Here, plaintiffs' actions to minimize the stream's damage was not performed out of familial affection. The court sees no reason why the plaintiffs should not be compensated for their labor, the value of which was assessed by expert testimony.

Defendant's counsel also asserts that, under Pennsylvania law, a property owner may not recover both remedial and permanent damages. This argument is, to say the least, disingenuous in light of *Wade v. S. J. Groves & Sons Co.*, 283 Pa. Super. 464, 424 A.2d 902 (1981). In that case, the court held that the injured landowner was entitled to damages for the reduction of his property's fair market value, in addition to damages for the cost of repairs. This was because, like the case before us, a real estate appraisal expert testified that a prospective buyer, when informed of the history of the property and of the possibility of future damages, would pay less for it.

Plaintiff Tosten petitions the court for compensation for damages to his septic system, in the event that it malfunctions or needs to be moved. There was no testimony, though, that his system has malfunctioned in any way as a result of either of defendants' actions. Also, while the sewage enforcement officer testified that he would not grant a new permit to a system situated where Tosten's is, he did not testify that Tosten's permit would be likely to be revoked. Any damages based on the possibility of future damages would be entirely speculative and unsupported by evidence on the record and, therefore, must be denied.

The court must also deny plaintiffs' claim for emotional distress. Under Pennsylvania law, a cause of action for infliction of mental distress is composed of: intentional and reckless conduct that is extreme and outrageous resulting in severe emotional distress. *Denenberg v. American Family Corp. of Columbus, Ga.*, 566 F. Supp. 1242 (E.D. Pa. 1983). Plaintiffs, here, have not proven by a preponderance of evidence that defendant's conduct was "outrageous", nor that the mental distress they suffered was "severe."

Ultimately, the plaintiffs wish to be restored to the position they enjoyed prior to the flooding. That is, they desire the return of the full use and enjoyment of the entire area of their properties. Obviously, the court cannot enjoin the stream itself from flowing.

Since Thrush was not made a party to the action, the court cannot order him to open his sinkholes. Even if the court were to make such an order, there is no guarantee that they would not mysteriously fill up again, forcing a relitigation of this issue.

There is only one way to assure the abatement of the flooding and to return the properties to their original state; Ray Gibble must fill in his channel and grade the area to the same contour that existed prior to the channel being dug. Such an order shall be entered. Furthermore, Ray Gibble shall pay to the plaintiff Ridge the amount of $3,990.50 and to plaintiff Tosten the amount of $5,505.50.

ORDER OF COURT

April 2, 1986, the court orders the defendant, Ray Gibble, to pay damages in the amount of $3,990.50 to plaintiff Ridge and damages in the amount of $5,505.50 to the plaintiff Tosten.

Further, the court orders the defendant, Ray Gibble, to fill the channel dug in his front yard in 1982 and to return the area to the contour which existed prior to 1982.

The defendants are given ninety (90) days to comply with this order.

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

Injunction - Attorney - Conflict of Interest

1. Whether a lawyer can fairly and adequately protect the interests of multiple clients depends on an analysis of each case.

2. Where plaintiffs claim one defendant used undue influence to induce another defendant to sign a deed, the same attorney may represent both defendants.

3. Before undertaking to represent multiple clients, an attorney must make all clients aware of the implications of common representation.

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

KELLER, J., January 3, 1986:

Plaintiffs filed an action to quiet title on July 11, 1985. On July 31, 1985, defendant Diehl filed a preliminary objection in the nature of a demurrer; defendant Thomas also filed a preliminary objection in the nature of a demurrer to Counts II and IV and a motion for a more specific complaint. Plaintiffs filed a petition for special relief pursuant to Pa. R.C.P. Rule 1532 and a rule to show cause was issued on July 22, 1985. An answer to the petition was filed August 2, 1985. Upon stipulation and agreement of counsel the petition for special relief was withdrawn on December 27, 1985. Plaintiffs filed a petition for injunctive relief and a rule issued on August 29, 1985. An answer was filed on September 9, 1985. Briefs were submitted and arguments on the injunction were heard at the November Argument Court. The issue of injunctive relief is ripe for disposition.

The issue is whether Attorney Thomas J. Finucane should be enjoined from representing Hazel M. Gsell Diehl because the plaintiffs allege that defendant Thomas exerted undue influence on defendant Diehl resulting in the execution of a deed conveying real estate from Mrs. Diehl to Mrs. Thomas. The trial court in the first instance has the power to regulate the conduct of the attorneys practicing before it and has the duty to insure that those attorneys act in accordance with the Code of Professional Responsibility. *American Dredging v. City of Philadelphia,* 480 Pa. 177, 389 A.2d 568 (1978). The Pennsylvania Code of Professional Responsibility, Canon 5, requires a lawyer to exercise independent professional judgment on behalf of a client.

> In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent . . .

BAR NEWS ITEM

The Pennsylvania Trial Lawyers Association has announced it will present, through the Trial Adversary Foundation of Pennsylvania, a seminar, titled "PA Auto Insurance Law," on Friday, March 27, 1987. The program will take place at the Sheraton Harrisburg West Motel, I-83 and PA Turnpike in New Cumberland, from 8:50 A.M. to 3:30 P.M. The seminar is intended to be a comprehensive update and analysis of the news PA Motor Vehicle Financial Responsibility Law, with report on case law developments, and other matters. For information or registration, contact Pennsylvania Trial Lawyers Association, 18th Floor, 230 Broad Street, Philadelphia, PA 19102, telephone (215) 546-6451.

Pa. C.P.R., EC 5-16, 42 P.S.

The corresponding disciplinary rule provides as follows:

> DR 5-105. Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.
>
> (A) A laywer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105 (c).
>
> (C) In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his indeendent professional judgment on behalf of each.

"Whether a lawyer can fairly and adequately protect the interests of multiple clients . . . depends upon an analysis of each case . . . " Pa. C.P.R. E.C. 5-17. "When dealing with ethical principles . . . we cannot paint with broad strokes." *Silver v. Downs,* 493 Pa. 50, 425 A.2d 359 (1981) quoting *Funds of Funds, Ltd. v. Arthur Anderson & Co.,* 567 F.2d 225 (2nd Cir. 1977).

With these principles in mind, we turn to the question of whether Attorney Thomas J. Finucane should be disqualified from representing both defendants. In *Peacock v. Danzis,* 12 D&C 3d 655 (1978), the plaintiff filed a petition requesting that a certain law firm be disqualified from representing the five defendant physicians on the ground of conflict of interest. The defendant's answer denied any conflict of interest and annexed affidavits from each defendant stating that each was aware of the plaintiff's claim, the defendant's positions relative to one another, that all the defendants were being represented by the same firm and that each wished to be represented by that firm. The court held that the affidavits satisfied the disclosure requirements of DR 5-105 (C). In the present case, the defendants' answer states,

> " . . . both parties separately and out of the presence of the other have requested Thomas J. Finucane to represent them and they are both aware of the implications of common representation."

In accordance with Pa. R.C.P. Rule 209 (b), all the averments of facts responsive to the petition and properly pleaded in the answer are deemed admitted for the purposes of the injunctive proceeding. Thus, it appears that the attorney explained the implications of common representation to both of his clients as required by the Code. Similar to the *Peacock* defendants, it is the position of the defendants in this case that their interests are alike:

> " . . . it is denied that the interest of Mrs. Diehl and Mrs. Thomas conflict in this litigation. They both are in favor of the validity of the deed from Mrs. Diehl to Mrs. Thomas and they both support the plaintiffs having no standing as to Count IV . . ."

Defendant's answer, paragraph 5. Analogous to the affidavits in *Peacock,* the facts pleaded in defendants' answer, which must be deemed admitted for the purpose of this determination, satisfy the disclosure requirements of Pa. C.P.R. DR 5-105 (C).

> If a lawyer is requested to undertake or continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues employment. Pa. C.P.R. E.C. 5-15.

In the present case, it appears that the attorney has complied with this standard.

The paramount consideration in this case is the right of both defendants to have their attorney act in their respective best interests and to exercise independent professional judgment on their behalf.

> "We cannot accept the premise, however, that the mere possibility that one of the ethical canons may be transgressed at some indeterminate point in litigation is sufficient to trigger, without discovery or an evidentiary hearing, the extreme remedy of disqualification." *Silver v. Downs,* 493 Pa. 50 at 60, 425 A.2d 359 at 364 (1981).

In the case at bar, the plaintiffs allege that in this action to quiet title the interests of the defendants are potentially conflicting because they allege that Mrs. Thomas exerted undue influence on Mrs. Diehl thereby causing her to convey property to Mrs. Thomas which she had previously conveyed to the plaintiffs. The allegations of undue influence are the subject of defendants'

pending preliminiary objections in the nature of a demurrer and a motion for a more specific complaint. Whether undue influence was exerted is at this stage of the litigation an open question. Although we are concerned about potential conflicts and need not wait for it to ripen into a certainty, *Pirillo v. Takiff,* 462 Pa. 511, 341 A.2d 896 (1975), we have no way of properly evaluating the seriousness of the potential for conflict here. It may be remote or non-existant.

Although disqualification and removal is appropriate in cases in which representation of conflicting interests is shown, it is, of course, a serious remedy which must be imposed with an awareness of the important interests of a client in representation by counsel of the client's choice. *Slater v. Rimor, Inc.,* 462 Pa. 138, 338 A.2d 584 (1975). In the case sub judice, each defendant has expressed her desire to be represented by the same counsel. This desire should be given considerable weight. We also recognize the hardship which easy disqualification may cause to Mrs. Diehl. Taking into consideration all of these factors, we decline to enjoin attorney Thomas J. Finucane from representing Hazel M. Gsell Diehl.

ORDER OF COURT

NOW, this 30th day of January 1986, the plaintiffs' petition for injunctive relief is denied.

Exceptions are granted the plaintiffs.

RICHARDSON V. BUNDY, C.P. Franklin County Branch, A.D. 1984-231

Medical Malpractice - TORT - Implied Warranty in Medical Care

1. A medical malpractice claim is a tort claim and a second count based on breach of implied warranty is redundant and improper.

Patrick J. Redding, Esquire, Counsel for Plaintiffs
Eugene D. McGurk, Jr., Esquire, Counsel for Plaintiffs
James W. Saxton, Esquire, Counsel for Defendants
Kevin E. Osborne, Esquire, Counsel for Defendants

OPINION AND ORDER

EPPINGER, S.J., January 13, 1986:

In deciding motions for more specific pleading, we have been guided for some time by the decision of the court in *Price v. The Pennsylvania Railroad Co.,* 17 D.&C.2d 518 (Dauphin 1958). We think the principles apply in Pennsylvania, a fact pleading state, that plaintiffs should be required to allege facts justifying their allegation of failure to exercise due care under the circumstances.

The hospital's motion to strike and the doctors' demurrer are both based on the claim that the second cause of action, which alleges malpractice as a breach of implied warranty, is redundant and improper. We agree. In Pennsylvania lower courts there are two lines of cases, one represented by *Dillard v. St. Francis General Hospital et al.,* 124 P.L.J. 235 (Allegheny 1976), recognizes the cause of action. The other, represented by *Moten v. Harrisburg Hospital,* 9 D.&C.3d 671 (Dauphin 1979), held that generally a malpractice claim is a tort claim and denied the implied warranty assumpsit claim. At best it is redundant, *Peterman v. Geisinger Medical Center,* 8 D. &C.3d 432 (Mountour 1978), and only succeeds in complicating the final determination of the case. We accept the reasoning of the second line of cases and will sustain the demurrer.

ORDER OF COURT

January 13, 1986, according to the stipulation at argument, subparagraphs (f) and (g) of paragraph 16 are stricken and the motion for more specific pleading as to subparagraph (e) of paragraph 16 is granted. The motion to strike and the demurrer to Count No. 2 and so much of Count No. 3 that alleges an implied warranty are treated as demurrers and are granted.

The plaintiff is given twenty (20) days from this date to file an amended complaint as to paragraph 16 (e).

Alicia Richardson sought the advice of the defendant physicians Thomas W. Bundy and Glenn H. Lytle during 1981 concerning a lump at or near her right breast. She alleges in a complaint that was filed that thereafter the two undertook to treat and advise her concerning the condition. Korangy Radiological Associates undertook to perform diagnostic studies and evaluations and the complaint alleges that Korangy was the agent, servant, and employee of the Chambersburg Hospital.