

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUTH WALDMAN : CIVIL ACTION  
 :  
v. :  
 :  
PEDIATRIC SERVICES OF AMERICA, : NO. 97-7257  
INC. d/b/a PREMIER NURSE :  
STAFFING, INC. and FIREMAN'S :  
FUND INSURANCE COMPANY d/b/a THE :  
AMERICAN INSURANCE COMPANY :

MEMORANDUM AND ORDER

BECHTLE, J.

NOVEMBER , 1998

Presently before the court are plaintiff Ruth Waldman's ("Plaintiff") unopposed Motion for Substitution of Her Personal Representative Due to Incompetency, defendant Pediatric Services of America's ("PSA") Motion for Summary Judgment, defendant Fireman's Fund Insurance Company's ("Fireman's Fund") Motion for Summary Judgment and Plaintiff's responses thereto. For the reasons set forth below, the court will: (1) deny Plaintiff's motion to substitute Harry and Nadine Waldman as parties due to Plaintiff's incompetency pursuant to Federal Rule of Civil Procedure 25; (2) allow the complaint to be amended to reflect Harry and Nadine Waldman as suing on Plaintiff's behalf; (3) grant PSA's motion for summary judgment; and (4) grant in part and deny in part Fireman's Fund's motion for summary judgment.

**I. BACKGROUND**

This case arises out of Plaintiff's allegations that

PSA employees stole items from Plaintiff's home which were covered under a homeowner's insurance policy issued by Fireman's Fund. The facts, viewed in the light most favorable to the non-moving party, are as follows.

Plaintiff is a seventy-nine year old woman who has suffered from dementia since prior to September, 1995. (Pl.'s Mot. for Substitution, Ex. A.) She has poor short term memory, is unable to care for herself and is unable to make decisions in her own best interests. Id. Her son, Harry Waldman, has power of attorney for Plaintiff. (Pl.'s Resp. to Fireman's Fund's Mot. for Summ. J., Ex. B.) Harry Waldman's wife, Nadine Waldman, holds substitute power of attorney for Plaintiff. (Pl.'s Resp. to Fireman's Fund's Mot. for Summ. J., Ex. C.)

Plaintiff holds a homeowner's insurance policy issued by Fireman's Fund, which covers the personal belongings in her home. (Fireman's Fund's Mot. for Summ. J., Ex. F.) The insurance policy contains a "Suit Against Us" provision which reads: "**No action can be brought unless** the policy provisions have been complied with and **the action is started within one year after the date of loss.**" Id. (emphasis added).

In December, 1994, Harry Waldman hired PSA to provide twenty-four hour care for Plaintiff and her ailing husband at their condominium. (H. Waldman Dep. at 16.) PSA's health care services required the staff to reside in Plaintiff's condominium on a full-time basis. (N. Waldman Dep. at 45.) Plaintiff's husband died on September 1, 1995. (Compl. ¶ 8.)

In September, 1995, Tina Andrews, a PSA nurse who sometimes provided care for Plaintiff, notified Nadine Waldman that other PSA employees were taking items from Plaintiff's condominium. (N. Waldman Dep. at 138.) Between October 23 and 30, 1995, Plaintiff was moved to a long term care community. (Compl. ¶ 9.) During this time, PSA stopped caring for Plaintiff and its employees ceased residing in her home. However, Plaintiff returned to her condominium on October 30, 1995 and PSA resumed care for her until November 6, 1995. (Compl. ¶ 10.) On November 6, 1995, Plaintiff moved back to the long term care community; this was the last day PSA provided services to Plaintiff and resided in her home. (N. Waldman Dep. at 92.)

On December 1, 1995, it came to Harry and Nadine Waldman's (the "Waldmans") attention that someone other than they had access to Plaintiff's apartment. Id. at 105. The Waldmans found a deadbolt lock was locked, although it was usually left unlocked. Id. The Waldmans called the police, but no charges were filed against anyone.

Between November 6, 1995 and June 6, 1996, although Plaintiff's possessions remained inside the condominium, no one resided there. Throughout this time period, the Waldmans gradually moved Plaintiff's belongings from her condominium to their home. (N. Waldman Dep. at 124.) On June 6, 1996, the condominium was sold and all items in the condominium were removed to the Waldmans' home.

In September or October, 1995, Nadine Waldman requested

from Fireman's Fund a list of items insured under Plaintiff's homeowner's policy. (N. Waldman Dep. at 180-81.) In December, 1995, Nadine Waldman called Claire O'Dell, an insurance agent at Fireman's Fund and notified her that "there was going to be a claim." Id. at 181-82. Claire O'Dell responded by expressing sympathy for Plaintiff's loss. Id. In the meantime, the Waldmans began inventorying Plaintiff's possessions in order to compile a list of missing items for Fireman's Fund. On March 22, 1996, the Waldmans hired an attorney who sent letters to Plaintiff's friends and relatives inquiring whether they had taken or received any items that belonged to Plaintiff. Id. at 148-51.

By November, 1996, the Waldmans had not submitted a proof of loss claim to Fireman's Fund. In November, 1996, Bruce Clayton, a claim investigator for Fireman's Fund, met with Nadine Waldman about an unrelated claim. At this meeting, Nadine Waldman again informed Fireman's Fund that she was going to submit a claim, but that she was not yet able to provide Fireman's Fund with a complete list of the missing items. On November 7, 1996, Bruce Clayton sent Harry Waldman a letter which read in part:

As you know, I met with [Nadine] Waldman yesterday to discuss these claims. I was informed by [Nadine] Waldman that there will be additional claims submitted to Fireman's Fund. Unfortunately, [Nadine] Waldman was not in a position to provide me with a list of items, because she had not yet completed the list. It is my understanding that the additional items have been missing since, at

least, November of last year. Please provide me with the list of additional items as soon as possible.

(Pl.'s resp. to Fireman's Fund's Mot. for Summ. J., Ex. D.) By January 17, 1997, the Waldmans had still not submitted a list of missing items to Fireman's Fund. Thus, on January 17, 1997, Fireman's Fund sent another letter denying any potential claim due to the Waldmans' failure to bring suit on the policy within one year of Plaintiff's date of loss. (Pl.'s Resp. to Fireman's Fund's Mot. for Summ. J., Ex. E.)

Nevertheless, the Waldmans continued to inventory Plaintiff's missing items and finally on May 29, 1997, they submitted a claim to Fireman's Fund. (N. Waldman Dep. at 184.) In the summer of 1997, Nadine Waldman phoned Fireman's Fund to check the status of Plaintiff's claim. An agent of Fireman's Fund responded that no record of such claim existed and that she should resubmit the claim. Id. at 190. The claim was resubmitted and on August 22, 1997, the claim was denied a second time, due to late reporting. (Fireman's Fund's Mot. for Summ. J., Ex. E.) The August 22, 1997 letter denying the claim made reference to its letter of January 17, 1997. Id.

On November 28, 1997, Plaintiff brought suit against PSA and Fireman's Fund. Plaintiff's Complaint alleges counts of negligence, conversion and breach of contract against PSA. The Complaint alleges counts of breach of contract, violation of the

Pennsylvania Unfair Insurance Practices Act<sup>1</sup>, bad faith and declaratory relief against Fireman's Fund. On June 4, 1998, Fireman's Fund filed a motion for summary judgment. On August 6, 1998, PSA filed a motion for summary judgment which included the argument that the case be dismissed because Plaintiff lacked capacity to sue. In addition to its September 1, 1998 response to PSA's motion, Plaintiff filed a separate motion seeking to substitute Plaintiff's personal representatives, the Waldmans, as plaintiffs in this action due to Plaintiff's incompetency.

## II. Legal Standard for Summary Judgment

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

On a motion for summary judgment, the non-moving party has the burden to produce evidence to establish prima facie each element of its claim. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Such evidence and all justifiable inferences that

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<sup>1</sup> The court approved a stipulation withdrawing this count on January 30, 1998.

can be drawn from it are to be taken as true. Anderson, 477 U.S. at 255. However, if the non-moving party fails to establish an essential element of its claim, the moving party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 322-23.

### **III. DISCUSSION**

The court will initially address the issues surrounding Plaintiff's capacity and the Waldmans' ability to sue on Plaintiff's behalf. Next, the court will address the legal standard for summary judgment. Then the court will address PSA's motion for summary judgment. Last, the court will address Fireman's Fund's motion for summary judgment.

#### **A. PSA's Motion for Summary Judgment Based on Plaintiff's Incapacity and Plaintiff's Motion to Substitute the Waldmans as Parties Due to Plaintiff's Incompetency**

As Plaintiff's Complaint currently stands, Ruth Waldman is the only named plaintiff. PSA's motion for summary judgment includes the argument that Plaintiff lacks the capacity to sue and that therefore, the court should dismiss this action. Plaintiff's response is that the Waldmans may represent her interests as they have power of attorney for her. However, since the Complaint does not currently reflect the Waldmans as suing on behalf of Plaintiff's interests, Plaintiff moved pursuant to Federal Rule of Civil Procedure 25(b) to substitute the Waldmans as parties due to Plaintiff's incompetency. Rule 25(b) allows a party's representative to be substituted for a party who "becomes

incompetent" in the course of a lawsuit. Fed. R. Civ. P. 25(b).

In this case, Plaintiff's exhibit in support of its motion to substitute the Waldmans as parties shows that Plaintiff was incompetent prior to September, 1995. (Pl.'s Mot. for Substitution, Ex. A.) In other words, she was already incompetent at the time this action was commenced. Thus, Plaintiff may not use Rule 25 to substitute the Waldmans as parties because she did not "become" incompetent during the course of the lawsuit. Thus, the court will deny Plaintiff's motion to substitute the Waldmans as parties pursuant to Rule 25.

Nevertheless, the court will not dismiss the action. Federal Rule of Civil Procedure 17(c) grants the court power to protect the interests of incompetent persons. The rule reads in part:

Whenever an . . . incompetent person has a representative, . . . the representative may sue . . . on behalf of the . . . incompetent person. An . . . incompetent person who does not have a duly appointed representative may sue . . . by a guardian ad litem. The court . . . shall make such . . . order as it deems proper for the protection of the . . . incompetent person.

F. R. Civ. P. 17(c). Here, the Waldmans have power of attorney for Plaintiff. They have power to institute a lawsuit on her behalf. The only defect is that the Complaint does not reflect the Waldmans as suing on behalf of Plaintiff's interests. In as much as the parties agree that Plaintiff is incompetent, the court will exercise its discretion under Rule 17(c) and will allow the Complaint to be amended to reflect the named plaintiff

as follows: RUTH WALDMAN, BY HER ATTORNEYS IN FACT, HARRY AND NADINE WALDMAN. Consequently, PSA's argument that Plaintiff lacks capacity to sue is mooted.

**B. Remainder of PSA's Motion for Summary Judgment**

PSA's motion for summary judgment is also based on (1) Plaintiff's violation of the statute of limitations, and (2) Plaintiff's failure to state a claim in its Count II against PSA for actions by its employees performed outside the scope of their employment. The court will address PSA's remaining grounds for summary judgment.

**1. Statute of Limitations**

**a. Applicable Limit is Two Years**

In Pennsylvania, an action for taking personal property must be commenced within two years from the date which it accrues.<sup>2</sup> 42 Pa. Con. Stat. Ann. § 5524(3). Pennsylvania imposes a four year limit on most contract actions. 42 Pa. Con. Stat. Ann. § 5525. Plaintiff's Complaint alleges negligence (Count I), conversion (Count II) and breach of contract (Count III) counts against PSA. The court must determine which statute of limitations applies here. In Pennsylvania, "the nature of the

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<sup>2</sup> This is a diversity case involving substantive issues of Pennsylvania law. A federal court sitting in diversity is required to follow the applicable state law. It is a settled principle that "[f]ederal courts presiding over diversity cases must give decisions of state intermediate appellate courts 'substantial weight in the absence of an indication that the highest state court would rule otherwise.'" Winterberg v. CNA Ins. Co., 868 F. Supp. 713 (E.D. Pa. 1994), aff'd, 72 F.3d 318 (3d Cir. 1995).

relief requested, rather than the form of the pleading, determines which statute of limitations controls a particular action." Spack v. Apostolidis, 510 A.2d 352, 353 (Pa. Super. Ct. 1986).

Here, Plaintiff's Complaint seeks damages stemming from thefts by PSA employees. Plaintiff alleges that either PSA benefitted by its employees' conversion of Plaintiff's property (conversion count) or that PSA was negligent in failing to train and supervise its employees (negligence count). Even Plaintiff's contract count is couched in terms of PSA's negligence in training and supervising its employees. Such an action is most properly characterized as an action in tort, or more specifically, as an action for negligence or conversion. See, e.g., Bednar v. Marino, 646 A.2d 573, 577 (Pa. Super. Ct. 1994) (applying two year limit where appellant's actions were more appropriately characterized as actions in tort than in contract or for an accounting). Thus, the court finds that Pennsylvania's two year statute of limitations applies to all counts against PSA, including Plaintiff's breach of contract count.

**b. Running of the Statute of Limitations**

"As a matter of general rule, a party asserting a cause of action is under a duty to use all reasonable diligence to be properly informed of the facts and circumstances upon which a potential right of recovery is based and to institute suit within the prescribed statutory period." Pocono Int'l Raceway v. Pocono Produce, 468 A.2d 468, 471 (Pa. 1983) (citations omitted). Thus,

the statute of limitations begins to run as soon as the right to institute and maintain a suit arises; lack of knowledge, mistake or misunderstanding do not toll the running of the statute of limitations." Id. (citations omitted). Under this general rule, Plaintiff's cause of action arose when her items were removed from her home. At least by September or October, 1995, Nadine Waldman was aware of circumstances upon which a potential right of recovery could be based. Tina Andrews, a PSA employee, told Nadine Waldman that PSA employees were removing things from Plaintiff's condominium. Under this general rule regarding the statute of limitations, because Plaintiff's suit was not filed until late November, 1997, it is barred by Pennsylvania's two year limitation period.

"Once the prescribed statutory period has expired, the party is barred from bringing suit unless it is established that an exception to the general rule applies which acts to toll the running of the statute." Id. In the instant action, neither Plaintiff's incompetency nor the application of the discovery rule operate to toll the statute of limitations.

**(1) Effect of Plaintiff's Mental Incapacity**

In Pennsylvania, a party's mental incapacity does not toll the statute of limitations. 42 Pa. Con. Stat. Ann. § 5533; see Walker v. Mummert, 146 A.2d 289, 291 (Pa. 1959) (holding that plaintiff's mental incapacity did not toll statute of limitations in personal injury action); Baily v. Lewis, 763 F. Supp. 802, 808

(E.D. Pa. 1991) ("[C]ourts applying Pennsylvania law have consistently stated that the statute of limitations runs against persons under a disability, including one who is mentally incompetent.") (citations omitted). Thus, Plaintiff's deteriorated mental condition is insufficient to bring her within the statute of limitations.

## (2) Discovery Rule

In some circumstances, the discovery rule can operate to toll the statute of limitations. The discovery rule "arises from the inability of the injured, despite the exercise of due diligence, to know of the injury or its cause." Pocono Int'l Raceway, 468 A.2d at 471. Courts applying Pennsylvania law apply the discovery rule to toll the statute of limitations only when a party's injury is not readily discernable:

"'[T]here are very few facts which diligence cannot discover, but there must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful.' . . . Moreover, with respect to knowledge of a claim, 'plaintiffs need not know that they have a cause of action, or that the injury was caused by another party's wrongful conduct, for once a plaintiff possesses the salient facts concerning the occurrence of his injury and who or what caused it, he has the ability to investigate and pursue his claim.'"

A. McD. v. Rosen, 621 A.2d 128, 131 (Pa. Super. 1993) (quoting Baily, 763 F. Supp. at 806-07)).

Courts which apply the discovery rule to toll the statute of limitations often point to facts which are latent in nature. In such cases, plaintiffs did not know, and could not

know, the nature of their injuries or who caused them until some time after the actual injury occurred. See Baily, 763 F. Supp. at 807 (listing types of cases where discovery rule applied); see e.g., Ayers v. Morgan, 154 A.2d 788, 789-94 (Pa. 1959) (applying discovery rule to case where surgical sponge left in plaintiff's abdomen was not discovered until plaintiff underwent tests for abdominal pain, nine years after sponge was left inside plaintiff); Smith v. Bell Telephone Co. of Pa., 153 A.2d 477, 481-82 (Pa. 1959) (applying discovery rule where defendant's underground telephone line conduit crushed and blocked plaintiff's sewage pipe); Lewey v. H.C. Fricke Coke Co., 31 A. 261 (Pa. 1895) (applying discovery rule in case involving removal of coal from plaintiff's land via access from defendant's land). In such cases, the statute of limitations begins to run from the time when the cause of harm should have been discovered. Smith, 153 A.2d at 477.

On the other hand, courts which have found that the discovery rule does not apply to toll the statute of limitations often point to facts indicating that a plaintiff was aware of circumstances which should have caused him or her to investigate a possible cause of action. See, e.g., A. McD., 621 A.2d at 131-32 (declining to apply discovery rule in tort action against therapist where plaintiff was aware of "salient facts regarding her mistreatment" in 1982, and thus her suit filed in 1985 against therapist was barred by two year statute of limitation); Pocono International Raceway, 468 A.2d at 470-72 (holding that

"cause of action was discoverable by the exercise of diligence in the use of means within reach of [plaintiff], and, as such, no equitable exception to the statutory limitation is warranted").

Upon consideration of the record in the instant action, the court finds that the discovery rule cannot operate here to toll the running of the statute of limitations. As early as September or October, 1995, the Waldmans were aware of salient facts concerning Plaintiff's injury and who caused it. Tina Andrews, a PSA employee, told Nadine Waldman that other PSA employees were removing things from Plaintiff's condominium. This should have caused the Waldmans to investigate and pursue any potential claim on Plaintiff's behalf within the prescribed statutory period. Because the Waldmans failed to sue on Plaintiff's behalf within two years after September or October, 1995, Plaintiff's claims against PSA are barred by the statute of limitations. Thus, the court will grant PSA's motion for summary judgment.

## **2. Plaintiff's Count II**

Because the court finds that all Plaintiff's claims against PSA are barred by the statute of limitations, it is unnecessary to address PSA's final argument for summary judgment -- that Plaintiff's conversion count (Count II) pleaded against PSA should be dismissed because PSA cannot be liable for acts its employees committed outside the scope of their employment. Nonetheless, the court briefly notes that it agrees with PSA's position. To be within the scope of employment, an employee's

conduct must in some way be actuated by a purpose to serve the master. Butler v. Flo-Ron Vending Co., 557 A.2d 730, 736 (Pa. Super. 1989); Restatement (Second) of Agency § 228. Plaintiff has failed to put forth any evidence that PSA authorized or benefitted in any way from its employees alleged conversion of Plaintiff's items.

**C. Fireman's Fund's Motion for Summary Judgment**

**1. Breach of Contract Count**

Fireman's Fund's motion for summary judgment is based on only one ground -- that plaintiff's action against Fireman's Fund is barred by the one year limitation of suit provision in the policy. Under Pennsylvania law, a clause in an insurance policy that sets time limits upon the commencement of suits to recover on a policy is valid and will be sustained. General State Authority v. Planet Ins. Co., 346 A.2d 265, 267 (Pa. 1975). If the time limitation for commencement of suit in the policy states that it runs from inception of the loss, such a provision will also be upheld. Id. at 268. Courts applying Pennsylvania law have consistently refused to measure time limitations on a policy from the date of discovery of the loss. See id.; Lardas v. Underwriters Ins. Co., 231 A.2d 740, 742 (Pa. 1967); Toledo v. State Farm Fire and Cas. Co., 810 F. Supp. 156, 159 (E.D. Pa. 1992).

Here, Plaintiff's homeowner's policy was subject to a one year limit to commence a suit to recover on the policy. The policy stated that such time limit ran from "the date of the

loss," not discovery of the loss. Thus, under Pennsylvania law, Plaintiff's civil action, commenced in November, 1997 was well outside one year from the date of loss. Plaintiff's action on the insurance policy is thus barred, unless she can show that Fireman's Fund waived its right to enforce the one year limit in the policy.

In certain circumstances, "a limitation of suit provision will not be permitted to bar a delayed suit: 'a provision of this nature may be extended or waived where the actions of the insurer lead the insured to believe the contractual limitation period will not be enforced.'" Schreiber v. Pa. Lumberman's Mut. Ins., 444 A.2d 647, 649 (Pa. 1982) (quoting General State Authority, 346 A.2d at 267 n.6). Courts have held that insurance companies waived their limitation of suit provisions where they have either deliberately misled the insured to believe the provision would not be enforced or where they deliberately delayed investigation of a claim until the limitation period had run. See Arlotte v. National Liberty Ins. Co., 167 A. 295 (Pa. 1933) (holding that action was not time-barred where insurer misrepresented terms of insured's policy); Commonwealth of Pennsylvania v. Transamerica Ins. Co., 341 A.2d 74, 76 (Pa. 1975) (holding that action not time-barred where insurer decided to deny claim in advance, but portrayed to insured a bona fide investigation until after suit limitation in policy expired).

Here, Fireman's Fund and its agents made no

communications to the Waldmans suggesting they would not enforce the one year limitation of suit provision in the policy. In fact, Bruce Clayton, a claim investigator for Fireman's Fund, sent Mr. Waldman a letter on November 7, 1996 stating that Fireman's Fund believed the loss had been sustained at the latest by November, 1995, and that the Waldmans should submit proof of loss forms "as soon as possible." (Pl.'s Resp. to Fireman's Fund's Mot. for Summ. J., Ex. D.) Plaintiff complains that Fireman's Fund never reminded the Waldmans of the limitation of suit clause in the policy. However, Fireman's Fund was under no such duty. See Lardas, 231 A.2d at 741 (stating that one year suit limitation is clear and unambiguous). In addition, no evidence on the record suggests that Fireman's Fund did anything to purposefully delay its investigation of Plaintiff's claim until the time limit for suit in the policy expired. In fact, Fireman's Fund sent a letter rejecting Plaintiff's potential claim for failure to meet the one year limit on suit before Plaintiff ever submitted the claim to Fireman's Fund. (Pl.'s Resp. to Fireman's Fund's Mot. for Summ. J., Ex. E.) On these facts, Plaintiff has failed to show conduct by Fireman's Fund which suggests that they waived the one year limitation of suit policy provision.

Because Plaintiff has failed to show either that (1) suit to recover on the policy was commenced within one year of the loss or (2) Fireman's Fund effectively waived its right to enforce its one year limitation of suit clause, the court finds

that Fireman's Fund is entitled to summary judgment on Plaintiff's Count IV alleging breach of contract by Fireman's Fund.

## **2. Bad Faith/Declaratory Relief Counts**

Fireman's Fund's only ground for seeking summary judgment was based on the policy's one year "Suit Against Us" provision. While the court agrees that such provision bars Plaintiff from bringing suit on the policy, the court disagrees that such provision bars all claims against Fireman's Fund. Plaintiff has also brought a claim against Fireman's Fund for bad faith pursuant to 42 Pa. Con. Stat. Ann. § 8371. (Compl. Count VI.) Courts applying Pennsylvania law have held that such a claim is separate and distinct from a suit to recover on a policy. See March v. Paradise Mut. Ins. Co., 646 A.2d 1254, 1256 (Pa. Super. 1994); Younis Bros. & Co. v. Cigna Worldwide Ins. Co., 899 F. Supp. 1385, 1396 (E.D. Pa. 1995); Margolies v. State Farm Fire and Cas. Co., 810 F. Supp. 637, 642 (E.D. Pa. 1992). These courts have also held that policy provisions limiting commencement of a suit are inapplicable to a bad faith claim under section 8371. See March, 646 A.2d at 1256; Younis Bros., 899 F. Supp. at 1396. Thus, Fireman's Fund is not entitled to summary judgment based on its argument that its one year "Suit Against us" provision bars Plaintiff's bad faith claim pursuant to section 8371. Thus, the court will deny Fireman's Fund's motion for summary judgment with respect to Counts VI and VII of Plaintiff's Complaint. However, Fireman's Fund may bring a

subsequent motion for summary judgment on such other grounds as it believes is warranted.

**IV. CONCLUSION**

For the foregoing reasons, the court will (1) deny Plaintiff's motion to substitute the Waldmans as parties pursuant to Federal Rule of Civil Procedure 25; (2) order that the matter be amended to reflect Plaintiff's name as "RUTH WALDMAN, BY HER ATTORNEYS IN FACT, HARRY AND NADINE WALDMAN; (3) grant PSA's motion for summary judgment; and (4) grant in part and deny in part Fireman's Fund's motion for summary judgment.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUTH WALDMAN : CIVIL ACTION  
: :  
v. : :  
: :  
PEDIATRIC SERVICES OF AMERICA, : NO. 97-7257  
INC. d/b/a PREMIER NURSE :  
STAFFING, INC. and FIREMAN'S :  
FUND INSURANCE COMPANY d/b/a THE :  
AMERICAN INSURANCE COMPANY :

ORDER

AND NOW, TO WIT, this            day of November, 1998, upon consideration of plaintiff Ruth Waldman's ("Plaintiff") unopposed Motion for Substitution of Her Personal Representative Due to Incompetency, defendant Pediatric Services of America's ("PSA") Motion for Summary Judgment, defendant Fireman's Fund Insurance Company's ("Fireman's Fund") Motion for Summary Judgment and Plaintiff's responses thereto, IT IS ORDERED that:

- (1) Plaintiff's Motion for Substitution of Her Personal Representative Due to Incompetency is DENIED;
- (2) the Clerk of Court is ORDERED to amend the caption in this civil action to reflect Plaintiff's name as follows:  

RUTH WALDMAN, BY HER ATTORNEYS IN FACT, HARRY  
AND NADINE WALDMAN;
- (3) PSA's Motion for Summary Judgment is GRANTED; judgment is entered in favor of defendant PSA and against Plaintiff; and
- (4) Fireman's Fund's Motion for Summary Judgment is

GRANTED IN PART and DENIED IN PART; Count IV against defendant Fireman's Fund is DISMISSED. Plaintiff's action may continue against Fireman's Fund with respect to Count VI and to Count VII to the extent that it is based on Plaintiff's bad faith claim pursuant to 42 Pa. Con. Stat. Ann. § 8371.

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LOUIS C. BECHTLE, J.