intoxication. However, blood alcohol level alone may not be admitted for the purpose of proving intoxication. There must be other evidence showing the actor's conduct which suggests intoxication. Only then, and if other safeguards are present, may a blood alcohol level be admitted. Custasis v. Reichert, *supra*, Couts v. Ghion, *supra* (test must be given within a reasonable time after accident); Schwarzbach v. Dunn, *supra* (test results, where test given three hours after accident, may not be extrapolated by expert who will testify as to probable blood alcohol level at time of accident).

Id. at 414.

In Ackerman, the Superior Court noted that "[t]he sole statutory provision concerning blood alcohol content is in 75 PA.CONS.STAT.ANN. §1547, relating to criminal prosecution for driving under the influence." Id. at 413. The statute provides in pertinent part that:

> Any person who drives, operates or is in actual physical control of the movement of a vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath, blood or urine for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a vehicle . . .

75 PA.CONS.STAT.ANN. § 1547(a).

Subsection (c) of the statute speaks to the admissibility of test results:

> In any summary proceeding or criminal proceeding in which the defendant is charged with a violation of section 3802 or any other violation of this title arising out of the same action, the amount of alcohol or controlled substance in the defendant's blood, as shown by chemical testing of the person's breath, blood or urine, which tests were conducted by qualified persons using approved equipment, shall be admissible in evidence.
>
> (1) Chemical tests of breath shall be performed on devices approved by the Department of Health using procedures prescribed jointly by regulations of the Departments of Health and Transportation. Devices shall have been calibrated and tested for accuracy within a period of time and in a manner specified by regulations of the Departments of Health and Transportation. For purposes of breath testing, a qualified person means a person who has fulfilled the training requirement in the use of the equipment in a training program approved by the Departments of Health and Transportation. A certificate or log showing that a device was calibrated and tested for accuracy and that the device was accurate shall be presumptive evidence of those facts in every proceeding in which a violation of this title is charged . . .

75 PA.CONS.STAT.ANN. § 1547(c).

Notably, the statute makes a separate provision for the administration of a PBT. It states:

> A police officer, having reasonable suspicion to believe a person is driving or in actual physical control of the movement of a motor vehicle while under the

> influence of alcohol, may require that person prior to arrest to submit to a preliminary breath test on a device approved by the Department of Health for this purpose. The sole purpose of this preliminary breath test is to assist the officer in determining whether or not the person should be placed under arrest. The preliminary breath test shall be in addition to any other requirements of this title. No person has any right to expect or demand a preliminary breath test. Refusal to submit to the test shall not be considered for purposes of subsections (b) and (e) (relating to suspensions for refusal of breath or blood test, and the admissibility of such refusal in criminal proceedings).

75 PA.CONS.STAT.ANN. § 1547(k).

In resolving this motion, the Court is guided by the Superior Court's discussion on the admissibility of blood alcohol content evidence in Ackerman. We note that therein, the Court based its' analysis on 75 PA.CONS.STAT.ANN. §1547(c), governing the admissibility of blood alcohol test results. As noted *supra*, subsection (c) requires that in order to be admissible in criminal proceedings, chemical breath tests must be performed on approved, calibrated and tested devices by a properly trained individual. Likewise, in Ackerman, the Superior Court took care to note that blood alcohol content evidence may only be admitted where safeguards are in place (noting the inadmissibility of a test too remote in time to the incident at the center of the litigation). In light of the reference to safeguards, in the absence of any civil case law condoning the use of PBT evidence, and because the evidence in this case fails to show that the PBT equipment used to read Defendant Black's alcohol content level was approved or calibrated,[21] the Court finds that the challenged evidence does not satisfy the requirements for admissibility in

[21] Although not appended to the motion or any response thereto, Officer Arredondo's deposition testimony, of record as appended to Plaintiffs' Pretrial Memorandum, reveals his uncertainty as to the particular piece of equipment he used to perform the PBT of Defendant Black on the night of the accident, and his lack of knowledge as to the standards and schedules pursuant to which the Department's PBT testing equipment is calibrated. Plaintiffs' Pretrial Memorandum, Exhibit H, 40:22-41:1, 48:16-49:1.

this matter and therefore must be excluded. Accordingly, Plaintiffs' motion as to the same is hereby **GRANTED.**[22]

Motion to Preclude Certain Opinions of Defendant Black's Liability Expert, Joseph Muldoon, P.E.

By the present motion, Plaintiffs seek to preclude the admission of certain opinions rendered by Defendant Black's liability expert as irrelevant to the issues in the case and therefore excludable under PA.R.E. 401 and 402, or alternatively, more prejudicial than probative and therefore excludable under PA.R.E. 403. The first of the opinions subject to the motion is set forth as follows:

> Owing to the constricted cartway devoid of shoulders, the pick-up truck travelled approximately a quarter mile until Mr. Black could find a place to pull over whereupon he exited the pick-up truck and proceeded back to the crash site on foot.

Plaintiffs' Motion, Exhibit A, Muldoon Report at 2.

As to this opinion, Plaintiffs argues that it is both speculative and self-serving, and therefore excludable. Specifically, Plaintiffs contend that this opinion lacks any scientific or factual basis, and ignores the evidence of record. With regard to the evidence of record, Plaintiffs note the deposition testimony of lay witness Brent Lawton, who stated in his deposition that he flagged Defendant Black's vehicle down in the road on the night of the accident and then returned to the scene with him. Plaintiffs' Motion, Exhibit B, 13:12-14:19. Further, Plaintiffs suggest that by

[22] In the instant case, there is no suggestion that the piece of equipment used to take Defendant Black's PBT can even be identified. For that reason, the Court sees no benefit to allowing the parties to amend their witness lists to allow for the presentation of evidence on the approval and calibration of the device used. Moreover, even if such evidence could be produced, the Court would still preclude the evidence in the absent of any legal authority for the admission of a PBT in a civil case.

his opinion, Mr. Muldoon ignores other possible courses of action Mr. Black could have taken after the accident, and other reasons for his failure to stop.

In response, Defendant Black argues that this, and indeed each of Mr. Muldoon's challenged opinions are based on evidence produced in discovery, and that such evidence is of the nature typically relied upon by experts in Muldoon's field. Accordingly, he contends their admissibility.

Defendant Riverview responds to Plaintiffs by arguing that in preparing his report, Mr. Muldoon investigated the portion of the roadway between the point of impact and where Defendant Black stopped his vehicle and on that basis, found it to be constricted and devoid of shoulders in the area of the crash site. Moreover, Defendant Riverview urges that the challenged conclusion has been corroborated by other witnesses, including several police officers, and Defendant Black himself. The officer testimony referenced by Defendant Riverview confirms the character of the roadway, and the testimony of Defendant Black sets forth his stated reason for failing to stop before he did.

Upon review and consideration of the cited evidence and the arguments of the parties, the Court finds that the portion of Mr. Muldoon's opinion as to the character of the roadway is clearly permissible as based on his own observation and training as a civil engineer. However, with regard to the portion of his opinion attributing Defendant Black's failure to stop until he had proceeded approximately a quarter mile down the road from the site of impact, the Court finds this conclusion purely speculative and without basis in Mr. Muldoon's expert training and experience.

Only Mr. Black can testify as to his motives for the actions her took that night. The purpose of expert testimony is to elucidate for a jury those matters with regard to which "scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue." PA.R.E. 702. While the factors that may have influenced Defendant Black's choices with regard to the maneuvering of his vehicle immediately after the accident are sufficiently within the purview of an expert, the reasons therefor are those of Defendant Black alone and to allow an expert to testify on those issues would be to allow impermissibly speculative testimony. Thus, with regard to the first of the challenged opinions, Plaintiffs' motion is **GRANTED IN PART** and **DENIED IN PART.** As such, Mr. Muldoon shall be permitted to testify as to the character of the roadway in the area between the site of impact and the place where Defendant Black's vehicle came to rest, and he may testify to the fact that upon stopping his vehicle approximately a quarter mile away, Defendant Black proceeded back to the crash site on foot. However, he shall be precluded from testifying that Defendant Black drove "until he could find a place to pull over."

The second of Mr. Muldoon's challenged opinions is that:

> Centerline encroachments on the order of this magnitude need not be caused by alcohol consumption. More often than not, they will arise from distraction such as tuning the car radio, reaching for a CD or cell phone – all of which are occasionally performed by anyone. And clearly, the proclivity for such centerline encroachment is greatly augmented along stretches of highway where there is a combination of a constricted highway and horizontal curvature – as manifest by the accident site.

Plaintiffs' Motion, Exhibit A, Muldoon Report at 3.

In opposition to this opinion, Plaintiffs argue that it is conclusive and speculative with regard to the cause of the accident, without regard to the evidence of Defendant Black's state of intoxication at the time, and must therefore be precluded as irrelevant, potentially confusing and misleading to the jury, and more prejudicial than probative.

In response, Defendant Black renews his argument that the opinion is based on evidence produced in discovery, which is of the nature typically relied upon by experts in Muldoon's field, and is therefore admissible. Defendant Riverview's argument contra the motion is that Mr. Muldoon's opinion is supported by Defendant Black's testimony as to the circumstances of the crash, as well as cell phone data and an expert report analyzing that data, which indicate that he received a text message just before the accident.

In consideration of the parties' arguments and on review of the challenged opinion, the Court finds that does not draw any impermissible conclusions, but merely sets forth a number of observations in support of Defendants' theory of the accident. That opinion, and Defendants' theory, will be subject to cross examination at trial. As such, Plaintiffs' motion in limine as to Mr. Muldoon's second challenged conclusion is **DENIED.**

The third of Mr. Muldoon's challenged conclusions is that:

> It cannot be proven, let alone beyond a reasonable doubt, that Mr. Black's centerline encroachment was caused by alcohol consumption. The more likely scenario is that was caused by distraction abetted by the curvature and the constricted cartway.

Plaintiffs' Motion, Exhibit A, Muldoon Report at 5.

Plaintiffs base their objection to this opinion on the same arguments made relative to their earlier objections, namely that the opinion is conclusive and speculative with regard to the cause of the

accident, without regard to the evidence of Defendant Black's state of intoxication at the time, and must therefore be precluded as irrelevant, potentially confusing and misleading to the jury, and more prejudicial than probative.

Whereas, Defendant Black once again advances the argument that the opinion is based on evidence produced in discovery, which is of the nature typically relied upon by experts in Muldoon's field, and is therefore admissible. Defendant Riverview accords, and points the Court to Defendant Black's own testimony as to the cause of the accident. Additionally, Defendant Riverview notes a portion of defense expert Schorr's written opinion wherein he notes that Defendant Black had negotiated twenty-one (21) separate curves before reaching the site of the accident.

Careful consideration of the challenged opinion leads the Court to conclude that it is impermissibly beyond the scope of this expert's realm of knowledge and experience and therefore inadmissible. While expert witnesses may opine as to the ultimate issues in a case, they must also be limited to the scope of their expertise. PA.R.E. 704; PA.R.E. 702. Here, Mr. Muldoon is purporting to be an expert in transportation and forensic engineering, and the challenged opinion goes to the weight and the sufficiency of the evidence offered to show that the accident was a result of Defendant Black's intoxication, which is far beyond the purview of the expert. As such, Plaintiffs' motion to preclude his third opinion, as set forth *supra,* is hereby **GRANTED.**

Plaintiffs' final challenge to the expert opinions of Mr. Muldoon is in response to the following:

> Given that Mr. Petti was operating the motorcycle too close to the centerline at a likely speed of 6 to 10 mph above the posted speed limit, his conduct was a substantial factor in the likely causation of this accident.

Plaintiffs' Motion, Exhibit A, Muldoon Report at 5.

Plaintiffs, acknowledging PA.R.E. 704, which provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact," nevertheless object to this opinion on that very basis. In so doing, Plaintiffs note that "the trial judge has the discretion to admit or exclude expert opinions on the ultimate issue depending on the helpfulness of the testimony versus its potential to cause confusion or prejudice." Plaintiffs' Motion, ¶8 *quoting* McManamon v. Washko, 906 A.2d 1259, 1278-79 (Pa. Super. 2006). Accordingly, Plaintiffs request that the Court strike Mr. Muldoon's opinion as speculative at best, absent any evidence that Decedent Petti was driving on or over the centerline, or any scientific basis for the conclusion that Decedent Petti was travelling at 6 to 10 miles over the posted speed limit.

Just as with Plaintiffs' other challenges to Mr. Muldoon's report, Defendant Black counters with the argument that the opinion is based on evidence produced in discovery, which is of the nature typically relied upon by experts in Muldoon's field, and is therefore admissible. Yet, Defendant Riverview argues that Muldoon's opinion is based directly on the results of his accident reconstruction and should therefore be permitted to come before the jury at trial.

A review of Muldoon's report reveals that his opinion that the motorcycle was very close to the centerline at the time of impact arises from his analysis of the skid marks at the scene. Plaintiffs' Motion, Exhibit A, Muldoon Report at 7. As to his conclusion that Decedent Petti

was travelling between 6 and 10 miles over the speed limit at the time of the crash, he bases that on analysis of the scene, detailed in a section of his report entitled "Vehicular Speeds." Plaintiffs' Motion, Exhibit A, Muldoon Report at 6. Upon consideration, the Court finds this opinion sufficiently rooted in the evidence as well as Mr. Muldoon's training and experience, and as such, Plaintiffs' motion to preclude it from presentation to the trial jury is hereby **DENIED.**

Motion to Preclude Certain Opinions of Steven M. Schorr, P.E. and Curtis M. Beloy, P.E.

Plaintiffs also seek to preclude certain opinions offered by Defendant Riverview's liability experts Steven M. Schorr, P.E. and Curtis M. Beloy, P.E. (collectively "experts"), as set forth in their expert report, on the basis that the opinions are irrelevant to the case, and therefore excludable under PA.R.E. 401 and 402, or alternatively, more prejudicial than probative and therefore excludable under PA.R.E. 403. In the first of the challenged opinions, the experts state that:

> There is no physical evidence or testimony that establishes the drifting of the Ford Ranger over the centerline was a result of anything other than Mr. Black being distracted (i.e., reaching for and opening his cell phone). Additionally, there is no data, conclusions or opinions noted in the reports by Dr. Kilareski or Dr. DiGregorio that establish that the drifting of the Ford Ranger over the centerline was a result of alcohol as opposed to driver distraction.

Plaintiffs' Motion, Exhibit A, Schorr/Beloy Report at 13.

As the basis for the motion, Plaintiffs argue that the challenged opinion contravenes, and in fact ignores, certain evidence tending to show that the accident was a result of Defendant Black's alcohol consumption, as evidenced by his guilty pleas to two counts of homicide by motor vehicle/DUI related and reckless driving, blood alcohol evidence, witness testimony and the

expert report of Dr. DiGregorio, who stated in his report that "to a reasonable degree of medical and scientific certainty . . . James Black . . . was impaired at the time of his accident by ethyl alcohol and was unfit to operate a motor vehicle. The symptoms of this impairment . . . directly contributed to Mr. Black's motor vehicle accident." Plaintiffs' Motion, Exhibit D, DiGregorio Report at 3.

In response, Defendant Black argues, as he does in response to each challenged opinion, that it was formulated on the basis of testimony and facts adduced during discovery and such evidence was of the type normally relied upon by experts in the field. Accordingly, he seeks the denial of the motion. Defendant Riverview joins Defendant Black and further takes the position that there is no evidence of record that the accident was caused by Defendant Black's intoxication. To that end, Riverview notes a complete absence of testimony to indicate that Black drifted over the centerline due to intoxication. Indeed, the only witness testimony as to the cause of the accident is the self-interested testimony of Defendant Black himself, who attributes the accident solely to his receipt of a text message on his cell phone.

Upon consideration, the Court notes that there is evidence, as noted *supra*, to suggest that the cause of the accident was Defendant Black's intoxication, and there is evidence to suggest that the cause of the accident was Defendant Black's receipt of a text message. As such, the Court finds that the first challenged opinion of Schorr and Beloy is an impermissible mischaracterization of the evidence and does not fall within the proper scope of an expert opinion, which is to elucidate certain issues in the case with the benefit of the expert's training and experience. The challenged report excerpt is not an expert opinion, in that it offers nothing

more than an evaluation of the evidence, which falls not within the purview of an expert, but the purview of the jury. In light of the foregoing, Plaintiffs' motion in limine to preclude defense experts Schorr and Beloy from offering the conclusion set forth in the first challenged opinion is hereby **GRANTED.**

> Plaintiffs' second challenge to the Schorr/Beloy report concerns the following:
>
> > The physical evidence and available data are consistent with the Ford Ranger's movement into the northbound lane being a result of Mr. Black being distracted by his cell phone, and consequently his not maintaining his position within the southbound land as the roadway curved to his right.

Plaintiffs' Motion, Exhibit A, Schorr/Beloy Report at 13.

Plaintiffs seek to preclude this opinion as speculative and ignorant of the other evidence in the case tending to show that Defendant Black's intoxication was the cause of the accident. As such, Plaintiffs contend that the opinion should be precluded from reaching the jury on the basis that it would serve to confuse and mislead the jury and would be unduly prejudicial to Plaintiffs. In addition to the position taken by Defendant Black with regard to each of the challenged opinions, that they are properly rooted in the facts and evidence adduced during discovery and therefore permissible, Defendant Riverview specifically points out that the opinion is supported by the experts' physical examination of the scene and document review, and is therefore admissible. Upon consideration, the Court agrees. While the challenged opinion does not take into account the role that Defendant Black's intoxication may have played in the accident, it does no more than state an opinion based on certain evidence, which is well within the proper scope of an expert report. To the extent that Plaintiffs disagree with the opinion, they will have ample

opportunity at trial to present their own evidence and to cross-examine the experts. Accordingly, Plaintiffs second challenge to the opinions of Schorr and Beloy is hereby **DENIED.**

Plaintiffs' final challenge to the Schorr/Beloy report concerns the following:

> There is no physical evidence, data, testimony, analysis or expert reports reviewed that establish that the movement of the Ford Ranger over the centerline was a result of Mr. Black's alcohol consumption as opposed to his admitted distraction as a result of reaching for the cellphone.

Plaintiffs' Motion, Exhibit A, Schorr/Beloy Report at 14.

Again, Plaintiffs take the position that this excerpt from the Schorr/Beloy report ignores certain evidence in the case related to Defendant Black's intoxication at the time of crash, and should therefore be precluded as speculative, irrelevant, confusing and misleading to the jury, and unduly prejudicial to their own position. In contrast, Defendants contend that the opinion is soundly grounded in the evidence adduced during discovery.

Upon review and consideration the Court finds that this conclusion, just like the first challenged conclusion, runs afoul of the purpose for expert testimony and into the domain of the jury by again characterizing, in fact mischaracterizing the evidence. Evidence can be of two different types; both direct and circumstantial. Thus, while there may not be any direct evidence of which conclusively demonstrates the cause of the accident, there is evidence of two different causes, which forms the basis of the parties' dispute. It is the job of the jury, and the jury alone, to weigh the evidence, both direct and circumstantial, and come do a determination as to liability, and thereafter, damages. As such, the Court cannot allow an expert to characterize the evidence. Accordingly, Plaintiffs' motion to preclude Schorr and Beloy's third challenged opinion is hereby **GRANTED.**

Motion to Preclude Certain Opinions of Defendant Riverview's Vocational Expert, Gary R. Kutay

As previously noted, Defendant Riverview elicited an expert opinion from vocational expert Gary R. Kutay as to Decedent Warren. By the present motion, Plaintiffs seek to preclude the admission of certain opinions set forth in his report. In preparing his report, Kutay reviewed a number of documents, including the deposition testimony of Plaintiff Marcia Karrow, Administratrix of Decedent Warren's estate. From his review of her testimony, he stated the following:

> Mrs. Karrow perhaps did not have a complete understanding of the circumstances surrounding [Decedent Warren's] employment, as much as she may have thought.

Plaintiffs' Motion, Exhibit A, Excerpt of Kutay Report at 7.

Plaintiffs seek to strike this statement as impermissibly speculative and irrelevant. In response, Defendant Black asserts that all of Mr. Kutay's opinions are admissible pursuant to PA.R.E. 701, which relates to lay opinion testimony. Defendant Riverview responds to the motion by asserting that the challenged opinion is properly based on the type of facts and data usually relied upon by experts in his field, and is therefore permissible pursuant to PA.R.E. 703 governing the bases for expert opinions.

While it may be true that Mrs. Karrow was not particularly well informed with regard to Decedent Warren's employment history, Mr. Kutay's statement in this regard is a speculative statement, or a mere observation, which fails to advance any issues in the case and is made without reliance on his training and experience. As such, the Court agrees with Plaintiffs as to

the irrelevance of the statement. Accordingly, Plaintiffs' motion in limine to preclude the same from admission at trial is hereby **GRANTED.**

> In the next of the opinions to which Plaintiffs raise a challenge, Mr. Kutay states:
>
> I was able to discuss wages with Ms. Iverson, HR Department at Michael's On East Restaurant. She informed me that she was able to pull up earnings for a waiter, whom she would classify as the same skill level as [Decedent Warren]. She indicated that his wages were approximately $28,000 in 2007. She felt this was an honest as well as accurate estimate. Since this was two years post [Decedent Warren's] firing at Michael's On East Restaurant, wages would have been slightly less.

Plaintiffs' Motion, Exhibit A, Excerpt of Kutay Report at 9.

Plaintiffs seek to strike this portion of Kutay's report on the basis that it is inadmissible hearsay pursuant to PA.R.E. 802. Moreover, they contend that Ms. Iverson's reported research, uncorroborated by any other source and subject to her own untrained assessment that the wage information she provided to Mr. Kutay would have been in line with Decedent Warren's wage history is too speculative to be reliable, and is not the sort of evidence upon which an expert in the field would regularly rely, as required by PA.R.E. 701.[23] In response, Defendants' jointly assert that Mr. Kutay's opinion is properly based on reliable evidence, Defendant Riverview points out that the evidence relied upon by an expert in the formation of his or her opinion need not be admissible in court, rendering the hearsay quality of the evidence irrelevant.

[23] In fact, Plaintiffs improperly cite PA.R.E. 701 for this proposition, which is set forth at PA.R.E. 703.

The threshold to the resolution of this motion is whether or not the information provided by Ms. Iverson is of the type typically relied upon by experts in the field,[24] and while that is a question for the Court to resolve pursuant to PA.R.E. 104,[25] at present, it does not have sufficient information upon which to make that determination. Accordingly, this portion of the motion shall be held in abeyance until trial, subject to the opportunity for the Court to illicit further information from the witness prior to his in-court testimony as to the reliability of the information provided to him by Ms. Iverson, and whether experts in his field regularly rely on this type of information in formulating their opinions.

Plaintiffs' third challenge to Mr. Kutay's report is in response to the following, wherein he states that as to Daniel Rappucci, one of Plaintiffs' experts:

> The evaluator's comment that typically waiters and waitresses do not report accurate wages to the IRS is surely a discriminating statement. The evaluator basically states that every waiter or waitress goes against the law in their tax obligation to the US Government. I find this statement self serving [sic] for the report written. What is reported to the IRS is considered one's earnings. Not to report such is a direct violation of the IRS code and is subject to fines and potential arrest and incarceration. If I were a waitress/waiter, I would not want to have such a label of cheating the government of taxes by falsifying a tax return.

Plaintiffs' Motion, Exhibit A, Excerpt of Kutay Report at 9.

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[24] See Kearns v. DeHaas, 546 A.2d 1226, 1231 (Pa. Super. 1988) (Recognizing applicability of PA.R.E. 703 to the testimony of vocational experts).

[25] The rule provides in pertinent part that:

> [p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> PA.R.E. 104(a).

Plaintiffs object to this passage from Mr. Kutay's report on the basis that it is impermissibly speculative, hypothetical and irrelevant. Defendant Riverview, joined by Defendant Black, who merely asserts that all of Mr. Kutay's opinions are amply supported by the evidence adduced in discovery, argues that Kutay's opinion is relevant given Plaintiffs' failure to produce any tax returns for Decedent Warren, as well as that fact that the challenged comment is merely a response to Rappucci's impermissibly speculative musings.

Having reviewed and considered the relevant portion of the record in light of the applicable law, the Court finds that evidence of the common practices of waitstaff is not germane to the issues in this case. As such, the Court finds the challenged statement too irrelevant, too speculative and too potentially confusing or misleading to the jury to be admissible. In light of the foregoing, Plaintiffs' motion to preclude Mr. Kutay's third challenged opinion from presentation to the jury is hereby **GRANTED.**

Finally, Plaintiffs object to the following statement by Mr. Kutay:

> This writer is appalled at the Scenario Section presented by the vocational evaluator [Plaintiffs' vocational expert, Daniel M. Rappucci.] They are presented with no data nor [sic] personal experience. They represent to me an unprofessional and borderline unethical presentation. It is hard to imagine how someone could actually portray these figures with any ounce of integrity.

Plaintiffs' Motion, Exhibit A, Excerpt of Kutay Report at 11.

Plaintiffs seek to preclude this portion of Kutay's report as irrelevant to the issues in the case, ad unduly prejudicial. Aside from the general position of Defendants that the opinion is soundly based on the evidence in the case, Defendant Riverview contends that if the Court allows Rappucci to testify as to certain scenarios posited in his report, their expert should have a fair

opportunity to respond to his methodology. We agree. However, we also agree with Plaintiffs that the language used by Mr. Kutay to criticize Mr. Rappucci's methodologies is unduly prejudicial to Plaintiffs. Accordingly, Plaintiffs' motion is **GRANTED IN PART** and **DENIED IN PART.** As such, Mr. Kutay shall be permitted to testify to his criticism of Mr. Rappucci's methodology insofar as he believes that it is devoid of any factual basis, and he may also testify as to whether he has ever seen this methodology employed by others in the field. However, he shall be precluded from making any reference to being "appalled" by Mr. Rappucci's report; to characterizing the report as "unprofessional" or "borderline unethical," and he shall also be precluded from stating to the jury his belief that "it is hard to imagine how someone could actually portray these figures with any ounce of integrity."

DEFENDANT BLACK'S MOTIONS

Motion to Preclude Testimony or Other Evidence of the Details of Alcohol Consumption by the Defendant, James Black

By his first motion, Defendant Black seeks to preclude the introduction at trial of any evidence as to his alcohol consumption on the date of the accident. As the basis for the motion, he asserts that as a result of his guilty plea to two counts of vehicular homicide/DUI related, the issue of his alcohol consumption has already been determined, and thus, the presentation of any evidence as to the amount consumed or the timing of his consumption would only serve to inflame the passions of the jury and unduly prejudice him. Accordingly, he seeks to preclude the introduction of such evidence pursuant to PA.R.E. 403. Defendant Black is joined in his motion by Defendant Riverview. In support of their position with regard to the motion, Defendant Riverview contends that such evidence is irrelevant and therefore inadmissible pursuant to

PA.R.E. 401 and 402. In furtherance of that position, they point to the absence of any witness who has testified to Defendant Black having been visibly intoxicated during the time he spent at Riverview, and as such, they contend that the issue is moot and the evidence is irrelevant. The Court respectfully disagrees. Proof of visible intoxication is not dependent upon direct evidence in the form of eyewitness accounts. Rather, it may be proven circumstantially. Fandozzi v. Kelly Hotel, Inc., 711 A.2d 524 (Pa. Super. 1998). Here, the quantity and timing of Defendant Black's alcohol consumption on the date of the accident is both relevant and admissible to Plaintiffs' claims. As such, Defendant Black's motion to preclude evidence as to the amount and timing of his alcohol consumption is hereby **DENIED.**

Motion to Preclude Plaintiffs from Bringing into Evidence the Distance Driven by Defendant Black After the Collision

Defendant Black also seeks to preclude Plaintiffs from introducing evidence that he drove approximately a quarter mile from the site of the collision before stopping his vehicle, on the basis that such evidence would only serve to confuse and prejudice the jury, in contravention of PA.R.E. 403. Defendant Riverview joins in the motion, arguing that such evidence is irrelevant to causation and too speculative to be of any evidentiary value with regard to Defendant Black's state of intoxication at the time of the accident, which, they argue, is the sole purpose for which Plaintiffs seek its admission.

In resolving this motion, the Court rejects Defendants' characterizations of the evidence and its' purportedly prejudicial effect. The evidence subject to this motion is of a purely factual nature and it is a fact upon which other facts in the case rely. Notably, the place where Defendant Black stopped his vehicle is where he encountered Mr. Lawton, a witness in this case,

who returned to the scene of the crash with Defendant Black and made certain observations of him during that period. While the parties may have opposing theories as to the significance of this evidence, the Court can see no reason to preclude the presentation of the evidence to the jury. Rather, it shall be permitted, and counsel shall be entitled to present its own version as to its significance at trial. The interpretation and weighting of the evidence is ultimately a matter for the jury to decide. As such, Defendant Black's motion to preclude Plaintiffs from referencing the distance he drove after the collision is hereby **DENIED.**

Motion to Include Jury Instruction That a Harm Arising from Driving While Using a Cell Phone Is Not a Sufficient Basis for the Imposition of Punitive Damages

By his next motion, Defendant Black, who posits that the accident occurred as a result of him reaching for his cell phone upon receipt of a text message, seeks to have the jury charged on the fact punitive damages cannot be imposed for driving while using a cell phone. As set forth *supra*, in order to succeed on a claim for punitive damages, a plaintiff must prove that the defendant engaged in conduct that was "outrageous," and done with a bad motive, or with "reckless indifference" to the safety of others. Hutchinson ex rel. Hutchinson v. Luddy, 870 A.2d 766, 770 (Pa. 2005). A tortfeasor acts recklessly if he acts in conscious disregard of the potential for harm arising from his conduct, where the risk of harm is so great as to rise above that associated with simple negligence. Junk v. East End Fire Dept., 396 A.2d 1269, 1273 (Pa. Super. 1978); See also Krivijanski v. Union Railroad Co., 515 A.2d 933, 937 (Pa. Super. 1986). This Court, in an opinion issued by the Honorable Leonard N. Zito, has stated that the use of a cell phone while driving is not outrageous or reckless conduct, and as such, cannot serve as the basis for a punitive damages claim. See Xander v. Kiss, 0048-CV-2010-11945 (Pa. Com. Pl.

January 11, 2012) (Striking plaintiff's punitive damages claim upon a finding that without additional indicators of outrageous conduct done either recklessly or with a bad motive, cell phone use alone is not a sufficient predicate for a punitive damages claim). On the basis of this case law, Defendant Riverview joins in the motion and further suggests that Plaintiffs' punitive damages claim against Defendant Black should be stricken.

In response, Plaintiffs argue that punitive damages are warranted against both defendants, and whether or not Defendant Black may or may not have been reaching for his cell phone at the time of the accident is of no consequence. In support of the same, Plaintiffs note the following as further evidence in support of their punitive damages claim: Defendant's BAC on the night of the accident; that Defendant Black had a history of driving while intoxicated; the fact that Defendant allowed his vehicle to cross over the centerline of the roadway; the fact that he struck Plaintiffs' Decedents and continued travelling down the road for approximately a quarter mile; his guilty plea and his sentencing; and evidence of his demeanor at the time of the accident. These facts, Plaintiffs argue, are precisely the "additional indicators" noted in the Xander case as warranting punitive damages in cases involving cell phone use.

In consideration of the parties competing theories with regard to the accident and their legal arguments in support thereof, the Court finds it appropriate to instruct the jury on the state of the law in this regard. An appropriate instruction shall direct the jury that if they find that the sole cause of the accident was Defendant Black reaching for his cell phone, such a finding shall preclude a claim for punitive damages. However, such instruction shall also caution the jury that if they believe that the accident was caused, in whole or in part by any other conduct on the part of Defendant Black, the assessment of punitive damages shall be appropriate upon a finding that such conduct was done recklessly or with an evil motive. The parties may submit proposals to

the Court along with their other proposed instructions when directed by the Court during the course of trial. In light of the foregoing, Defendant Black's motion seeking an instruction to the jury with regard to the fact that the use of a cell phone, standing alone, is an insufficient basis for the imposition of punitive damages is hereby **GRANTED.**[26]

Motion to Preclude Evidence of Blood Alcohol Content

Finally, Defendant Black seeks to preclude evidence of his blood alcohol content on the basis of Plaintiffs' alleged failure to establish the qualifications of the laboratory and personnel responsible for administering the test, and to show the chain of custody with regard to the evidence. Defendant Riverview joins in the motion and argue further that because Defendant Black has already pled guilty to two counts of Homicide by Vehicle and Reckless Driving, he is not contesting liability and therefore such evidence is both irrelevant and more prejudicial than probative. Further, Defendant Riverview contends that such evidence is not admissible against it because under the law, "evidence of another party's guilty plea for driving under the influence cannot be used against another party." Defendant Riverview's Response to Defendant Black's Motions at 8, *citing* Arnold v. Davis, 32 Pa. D.&C.4th 253, 269 (Pa. Com. Pl. Pike Co. 1996) (memorandum opinion pursuant to PA.R.A.P. 1925(a)) *affirmed in an unpublished memorandum opinion*, 697 A.2d 270 (Pa. Super. 1996).

In Arnold, plaintiff brought a Dram Shop claim against an establishment where plaintiff's decedent and additional defendant driver were drinking prior to getting into an accident that killed plaintiff's decedent. Arnold v. Davis, 32 Pa. D.& C. 4th 253, 255 (Pa. Com. Pl. Pike Co.

[26] To the extent that Defendant Riverview seeks the dismissal of the punitive damages claim against it under the ambit of Defendant Black's motion, the Court declines in the absence of a nexus between the arguments advanced pursuant to the motion and the Plaintiffs' claim against Defendant Riverview. Defendant Riverview's request will be fully addressed under their own motion to strike the punitive damages claims against them, appearing *infra*.

1996). A jury trial resulted in a verdict in favor of defendant. Post-trial motions were filed, and an appeal to the Superior Court followed. In a memorandum opinion, the trial court noted that its' refusal to admit evidence of the driver's BAC into evidence with regard to the Dram Shop claim against the defendant bar was due to (1) the absence of evidence laying a foundation for and authentication of such evidence; and (2) the absence of other evidence tending to show that the driver was intoxicated when he was served at defendant bar (Noting that after he and the victim left the bar, they purchased a six-pack of beer.)

Upon consideration, the Court finds the facts of this case inapposite to Arnold. First, the Court rejects Defendants' contentions that Plaintiffs cannot properly lay a foundation and establish the authenticity of the BAC evidence as premature. Second, the Court notes that in contrast to Arnold, there is other evidence in support of Plaintiffs' Dram Shop claim against Riverview. For these reasons, we decline to follow Arnold, which we note further, is a Common Pleas case and therefore not binding on this Court. Finally, we find that in suggesting that Defendant Black will not contest liability at trial, Defendant Riverview has once again mischaracterized the posture of this case. In fact, it is clear from the record that Defendant Black contests causation, which is a liability issue. In light of the foregoing, the Court finds the introduction of evidence with regard to Defendant Black's BAC is both relevant and admissible to the issues in this case. Accordingly, Defendant Black's motion to preclude admission of the same is hereby **DENIED.**

DEFENDANT RIVERVIEW'S MOTIONS

Motion to Preclude Evidence in Support of Plaintiffs' Dram Shop Claim

As an initial matter, Defendant Riverview seeks to preclude Plaintiffs from presenting any evidence in support of their Dram Shop claim. As noted, the Dram Shop Act makes it

unlawful for a licensee to "sell, furnish or give" alcohol to a visibly intoxicated person, or to permit it to be sold, furnished or given them. 47 P.S. §4-493(i). In the instant case, the parties agree that there is no evidence that Defendant Black was personally served alcohol by a bartender while at Riverview on the night of the accident, or that he was observed to be visibly intoxicated while on the premises. Nor, Riverview asserts, can Plaintiffs establish that Defendant Black's consumption of alcohol while at Riverview caused or contributed to the accident. As such Defendant Riverview argues that Plaintiffs cannot proceed on their Dram Shop claim.

In response, Plaintiffs contend that the Honorable Emil Giordano's denial of Defendant Riverview's motion for summary judgment is dispositive of the present motion, and as such, Riverview's motion should be denied and it should not be given a "second bite at the apple." We agree. Despite Defendant Riverview's protests to the contrary, the absence of any direct evidence that (1) Defendant Black was personally served or furnished alcohol by Defendant Riverview, or that (2) he was observed to be visibly intoxicated while drinking at Riverview is not fatal to Plaintiffs' claim. While such proof would undeniably strengthen Plaintiffs' case, there is evidence of record in support of Plaintiffs' Dram Shop claim, and by the entry of an Order denying Defendant Riverview's motion for summary judgment, Judge Giordano passed upon that evidence and found that it raised issues of material fact sufficient to place the matter before a jury. That decision is binding, and it dictates the resolution of this motion. Accordingly, Defendant Riverview's motion to preclude evidence of Plaintiffs' Dram Shop claim is hereby **DENIED** without further consideration of the parties' arguments.[27]

[27] While not entertaining the remaining arguments of the parties at length, the Court pauses to respond to Defendant Riverview's contention that the Court would be committing a "significant prejudicial error" if it were to allow Plaintiffs' lay and expert testimony (the latter of which Defendant Riverview indicates, is impermissibly

Petti: Motion to Preclude Plaintiffs from Asserting a Claim for Economic Loss

By its' first motion, Defendant Riverview seeks to preclude Plaintiffs from bringing a claim for economic loss on Decedent Petti's behalf. Defendant Riverview asserts two arguments in support of its' motion. As Defendant Riverview points out, a plaintiff seeking damages bears the burden of establishing the elements of their claims. See Gordon v. Trovato, 338 A.2d 653, 654 (Pa. Super. 1975). Accordingly, a plaintiff in a wrongful death action bears the burden of presenting evidence as to a decedent's lost earnings and their maintenance costs. See generally Vizzini v. Ford Motor Co., 569 F.2d 754 (3rd. Cir. 1977); 2 SUMM.PA.JUR.2D TORTS §25:27 (2012).

In the instant case, Defendant Riverview argues that any economic loss claim that Plaintiffs are asserting on behalf of Decedent Petti is unsupported by his inconsistent work history,[28] particularly in light of Plaintiffs' expert, Andrew Verzilli's projection of Decedent Petti's economic loss ranging from Seven Hundred Ninety-Six Thousand Two Hundred Seventy-Two Thousand Dollars ($796,272) and Nine Hundred Thirty Three Hundred Ten Thousand Dollars ($930,310). Such damages, Defendant Riverview correctly points out, must not be speculative. Klein v. Weisberg, 694 A.2d 644 (Pa. Super. 1997). As to the insufficiency of Plaintiffs' evidence, Defendant Riverview further notes that in response to interrogatories,

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speculative) in support of its Dram Shop claim. To that end, we refer Defendant Riverview to the evidence of record that Defendant Black consumed alcohol provided by Riverview, that shortly after he left Riverview and caused the fatal accident that killed Plaintiffs' decedents, witnesses observed him to appear visibly intoxicated, the existence of blood alcohol evidence, and case law standing for the proposition that visible intoxication may be proven by circumstantial evidence. See Shuenemann v. Dreemz, Inc., 34 A.3d 94 (Pa. Super. 2011). While relation back expert testimony alone is insufficient to support a Dram Shop, expert testimony of the very nature condemned by Defendant Riverview as impermissibly speculative is admissible to prove a Dram Shop claim where, as here, there is additional evidence of visible intoxication. Fandozzi v. Kelly Hotel, Inc., 711 A.2d 524 (Pa. Super. 1998).

[28] As Defendant Riverview notes, at the time of the accident, Decedent Petti was unemployed, having been fired from Goodyear several months earlier, he had filed bankruptcy in 2006, and his reported income for the following year was Four Thousand Twenty-Eight Dollars ($4,028). Further, they assert that he had no job prospects at the time of the accident.

Plaintiffs failed to offer any information with regard to support offered by Plaintiffs' Decedent to any third party; his personal maintenance costs at the time of the accident; the amounts he spent for groceries, clothing and hygiene, entertainment, internet, cell phone, mortgage or rental costs; vehicle expenses; and several other items. Additionally, Defendant Riverview complains that Plaintiffs failed to provide any information with regard to the accounts held by Plaintiffs' Decedent, or otherwise provide information with regard to his assets and expenses. Defendant Riverview asserts that such failure was part of a willful attempt by Plaintiffs to shield relevant and discoverable information from it on the issue of future economic losses. In light of these alleged failures, Defendant Riverview argues that Plaintiffs' claim for economic loss on behalf of Decedent Petti must be stricken for failure to meet their evidentiary burden. Defendant Black joins in the motion, and presents no supplemental argument.

In response, Plaintiffs first note that all of the economic information available to them was handed over in discovery. As such, they refute Defendant Riverview's assertion that they engaged in any sort of willful attempt to preclude the discovery of relevant information with regard to Decedent Petti's financial information. As to the substance of the motion, Plaintiffs contend that in order to succeed on their claim, they must present evidence to demonstrate the type of work that Decedent Petti was capable of doing, and the extent of his harm, which they say, will be offered via the testimony of Plaintiff Garrett Petti. They will also present the testimony of their expert, Andrew C. Verzilli, who on the basis of Decedent's biographical information, earnings history and work history, in light of labor statistics and other information usually relied upon by experts in the field, calculated his economic losses to be between Seven Hundred Ninety-Six Thousand Two Hundred Seventy-Two Thousand Dollars ($796,272) and Nine Hundred Thirty Three Hundred Ten Thousand Dollars ($930,310). Mr. Verzilli's report

also calculates Decedent Petti's maintenance costs to be Forty-Two percent (42%) of his earnings, as based on the Consumer Expenditure Survey. Accordingly, Plaintiffs contend that such proof is sufficient to support their economic loss claim with regard to Decedent Petti. We agree.

Defendant Riverview's assertion that Plaintiffs' failure to answer certain interrogatories to their satisfaction is fatal to their economic loss claim is unsupported by the law. The type of information sought by Defendant Riverview, while potentially very helpful to supporting a claim for economic losses, is not required. The Supreme Court has held that a projection of damages based upon mere guess or speculation cannot stand, but that a projection which represents a fair estimate based upon the available evidence is sufficient, as the plaintiff cannot be held to a "standard of mathematical exactness." Smail v. Flock, 180 A.2d 59 (Pa. 1962) (Internal citation omitted). In Smail v. Flock, the Supreme Court upheld an award of damages arising out of the death of a dairy farmer who apparently had a successful business, but kept no financial records. The plaintiff met his burden of proof by calling as witnesses customers of the farm who purchased from it, and farmers who ran similar-sized dairies. The Supreme Court held that such testimony was sufficient to provide a reasonable estimate of the decedent's lost earnings.

> Sources of evidence for proof of lost earning capacity vary. The courts have accepted expert testimony, testimony from the decedent's employer, earnings as set forth in tax returns, and testimony from family members as the basis for a claim of lost earning capacity. In practice, expert analysis of the decedent's earning history is the most prevalent means of establishing loss of future earning capacity.

4 WEST'S PA. PRAC. TORTS: LAW AND ADVOCACY § 14.11 (2011)

Defendant Riverview also places undue emphasis on the role of a plaintiff in proving damages, stressing that a plaintiff must provide such information and evidence, in an effort to suggest that

such proof cannot be provided by an expert witness. Defendant Riverview further contends that a plaintiff's proof must be exact, and not based on projections, given the prohibition on speculative damages awards. This is a misstatement of the law. In fact, the kind and character of the evidence cited by Plaintiffs as serving as the basis for their claim is sufficient to satisfy their evidentiary burden and of the type frequently relied upon in such cases.[29] Accordingly, Defendant Riverview's motion to preclude Plaintiffs from asserting an economic loss claim on behalf of Decedent Petti is hereby **DENIED.**

Warren: Motion to Preclude Plaintiffs from Asserting a Claim for Economic Loss

By the instant motion, Defendant Riverview, joined by Defendant Black, seeks to preclude Plaintiffs from bringing a claim for economic loss on behalf of Decedent Warren. As with the previous motion, Defendant Riverview once again contends the insufficiency of Plaintiffs' evidence given Decedent Warren's inconsistent work history,[30] and they assert Plaintiffs' willful attempt to shield relevant and discoverable information from it on the issue of future economic losses by failing to respond to interrogatories seeking support offered by Plaintiffs' Decedent to any third party; her personal maintenance costs at the time of the accident; the amounts she spent for groceries, clothing and hygiene, entertainment, internet, cell phone, mortgage or rental costs; vehicle expenses; and several other items. Likewise, they complain that Plaintiffs have failed to provide any information with regard to the accounts held by Plaintiffs' Decedent, or otherwise provide information with regard to her assets and expenses. The only evidence in support of their claim, Defendant Riverview notes, is the report of

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[29] Smail v. Flock, 180 A.2d 59 (Pa. 1962); Brodie v. Philadelphia Transp. Co., 203 A.2d 657 (Pa. 1964).

[30] Decedent Warren was fired from long-term employment on June 30, 2005 and remained unemployed until securing employment in November 2007 at Country Griddle Restaurant in Flemington, New Jersey, where she earning little more than minimum wage.

Plaintiffs' expert Daniel Rappucci, who projected her economic losses to be between Nine Hundred Six Thousand Four Hundred Thirty-Three Dollars ($906,433) and One Million Eighteen Thousand Nine Hundred Eight Dollars ($1,018,908), based purely on statistical information and without reference to any earnings of record during Decedent Warren's lifetime, which Defendant Riverview contends, is impermissibly speculative and therefore insufficient to support a claim.[31]

Plaintiffs argue that their evidence is indeed sufficient to support an economic loss claim on behalf of Decedent Warren and that therefore, Defendant Riverview's motion should be denied. In support thereof, they note that in order to establish a claim for economic loss, a plaintiff must present evidence as to the type of work a person did or was capable doing prior to their injury, and the extent of their injury. With regard to the first prong of the inquiry, they argue that prior to the accident, Decedent Warren had worked as a server in high-end restaurants, and she remained capable of doing that work until her death. Further, they contend that this information forms a sufficient basis for Rappucci and Verzilli to render their expert opinions. Expert opinions, Plaintiffs note, "need not be based on absolute certainty, but . . . also cannot be based solely upon conjecture." Plaintiffs' Brief at 3, *citing* Helpin v. Trs. of the Univ. of Pa., 969 A.2d 601 (Pa. Super. 2009) (internal citation omitted). Their expert opinions, Plaintiffs contend, are soundly based upon the deposition testimony of Plaintiff Marcia Karrow, Decedent Warren's biographical history, her known work history and known training and experience. As such, Plaintiffs argue that their expert opinions are not impermissibly speculative but rather, relevant and admissible evidence, which, together with Ms. Karrow's testimony, is sufficient to

[31] In contrast to the information provided by Plaintiffs with regard to their economic loss claim on behalf of Decedent Petti, Defendant Riverview notes Plaintiffs' failure to provide "any information regarding [her] actual earnings in the ten years prior to her death." Defendant Riverview's Brief at 7.

support an economic loss claim behalf of Decedent Warren. We agree. Accordingly, Defendant Riverview's motion to preclude Plaintiffs from asserting an economic loss claim on behalf of Decedent Warren is hereby **DENIED.**

Motion to Preclude Plaintiffs' Expert Opinion Testimony as to Causation and "Visible Intoxication"

By their next motion, Defendant Riverview seeks to preclude Plaintiffs' experts from testifying that (1) Defendants' consumption of alcohol served by Defendant Riverview at their premises caused or contributed to the accident; and (2) that Defendant Black was visibly intoxicated while on the premises of Defendant Riverview. Plaintiffs' expert G. John DiGregorio, MD, Ph.D. specifically draws the conclusion that Defendant Black's visible intoxication contributed to the accident, stating:

> I can state with a reasonable degree of medical and scientific certainty that James Black would have appeared visibly intoxicated when he was at Riverview Country Club. Further, Mr. Black was impaired at the time of his accident by ethyl alcohol and was unfit to operate a motor vehicle. The symptoms of this impairment include but are not limited to lack of concentration, decreased reaction time, some incoordination and loss of inhibitions and these directly contributed to Mr. Black's motor vehicle accident.

Defendant Riverview's Motion, Exhibit A, DiGregorio Report at 3.

In seeking to preclude DiGregorio from testifying that Defendant Black was visibly intoxicated while at Defendant Riverview, Riverview notes that not one witness who was present at the establishment that night has testified to Defendant Black being in a state of visible intoxication. Thus, because "[i]t is impermissible under Pennsylvania law to infer from a person's presence at an establishment that serves alcoholic beverages that such person was served alcoholic beverages," Riverview argues that allowing DiGregorio to testify that Defendant Black was served while visibly intoxicated would unduly prejudice and confuse the

jury by adding facts not in evidence." Defendant Riverview's Brief at 11; see e.g., Conner v. Duffy, 652 A.2d 372 (Pa. Super. 1994) (Grant of summary judgment on Dram Shop claim, decided in favor of defendant concessionaire at Veteran's Stadium, affirmed upon a finding that evidence of driver's appearance at the time of his arrest, blood alcohol content and expert's relation back testimony was insufficient to prove visible intoxication at time of service, *where there was evidence that the driver had consumed more beer in the car after leaving the stadium*.) (Emphasis added).

In response, Plaintiffs initially concede the absence of direct evidence to show prove Defendant Black's visible intoxication while at Riverview. However, they argue that notwithstanding the absence of direct evidence, there is sufficient circumstantial evidence to show that Defendant Black was furnished alcoholic beverages at Riverview while in a state of visible intoxication. Specifically, they point to Defendant Black's testimony that while at Riverview, he drank a beer purchased by his golf partner, and he then drank from a pitcher purchased by another patron, consuming two glasses of beer in fifteen minutes.[32] Additionally, they note Riverview bartender Krystal Americus' testimony that on the night in question, she served pitchers of beer to purchasing patrons but then had no means by which to monitor who partook from the pitcher, or how much they consumed.[33]

With regard to Defendant Riverview's contention as to the lack of proof that Defendant Black was served by Defendant Riverview, the Court finds that even without direct evidence to show that he was personally served by an agent of Riverview; there is sufficient evidence for a jury to conclude that Defendant Black was furnished alcohol by Defendant Riverview. See

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[32] Plaintiffs' Brief, Exhibit D, 38:1-9; 41:241:18.

[33] Plaintiffs' Brief, Exhibit E, 28:10-12; 29:18-21.

Plaintiffs' Memorandum of Law, Exhibit E, Portion of Defendant Black's Deposition at 115:24-117:18. Moreover, the facts of this case are inapposite to Conner, where circumstantial evidence of the defendant's visible intoxication was frustrated by evidence of intervening drinking prior to the accident. Here, there is no evidence of intervening alcohol consumption, and, as per the Honorable Emil Giordano's denial of Defendant Riverview's motion for summary judgment, the circumstantial evidence offered to prove Defendant Black's visible intoxication while at Riverview is sufficient, in both quality and quantity, to create a jury question with regard to the issue of Defendant Riverview having furnished alcohol to Defendant Black when he was in a state of visible intoxication.

Defendant Riverview further argues that DiGregorio's opinion as to Defendant Black's visible intoxication while at Riverview must be precluded in the absence of direct evidence as to the same. As Defendant Riverview correctly notes, proof of alcohol consumption, or even legal intoxication, alone, is insufficient to prove visible intoxication.[34] Accordingly, in the absence of direct evidence to support their claim of visible intoxication, Defendant Riverview contends the absence of sufficient support for DiGregorio's opinion that Defendant Black would have been visibly intoxicated while at Riverview, rendering it impermissibly speculative. The Court disagrees.

Indeed, as noted above, there is circumstantial evidence, which is both relevant and admissible to prove Defendant Black's visible intoxication while at Riverview. This is not a case where the only evidence in that regard is mere alcohol consumption, or even the relation back testimony of an expert who, based upon a later blood alcohol content, is opining that Defendant

[34] Schuenemann v. Dreemz, Inc., 34 A.3d 94 (Pa. Super. 2011) (Noting that the relationship between legal intoxication and visible intoxication is attenuated); Fandozzi v. Kelly Hotel, Inc., 711 A.2d 524 (Pa. Super. 1998) (Setting forth the elements of a Dram Shop claim as service of alcohol to a visibly intoxicated person, and the establishment of proximate cause between that service and the tortious conduct of the visibly intoxicated person).

Black must have been visibly intoxicated while at Riverview. Here, DiGregorio's opinion is based not only on relation back evidence, but also on the evidence of record demonstrating what alcohol Defendant Black consumed, where and when he consumed it, and his condition at the time of the accident, just minutes after leaving Riverview. Further, as previously noted, this case is inapposite to cases such as Conner, because here, there is no evidence that Defendant Black consumed any additional alcohol between the time he left Riverview and the time of the accident. A careful review of DiGregorio's report in light of the relevant law, leads the Court to conclude that the evidence is sufficient to support DiGregorio's opinion that Defendant Black would have appeared visibly intoxicated at Defendant Riverview, and to the extent that Defendants believe otherwise, they may avail themselves of the opportunity to cross-examine the witness. Accordingly, the Court hereby **DENIES** the portion of Defendant Riverview's motion seeking to preclude DiGregorio from testifying that Defendant Black would have appeared visibly intoxicated in the time that he was imbibing on the premises of Defendant Riverview.

As to the portion of the motion seeking to preclude Plaintiffs' experts from testifying that Defendant Black's consumption of alcohol while on Defendant Riverview's premises either caused or contributed to the accident, Defendant Riverview contends that such conclusions are not contained in any of Plaintiffs' expert reports,[35] and would therefore be impermissibly speculative. Whereas, Plaintiffs contend that DiGregorio should be permitted to testify that

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[35] Specifically, Defendant Riverview notes DiGregorio's report, wherein he concludes that:

> I can state with a reasonable degree of medical and scientific certainty that James Black would have appeared visibly intoxicated at Riverview Country Club. Further, Mr. Black was impaired at the time of his accident by ethyl alcohol and was unfit to operate a motor vehicle. The symptoms of this impairment include but are not limited to a lack of concentration, decreased reaction time, some incoordination and loss of inhibitions and these directly contributed to Mr. Black's motor vehicle accident.

Defendant Riverview's Brief at 7.

Defendant Black's receipt and consumption of alcohol from Defendant Riverview caused or contributed to the accident, based on the facts of the case and his stated opinion that Defendant Black would have appeared visibly intoxicated while consuming alcohol at Defendant Riverview.

Upon review of DiGregorio's report, the Court notes that he does not draw the specific conclusion that Defendant Black's consumption of alcohol while at Defendant Riverview directly caused or contributed to the accident. While a jury may conclude that from the evidence presented, DiGregorio shall be limited to testifying in accordance with the four corners of his report. Accordingly, Defendant Riverview's motion is **GRANTED** insofar as DiGregorio shall be precluded from testifying that Defendant Black's consumption of alcohol while at Defendant Riverview directly caused or contributed to the accident. However, he may testify, in accordance with his report, that: (1) Defendant Black would have appeared visibly intoxicated while at Defendant Riverview; (2) Defendant Black was impaired by ethyl alcohol at the time of his accident and unfit to operate a motor vehicle, such that he exhibited a lack of concentration, decreased reaction time, some incoordination and loss of inhibitions; (3) all of which directly contributed to the accident.

Motion to Preclude Evidence of Blood Alcohol Content at or Near the Time of the Accident

Defendant Riverview next seeks to preclude evidence of Defendant Black's BAC on the night of the accident.[36] As noted *supra* in the discussion of Defendant Black's motion to preclude evidence of his BAC, evidence of blood alcohol content is admissible in cases where service to a visibly intoxicated person, visible intoxication, or reckless or careless driving is at issue, and

[36] A ruling on essentially the same motion, as raised by Defendant Black, appears *supra*.

there is other evidence of record as to the conduct of the person "which fairly suggests that he was intoxicated." Ackerman v. Delcomico, 486 A.2d 410, 414 (Pa. Super. 1984).

> The theory behind allowing a blood alcohol level to be admitted into evidence in a civil case is that it is relevant circumstantial evidence relating to intoxication. However, blood alcohol level alone may not be admitted for the purpose of proving intoxication. There must be other evidence showing the actor's conduct which suggests intoxication. Only then, and if other safeguards are present, may a blood alcohol level be admitted. Custasis v. Reichert, *supra*, Couts v. Ghion, *supra* (test must be given within a reasonable time after accident); Schwarzbach v. Dunn, *supra* (test results, where test given three hours after accident, may not be extrapolated by expert who will testify as to probable blood alcohol level at time of accident).

Id. at 414.

The admissibility of blood alcohol evidence, as a general rule, is not at issue in the present motion. Rather, the basis for the motion is Defendant Riverview contention that the evidence of record is insufficient to establish the chain of custody and authenticity of the BAC results, which they say, are prerequisites to admissibility pursuant to the Vehicle Code at 75 PA.CONS.STAT.ANN. § 1547. Accordingly, Defendant Riverview urges that the evidence of Defendant Black's BAC on the night of the accident is unreliable and therefore inadmissible at trial, and as such they seek to preclude not only the results of Defendant Black's BAC testing, revealing a level of .16%, but the testimony of Plaintiffs' expert toxicologist, Mr. DiGregorio with regard to Black's BAC results, or DiGregorio's relation back calculation of Black's BAC at the time of the accident, given that it relies upon the results of his blood test.

In response to Defendant Riverview's motion, Plaintiffs argue that Defendant Riverview is incorrect as to its statement of the law with regard to authentication of BAC evidence in civil cases. Rather, Plaintiffs contend that "[p]hysical evidence may be admitted at trial without demonstrating the precise chain of custody; the evidence need only establish a reasonable

inference which the fact finder may or may not accept." Commw. v. Morrow, 650 A.2d 907 (Pa. Super. 1994) (Bag of marijuana admitted into evidence upon a finding that testimony with regard to the fact that police informant received drugs from appellant and delivered them directly to a trooper, whose testimony corroborated the same.)

The question before the Court then, is the determination of the requisites for authentication of BAC evidence in a civil case. Notably, §1547 of the Vehicle Code states that its requirements are expressly applicable in criminal and summary proceedings, which, at first blush, would lead one to conclude their inapplicability in civil cases. However, as we noted *supra* in our discussion of Defendant Black's motion to preclude the admission of his BAC, in Ackerman, the Superior Court noted § 1547 as "[t]he sole statutory provision concerning blood alcohol content." Id. at 413. The statute provides that:

> Any person who drives, operates or is in actual physical control of the movement of a vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath, blood or urine for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a vehicle . . .

75 PA.CONS.STAT.ANN. § 1547(a).

Subsection (c) of the statute speaks to the admissibility of test results:

> In any summary proceeding or criminal proceeding in which the defendant is charged with a violation of section 3802 or any other violation of this title arising out of the same action, the amount of alcohol or controlled substance in the defendant's blood, as shown by chemical testing of the person's breath, blood or urine, which tests were conducted by qualified persons using approved equipment, shall be admissible in evidence.
>
> (2) (i) Chemical tests of blood or urine, if conducted by a facility located in this Commonwealth, shall be performed by a clinical laboratory licensed and approved by the Department of Health for this purpose using procedures and equipment prescribed by the Department of Health or by a Pennsylvania State Police criminal laboratory.

75 PA.CONS.STAT.ANN. § 1547(c).

Just as we were in resolving Defendant Black's motion, the Court is guided by Ackerman in resolving the present motion. In Ackerman, the Court, after acknowledging § 1547 as the only statutory authority regarding the admissibility of blood alcohol evidence, while it did not expressly adopt § 1547(c) the standard by which BAC evidence shall be admissible in civil cases, did rule that blood alcohol content evidence may only be admitted where safeguards are in place. Accordingly, the Court finds it necessary to establish the safeguards set forth in 1547(c) as a necessary predicate to the admissibility of BAC results in this case. Accordingly, in order for Defendant Black's BAC to be admissible, Plaintiffs must establish both chain of custody under PA.R.E. 901, as well as evidence demonstrating the use of approved equipment by a qualified person, as required under § 1547(c).

As to chain of custody, Defendant Riverview asserts Plaintiffs' failure to identify anyone in their pretrial memorandum as being prepared to testify as to the taking, storage, transportation or testing of Defendant Black's blood sample. In response to this assertion, Plaintiffs have presented certain items of documentary evidence appended to their brief as "Exhibit B," inclusive of a "Blood Alcohol & Toxicology Request/Chain of Custody Report" completed by the Northampton County DUI Center phlebotomist who drew Black's blood and the Health Network Laboratories scientist who tested it; a "Chain of Custody/Transportation Release Form" from Health Network Laboratories showing the transfer of the specimen from the Easton Police Department to the lab, an affidavit signed by George Brunieo, supervisor of the DUI Center regarding custody of the sample, and the other paperwork attendant with Defendant Black's

processing at the DUI Center. In the Court's view, that evidence is sufficient to establish chain of custody.

As to the additional prerequisites to admissibility, namely "the qualifications of the laboratory, equipment and personnel involved" in taking and testing Defendant Black's blood sample, Defendant Riverview likewise asserts Plaintiffs' failure to identify anyone in their pretrial memorandum able to testify as to the qualifications, licensure, equipment or methodology of the lab that tested the blood sample. Moreover, they argue that Plaintiffs are precluded, under N.C.R.CIV.P. 212B, from identifying or calling those witnesses now in an attempt to save the BAC evidence from preclusion at trial.

In consideration of these arguments, we note that while evidence as to licensure, qualification and approved equipment is a necessary predicate to the admissibility of BAC evidence, there is no requirement as to proof of methodology. Having determined the elements of proof necessary to establishing authenticity of Defendant Black's BAC results, the Court, noting the absence of any assertion on Plaintiffs' behalf that indeed, they have witnesses available to testify to these issues, we must address Defendant Riverview's contention that they are precluded, pursuant to N.C.R.CIV.P. 212B, from expanding their witness list to include those who can testify to these issues.

The rule provides in pertinent part that:

> At trial the parties will be limited to those witnesses, exhibits and documents divulged at pre trial, unless opposing counsel waives such restrictions or the Court finds such limitation to be manifestly unjust.

N.C.R.CIV.P. 212B(c)(5).

Thus, the rule is not dispositive, but rather, allows the Court to exercise discretion over a request to the amendment of a witness list. In ruling on such a request, the Court shall consider:

(1) the prejudice or surprise in fact of the party against whom the excluded witness would have testified,

(2) the ability of that party to cure the prejudice,

(3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of cases in the court,

(4) the bad faith [or] willfulness [of a party] in failing to comply with the court's order.

Smith v. Grab, 705 A.2d 894, 902 (Pa. Super. 1997) *quoting* Linker v. Churnetski Transp., Inc., 520 A.2d 502 (Pa. Super. 1987).

In the instant case, the Court finds that the addition of a witness or witnesses testifying to establish authentication or qualifications as a precursor to the admissibility of known evidence, weeks in advance of trial does not affect any prejudice on either Defendant, nor would it disrupt the orderly and efficient trial of the case. Moreover, the Court finds no bad faith or willfulness on the part of Plaintiffs, as it is clear that the omission of such individuals from their witness list is attributable to a belief that the Court would not require testimony on the foregoing issues. Accordingly, the Court rules that Plaintiffs' evidence is currently insufficient to establish the admissibility of Defendant Black's BAC results, and to that end, Defendant Riverview's motion to preclude the same is hereby **GRANTED.** However, should Plaintiffs seek to amend their witness list to include persons able to testify to the outstanding authentication issues, the Court will consider such amendment and revisit its' ruling on the foregoing motion.

Motion to Preclude Evidence of Defendant Black's Guilty Plea or Blood Alcohol Content at or Near the Time of the Accident

Defendant Riverview's next motion is one to preclude evidence of Defendant Black's guilty plea and his blood alcohol content ("BAC") at or near the time of the accident. With regard to the portion of the motion seeking to preclude evidence of Defendant Black's guilty plea

to the criminal charges arising from the accident, Riverview contends that because he cannot dispute liability, the evidence of Defendant Black's plea is cumulative and should therefore be precluded. Further, they assert the inadmissibility of Defendant Black's guilty plea on the basis that it is inadmissible as evidence with regard to any element of the claims against them. Alternatively, they argue that even if it were admissible against them, evidence of Defendant Black's plea would only serve to inflame the passions of the jury against Riverview, and as such, it should be deemed more prejudicial than probative and therefore inadmissible pursuant to PA.R.E. 403.

In response to the motion, Plaintiffs argue that Defendant Black's guilty plea is admissible against him as an admission against interest. See Cromley v. Gardner, 385 A .2d 433 (Pa. Super. 1978). Furthermore, because Defendant Black maintains that the accident was caused by him reaching for his cell phone while driving, Plaintiffs urge that his plea is admissible as impeachment evidence against him in accordance with PA.R.E. 609(a), which provides that:

> For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or nolo contendere, shall be admitted if it involved dishonesty or false statement.

PA.R.E. 609.

As to the inadmissibility of the plea against Defendant Riverview, Plaintiffs assert that to the extent that the evidence is admissible against Defendant Black to dispute his position with regard to the cause of the accident, it is also admissible against Riverview on the issue of causation.

As an initial matter, the Court notes that Defendant Black did not plead to a crime of dishonesty or false statement, and as such, the plea is not admissible against him under PA.R.E. 609. Nevertheless, it is well settled that his plea is admissible against him as an admission

against interest. See Cromley v. Gardner, 385 A.2d 433 (Pa. Super. 1978). Accordingly, there is no question that his plea is admissible against Defendant Black at trial. Moreover, because Defendant Black contends that his intoxication was not the cause of the accident, we reject Defendant Riverview's assertion as to the cumulative nature of the evidence. However, we agree with Defendant Riverview as to the inadmissibility of the evidence against it.

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Motion to Preclude Evidence in Support of Common Law Negligence Claims

By the next motion, Defendant Riverview seeks to preclude Plaintiffs from presenting evidence in support of common law negligence claims against it on the basis that such claims are barred under Pennsylvania law and otherwise irrelevant to the issues in the case. Specifically, Defendant Riverview seeks to preclude evidence in support of the allegations that it failed to: have adequate security on the night of the accident; properly train employees; and prevent Black from leaving the premises while intoxicated. Additionally, they seek to preclude any evidence with regard to the allegation that they fostered an atmosphere of drinking to excess.

As the basis for the motion, Defendant Riverview points to a provision of the Dram Shop Act, which provides that:

> [n]o licensee shall be liable to third persons on account of damages inflicted upon them off of the licensed premises by customers of a licensee unless the customer who inflicts the damages was sold, furnished or given liquor or malt or brewed beverages by the said licensee or his agent, servant or employee when the said customer was visibly intoxicated.

47 P.S. § 4-497.

This provision, Defendant Riverview contends, is the exclusive means by which a liquor licensee can be held liable to third parties. Accordingly, they urge that Plaintiffs' common law

negligence claims must fail. Until recently, the body of case law on the issue has come exclusively from the Common Pleas courts, some in support of Defendant Riverview's position, and others in support of Plaintiffs' position, and as such, not until a recent decision of the Superior Court has there been any binding authority on the issue. Schuenemann v. Dreemz, LLC, 34 A.3d 94 (Pa. Super. 2011). In Schuenemann, appellant Dreemz, LLC, a licensee under the Dram Shop Act found liable for service to a visibly intoxicated driver who was killed, appealed the denial of their post-trial motions for judgment notwithstanding the verdict or a new trial. Dreemz raised two issues on appeal, the first of which was whether the Superior Court should grant a new trial on the basis that the trial court "improvidently allowed appellee to present a general negligence claim against [it] and to present improper and prejudicial evidence, despite the clear statutory language contained in 47 P.S. § 4-493(1) and 47 P.S. § 4-947 limiting Appellee's cause of action to service of alcohol to a visibly intoxicated person." Schuenemann v. Dreemz, LLC, 34 A.3d 94, 98 (Pa. Super. 2011). Specifically, they argued that their liability was limited by the statute to service to a visibly intoxicated person, and as such, they challenged the admission of evidence as to their internal procedures and compliance the RAMP provisions of the liquor code as irrelevant to the sole question of service to a visibly intoxicated person.

Affirming the trial court, the Superior Court found the challenged evidence relevant and material to the issue service to a visibly intoxicated person, given the duty of a licensee under the Dram Shop Act to "monitor[…] the patrons to whom they serve alcohol, in order to detect visible signs of intoxication." Id. at 101. Dreemz also challenged the admission of evidence as to the admission of another patron without proper identification, and service to an underage patron, which the Court found relevant and admissible to show Dreemz course of conduct with respect to its patrons. Id. at 102. In affirming the trial court's evidentiary rulings, the Superior

Court did not expressly, but impliedly recognized common law causes of action against licensees who violate the Dram Shop Act.

However, a close reading of the statute and the Schuenemann opinion leads the Court to conclude that the a Dram Shop action is a common law and not a statutory action, and that under Schuenemann, evidence of compliance with statutory provisions and internal policies is relevant, not as a basis for additional causes of action against a licensee, but rather, to prove service to a visibly intoxicated patron. Having made that determination, the Court turns to consideration of the evidence that Riverview seeks to preclude by its motion. It seeks to preclude evidence of inadequate security; improper employee training; and its' failure to keep Defendant Black from leaving the premises on the night of the accident. Under Schuenemann, it is clear that evidence of improper employee training is admissible and relevant to Plaintiffs' claim.[37] However, there is nothing in Schuenemann, or any of the persuasive authority of the other Common Pleas courts to suggest that inadequate security is relevant and admissible evidence against a licensee, and more significantly, Plaintiffs fail to point of any evidence of the same in this case. As to the allegation of Defendant Riverview's failure to preclude Defendant Black from leaving the premises on the night of the accident, while there is persuasive Common Pleas case law to suggest such a duty, and therefore the admissibility of such evidence, the Court finds that absent any evidence showing that any agent of Defendant Riverview recalls encountering Defendant Black on the night of the accident, evidence of the failure to keep him from leaving the premises is irrelevant and therefore inadmissible at trial. Accordingly, Defendant Riverview's motion is **GRANTED IN PART** and **DENIED IN PART,** as set forth above.

[37] Per her deposition testimony, Ms. Americus testified that although she has never taken TIPS classes, that prior to her employment at Riverview she had experience, had been trained and had acted as a trainer for others with regard to how to detect signs of visible intoxication. Kristal Americus Deposition at 53:24-54:6. However, it is appropriate for Plaintiffs to further explore that testimony if they wish to do so.

Motion to Preclude Introduction of Evidence That Defendant Riverview Left Pitchers Out for Anyone to Consume on the Night of the Accident

By their next motion, Defendant Riverview seeks to preclude evidence that Defendant Riverview simply left pitchers of alcohol out on the bar for anyone to consume on the night in question, on the basis that it is both unsupported by the facts and highly prejudicial. In response, Plaintiffs note that per the deposition testimony of Riverview bartender Krystal Americus, the record establishes that she sold pitchers to certain patrons but did not track who actually consumed the alcohol once it was purchased. They also note Defendant Black's deposition testimony that he poured himself two or three beers from pitchers purchased by other patrons and accordingly, they argue that Ms. Americus' testimony as to the fact that she did not track the consumption of pitchers once they were sold is relevant and admissible evidence that should he presented to the jury. In their pretrial memorandum, Plaintiffs allege that Ms. Americus "simply left alcohol on the bar" on the night of the accident, which Defendant Riverview argues, infers something different than that she sold pitchers to individual patrons. Neither of the interested parties dispute the fact that Ms. Americus sold pitchers to these individual patrons and then did not track the consumption of the beer. Rather, the sum of this objection seems to be to Plaintiffs' use of misleading language in the description of these facts.

Upon consideration, Plaintiffs shall not be precluded from eliciting evidence as to the manner in which pitchers were sold to patrons on the night in question. Nor shall they be precluded from eliciting evidence as to the fact that Ms. Americus did not track the consumption of the pitchers, as per her deposition testimony. However, Plaintiffs shall be precluded from mischaracterizing the evidence in a manner inconsistent with Ms. Americus' testimony. Accordingly, insofar as it seeks to preclude Plaintiffs from presenting evidence tending to show

that Ms. Americus sold pitchers to individual patrons and did not track their consumption, the motion is **DENIED.** However, to the extent that Defendant Riverview seeks to preclude Plaintiffs from mischaracterizing the evidence to suggest that on the night in question, Ms. Americus furnished alcohol to patrons in any other manner inconsistent with her testimony, the motion is **GRANTED.**

Motion to Preclude Evidence that Krystal Americus Did Not "Drink Count" On the Night of the Accident

The next matter for the Court's consideration is Defendant Riverview's motion to preclude evidence that bartender Krystal Americus did not "drink count" on the night in question. As the basis for the motion, Defendant Riverview argues that it is wholly irrelevant to the question of whether Defendant Black was served in a state of visible intoxication, and therefore excludable under PA.R.E. 401 and 402. In furtherance of their position, Riverview points to the absence of evidence that Ms. Americus ever personally served or even encountered Defendant Black on the night of the accident as obviating potential relevance of whether or not she was drink counting that night. As such, they contend that the admission of such evidence would allow the jury to impermissibly speculate as to whether drink counting would have prevented the accident, when there is no proof that she even encountered Defendant Black. Further, they argue that there is no duty, either under statute or at common law, imposed upon a licensee to drink count. Accordingly, they argue that the introduction of such evidence would be more prejudicial than probative and is therefore also excludable under PA.R.E. 403.

Plaintiffs respond to the motion by noting that pursuant Schuenemann, discussed *supra*, evidence as to compliance with the provisions of the Liquor Code[38] requiring licensees to train their employees with regard to the service of alcohol to visibly intoxicated patrons is relevant and material to the ultimate issue of whether a defendant licensee in a Dram Shop action provided service of alcohol to a visibly intoxicated person. In the instant case, Plaintiffs argue that service of Defendant Black was effectuated by the sale of pitchers to certain patrons, followed by no effort on the part of Defendant Riverview to monitor consumption, in violation of the duty imposed under the Dram Shop Act, to prevent service to visibly intoxicated persons. Accordingly, they contend that Ms. Americus' lack of familiarity with the term drink counting is evidence of her overall unfamiliarity or complete disregard for her duties under the Dram Shop Act.

The problem with Plaintiffs' argument is that they fail to point to any law or regulation imposing the duty to drink count. In Schuenemann, the Superior Court held that evidence of

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[38] 47 P.S. § 4-471.1, entitled "Responsible Alcohol Management" (commonly referred to as the RAMP provisions) provides in pertinent part that:

In order to be considered in compliance with this section for purposes of section 471, a restaurant, retail dispenser, eating place, hotel, club, catering club, distributor and importing distributor licensee shall:
(1) have at least fifty per centum of its alcohol service personnel certified as having successfully completed an alcohol beverage servers training;
(2) have its manager or owner certified as having successfully completed manager/owner training;
(3) *have all alcohol service personnel undergo new employe[e] orientation*; and
(4) have appropriate responsible alcohol service signage posted on the licensed premises.

47 P.S. § 4-471.1(d) (emphasis added).

The statute further provides that:

New employe[e] orientation shall consist of orienting newly hired alcohol service personnel as to Pennsylvania law relating to the sale, furnishing or serving of alcoholic beverages to minors and visibly intoxicated persons.

47 P.S. § 4-471.1(a).

defendant licensee's compliance with RAMP provisions and/or internal policies was relevant to the question of service to a visibly intoxicated person. Accordingly, if the evidence sought to be precluded was of that nature, we would deny the motion. However, there is no proof in this case that drink counting was a requirement of RAMP, Riverview's internal policies or any other authority. At best, it is a suggested method of preventing service of alcohol to visibly intoxicated patrons. Therefore, it is not the type of evidence deemed admissible as proof of a Dram Shop violation under Schuenemann, and as such, it is appropriately excluded from reaching the jury. In light of the foregoing, Defendant Riverview's motion to preclude evidence that Krystal Americus did not drink count on the night of the accident is hereby **GRANTED.**

Motion to Preclude Evidence that Riverview Bartender Krystal Americus Had Not Undergone "TIPS" Training or Been "TIPS" Certified

Defendant Riverview next seeks to preclude the presentation of evidence at trial the Riverview bartender Krystal Americus had not undergone "TIPS"[39] training or been "TIPS" certified prior to the night of the accident, as irrelevant and therefore inadmissible pursuant to PA.R.E. 401 and 402. In the first instance, Defendant Riverview points to the complete absence of evidence that Ms. Americus ever encountered Defendant Black on the night of the accident as obviating the question of whether or not she was properly trained to determine whether or not he was exhibiting signs of visible intoxication. Additionally, Defendant Riverview notes Plaintiffs' failure to cite to any authority for the position that Ms. Americus was required to be TIPS trained or certified as further rendering moot and inadmissible evidence as to whether or not she was in fact trained. In an effort to suggest that Ms. Americus would have been able to properly detect

[39] As Defendant Riverview notes in its motion, "TIPS" (Training for Intervention Procedures is a program offered by a non-profit entity, which is aimed at preventing "intoxication, underage drinking, and drunk driving." Defendant Riverview's Motion at 1, n1 quoting http://www.gettips.com/learn.shtml.

the signs of visible intoxication had she observed them in Defendant Black, Defendant Riverview points to her deposition, noting more than five years of experience as a waitperson at licensed establishments.[40]

In response, Plaintiffs argue that evidence of whether or not Ms. Americus was TIPS trained is clearly relevant and admissible pursuant to Shuenemann and the RAMP provisions of the Liquor Code. What Plaintiffs overlook is that the RAMP provisions require that all servers be trained in detection of the signs of visible intoxication, but they do not specifically require TIPS training. Furthermore, what both Plaintiff and Defendant Riverview fail to note is Ms. Americus' deposition testimony that she was both trained and a trainer on the signs of visible intoxication prior to the night of the accident. Kristal Americus Deposition at 53:24-54:6. In light of this evidence and in the absence of any authority suggesting any requirement imposed upon Defendant Riverview that Ms. Americus be trained and/or certified in detecting the signs of visible intoxication by the TIPS method as opposed to another training program, Defendant Riverview's motion to preclude evidence that Ms. Americus was neither TIPS trained or certified is hereby **GRANTED.**

Motion to Preclude Evidence That Riverview Discontinued the Use of Pitchers Subsequent to the Accident

Defendant Riverview seeks to preclude evidence that it discontinued the use of pitchers subsequent to the accident involving Defendant Black and Decedents, as violative of PA.R.E. 407, which provides that:

> [w]hen, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove that the

[40] Defendant Riverview's Motion, Exhibit B 12:23-14:22, noting her experience in the field, some of which occurred subsequent to the accident.

> party who took the measures was negligent or engaged in culpable conduct, or produced, sold, designed, or manufactured a product with a defect or a need for a warning or instruction.

PA.R.E. 407.

However, the rule further provides that:

> This rule does not require the exclusion of evidence of subsequent measures when offered for impeachment, or to prove other matters, if controverted, such as ownership, control, or feasibility of precautionary measures.

Id.

Accordingly, Plaintiffs argue that the challenged evidence is properly admissible to impeach witnesses for Defendant Riverview. Specifically, Plaintiffs seek the introduction of the evidence to impeach Riverview bartender Krystal Americus, who testified at her deposition that when she sold pitchers, she had no means of tracking who actually consumed the alcohol. However, Plaintiffs fail to adequately argue how the challenged evidence could be properly used to impeach Ms. Americus' statement. The connection is tenuous at best, and as such, the Court rejects Plaintiffs' argument as to the admissibility of the challenged evidence for impeachment purposes.

Plaintiffs' second argument is that the challenged evidence should be admitted to show control, specifically that Defendant Riverview "was always in control of the way in which it served alcohol to its patrons." Plaintiffs' Brief at 5. Per the rule, the admission of evidence regarding subsequent remedial measures to demonstrate control is admissible only when control is at issue. That is, where there is some question as to control over some place or instrumentality in a case. Here, there is no question of Defendant Riverview's control over its' premises or of the alcohol it served to its' patrons. Evidence that bartenders did not track the consumption of pitchers does not create a question of control. Rather, it answers the question. Therefore, the

Court rejects Plaintiffs' argument that the discontinued sale of pitchers is admissible to show control.

Finally, Plaintiffs contend that evidence as to the discontinuance of pitchers is admissible to show the feasibility of precautionary measures. Notably, evidence of subsequent remedial measures is only admissible where an opposing party places feasibility at issue. PA.R.E. 407 cmt.; Duchess v. Langston, 769 A.2d 529 (Pa. 2001) (Products liability action where Supreme Court of Pennsylvania held that evidence of subsequent remedial measures was admissible where the manufacturer of a product had placed it at issue by taking the position that a particular design modification "could not practically be done.").

In the instant case, Plaintiffs rely on the foregoing statement, set forth in their motion, that:

> there is no claim in this lawsuit, nor could there be such a claim, that Riverview's service of pitchers . . . is by itself evidence of negligence. There is also no evidence in this case to suggest that Black's consumption of beer in cups from another patron's pitcher (as opposed to bottles of beer purchased by another patron) increased the likelihood that the accident would occur.

Plaintiffs' Brief at 6, *quoting* Defendant Riverview's Motion at ¶ 13.

Plaintiffs assert that by this language, Defendant Riverview has put the feasibility of subsequent remedial measures at issue "by arguing that it did everything it possibly could have to avoid permitting Defendant Black to get drunk, continue to drink at its bar and ultimately get behind the wheel and kill Plaintiffs' Decedents." Plaintiffs' Brief at 6. The Court disagrees.

In the first instance, the quoted language is not a denial by Defendant Riverview as to the feasibility of subsequent remedial measures. It is merely Defendant Riverview's characterization of the evidence, as set forth in the present motion. As such, the statement cannot be fairly said to place feasibility at issue in this case. Moreover, even if we were to decide otherwise and

determine that the quoted portion of Defendant Riverview's motion did indeed place feasibility of subsequent remedial measures at issue in this case, we would find the challenged evidence more prejudicial than probative, absent any evidence that the means by which alcohol was served had any bearing on Defendant Black's procurement or consumption of alcohol while on the premises of Defendant Riverview.[41] In light of the foregoing, Defendant Riverview's motion to preclude evidence as to its' discontinued use of pitchers after the accident is hereby **GRANTED.**

Motion to Preclude Evidence of the Relationship Status Between Plaintiffs' Decedents

By the present motion, Defendant Riverview seeks to preclude any evidence as to the fact that Plaintiffs' Decedents were engaged to be married at the time of their deaths. Plaintiffs make reference to Decedents' relationship status in their pretrial memorandum, and in seeking the preclusion of any reference thereto, Defendant Riverview asserts that this information has no bearing on any of Plaintiffs' causes of action and is therefore irrelevant and excludable pursuant to PA.R.E. 401 and 402. Further, they suggest that the only purpose this information could possibly serve would be to inflame the passions of the jury, thereby unduly prejudicing Defendants. As such, they argue the evidence is also excludable under PA.R.E. 403.

In response to the motion, Plaintiffs assert that Decedents' relationship status is relevant to why they were riding Decedent Petti's motorcycle together on the night of the accident, providing a context for the events of that night that absent which, might serve to confuse or otherwise distract the jury from the greater issues in the case. Upon review and consideration, the Court finds that the relationship status of the Decedents, just like the relationships of the

[41] Notably, Defendant Black testified at his deposition that the first drink he consumed while at Riverview on the night of the accident was a bottled beer purchased for him by his golf partner. Certainly, the practice of purchasing drinks for another, or "rounds," can lead to a situation where a licensee may not come into direct contact with every patron consuming the purchased drinks. However, there is no evidence to suggest that the form of a purchase, whether a pitcher or individual drinks, has any bearing on the ability of a licensee to monitor consumption.

parties to one another, or the parties to certain witnesses, provides a necessary context to the events giving rise to Plaintiffs' claims. As such, evidence of their relationship status shall be admissible at trial. The Court understands that the underlying purpose of this motion is to limit Plaintiffs' ability to personalize or dramatize the facts of this case as a means of impassioning the jury. However, Defendant Riverview's concern in this regard does not warrant the preclusion of this very basic biographical information with regard to Plaintiffs' Decedents. Accordingly, Defendant Riverview's motion to preclude evidence of the relationship between Plaintiffs' Decedents is hereby **DENIED.**

Motion to Preclude or Limit Photographs and Videotape Footage of the Accident Scene and Decedents' Injuries

Defendant Riverview next seeks to preclude or limit the presentation of photographs and videotape footage of the accident scene and Decedents' injuries to the jury. There appears to be no dispute that the accident scene was dramatic and the injuries to Decedents severe. Accordingly, Defendant Riverview seeks to limit the admission of documentary evidence in this regard to avoid the admission of cumulative evidence, and the undue prejudice it believes it would suffer if the documentary evidence were to be admitted in *toto*. By way of relief, Defendant Riverview seeks to preclude this evidence from the purview of the jury completely. Alternatively, it argues that the bifurcation of the trial would, at least initially, spare the jury from the presentation of the evidence. As a third alternative, it suggests that Plaintiffs' evidence in this regard should be proffered to the Court prior to trial for an in-camera review.

In answer to the motion, Plaintiffs argue that documentary evidence of the accident scene and Decedents' injuries are relevant to Plaintiffs' claims of conscious pain and suffering and punitive damages, and more probative than prejudicial as to these issues. Accordingly, they

argue that the motion should be denied. The Court agrees with Plaintiffs as to the relevance and admissibility of the challenged evidence. Commw. v. Solano, 906 A.2d 1180 (Pa. 2006) c*ert. denied* 127 U.S. 2247 (2007) (Photographs depicting pools of blood at scene of shooting were relevant, admissible and more probative than prejudicial as they depicted the location of several items at the scene); Commw. v. Malloy, 856 A.2d 767 (Pa. 2004) (Photographs showing bullet wounds sustained by victim were properly admitted into evidence); Ligon v. Middletown Area School Dist., 584 A.2d 376 (Pa. Commw. 1990) (Photograph showing injured plaintiff being cared for by emergency personnel at scene was relevant, admissible and more probative than prejudicial). However, because of the danger of cumulative evidence or the admission of unduly inflammatory evidence, the Court finds it appropriate to schedule a pretrial in-camera review of all photographic and video evidence sought to be presented by the parties so that the Court might rule on each piece of proposed evidence in advance of trial. Accordingly, the Court's ruling on the instant motion is hereby **HELD IN ABEYANCE** pending an opportunity to review the challenged evidence.

Motion to Preclude Plaintiffs from Asserting a Claim for Conscious Pain and Suffering on Behalf of Decedent Warren

Defendant Riverview's next motion seeks to preclude Plaintiffs from asserting a claim for conscious pain and suffering on behalf of Decedent Warren. Conscious pain and suffering is an element of damages in a survival action under 42 PA.CONS.STAT.ANN. § 8302, whereby damages may be awarded for the pain and suffering experienced by a decedent from the time of an accident until their resulting death. Slaseman v. Meyers, 455 A.2d 1213, 1217 (Pa. Super. 1983). Where, however, the decedent dies instantly or not conscious for any period of time between the accident and their death, there can be no recovery. Nye v. Commw., Dept. of Transp., 480 A.2d

318, 321 (Pa. Super. 1984). While a claim for pain and suffering may be supported by the presentation of medical evidence, all that is required is evidence that the decedent was conscious of pain before she died.[42] Williams v. Southeastern Pennsylvania Transp. Auth., 741 A.2d 848, 859 (Pa. Super. 1999).

In the instant case, the evidence of record on the issue of Decedent Warren's conscious pain and suffering is the lay testimony of witness Robert Heckman, Officer Arredondo, and witness Brent Lawton. Mr. Heckman testified that he came upon the scene with witness Garrett Smith and shortly thereafter came upon Decedent Warren. Plaintiffs' Memorandum of Law, Exhibit A, 20:21-24; 27:6-9. She way lying on the bank of the Delaware River when he first saw her, and she was moving around. Id. at 27:7-13. He noted that she was "mumbling and slurring" and "her legs were bent in all different directions." Id. at 27:16-18. He noted that her eyes were

[42] Defendant Riverview cites to authority for the proposition that "expert testimony is needed when a jury of lay persons lack the knowledge necessary to make a determination." Defendant Riverview's Brief at 5, citing to Toogood v. Owen Rogal, DDS, 824 A.2d 1140, 1149 (Pa. 2003). In Toogood, a medical malpractice action, our Supreme Court found that "[c]ourts sitting in medical malpractice cases require detailed expert testimony because a jury of laypersons generally lacks the knowledge to determine the factual issues of medical causation; the degree of skill, knowledge, and experience required of the physician; and the breach of the medical standard of care." Id. While Defendant Riverview argues that therefore, expert medical testimony is necessary to proving conscious pain and suffering, the Court disagrees. While a survey of the case law reveals that experts are commonly called upon to testify as to conscious pain and suffering, there is no legal requirement dictating the use of medical expert testimony. While medical malpractice actions consistently involve questions beyond the purview of a lay person, such as standard of proof and issues of medical cause and effect, conscious pain and suffering is proven upon evidence of a decedent's consciousness of pain for a period before her death, even if her condition renders her incapable of communicating that pain to others. Williams v. Southeastern Pennsylvania Transp. Auth., 741 A.2d 848, 859 (Pa. Super. 1999). As opposed to the issues raised in medical malpractice matters, the concepts of pain and consciousness are well within the perception and understanding of a lay person. As such, Plaintiffs note, the law permits lay testimony as to a person's appearance of apparent physical condition. Plaintiffs' Brief at 2, citing Collins v. Cooper, 746 A.2d 615, 620 (Pa. Super. 2000) (Noting the rule that a lay person may testify as to a person's apparent physical condition, but is "barred from testifying to the existence or nonexistence of a disease or disorder, the discovery of which requires the training and experience of a medical expert"); see also Terwilliger v. Kitchen, 781 A.2d 1201, n.9 (Pa. Super. 2001) (State Trooper's testimony that decedent had a pulse and was moaning after accident was sufficient to support an award of damages under the Survival Act for conscious pain and suffering). Certainly, where a decedent's conscious pain and suffering is complicated by medical diagnoses, expert testimony may be required to elucidate those issues for the jury. Cominsky v. Donovan, 846 A.2d 1256, (Pa. Super. 2004) (Lay testimony that decedent suffered pain while in vegetative state was insufficient to meet burden of proof, but distinguishing the case from cases in which decedent was conscious for a time and lay testimony was sufficient to prove conscious pain and suffering, see e.g., Commw. v. Counterman, 719 A.2d 284 (Pa. 1998)); Fogg v. Paoli Hospital, 686 A.2d 1355 (Pa. Super. 1996).

closed, but she appeared as though she was trying to get up. Id. 28:3-14. He further testified that she said her name faintly at one point and she was conscious. Id. 33:6-7, 18-22. Mr. Heckman's testimony is reflected in a police report prepared by Easton Police Officer Charles McMonagle, appended to Plaintiffs' brief as Exhibit B. Plaintiffs' Exhibit C is an emergency services report noting in pertinent part that both Decedents were noted as conscious at 8:54pm on the night of the accident. Plaintiffs' Exhibit D is the deposition testimony of Officer Arredondo, who testified as to the notation of Decedent's consciousness at Exhibit C. Finally, Plaintiffs offer the deposition testimony of witness Brent Lawton at Exhibit D. Mr. Lawton, who walked with Defendant Black from the place where he stopped his car to the crash site, testified in pertinent part that shortly after arriving at the scene he heard the moan of a female's voice and then saw Decedent Warren lying on the other side of the guard rail along the river bank. Plaintiffs' Memorandum of Law, Exhibit D, 16:19-22. He further testified that "I heard her moaning. Like, I heard her, like, crying out for help." Id. at 17:22-23.

Upon review and consideration, the Court finds the foregoing evidence sufficient to support a claim for conscious pain and suffering on behalf of Decedent Warren. Accordingly, Defendant Riverview's motion to preclude the same is hereby **DENIED.**

Motion to Preclude Plaintiffs from Asserting a Claim for Conscious Pain and Suffering on Behalf of Decedent Petti

Just as with the previous motion, Defendant Riverview argues that the quantum of evidence offered by Plaintiffs in support of conscious pain and suffering on behalf of Decedent Petti is insufficient and therefore, any such claim must be precluded. Having already determined the burden of proof relative to the claim, we reject Defendant Riverview's contention that the claim must fail in the absence of expert testimony, and we move to the question of whether the

evidence of record is sufficient to bring the question of Decedent Petti's pain and suffering before the jury. Specifically, Defendant Riverview points out that not one witness has testified to Decedent Petti being in pain before his passing. What Defendant Riverview ignores is that a person cannot perceive the pain of another. For that reason, it is sufficient that witnesses testifying with regard to conscious pain and suffering be able to offer their observations as tot eh consciousness and condition of a person from which a jury can properly conclude whether or not the decedent experienced conscious pain and suffering before their passing.

In opposition to the motion, Plaintiffs have appended excerpts from the depositions of lay witnesses Garrett Smith, Brent Lawton and Taryn Jordy who were all present at the scene on the night of the accident. Per his testimony, Garrett Smith noted that when he came upon Decedent Petti, they were conversing, and Petti was asking about Decedent Warren's whereabouts. Plaintiff's Memorandum of Law, Exhibit A, 30:11-31:4. He was also "squirming around . . . [and] grunting." Id. at 31:16-19. When they spoke, Smith was looking into Decedent Petti's eyes, and Decedent Petti was looking back at him. Id. at 32:11-23. He noted that Decedent Petti had lost his leg, and it appeared as though he was in pain. Id. at 32:24-33:-3.

By his deposition testimony, witness Brett Lawton testified to Decedent Petti's injuries and behavior at the scene, noting that at one point "he was crying and screaming about his arm, that his arm hurt. And he was asking, like, why he couldn't get up. And, you know he had no leg from the waist down. And his arm was just – he seen [sic] his arm and he started crying about his arm. Then he was – you know, he was screaming about his wife or whoever she was." Plaintiffs' Memorandum of Law, Exhibit B, 17:6-13. Thus, in this testimony, we have a clear expression of pain by Decedent Petti. Finally, witness Taryn Jordy noted in her deposition testimony that when she came upon the scene and in particular Decedent Petti, it became clear

"that he was, sort of, riding [sic] in pain . . ." and "screaming." Plaintiffs' Memorandum of Law, Exhibit , 15:20-21; 16:15.

Upon review of the proffered evidence, the Court finds it sufficient to support a claim of conscious pain and suffering on behalf of Decedent Petti, and as such, Defendant Riverview's motion to preclude the claim is hereby **DENIED.**

Motion to Preclude a Claim for Medical Expenses on Behalf of Either Decedent Pursuant to 75 PA.CONS.STAT.ANN. §1722

By their next motion, Defendant Riverview seeks to preclude Plaintiffs from asserting a claim for medical expenses on behalf of either Decedent. As the basis for the motion, Defendant Riverview relies on a provision of the Motor Vehicle Financial Responsibility Law ("MVFRL") which provides that:

> [i]n any action for damages against a tortfeasor, or in any uninsured or underinsured motorist proceeding, arising out of the maintenance or use of a motor vehicle, a person who is eligible to receive benefits under the coverages set forth in this subchapter, or workers' compensation, or any program, group contract or other arrangement for payment of benefits as defined in section 1719 (relating to coordination of benefits) shall be precluded from recovering the amount of benefits paid or payable under this subchapter, or workers' compensation, or any program, group contract or other arrangement for payment of benefits as defined in section 1719.

75 PA.CONS.STAT.ANN. § 1722.

This section precludes a plaintiff in an action involving a motor vehicle from recovering damages in the form of first party benefits, inclusive of "medical benefits, income loss benefits, accidental death benefits and funeral benefits"[43] otherwise covered by their motor vehicle insurance, medical insurance workers compensation or other benefit plan, commonly referred to as first party benefits. The purpose of the statute was to "abolish the practice which allowed a

[43] 75 PA. CONS. STAT. ANN. § 1702.

plaintiff to recover first-party insurance benefits from his insurer as well as special damages from [a] tortfeasor." Carlson v. Bubash, 639 A.2d 458 (Pa. Super. 1994) *appeal denied* 655 A.2d 982 (Pa. 1995).

While the statute would appear to preclude Plaintiffs from seeking medical expenses on behalf of Decedents, Plaintiffs note that pursuant to § 1714 of the MVFRL, §1722 is inapplicable to riders of motorcycles, and as such, Plaintiffs shall be entitled to seek damages for Decedents' medical expenses. § 1714 of the MVFRL provides that:

> [a]n owner of a currently registered motor vehicle who does not have financial responsibility or an operator or occupant of a recreational vehicle not intended for highway use, *motorcycle*, motor-driven cycle, motorized pedalcycle or like type vehicle required to be registered under this title *cannot recover first party benefits.*

75 PA.CONS.STAT.ANN. § 1714 (Emphasis added).

Given that motorcycle operators and passengers are precluded from seeking first party insurance benefits under the MVFRL, Plaintiffs assert that they are thereby exempted from §1722 and able to seek medical expense damages from Defendants. They are correct. See Green v. K & K Ins. Co., 566 A.2d 622 (Pa. Super. 1989) (Discussing preclusion against motorcyclists obtaining first party benefits under the MVFRL); 1 WEST'S PA. FORMS CIVIL PROCEDURE, §11:7 cmt. (2011). As such, Defendant Riverview's motion to preclude Plaintiffs from seeking medical expense damages on behalf of Decedents is hereby **DENIED.**

Motion to Preclude Plaintiffs' Claim for Punitive Damages

By their next motion, Defendant Riverview seeks to preclude Plaintiffs from proceeding with their punitive damages claim in the absence of evidence demonstrating any outrageous conduct or reckless indifference on their part. As noted *supra*, Punitive damages are damages in addition to compensatory or nominal damages, awarded to punish a tortfeasor for his conduct,

and to deter such future conduct. Snead v. Society for the Prevention of Cruelty to Animals of Pennsylvania, 929 A.2d 1169, 1184 (Pa. Super. 2008). Pennsylvania follows the Restatement (Second) of Torts §908(2) governing punitive damages which provides that "[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others . . .." Restatement (Second) of Torts § 908(2) (1968). See also Samuel Feld, et al. v. John W. Merriam, et al., 485 A.2d 742,747 (Pa. 1984) *citing* Joseph Chambers v. Charles Montgomery, 192 A.2d 355, 358 (Pa.1963).

In order to state a claim for punitive damages, a plaintiff must prove that the defendant engaged in conduct that was "outrageous," and done with a bad motive, or with "reckless indifference" to the safety of others. Hutchinson ex rel. Hutchinson v. Luddy, 870 A.2d 766, 770 (Pa. 2005). A tortfeasor acts recklessly if he acts in conscious disregard of the potential for harm arising from his conduct, where the risk of harm is so great as to rise above that associated with simple negligence. Junk v. East End Fire Dept., 396 A.2d 1269, 1273 (Pa. Super. 1978); See also Krivijanski v. Union Railroad Co., 515 A.2d 933, 937 (Pa. Super. 1986).

By way of response, Plaintiffs contend that the Honorable Emil Giordano's denial of Riverview's motion for summary judgment issued November 18, 2011 is dispositive of this motion, and as such, it should be denied. In answer to that argument, Defendant Riverview counters that subsequent to the issuance of Judge Giordano's Order denying the motion for summary judgment, the parties have submitted pretrial memorandums identifying "all the relevant facts" to be offered at trial as required by N.C.R.CIV.P. N212B(c)(2)(1), and in their pretrial memorandum, the only basis asserted by Plaintiffs in support of their punitive damages claim are the allegations that Riverview bartender Krystal Americus "simply left alcohol on the

bar," and that she did not "drink count" on the night of the accident, which, they allege, is insufficient to support the claim.

In further support of their position, Defendant Riverview cites to case law for the proposition that "mere service of an alcoholic beverage by a bar to a patron who is visibly intoxicated is not outrageous conduct warranting punitive damages as a matter of law." Defendant Riverview's Motion, ¶ 11 *citing* Kotchin v. Simpkins, 43 Pa. D.&C.3d 263, 268-69 (Pa. Com. Pl. Luzerne Co. 1986) *aff'd*, 531 A.2d 39 (Pa. Super. 1987), *aff'd* 550 A.2d 1319 (Pa. 1988); Conner v. Duffy, 652 A.2d 372 (Pa. Super. 1994); McMahon v. Bath Hotel, Inc., 1995-C-6268 (Pa. Com. Pl. Northampton Co. 1997). In Kotchin, the Luzerne County Court of Common Pleas found plaintiff's evidence of punitive damages insufficient, but made no pronouncement that service of an alcoholic beverage to a visibly intoxicated person is, by itself, insufficient to support an award of punitive damages. The Superior and Supreme Courts then affirmed the opinion without published opinions. The Superior Court did not address the issue of punitive damages in Conner; and in McMahon, this Court, the Honorable Judge Panella presiding, found the evidence of record insufficient to support a threshold finding that the patron in that case was served while visibly intoxicated, thereby disposing of the case without reaching the issue of punitive damages.

In light of the foregoing, the Court finds Defendant Riverview's characterization of the cited case law somewhat misleading. There is no question that in order to warrant an award of punitive damages, the conduct of an actor must rise to the level of outrageousness, done either with evil motive or with reckless disregard for others. While Defendant Riverview suggests that mere service of alcohol to a visibly intoxicated person does not rise to this level, the Court believes that the appropriateness of a punitive damages award is such a fact-specific inquiry that

it cannot be said service to a visibly intoxicated person is not enough to warrant an award. Rather, that determination depends upon the specific facts and circumstances of the case.

In the instant case, Defendant Riverview contends that the only facts averred by Plaintiffs in support of their punitive damages claim are that Ms. Americus left alcohol out on the bar for anyone to consume on the night in question and she did not drink count. The Court's review of Plaintiffs' pretrial memorandum reveals an additional reference therein to inadequate training of Riverview's bartending personnel, with specific reference to the absence of TIPS training. Notably, the Court, by rulings on prior motions, has precluded Plaintiffs from presenting evidence as to Ms. Americus' failure to drink count on the night of the accident, and it has likewise precluded Plaintiffs' from characterizing Ms. Americus as simply leaving alcohol out on the bar for anyone to consume on the night of the accident, or from referencing the fact that Ms. Americus was not TIPS trained. To that end, Defendant Riverview is correct in the statement that the facts upon which the motion for summary judgment was decided are not precisely the same. However, they are substantially the same. Notwithstanding the Court's limitation on Plaintiffs' presentation of evidence in support of its punitive damages claim pursuant to the rulings on the aforementioned motions, the theory of Plaintiffs' punitive damages claim remains unchanged, and in accordance with the Court's earlier rulings, they shall be entitled to present evidence as to manner of Ms. Americus' service of pitchers to patrons, her failure to track consumption of the same, evidence of her training or lack thereof pursuant to 47 P.S. § 4-471.1. As a result, Plaintiffs' theory, and their evidence, remains essentially the same as it was when put before Judge Giordano for consideration of the summary judgment motion. Accordingly, the Court finds itself bound by the law of the case established by Judge Giordano's ruling, and it hereby **DENIES** Defendant Riverview's motion to preclude Plaintiffs from

asserting their claim for punitive damages. This ruling is made without prejudice to Defendant Riverview's ability make available motions with regard to punitive damages at the close of Plaintiffs' evidence or post-trial.

Motion to Preclude Plaintiffs from Calling Previously Unidentified Witnesses Named in Their Pretrial Memorandum

By their final motion, Defendant Riverview seeks to preclude Plaintiffs from calling certain previously unidentified witnesses named for the first time in their pretrial memorandum. On or about April 29, 2011, Defendant Riverview served Witness Interrogatories upon Plaintiffs which, in pertinent part, asked them to identify all fact witnesses and treating physicians not previously deposed who may be called to testify at trial. Defendant Riverview's Motion, Exhibit C. By their motion, they indicate that Plaintiffs did not respond to the request. Accordingly, and because the failure to produce evidence in discovery is grounds for exclusion, Defendant Riverview seeks to preclude the testimony of thirty-four (34) witnesses identified for the first time in Plaintiffs' pretrial memorandum. In support of their motion, Defendant Riverview contends that Plaintiffs' failure to previously identify these witnesses foreclosed Defendants from the opportunity to depose the witnesses, resulting in undue prejudice to them if the witnesses were allowed to testify at trial, in contravention of PA.R.E. 403.

By a brief contra the motion, Plaintiffs argue that each and every of the witnesses identified in their pretrial memorandum were identified, "at least by name, in written documents . . . provided during discovery." Plaintiffs' Memorandum of Law at 2. As such, and because of their inclusion in Plaintiffs' pretrial memorandum in compliance with N.C.R.CIV.P. 212B, they argue that they are in compliance with the rules of discovery and should not be precluded from calling the challenged witnesses. Further, while they acknowledge their failure to respond to Defendant Riverview's witness interrogatories, they note Defendant Riverview's failure to seek

relief in the form of a motion to compel their response pursuant to PA.R.CIV.P. 4019. Additionally, as to the identification of Decedent Warren's children Brittany and Robert in a supplement to their pretrial memorandum, Plaintiffs argue that they were specifically identified in the Complaint, their testimony or written statements were entered into the record at Defendant Black's guilty plea to his criminal charges, and they were repeatedly identified throughout written discovery. Moreover, they note that not all of the witnesses listed in Defendant Riverview's pretrial memorandum were previously identified in discovery, and therefore, they seek the preclusion of Plaintiffs' witnesses from a position of unclean hands.

> [T]he purpose of discovery is to prevent surprise and unfairness, thereby allowing a fair trial on the merits. The rules of discovery are intended to prevent a trial by ambush. Thus, discovery during the pretrial stages of litigation allows the parties to learn of additional evidence and witnesses, to discover the testimony that the witnesses will offer, and to assess the witnesses' credibility and impact.

STD. PA. PRAC. § 34:1.

Accordingly, the imposition of sanctions for a violation of the discovery rules lies within the sound discretion of the Court. Philadelphia Contributorship, Ins. Co. v. Shapiro, 798 A.2d 781, 784 (Pa. Super. 2002). In the instant case, Plaintiffs' failure to respond to Defendant Riverview's witness interrogatories was a clear violation of their duty under PA.R.CIV.P. 4006(a)(2). However, given the Court's discretion to resolve discovery matters, Plaintiffs' violation of the rules does not mandate the grant of Defendant Riverview's requested relief.

In resolving the present motion, the Court notes that Plaintiffs' pretrial memorandum affirmatively identifying thirty-two (32) of the thirty-four (34) challenged witnesses was filed of record several months before trial, on January 30, 2012. The remaining two witnesses were identified in a supplement to their pretrial memorandum, filed February 1, 2012. Thus, it cannot be said that this is an instance of trial by ambush, or that Defendant Riverview will be unfairly

surprised or prejudiced at trial. Rather, Defendant Riverview has been aware of the identified witnesses for a matter of months now, and in that time, could have undertaken, and may they still avail themselves of, the opportunity to seek certain information from Plaintiffs with regard to their intended witnesses, inclusive of contact information and/or offers of proof. Yet, given that Plaintiffs identified their witnesses within ample time prior to trial, the Court hereby declines to preclude them from calling those witnesses at trial as a sanction for failing to respond to Defendant Riverview's interrogatories. As such, Defendant Riverview's motion seeking the same is hereby **DENIED.**