previous criminal record nor any previous contact with juvenile authorities or courts.

III. THE NATURE AND CIRCUMSTANCES OF THE SHOOTING

The court is particularly concerned with the violent, apparently well planned, execution type slaying of Keith Koons. Whoever committed this heinous crime had a great deal of sophistication and eluded the Pennsylvania State Police for a lengthy period of time. The court is not suggesting that Mr. Grasso was that individual.

Defendant contends that the alleged homicide did not contain any of the heinous nature of the crimes which were exhibited in other cases in which courts have denied petitions to transfer to the juvenile system. See *Commonwealth v. Waters,* 334 Pa. Super. 513, 483 A.2d 855 (1984) where the victim had been stabbed and bludgeoned to death in an abandoned farm house; see also *Commonwealth v. Zoller,* 345 Pa. Super. 350, 498 A.2d 436 (1985) where the victim was beat over the head with a shovel and buried in a shallow grave. The court believes that shooting another person in the back of the head is both a very serious charge and also an inherently heinous act. In *Commonwealth v. Williams,* 514 Pa. 62, 522 a.2d 1058 (1987) the Pennsylvania Supreme Court has noted that "Murder is a heinous and serious crime, and the Legislature's assumption that one who commits murder is in need of adult discipline and restraint is a reasonable one." This court is particularly concerned with the serious and heinous nature of the alleged crime in this case.

The court is concerned with the defendant's continuous denial of any involvement or knowledge of the events surrounding the shooting death of Keith Koons. John Hargreaves, Department of Public Welfare liaison to the Juvenile Justice System, testified that the first step of rehabilitation is to have the party admit his involvement in the crime. However, after a period of time where the defendant continously denies involvement, it becomes counter-productive to keep approaching the juvenile with this particular issue. Mr. Hargreaves said that it is difficult to build a trusting relationship with the juvenile if he continues to deny and the counselor continues to probe into the juvenile's involvement. In his many years of experience, Mr. Hargreaves can only recall of two juveniles charged with murder being transferred to juvenile court.

No psychological or psychiatric evidence was presented that based on the juvenile programs available, the individual make-up of the defendant, and the time remaining before the defendant turns 21, that a program is available that could reasonably assure defendant's rehabilitation.

The court presumes the defendant to be innocent. It is the court's belief that if the defendant were convicted, there is not reasonable assurance that the defendant could be rehabilitated within the remaining time as a juvenile. The defendant is presently 17 years, 7 months old. He would only have approximately three years to be detained and successfully rehabilitated before reaching 21 years of age. Therefore, considering the violent and heinous nature of the crime, the degree of criminal sophistication exhibited by the perpetrator of this crime, and the defendant's continuous denial of any involvement in the crime, the court does not believe that the defendant could be rehabilitated within the juvenile system within a little over three years.

With the foregoing concerns in mind, the court finds that the need for legal restraint far outweighs the need for treatment in the juvenile system. The defendant has failed to show that his need for care, guidance and control as a juvenile outweighs the state's and society's need to apply legal restraint as an adult.

The court considered the defendant's maturity, home life, good work habits and good character testimony in reaching its decision. However, the serious nature of the crime and the lack of reasonable assurance that the defendant could be rehabilitated within the juvenile system before reaching majority require that the defendant's petition to transfer to the juvenile court be denied.

ORDER OF COURT

November 16, 1988, defendant's petition to transfer this case to the jurisdiciton of the juvenile court is denied.

HOLTRY, ETC., ET AL. VS. DRUCKENBROD, ET AL., C.P. Franklin County Branch, No. A.D. 1988-290

Medical Malpractice - Filial Consortium - Negligent Infliction of Emotional Distress - Sensory

1. Pennsylvania does not recognize a cause of action for loss of filial consortium.

2. The word "sensory" as adopted by the appellate courts includes perceptions received by other senses than that of vision.

3. The allegation of an objective physical manifestation of emotional distress is not required if there is some medically identifiable effect alleged.

4. A complaint which lists defendants' omissions in treating a pregnant woman over 26 days which involved other unidentified individuals and not involving all of the defendants does not allege a discrete and identifiable traumatic event.

Pamela G. Shuman, Esq., Attorney for Plaintiffs
G. Thomas Miller, Esq., Attorney for Defendant/Druckenbrod
James W. Saxton, Esq., Attorney for Christman, Swartz and Chambersburg OB-GYN ASSOCIATES, P.C.
Kevin E. Osborne, Esq., Attorney for Chambersburg Hospital

KELLER, P.J., March 15, 1989:

This action for medical negligence was commenced by the filing of a complaint. Subsequent to the filing of preliminary objections by the defendants an amended complaint was filed on November 18, 1988. The preliminary objections of Defendant Dr. Druckenbrod were filed December 21, 1988. The preliminary objections of defendants Drs. Christman, Swartz and Chambersburg OB-GYN Associates, P.C. were filed December 9, 1988, and the preliminary objections of defendant Chambersburg Hospital were filed December 6, 1988. The preliminary objections were place on the February Argument List. Briefs were exchanged and oral arguments by counsel for defendant's, Christman, Swartz, and Chambersburg OB-GYN Associates, P.C., counsel for defendant Chambersburg Hospital, and counsel for the plaintiff were heard February 2, 1989. Counsel for defendant Druckenbrod did not appear and was not heard. On February 6, 1989 the letter of defendant Druckenbrod's attorney dated February 3, 1989 was received. This letter indicated Mr. Armour had intended to request counsel for the co-defendants to inform the Court that he joined in their argument, but failed to do so, and apologized for any inconvenience caused the Court by his failure to appear. We take this opportunity to point out to Attorney Armour, it is not

his prerogative or that of counsel for other parties to the litigation to decide whether or not an attorney representing a party will be present for a scheduled court proceeding. In absence of court approval, counsel of record for a party, or substitute counsel for the party, will be present to assert the position of their client, respond to the contentions of opposing counsel, and answer the questions of the Court or appropriate sanctions will be imposed. (We note 58 attorneys are named in the letterhead of Mr. Armour's firm. We find it hard to believe that none of them could have appeared if he was unavailable.)

In the instant case, we will note the preliminary objection of defendant Druckenbrod but will disregard the brief filed in support of those preliminary objections. If the briefs and arguments of counsel for the co-defendants sufficiently support any or all of the Druckenbrod objections, they will be sustained. If not, they will be overruled.

Defendant Chamberburg Hospital's preliminary objection in the nature of a motion to strike applies to plaintiff's paragraphs 42, 56 and 57, and alleges the failure of plaintiff to allege material facts required by the Rules of Civil Procedure.

The motion to strike of defendants Chambersburg OB-GYN and Drs. Christman and Swartz allege:

1. Paragraph 48(b) of plaintiff's amended complaint fails to allege material facts as required by the Rules of Civil Procedure.

2. Plaintiff's averments of five separate counts against each of the defendants, and averment of Claims I, II and III, lumping damages alleged to be due the child/plaintiff, plaintiff/parents and the plaintiff/mother violate the applicable Rules of Civil Procedure.

Defendant Druckenbrod's motion to strike alleges paragraph 46 (a through c) and (e through g) fail to allege material facts as required by the Rules of Civil Procedure.

Paragraph 42 of the amended complaint alleges:

> 42. The Defendants' and their agents' negligence as set forth *infra* in not appreciating minor Plantiff's precarious condition and failing to perform, monitor and/or report promptly results of tests, failure to document, diagnose and properly perform a caesarean section

> contributed to and caused the permanent injuries that Brianna has suffered.

Defendant Chambersburg Hospital contends that the plaintiffs have failed to allege which defendants or their agents were responsible for the variety of negligent acts or a time when they were so negligent. Material facts must be pleaded not only concisely but precisely, and the plaintiffs have failed to do so. Rather than grant defendant hospital's motion to strike, we will consider it as a motion for more specific pleading and it will be granted.

Paragraph 56 of plaintiffs' amended complaint alleges:

> 56.Defendant Chambersburg Hospital is liable because of the negligence of its employees in failing to properly read, interpret, and notify promptly of the results of fetal testing performed and the deteriorating condition of minor Plaintiff and in failing to have adequate facilities and personnel to perform an *immediate* caesarean section.

Paragraph 57 of the amended complaint alleges:

> 57. Defendant Chambersburg Hospital, acting through its agents, apparent agents, servants and/or employees is vicariously and independently liable to the Plaintiffs for its negligence in:
>
> (a) failing to establish and/or enforce hospital by-laws, rules, and regulations requiring continuity of care when a physician requests a consultation by a specialist for a patient whose baby is in fetal distress;
>
> (b) failing to establish and/or enforce hospital by-laws, rules and regulations requiring doctors with privileges to promptly order consultations;
>
> (c) failing to establish and/or enforce hospital by-laws, rules and regulations requiring doctors to promptly diagnose and treat fetal distress;
>
> (d)failing to establish and/or enforce hospital by-laws, rules and regulations requiring nurses on duty to immediately inform physicians of deteriorating conditions and increased fetal distress experienced by patients in its facility;
>
> (e) failing to establish and/or enforce hospital by-laws, rules and regulations to provide adequate training to personnel who provide

nursing services to pregnant patients on fetal monitoring equipment whose infants are suffering increasing fetal distress.

(f) failing to establish and/or enforce hospital by-laws, rules and regulations that require nursing personnel to consult with physicians immediately upon noting increased fetal distress and deteriorating fetal condition;

(g) failing to promptly order appropriate consultations when fetal monitoring shows deteriorating fetal condition;

(h) failing to select, supervise, and monitor properly qualified medical personnel to whom it entrusts the care and treatment of infants in fetal distress; and

(i) failing to develop and enforce appropriate guidelines and procedures for the care of fetuses in distress.

In *Conner v. Allegheny General Hospital,* 501 Pa. 306, 461 A.2d 600 (1983), the Supreme Court of Pennsylvania reversed the decisions of the trial court and the Superior Court which held the plaintiff could not amend his complaint due to the running of the Statute of Limitations because the new allegations of negligent acts were under a different theory of action. The Supreme Court reversed holding that the proposed amendment did not state a new cause of action, but rather amplified an existing one. The court noted that the boiler-plate language in the complaint that the defendant was negligent by "otherwise failing to use due care and caution under the circumstances" permitted the proposed amendment. In a footnote the court observed:

> If (defendant) did not know how it "otherwise failed to use due care and caution under the circumstances", he could have filed a preliminary objection in the nature of a request for a more specific pleading or it could have moved to strike that portion of (plaintiff's) complaint. *Conner* at 311, 461 A.2d at 602.

The defendant Chambersburg Hospital contends that the allegations of paragraphs 56 and 57 are non-factual, conclusionary allegations of negligence which would lend themselves to *Conner* type amendments.

The defendant contends it is unable to prepare a responsive pleading in conformity with Pa. R.C.P. 1029 or formulate a defense because of the generality of the allegations.

Pa. R.C.P. 1022 provides inter alia: "Each paragraph shall contain as far as practicable only one material allegation." Quite obviously, paragraph 56 seriously offends against the one material allegation rule. We find it difficult to envision how the defendant hospital could responsively plead to the multiple allegations of paragraph 56.

In our judgment paragraphs 56 and 57 fail to allege material facts as required by Pa. R.C.P. 1019 and fail to allege as far as practicable only one material allegation. In the light of *Conner v. Allegheny General Hospital,* supra, the defendant hospital was justified and well-advised to file its preliminary objections. They will, however, be considered as motions for more specific pleading and on that basis they will be granted.

We feel it appropriate at this point to remind counsel that the pleadings in civil actions not only serve the primary purpose of informing the opposing parties of the plaintiff's theory of action, and the defendant's theory of defense, but they also establish the parameters of the trial. This should be of great value to counsel for all parties, and it is invaluable to the court.

Paragraph 48(b) of the amended complaint alleges:

> (b) failing to order, read, or properly evaluate tests necessary to diagnose and treat Mrs. Holtry and Brianna including but not limited to external and internal fetal monitoring, fetal scalp ph, stress and non-stress testing, physical examination, ausculation, fetal heart tones and ultra-sound when first contacted on August 30, 1986 at approximately 1:50 a.m., and in the hours which followed until Brianna was delivered by caesarean section at approximately 10:35 a.m. on August 30, 1986;

Defendant Dr. Swartz identifies the words "including but not limited to" as the classic example of the expandable pleading clearly identified in *Connor v. Allegheny General Hospital,* supra. We agree. The motion to strike will be deemed a motion for a more specific pleading and on that basis will be granted.

The plaintiffs' complaint sets forth their various claims of negligence in five separate counts against the five named defendants. It then alleges the damages claimed by the minor plaintiff, by the parents of the minor child in their individual capacities, and the plaintiff mother in her individual capacity against all five defendants collectively in "Claim I, Claim II and Claim III."

The defendants Chambersburg OB-GYN Associates, P.C., Dr. James C. Christman and Dr. Edward F. Swartz moved to strike "Claims I through III" for non-compliance with Pa. R.C.P. 1020(b).

Pa. R.C.P. 1020(b) provides:

> If persons join as plaintiffs under Rules 2228, 2229(a) or (e) the complaint shall state the cause of action, any special damage, and the demand for relief of each plaintiff in a separate count, preceded by a heading naming the parties to the cause of action therein set forth.

The plaintiffs respond to defendants' motion to strike contending that all of the defendants are jointly and severally liable for the damages suffered by the plaintiffs as set forth in Claims I, II and III, and the damages are inseparable. Consequently, no useful purpose would be served by extending the length of the complaint by asserting the same damages in each count against each defendant. Plaintiffs cite *Lancaster County Civil Case No. 4151 of 1987, McNally, et al. vs Eberly, et al.* However, the court seems to refer to this matter only in footnote 4 under discussion of a demurrer. We, therefore, do not find it authoritative.

In our judgment Pa. R.C.P. 1020 (b) requires a plaintiff to plead his damages against each defendant in a separate count. Until the Supreme Court approves the innovative pleading system adopted by the plaintiffs, they will be expected to comply with the rules as written. The defendant's motion to strike will be granted.

Paragraph 46 (a through c) and (e through g) of plaintiffs' amended complaint allege:

> 46. Defendant James F. Druckenbrod, M.D., acted negligently with respect to Brianna Holtry by:
>
> (a) failing to diagnose and/or recognize and/or appreciate the potentially precarious condition of minor Plaintiff on August 4, 1986;
>
> (b) failing to order appropriate tests, consult, and/or otherwise respond to the decreased fetal movement noted on August 4, 1986;
>
> (c) failing to properly read, interpret, act upon, consult, and/or perform additional diagnostic tests, or otherwise respond after ordering and receiving the results of the first non-stress test

performed on the morning of August 29, 1986, in which no fetal movement was noted;

(e) failing to properly read, interpret, and act upon the results when the second non-stress tests performed on the afternoon of August 29, 1986, showed no fetal movement and/or to consult, admit, operate on Mrs. Holtry or otherwise respond to the precarious situation then existing;

(f) failing to properly read, interpret, and act upon the results when the third non-stress performed on the night of August 29, 1986, showed no fetal movement and/or consult, admit, operate on Mrs. Holtry, or otherwise respond to the precarious situation then existing;

(g) failing to appreciate the ominous signs, diagnose the cause thereof, and treat same when the third non-stress test performed on Mrs. Holtry on the night of August 29, 1986 showed no fetal movement.

Defendant Dr. Druckenbrod moved to strike the above-quoted paragraphs alleging his negligence on the grounds that they were over broad, vague, non-specific and conclusary allegations.

We conclude the words "potentially precarious condition" in subparagraph (a) "and/or otherwise respond" in subparagraph (b), "or otherwise respond" in subparagraph (c), "and/or to consult, admit, operate...or otherwise respond" in subparagraphs (e) and (f), and "ominous signs" in subparagraph (g) are the expandable clauses found so damaging in *Connor vs. Allegheny General Hospital*, supra. For the reasons hereinabove set forth in our discussion of the co-defendant's motions to strike for similar reasons, Dr. Druckenbrod's motion to strike will be deemed a motion for a more specific pleading, and will be granted.

Defendant Dr. Druckenbrod's preliminary objection C to strike off Claims I, II and III of plaintiff's amended complaint for lack of conformity to law or rule of court, is essentially the same preliminary objection as that made by the defendant Chambersburg OB-GYN Associates and defendants Drs. Christman and Swartz in their preliminary objection II. For the reasons above set forth, defendant Dr. Druckenbrod's preliminary objection (c) will be granted and Claims I, II and III will be stricken.

Paragraph 70 of Claim II of the Amended Complaint alleges:

> 70. As a result of the aforesaid events, Plaintiffs Deborah and Jeffrey Holtry have undergone and in the future will undergo great mental pain and suffering as well as loss of enjoyment of their daughter, and claim is made therefore.

Defendant Chambersburg Hospital has demurred to this paragraph in its preliminary objection III. Defendants Chambersburg OB-GYN Associates and defendants Drs. Christman and Swartz have demurred to the same paragraph in their preliminary objection IV. Defendant Dr. Druckenbrod has demurred to the same paragraph in his preliminary objection E. The demurrers of all five defendants are predicated upon the contention that Pennsylvania does not recognize a cause of action for loss of filial consortium.

Counsel for the plaintiff concedes a lack of clarity as to the present status in Pennsylvania of claims for filial consortium. Counsel cites the well-recognized philosophical grounds and several Court of Common Pleas cases. Indeed, the undersigned judge authored several opinions in which we concluded that everything pointed to the fact that the appellate courts of Pennsylvania would in a properly presented case decide that filial consortium did constitute a proper cause of action in this Commonwealth.

Unfortunately for the position of the plaintiffs, the decision in *Steiner vs Bell Telephone Company of Pennsylvania*, 358 Pa. Super. 505, 517 A.2d 1348 (1986) led us to the inevitable conclusion that we were absolutely wrong. *Steiner* is nothing more than a reaffirmation of *Quinn vs Pittsburgh*, 243 Pa. 521, 90A. 353 (1914). In our Opinion and Order of April 30, 1987 in *Radbill vs Chambersburg Hospital, et al.*, we followed *Steiner* as we will in this case.

We decline to follow the procedure adopted by our colleague the Honorable P. Richard Thomas in *Shafer vs Spencer Hospital,* No. A.D. 1988-372 (C.P. Crawford) of permitting the issue of filial consortium to go to the jury on a special verdict basis because we believe that we are required to follow the guidance of our appellate courts. In the event, as plaintiffs suggest, our appellate courts have by the time this case comes to trial concluded that filial consortium is a proper item of damages, we will entertain a motion to amend plaintiffs' complaint to include that item of damages.

At this time the demurrers of the five defendants to the claim for filial consortium will be sustained.

Plaintiffs' amended complaint alleges:

> 43. Mrs. Holtry experienced contemporaneous sensory perception of the negligence of the Defendants and experienced physical manifestations thereto including increased heart rate, sweaty palms, generalized perspiration, trembling in her leg, and altered breathing patterns.
>
> 73. As a result of contemporaneous sensory perception of the negligence of the Defendants in ministering to the critical needs of her daughter, Brianna Holtry, and physical manifestations as alleged above, Plaintiff Deborah Holtry sustained considerable emotional trauma as well as pain and suffering, and claim is made therefore.

All of the defendants in their preliminary objections identified paragraph 73 as a claim by the plaintiff/mother Deborah Holtry to recover damages for negligent infliction of emotional distress. Defendants' Drs. Christman and Swartz and Chambersburg OB-GYN Associates, P.C., identify paragraph 43 as alleging the factual basis for the cause of action for negligent infliction of emotional distress. All defendants have demurred to this specific cause of action and the damages claimed there under.

Parenthetically, we note that all defendants assert in their preliminary objections that paragraph 70 of the amended complaint alleges a claim for damages by both plaintiff/parents for negligent infliction of emotional distress as well as filial consortium. All defendants here again demur to the negligent infliction of emotional distress they perceive incorporated in the paragraph. While plaintiffs' brief seems to indicate the assertion of such a claim on behalf of both the plaintiff/mother and father, counsel for the plaintiffs specifically advised the Court that the plaintiff/father asserted no claim for negligent infliction of emotional distress, and that is reflected by the fact that Claim III of the Amended Complaint is limited to the plaintiff/mother's exclusive claim for negligent infliction of emotional distress. We accept counsel's statement of withdrawal of any claim of this nature by the plaintiff/father. The filial consortium claim has been disposed of above. No further consideration will be given to the demurrers to paragraph 70 as they apply to a negligent infliction claim.

The defendants contend *Sinn vs Burd,* 486 Pa. 146, 404 A.2d 672 (1979) modified the then existing law of Pennsylvania to permit recovery for emotional distress suffered by a bystander who did not suffer any impact and was not within the zone of danger only where: (1) The claimant was located at or near the scene of the occurrence; (2) the claimant suffered severe emotional distress as a result of observing contemporaneously the occurence; and (3) the claimant is closely related ot the injured party. In the case at bar, the defendants argue that the plaintiff/mother did not allege observation of a negligent act which was a discrete, indentifialbe, traumatic event which inflicted the injury to the infant/plaintiff or that she suffered any objective physical manifestation of the emotional distress she claims to have suffered. Therefore, Mrs. Holtry has failed to state a cause of action for negligent infliction of emotional distress.

To the contrary, the plaintiff contends she has complied with the condition enunciated in *Sinn,* in that:

1. She has alleged that Brianna is the child she gave birth to; thus establishing the close relationship.

2. That by virtue of the birthing process at the Chambersburg Hospital, she could not have been nearer to the scene of the occurrence.

3. that she suffered severe emotional distress as a result of contemporanously having the sensory experience of the extended course of the defendants' negligent failure to properly examine, diagnose and treat her and her unborn child.

Until 1970 an injured person in Pennsylvania could only recover damages if he suffered physical impact. In *Niederman v. Brodsky,* 436 Pa. 392, 261 A.2d 84 (1970), the Supreme Court of Pennsylvania abandoned the impact rule in favor of the "zone of danger" concept and permitted recovery for shock, mental pain and injury by one in personal danger of physical impact from a negligent force, but not struck by that force. (See now Chief Justice Nix's discussion *Sinn v. Burd,* 481 Pa. at pages 153, 154.) *Sinn v. Burd,* supra, expanded the "zone of danger" concept and the majority opinion concluded: "Where the bystander is a mother who witnessed the violent death of her small child and the emotional shock emanated directly from personal observation of the event, we hold as a matter of law that the mental distress and

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

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its effects is a foreseeable injury." (*Sinn v. Burd,* 486 Pa. at page 173). Chief Justice Eagen in a concurring opinion concluded:

> Recovery should be permitted in cases of this nature even where the plaintiff is beyond the scope of danger if (1) the plaintiff is closely related to the injured party, such as a mother, father, husband or wife; (2) the plaintiff is near the scene of and views the accident; (3) the plaintiff suffers serious mental distress as a result of viewing the accident and physical injury or suffers serious mental distress and there is a severe physical manifestation of this mental distress. *(Sinn vs. Burd* at page 174); *Mazzagatti v. Everingham,* 512 Pa. 266, 276, 516 A.2d 672 (1986).

Since the decision in *Sinn vs. Burd,* supra, the attention of the legal profession and the courts has been directed to determining the parameters established by the Supreme Court. In *Tackett v. Encke,* 353 Pa. Super. 349, 509 A.2d 1310 (1986), the Superior Court sustained the trial court's dismissal of the plaintiff/mother's complaint which alleged she observed her son's physical deterioration over a period of approximately one month due to the medical negligence of the defendants. That court held:

> "Instantly, since appellant has not alleged that she witnessed 'a discrete and identifiable traumatic event,' we must affirm the order of the trial court."

Footnote 2 provides inter alia,

> "We note further that a negligent act which is not sustained by the plaintiff does not give rise to recovery under a cuase for negligent infliction of emotional distress . . . In the instant case there was a perforce non-witnessed negligent omission to act." (*Tackett v. Encke* at page 352.)

In *Mazzagatti v. Everingham,* 512 Pa. 266, 516 A.2d 672 (1986), plaintiff/mother was approximately one mile away from the scene of an automobile/bicycle accident in which her daughter was fatally injured. She was summoned; arrived at the accident scene in time to observe her daughter lying in the road and became hysterical, unnerved and emotionally shattered. The Supreme Court affirmed the decision of the Superior Court which had affirmed the trial court's order granting defendant's motion for summary judgment. Chief Justice Nix authored the majority opinion, and we find the following instructive:

> We presently adhere to the view in this Commonwealth that the driver of a vehicle owes a duty of care to all motorists and

pedestrians in his immediate zone of danger and to any bystander who experiences a contemporaneous observance of an injury to a close relative. In those circumstances we found that the driver's conduct was the proximate cause of the physical or psychic injury to the plaintiff. In *Sinn* we expressed the concept of proximate cause in the first two criteria of the foreseeability test, which bear repetition:

(1) Whether plaintiff was located near the scene of the accident as constrasted with one who was a distance away from it;

(2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as constrasted with learning of the accident from others after its occurrence. *Sinn v. Burd,* supra 486 Pa. at 170-71, 404 A.2d at 685 (emphasis added).

The corollary of those two criteria is that when a plaintiff is a distance away from the scene of the accident and learns of the accident from others after its occurrence rather than from a contemporaneous observance, the sum total of policy considerations weigh against the conclusion that that particular plaintiff is legally entitled to protection from the harm suffered. Thus, we conclude that, as relative to Mazzagatti, Everingham's conduct was not negligence at all. 'Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right.' *Palsgraf,* supra 248 N.Y. at 341, 162 N.E. at 99.

We believe that where the close relative is not present at the scene of the accident, but instead learns of the accident from a third party, the close relative's prior knowledge of the injury to the victim serves as a buffer against the full impact of observing the accident scene. By contrast, the relative who contemporaneously observes the tortious conduct has no time span in which to brace his or her emotional system. The negligent tortfeasor inflicts upon this bystander an injury separate and apart from the injury to the victim. See *Sinn v. Burd,* supra 486 Pa. at 158-62 404 A.2d at 678-80. Hence the critical element for establishing such liability is the contemporaneous observance of the injury to the close relative. Where, as here, the plaintiff has no contemporaneous sensory perception of the injury, the emotional distress results more from the particular emotional makeup of the plaintiff rather than from the nature of defendant's actions. (*Mazzagatti v. Everingham,* 512 Pa. at 279-280.)

The plaintiff contends the use of the word "sensory" by the Superior and Supreme Court evidences a judicial enlargement of the "contemporaneous observance" of the negligent act from sight only to encompass identification of the negligence by other

you without further notice for the relief requested by the Plaintiff. You may lose money or property or other rights important to you.

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senses such as hearing. In *Blair v. The Allentown Public Library,* 497 F. Supp. 487 (E.D. 1980), the plaintiff/mother who was twenty-five feet from her child heard but did not see a metal sculpture fall upon the child crushing bones, nerves and blood vessels in the arm. Judge Troutman denied defendant's motion to dismiss; describing the mother as a "percipient witness" and observed:

> "In the case at bar, denying the mother's claim because of the position of her eyes at the split second that the accident occurred ignores the reality that the entire incident produced the emotional injury for which she seeks redress. The mother's injury, if any, was clearly foreseeable under the circumstances, and it would not be an unreasonable extension of defendant's duty of care to improve liability if plaintiffs prove negligence at trial.
>
> "A demurrer can only be sustained where the complaint is clearly insufficient to establish the pleaders right to relief." (Citations omitted) For the purpose of testing the legal sufficiency of the challenged pleading a preliminary objection in the nature of a demurrer admits as true all well-pleaded, material, relevant facts, (citations ommitted) and every inference fairly deducible from those facts (citations omitted). The pleader's conclusions or averments of law are not considered to be admitted as true by a demurrer."
>
> "Since the sustaining of a demurrer results in a denial of the pleader's claim or a dismissal of his suit, a preliminary objection in the nature of a demurrer should be sustained only in cases that clearly and without a doubt fail to state a claim for which relief may be granted. (Citations omitted). If the facts as pleaded state a claim for which relief may be granted under any theory of law then there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected. (Citations omitte)." *County of Allegheny v. Commonwealth,* 507 Pa. 360, 372 490 A.2d 402 (1985).

In the case at bar, there can be no serious doubt but that Deborah Holtry was "closely related" to Brianna Holtry as her mother or that she was "located at or near the scene of the occurrence" since the "occurrence" pleaded extended from the prenatal visit of August 4, 1986 through the non-stress tests and hospital admission of August 29, 1986 to the monitoring and delivery by caesarean section on August 30, 1986. Thus, two of the three criteria of *Sinn v. Burd,* supra and *Mazzagatti v Everingham,* supra, have been met.

The issue here to be resolved is whether the plaintiff/mother has pleaded her emotional trauma, pain and suffering was the result of her sensory and contemporaneous observance of a

discrete and traumatic event caused by the negligence of the defendants.

Lest there be any misunderstanding of our interpretation of this criterion or our position, we do conclude that the word "sensory" adopted by our appellate courts does include perceptions received by a plaintiff by other senses than that of vision. In other words hearing a traumatic event as in *Biss v. The Allentown Public Library,* supra, falls within the ambit of a sensory observation. We also conclude the allegation of an objective physical manifestation of emotional distress is not required if there is some medically identifiable effect alleged. *Cathcart v. Keen Industries Insulation,* 324 Pa. Super. 123, 152, 471 A.2d 493 (1984).

We find the hereinafter summarized allegations of plaintiffs' complaint admitted as true for the purpose of defendants' demurrers:

1. During a prenatal visit on August 4, 1986 plaintiff/mother informed defendant Dr. Druckenbrod that she noted less active movement of the child expected to be born on or about August 16, 1986. (Paragraphs 10, 11).

2. No tests were ordered or consultation requested by Dr. Druckenbrod concerning the reported decreased fetal activity. (Paragraph 12).

3. At the prenatal visit of August 25, 1986 Dr. Druckenbrod ordered a non-stress test for August 29, 1986. (Paragraph 13).

4. Non-stress tests were performed at the Chambersburg Hospital on August 29, 1986 at 8:35 a.m., 1:20 p.m. and 10:30 p.m. and results of each test were read by Dr. Druckenbrod. (Paragraphs 14, 16, 20).

5. Plaintiff/mother was told that no fetal movement was noted during the first non-stress test but no consultations were held with obstetric specialists or additional tests performed. (Paragraph 15).

6. Lack of fetal movement was noticed during the second and third non-stress tests. (Paragraphs 17, 21)

7. No additional tests were ordered or consultations with obstetric specialists requested and no plans were made to either induce labor or surgically deliver the baby after the second and third non-stress tests. (Paragraphs 18, 22).

*Included in the above description but expressly excluded from this mortgage is a tract of real estate containing 2.5062 acres as per subdivision of land by Best Angle Associates, dated June 11, 1986, conveyed to Faith E. Carbaugh this date.

BEING sold as the property of Faith E. Carbaugh and Curtis J. Carbaugh, as joint tenants with the right of survivorship and not as tenants in common, Writ No. AD 1989-105.

TERMS

As soon as the property is knocked down to purchaser, 10% of the purchase price plus 2% Transfer Tax, or 10% of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the auctioneer to resell the property.

The balance due shall be paid to the Sheriff by NOT LATER THAN Monday, August 28, 1989 at 4:00 P.M., prevailing time. Otherwise all money previously paid will be forfeited and the property will be resold on September 1, 1989 at 1:00 P.M., prevailing time in the Franklin County Courthouse, 3rd Floor, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

Raymond Z. Hussack
Sheriff
Franklin County, Chambersburg, PA

Notice

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 9th day of June, 1989, for the purpose of obtaining a certificate of incorporation. The name of the corporation organized under the Commonwealth of Pennsylvania Business Corporation Law approved May 5, 1933, P.L. 364 as amended, is Blue Ridge Cookery, Inc., 12208 Charmian Lane, P.O. Box R. Blue Ridge Summit, Pennsylvania, 17214.

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.

Stephen E. Patterson
PATTERSON, KAMINSKI,
KELLER & KIERSZ
239 East Main Street
Waynesboro, PA 17268

7/28/89

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 June 23, 1989, an application for a certificate for the conducting of a business under the assumed or fictitious name of CRACKERS, with its principal place of business at 6159 Orphanage Road, Quincy, PA 17247. The name and address or the person owning or interested in said business is Mike and Dave's Corporation, 6159 Orphanage Road, Quincy, PA 17247.

Martin and Kornfield
17 North Church Street
Waynesboro, PA 17268

7/28/89

CERTIFICATE OF AUTHORITY

Notice is hereby given that an application was made to the Department of State of the Commonwealth of Pennsylvania at Harrisburg, PA, by ROADWAY REALTY, INC. a foreign corporation, formed under the laws of the State of New York, where its principal office is located at 760 Brooks Avenue, Rochester, 14619 for a Certificate of Authority to do business within the Commonwealth of Pennsylvania under the provisions of the Business Corporation Law of the Commonwealth of Pennsylvania, approved May 5, 1933, P.L. 364, as amended. The character and nature of the business said corporation proposes to transact in the Commonwealth of Pennsylvania under the said Certificate of Authority is:

To take, buy, exchange, lease or otherwise acquire real estate and any interest or right therein and to hold, own, operate, control, maintain, manage and develop the same only and soley as agent and nominal title holder for the real holders thereof; and to sell, assign, transfer, convey, lease or otherwise alienate or dispose of and to mortgage or otherwise encumber the lands, buildings, and real property soley at the direction of and for the benefit of the real owners thereof.

The proposed registered office of the said corporation in the Commonwealth of Pennsylvania will be located at 710 Buchanan Trail East, Greencastle, PA 17225.

The said Certificate of Authority was filed with and approved by the Department of State, at Harrisburg, PA, on May 31, 1989.

7/28/89

8. At the time of plaintiff/mother's last non-stress test, it was noted that she was experienceing a bloody discharge and her last recollection of fetal movement had been at approximately 8:00 p.m. the night before. (Paragraph 23)

9. Dr. Druckenbrod admitted plaintiff/mother to the Chambersburg Hospital at 11:05 p.m. August 29, 1986 for monitoring. (Paragraph 24)

10. At the approximate time of admission deceleration of the fetal heart rate with decreased variability was noted, but appropriate physicians were not notified and immediate surgical delivery did not follow. (Paragraph 25)

11. Fetal heart variability with deceleration of the heart rate for as long as two minutes was noted at approximately 1:00 a.m. on August 30, 1986. (Paragraph 26)

12. Approximately two hours after deceleration was noted at approximately 1:15 a.m., Dr. Druckenbrod was notified of the deceleration pattern and decreased variability. (Paragraph 27)

13. Dr. Druckenbrod reviewed the fetal monitoring tracings at approximately 1:50 a.m. and had a telephone consultation with defendant Dr. Swartz at 2:00 a.m. (Paragraph 28)

14. Dr. Druckenbrod informed plaintiff/mother that Dr. Swartz would see her in the morning . The first obstetric specialist to examine plaintiff/mother was defendant Dr. Christman, who saw her at 9:05 a.m. August 20, 1986 at Dr. Druckenbrod's request. (Paragraph 29)

15. Deceleration of fetal heart beat with poor variability was noted repeatedly during the early hours of August 20, 1986. (Paragraph 30)

16. Decreased almost flat variability in the fetal heart rate was noted by 7:30 a.m. on August 30, 1986, and Dr. Druckenbrod was notified when he arrived at approximately 8:25 a.m. (Paragraph 31)

17. On examination of plaintiff/mother at approximately 9:05 a.m. Dr. Christman ruptured the membrane, noted meconium staining, applied an internal monitor and noted the flat baseline and late deceleration. He ordered an immediate caesarian section but it was delayed until approximately 10:30 a.m. while a second operating room team was being called and assembled at the hospital. (Paragraph 32, 33)

18. When infant Brianna Holtry was delivered by caesarian section

at approximately 10:35 a.m., she was severely depressed with thick meconium fluid in her mouth, throat, vocal cords and lungs. (Paragraph 34)

19. No neonatoligist or pediatrician was present in the operating room at the time of the surgical delivery despite the doctor's knowledge that the infant was in severe fetal distress with meconium present. (Paragraph 35)

20. A pediatrician took over Brianna's care at 11:00 a.m. when she arrived in the nursery. (Paragraph 36)

21. Plaintiff/mother experienced contemporaneous sensory perception of the negligence of the defendants and experienced physical manifestations such as increased heart rate, sweaty palms, generalized perspiration, trembling in her leg and altered breathing patterns. (Paragraph 43)

An analysis of the admitted well pleaded, material, relevant facts above set forth leads us to conclude:

1. Plaintiff/mother alleges she was told that no fetal movement was noted during the 8:35 a.m. non-stress test on August 29, 1986 and that Dr. Swartz would see her in the morning. (Findings 5 and 14)

2. Plaintiff/mother alleged no other "contemporaneous sensory perception" of defendants' negligence and none may be inferred from the facts alleged.

3. Plaintiff/mother was aware of less fetal movement on August 4, 1986 and her last recollection of fetal movement was at 8:00 p.m. on August 28, 1986.

4. The negligence attributed to all of the defendants encompasses prenatal appointments with Dr. Druckenbrod on August 4 and 25, 1986, three non-stress tests performed at defendant Chambersburg Hospital by unidentified individuals but read by Dr. Druckenbrod during August 29, 1986, admission to the hospital for monitoring and monitoring by unidentified individuals late on August 29, 1986 unitl at least 7:30 a.m. on August 30, 1986, a telephone consult by Dr. Druckenbrod with Dr. Swartz at 2:00 a.m. on August 30, 1986 and order for immediate caesarean section by Dr. Christman at 9:05 a.m. on August 30, 1986, delay in performing surgical delivery until 10:30 a.m. due to the unavailability of a second operating team, delivery of infant by an unidentified individual at 10:35 a.m. and the failure of an unidentified defendant to have a neonatoligist or pediatrician during the surgical delivery procedure.

*Included in the above description but expressly excluded from this mortgage is a tract of real estate containing 2.5062 acres as per subdivision of land by Best Angle Associates, dated June 11, 1986, conveyed to Faith E. Carbaugh this date.

BEING sold as the property of Faith E. Carbaugh and Curtis J. Carbaugh, as joint tenants with the right of survivorship and not as tenants in common, Writ No. AD 1989-105.

TERMS

As soon as the property is knocked down to purchaser, 10% of the purchase price plus 2% Transfer Tax, or 10% of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the auctioneer to resell the property.

The balance due shall be paid to the Sheriff by NOT LATER THAN Monday, August 28, 1989 at 4:00 P.M., prevailing time. Otherwise all money previously paid will be forfeited and the property will be resold on September 1, 1989 at 1:00 P.M., prevailing time in the Franklin County Courthouse, 3rd Floor, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

Raymond Z. Hussack
Sheriff
Franklin County, Chambersburg, PA

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 June, 13, 1989, an application for a certificate for the conducting of a business under the assumed or fictitious name of DATE MASTERS, with its principal place of business at 164 Guilford Drive, Chambersburg, Pennsylvania 17201. The name and address or the person owning or interested in said business is Robieann Pecher, 164 Guilford Drive, Chambersburg, Pennsylvania 17201.

Law Offices of Welton J. Fischer
550 Cleveland Avenue
Chambersburg, Pennsylvania 17201

8/4/89

NOTICE IS HEREBY GIVEN that on July 20, 1989, the Petition of Bryce Collins Dewitt was filed in the Court of Common Pleas of the 39th Judicial District, Franklin County Branch, praying for a decree to change his name to Bryce Collins Rodgers.

The Court has fixed Thursday, the 17th day of August, 1989 at 10:00 o'clock A.M. in the assigned courtroom at the Franklin County Courthouse, Chambersburg, Pennsylvania, for the hearing of said Petition, when and where all persons interested may appear and show cause, if any, they have, why the prayer of said Petition should not be granted.

DILORETO AND COSENTINO
326 Trust Company Building
Chambersburg, PA 17201
(717) 264-2096

8/4/89

NOTICE

In the Court of Common Pleas of the 39th Judicial District, Pennsylvania - Franklin County Branch. Civil Action - Law, Miscellaneous Docket Volume Z, Page 340.

Notice is hereby given that on July 25, 1989, the petition of Louis Szaraz was filed in the above named court praying for a decree to change his name to Louis John Cyrus.

The Court has fixed Thursday, September 7, 1989 at 2:00 o'clock P.M., prevailing time, in Courtroom Number 3 of the Franklin County Courthouse, Chambersburg, Franklin County, Pennsylvania, as the time and place for hearing, when and where all persons interested may appear and show cause, if any they have, why the prayer of the said petitioner should not be granted.

William R. Davis, Jr.
Suite 410
Chambersburg Trust Company Building
Chambersburg, Pennsylvania 17201
Attorney for Petitioner

8/4/89

NOTICE OF AMENDMENT OF ARTICLES OF INCORPORATION

Notice is hereby given that Articles of Amendment to the Articles of Incorporation of Family Care Services, Inc., a Pennsylvania corporation with its registered office at 4498 Edenville Road, Chambersburg, Pennsylvania 17201, were filed with the Department of State on the 10th day of July, 1989.

The nature and character of the amendment was to make reference in the corporate purposes to the charitable nature of the corporation, to provide that no part of the net earnings of the corporation can inure to any private individual, and to provide that upon dissolution the assets of the corporation will continue to be devoted to charitable purposes.

LAW OFFICES OF WELTON J. FISCHER
550 Cleveland Avenue
Chambersburg, Pennsylvania 17201

8/4/89

In our judgment the defendants' demurrers must be sustained for:

1. Hearing that no fetal movement was noted during the 8:35 a.m. non-stress test, and that Dr. Swartz would see plaintiff/mother in the morning, does not reasonably rise to the level of a contemporaneous sensory perception of the negligence of the defendants.

2. The catalogue of alleged ambiguous omissions from August 4, 1986 to August 30, 1986 frequently involving unidentified defendants or other individuals, and rarely, if ever, involving all of the defendants, does not constitute a discrete and identifiable traumatic event.

We note that in the section of plaintiffs' brief discussing the negligent infliction of emotional distress, reference is made to the breach of the fiduciary relationship existing between plaintiffs and defendants entitling plaintiff/mother to recover damages for her emotional distress. We will disregard this contention, for we find no allegations in the amended complaint pertaining to such a relationship or its breach.

Defendant Dr. Druckenbrod's preliminary objection II alleges it is in the nature of a demurrer to the claims of Deborah Holtry, individually, and Jeffrey Holtry, individually, on the grounds that the headings of the five counts identify the cause of action as being brought by "Brianna Holtry, a minor, by her parents and natural guardians, Debroah Holtry and Jeffreh Holtry v...." and omit any reference to the parents as individual parents.

As previously noted, we decline to consider the brief submitted on hehalf of Dr. Druckenbrod. The other defendants did not raise this particular issue so we will consider only the averments of this preliminary objection. In our judgment the failure of the plaintiffs to identify the parent/plaintiffs individually in the heading of each separate count is at most a stylistic error. Such a pleading omission would not effect the legal sufficiency of the amended complaint. Therefore, the demurrer will be overruled. Since the plaintiffs will be amending their amended complaint, we assume they will take note of this objection raised by this defendant.

ORDER OF COURT

NOW, this 15th day of March 1989:

I. As to the Preliminary Objections of James C. Christman, M.D., Edward F. Swartz, M.D., and Chambersburg OB-GYN Associates, P.C.:

A. Preliminary Objection I, the motion to strike paragraph 48(b) will be deemed a motion for a more specific pleading and is granted.

B. Preliminary Objection II, the motion to strike Claims I, II and III is granted.

C. Preliminary Objection III, the demurrer to the claim of negligent infliction of emotional distress as set forth specifically in paragraphs 43 and 73 is sustained.

D. Preliminary Objection IV, the demurrer to the claim for filial consortium as specifically set forth in paragraph 70 is sustained.

II. As to the Preliminary Objection of Chambersburg Hospital:

A. Preliminary Objection I-1, the motion to strike paragraph 42 will be deemed a motion for a more specific pleading and is granted.

B. Preliminary Objection I-2, the motion to strike paragraph 56 will be deemed a motion for a more specific pleading and is granted.

C. Preliminary Objection I-3, the motion to strike paragraph 57 (a through i) will be deemed a motion for a more specific pleading and is granted.

D. Preliminary Objection II, the demurrer to the claim of negligent infliction of emotional distress as specifically set forth in paragraph 73 is sustained.

E. Preliminary Objection III, the demurrer to the claim for filial consortium as specifically set forth in paragraph 70 is sustained.

III. As to Preliminary Objections of James F. Druckenbrod:

A. Preliminary Objection I-3, the motion to strike paragraph 46 (a through c and e through g) will be deemed a motion for a more specific pleading and is granted.

B. Preliminary Objection II, the demurrer to Claims II and III is overruled.

c. Preliminary Objection III, the motion to strike Claims I, II and III is granted.

D. Preliminary Objection IV, the demurrer to the claim of

NOTICE OF ERRATIM

We note that in Vol.9 Issue No. 82 July 21, 1989, Opinion pages 260 and 261 were misnumbered. The page appearing therein as page number 261 should be 260 and the page appearing therein as page number 260 should be 261.

We regret the error and apologize for any inconvenience. It is our intention, to correct this for the bound volume.

MANAGING EDITOR