

KIMBERLY P. JOHNSON, PERSONAL	:	IN THE SUPERIOR COURT
REPRESENTATIVE OF THE ESTATE OF	:	OF PENNSYLVANIA
SANDRA S. LOBB, DECEASED,	:	
Appellant	:	
	:	
v.	:	
	:	
INDEPENDENCE BLUE CROSS,	:	
Appellee	:	NO. 1310 EDA 2004

Appeal from the Order Entered on April 12, 2004
In the Court of Common Pleas, CHESTER County
Civil Division, No. 01-01070

BEFORE: BOWES, McCAFFERY, JJ., and McEWEN, P.J.E.

FILED NOVEMBER 4, 2005

DISSENTING STATEMENT BY McEWEN, P.J.E.:

While the memorandum of my astute colleagues of the majority reveals a perceptive analysis and provides a persuasive expression of rationale, and while the opinion of the trial judge reflects an exceptional jurisprudential insight, I find myself unable to join my learned colleagues of the majority in the decision to affirm the entry of summary judgment in favor of Independence Blue Cross (hereinafter "IBC") as I believe that

- There are substantial issues of disputed material fact, which, under Pennsylvania law, may only be resolved by a jury.
- The existence of such factual disputes, under well-settled appellate court precedent, precludes the entry of summary judgment.

See, e.g.: 401 Fourth Street, Inc. v. Investors Insurance Group*, ___ Pa. ___, ___, 879 A.2d 166, 175 (2005); *Fine v. Checcio*, ___ Pa. ___, ___ 870 A.2d 850, 861–862 (2005); *Drelles v. The Manufacturers Life

Insurance Company, ___ A.2d ___, ___, 2005 Pa.Super. LEXIS 1594 (Pa.Super. 2005); **Porter v. Joy Realty, Inc.**, 872 A.2d 846, 848–849 (Pa.Super. 2005).

Plaintiff Kimberly Johnson’s mother, Sandra Lobb, died on February 1, 1999. Eighteen months earlier, on July 26, 1997, Mrs. Lobb, a school teacher living alone in her home in Chester County was found unconscious and in critical condition as a result of alcoholism. Mrs. Lobb was taken to Chester County Hospital and admitted with a diagnosis of “alcoholic ketoacidosis, alcoholic hepatitis/pancreatitis, hypokalemia and malnutrition.” Mrs. Lobb had health insurance issued by appellee IBC and provided to her by her employer, the Oxford Area School District. As required by 40 P.S. § 908-1 *et seq.*,¹ the policy provided for inpatient treatment for alcoholism based upon a physician’s certification of alcohol dependency.² Dr. Pileggi, Mrs. Lobb’s physician, certified Mrs. Lobb as suffering from alcohol dependency and requested that the hospital social worker, Kurt Quemore,

¹ 40 P.S. § 908-3 requires an insurer to provide minimum coverage for inpatient alcohol detoxification of “seven (7) days of treatment” for alcohol, with a lifetime limit of four admissions, while 40 P.S. § 908-4 calls for a minimum of 30 days per year of residential non-hospital alcohol or drug services provided that “a licensed physician or licensed psychologist must certify the insured as a person suffering from alcohol or other drug abuse or dependency and refer the insured for the appropriate treatment.” These statutory provisions are supplemented by the regulations contained in 31 Pa.Code § 89.601 *et seq.*

² The IBC policy provided the coverages required by 40 P.S. §§ 908-3, 908-4, allowing up to a maximum of 30 days per calendar year (with a lifetime maximum of 90 days) of hospital or non-hospital residential alcohol dependency treatment.

arrange for alcohol rehabilitation placement for Mrs. Lobb as soon as she was medically cleared for discharge. On July 31, 1997, Mr. Quemore notified IBC of Mrs. Lobb's alcohol dependency. IBC instructed Mr. Quemore to contact Greensprings, IBC's mental health services administrator.

On August 1, 1997, IBC approved Mrs. Lobb for five days of inpatient treatment at Brandywine Hall. However, that same day, August 1, 1997, Mrs. Lobb exhibited signs of agitation and confusion which rendered her medically unable to be discharged from Chester County Hospital. Dr. Pileggi then determined that Mrs. Lobb would require hospitalization at a skilled nursing facility in order to progress to the point where she would be medically acceptable for admission to an inpatient alcohol rehabilitation program.

The policy issued by IBC to Mrs. Lobb also provided for coverage for inpatient treatment at a skilled nursing care facility:

Benefits will be provided when you need skilled nursing care for continued treatment of an illness or injury which required at least three days of hospitalization, and are admitted to a skilled nursing facility that is a member of a Blue Cross Plan, within 14 days following discharge from the hospital. You will be entitled to bed and board ... and other services which are usually provided and billed for by the facility.

However, on August 5, 1997, Dr. Pileggi was notified that Richard Gash, an IBC medical director, had determined that skilled nursing care was not medically necessary for Mrs. Lobb and would not be approved by IBC. Dr. Pileggi immediately telephoned IBC to object to the determination that

skilled nursing care was not medically necessary for her patient and was informed by Cathy Dratman, another IBC medical director, that skilled nursing care was not medically necessary for Mrs. Lobb because Mrs. Lobb's "prognosis for improvement was poor." Ms. Dratman then placed the following entry in her claim log:

I explained and she [Dr. Pileggi] agreed that although PT is in poor condition w many med problems, prognosis for improvement is also poor; therefore, PT requires custodial care.

Dr. Pileggi testified at her discovery deposition that after IBC refused to approve skilled nursing care for Mrs. Lobb, she called IBC to set the appeal process in motion.

Dr. Pileggi testified³ under oath that she never agreed with Ms. Dratman's decision and, in fact, in an August 13th letter to IBC seeking to reverse Ms. Dratman's decision that a skilled nursing facility was not medically necessary, Dr. Pileggi wrote, *inter alia*:

Sandra Lobb deserves more than custodial care; she will benefit from a skilled level of care. Since she has continued to improve with the care she has received so far, continuation of this intensive treatment is necessary to ensure that she reaches her full potential for recovery.

³ Dr. Pileggi testified at her discovery deposition that she appealed the IBC decision which she believed was wrong because "[Mrs. Lobb] needed a combination of physical therapy to steady her gait, and she needed [an] alcoholic rehabilitation program. She did not need somebody who would just bathe her and feed her. She needed more than that. And she was responding to more than that in the hospital." Deposition of Cecile M. Pileggi, August 6, 2003, p. 50.

IBC refused to reconsider its position that skilled nursing care was not medically necessary for Ms. Lobb and denied Dr. Pileggi's appeal.

Dr. Pileggi also testified that after she informed the family of Mrs. Lobb that IBC had denied her appeal, the family requested a meeting with the hospital, Dr. Pileggi, and a representative of IBC.

The meeting requested by Mrs. Lobb's family was held on August 11, 1997. IBC declined to attend. The hospital's representative, Mr. Quemore, explained that due to the hospital's contract with IBC, if IBC determines services are unnecessary, the hospital was prohibited from providing those services to Mrs. Lobb even though her doctor (Dr. Pileggi) believed the services to be necessary and even though Mrs. Lobb's family would pay for the services directly. Dr. Pileggi also informed the family that she herself was unable to provide any treatment which IBC had determined to be "medically unnecessary" regardless of the source of payment for such treatment.

Dr. Pileggi testified at her discovery deposition as follows:

Q. Did you have meeting with the Lobbs and Kurt Quemore?

DR. PELIGGI: Yes.

Q. Do you know whether any representative of IBC was invited to that meeting?

A. There was a representative invited. He did not attend.

Q. Do you know why he did not attend?

A. No.

Q. Can you tell me the substance of the meeting; what was said?

A. Well, the family and I felt that she should have more than custodial care, and we were working on ways for that to be accomplished.

Q. Did you tell them anything about IBC's decision?

A. I told them that IBC was refusing more than custodial care.

Q. WHAT DID THE LOBB FAMILY SAY IN RESPONSE TO THAT?

A. THEY WERE WILLING TO PAY FOR THE CARE THEMSELVES.

Q. WHAT DID YOU SAY IN RESPONSE TO THAT?

A. ACCORDING TO THE HOSPITAL'S CONTRACT – KURT [QUEMORE], I BELIEVE, SAID THAT ACCORDING TO THE HOSPITAL'S CONTRACT THAT THEY WERE NOT ABLE TO PROVIDE THEIR OWN RESOURCES.

Q. Did you agree with that?

A. Did I agree that they shouldn't be able to provide – to pay for services?

Q. NO. DID YOU BELIEVE THAT KURT WAS CORRECT?

A. YEAH. HE'S A SOCIAL WORKER. HE KNOWS THOSE RULES AND REGULATIONS.

Q. WHAT DID YOU TELL THE LOBBS ABOUT YOUR ABILITY TO PROVIDE THE TREATMENT THEY WERE REQUESTING FOR MRS. LOBB?

A. WELL, I SAID THAT I WAS LIMITED ON THE WHAT I COULD ACCOMPLISH BECAUSE OF THESE RESTRICTIONS IN THE CONTRACT.

Q. HOW WERE YOU RESTRICTED?

A. I could make the recommendations; however, I could not enforce them.

Q. Why could you not enforce them?

A. Because it's part of the contract.

Q. What contract?

MS. MANGOLD: Objection to the form of question.

THE WITNESS: IBC contracts.

MS. MANGOLD: With?

THE WITNESS: With the hospital.

BY MR. KEEPERS:

Q. If you would look at Tab 11, please.

A. (Witness complies)

Q. Is this your contract that you had in 1997 with IBC?

A. Yes.

Q. Paragraph 2.7 of the contract, which is Bates No. – it looks like 307, but it's faint. The paragraph that's entitled Utilization Management Requirements, would you read that, please?

A. ["] Provider agrees to participate in and cooperate with **and comply with all decisions rendered in connection with Independence's utilization management program** as detailed in the provider manual. Provider also agrees to provide such records and

other information as may be required or requested under such utilization management program.["]

Q. The first sentence is what I'm going to ask you [a] question about. What is your understanding of that first sentence?

A. THAT I HAVE TO COMPLY WITH ALL THE DECISIONS MADE BY THE UTILIZATION REVIEW PERSON.

Q. What do you believe that means if the utilization management review person says the treatment is not medically necessary?

A. THAT I HAVE NO RECOURSE; I HAVE TO ACCEPT THEIR DECISION.

Q. ARE YOU PERMITTED UNDER THIS CONTRACT TO RENDER TREATMENT TO A PATIENT THAT IBC SAYS IS NOT MEDICALLY NECESSARY?

A. NO.

Q. WOULD YOU HAVE BEEN PERMITTED TO PROVIDE SKILLED NURSING CARE FOR MRS. LOBB AFTER IBC SAID IT WAS NOT MEDICALLY NECESSARY?

A. NO.

Q. DID YOU INFORM THE LOBBS THAT YOU COULDN'T PROVIDE SKILLED NURSING CARE FOR MRS. LOBB?

A. YES, I BELIEVE SO.

Deposition of Cecile M. Pileggi, M.D., August 6, 2003, pp. 25-29 (emphasis supplied).

Frank Lobb testified under oath at his deposition concerning the attempts by the family to obtain treatment for Mrs. Lobb as follows:

Q. Did any of the family members ever attempt to have Mrs. Lobb placed in Brandywine or any other skilled nursing facility at a skilled level of care with the offer to pay for it?

A. Yes.

Q. What facilities?

A. I want to put it in context. She was at Chester County. We tried to keep her at Chester County, and at that time there was a meeting with Dr. Pileggi and the hospital, and Dr. Pileggi and the hospital told us that there was no opportunity to get her treatment anyplace, and we went through that meeting and I objected to it and we thought we did everything, but they were consistent, **and they said there was no ability to get her treatment anyplace**; the only place you could put her was in a – the only other option open to us was to transfer to a custodial care facility with no treatment. We made – and there was much more. Chris [Mrs. Lobb's adult daughter] broke this up, and we were all working on it, and Chris made numerous phone calls. I was aware of them and as soon as we told – or **she told the facility that IBC was denying care and that we wanted to pay for it, the people said that they couldn't help us and terminated the discussion, so yes, we tried hard.**

Q. Was it your understanding that Dr. Pileggi was seeking to have Mrs. Lobb stay at Chester County Hospital?

A. It was my understanding that Dr. Pileggi was doing her absolute best to get Mrs. Lobb treated. Whether it was at Chester County, I can't – I'm not going to go back and try to guess what Dr. Pileggi would say to other people relative to Chester County because I wasn't privy to those discussions. What I can say is Dr. Pileggi told us Mrs. Lobb needs treatment and Chester County was one of the options, but the issue was treatment.

* * * *

We understand that IBC was blocking our ability to pay for that stuff, okay, and what I was simply trying to do was figure out where Blue Cross was. In other words, in that letter – or in that letter you’re referring to, I called them and they told me there had been an error, that Blue Cross was approving treatment, okay, and so I said well, what are you – what form of treatment would you approve, then they said, oh, we’ll have to call you back, so they called back and then they had two people – three people on the phone, a manager and two supervisors as I remember it, **and then they told me that Dr. Pileggi was fully in agreement with Blue Cross’s determination to terminate treatment, and, okay, that Dr. Pileggi had done nothing through the entire thing, of course, but to support Blue Cross’s decisions to terminate all treatment, and that’s why I wrote the letter because I was furious.** As a matter of fact, when I look at that letter again I get – I do think I can write better than that. It’s kind of confusing. **But I was so angry when I got off the phone that they would lie to me directly to my face when I’ve been talking to the hospital and that doctor at length,** and I knew where the hospital and the doctor – and then to come back with three people in a coordinated position to tell me – basically tell me my doctor agreed with them – but it was not [my] doctor, Mrs. Lobb’s doctor – when we had talked to the doctor at length for some time, and we knew her exact position.

* * * *

Q. When you offered to Mr. Quemore and Dr. Pileggi at this meeting that the family would personally pay for her treatment --

A. At Chester County?

Q. – at Chester County Hospital –

A. – or any other place?

Q. – what was Mr. Quemore’s response?

A. Mr. Quemore said that Chester County could not accept our money because the contract relationship that they had with IBC barred their taking any money directly from a patient, and there was just no way to have it happen.

And did you also want something of what Dr. Pileggi said?

Q. If you –

A. Dr. Pileggi confirmed and supported that statement, and I'm very confident in it because I argued the point because it's so ridiculous, and I demanded a right to pay. **It wasn't a matter I offered. I demanded and told them they had to get out of the way, and they just talked long enough and persuasively enough that they convinced us – me in particular – that not only could we not pay at Chester County but there was no place that would offer treatment that could take Mrs. Lobb and [we] pay for it. They were all blocked. And the exact words were IBC has blocked all options of treatment.**

Q. Did you ever attempt to ask anybody else at Chester County if this was correct?

A. No, because my first personal position was that Dr. Pileggi had told me that and I think I [-] you'll find that I called IBC right after that. Remember, that's the letter documenting that IBC lied to me. Mr. Quemore and Dr. Pileggi – did they – let me go back. I believe I have to look at the chron, but I think you'll find that right after the meeting I had called IBC, and IBC, you know, at first said that there –

Q. Did you follow up with Independence Blue Cross or did you ever follow up with anybody at Chester County Hospital?

A. He was the representative for Chester County. He was in the room for Chester County Hospital. There just didn't seem to be anyplace to go with it. Our doctor had told us there was no recourse and – no, I did not. I

mean, I just could not see – and they were convincing enough and they clearly told us something that they felt that were not – as a matter of fact, I asked and they told us this is something that they were not really ready to talk about but –

Q. Mr. Quemore is a social worker for Chester County Hospital, correct?

A. I think you need to talk to Chester County Hospital to find exactly what Mr. Quemore is. He was their representative to us.

Q. Did Mr. Quemore or Dr. Pileggi tell what their statement that you could not personally pay for any treatment was based on?

A. Say that again.

Q. Did Mr. Quemore or Dr. Pileggi tell you what their statement that the family could not pay for any further treatment of Mrs. Lobb was based on?

A. I believe I've already testified to that.

Q. What was it?

A. I said specifically they both confirmed or stated that – the way I said it was, Mr. Quemore said that the contract [which] Chester County had with Independence Blue Cross specifically forbids or barred us as the family to pay directly for the care, and Dr. Pileggi confirmed that that was, in fact, the case. We could not pay for the care, and therefore, she could not stay at Chester County.

* * * *

Q. Did you ever ask Independence Blue Cross why you were not being allowed to pay personally for Mrs. Lobb's treatment?

A. The issue came up. I can't testify that in that conversation when I followed up with Independence Blue

Cross that I asked why they were blocking it. I certainly said that we wanted to pay for treatment.

Q. And what was their response?

A. They didn't respond that way. They just went back to denying it. You know, their position was – and they just restated it – that the only the – you know, just the only appropriate care – which is interesting because they didn't – **they never said denied coverage. Those words were never used. The words used repeatedly were the only appropriate care for Mrs. Lobb was custodial care.** And so if they – I'm not aware of any time when Independence Blue Cross contacted us and said, you know – or where they denied coverage or limited coverage. It was – it was always couched in the term of the only appropriate care was no care.

Q. In that last response you testified that Independence Blue Cross was denying care, not denying coverage; is that a correct –

A. I never said that.

Q. Well, why don't you explain to me again what you understood Independence Blue Cross –

A. I'm saying to my knowledge in all the context with – they never denied coverage. They basically stated that the only appropriate treatment or care was custodial care. In other words, the only medically necessary care was – it was never couched in the terms of coverage or insurances.

Q. You telephoned Independence Blue Cross on a physician-to-physician line. Where did you get that telephone number?

A. From the meeting, the meeting with Dr. Pileggi and Dr. – with Quemore. Which one gave it to me, I can't tell you –

Q. But one of those two did?

A. – but they encouraged us to pursue Blue Cross.

Q. Again, what was the objective of the telephone call to Independence Blue Cross?

A. I had just been told that all options for treatment were blocked, and we had been refused the right to pay for it, and I was trying to get them to simply to get out of the way.

Q. And what was Independence Blue Cross's response to your request –

A. Well, they changed the whole –

Q. – for the ability to pay?

A. – ground rules because they told me my doctor – it's in my letter. **They were saying that Dr. Pileggi agrees no treatment is necessary; whereas as you just pointed out I got the phone number probably from Pileggi**, however, I can't say that it was the physician-to-physician line. I most certainly got it from Dr. Pileggi. I know I got it in that meeting, **and Blue Cross was taking a formal position with their management** – that's the only way I can do it – **in direct opposition to the facts as I knew it.**

Q. On August 12, 1997, you telephoned Independence Blue Cross again and spoke with Joanne Pola and Pam Ecaardt; is that correct?

A. No. They called me.

Q. But you did speak with them on that date?

A. What I've just testified encompasses both phone conversations, not one, and my letter – the letter in the file that you have – I assume you have a copy of it – points out both, and it was the second one – it was the second phone call that they misrepresented the facts.

Q. Independence Blue Cross's records of that telephone conversation indicate that you wanted

the hospital days that are denied covered. Why were you seeking that?

A. I wasn't. I would say somebody changed the records. My letter doesn't indicate that. If that was true, why didn't they respond to my letter? I sent it to the insurance commission. You know, I copied it pretty broadly and asked for a reply, and they never responded. So I'm saying, no. I didn't ask for that.

Q. Who made the decision to send Mrs. Lobb to Pembroke?

A. No single person. It was made collectively. They told us – the hospital told us – they told us there were some facilities that would accept her. We were told that those were our only options. We were told that she had to leave Chester County and Kim and Chris [daughters of Mrs. Lobb] had visited that and one other facility of the two, and in the time we had, that was the only choice open to us. You know, that was reasonably – of the two unacceptable choices, that was the best of the two, so we collectively did.

* * * *

Q. What facilities did you attempt to place Mrs. Lobb in but were advised that you could not personally pay for it because of Independence Blue Cross specifically?

A. I believe it was Mirmont. In other words, we tried to put her back again, and we were told – well, Mirmont. That's what your question was.

Q. Is that the only facility that that occurred in other than Chester County Hospital?

A. No. You said me. I was involved in that. I didn't – I am aware that we made lots of phone calls, but if you want to ask specifically which ones, that's going to be very difficult to remember at this point.

Q. But the only ones –

A. All the ones we could find in the phone book, and that was Chris.

Deposition of Frank Lobb, August 18, 2003, pp. 32-60 (emphasis supplied).

Mr. Quemore, an employee of Chester County Hospital, also confirmed in his deposition testimony that he had advised the Lobb family that there was no private pay option for treatment for Mrs. Lobb due to IBC's contract requirements:

BY MR. RODA [Counsel for Appellants]:

Q. I just want to make sure I understand what your understanding was then.

Your belief was that pending the appeal process so long as the appeal process had been completed, the hospital under its contract with Blue Cross could not accept private payment from Mrs. Lobb or her family?

MS. MANGOLD [Counsel for IBC]: Object to form of the question.

BY MR. RODA:

Q. Have I fairly stated what your understanding was?

MR. OLSHIN: Do you understand the question, Kurt?

THE WITNESS: Yes. That's my understanding.

BY MR. RODA:

Q. What I just said was your understanding?

A. Yes.

Q. Is that still your understanding today?

A. Yes.

Q. And your understanding was reaffirmed by your discussion with Mr. Fleckinger?

A. Well, my understanding – yes.

* * * *

Q. So if the Lobb situation reoccurred today and they raised the question about paying privately, your belief and your statement to them would be the same as it was back in 1997?

A. Yes.

* * * *

Q. Do you believe as of August 11, 1997, that the hospital's contract with Blue Cross prohibited the hospital from accepting any form of private payment from a family if Blue Cross had denied for their coverage for that patient?

A. I believe so.

Q. Do you still believe that today to be the case?

A. I still believe so. ...

Deposition of Kurt Quemore, July 3, 2003, pp. 73-76 and 67-68.

After Mrs. Lobb was transferred to custodial care at Pembroke on August 12, 1997, responsibility for her care was transferred to Dr. Diwan, who attempted, as had Dr. Pileggi previously, to obtain treatment for Mrs. Lobb's alcohol dependency by certifying the necessity for inpatient treatment at Mirmont Alcohol Rehabilitation Hospital on September 1, 1997.

The Mirmont Director of Nursing, Michelle Angeline, visited Pembroke on September 30, 1997, but did not accept Mrs. Lobb for admission to

Mirmont. Instead, the next day, because IBC would not approve residential treatment as Mrs. Lobb had not ingested any alcohol since her admission to Pembroke, Ms. Angeline recommended that Mrs. Lobb be discharged from Pembroke to her home and receive three days of outpatient treatment each week at Mirmont.

IBC's Medical Necessity Criteria, however, only required two criteria in addition to a physician's certification:

There is actual evidence for, or clear and reasonable inference of serious, imminent physical harm to self or others directly attributable to the continued abuse of substances which would prohibit treatment in an outpatient setting.

. . . .

Due to significant impairment in social, familial, scholastic or occupational functioning, the individual requires intensive individual, group, and family education and therapy in an inpatient rehabilitative setting.

Pembroke requested a copy of the September 30 evaluation of Mrs. Lobb but was informed by Mirmont that no written evaluation or report had been done. Mr. Lobb then called Mirmont and was told that there was no written evaluation, and that the decision rejecting inpatient care for Mrs. Lobb had been made by Greensprings on behalf of IBC. When Mr. Lobb then attempted to obtain inpatient treatment for Mrs. Lobb at Mirmont by paying the charges himself, he was informed by Mirmont that their contract with IBC precluded them from accepting Mrs. Lobb as an inpatient.

Mr. Lobb testified as follows concerning his attempt to ascertain why

Mrs. Lobb had been refused treatment at Mirmont:

Q. Who did you speak with at Mirmont?

A. I can't tell you, but she was – I asked for the head of admissions, and that's where she represented herself, and I want to be careful. I asked for admissions and spoke to the person in admissions.

Q. And describe for me the conversation you had with this woman.

A. We had been told that she had to be tested and we would have to pay for the test. I think it was \$100 – for a test to qualify. We had been told that she had taken the test and failed, so I called Mirmont and talked to admissions, and I said I wanted a copy of the test and was told that they did not provide copies of the test, and I said you have a simple choice, you will simply provide it today or you'll provide it under a court order, I own it. I paid for it. We don't have it. **And the woman said oh, please, please, do not do that, we don't do a test, we simply call the insurance company, and they say they simply call IBC, and if Blue Cross will not approve it, we deny it. And the reason I can remember that so well because it angered me so much, and I tried to tell her at that time this has nothing to do with the insurance company, we're not looking for coverage, we're paying, and she went back over the same story.**

Q. Did anybody from Mirmont see Mrs. Lobb?

A. I can't testify to that. Not to my knowledge.

Q. What is your understanding of what the test was?

A. Well, I just testified to you. I assumed going in when we paid the \$100, they were doing some kind of medical evaluation. **What they told me was that there was nothing more than a phone call to Blue Cross to determine whether Blue Cross would allow**

them to proceed, and since they got a no, they turned us down.

Deposition of Frank Lobb, August 18, 2003, pp. 60-62 (emphasis supplied).

The esteemed trial court, in a footnote to its order granting summary judgment, explained that it found summary judgment appropriate in this action since:

[t]he evidence before us is clearly insufficient to support a verdict in favor of plaintiff. Plaintiff contends that defendant declined to provide to Lobb in-patient treatment for alcoholism and that as a result, Lobb died. During the period from July to October, 1997, neither Dr. Pileggi, nor any of Lobb's other treating physicians, ever requested in-patient alcohol rehabilitation treatment.

* * * *

The second part of plaintiff's breach of contract claim alleges that defendant breached its contract with Lobb by failing to allow her or her family to pay for residential treatment for her alcoholism at Chester County Hospital or at Mirmont. Again, plaintiff has failed to provide sufficient evidence in support of [her] claim. As has been stated above, there is no evidence that Lobb or anyone on her behalf made a request to defendant for residential treatment for her alcoholism. Equally so, there is no evidence that any residential alcohol treatment facility refused payment from Lobb or members of her family.

While the eminent trial court correctly recited the appropriate standard of review applicable to a motion requesting the entry of summary judgment, I am of the mind that, contrary to the foregoing evidentiary findings of the trial court, the above-cited testimony reveals:

(1) that both Dr. Diwan and Dr. Pileggi, in quite persistent fashion, did request inpatient alcohol rehabilitation treatment,

(2) that the Lobb family did, in similar persistent fashion, request IBC to approve inpatient alcohol rehabilitation treatment, and

(3) that the requests of Dr. Pileggi, of Dr. Diwan, and of the Lobb family for such inpatient alcohol rehabilitation treatment were denied by Chester County Hospital, and by Mirmont.

Thus I would vacate the order entered April 12, 2004, and remand for trial.