IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CHARLOTTE FRANKLIN, an incapacitated person, by Charn F. Floyd, Guardian	**: CIVIL TRIAL DIVISION**
	: September Term, 1999
	: No. 2850
VS.	**: Superior Court#2814EDA2002**
MELLON BANK, NA	**:**

O P I N I O N

Before the Court is the Appeal taken by Plaintiff/Appellant, Charlotte Franklin, (hereinafter "Franklin"), from the Order of this Court dated August 7, 2002, which granted Defendant/Appellee, Mellon Bank, NA's, (hereinafter "Bank") Motion for Summary Judgment, thereby dismissing all causes of action, with prejudice, which were filed by Franklin.

FACTUAL AND PROCEDURAL HISTORIES

The underlying facts and procedural history of this litigation are as follows.

On September 13, 1994, Franklin appeared at the Bank's branch office located at 1735 Market Street, Philadelphia, Pennsylvania to obtain a cashier's check in the amount of $39,000.00. The Bank concedes that, on September 13, 1994, Franklin did withdraw $39,000.00 from her account and used those funds to purchase a cashier's check from the Bank. (Answer and New Matter, ¶ 2)

Immediately, however, confusion began to swirl around the whereabouts of the cashier's check, and to this day the status of that check remains shrouded in mystery. Later that same day, Franklin maintains that she returned to the Bank to notify the Bank that she had lost the check and that she requested the Bank to issue a stop payment order

on the check and to prepare a replacement check for the lost check. Franklin alleges that the Bank agreed to issue the stop payment order, advising Franklin to return to the Bank in a few days to receive a replacement check. The Bank concedes, "It does appear, however, that Mellon Bank prepared a cashier's check to replace an item that was misplaced by Charlotte Franklin." (Reply to Resp. of Pl. to Bank's Mot. Summ. J. at 2) The Bank explained that it would issue such replacement checks and store it and other valuables in its safe-keeping vault, "on occasion as an accommodation to customers who do not have a safe deposit box." (Mem. Law Supp. Bank's Obj. To Pl's Pet. App't Guardian Ad Litem at 1). Since the original cashier's check had never surfaced as a found item, the check that the Bank stored in its safekeeping vault, and that is the subject matter of this litigation, is the replacement check. Franklin alleges that the Bank advised her to return to the branch office in a few days to receive the funds.[1]

The basis of Franklin's Complaint is that at some point in time she returned as advised to the Bank to receive her funds only to be told by Bank employees that the Bank had neither a record of the cashier's check nor a record of a stop payment order placed on that check, nor a replacement check. Franklin alleges that she returned to the Bank's Market Street branch office on numerous occasions, at times alone and at other times accompanied by a social worker (Compl. ¶ 9), and at still other times with a family member to inquire into the whereabouts of her funds; that Bank employees continued to deny any knowledge of the cashier's check or the stop payment order on that check; and that Bank employees provided her only with volumes of irrelevant documents. (Compl. ¶11)

Franklin maintains that in 1995 the Bank had made at least three (3) audits of its safekeeping vault at its 1735 Market Street branch office but failed to return the check to Franklin, despite Franklin's repeated inquiries into the whereabouts of her funds. Bank concedes that "[i]n February, 1999, Mellon removed from its safekeeping vault at 1735

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[1] This Court takes judicial notice that a cashier's check is a negotiable instrument on its face, that is, is the equivalent of cash, and that the Bank, concerned over the eventual presentation and negotiation of the original cashier's check, would take steps to protect itself by retaining the replacement check in its vault for a reasonable time.

Market Street, a cashier's check payable to Ms. Franklin and unilaterally credited the funds, $39,000, to her checking account." (Mem. Law Supp. Obj. of Def. to Pl.'s Pet. for App't of Guardian Ad Litem at 3) Thus, on February 11, 1999, Bank deposited $39,000 into the open account of Franklin, 4 ½ years after the bank had placed the replacement check in the amount of $39,000 into its safekeeping vault at 1735 Market Street, Philadelphia, Pennsylvania.

Franklin sought counsel in this matter, served a Writ of Summons on Bank on September 24, 1999, and thereafter filed a Complaint on February 3, 2000. The Complaint filed by Franklin alleges conversion, breach of contract, fraud, negligent misrepresentation, violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (73 Pa. C.S.§ 201, et seq.), and violation of 13 Pa. C.S.A.§3411. Franklin, moreover, avers that those alleged legal wrongs have caused her to suffer serious physical pain, as well as mental and emotional anguish; deprived her of the use, enjoyment and benefits of her money; caused her to suffer severe humiliation, embarrassment and harm to her reputation; and caused her to fail to meet certain financial obligations, which failures resulted in judgments, liens and tax levies being entered against her (Compl. at ¶25-29).

To redress her alleged legal wrongs, Franklin petitions the Court for actual damages, statutory damages, treble damages, punitive damages, and costs and attorney's fees in the amount of $400,000.

Following the commencement of this suit, at a Case Management Conference held on February 25, 2000, this Court issued a February 25, 2000 Case Management Order ordering, among other things, that all discovery on this matter be completed not later than November 6, 2000.

To investigate Franklin's claim that she appeared at the Bank on various occasions and that Bank employees intentionally and fraudulently refused to return her replacement check upon her demands for it, the Bank's counsel sought to conduct Franklin's oral

deposition. (Mem. Law Supp. Obj of Def. To Pl's Pet App't Guardian Ad Litem at 2). Yet, in lieu of presenting his client Franklin for her oral deposition, Franklin's counsel offered a handwritten note inscribed on a physician's prescription pad, dated July 25, 2000, from Dr. Remesh Parchuri, who wrote that Franklin, due to her physical and psychological condition, would not be able to submit to any oral deposition testimony. (Def's Ex. "B") A motion was thereafter filed to compel Franklin's deposition and answers to written discovery, and on August 9, 2000, the Court granted Bank's Motion to Compel Discovery and Deposition, requiring that "Plaintiff's deposition shall take place at Plaintiff's nursing home unless a physician's report would otherwise indicate."

But Franklin further delayed providing her oral deposition when her counsel, as a substitute for the court-ordered physician's report, offered a second handwritten note from Dr. Parchuri, dated August 29, 2000, which simply restated Dr. Parchuri's first pronouncement about Franklin's inability to give oral deposition testimony due to her physical and mental condition. Bank's counsel maintained that this second note (Def's Ex. "C") rendered the same unsubstantiated conclusion that Franklin is in no condition to answer deposition questions. Bank pointed out to the Court that Franklin never produced any report about her medical and psychological condition, despite this Court's August 9, 2000 Order so to do, and filed a Petition for Extraordinary Relief (Control #55-00101855) on October 24, 2000. Bank's Petition requested an additional 60-day extension to complete discovery of its own and to produce records Franklin had requested. The Petition stated that Franklin had ignored the August 9, 2000 Discovery Order by failing to provide full and complete responses to Interrogatories, document requests, and oral deposition testimony and maintained that Franklin had failed to produce any medical records pertaining to her condition, had not petitioned the Court for a guardian ad litem and had failed to provide addresses for three non-party witnesses whom Bank needed to depose. As a result of Franklin's repeated delays in providing discovery, Bank had scheduled a hearing in Discovery Court on a Motion For Sanctions Against Plaintiff.

On October 18, 2000, the Court ordered that Bank respond to Franklin's First Set of Interrogatories and Franklin's First Request for Production of Documents by October

30, 2000, or suffer appropriate sanctions to be imposed upon further application to the Court. Without responding to the Court's Order, on October 25, 2000, Franklin filed a Petition For the Appointment of A Guardian Ad Litem For an Incompetent (Control #69-00101969), nominating James Francis, Esquire, as the Guardian Ad Litem.

On November 8, 2000, the Court granted Bank's Second Motion to Compel Discovery. The Court further ordered that Franklin shall appear at her nursing home for the purpose of giving sworn oral deposition testimony within 30 days of this Order, repeating its original insistence that Franklin's deposition shall take place unless a report from a physician indicates, with specificity, that Franklin is incompetent such that she cannot testify at an oral deposition or trial. This Order put Plaintiff on notice that "[v]iolations of this Order shall result in sanctions against Plaintiff, including, but not limited to, the preclusion of evidence at trial or the entry of judgment, upon further application to the Court by Defendant."

On November 14, 2000, Bank filed an Objection To Franklin's Petition For the Appointment of a Guardian Ad Litem, as well as a Memorandum of Law In Support of that Objection, in which it requested the Court to dismiss without prejudice Franklin's petition for guardianship. Bank denied that the nominated guardian James Francis, Esquire, had no interest in the subject matter of this action. Bank maintained that Attorney Francis's "independence and impartiality required of a Guardian Ad Litem may be compromised." (Mem. Law Supp. Obj. Of Def. To Pl.'s Pet. App't Guardian Ad Litem at 2-3) because Attorney Francis "represents another Plaintiff in a separate action pending against Mellon Bank in the Court of Common Pleas of Philadelphia." (*Id.* at 2)

Moreover, Bank raises the objection that Franklin might not meet the clear and convincing burden of proof necessary for the Court to find that she is in fact an incapacitated person pursuant to the statutory requirements of Pa.R.C.P. 2051 (*Id*. at 2). Since, Bank avers, Franklin's petition for guardianship "provides no supporting evidence whatsoever of Franklin's incapacity," (*Id.*) that petition is "substantially deficient." (*Id.*)

On November 15, 2000, the Court granted Franklin's November 5, 2000 Motion for Sanctions For Defendant's Failure to Appear at Depositions and ordered that the Bank

produce within thirty days for deposition all parties noticed by Franklin on October 6, 2000. (See Ex. "A") On November 17, 2000, the Court granted Bank's Petition For Extraordinary Relief (55-00101855).

In a letter to Dr. Parchuri, dated December 7, 2000, counsel for Bank confirmed a telephone conversation of December 1, 2000, in which Dr. Parchuri apparently conceded that

> [he] ha[d] never been Charlotte Franklin's treating physician and that, in fact, [his] only contact with her was when [he] examined her during rounds on two occasions earlier this year at the nursing home where she formally [sic] resided. This shall also confirm that you have no medical records, reports or treatment notes in your possession with respect to Ms. Franklin. Based upon this information, we shall not move to enforce the subpoena that was served upon you on October 20, 2000 [on] behalf of Mellon Bank.

Following a hearing on December 20, 2000, Bank filed a Motion to Enforce Subpoenas, which this Court denied in part but which stated that "Defendant shall draft appropriate order limited to the financial issues and such order shall be in lieu of a broad subpoena." On December 22, 2000, The Orphans' Court, in Philadelphia, denied Franklin's October 25, 2000 Petition for Appointment of a Guardian Ad Litem (Control #69-00101969) and ordered Franklin to file for Adjudication of Incompetency and Appointment of a Guardian.

On January 5, 2001, Bank filed a Petition for Extraordinary Relief, which Petition this Court granted on January 9, 2001, and on January 22, 2001 this Court ordered a revised Case Management Order which required that "[a]ll discovery shall be completed not later than 5 March 2001." On January 29, 2001, this Court issued an Order in Lieu of Subpoenas that demanded that

> 1. Philadelphia Corporation for Aging (PCA) and North City Congress (NCC) produce all records in their possession pertaining to Appellant's financial transactions relevant to this lawsuit.
>
> 2. The three social workers--Carrie Coward, Lillian Jackson and Lillie Watts--give sworn oral deposition testimony (on or before January 5, 2001) pertaining to Appellant's financial transactions relevant to this lawsuit.

> 3. Appellee Mellon Bank shall have the right to apply to this Court for permission to obtain additional records from PCA and NCC pertaining to Appellant but beyond the scope of this Order.
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> 4. The Philadelphia Owner's Ass'n (POA), which failed to respond to Appellee's Motion to Enforce Subpoenas and which failed to appear at the December 20, 2000 Hearing, shall, within seven (7) days, produce all documents specified in the subpoena, or suffer the imposition of sanctions and/or be adjudged in contempt of this Court.

Although not parties to this lawsuit, PCA and NCC produced relevant documents, as did POA. Timely depositions were taken of the following parties: 1) Bank's employees Lisa Spiller, Pamela Hamm, Jean Bailey and Victoria Cabella; 2) Social Workers Carrie Coward, Lillian Jackson and Lillie Watts; and 3) Franklin's daughter and court-appointed Guardian Ad Litem Charn Floyd. (See below) Franklin was never deposed and her counsel insisted that she would not testify at trial.

On February 16, 2001, Franklin's counsel made timely filing of a second petition for guardianship (Control# 14-01021114) and requested the Court to appoint Charn Floyd, Franklin's daughter, as the Guardian Ad Litem. On March 6, 2001, Bank filed an Objection to that petition for guardianship. On March 7, 2001, the Court issued a Stay of Proceedings until a final disposition of the petition for guardianship be entered and scheduled a Rule Returnable Hearing for March 16, 2001, in Courtroom 243, City Hall, at 10:00 a.m.

On April 30, 2001, The Orphans' Court entered a Final Decree naming Ms. Floyd as her mother's Guardian Ad Litem. The Orphans' Court found that Franklin suffered from chronic schizophrenia, dementia and Parkinson's disease, was dependent upon others for activities of daily living, and was unable to comprehend financial transactions. The Final Decree stated:

> Such mental disabilities totally impair her ability to receive and evaluate information effectively and to make and communicate decisions concerning the management of her financial affairs or to meet essential requirements for her physical health and safety.
>
> Accordingly, it is hereby ordered and decreed that Franklin is adjudged a totally incapacitated person and that Charn Floyd is appointed

plenary guardian of the person and estate of Charlotte White Franklin.

On May 7, 2001, Bank filed a Motion for Judgment Non Pros to which Franklin, on May 22, 2001, filed an Answer and which, on June 13, 2001, this Court denied. On May 15, 2001, Franklin filed an Amended Complaint naming Charn Floyd as her legal guardian. On May 24, 2001, the Court granted Franklin's Petition For A Stay Pending Adjudication Of Her Competency, as well as the Petition For The Appointment Of A Guardian ad Litem.

On October 10, 2001, this Court granted Bank's Motion for Sanctions, Discipline, and Deposition, and on November 14, 2001, the Court ordered that Bank's Motion to Preclude be denied without prejudice.

On May 2, 2002, this Court issued a revised Case Management Order requiring that "[a]ll discovery shall be completed not later than 3 June 2002." and that "[a]ll pre-trial motions shall be filed not later than 1 July 2002." On June 22, 2002, the Court ordered that Bank's Motion for Sanctions Against Plaintiff is moot by reason of the Record created and agreements reached.

On July 1, 2002, Bank filed a Motion for Summary Judgment. (The docket incorrectly credits "Brandon Knitwear" with this filing.)

On July 31, 2002, Franklin filed her Answer to Defendant's Motion for Summary Judgment. On August 7, 2002, Bank filed its Reply in Support of Motion of Summary Judgment.

On August 7, 2002, this Court ordered that Defendant Mellon Bank's Motion for Summary Judgment Against Plaintiff Charlotte Franklin be granted and dismissed this case with prejudice.

On September 6, 2002, Franklin filed a Notice Of Appeal from the August 7, 2002 Order to the Superior Court, and on September 26, 2002 timely filed her Statement of Matters Complained Of Upon Appeal, pursuant to Pa.R.A.P. 1925(b).

LEGAL ANALYSES

The following issues, raised by Franklin in her Statement of Matters Complained Of Upon Appeal, were filed pursuant to Pennsylvania Rules of Appellate Procedure 1925(b) and are addressed by this Court in what follows.

ISSUE ONE

Whether this Court committed an error of law in granting Bank's Motion For Summary Judgment.

The Pennsylvania Supreme Court has ruled that "[w]e have a summary judgment rule in this Commonwealth in order to dispense with a trial of a case (or, in some matters, issues in a case), where a party lacks the beginnings of evidence to establish or contest a material issue." *Ertel v. Patriot-News Co.,* 544 Pa. 93, 100, 674 A.2d 1038, 1042 (1996). Thus, Pennsylvania Courts have ruled that "[t]he function of a summary judgment motion is to avoid a useless trial." *Dillon v. Nat'l R.R. Corp. (Amtrak),* 345 Pa. Super 126, 137, 497 A.2d 1336, 1341 (1985) (citations omitted). In Pennsylvania, the principles governing summary judgment are well-settled: "First, the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, must demonstrate that there exists no genuine triable issue of fact...Second, the record must show that the moving party is entitled to judgment as a matter of law." *Stidham v. Millvale Sportsman's Club*, 421 Pa. Super. 548, 558, 618 A.2d 945, 950 (1992) (citations omitted). "It is not part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried." *Washington Fed. Sav. & Loan Ass'n v. Stein,* 357 Pa. Super. 286, 288, 515 A.2d 980, 981 (1986). "'[A]ll doubts as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment.'" *Breslin v. Ridarelli,* 308 Pa. Super. 179, 183, 454 A.2d 80, 82 (1982) (citations omitted). "Summary judgment may be granted only where the right is clear and free from doubt." *First Wisconsin Trust Co. v. Strausser,* 439 Pa. Super. 192, 198, 653 A.2d. 688, 691 (1995) *(citing Thompson Coal Co. v. Pike Coal*

Co., 488 Pa. 198, 412 A.2d. 466 (1979)). "The moving party has the burden of proving that there is no genuine issue of material fact." *Id.*, 653 A.2d. at 691. In determining whether the moving party has met this burden, the Court must examine the Record in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences. *See Elder v. Nationwide Ins. Co.,*410 Pa. Super. 290, 294, 599 A.2d. 996, 998 (1991). Once a motion for summary judgment is made and properly supported, "'a non-moving party may not avoid summary judgment by rest[ing] upon the mere allegations or denials of his pleading...'"*Ertel,* 544 Pa. at 100, 674 A.2d. at 1042. Rather, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. *See Curran v. Children's Service Center of Wyoming County, Inc.,* 396 Pa. Super. 29, 33, 578 A.2d. 89 (1990). Thus, rearticulating the Pennsylvania Supreme Court's own well-settled ruling, the *Ertel* Court ruled that in Pennsylvania "'the mission of the summary judgment procedure is to pierce the pleadings and assess the proof in order to see whether there is a genuine need for a trial.'" *Ertel,* 544 Pa. at 100, 674 A.2d. at 1042 (citations omitted).

Applying these principles to the present case, this Court found no genuine issue of material, triable fact and, therefore, properly granted summary judgment in favor of Bank and against Franklin.

The evidence Franklin offers in her Complaint is limited to witnesses' hearsay testimony concerning conversations between Franklin and Bank's employees that had to do with Franklin's lost check. Invoking concern about Franklin's weakened physical and mental condition, counsel for Franklin did not allow her to be deposed; would not allow her to testify or be a witness at trial; and, initially, would not serve Answers to Bank's Second Set of Interrogatories. The Answers to Interrogatories eventually provided by Franklin were sparse, vague and, pursuant to Rule 4006, unverified, despite this Court's Order of August 9, 2000, directing that Franklin "provide full and complete responses to Defendant's Fact Witness Interrogatories, Second Set of Interrogatories and Request for Production of Documents." Along with her Answers to Interrogatories, Franklin provided a second handwritten note from Dr. Parchuri, dated August 29, 2000, reasserting

the opinion he offered in his first handwritten note of July 25, 2000, that Franklin is "in no condition due to her medical and psychological condition to answer any questions." Dr. Parchuri's two notes, written on a doctor's prescription-pad-like note pads, far from satisfy this Court's Order for a *report*, because those notes provide no medical and psychological analyses of Franklin's condition and identified nothing about Franklin's medical and/or psychological condition with the specificity the Court required.

Furthermore, Pennsylvania Rules of Civil Procedure "set[] forth the general principle that a motion for summary judgment is based on an evidentiary record which entitles the moving party to judgment as a matter of law." Pa .R.C.P. 1035.2, note. Those Rules declare that a Record "includes any, (1) pleadings, (2) depositions, answers to interrogatories, admissions and affidavits, and (3) reports signed by an expert witness that would comply with Rule 4003.5(a)(1) whether or not the reports have been produced in response to interrogatories." Pa. R.C.P. 1035.1.

The evidence Franklin offers to support the many causes of action she pleads in her Complaint is limited to unsubstantiated allegations. Although Franklin is not required to present her entire case in opposing a Motion For Summary Judgment, she cannot rest upon mere allegations in her pleadings. Rather, Franklin must present depositions, affidavits, or other acceptable documents, that show that there is a genuine triable issue of material fact and that, therefore, the moving party is not entitled to summary judgment as a matter of law. "Bold unsupported assertions of conclusionary accusations cannot create genuine issues of material fact." *McCain v. Pennbank,* 379 Pa. Super. 313, 318-319, 549 A.2d 1311, 1313-1314 (1988).

The absence of deposition testimony, the inadequacies of her Answers to Interrogatories, and the absence of any other admissible evidence lead this Court to determine that Franklin has not set forth any genuine triable issues of material fact, but rather has rested upon the mere allegations in her pleadings.

Furthermore, a motion for summary judgment cannot be supported or defeated by statements that include inadmissable hearsay evidence. *See Isaacson v. Mobile Propane Corp.,* 315 Pa. Super. 42, 461 A.2d 625 (1983). Franklin argues that her out-of-court

statements made to three social workers and to her daughter should be admitted into evidence as Pa. R. Ev. 803(1) and 803(3) exceptions to the hearsay Rule 802. First, Rule 803(1), the Present Sense Impression exception to the Rule 802, demands that the declarant utter her statements while declarant "was perceiving the event or condition, or immediately thereafter." To be admitted into evidence as an 803(1) exception to the hearsay rule, an out-of-court statement must contain trustworthiness.

Here, the trustworthiness of Franklin's declaration would be determined by when she made the statements. The oral depositions of Franklin's own witnesses show, however, that none of the witnesses was present during conversations Franklin had had with any of Bank's employees. Franklin's witnesses cannot, therefore, substantiate the allegations that Franklin made the statements while engaged in conversation with Bank employees. The Record also shows that sufficient time had elapsed between the sense impression (here, the contentious conversations with Bank's employees) and the declarant's utterances (here, what Franklin later said to her witnesses) to deprive her out-of-court statements of trustworthiness.

Second, Rule 803(3), the Then-Existing Mental, Emotional, or Physical Condition exception to the hearsay Rule 802, demands that "[t]he declarant's statement must be referring to his or her own present mental, emotional, or physical condition, not to the condition of someone else." Edward D. Ohlbaum, OHLBAUM ON THE PENNSYLVANIA RULES OF EVIDENCE 615 (2002-2003 ed.).

Here, Franklin offers no competent evidence into the Record to substantiate that her statements to Bank's employees explicitly described her then-existing mental or physical condition. As this Court states above, Franklin offers into the Record no oral deposition testimony and no adequate Answers to Interrogatories. In the view of this Court, Franklin's statements are mere allegations, unsubstantiated by competent evidence in the Record, and should not be admitted into evidence as 803 (3) exceptions to the hearsay Rule 802.

After carefully examining the entire Record in a light most favorable to Franklin, the non-moving party in this matter, and after giving Franklin the benefit of all reasonable

inferences, this Court has found that Bank's right to summary judgment is clear and free from doubt and that Bank has met its burden of demonstrating that the out-of-court statements Franklin wishes to introduce into evidence are untrustworthy and, therefore, inadmissible hearsay evidence. This Court has found that Franklin has simply rested upon the mere allegations she made in her pleadings and offered no trustworthy competent evidence into the Record that could be admissible at trial.

Consequently, this Court granted Bank's Motion For Summary Judgment, dismissing Franklin's causes of action in their entirety, and committed no error of law thereby.

Additionally, in responding to Franklin's appeal of the summary judgment Order, this Court addresses the issue whether this Court committed an error of law in granting Bank's Motion in Limine to preclude testimony of Franklin's and of four of her witnesses.

Pennsylvania courts have ruled that "[a] motion in limine is a procedure for obtaining a ruling on the admissibility of evidence prior to or during trial, but before the evidence has been offered." *Commonwealth v. Johnson,* 399 Pa. Super. 266, 269,582 A.2d 336, 337 (1990), *aff'd Commonwealth v. Johnson,*534 Pa. 51, 626 A.2d 514 (1993) (citation omitted). Moreover, Pennsylvania courts, reviewing the scope and the purpose of a motion in limine, have ruled that "[a] motion in limine is a pre-trial application before a trial court made outside the presence of a jury, requesting a ruling or order from the trial court prohibiting the 'opposing counsel from referring to or offering into evidence matters so highly prejudicial to the moving party that curative instructions cannot alleviate an adverse effect on the jury.["] *Commonwealth v. Noll,* 443 Pa. Super. 602,605,662 A.2d 1123, 1125, (1995)(citation omitted). The *Noll* Court ruled, accordingly, that "[t]he purpose of a motion in limine is two fold: 1) to provide the trial court with a pre-trial opportunity to weigh carefully and consider potentially prejudicial and harmful evidence; and 2) to preclude evidence from ever reaching a jury that may prove to be so prejudicial that no instruction could cure the harm to the defendant, thus reducing the possibility that prejudicial error could occur at trial which would force the

trial court to either declare a mistrial in the middle of the case or grant a new trial at its conclusion." *Noll,* 443 Pa. Super. at 605-606, 662 A.2d at 1125 (citation omitted)

In the instant matter, Bank filed a Motion For Summary Judgment or, In the Alternative, Motion in Limine to Preclude Hearsay Testimony and Evidence of Damages. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Pa. R. Evid. 602 The Pennsylvania Supreme Court has long held that "[t]he primary object of a trial in our American courts is to bring to the tribunal, which is passing on the dispute involved, those persons who know of their own knowledge the facts to which they testify." *Johnson v. Peoples Cab Co.,* 386 Pa. 513, 514-515, 126 A.2d 720, 721 (1956. The Pennsylvania Supreme Court, moreover, has ruled that the proponent of testimony has the burden of proving that the witness has first-hand, personal knowledge of the matter about which the witness intends to testify. *See Carney v. Pennsylvania R.R. Co.,* 428 Pa. 489, 493, 240 A.2d 71,73 (1968) Statements not based on personal knowledge of the matters to be testified about are hearsay, and such statements, unless they fall into a category of exceptions to the hearsay Rule 802, are inadmissible at trial.

In this case, the Orphans' Court of Philadelphia County had declared Franklin to be an incompetent and appointed her daughter to be her Guardian Ad Litem. Before Franklin was declared by the Court to be an incompetent, her counsel had consistently refused to allow her to be deposed or to be a witness at trial because of her alleged fragile medical and psychological condition. Although the Court twice ordered a *report* to be submitted concerning Franklin's medical and psychological condition, Franklin's attorney offered instead only two handwritten notes from Dr. Parchuri, who twice simply stated that Franklin could not give any oral testimony due to her medical and psychological condition but who did not provide any medical analyses of Franklin's condition. Franklin never produced a medical report of any kind about her condition and never appeared for deposition.

Franklin, accordingly, had made it impossible for Bank's counsel to investigate Franklin's allegation and for this Court to rule on the admissibility of evidence that might

have been offered for this Court's consideration prior to trial. Franklin's refusal to be deposed has frustrated this Court's pre-trial opportunities to weigh carefully potential hearsay evidence Franklin would have introduced at trial and to consider potentially prejudicial and harmful to Bank hearsay evidence Franklin would seek to introduce at trial.

Therefore, this Court properly granted Bank's Motion in Limine to Preclude Charlotte Franklin's hearsay evidence and committed no error of law thereby.

In this case, moreover, Franklin offers as witnesses to statements made to her by Bank employees three social workers (Lillian Jackson, Carrie Coward and Lillie Watts), as well as her daughter and court-appointed Guardian Ad Litem, Charn Floyd. Yet the oral depositions of each of those four potential witnesses provide compelling evidence that none of the four witnesses has personal knowledge of any statements made by Bank employees to Franklin regarding her replacement check. First, social worker Lillian Jackson testified on December 14, 2001, that she was not standing close to Franklin and an unnamed Bank employee when the two were engaged in conversation (Jackson Dep.at 27, 31); that she was standing nearby but could not hear the conversation between Franklin and Bank employee (*Id.* at 31-32); that she is certain she did not hear any of the conversation (*Id.* at 33); that Franklin never discussed a cashier's check with her (*Id.*at 46); and that she kept no written record in her social worker's progress notes indicating that she had accompanied Franklin to Mellon Bank (*Id.*at 99-100).

Because, as the Record amply evidences, Lillian Jackson had no personal knowledge of the conversations between Franklin and Bank's employees, but learned of those conversations only from what Franklin eventually told her about them, Lillian Jackson's knowledge of this matter is not based upon personal knowledge, and her testimony is hearsay evidence and would be inadmissible at trial.

This Court, therefore, properly granted Bank's Motion in Limine to Preclude Lillian Jackson's hearsay testimony and committed no error of law thereby.

Second, social worker Carrie Coward testified on December 14,2001 that her knowledge of Franklin's alleged difficulties with Bank employees was based solely on

what Franklin told her about them (Coward Dep.at 35); that she never knew what Franklin and Bank employees had spoken about because Franklin was not fond of her and, apparently, would not confide in her (*Id.*at 38); that Franklin never spoke to her about a cashier's check, stop payment order on that check or a replacement check (*Id.*at 45-47); that, as an Intensive Case Manager for Philadelphia Corporation for the Aging, she never made any case manager's notes about accompanying Franklin to a bank when Franklin intended to inquire into her missing check (*Id.* at 57-58).

Because, as the Record amply evidences, Carrie Coward had no personal knowledge of the conversations between Franklin and Bank employees about a missing check, but learned about this matter only from what Franklin eventually told her, Carrie Coward's knowledge of this matter is not based upon personal knowledge, and her testimony is hearsay evidence and would be inadmissible at trial.

This Court, therefore, properly granted Bank's Motion in Limine to Preclude Carrie Coward's hearsay testimony and committed no error of law thereby.

Third, social worker Lillie Watts provided oral deposition testimony on November 15, 2001. Yet, to every question about her relationship with Franklin and about Franklin's financial affairs, including two joint checking accounts Lillie Watts had opened with Franklin (Watts Dep.at 53, 62-63) and the several checks Franklin had issued to payee Lillie Watts, amounting to several thousand dollars (*Id.* at 54-59, 62-63), Lillie Watts, under advice from her counsel, exercised her Fifth Amendment privilege against self-incrimination and answered no questions.

Because, as the Record clearly evidences, Lillie Watts adamantly refused to testify during her oral deposition about any financial matters involving Franklin, this Court has determined that it would be highly prejudicial to Bank to allow this witness to testify at trial and, accordingly, granted Bank's Motion in Limine to Preclude Lillie Watt's testimony.

Fourth, Franklin's daughter and court-appointed Guardian Ad Litem, Charn Floyd, testified on August 21, 2001, that her mother had accused her of stealing her $39,000 (Floyd Dep.at 39,42); that Franklin never confided in her about anything

regarding legal difficulties deriving from her missing check until 1999 (*Id.*at 74); and that her mother stopped payment on other cashier's checks in the past (*Id.*at 81). As her deposition testimony shows, Charn Floyd was not able to testify that she had any personal knowledge of any conversations that transpired between Franklin and any Bank employees. Pennsylvania's Rule of Evidence 602 requires such personal knowledge to render the evidence admissible. This potential witness's testimony, therefore, is hearsay and would be inadmissible at a trial.

This Court, therefore, properly granted Bank's Motion in Limine to Preclude Charn Floyd's hearsay testimony at trial and committed no error of law thereby.

ISSUE TWO

Whether this Court erred in dismissing Franklin's claim of conversion based upon Bank's several alleged refusals to hand over her funds following numerous demands by Franklin for those funds.

Pennsylvania courts have long defined conversion as "the deprivation of another's right of property in, or use or possession of, a chattel, without the owner's consent and without lawful justification." *Pioneer Commercial Funding Corp. v. American Fin. Mortgage Corp.,* 797 A.2d 269, 279-280 (Pa. Super. 2002) (citations omitted). Furthermore, Pennsylvania courts have ruled that "[w]hen such an act occurs, the Plaintiff may bring suit if he or she had either actual or constructive possession, or an immediate right to possession of the chattel at the time of the conversion." *Eisenhauer v. Clock Towers Assocs.,* 399 Pa. Super. 238, 243-44, 582 A.2d 33, 36 (1990) (citations omitted).

Yet the Pennsylvania Supreme Court, in determining if conversion has taken place, has ruled that possession of another's chattel is not wrongfully or unreasonably withheld if the owner of the chattel makes no demands for that chattel. *See Norriton East Realty Corp. v. Central Penn Nat'l Bank,* 435 Pa. 57, 61, 254 A.2d 637, 639. Our Supreme Court has ruled that "'[a] Defendant who has come rightfully into possession in

the first instance, as for example by a bailment, becomes a converter when he refuses to deliver on demand.'" *Id.* (Citation omitted). Consequently, the *Norriton* Court ruled that "[s]ince there has been no wrongful taking or disposal of the property, demand and refusal are necessary to complete the tort." *Id.*

Moreover, the *Norriton* Court identified four ways in which a conversion can be committed:

> (a) Acquiring possession of the goods, with an intent to assert a right to them which is, in fact, adverse to that of the owner.
> (b) Transferring the goods in a manner which deprives the owner of control.
> (c) Unreasonably withholding possession from one who has the right to it.
> (d) Seriously damaging or misusing the chattel in defiance of the owner's rights.
> *Id.* at 60, 254 A.2d at 638 (*citing* Prosser, TORTS §15 (d. ed., 1955).

Accordingly, Pennsylvania courts have ruled that conversion necessarily entails the "exercise [of] a substantial degree of dominion or control over the property of another." *Bank of Landisburg v.Burruss,* 362 Pa. Super. 317, 322, 524 A.2d 896, 899 (1987). Furthermore, Pennsylvania courts are clear in ruling that "money may be the subject of conversion." *Pioneer,* 797 A.2d at 280 (citation omitted) Finally, the Pennsylvania Superior Court has enunciated the Pennsylvania Supreme Court's long-standing definition of a bailment as "the delivery of personalty for the accomplishment of some purpose upon a contract, expressed or implied, that after the purpose has been fulfilled, it shall be redelivered to the person who delivered it, otherwise dealt with according to his directions or kept until he reclaims it." *Commonwealth v. Whiting,* 767 A.2d 1083, 1091 (2001 Pa. Super. 31) (citations omitted)

In this case, Bank had come into rightful possession of Franklin's replacement check and therefore exercised neither wrongful taking nor wrongful disposal of Franklin's money. As a rightful bailee of Franklin's check, Bank retained the check for the benefit of its customer in its safekeeping vault until Franklin would have demanded to reclaim it. While the check remained in the safekeeping vault, there was no competent evidence that the Bank ever expressed an intent to exercise any unlawful dominion or

control over the money; ever intentionally refused to deliver Franklin's funds to her following her demands for her funds; and ever denied Franklin's right to possession of her money. Franklin alleges that she, "on numerous occasions seeking the return of her money," (Pl's Resp. To Def.'s Mot. Summ. J. Or, In Alternative, Mot. Limine Preclude Hearsay Test. Evid. Damages at 1), demanded her money only to have the Bank refuse every demand. Yet nothing in the depositions of Franklin's witnesses substantiates Franklin's claim that any Bank employee ever discussed a missing cashier's check with Franklin or refused to relinquish that check to Franklin upon her demands for it. Without a bailor's demands and a bailee's refusals, no party can prove conversion.

Since, as the Record attests, Franklin offers no credible evidence that she ever demanded her money during the 4 ½ years it had remained in Bank's safekeeping vault, and since the Record provides no competent evidence that Bank on any occasion refused Franklin's demands for her money, Franklin does not prove the elements necessary to succeed with a claim of conversion.

After carefully examining the entire Record in a light most favorable to Appellant Franklin, the non-moving party in this matter, this Court properly granted Appellee Bank's Motion For Summary Judgment, dismissing Franklin's claim for conversion, and committed no error of law thereby.

ISSUE THREE

Whether this Court committed an error of law in dismissing Franklin's claim for breach of contract.

In September, 1994, Bank came into legal possession of Franklin's replacement's check by placing it into its safekeeping vault and thereby assumed the legal responsibilities of a bailee. The Pennsylvania Superior Court has defined a bailment as "the delivery of personalty for the accomplishment of some purpose upon a contract, expressed or implied, that after the purpose has been fulfilled, it shall be redelivered to

the person who delivered it, otherwise dealt with according to his directions, or kept until he reclaims it." *Commonwealth v. Whiting,* 767 A.2d 1083, 1091 (2001 Pa. Super.) Furthermore, Pennsylvania courts distinguish between a bailment for hire and a gratuitous bailment. *See E.I. duPont de Nemours & Berm Studios, Inc.*, 211 Pa. Super. 352, 356, 236 A.2d 555, 557. A bailment for hire mutually benefits both the bailor and the bailee, as is the case where a bank offers its customers a Night Depository Service. A Night Depository Service "is provided not as a gratuity to depositors merely, but in the interest of the bank as well, to retain present deposit accounts and to invite new ones." *Bernstein v. Northwestern Nat'l Bank in Philadelphia,* 157 Pa. Super. 73, 77, 41 A.2d 440, 442. "The daily balances of those who use the [night depository] service augment the bank's general fund available for investment, to the profit of the bank." *Id.*

Thus, the Pennsylvania Supreme Court has ruled that "[w]hen the bailment is for the sole benefit of the bailee, the law requires great diligence on the part of the bailee, and makes him responsible for slight neglect." *Ferrick Excavating and Grading Co. v. Senger Trucking Co.,* 506 Pa. 181, 188, 484 A.2d 744, 748. The *Ferrick* Court also ruled that "[w]hen the bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and makes him responsible for ordinary neglect." *Id.* at 189, 484 A.2d at 748. By way of contrast to a bailment that benefits only the bailee and to one that mutually benefits both bailor and bailee, the *Nemours* Court defined a gratuitous bailment as a bailment "for the sole benefit of the bailor,..." *Nemours,* 211 Pa. Super. at 356, 236 A.2d at 557.

In the instant matter, unlike a bank's for-profit Night Depository Service, Bank's safekeeping service yielded no benefit for or profit to Bank, since the funds did not augment the Bank's general funds. The Bank had not billed Franklin for the safekeeping service it performed for her, and Franklin had not paid the Bank to perform that service. Therefore, in the view of this Court, since providing a safekeeping vault for the valuables of its customers does not redound to the profit of the bank as a Night Depository Service would, Bank had assumed the responsibilities attendant upon a gratuitous bailment only.

The Pennsylvania Superior Court has ruled that different standards of care apply

to the different senses of bailment:

> Where one undertakes to perform a gratuitous act, from which he is to receive no benefit, and the benefit is to accrue solely to the bailor, the bailee is liable only for gross negligence... It is that omission of care which even the most inattentive and thoughtless men take of their own concerns. There is this marked difference in cases where ordinary diligence is required, and where a party is accountable only for gross neglect. *Ratti v. Wheeling Pittsburgh Steel Corp.,* 758 A.2d 695, 704 (2000) (*citing Ferrick Excavating v. Senger Trucking,* 506 Pa. 181, 484 A.2d 744 (1984), *quoting First Nat'l Bank of Carlisle v. Graham,* 79 Pa. 106, 116, 1875 WL 13115 (1875))

The *Ferrick* Court has ruled that "[t]he reasons for the existence of these standards of care, we suggest, is that *basic fairness* is repelled by the notion that a bailee who acts for the bailor's benefit, but not his own, should be sued and held to the same standard of care as if he were acting for a fee, when some misfortune befalls the bailed goods." *Ferrick,* 506 Pa. at 189, 484 A.2d at 748 (emphasis in original)

In the instant matter, as this Court argues immediately below, this bailment is a gratuitous bailment; and, as this Court argued above in its analysis of Franklin's conversion claim, Franklin made no demands for her replacement check during the 4 1/2 year period in question. The Record shows that when Bank's auditors found the check, they deposited it into Franklin's account. If the Court accepts the fact that Bank's log showed that the check was logged in September, 1994, and that it was discovered in its vault in February, 1999, then this matter does not rise to the level of gross negligence.

In light of Franklin's failures to offer competent evidence from any of her witnesses that corroborates her claim that she made numerous demands for her bailed money, and in light of the fact that the original cashier's check, a live negotiable instrument that was not in the possession of the Bank, was never located, this Court has determined that Franklin has failed to prove her claim of gross negligence.

Furthermore, gross negligence is the standard of care relevant to reciprocally beneficial bailments, and, as such, that standard of care would not apply to this case of a gratuitous bailment. The Pennsylvania Supreme Court has ruled, " 'When the bailment is for the sole benefit of the bailor, the law requires only slight diligence on the part of the bailee, and of course makes him answerable only for gross negligence.'" *Ferrick,* 506 Pa.

at 188, 484 A.2d at 747-748. The *Ferrick* Court has ruled that an "only slight diligence" standard of care means that "[t]he bailee without reward is not bound to ordinary diligence, is not responsible for that care which every attentive and diligent person takes of his own goods, but only for that care which the most inattentive take." *Id.* at 189, 484 A.2d at 748

In this matter, this Court has taken into consideration four significant facts present in the Record. No competent evidence exists that bailor Franklin made demands upon the bailee Bank for the return of her bailed property. Second, Franklin has failed to prove gross negligence in Bank's care for Franklin's replacement check. Third, in this situation of a gratuitous bailment, gross negligence is irrelevant as a standard of care for bailed property. Fourth, Franklin has failed to demonstrate that Bank, as bailee in a gratuitous bailment, had any more exacting duty of care than the "only slight diligence" standard and has not proved that since the Bank fell below that minimal standard of care, Bank cannot be held to the same standard of care as if Bank were receiving from Franklin a fee for performing the profit-making service of safe-guarding Franklin's replacement check in its safe-keeping vault.

The Record evidences that Bank concedes a miscommunication that resulted in Franklin's having no access to her funds for 4 ½ years, for which Bank offers to pay to Franklin the 6% statutorily determined interest rate on her $39,000 for those 4 ½ years. Given the totality of the circumstances surrounding this case as they appear in the Record, this Court determined that Bank's offer of 6% interest, amounting to $10,390.61, is a fair and equitable resolution, and that Franklin's claim of $400,000 cannot be supported by any competent evidence in the Record.

After carefully examining the entire Record in a light most favorable to Appellant Franklin, the non-moving party in this matter, this Court properly granted Appellee Banks' Motion For Summary Judgment, dismissing Franklin's claim of breach of contract, and committed no error of law thereby.

ISSUE FOUR

Whether this Court committed an error of law in dismissing Franklin's claim for violation of Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. C.S.A. §201-2, based upon Appellee's alleged unfair and deceptive dismissals of Appellant's demands for her missing funds.

73 Pa. C.S.A. §201-2(4)(i-xx) identifies twenty specific acts or practices as unlawful in that they are in one or another way unfair or deceptive. Moreover, in a generically worded catch-all section, that statute identifies as unlawful "any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding." 73 Pa. C.S.A. §201-2(4)(xxi). Franklin avers that Bank perpetrated six "unfair and deceptive acts" in violation of that catch-all section (Compl. at ¶ 23). This Court agrees with Franklin's argument that one need not prove common law fraud to succeed in a cause of action for a violation of 73 Pa. C.S.A. §201-2(4)(xxi). The Court is persuaded by Franklin's citation from *In re Patterson* to the effect that one can succeed in a cause of action for violation of 73 Pa. C.S.A. §201-2(4)(xxi) by proving deception, without needing to prove common law fraud. "[T]he addition [by the Pennsylvania Legislature] of the word 'deceptive' was intended to cover conduct other than fraud which was clearly embraced by the pre-amendment statute." *In re Patterson,* 263 B.R. 82, 92 n.17 (Bankr.E.D. Pa. 2001).

Since none of Franklin's six allegations illustrates any of the twenty enumerated examples of violations of the Consumer Protection Law, it remains for this Court to consider whether Bank engaged in any acts of deception that would rise to a violation of 73 Pa. C.S.A. §201-2(4)(xxi). Pennsylvania courts have defined "deceptive" as any intentional act that:

> (1) creates or reinforces a false impression including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise;
>
> (2) prevents another from acquiring information which would affect his judgment

of a transaction; or

> (3) fails to correct a false impression which the deceiver previously created or reinforced or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship. *Commonwealth v. Quartapella*, 372 Pa. Super. 400, 402, 539 A.2d 855, 856 (1988).

Franklin avers that Bank employees deceptively gave her volumes of materials irrelevant to her demand for her money (Compl ¶ 11) , but one of her own deposed witnesses testified that Franklin was never given any documents to take home with her from the Bank (Coward Dep. at 44). The Record does not support the claim that Bank employees ever prevented Franklin from acquiring information about her replacement check or dissembled by failing to correct any false impression Franklin might have had about the significance of the conversations that took place. The Record before this Court shows that no representatives of Bank at any point engaged in any acts of deception as the *Quartapella* Court defines deception.

After carefully examining the entire Record in a light most favorable to Appellant Franklin, the non-moving party in this matter, this Court ruled that Franklin was unable to establish by credible, admissible evidence that Appellee Bank engaged in deceptive acts that would rise to a violation of 73 Pa. C.S.A. §201-2(4)(xxi). Accordingly, this Court properly entered summary judgment in favor of Bank, dismissing Franklin's claim for violation of 73 Pa. C.S.A.§201-2(4)(xxi), and committed no error of law thereby.

ISSUE FIVE

Whether this Court committed an error of law in dismissing Franklin's claim for fraud.

The Pennsylvania Supreme Court has ruled that "[f]raud is not presumed; it must be proved." *Highmont Music Corp. v. J.M. Hoffman Co.,* 397 Pa. 345, 350, 155 A.2d 363, 366 The *Highmont* Court restated the well-settled Pennsylvania law that "[e]vidence of fraud must be 'clear, precise and indubitable' and the question of determining whether

the evidence presented is of that quality is a question of law." *Id.,* (citing *Gerfin v. Colonial Smelting & Refining Co., Inc.,* 374 Pa. 66, 97 A.2d 71, 72). The Pennsylvania Superior Court has determined that "[f]raud consists of anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct innuendo, by speech or silence, word of mouth, or look or gesture." *Delahanty v. First Pennsylvania Bank, N.A.*, 318 Pa. Super. 90, 107, 464 A.2d 1243, 1251 (1983) (*citing Fromer v. Blank,* 493 Pa. 137, 425 A.2d 412 (1981)). The *Delahanty* Court articulated the long-settled elements a party must prove to succeed on a cause of action for fraud. "The elements of fraud are as follows: ' "there must be (1) a misrepresentation, (2) a fraudulent utterance thereof, (3) an intention by the maker that the recipient will thereby be induced to act, (4) justifiable reliance by the recipient upon the misrepresentation, and (5) damage to the recipient as the proximate result."' *Id.* at 108, 464 A.2d at 1252 (citations omitted).

The *Delahanty* Court, furthermore, ruled that "the initial inquiry for the judge is whether the proof of every element of fraud has met the exacting standard, justifying a refusal to grant a non-suit and its submission to the fact-finder." *Id.* at 110, 464 A.2d at 1253. By analogy with the non-suit issue in *Delahanty,* this Court, in entering a judgment of summary motion, was throughout cognizant that " 'it is evident under Pennsylvania law [that] fraud must be proved by a higher standard than the preponderance of the evidence standard.'" *Id.* at 109, 462 A.2d at 1253 (citation omitted). In *Delahanty,* the Court wrote expansively of the meaning of evidence that meets the rigorous standard of clear, precise and indubitable:

> What is meant by the statement that the evidence must be clear, precise and indubitable? It means that the witnesses must be "credible,...distinctly remember the facts to which they testify, and narrate the details exactly," that the evidence "is not only found to be credible, but of such weight and directness as to make out the facts alleged beyond a reasonable doubt"; that "the witnesses must be found to be credible, that the facts to which they testify are distinctly remembered and the details thereto narrated exactly and in due order, and that their testimony is so clear, direct, weighty and convincing as to enable the jury to come to a clear conviction without hesitancy, of the truth of the precise facts in issue. *Id.,* at 110-111, 464 A.2d at 1253.

After attending with care to the nature and quality of the evidence Franklin offers into the Record to support a cause of action for fraud, this Court is persuaded that Franklin has failed to meet the fraud claim's exacting standard of clear, precise and indubitable proof. Nowhere does the Record provide clear, precise, indubitable proof that Bank or any of its representatives said or did anything in the order of a misrepresentation, suppressed the truth or suggested what was false, individually or in concert with others, thus neither doing nor saying anything expressly calculated to deceive Franklin concerning the status or whereabouts of her replacement check. Franklin's attorney has resolutely refused to allow Franklin to be deposed or to participate as a witness if there should be a trial, thereby obviating Bank's attempts to ascertain direct evidence of any instances of fraudulent conduct Franklin alleges Bank engaged in.

Franklin's daughter and court-appointed Guardian Ad Litem, Charn Floyd, has no direct, material knowledge of anything Bank said or did about her mother's check. Indeed, Franklin entertained the possibility that her daughter had been stealing money from her and might even have been in some kind of conspiracy with the Bank to cheat her out of her $39,000. (Floyd Dep. at 39, 42) Nor do two social workers, Carrie Coward and Lillian Jackson, who accompanied Franklin to certain banks during the time in question, have any direct, material information about the matter of a lost cashier's check, because all they know about this matter is only what Franklin told them about her conversations with Bank employees. Neither social worker ever heard first-hand any of the conversations Franklin had with Bank employees. A third social worker, Lillie Watts, who had Franklin open a joint checking account with her during the time when Franklin was in her charge as an elderly social services client at Philadelphia Corporation for Aging, pled her Fifth Amendment rights against self-incrimination during her deposition every time she was asked anything about Franklin, especially about Franklin's financial affairs, about the joint checking account, and about the several checks amounting to thousands of dollars Franklin had issued to Ms. Watts. The depositions of representatives of Bank evidence that none of those representatives ever engaged Franklin in conversations about her missing check.

The Record, therefore, stands bereft of any clear, precise and indubitable proof that Bank made any misrepresentations to Franklin about her replacement check, or that Bank intentionally induced Franklin to act in a fraudulently designed manner, or that Franklin relied upon Bank's misrepresentations to her detriment. Several of the serious financial problems Franklin had in being unable to meet her real estate bills, as well as her delinquent income tax payments antedate this matter (in some cases by several years) and cannot be the legal result of the misplaced replacement check.

The Record before this Court leads to the inference that Franklin's witnesses are not credible because they never directly heard any Bank employees make any misrepresentations to Franklin. Also, there are no admissible facts they could distinctly remember to which they could testify in Court and the details of which they could narrate exactly and in due order.

Franklin specifically avers that Bank had misrepresented to Franklin that the Bank had investigated her claim of the lost cashier's check, when, in fact, Franklin alleges, the Bank had not undertaken that investigation. Franklin maintains that Bank had a fiduciary duty properly to account for and dispose of Franklin's money but breached that duty by failing to investigate her claims of her lost money. Franklin maintains, further, that her social workers and her daughter were also convinced that the Bank had investigated her claims, thus, Franklin argues, substantiating Franklin's claims of intentional misrepresentation.

Yet the Record before this Court would appear to suggest a different state of affairs. First, neither the social workers nor the daughter ever spoke directly with any Bank representative about Franklin's check. What the social workers and the daughter know about this matter is exclusively what Franklin had eventually communicated to them. Their assertions in the Record, therefore, are hearsay and, as such, inadmissible at trial under Pennsylvania Rule of Evidence 802. Because of Franklin's mental and physical incapacities, Franklin had not been deposed and, on the advice of her counsel, would not testify at trial. Thus, as this Court argued above, Franklin has rendered impossible the gathering of evidence to support her own case. Second, the Record attests

that two Bank representatives, Jean Bailey and Victoria Cabella, did in fact speak directly with Franklin at different points in time, although never about Franklin's lost check; indeed, Ms. Bailey spoke with Franklin years before the gravamen for this action could have eventuated. The Record offers no competent evidence to prove that Bank violated any fiduciary duty to Franklin.

After carefully examining the entire Record in a light most favorable to Appellant Franklin, the non-moving party in this matter, this Court ruled that Franklin had failed to meet the exacting burden of proving with precise, clear and indubitable evidence all the elements of fraud. Given the absence of any material evidence that would be admissible at trial to support a claim for fraud, this Court properly entered summary judgment in favor of Appellee Bank, dismissing Franklin's claim of fraud, and committed no error of law thereby.

ISSUE SIX

Whether this Court committed an error of law in dismissing Franklin's claim for negligent misrepresentation.

The Pennsylvania Supreme Court has articulated four elements a party must prove to succeed in a cause of action for negligent misrepresentation:

> (1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation. *Bortz v. Noon,* 556 Pa. 489, 500, 729 A.2d 555, 561 (1999) (citations omitted).

The *Bortz* Court differentiates negligent misrepresentation from intentional misrepresentation by ruling that in negligent misrepresentation "the misrepresentation must concern a material fact and the speaker need not know his or her words are untrue, but must have failed to make a reasonable investigation of the truth of these words." *Id.* at 501, 729 A.2d 561 (citations omitted).

Franklin argues that "if this Court finds that Mellon's employee's [sic] statements, that it had investigated her claim when they had not were intentional, those statements should at the very least be deemed to have been made negligently" (Mem. Law Supp. Pl's Resp. Def's Mot. Summ. J. or, In Alternative, Mot. Lim. to Preclude Hearsay Test. and Evid. Dmgs at 22). Yet, as this Court found in its analysis of Franklin's claims for intentional misrepresentation, the Record does not support the claim that Bank's employees made any fraudulent misrepresentations to Franklin about her replacement check, because no Bank representatives ever spoke to Franklin about that material fact of that missing check.

Moreover, no evidence in the Record would substantiate the claim that Franklin, at any point, justifiably relied upon a misrepresentation to her harm. No circumstances ever presented themselves to the deposed Bank employees with whom Franklin spoke into which those Bank employees should have made a reasonable investigation to determine whether Franklin's claims about a missing check were true. Thus, the Bank employees did not make any negligent misrepresentations to Franklin about her check. Because the Record offers no credible evidence to support Franklin's claims of Bank's misrepresentations and failures to investigate into the truth of its statements made to Franklin, Franklin failed to prove the necessary elements for a successful cause of action for negligent misrepresentation.

After carefully examining the entire Record in a light most favorable to Appellant Franklin, the non-moving party in this matter, this Court properly entered summary judgment in favor of Appellee Bank, dismissing Franklin's claim of negligent misrepresentation, and committed no error of law thereby.

ISSUE SEVEN

Whether this Court committed an error of law in dismissing Franklin's claim for violation of 13 Pa. C.S.A.§3411 based upon Bank's breach of its fiduciary duty to

Franklin to honor her cashier's check upon presentation to the drawee bank.

Franklin argues that Bank had a fiduciary duty to Franklin pursuant to the U.C.C. comment to 13 Pa. C.S.A § 4403, note 4, because she purchased a cashier's check from the Bank. Moreover, Franklin argues that Bank cites no "authority to support its proposition that Appellant is not entitled to recover under 13 Pa. C.S.A. 3411." (Mem. Law Supp. Pl's Resp. Def's Mot. Summ. J. or, In Alternative, Mot. Lim. Preclude Hearsay Test. & Evid. Dmgs at 25) Yet Bank does cite the authority of 13 Pa. C.S.A. § 3411(a)(b)(1)(2)(3), reproducing that statute in its entirety in a footnote (Mem. Law Supp. Def.'s Mot. Summ. J., or In Alternative, Mot. Lim. Preclude Hearsay Evid. and Evid. Dmgs at 24, n.4) Bank maintains that Franklin's reliance upon that statute is misplaced because Franklin never "presented the cashier's check to Mellon for payment, or that she even took possession of the item." (*Id.* at 25) Bank, accordingly, argues that it did not act wrongfully "by failing to make payment to" Franklin. (*Id.*)

This Court has determined that the Record before it provides no credible evidence to support Franklin's claim that she at any time presented her cashier's check to Bank for payment only to have the Bank refuse to honor that check and pay her upon presentation. In the view of this Court, Franklin was unable to establish by admissible evidence that Bank violated 13 Pa. C.S.A. §3411.

After carefully examining the entire Record in a light most favorable to Appellant Franklin, the non-moving party in this matter, this Court properly entered summary judgment in favor of Appellee Bank, dismissing Franklin's claim for violation of Pa. C.S.A.§3411, and committed no error of law thereby.

ISSUE EIGHT

Whether this Court committed an error of law in dismissing Franklin's plea for punitive, compensatory, and consequential damages suffered as a result of Bank's

alleged tortious conduct.

Pennsylvania Courts have ruled that the purpose of punitive damages remains two-fold: "to punish a tortfeasor for outrageous conduct and to deter him or others from similar conduct." *D.K. & J. K. [Minors] v. Johnson,* 447 Pa. Super. 340, 348, 669 A.2d 378, 382, (1995) (*citing Kirkbride v. Lisbon Contractors, Inc.,* 521 Pa. 97, 555 A.2d 800 (1989)) Moreover, Pennsylvania courts have adopted the definition of punitive damages as the Restatement (Second) of Torts, § 908 defines that term. "Punitive damages are damages ...awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." *Moran v. Corson,* 402 Pa. Super. 101, 113, 586 A.2d 416, 422,(1991) (citation omitted) Additionally, the *Moran* Court has ruled that conduct becomes "outrageous" whenever that conduct is grounded in the tortfeasor's "evil motive or his reckless indifference to the rights of others." *Id.,* 586 A.2d at 422 (citation omitted).

The *Moran* Court went on to rule that "[r]eckless indifference to the rights of others and conscious action in deliberate disregard of them (see § 500) may provide the necessary state of mind to justify punitive damages." *Moran,* 402 Pa. Super. at 114, 586 A.2d at 423 (emphasis in original) By adopting the Restatement's definition of "reckless," the *Moran* Court ruled that "to be reckless [conduct] must be something more than negligent." *Id.,* 586 A.2d at 423 Finally, the *Moran* Court articulated the well-settled Pennsylvania law that punitive damages are allowable "for torts committed willfully, maliciously, or so carelessly as to indicate wanton disregard for the rights of the party injured." *Id.* at 114-115, 586 A.2d at 423 (*citing Neal v. Carey Canadian Mines, Ltd.,* 548 F. Supp. at 377, *quoting Thompson v. Swank,* 317 Pa. 158, 159, 176 A.2d 211, 211(1934)). "[O]ne must look to 'the act itself together with all the circumstances including the motive of the wrongdoers and the relations between the parties...."*Id.*at 115, 586 A.2d at 423 (citations omitted) "The state of mind of the actor is vital." *Id.* "The act, or the failure to act, must be intentional, reckless or malicious." *Id.* (*citing Feld v. Merriam,* 506 Pa. at 395, 485 A.2d at 747-748).

In the instant matter, the Record before this Court provides no credible evidence that Bank's conduct even closely approximated outrageous, reckless or malicious conduct. Bank concedes that an unexplained communication breakdown between Franklin and Bank resulted in her check's remaining in Bank's safekeeping vault instead of being returned to her in a more prompt manner and that "[t]he reasons for which the bank held the replacement item in its safekeeping vault are unclear..." (Bank's Reply to Resp. of Pl. to Bank's Mot. Simm. J. at 2). Nevertheless, Bank's failure to act by depositing Franklin's check into her account before 4 ½ years had expired does not entail a reckless indifference to Franklin's rights as a customer with an open account at Bank, and does not reflect that evil state of mind and wanton disregard for Franklin's rights necessary to justify an award of punitive damages.

This Court, in attending to the act itself of Bank's failure to credit Franklin's account in a more timely manner, as well as to the intention and state of mind of Bank's employees, finds that Bank's failure to credit Franklin's account with her $39,000 was not intentional, reckless, or malicious, and, therefore, did not rise to the standard of tortious conduct which Pennsylvania courts require to justify the awarding of punitive damages.

Thus, after carefully examining the entire Record in a light most favorable to Appellant Franklin, the non-moving party in this matter, this Court granted Appellee Bank's Motion For Summary Judgment, dismissing Franklin's claim for punitive damages, and committed no error of law thereby.

Moreover, alleging breach of contract, Franklin sues for compensatory damages. The Pennsylvania Supreme Court has ruled that "[g]enerally speaking, the measure of damages applicable in a case of breach of contract is that the aggrieved party should be placed as nearly as possible in the same position he would have occupied had there been no breach." *Harman v. Chambers*, 358 Pa. 516, 521, 57 A.2d 842, 845 (1948) "The rationale behind compensatory damages is to restore the injured party to the position he or she was in prior to the injury." BLACK'S LAW DICTIONARY 390 (6th ed. 1990) In this matter, Franklin claims injury due to breach of contract. Yet, on February 11, 1999,

Bank returned the $39,000 to Franklin, thereby restoring the aggrieved Franklin to the position she was in prior to Bank's placing the replacement check in its safekeeping vault.

Thus, after carefully examining the entire Record in a light most favorable to Appellant Franklin, the non-moving party in this matter, this Court granted Appellee Bank's Motion For Summary Judgment, dismissing Franklin's claim for compensatory damages, and committed no error of law thereby.

Furthermore, alleging breach of contract, Franklin sues for consequential damages. The Pennsylvania Supreme Court has ruled that the aggrieved party in a breach of contract case *"is entitled to recover, unless the contract provides otherwise, whatever damages he suffered provided (1) they were such as would naturally and ordinarily result from the breach,* or (2) *they were reasonably foreseeable and within the contemplation of the parties at the time they made the contract,* and (3) *they can be proved with reasonable certainty." Taylor v. Kaufhold,* 368 Pa. 538, 546, 84 A.2d 347, 351 (1951) (citation omitted) (emphasis in original) In this matter, Franklin alleges actual damages; serious physical pain and mental and emotional anguish; the deprivation of her use, enjoyment and benefits of her money; severe humiliation, embarrassment and harm to her reputation; and in inability to meet her financial obligations. Yet Franklin's claims for physical and emotional anguish, severe humiliation, embarrassment and harm to her reputation are not the kinds of harms that would naturally and ordinarily result from a breach of contract Franklin alleges against Bank in this matter, nor would those kinds of harms be reasonably foreseeable and within the contemplation of the two parties when they entered into the contract by opening an account at the Bank. Additionally, the Record shows no proof at all that Franklin's deteriorated physical and mental condition (due to her Parkinson's disease, her schizophrenia and her dementia) legally resulted from this alleged breach of contract.

Finally, Franklin's financial distress clearly antedated by years the commencement of this lawsuit, and it was likely acutely exacerbated by the drain on her account by the questionable financial transactions she had entered into with social worker Lillie Watts, while she was under Ms. Watts' charge. (Mem. Law Supp. Def's Mot. Summ. J. or In the

Alternative, Mot. Lim. Preclude Hearsay Evid. & Evid Dmgs. at 36-38).

Indeed, for a breach of contract that involves a failure to pay money in a timely manner, as is the case here, "[t]he only damages which normally and ordinarily flow from the failure to timely pay money are interest." *Commonwealth Dept. of Transp. v. Cumberland Construction Co.,* 90 Pa. Cmwlth. 273, 282, 494 A.2d 520, 525 (1985). Bank has offered to pay Franklin $10,390.61 in lost interest, a figure calculated at the legal rate of 6% on the $39,000, for the 4 ½ years Franklin's replacement check had lain in Bank's safekeeping vault.

After carefully examining the entire Record in a light most favorable to Appellant Franklin, the non-moving party in this matter, this Court has granted Appellee Bank's Motion For Summary Judgment, dismissing Franklin's claim for consequential damages, and committed no errors of law thereby.

ISSUE NINE

Whether this Court committed an error of law in granting Bank's claim that Franklin's cause of action is time-barred by the running of the statute of limitations.

The Pennsylvania Supreme Court has ruled, "The true test in determining when a cause of action arises or accrues is to establish the time when the Plaintiff could have first maintained the action to a successful conclusion." *Kapil v. Ass'n of Pennsylvania State College and University Faculties,* 504 Pa. 92, 99, 470 A.2d 482, 485 (1983) Thus, the party's "right to demand a return of the property accrued when default was made in payment." *Barton v. Dickens,* 1865 WL4471, *5 (Pa). "Where chattels are placed into the possession of another and are to be returned at a fixed time, as in the case of a conditional sale and undoubtedly in a bailment, the right of action accrues immediately upon a default." *Priester v. Milleman,* 161 Pa. Super. 507, 510, 55 A.d. 540, 542 (1947) (citation omitted). "The Statute of Limitations, therefore, began to run from the time the right of action accrued." *Barton,* 1865 WL 4471, *5.

That is, the statute of limitations begins to run from the time the bailee (here, Bank) first refuses to return the bailed property (here, the replacement check) upon demand for it by the bailor (here, Franklin). Bailor Franklin maintains that she made the first demand upon bailee Bank for the return of her bailed check in September 1994. Franklin maintains further that she made several more demands soon thereafter and that Bank refused every one of her demands. (Mem. Law Supp. Pl's Resp. Def's Mot. Summ. J. or In the Alternative, Mot. Lim. Preclude Hearsay Test. & Evid. Dmgs. at 1). Thus, Franklin's cause of action had to accrue in September 1994 when, as Franklin herself alleges, Bank first refused her demand for her bailed money.

If Franklin advances a cause of action in torts, then, pursuant to 42 Pa. C.S.A. §5524, the statute of limitations runs for two years. If Franklin advances a cause of action in contract, then, pursuant to 42 Pa. C.S.A. §5525, the statute of limitation runs for four years. In either case, however, the statute of limitations has run, and Franklin's cause of action is time-barred.

After carefully examining the entire Record in a light most favorable to Appellant Franklin, the non-moving party in this matter, this Court granted Appellee Bank's Motion For Summary Judgment, persuaded that Franklin's claims are time-barred, and committed no error of law thereby.

CONCLUSION

For the reasons stated above, this Court respectfully requests that the Appeal filed by Appellant, Charlotte Franklin, be denied and that this Court's Order of Summary Judgment in favor of Appellee, Mellon Bank, dated August 7, 2002, be affirmed.

BY THE COURT:

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ALLAN L. TERESHKO, J

Date

cc: All Counsel

Robert Montgomery, Esq., For Franklin
Daniel Bernheim, III, Esq., For Mellon Bank