

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

**MICHAEL B. JACOBS, individually and  
as Administrator of the Estate of  
GREGORY JACOBS, and TERESA A.  
JACOBS,**  
  
**Plaintiffs,**

v.

**THE CENTER FOR ORGAN  
RECOVERY & EDUCATION;  
JONATHAN COLEMAN; THE  
HAMOT MEDICAL CENTER OF THE  
CITY OF ERIE, PENNSYLVANIA;  
WILLIAM R. PHELPS, M.D.; PETER  
PAHAPILL, M.D.; JEFFREY  
BEDNARSKI, M.D.,**  
  
**Defendants**

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: **JUDGE McLAUGHLIN**  
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: **CASE NO. 1:09-CV-00048**  
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:  
: **CIVIL ACTION - LAW**  
:  
: **JURY TRIAL DEMANDED**

**PLAINTIFFS' TRIAL BRIEF**

**BOYLE, AUTRY & MURPHY**

**Dennis E. Boyle, Esquire**  
Supreme Court I.D. No. 49618

**Joshua M. Autry, Esquire**  
Supreme Court I.D. No. 208459  
4660 Trindle Road, Suite 200  
Camp Hill, PA 17011  
Phone: (717) 737-2430  
Fax: (717) 737-2452  
deboyle@dennisboylelaw.com  
jmautry@dennisboylelaw.com

Date: August 27, 2012

Counsel for Plaintiff

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**I. STATEMENT OF THE CASE**

**A. Procedural History.**

The Plaintiffs are currently scheduled for trial beginning on August 28, 2012.

**B. Statement of the Evidence to Be Presented.**

On March 8, 2007, Gregory Jacobs fell and sustained a very serious head injury while on a school-sponsored ski trip to Peek ‘n Peak Ski Resort in Findley Lake, New York. He was thereafter transported to Hamot Medical Center (“Hamot”) in Erie, Pennsylvania.

After Gregory arrived at Hamot, surgery was performed, and Gregory was in relatively stable condition. However, despite Gregory’s improvement, a “DNR” or “do not resuscitate” order, was subsequently placed on his chart. After the entry of the DNR, Gregory’s condition did not immediately change – he was by no measure “brain dead,” and even according to Peter Pahapill, M.D., death was not imminent; in fact, there would appear to be near unanimity among all physicians that Gregory’s condition was not terminal and death was not imminent. Even so, Amy Lindstrom, a nurse with Hamot, called the Center for Organ Recovery and Education (“CORE”) to arrange for the harvesting of Gregory’s organs.

Even with CORE’s first involvement with Gregory, it is clear that Gregory was not brain dead, was probably not going to proceed to brain death, and did not have a condition that was terminal. Telephone conversations show that CORE staff recognized these facts.

On March 12, 2007, Peter Pahapill, M.D. reviewed a CT scan of Gregory’s with his parents. While the meaning of the CT scan is disputed, even Dr. Pahapill acknowledges that Gregory was not brain dead and that his condition was not terminal. This sentiment is echoed in another call from Hamot to CORE wherein Amy Lindstrom acknowledged that Gregory “. . . still

has cough and gag and everything.” She also said that at that point in time, Gregory was still breathing above the vent, despite his heavy sedation. Nevertheless, the nurse stated that it was actually Gregory’s father who wanted life support withdrawn because “. . . he’s never going to be the same if he even makes it.”

By this time, CORE had been contacted by Hamot concerning the harvesting of Gregory’s organs, but no one from Hamot had talked to the Jacobs about the termination of life support. Dr. Pahapill, the neurosurgeon treating Gregory, believed it was someone else’s job. William Phelps, M.D., the “attending” physician responsible for Gregory’s care under Hamot protocols, had no involvement in Gregory’s care. The responsibility for discussing the termination of life support therefore fell to Jonathan Coleman, the CORE representative, whose medical background consisted of an Associate’s Degree in Mortuary Science. The advice Mr. Coleman gave is the subject of fierce dispute; however, it is undisputed that he used a written consent form that said, “. . . death has been declared and recorded in the medical records.” In fact, death had not been declared and would not be declared until twenty minutes after Gregory’s breathing tube had been removed. Only Michael Jacobs signed the consent form.

On March 13, 2007, after the consent form was signed by Michael Jacobs, Coleman, CORE went about making plans to harvest the organs even though Gregory was still alive. At this time, Gregory was heavily sedated, and his respiration was artificially suppressed. At 3:49 P.M., he was given Ampicillin, Cefazolin, Fluconazole, Matronidazole and Vanomyein. Three minutes later, Betadine was administered. The medications were given to Gregory for the purposed of harvesting his organs; they were not provided for the purposes of medical treatment.

At 5:15 A.M., Gregory was taken to an operating room, for the purpose of organ recovery. Official hospital records indicate that the surgery to recover his organs began at 5:50 A.M. at a time when Gregory was still clearly alive. There was a conversation at about this time between CORE and Gregory Engel, M.D., the trauma surgeon, about the removal of the breathing tube, but Dr. Engel does not remember the substance of the conversation. In any event, the breathing tube was removed from Gregory at 6:03 A.M. and Gregory eventually suffocated fourteen minutes later. He was pronounced dead at 6:19 A.M., many hours after Michael Jacobs signed the CORE release form that said “death has been declared and recorded in the medical records”.

As Jonathan was making arrangements for Gregory’s death, he was simultaneously arranging for the sale of Gregory’s organs. As a result of the organ recovery, CORE was able to sell Gregory’s kidneys for \$42,000, his liver for \$30,000, heart valves for \$1,600, prostate for \$200, and bladder for \$200.00. Gregory’s most valuable organ, his heart, however, was not recoverable.

**II. QUESTIONS PRESENTED:**

- A. WHETHER THE EVIDENCE WILL SHOW THAT DEFENDANTS HAMOT, DR. PAHAPILL, CORE AND COLEMAN ENGAGED IN A CIVIL BATTERY AGAINST GREGORY JACOBS THROUGH THEIR RESPECTIVE ACTIONS?

(Suggested Answer in the Affirmative)

- B. WHETHER THE EVIDENCE WILL SHOW THAT DEFENDANTS HAMOT, DR. PAHAPILL, CORE AND COLEMAN CONSPIRED TO COMMIT CIVIL BATTERY AGAINST GREGORY JACOBS TO REMOVE HIM FROM LIFE SUPPORT?

(Suggested Answer in the Affirmative)

- C. WHETHER THE EVIDENCE WILL SHOW THAT DEFENDANTS HAMOT, DR. PAHAPILL, CORE AND COLEMAN ENGAGED IN FRAUDULENT MISREPRESENTATION BY TELLING GREGORY'S PARENTS THAT GREGORY WAS BLIND, BRAIN DEAD AND THAT HE WOULD DIE OF A HERNIATION AND/OR A BAD HEART?

(Suggested Answer in the Affirmative)

- D. WHETHER THE EVIDENCE WILL SHOW THAT DEFENDANTS HAMOT, DR. PAHAPILL, CORE AND COLEMAN ENGAGED IN NEGLIGENT MISREPRESENTATION BY TELLING GREGORY'S PARENTS THAT GREGORY WAS BLIND, BRAIN DEAD AND THAT HE WOULD DIE OF A HERNIATION AND/OR A BAD HEART?

(Suggested Answer in the Affirmative)

- E. WHETHER THE EVIDENCE WILL SHOW THAT DEFENDANTS HAMOT AND DR. PAHAPILL ENGAGED IN MEDICAL MALPRACTICE WHEN THEY TOOK ACTIONS THAT BREACHED THE STANDARD OF CARE OWED TO GREGORY?

(Suggested Answer in the Affirmative)

F. WHETHER THE EVIDENCE WILL SHOW THAT PLAINTIFFS  
ARE ENTITLED TO PUNITIVE DAMAGES?

(Suggested Answer in the Affirmative)

G. WHETHER THE EVIDENCE WILL SHOW THAT PLAINTIFFS  
ARE ENTITLED TO COMPENSATORY DAMAGES?

(Suggested Answer in the Affirmative)

**III. ARGUMENT:**

**A. Defendants Hamot, Dr. Pahapill, Coleman and CORE committed civil battery against Gregory Jacobs.**

The evidence will show that Defendants, each in their own right, engaged in a civil battery against Gregory Jacobs. To prove a claim for civil battery, a plaintiff must produce evidence of an intentional, unpermitted and offensive contact with the person. *See Montgomery v. Bazaz-Sehgal, M.D.*, 742 A.2d 1125, 1131 (Pa. Super. Ct. 1999).

CORE, through Mr. Coleman, engaged in intentional, unpermitted contact against Gregory by misleading Michael Jacobs into consenting to the withdrawal of life support; directing that Gregory be taken to the operating room for surgery before he was dead; directing that surgery commence before Gregory was dead; and directing that Gregory's breathing tube be removed resulting in Gregory's suffocation.

Hamot, through Dr. Pahapill, directed, participated in, and was responsible for all of the intentional, unpermitted contact against Gregory. Specifically, Dr. Pahapill misled Michael Jacobs into consenting to withdrawal of life support. This unpermitted contact includes killing him by starting surgery before he was dead and by removing his breathing tube so that he died of suffocation.

All of these actions amount to a civil battery. The Defendants argue that they had the consent, and thus permission, of Gregory's parents to do all of the above, including taking Gregory off life support. Consequently, Defendants argue that there was no battery. However, as the evidence will show, Defendants did not have consent because legally they could not obtain it from Gregory's parents.

In the case of *In re Fiori*, 673 A.2d 905 (Pa. 1996), the Pennsylvania Supreme Court was asked to rule on the withdrawal of life support where a patient is in a persistent or permanent vegetative state and is not faced with an end-stage condition. “The term ‘vegetative state’ describes a body which is functioning entirely in terms of its internal controls.” *Id.* at 908. The Court cited to the New England Journal of Medicine to distinguish between persistent and permanent vegetative states. According to the medical journal, “[a] wakeful unconscious state that lasts longer than a few weeks is referred to as a *persistent* vegetative state...a *permanent* vegetative state, on the other hand, means an *irreversible* state...” *Id.* at 908 n. 1 (quoting Multi-Society Task Force on PVS, Medical Aspects of the Persistent Vegetative State (Pts. 1 & 2), 330 New Eng. J. Med. 1499, 1501 (1994)) (emphasis supplied by court). Here, Gregory was in a chemically-induced coma for only a few days and was not in a vegetative state of any sort.

The Pennsylvania Supreme Court recognized an unconscious person’s need for a substitute decision maker and held that “a close family member is well-suited to the role of substitute decision maker.” *Id.* at 912. Recognizing the difficulty associated with allowing any person to decide to end the life of another, the Court placed significant limitations on the authority of a family member in order to ensure that the decision to end another’s life is not made in haste or based upon inadequate information. Specifically, the Court held that “the surrogate must [] obtain written statements of two doctors qualified to evaluate the patient’s condition,” and “[t]hese statements must certify that the patient has been diagnosed as being in a permanent vegetative state.” *Id.* at 912-13. Furthermore, “[i]f the patient has an attending physician, that physician shall also prepare a statement.” *Id.* at 913. Therefore, a next-of-kin can only legally

authorize the withdrawal of life support if three doctors (the physician and two others) certify that the patient is in a permanent vegetative state. *Id.* at 912-13.

Here, Gregory was not in any sort of vegetative state, and there were no certifications to that effect by any physicians. Michael and Teresa Jacobs simply lacked the ability to consent to the withdrawal of life support on Gregory's behalf. There was no directive, court order, or even a single medical opinion (much less three) that Gregory Jacobs was in a permanent vegetative state. Therefore, Defendants committed a battery when they terminated Gregory's life without his permission.

Further support for this point can be found in the Health Care Agents and Representatives Act. Section 5462 (c) (1) of the act provides that:

Health care necessary to preserve life shall be provided to an individual who has neither an end-stage medical condition nor is permanently unconscious, except if the individual is competent and objects to such care or a health care agent objects on behalf of the principal if authorized to do so by the health care power of attorney or living will. In every other case, subject to any limitation specified in the health care power of attorney, an attending physician or health care provider shall comply with a health care decision made by a health care agent or health care representative to the same extent as if the decision had been made by the principal.

Thus, the statute made it illegal to remove life support from a person like Gregory Jacobs, who was not in an end-stage medical condition or a permanent vegetative state. The exceptions listed in the statute—where a patient has a health care power of attorney or living will—do not apply here because it is undisputed that Gregory Jacobs had neither. Because Michael and Teresa Jacobs were not health care agents acting pursuant to a health care power of attorney, they had no legal authority to consent to the withdrawal of his life support, as “[s]ection 5462(c)(1) does allow for life-preserving medical treatment to be refused in such instances, *but only by a health*

*care agent* (or the principal should he or she regain the capacity to make health care decisions.)”  
*In re D.L.H.*, 2 A.3d 505, 514 (Pa. 2010) (emphasis added).

Defendants were legally prohibited from ending Gregory’s life. As the Pennsylvania Supreme Court has held, “where . . . life-preserving treatment is at issue for an incompetent person who is not suffering from an end-stage condition or permanent unconsciousness, and that person has no health care agent, the Act mandates that *the care must be provided.*” *Id.* at 515 (emphasis added). Defendants had no discretion to end Gregory’s life and his parents could not consent on his behalf because he was neither in a vegetative state nor in an end-stage condition.

Finally, as will be discussed, whatever consent that Defendants obtained is not legitimate because it is tainted by the fraudulent/negligent misrepresentations of Defendants to Mr. and Mrs. Jacobs. As such, the evidence will show that the Defendants’ harmful contact with Gregory Jacobs without his consent constituted a civil battery.

**B. The Defendants conspired to commit a civil battery against Gregory Jacobs.**

The Defendants conspired to commit a civil battery against Gregory Jacobs to remove him from life support. Under Pennsylvania law, a claim for conspiracy requires that two or more persons combine or agree with intent to do an unlawful act or to do an otherwise lawful act by unlawful means. *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 472 (Pa. 1979).

As the evidence will show, CORE, through Mr. Coleman, and Hamot, through Dr. Pahapill, agreed to mislead Gregory’s parents into believing that Gregory was “brain dead” and had no chance of survival so that they could take him off of life support. Defendants knew that no objective tests had been done to establish brain death, but rather than seeking a consultation

from a neurologist, they misled Mr. and Mrs. Jacobs into believing that Gregory was brain dead and had no chance of survival.

The evidence will show that CORE, through Mr. Coleman, and Hamot, through Dr. Pahapill, agreed that they should take Gregory to the operating room before he was dead and remove him from the ventilator. They also agreed that surgery should be started prior to his death. Based on the agreement, the Defendants started surgery and removed Gregory from the ventilator (without consent), killing him. The evidence will show that all of these elements of conspiracy are satisfied.

**C. The Defendants engaged in fraudulent misrepresentation.**

The evidence will show that the Defendants engaged in fraudulent misrepresentation by leading the Plaintiffs to believe that Gregory's prognosis was materially more serious and dire by telling Gregory's parents that Gregory was 1) blind, 2) brain dead, 3) would die of a herniation, and 4) would die of a bad heart. Under Pennsylvania law, a claim for fraudulent misrepresentation involves proof of a representation: a) which is material to the transaction at hand; b) made falsely with knowledge of its falsity or recklessness as to whether it is true or false; c) with the intent of misleading another into relying on it; d) justifiable reliance; and e) a resulting injury that was proximately caused by reliance. *See Ira G. Steffy & Son, Inc. v. Citizens Bank of Pennsylvania*, 7 A.3d 278, 290 (Pa. Super. Ct. 2010). These elements must be proved by clear and convincing evidence. *See Fritz v. Glen Mills School*, 894 A.2d 172, 178 (Pa. Commw. Ct. 2006).

All the elements of fraudulent misrepresentation will be proven by clear and convincing evidence. Plaintiffs were fraudulently told that Gregory was blind, that he had a complete neurological deficit, that he would die of a brain herniation and/or a bad heart, and that there was no hope for him. These misrepresentations are clearly material to the transaction at hand. These statements were false, and at the very least were made recklessly as to whether or not they were true. Defendants made these statements with the intent of inducing the reliance of Gregory's parents, so as to take Gregory off of life support. Mr. and Mrs. Jacobs justifiably relied on the Defendants' fraudulent misrepresentations because the Defendants were doctors and they had no reason to believe that these doctors would lie to them. Finally, the resulting injury was the proximate cause of the misrepresentation because the Defendants used this tainted consent to remove Gregory off of life support. Thus, Plaintiffs will show by clear and convincing evidence that the Defendants made fraudulent misrepresentations to Plaintiffs.

**D. The Defendants engaged in negligent misrepresentation.**

The evidence will show that the Defendants engaged in negligent misrepresentation in advising Plaintiffs that Gregory was 1) brain dead, 2) would die of a herniation, and 3) would die of a bad heart. Negligent misrepresentation requires proof of (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. *See Commonwealth v. TAP Pharmaceutical Products, Inc.*, 36 A.3d 1112, 1143 (Pa. Commw. Ct. 2011). With respect to the

element of reliance, the appropriate test is “whether the misrepresentation induced or influenced the plaintiff’s course of conduct. *Id.* at 1144.

Here, the evidence will clearly show that Defendants negligently misrepresented Gregory’s condition. As discussed previously, the misrepresentations in this case are misrepresentations of material fact that resulted in injury. Also as discussed above, Defendants made representations regarding Gregory’s condition “under circumstances in which” they “ought to have known” of the falsity of the statements. In addition, the evidence will show that Defendants told Michael Jacobs that Gregory 1) was brain dead, 2) would die of a herniation, and 3) would die of a bad heart—a representation Defendants should have known was actually false. Regarding the element of reliance, the evidence will show that Defendants’ negligent misrepresentations clearly influenced Mr. Jacobs’ decision, for Mr. Jacobs only signed the consent form because of Defendants’ misrepresentation. As such, the evidence will show that all the elements of negligent misrepresentation are satisfied.

**E. The evidence will show that Defendants Hamot and Dr. Pahapill engaged in medical malpractice.**

The evidence will show that Defendants Hamot and Dr. Pahapill engaged in medical malpractice. In Pennsylvania, to prevail on a medical malpractice claim, a plaintiff must show that there was “a duty owed by the physician to the patient, a breach of that duty by the physician, that the breach was the proximate cause of the harm suffered, and the damages suffered were a direct result of the harm.” *Grossman v. Burke*, 868 A.2d 561, 566 (Pa. Super. Ct. 2005).

All of these elements are satisfied in the present case. Hamot and Dr. Pahapill owed a duty to Gregory to engage in actions that were designed to help him, not kill him. The evidence will show that Hamot failed to properly supervise or train its staff by allowing nurses to prematurely discuss organ donation, Coleman to use a false consent form, Dr. Pahapill to misstate Greg's prognosis, and Coleman to take control of Gregory's case. Hamot, through its staff, breached the standard of care by, *inter alia*, failing to follow its own policies, provide informed consent for DNR and organ donation, ensure that both parents consented, adequately designate a physician for end of life discussions, and have any withdrawal of life support policy.

As to its own policies, there was no consent even obtained to withdraw life support in violation of Hamot's DCD policy. Hamot violated its DCD policy when Greg was pronounced dead in less than 5 minutes after asystole. Additionally, Hamot violated its DNR policy when a nurse, not a physician, had the DNR discussion with Michael Jacobs.

Also, Hamot violated its DNR policies when Dr. Khoja discontinued treatment of Greg. Additionally, the hospital violated its organ donation policy when it notified CORE of the case even though death was not imminent. Of particular importance, the premature organ donation discussions by Hamot staff violated the standard of care and their own policy—here, there was no “de-coupling” of the discussion regarding withdrawal of life support from the discussion regarding organ donation.

Dr. Pahapill breached the standard of care by misreading Gregory's CT scan and thus misdiagnosing Gregory's condition. Subsequently, Dr. Pahapill misinformed Gregory's family about Gregory's neurological condition, delegating end of life discussion and medical

management to Coleman who has no medical training, and failing to consult a neurologist about Greg's prognosis.

Clearly, all of these actions were a breach of the duty owed to Gregory and these breaches were the proximate cause of Gregory's death. Obviously, the damages that were suffered were a direct result of this harm. Thus, all of the elements of medical malpractice are satisfied.

**F. The evidence will show that Plaintiffs are entitled to punitive damages.**

Generally, punitive damages are available in Pennsylvania based upon vicarious liability. In Pennsylvania, "a corporation is liable for exemplary damages for the acts of its servant, acting within the scope of his authority." *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1278 (3d Cir. 1979). As the Superior Court explained:

Punitive damages may be awarded on the basis of vicarious liability. In Pennsylvania, there is no requirement that an agent commit a tortious act at the direction of his principal, nor must the principal ratify the act, in order for punitive damages to be imposed on him.

*Shiner v. Moriarty*, 706 A.2d 1228, 1240, 1998 WL 6029 (Pa. Super. 1998). However, as this Court recognized, Section 505(c) of the Medical Care Availability and Reduction of Error Act (MCARE) provides an exception to this general rule that prevents the imposition on medical malpractice claims. 40 Pa. Stat. Ann. § 1303.505(c). While 1303.505(c) applies to the medical malpractice claim, the section does not apply to the claims for battery, conspiracy, fraud, and negligent misrepresentation.

Therefore, CORE can be held vicariously liable for punitive damages for the actions of

its employees, and Hamot can be held vicariously liable for punitive damages on the claims of battery, conspiracy, fraud, and negligent misrepresentation. In this regard, the evidence will show outrageous conduct worthy of punitive damages—that Hamot and CORE employees falsely told Michael Jacobs that Gregory was already dead, allowing them to obtain consent for organ donation. The evidence will also show that Gregory Jacobs would likely have recovered, but was prevented from doing so due to Defendants’ misrepresentations to his parents. This is the type of outrageous behavior and willful, wanton, and reckless conduct that merits punitive damages to ensure deterrence and prevent it from happening in the future.

**G. The evidence will show that Plaintiffs are entitled to compensatory damages.**

Plaintiffs are entitled to compensatory damages under both wrongful death and survival actions. Regarding the wrongful death action, Plaintiffs are entitled to damages for pecuniary loss suffered by decedent’s survivors by reason of the wrongful death of Gregory, as well as for reimbursement for medical bills, funeral and burial expenses, administrative expenses, and other expenses incident to the death of Gregory. The evidence will show Plaintiffs’ financial loss in all these areas.

Regarding the survival action, Gregory’s estate is entitled to damages for the economic value of his life expectancy, damages for the pain and suffering undergone by Gregory from the time of Defendants’ involvement with him up until his death, damages for the expenses incurred by Gregory for his medical attention and treatment, and punitive damages for Defendants’ outrageous conduct as explained above. The evidence will show the amount of financial loss due to Gregory’s medical treatment, the economic value of Gregory’s life expectancy, and Gregory’s

pain and suffering. Additionally, as explained above, the evidence will show that Defendants' misrepresentations justify punitive damages.

**IV. CONCLUSION:**

For the reasons set forth above, the evidence will show that the Defendants committed a civil battery, engaged in a conspiracy to commit a civil battery, engaged in fraudulent misrepresentation, engaged in negligent misrepresentation, that Defendants Hamot and Dr. Pahapill engaged in medical malpractice, and that Plaintiffs are entitled to punitive and compensatory damages for Defendants' actions.

**BOYLE, AUTRY & MURPHY**

*/s/ Dennis E. Boyle*

**Dennis E. Boyle, Esquire**

Supreme Court I.D. No. 49618

**Joshua M. Autry, Esquire**

Supreme Court I.D. No. 208459

4660 Trindle Rd, Suite 200

Camp Hill, PA 17101

Telephone: (717) 737-2430

Facsimile: (717) 737-2452

Email: [deboyle@dennisboylelaw.com](mailto:deboyle@dennisboylelaw.com)

[jmautry@dennisboylelaw.com](mailto:jmautry@dennisboylelaw.com)

Counsel For: Plaintiff

Dated: August 27, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that on the date listed below I electronically filed the foregoing with the Court using the CM/ECF system, which sent notification of such filing to the following person(s):

H. Woodruff Turner, Esquire  
woodruff.turner@klgates.com

Paul K. Vey, Esquire  
pkv@pietragallo.com

Francis J. Klemensic, Esquire  
fklemensic@kmgslaw.com

/s/ Penny A. Rogers  
Penny A. Rogers, Paralegal

Dated: August 27, 2012