

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA**

RANDY L. PFIRMAN,	:	
Plaintiff	:	
	:	
v.	:	No. 05-02,122
	:	
COMMONWEALTH OF PA,	:	
Defendant	:	

**OPINION and ORDER**

This is an appeal from the Department of Transportation’s Notice of License Suspension, which was based upon the plaintiff’s deemed refusal to submit to chemical testing. The plaintiff argues his learning disability rendered him incapable of making a knowing and conscious refusal to take the test.

To prevail on this defense, a driver must provide competent medical evidence sufficient to show that his medical condition, which was unrelated to consumption of alcohol, rendered the driver’s refusal to undergo chemical testing unknowing. Gombar v. Commonwealth of Pennsylvania, Department of Transportation, 678 A.2d 843 (Pa.Cmwlt. 1996). To establish competent medical evidence, an expert witness must tender such an opinion with a reasonable degree of medical certainty. Barbour v. Commonwealth of Pennsylvania, Department of Transportation, 732 A.2d 1157 (Pa. 1999).

In this case, the plaintiff provided expert testimony from Dr. Daniel Egli, a clinical psychologist. Dr. Egli opined that the plaintiff’s deemed refusal of the blood test was not knowing and conscious because he was impaired. Dr. Egli further opined that the impairment was due to three factors: 20% because of alcohol, 20% because of anxiety, and 60% because of his learning disability.

The court does not believe Dr. Egli’s testimony was sufficient as a matter of law to meet the plaintiff’s burden. The Commonwealth Court has held that where a

motorist's voluntary consumption was a factor in the motorist's alleged inability to make a knowing and conscious refusal, the defense is not established. Commonwealth of Pennsylvania, Department of Transportation v. Monsay, 596 A.2d 1269 (Pa.Cmwlt. 1991). In Monsay, the psychiatrist testified that alcohol probably played a minor role in the driver's inability to make a knowing and conscious refusal, and that alcohol could have been a contributing factor to the driver's behavior at the time of the arrest. Because the psychiatrist could not state the driver's psychiatric disorder alone would have prevented the driver from making a knowing and conscious refusal, the defense failed.<sup>1</sup> By contrast, in Barbour, supra, the expert testified the driver's injuries made him incapable of rendering a conscious and knowing refusal, apart from the driver's consumption of alcohol.

In the case before this court, Dr. Egli stated several times that alcohol was a factor in rendering the plaintiff incapable of making a knowing and conscious refusal. In his brief, the defendant argues Dr. Egli clearly testified that even without the alcohol consumption, the plaintiff would not have been able to make a knowing refusal. That is not this court's recollection of Dr. Egli's testimony, nor is such a statement reflected in our notes. In fact, our notes indicated that when asked on cross-examination whether he could definitely say that alcohol was not part of the problem, Dr. Egli answered, "Absolutely not. I've indicted it is part of the problem." As the plaintiff has failed to produce evidence that alcohol was not a contributing factor in his refusal, his appeal must fail.

The court notes the plaintiff has preserved his argument regarding lack of Miranda warnings and right to consult with an attorney. It is further noted that this

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<sup>1</sup> Although our Supreme Court has clarified that the testimony required must be rendered with a "reasonable degree of medical certainty" rather than "certain and essentially without doubt," the expert testimony still needs to establish that alcohol was not a factor in rendering the refusal unknowing. Barbour, supra.

issue is awaiting decision by the Pennsylvania Supreme Court. However, the court will deny the plaintiff's request to stay the suspension until that case has been decided.

**ORDER**

AND NOW, this \_\_\_\_\_ day of May, 2006, the appeal of Randy Pfirman is denied, the stay is vacated, and the suspension order issued by the Department of Transportation is reimposed.

BY THE COURT,

Richard A. Gray, J.

cc: Ronald Travis, Esq.  
Francis Bach, Esq.  
PA Department of Transportation  
Riverfront Office Center, 3<sup>rd</sup> floor  
Harrisburg, PA 17104-2516