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

STEPHEN P. JURINKO and CYNTHIA JURINKO, h/w as Assignees of PAUL G. MARCINCIN,	**:**	**No. 03-CV-4053**
Plaintiffs	**:**	
v.	**:**	
THE MEDICAL PROTECTIVE CO.,	**:**	
Defendant	**:**	

MEMORANDUM OPINION AND ORDER

RUFE, J. **March 29, 2006**

Plaintiff brought this statutory bad faith case pursuant to 42 Pa. Cons. Stat. § 8371. Plaintiffs allege that Defendant The Medical Protective Co. ("Medical Protective"), a medical malpractice insurance company, acted in bad faith when it failed to tender its policy limits ($200,000) to settle a medical malpractice claim against its insured, Dr. Paul Marcincin, a dermatologist. Plaintiffs further allege that Medical Protective acted in bad faith when it assigned Dr. Marcincin a defense lawyer whose conflict of interest prevented him from vigorously defending Dr. Marcincin. As a result of these acts of bad faith, Plaintiffs' medcial malpractice lawsuit against Dr. Marcincin went to trial, resulting in a jury verdict of $2.5 million against Dr. Marcincin. The verdict was $1.3 million in excess of Dr. Marcincin's total malpractice insurance coverage. In lieu of paying the excess verdict from his personal assets, Dr. Marcincin assigned the Jurinkos his right to bring the present bad faith lawsuit. After a six day trial before this Court, a jury returned a verdict in favor of the Jurinkos, finding that Medical Protective acted in bad faith, and that its bad faith conduct was a substantial factor in bringing about the harm to Dr. Marcincin in the form of an excess verdict. The jury awarded $1,658,345 in compensatory damages (as stipulated by the parties) and

$6.25 million in punitive damages. Presently before the Court are Medical Protective's post-trial Motion for Judgment as a Matter of Law or, in the alternative, for a New Trial.

STATEMENT OF FACTS

The issue in the underlying malpractice case was Dr. Marcincin's failure to diagnose as cancerous a dark black lesion on Plaintiff Stephen Jurinko's nose in 1993. The failure to diagnose this as melanoma allegedly caused that lesion to metastasize and spread to a lymph node in Mr. Jurinko's neck by 2000. Plaintiffs also sued Dr. Edelman, a pathologist who interpreted a biopsy of the skin tissue. Dr. Edelman sent a report to Dr. Marcincin which stated that the tissue sample appeared to be benign, but the report also noted that the sample tested was inadequate. Dr. Marcincin did not respond to this report by ordering additional tests but instead treated the lesion as benign with liquid nitrogen and phenolic acid. A third defendant in the underlying medical malpractice case, Smith Kline Beecham Clinical Laboratories, which analyzed the biopsy, settled with the Jurinkos prior to the trial's conclusion.

Medical Protective was Dr. Marcincin's primary medical malpractice insurer. It insured Dr. Marcincin for up to $200,000. Dr. Marcincin also maintained $1 million in excess coverage through the CAT/MCARE fund,[1] but this entity was unable to draw from Dr. Marcincin's coverage for the purpose of settlement without a complete tender of the $200,000 primary policy by Medical Protective. Dr. Edelman was also insured by Medical Protective at the time, and while the CAT/MCARE fund ultimately was the only line of coverage available to him for the Jurinko lawsuit,

[1] The CAT fund refers to the "Medical Professional Liability Catastrophic Loss Fund." It became the Medical Care Availability and Reduction of Error Fund, or MCARE fund during the underlying events. For all relevant purposes, the CAT and MCARE funds are the same.

Medical Protective initially took responsibility for Dr. Edelman's defense. Medical Protective assigned the same lawyer, Mr. Kilcoyne, to represent both Dr. Marcincin and Dr. Edelman through the early stages of the litigation. The Medical Protective employee who assigned Mr. Kilcoyne to the two doctors, James Alff, testified that he did so despite knowing that appointing them the same lawyer created a conflict of interest for the lawyer in violation of legal rules of ethics.

Dr. Marcincin testified that he wanted to settle the case, that he repeatedly communicated his wish to settle to his lawyer, and that he asked his attorney to demand that Medical Protective tender his policy limits on his behalf. The CAT/MCARE fund made a written request for Medical Protective to tender its policy and advised in writing that refusal to do so would be considered bad faith and would undermine the ability to reach a global settlement in the case. By Medical Protective's own admission, it knew that the case was likely to result in a finding of liability against Dr. Marcincin and could result in damages exceeding his $200,000 policy limits. Furthermore, at a January 2002 settlement conference in the Philadelphia County Court of Common Pleas, the Honorable Sandra Moss placed a settlement value of $1.5 to 2 million on the case (divided among the three defendants). During the trial itself, the Honorable Alfred DiBona recommended the case settle for the sum of $1.6 million. Despite these two knowledgeable judicial valuations of the case, and Medical Protective's own assessment that Dr. Marcincin risked liability in excess of his Medical Protective line of coverage, Medical Protective never offered more than $50,000 from Dr. Marcincin's $200,000 line of coverage. This failure to tender meant that the CAT/MCARE fund could not draw any money from Dr. Marcincin's $1 million line of malpractice insurance coverage to settle the case.

In April 2002, the case was tried before a jury in the Philadelphia County Court of

Common Pleas, with Judge DiBona presiding. During jury deliberations, the jury submitted a question about calculation of damages, and Judge DiBona again recommended that the two remaining parties (Drs. Edelman and Marcincin) try to reach a settlement agreement with Plaintiffs, as it appeared from its question that the jury had found against at least one defendant doctor on the issue of liability. Medical Protective, however, again declined to tender the policy. On April 22, 2002, the jury returned a verdict for Plaintiff and against Dr. Marcincin alone in the amount of $2.5 million. The jury found Dr. Edelman was not liable for any injury to Plaintiffs.

The verdict against Dr. Marcincin was $1.3 million in excess of his medical malpractice insurance coverage. In lieu of executing judgment against Dr. Marcincin's personal assets to satisfy the excess verdict, the Jurinkos accepted an assignment of Dr. Marcincin's right to sue his insurance carrier for bad faith. The Jurinkos then filed this bad faith claim seeking compensatory damages, plus interest, costs, attorney's fees, and punitive damages.

At trial, Medical Protective argued that its failure to tender was not an act of bad faith. At the time of the underlying trial, Medical Protective was aware of evidence that the tissue sample Dr. Marcincin submitted was adequate (as it was sufficient for retesting in 2000), that the tissue clearly indicated cancer during the 2000 retesting, and, therefore, Dr. Edelman should have detected this "melanoma in situ" and reported it to Dr. Marcincin. Because this evidence suggested that Dr. Edelman was liable rather than Dr. Marcincin, Medical Protective claims it was not at all sure that a jury would find Dr. Marcincin liable, and it acted in good faith when it failed to tender Dr. Marcincin's policy for settlement.

Furthermore, Medical Protective argued, when Jurinko's nose was retested in 2000, after the lymph node cancer in his neck was discovered, his nose was cancer free. According to

Medical Protective, this suggests that his lymph node cancer was completely unrelated to his melanoma, and that the melanoma Dr. Marcincin had failed to diagnose had not metastasized to cause the lymph node cancer. Since Mr. Jurinko's lymph node cancer, as well as his melanoma, had been aggressively and successfully treated,[2] Medical Protective also believed that damages were being overestimated by the Plaintiffs and the Judges who reviewed the case. Medical Protective simply thought that the Plaintiffs' "rock bottom" demand was too high, and argued that it had ample and reasonable basis for its position during settlement negotiations.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 50 sets forth the standard for entering judgment as a matter of law in jury trials. The Court may grant a motion for judgment as a matter of law when there is "no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue."[3] Such a motion will be granted only if, viewing all the evidence in the light most favorable to the party opposing the motion, no jury could decide in that party's favor.[4]

Federal Rule of Civil Procedure 59 governs any motion for a new trial, and provides that, after a jury trial, the Court may grant a new trial for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.

DISCUSSION

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[2] To date Mr. Jurinko has not suffered a recurrence of cancer. However, both the jury in this case and the jury in the underlying trial heard testimony that the cancer could recur and any recurrence would likely result in death.

[3] Fed. R. Civ. P. 50.

[4] Alexander v. Univ. of Pittsburgh Med. Ctr. Sys., 185 F.3d 141, 145 (3d Cir. 1999).

Defendant raises the following issues in his post-trial renewal of his Motion for Judgment as a Matter of Law, or in the alternative, Motion for a New Trial: 1) the verdict was not supported by adequate non-speculative evidence that the case would have settled had Medical Protective tendered its $200,000 policy limits for Dr. Marcincin; 2) evidence of Medical Protective's assignment of Mr. Kilcoyne as attorney for both Dr. Edelman and Dr. Marcincin was improperly admitted to the extreme prejudice of Medical Protective; 3) the amount of punitive damages awarded was excessive and violates constitutional due process standards; 4) the Court incorrectly charged the jury with respect to punitive damages; and 5) the judgment was erroneously entered in a way which would permit duplicative interest and delay damages, as delay damages and interest up to the date of the verdict were already factored into the stipulated compensatory damages figure.[5]

1. Insufficiency of Evidence

Medical Protective argues that there was insufficient evidence for the jury to find that Medical Protective's failure to tender its $200,000 policy limits was the reason the Jurinko's underlying case against Dr. Marcincin failed to settle. Specifically, Medical Protective cites to the fact that the Jurinkos never made an offer of settlement that suggested the case would settle if Medical Protective offered the full $200,000 policy. Medical Protective now acknowledges that the Court correctly charged the jury[6] regarding the need to find "an expressed willingness on the part of the third party, the plaintiff in the underlying litigation, at some point in time to accept an offer of

[5] The Court will address this final issue in its forthcoming memorandum opinion and order on Plaintiff's Motion to Mold the Verdict.

[6] The Court will not entertain a motion for a new trial on this issue, given Medical Protective's own admission that the Court provided the jury with a proper instruction.

the policy limits."[7]

Having been correctly charged, the jury found that Medical Protective acted in bad faith. It is unclear from the verdict form whether the jury found bad faith failure to settle, or bad faith based on Medical Protective's appointment of a lawyer with a conflict of interest to defend Dr. Marcincin, or both. Nevertheless, the Court finds that Plaintiffs did present sufficient evidence for a jury to find bad faith failure to settle,[8] as well as bad faith in appointing a lawyer with a conflict of interest.

Medical Protective employee James Alff admitted that he knew that Dr. Marcincin's exposure was in excess of $50,000, and yet he never offered more than $50,000.[9] The jury also heard testimony that the CAT/MCARE fund had informed Medical Protective that their failure to tender was in bad faith and was undermining the settlement of the case. Alff admitted that Dr. Marcincin could not negotiate with funds from his $1 million secondary line of coverage (the CAT/MCARE fund) without tender of the full policy limits. Alff also admitted to unfair gamesmanship in his negotiating tactics, and attempting to get the CAT/MCARE fund to cover Dr. Marcincin's liability from Dr. Edelman's line of coverage in order to save Medical Protective money.[10] The evidence demonstrated that both Alff and Jacqueline Busterna, who was negotiating for the CAT/MCARE fund, believed the case would settle for around $1 million.[11] From the

[7] N.T. 10/18/05 at 146.

[8] This issue was previously raised on a motion for summary judgment, in which Medical Protective argued that there was no legally sufficient evidence to support a finding of bad faith. The Court found that there was an issue of fact as to bad faith, and permitted the case go to the jury on this issue.

[9] N.T. Alff 10/10/6/05 at 65.

[10] N.T. Alff, 10/6/05 at 65-67.

[11] N.T. Alff, 10/6/05 at 140; N.T. Busterna, 10/14/05 at 184-185.

evidence presented, it was also possible for the jury to conclude that the Jurinkos would have been offered approximately $1 million had Medical Protective tendered its policy, even if the CAT/MCARE fund had not offered any money from Dr. Marcincin's $1 million line of secondary insurance. Overall, the Court finds sufficient evidence for the jury to find bad faith.

The jury also received sufficient evidence to find that Medical Protective acted in bad faith when it assigned Kilcoyne to defend both Dr. Marcincin and Dr. Edelman, thereby creating a conflict of interest that would affect and undermine Kilcoyne's representation of Dr. Marcincin throughout the malpractice litigation. Alff testified that Medical Protective made this assignment fully aware that it was unethical and would create a conflict of interest, and that it did so to save money.[12] There was also sufficient evidence for the jury to find that this bad faith action deprived Dr. Marcincin of his ability to vigorously assert his best defense (the liability of Dr. Edelman) and thereby caused the excess jury verdict against Dr. Marcincin alone in the underlying litigation.

2. Prejudicial Admission of Irrelevant Evidence (the Expert Testimony of James L. Griffith, Esq.)

Medical Protective argues that Mr. Griffith's expert testimony should have been precluded by the Court, and further argues that the Court should grant its Motion for a New Trial based on the admission of this allegedly prejudicial and irrelevant evidence. Medical Protective previously raised this issue as a pre-trial Motion *in Limine* to preclude Mr. Griffith's testimony. The Court denied that Motion, provided that Plaintiff establish the proper foundation for Mr. Griffith's opinions at trial.

[12] N.T. Alff, 10/6/05 at 19-20, 30.

Medical Protective now reasserts its position that the expert testimony of Mr. Kilcoyne's alleged malpractice was irrelevant to this bad faith insurance case and should not have been admitted as evidence.[13] Medical Protective thus misstates the issue Plaintiffs presented to the jury. Plaintiffs did not assert that Mr. Kilcoyne's alleged malpractice was per se evidence of bad faith by Medical Protective. Rather, Plaintiffs put forth evidence that Medical Protective affirmatively appointed Mr. Kilcoyne to represent both Drs. Edelman and Marcincin, two defendants with incompatible interests in one lawsuit, despite Medical Protective's duty to provide *each* doctor with an effective defense and its knowledge that the dual representation was unethical. Mr. Griffith testified that this breach of Medical Protective's duty to provide an adequate defense for its insureds was an act of bad faith. The Court finds that the expert evidence was directly relevant to the central issues of the trial.

The Court instructed the jury that if it found the appointment of Kilcoyne to represent both doctors was an act of bad faith, the jury must also find that the bad faith *caused* an injury to Dr. Marcincin (i.e., either caused settlement negotiations to fail or was a substantial factor in bringing about the excess verdict against Dr. Marcincin) to establish liability. Therefore, any evidence Mr. Griffith offered regarding causation was also relevant and therefore, with proper foundation, admissible.

The Court found that Plaintiffs properly laid a foundation for Mr. Griffith's expert testimony. On cross examination, Alff admitted that he had appointed Mr. Kilcoyne to represent both Drs. Edelman and Marcincin, knowing that the dual representation posed a conflict of interest

[13] Although it is framed as an objection to Mr. Griffith's testimony, Medical Protective's briefing focuses on the characterization of his testimony during Plaintiffs' closing argument. Medical Protective puts forth no legal support for a finding that the Court erred in admitting Mr. Griffith's testimony.

and was unethical, to save Medical Protective money. Having established that Medical Protective knew of and endorsed the dual representation, it was proper and relevant for Mr. Griffith to provide an opinion as to the ethics of this dual representation, the likely impact on Dr. Marcincin's defense, and whether this action constituted bad faith on the part of Medical Protective.

3. Motion for a New Trial on Incorrect Punitive Damages Instruction

Medical Protective claims that the jury instruction on punitive damages violated Pennsylvania substantive law, alleging that the Court did not instruct the jury that punitive damages must be based on conduct that is malicious, wanton, reckless, willful or oppressive as requested in their Proposed Jury Instruction No. 34.[14] The Court takes issue with this factual allegation, as the Court instructed the jury that it must find Defendant's conduct was "outrageous," and further defined outrageous to mean acting with bad motive or with reckless indifference to the interests of others.[15] Furthermore, the Court cannot understand Medical Protective's argument that this instruction violates Pennsylvania substantive law, since the Court read the Pennsylvania Suggested Standard Civil Jury Instruction 14.00 to the jury *verbatim*.[16] This instruction as well as the definition were also approved by the Pennsylvania Supreme Court.[17] The Court required the jury to make a finding of outrageousness to support punitive damages, despite the fact that the bad faith statute allows for

[14] Defendant did note its objection to this instruction. N.T. 10/18/05 at 151.

[15] N.T. 10/18/05 at 153.

[16] N.T. 10/18/05 at 153-154.

[17] Feld v. Merriam, 485 A.2d 742, 747 (Pa. 1984).

punitive damages based on a finding of bad faith alone.[18]

4. Motion for Judgment as a Matter of Law to Reduce or Vacate Punitive Damages

Medical Protective argues that Plaintiff's evidence was insufficient to support an award of punitive damages under state law. However, Pennsylvania's bad faith statute authorizes punitive damages on an insurance company found to have acted in bad faith.[19] The jury in this case found that Medical Protective acted in bad faith, and caused an injury to its insured. Therefore, as the Court instructed, it was proper for the jury to award punitive damages to punish and deter such conduct *if* the jury also found that Medical Protective's behavior was "outrageous."[20]

Medical Protective also argues that the punitive damages awarded in this case (almost quadruple the compensatory damages, minus attorney's fees and costs) were grossly excessive and therefore unconstitutional. The U.S. Supreme Court has held that punitive damages which are grossly excessive violate the Due Process Clause, as an arbitrary deprivation of property.[21] The Supreme Court has provided three guideposts for the District Courts to use in determining whether a jury's punitive damages award is excessive:[22] 1) the reprehensibility of the conduct; 2) the disparity between the compensatory and punitive damages awarded; and 3) the difference between

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[18] 42 Pa. Cons. Stat. Ann. §8371 reads, in relevant part: "In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith towards the insured, the court may take all of the following actions. . . (2) award punitive damages against the insurer.".

[19] Id.

[20] N.T. 10/18/06 at 153-155.

[21] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).

[22] Id.

the punitive damages award and authorized civil penalties.[23]

A. Reprehensibility of Conduct

The most important indicia of the reasonableness of any punitive damages award is the degree of reprehensibility of the defendant's conduct.[24] In determining reprehensibility, the Court must consider: 1) was the harm merely economic, or also physical; 2) did the tortious conduct demonstrate an indifference to or reckless disregard for the health or safety of others; 3) was the target of the conduct financially vulnerable; 4) did the conduct involve repeated actions or an isolated incident; and 5) was the harm the result of intentional behavior, or was it mere accident.[25] In this case, the Court finds that the latter three factors are applicable to Medical Protective's conduct, supporting the award of punitive damages.[26]

First, Medical Protective was aware that Dr. Marcincin was financially vulnerable, as it knew that his liability in the case could exceed his insurance coverage. Dr. Marcincin testified to the effect of the excess verdict on his financial well-being, stating that it would have cost him his life savings. The fact that Plaintiffs ultimately agreed to accept an assignment of Dr. Marcincin's rights to bring a bad faith claim, rather than going after his personal assets, is irrelevant to the Court's determination that Medical Protective acted as it did despite its knowledge of Dr. Marcincin's financial vulnerability and his reliance on his insurance carrier to protect his personal assets.

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[23] Id.

[24] BMW, 517 U.S. at 575.

[25] BMW, 517 U.S. at 576-77.

[26] Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co., 399 F.3d 224 (3d Cir. 2005)

Second, Medical Protective's conduct involved repeated actions, beginning with the assignment of counsel with a conflict of interest, and continuing with its repeated refusal to tender its policy during settlement negotiations despite clear indications that Dr. Marcincin's liability exceeded the policy limits. These actions amounted to a pattern of conduct "designed to achieve a fiscally beneficial result for [Medical Protective] at odds with the Pennsylvania Supreme Court's long-time dictate that an insurer must act with the 'utmost good faith' toward its insured."[27] Medical Protective refused to tender during settlement conferences with experienced and well-respected judges who advised that Dr. Marcincin's liability would exceed the policy limits, and it refused to tender despite clear communication from Dr. Marcincin's secondary carrier that its refusal was an act of bad faith. It never offered more than $50,000 in the settlement negotiations, knowing that Dr. Marcincin could not access his $1 million secondary line of coverage without a full tender of his $200,000 Medical Protective policy.

Third, the Court finds that the harm was the result of intentional conduct, and not mere accident. Alff testified that he knowingly appointed a single lawyer to represent Drs. Marcincin and Edelman, although he was aware that this posed a conflict of interest, for the financial benefit of his employer. Alff also testified that he intentionally failed to tender Dr. Marcincin's policy during settlement negotiations, because he wanted the CAT/MCARE fund to pay more from Dr. Edelman's policy. He testified that he knew that such negotiating tactics were unfair, but engaged in them nevertheless, in an attempt to save his employer money. In other words, he was "intentionally stonewalling"[28] during the negotiating process. Therefore, the jury had ample

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[27] Id. at 233.

[28] See Willow, 399 F.3d at 233.

evidence to find that Medical Protective deliberately acted in direct conflict with the best interest of Dr. Marcincin, and to his extreme detriment.

B. Ratio of Punitive Damages to Harm

The Supreme Court has twice declined to impose a bright-line ratio which a punitive damages award cannot exceed.[29] However, it has noted that an award of more than four times the amount of compensatory damages might be close to the line of constitutional propriety, especially when the compensatory damages are substantial.[30] In this case, the award of punitive damages ($6.25 million) was less than four times the award of compensatory damages (approximately $1.66 million, excluding attorney's fees and costs[31]). The Court finds that the ratio is not excessive in this case, and will uphold the jury's award of punitive damages.[32]

C. Civil Penalties

Pennsylvania's Unfair Insurance Practices Act[33] allows the insurance commissioner to impose penalties up to $5000 for each violation of the act, and also allows the commissioner to suspend or revoke an offender's licence. Bad faith failure to settle is an unfair practice under this

[29] State Farm, 538 U.S. at 425.

[30] Id.

[31] In Willow, 399 F.3d at 236-237, the Third Circuit clarified that attorneys' fees and costs are compensatory damages in the context of insurance bad faith, and should be considered when calculating the ratio of compensatory to punitive damages.

[32] See, Hollock v. Erie Ins. Exch., 842 A.2d 409 (Pa. Super. Ct. 2002 (approving award of $2.8 million in punitive damages, a 10:1 ratio to compensatory damages); Patel v. Himalayan Int'l Inst. of Yoga Sci., No. 94-1118, 1999 WL 33747891 (M.D. Pa. Dec. 9, 1999) (punitive damages award of $1.6 million, almost six times the award of compensatory damages, was not excessive).

[33] 40 P.S. §1171.1 et seq.

act.[34] The bad faith statute allows an award of punitive damages, in addition to sanctions by the commissioner, to punish and deter bad faith conduct.[35] The Willow court found that punitive damages should not be overturned, despite being well in excess of the civil penalty, because the insurer's conduct amounted to multiple violations of §1171, and the statute provides for escalating penalties and even revocation of a license to insure.[36] Given similar facts in this case, the Court will not overturn the jury's punitive damages award on this basis.

An appropriate Order follows.

[34] 40 P.S. §1171.5(a)(10).

[35] 42 Pa. Cons. Stat. A. §8371.

[36] Willow, 399 F.3d at 238.

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

STEPHEN P. JURINKO and CYNTHIA JURINKO, h/w as Assignees of PAUL G. MARCINCIN,	**:**	**No. 03-CV-4053**
Plaintiffs	**:**	
	:	
v.	**:**	
	:	
THE MEDICAL PROTECTIVE CO.,	**:**	
Defendant	**:**	

ORDER

AND NOW, this 24 day of March, 2006, upon review of Defendant's post-trial Motion for Judgment as a Matter of Law or, in the alternative, for a New Trial [Doc. # 80], Plaintiff's Response thereto, and Defendant's Reply, it is hereby **ORDERED** that Defendant's Motion is **DENIED** for the reasons set forth in the attached memorandum opinion.

It is so **ORDERED.**

BY THE COURT:

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CYNTHIA M. RUFE, J.