Estate of Ruth G. Madden, late of Chambersburg Borough, Franklin County, Pennsylvania, deceased.

SULLIVAN: First and final account, statement of proposed distribution and notice to the creditors of Valley Bank and Trust Company, Chambersburg, Pennsylvania Executor of the Estate of Ellen M. Sullivan, a.k.a., Ellen McV. Sullivan, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

Robert J. Woods
Clerk of Orphans' Court
Franklin County, Pennsylvania
4/8, 4/15, 4/22, 4/29/88

NOTICE OF FILING OF
ARTICLES OF INCORPORATION

Notice is hereby given that Articles of Incorporation were filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, on the 17th day of March, 1988, for the purpose of obtaining a certificate of incorporation.

The name of the proposed corporation organized under the Commonwealth of Pennsylvania Business Corporation Law approved May 5, 1933, P.L. 364, as amended, is Ordnance Sports, Incorporated - A Close Corporation.

The purpose for which the corporation has been organized is to engage in and to do any lawful acts concerning any or all lawful business for which corporations may be incorporated under the Business Corporation Law of the Commonwealth of Pennsylvania.

LAW OFFICES OF
WELTON J. FISCHER
550 Cleveland Avenue
Chambersburg, PA 17201
4/15/88

NOTICE IS HEREBY GIVEN THAT Articles of Incorporation have been filed with and approved by the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania on December 21, 1987, for the purpose of obtaining a Certificate of Incorporation pursuant to the provisions of the Professional Corporation Act of the Commonwealth of Pennsylvania, approved July 9, 1970, being Act No. 160. The name of the corporation is TUSCARORA FAMILY PRACTICE, P.C. The purpose or purposes for which it was organized are as follows: To render family and individual medical care and to have all powers necessary or incident thereto, and to have, possess and enjoy all rights, benefits and privileges under the Professional Corporation Law and the Business Corporation Law of the Commonwealth of Pennsylvania.

Maria Greco Danaher, Esquire
DATTILO, BARRY, FASULO
AND CAMBEST
32nd Floor Gulf Tower
707 Grant Street
Pittsburgh, PA 15219
4/15/88

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing, with the Department of State of the Commonwealth of Pennsylvania, on March 7, 1988, an application for a certificate for the conducting of a business under the assumed or fictitious name of WAYNESBORO ANTIQUE MARKET, with its principal place of business at 320 South Potomac Street, Waynesboro, PA 17268. The names and addresses of the persons owning or interested in said business are Carroll C. Smith, 13066 Monterey Lane, Blue Ridge Summit, PA 17214 and Betty J. Smith, 13066 Monterey Lane, Blue Ridge Summit, PA 17214.

Martin and Kornfield
17 North Church Street
Waynesboro, PA 17268
4/15/88

DOWNIN, ET AL., v. LYTLE, ET AL., C.P. Franklin County Branch, No. A.D. 1986-354

Discovery - Sanctions

1. The party objecting to a question during discovery has the burden of demonstrating a question is improper.
2. If there is any possible basis for relevancy, discovery should be allowed.
3. Where sanctions should be ordered at the same time the motion to comply is granted, depends on the state of the discovery process.

Neil J. Rovner, Esq., Counsel for Plaintiff
Steven D. Snyder, Esq., Counsel for Defendants

KELLER, P.J., November 27, 1987:

Plaintiff, Paul H. Downin, Executor of the Estate of Joyce E. Downin, commenced this action on November 20, 1986, by filing a complaint against Glenn Lytle, M.D., alleging, inter alia, that Dr. Lytle failed to provide appropriate medical and surgical care and treatment to plaintiff's wife, Joyce E. Downing. Plaintiff further alleges that his wife died as a result of Dr. Lytle's substandard medical care.

On February 27, 1987, plaintiff noticed the deposition of Dr. Lytle. The deposition was held on June 25, 1987. At the beginning of the deposition counsel stipulated that the only objections that would be made would be those as to the form of question. At two different points during the deposition counsel for the plaintiff posed a question which counsel for Dr. Lytle instructed the defendant not to answer. On each occasion, counsel argued briefly. They were eventually able to complete the deposition reserving rulings on the two objections for the court.

The two questions are:

(1) In the last nine years have you ever been sued for medical malpractice other than the present case?; and,

(2) Are you aware that any other person may have been responsible for her medical problems as of the time of her office visit with you on June 18, 1985, until the time of her death on August 17, 1985?

Plaintiff's counsel filed a motion to compel Dr. Lytle to answer, a motion for sanctions, and a brief in support of these motions. Counsel for Dr. Lytle responded with a brief in opposition to both

motions alleging, (1) that the first question is irrelevant to this case and is not likely to lead to the discovery of admissible evidence, (2) that the second question is improper because it requests Dr. Lytle to express a medical/legal opinion as if he were an expert witness, and (3) that an award of sanctions would be premature at this stage in the case, and that an award of sanctions would be inappropriate.

DISCUSSION

Initially, we find it imperative to point out to counsel for both parties that it is patently obvious that the objections to both questions at issue were premature. Both questions call for mere "yes" or "no" answers. If at all, it would be the follow-up question which would be objectionable. For the purpose of disposing of this matter, we will treat these issues as though the objections were made at the proper time.

We must first decide if Dr. Lytle must disclose whether in the last nine years he has ever been sued for medical malpractice other than the present case. Dr. Lytle contends that deposition questions concerning his litigation history are irrelevant to the present case, and, therefore, are improper. The burden of proof is upon the party objecting to discovey to establish non-discoverability rather than upon the proponent of discovery to establish discoverability. *Winck v. Daley Mack Sales, Inc.,* 21 D & C 3d 399, 404 (1980). Therefore, since Dr. Lytle objected to the question, it is he who has the burden of demonstrating that the question was improper. Plaintiff does not have the burden of proving that the question was proper.

Pa. R.C.P. 4003.1 provides:

> "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Since the information sought is definitely not privileged, we must at this point decide whether the information sought is relevant to the subject matter involved in the pending action. In deciding what matters are relevant for the purposes of discovery, the court should endeavor to determine whether there is any basis on which the proposed matters *might be* relevant at the trial.

(Emphasis added.) *Paxton v. Maio,* 59 Lanc. Rev. 259, 261 (1964). It is difficult to determine what evidence is relevant in advance of the trial and any doubt on that point should be resolved in favor of relevancy. *Prep. v. Penna. Turnpike Commission,* 80 Dauph. 1, 14 (1962); *Rush v. Butler Fair and Agricultural Ass'n., (No. 3),* 17 D & C 2d 250, 257 (1958). If there is any possible basis for relevancy, discovery should be allowed. *Yoffee v. Golin,* 45 D & C 2d 318, 322 (1968).

In the case at bar, the plaintiff has alleged in his complaint that Dr. Lytle performed unnecessary surgery and rendered substandard medical treatment to Joyce E. Downin, which acts were the proximate cause of her death. Plaintiff has since contended that evidence of other unnecessary operations performed by Dr. Lytle would reflect on his professional competence and might also show a common scheme or plan by the doctor to render care which was not in accord with accepted medical practice.

Without prejudging the admissibility of such evidence at trial, we do resolve the present issue in favor of relevancy and will compel Dr. Lytle to answer the first question. In keeping with the decision in *Paxton,* supra., we find that there may be *some* basis on which the proposed matters *might be* relevant at the trial. Plantiff's state purpose for seeking such discovery is sufficient to meet the *Paxton* test. (Italics ours.)

Dr. Lytle's objection to the first question on relevancy grounds appears to be merely another way for him to contend that the information sought will be inadmissible at trial. The mandate of Pa. R.C.P. 4003.1 requires the court to ignore such an objection if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Plaintiff's stated purpose for seeking such discovery is sufficient to meet the Pa. R.C.P. 4003.1 test.

Having found that the first question at issue is not privileged, is relevant to the subject matter involved in the pending litigation, and reasonably calculated to lead to the discovery of admissible evidence, we must now consider the limitations of the scope of discovery and depositions as defined in Pa. R.C.P. 4011.

Pa. R.C.P. 4011 provides:

No discovery or deposition shall be permitted which
(a) is sought in bad faith;

(b) would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party;
(c) relates to matter which is privileged; or
(d) rescinded Nov. 20, 1978, effective 120 days after Dec. 16, 1978;
(e) would require the making of an unreasonable investigation by the deponent or any party or witness;
(f) rescinded Nov. 20, 1978, effective 120 days after Dec. 16, 1978.

There is no allegation or evidence that the deposition question was asked in bad faith. In addition, although answering the question may cause annoyance, embarrassment, oppression, burden or expense to Dr. Lytle, such annoyance, etc., would not be unreasonable. Furthermore, the information sought does not relate to privileged matters, nor does it require the making of an unreasonable investigation by Dr. Lytle.

Defendant next contends that *Morgan v.Memorial Osteopathic Hospital,* Court of Common Pleas of York County, No. 83-S-183, Slip Op., December 19, 1985, and *Payne v. Howard,* 75 F.R.D. 465 (D. D.C. 1977) are controlling on this issue. We first note that we are bound by neither of these decisions. In *Morgan,* it is obvious that the plaintiff was unable to state a sufficient reason to support his relevancy contention. We are not confronted with such a problem in the instant case because we have already found that the plaintiff has been able to meet the requirement of the *Paxton* test that there may be *some* basis on which the proposed matters *might be relevant at trial.* (Italics ours.)

The *Payne* case is distinguishable not only on the same rationale of the *Morgan* distinction, but also because in *Payne,* the plaintiff was seeking documents in the nature of pleadings from past lawsuits. No such request was made of Dr. Lytle. He was merely asked a question.

We, therefore, conclude that Dr. Lytle shall be ordered to answer not only the "yes" or "no" portion of the following question, but also the substantive portion of the question:

> In the last nine years have you ever been sued for medical malpractice other than the present case?

The next issue is whether Dr. Lytle must disclose if he is aware of any other person responsible for Joyce Downin's medical problems as of the time of her office visit with him on June 18, 1985, until the time of her death on August 17, 1985.

The defendant contends that the question requires him to express an expert opinion which is outside the scope of his

tors and Guardian Account, Proposed Schedules of Distribution and Notice to Creditors and Reasons Why Distribution cannot be Proposed will be presented to the Court of Common Pleas of Franklin County, Pennsylvania, Orphans' Court Division for CONFIRMATION: June 2, 1988.

HARNISH: First and final account, statement of proposed distribution and notice to the creditors of Larry D. Harnish, Executor of the Estate of Viola C. Harnish, late of Waynesboro, Franklin County, Pennsylvania, deceased.

MCKELVEY: First and final account, statement of proposed distribution and notice to the creditors of S. David Beltz, Executor of the Estate of Vera J. McKelvey, late of Lurgan Township, Franklin County, Pennsylvania, deceased.

Robert J. Woods
Clerk of Orphans' Court
Franklin County, Pennsylvania
5/6, 5/13, 5/20, 5/27/88

LEGAL NOTICES, cont.

treatment to Downin. We can find no basis for this argument. The question asked required a mere "yes" or "no" answer based on fact. Either the doctor does know who may have been responsible, or he doesn't. The question certainly does not require the expression of an expert opinion.

Defendant's argument is also deficient for the reason that it was he who opened the door to this particular line of examination. In his Answer and New Matter paragraph 49, he alleged that Joyce Downin died as a result of circumstances and conditions beyond the control of Dr. Lytle for which he is not responsible or otherwise legally liable. Plaintiff's deposition question merely requests the doctor to give an explanation of the "circumstances and conditions" beyond his control.

Assuming arguendo that the question does call for an expert opinion by Dr. Lytle,

> "the ability to discover the potential expert testimony of a party witness, either by propounding written interrogatories or by taking oral or written depositions, is fettered only by the general limitations that apply to all discovery. Since the rescission of Rule 4011(f) in 1978, the party witness against whom discovery is sought can no longer object on the ground that the requested disclosure would require him or her to 'give an opinion as an expert.' "

Neal by Neal v. Lee, Pa. Super. , 530 A.2d 103, 107 (1987).

Accordingly, Dr. Lytle will be ordered to answer the "yes" or "no" portion of the following question, and, if applicable, the substantive portion of the question:

> Are you aware that any other person may have been responsible for her medical problems as of the time of her office visit with you on June 18, 1985, until the time of her death on August 17, 1985?

We now turn to the final issue of sanctions. We are guided by Pa. R.C.P. 4019 which provides in pertinent part:

> (a)(1) The court may, on motion, make an appropriate order if (viii) a party or person otherwise fails to make discovery or to obey an order of court respecting discovery.
> (g)(1) Except as otherwise provided in these rules, if following the refusal, objection or failure of a party or person to comply with any provision of this chapter, the court, after opportunity for hearing, enters an order compelling compliance and the order is not obeyed,

the court on a subsequent motion for sanctions may, if the motion is granted, require the party or deponent whose conduct necessitated the motions or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses, including attorneys' fees, incurred in obtaining the order of compliance and the order for sanctions, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

The particular bone of contention on the issue of sanctions is whether the imposition of sanctions must flow from a one-step procedure, or from a two-step procedure. That is, once the court grants a motion to compel, may the court also order sanctions? Or, must the court allow the non-moving party the opportunity to comply with the grant of the motion to compel, before it may entertain a motion for sanctions? The problem that arises is, to what does the phrase "except as otherwise provided in these rules" refer, in Pa. R.C.P. 4019(g)(1)?

We find guidance in the Explanatory Note to the 1978 amendment of Pa. R.C.P. 4019.

The Note provides in pertinent part:

> The amendment suggests a new approach. It refers generally to 'refusal, objection or failure of a party or person to comply with any provision of this chapter' which could hardly be more allinclusive. However, it preserves the special provisions of subdivisions (d), (e), (f) and (h) by the phrase 'except as otherwise provided in these rules'. As to those situations not covered by subdivisions (d), (e), (f) and (h), it requires a 'two-step' procedure rather than the 'single step' procedure of the Federal Rule.
>
> The first step under subdivision (g) (1) is a motion to compel compliance. If, after a hearing, the motion is granted and depositions or discovery are ordered and the party against whom it is directed complies, that is the end of the matter as far as expenses and counsel fees are concerned. There can be no award of expenses and fees. If the order to comply is not obeyed, the aggreived party may file a new motion to impose sanctions. The court, at this 'second stage' of the proceedings, may award expenses and counsel fees for either or both steps depending upon how the court views the conduct of the defaulting party and his counsel.

Since the plaintiff is proceeding under subdivision (a)(1)(viii), it is not a situation covered by subdivision (d), (e), (f) and (h), and requires the "two-step" procedure. The granting of plaintiff's

tors and Guardian Account, Proposed Schedules of Distribution and Notice to Creditors and Reasons Why Distribution cannot be Proposed will be presented to the Court of Common Pleas of Franklin County, Pennsylvania, Orphans' Court Division for CONFIRMATION: June 2, 1988.

HARNISH: First and final account, statement of proposed distribution and notice to the creditors of Larry D. Harnish, Executor of the Estate of Viola C. Harnish, late of Waynesboro, Franklin County, Pennsylvania, deceased.

MCKELVEY: First and final account, statement of proposed distribution and notice to the creditors of S. David Beltz, Executor of the Estate of Vera J. McKelvey, late of Lurgan Township, Franklin County, Pennsylvania, deceased.

Robert J. Woods
Clerk of Orphans' Court
Franklin County, Pennsylvania
5/6, 5/13, 5/20, 5/27/88

NOTICE OF FILING OF
ARTICLES OF INCORPORATION

Notice is hereby given that Articles of Incorporation were filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, on the 20th day of April, 1988, for the purpose of obtaining a certificate of incorporation.

The name of the proposed corporation organized under the Commonwealth of Pennsylvania Business Corporation Law approved May 5, 1933, P.L. 364, as amended, is KBR Management, Incorporated - a Close Corporation.

The purpose for which the corporation has been organized is to engage in and to do any lawful acts concerning any or all lawful business for which corporations may be incorporated under the Business Corporation Law of the Commonwealth of Pennsylvania.

LAW OFFICES OF WELTON J. FISCHER
550 Cleveland Avenue
Chambersburg, Pennsylvania 17201
5/13/88

LEGAL NOTICES, cont.

motion to compel in this Opinion and Order is the first step of the procedure. The second step may arise on subsequent motion by plaintiff only if this order to comply is not obeyed. Although contrary to our opinion in *Crawford v. Chambersburg Hospital,* 18 D&C 3d 121 (1980), and more recently this Court's opinion in *Haas v. Foster,* A.D. 1985-259 (Jan. 5, 1987), imposition of sanctions at this stage of the discovery process would in our judgment be premature.

ORDER OF COURT

NOW, this 27th day of November, 1987, the plaintiff's motion to compel defendant, Dr. Glenn Lytle, to answer is granted.

The plaintiff's motion for sanctions is denied.

Exceptions are granted plaintiff and defendant Dr. Lytle.

GSELL, ET AL. V. THOMAS, C.P. Franklin County Branch, E.D. Vol. 7, Page 392

Quiet Title - Probate of Will - Unrecorded Deed - Bona Fide Purchaser - Constructive Notice

1. Constructive notice is not limited to instruments of record, a subsequent purchaser may be bound by constructive notice of a prior unrecorded agreement.

2. Where a sister knew her brother had attempted on a number of occasions to buy their mother's land, she must conduct a vigorous investigation of the title to the property prior to purchase.

3. Where plaintiff blocked roads into land and put up no trespassing signs bearing his name, defendant by inspecting the property would have constructive notice of plaintiffs' claim of ownership.

4. A prospective purchaser of land has a duty to make inquiry as to the status of the title of his vendor and one who fails to make inquiry is not a bona fide purchaser as against an unrecorded deed.

Donald L. Kornfield, Esq., Counsel for Plaintiffs
Thomas J. Finucane, Esq., Counsel for Defendant

KELLER, P.J., November 9, 1987*:

*Editors Note: See, also, Amended Adjudication in this case, dated November 18, 1987, which follows, hereinafter, immediately after the report of the instant Opinion and Order.