

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

DONALD BENN, )  
)  
Plaintiff, )  
)  
v. ) C.A. No. 2003-10-757  
)  
LISA MAY, )  
)  
Defendant. )

Submitted: February 9, 2006  
Decided: March 9, 2006

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For the Defendant

**FINAL DECISION AND ORDER AFTER TRIAL**

In this negligence action, Donald Benn, plaintiff (hereinafter “Benn”) seeks special and general damages for personal injuries, pain and suffering, medical expenses in the amount of \$19,229.44<sup>1</sup>, and cost of these proceedings from Lisa May, defendant (hereinafter “May”) for injuries resulting from a car accident that occurred on October 30, 2001. Both parties are employed by the State of Delaware at the Howard Young Correctional Facility (hereinafter “prison”) on East 12<sup>th</sup> Street, Wilmington, Delaware. While Benn was driving westbound in the prison’s rear parking lot, May, while operating a prison pool van vehicle, backed into Benn’s vehicle, resulting in damages. This

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<sup>1</sup> Plaintiff’s Exhibit No.: 4.

litigation arises out of alleged injuries Benn claims he sustained to his upper right shoulder. May denies all liability and raises ten affirmative defenses in her Answer. Trial was held on February 9, 2006 and this is the Court's decision and order.

At trial, May conceded her negligence caused the accident but challenges the extent of Benn's damages. In particular, May disputes liability for medical expenses Benn incurred in June, 2005, four years after the accident, relating to an operation Benn underwent to repair a labral tear in his upper right shoulder. Benn argues that the labral tear was the proximate result of the 2001 car accident, and relies upon the expert opinions of Dr. Evan Crain, M.D.<sup>2</sup>, (hereinafter "Dr. Crain") and Dr. David M. Krasner, D.O.<sup>3</sup>, (hereinafter "Dr. Krasner"). In response, May argues that there were other occasions on which Benn sustained trauma to his upper right shoulder which could have caused the labral tear, and May relies upon Dr. Andrew Gelman, D.O.<sup>4</sup>, (hereinafter "Dr. Gelman"), who concluded that Benn's labral tear could not have been caused by the 2001 car accident.

### FACTS

On October 30, 2001 at approximately 8:15 a.m. Benn was leaving his night shift at the prison where he works as a Corrections Officer. He drove his vehicle westbound towards the exit of the prison's rear parking lot, and approached behind one of the prison's passenger vans. May was driving the van, which Benn recalled at trial "was stopped for a longer than usual time." Benn put his vehicle in "park" and with his right

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<sup>2</sup> Plaintiff's Exhibit No.: 1, Video Deposition of Evan Crain, M.D., January 23, 2006; Plaintiff's Exhibit No.: 3, Transcript of Dr. Crain's video deposition (hereinafter "Dr. Crain's Testimony").

<sup>3</sup> Plaintiff's Exhibit No.: 2, Deposition of David M. Krasner, D.O., February 2, 2006 (hereinafter, "Dr. Krasner's Testimony").

<sup>4</sup> Defendant's Exhibit No.: 1, Video Deposition of Andrew Gelman, D.O. & written transcript, January 24, 2006; Defendant's Exhibit No.: 2, Transcript of Dr. Gelman's video deposition (hereinafter, "Dr. Gelman's Testimony").

hand, reached over to turn on the radio. Suddenly, he felt an impact and saw that May's van had reversed and collided into the front of his vehicle. Benn immediately felt pain in his upper right shoulder. Benn was taken to the Emergency Room at Christiana Hospital, where he was examined and had X-rays taken of his upper right neck, shoulder and back area. The X-rays revealed no detectible injury, and Benn was given pain medication and released the same day.<sup>5</sup> On November 1, 2001, Benn saw Dr. Krasner, his primary care physician, who found that Benn experienced tenderness, spasm, and decreased range of motion in his cervical spine, as well as his upper thoracic area.<sup>6</sup> Dr. Krasner prescribed physical therapy and refilled Benn's pain medication, and advised Benn to not return to work. A November 5, 2001 notation in Benn's medical records reveals Benn was still experiencing pain in his right shoulder and trapezius.<sup>7</sup> On November 15, 2001, Dr. Krasner again noted spasm, tenderness, and decreased range of motion in Benn's right cervical and thoracic areas,<sup>8</sup> and instructed Benn to continue his physical therapy and to continue taking the pain medication.<sup>9</sup>

A notation on the November 26, 2001 physical therapy report indicates Benn's pain increased after Benn "slipped and fell down steps."<sup>10</sup> Benn testified at trial that on this occasion, he felt pain in his right shoulder when he "miscalculated" a step on a stairway and used his right hand to grab the railing and that "it hurt a little bit" but emphasized that he did not fall down. Two days later, a physical therapy notation from

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<sup>5</sup> Defendant's Exhibit No.: 5, Christiana Care Emergency Department, "Nursing Assessment Sheet/Interdisciplinary Care Record," October 30, 2001, p. 2.

<sup>6</sup> Dr. Krasner's Testimony, p. 8 ¶ 2-4.

<sup>7</sup> Defendant's Exhibit No.: 7; Dr. Krasner's Testimony, p. 16, ¶ 14-16.

<sup>8</sup> Dr. Krasner's Testimony, p. 10, ¶ 18-20.

<sup>9</sup> Id. at p. 11, ¶ 16-17.

<sup>10</sup> Defendant's Exhibit No.: 9, Record of Dr. Krasner, Family Practice Associates, November 26, 2001 entry.

November 28, 2001 indicates Benn's trapezius pain had since decreased.<sup>11</sup> Two more days later, on November 30, 2001, Dr. Krasner indicated again that Benn's trapezius pain had further decreased.<sup>12</sup>

Dr. Krasner referred Benn to Dr. Stephen M. Beneck (hereinafter "Dr. Beneck") of Rehabilitation Associates, P.A. for follow-up treatment.<sup>13</sup> Dr. Beneck's findings were similar to Dr. Krasner's, and he requested Benn's physical therapist "to add ROM [range of motion] exercises for his right shoulder, chin tuck posture, and retraining and strengthening of scapular and cervical retractors," and that Benn "work with a chiropractor two times a week for the next two weeks for myofascial release treatments for the right upper trapezius."<sup>14</sup> On December 7, 2001 a physical therapy notation indicated Benn's tenderness and soreness in his shoulder were further decreasing.<sup>15</sup> However, a December 14, 2001 notation indicates that Benn "woke up with right shoulder/trapezius stiffness."<sup>16</sup>

Ultimately, Benn responded well to this combined treatment plan and finally returned to work on January 3, 2002. On January 10, 2002 Benn reported to Dr. Krasner that he was feeling better and was not in pain. This was noted by Dr. Beneck in a January 18, 2002 follow-up evaluation, that Benn was doing "very well."<sup>17</sup> Benn testified that although he felt no continuous pain after his physical therapy ended, he still felt some pain, and restricted his activities whenever he used his right shoulder. Benn

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<sup>11</sup> Dr. Krasner's Testimony, p. 35, ¶1-19.

<sup>12</sup> Id. at p. 35, ¶1-19.

<sup>13</sup> Id. at p. 13, ¶9-12.

<sup>14</sup> Id.

<sup>15</sup> Defendant's Exhibit No.: 7

<sup>16</sup> Id.

<sup>17</sup> Defendant's Exhibit No.: 13, Letter from Dr. Beneck to Dr. Krasner, Follow-up Visit RE: Donald Benn, January 18, 2002.

continued to limit using his right shoulder until 2003, when he noticed “a numbing pain” whenever he slept on or applied weight or pressure to his right shoulder.

On January 6, 2003 Dr. Robert A. Smith (hereinafter “Dr. Smith”) examined Benn for a work-related insurance evaluation. Dr. Smith’s report reveals that he examined Benn but did not review his medical history. He noted that Benn complained of “right shoulder discomfort” and that this pain “interferes with his activity and ability to exercise.”<sup>18</sup> Dr. Smith noted tenderness in Benn’s shoulder and even heard what he describes as “an intermittent palpable click in the [shoulder] joint.”<sup>19</sup> Nonetheless, Dr. Smith stated that Benn had “reached maximum medical improvement with regard to his neck, back, and shoulder” but immediately cautioned, “although he has symptoms and the finding of clicking in the shoulder joint.”<sup>20</sup> Dr. Smith concluded, “Until the cause of the right shoulder complaints is determined, I cannot state that Mr. Benn has reached his pre-injury status.”<sup>21</sup>

In October, 2003 Benn filed this action. In preparation for litigation, defendant retained Dr. Gelman, a specialist in the field of orthopedic surgery, to examine and evaluate Benn. On April 6, 2004, Dr. Gelman reviewed Benn’s medical history and conducted a physical examination.<sup>22</sup> Dr. Gelman testified Benn’s pain was a result of cervical sprain or strain.<sup>23</sup> Dr. Gelman noted soreness when he pressed on Benn’s right trapezius area.<sup>24</sup> Next, Dr. Gelman examined Benn’s shoulders to look for impingement of the bursa or the rotator cuff, which can indicate a labral tear. Dr. Gelman found no

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<sup>18</sup> Defendant’s Exhibit No.: 8, Letter from Dr. Robert A. Smith, RE: Donald Benn, January 6, 2003.

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> Defendant’s Exhibit No.: 3, Letter to Robert F. Phillips from Dr. Gelman, RE: Donald Benn, April 6, 2004.

<sup>23</sup> Dr. Gelman’s Testimony, p. 12, ¶8-10.

<sup>24</sup> Id. at p. 10, ¶18-24; p. 11, ¶1-2.

evidence of impingement<sup>25</sup> and concluded Benn's prognosis was "excellent"<sup>26</sup> and that beginning January, 2002 Benn reached "maximum medical improvement." Dr. Gelman found no need for "any investigational testing and/or surgical intervention."<sup>27</sup> It is uncontested that this examination was conducted within a brief period.

Towards the end of 2004, Benn returned to Dr. Krasner with complaints of pain in his right shoulder that he testified was a "different" pain that was sharp, constant and numbing when he would lay down or sleep on his right side. Benn also returned to Dr. Beneck early in 2005 for an MRI of the area, and was referred to Dr. Crain, an orthopedic surgeon. On February 9, 2005 Benn met with Dr. Crain and informed him of the accident and the pain he was experiencing, and upon a physical examination Dr. Crain found evidence of impingement in Benn's right shoulder.<sup>28</sup> Dr. Crain reviewed the MRI and found the labrum in Benn's right shoulder appeared torn.<sup>29</sup> Dr. Crain testified that in his opinion, Benn's pain was a result of post-traumatic impingement, and the original injury may have caused a tear on the lip of the shoulder socket which developed into a labral tear. On March 14, 2005, Dr. Crain found Benn's pain was severe enough to warrant a surgical procedure referred to as arthroscopic subacromial decompression<sup>30</sup> (arthroscopy). The arthroscopy surgery was performed on July 26, 2005.<sup>31</sup>

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<sup>25</sup> Id. at p. 11, ¶8-13.

<sup>26</sup> Id. at p. 13, ¶ 8

<sup>27</sup> Defendant's Exhibit No.: 3 at p. 3.

<sup>28</sup> Dr. Crain explained that the impingement test he performed is called the Neer and Hawkins positioning test is performed by having a patient bring his arm up in an elevated position in forward flexion, and if there is pain in the shoulder area then this is a sign of impingement. The other position is when a patient is instructed to bring his arm up and "internally rotate" it. Dr. Crain testified that both of these positions were painful for Benn, and this was evidence of impingement. Dr. Crain's Testimony, p. 11, ¶ 5-22.

<sup>29</sup> Dr. Crain further explained the location of the labrum in the shoulder, "The labrum is deep inside the shoulder. It basically means lip and it's the lip of the socket. So the shoulder is a ball and socket joint and the socket has a soft tissue lip that runs around it, kind of like a swimming pool and the side of the swimming pool, and the labrum is that side." Id. at p. 13, ¶ 13-18.

<sup>30</sup> An arthroscopic surgery of the shoulder "is when we make small holes around the shoulder, insert a fiberoptic camera so we can visualize the inside of the shoulder and in the subacromial space. We can

During the surgery, Dr. Crain observed trauma to the labrum and scuffing of the ball of the humeral head on the shoulder socket,<sup>32</sup> which had been revealed by the MRI. This confirms his initial impression, that Benn had a labral tear. To repair it, the labrum was “trimmed” with a chondroplasty procedure. Dr. Crain testified his observations and medical experience led him to conclude that the injury was not recent, and was “consistent with an injury that...could have occurred four years ago.”<sup>33</sup> Dr. Crain further testified that the pain in upper right trapezius area of the neck and shoulder are common when there is impingement. Dr. Crain stated as follows:

“Q: ...Is it possible that Mr. Benn had injuries to both his shoulder and the trapezius or the neck associated with this accident?

A: Well, the trapezius muscle goes all the way to the top of the shoulder. The trapezius is a muscle that goes to the neck, to the shoulder and down the back. Those complaints that were detected by his other physicians at the time were likely coming from the shoulder. A lot of patients that I see every day with shoulder problems have pain in the trapezius area. Underneath the trapezius is the rotator cuff and that is the area that was annoyed and aggravated as a result of [Benn’s] injury. The glenohumeral joint is in the same area as is the labrum which is inside and patients with shoulder problems frequently have pain in the trapezius. So it’s not at all unusual. And that pain was improved with the surgery what we did to his shoulder.”<sup>34</sup>

During Dr. Crain’s cross-examination the defense questioned Dr. Crain about a June, 2000 assault where Benn fell on his right shoulder.<sup>35</sup> Dr. Crain testified that hypothetically, if the June, 2000 assault were the cause of the labral tear, then Benn

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evaluate the structures and treat them if need be. And a subacromial decompression is taking pressure off of the rotator cuff in the area where he was having pain.” Id. at p. 18, ¶6-14.

<sup>31</sup> On July 14, 2005, just prior to the surgery, a notation in Dr. Crain’s records revealed that Benn had full range of motion in his right shoulder. Dr. Crain explained that this was normal and consistent with impingement, since individuals with impingement often live with the pain but have trouble with certain things such as sleeping, overhead lifting, throwing, and other activities that put pressure on the rotator cuff, range of motion is not necessarily restricted in every case. Id. at p. 19, ¶20-24; p. 20, ¶ 1-6.

<sup>32</sup> Id at p. 21, ¶ 12-23.

<sup>33</sup> Id. at p.25, ¶ 16-21.

<sup>34</sup> Id. at p. 26, ¶ 6-22.

<sup>35</sup> Id at p. 34, ¶ 13-19.

would have sought medical treatment for it at that time.<sup>36</sup> Defense also raised the incident in November, 2001 when Benn “miscalculated” and slipped while going down the stairs. Dr. Crain repeatedly maintained (fourteen times) that in spite of these two incidents, the findings during surgery were consistent with injuries resulting from the accident, as well as what Benn relayed to Dr. Crain about the accident.<sup>37</sup>

On October 28, 2005, Dr. Gelman examined Benn for a second time, at the request of defense. During this exam, which again only lasted several minutes, Dr. Gelman concluded that everything relating to Benn’s right shoulder appeared normal, that Benn was healing well after surgery, and that the only soreness Benn experienced during the exam was consistent with the recent surgical procedure.<sup>38</sup> Dr. Gelman found no basis to relate the labral tear to the accident with May. In reaching this conclusion, Dr. Gelman emphasized the absence of any entry or notation relating to the right shoulder in Benn’s medical records for a span of nearly three years following the accident. Dr. Gelman recalled that Benn’s initial complaints were focused on his trapezius, but that during the October 28, 2005 evaluation Benn was experiencing pain “in the front portion of his right shoulder.”<sup>39</sup> In Dr. Gelman’s view, these are “two different body parts anatomically... Trapezius, neck, one... problem; A.C. joint, shoulder, subacromial area, separate, totally different bodily part problem.”<sup>40</sup> On cross-examination, counsel for plaintiff pointed out *five separate instances* in Benn’s records, four occurring in 2001 and one in 2003, where complaints relating to his right shoulder have been documented. Regardless, Dr. Gelman

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<sup>36</sup> Dr. Crain’s Testimony, p. 35, ¶20-24; p. 36, ¶7-10; p. 39, ¶ 6-9.

<sup>37</sup> Id. at p. 16, ¶4-17; p. 25, ¶9-21; p. 33, ¶10-15; p. 37, ¶3-6; p. 39, ¶19-24; p. 40, ¶1-2; p. 41, ¶1-7; p. 44, ¶3-10; p. 44, ¶19-24; p. 45 ¶1-2; p. 45, ¶5-20; p. 46, ¶2-7; p. 47, ¶22-24; p. 48, ¶1-3.

<sup>38</sup> Dr. Gelman’s Testimony, p. 16, ¶4-17; p. 17, ¶2-8.

<sup>39</sup> Id. at p. 31, ¶4-7.

<sup>40</sup> Id. at p. 33, ¶18-24; p. 34, ¶1-11.

insisted that any reference made to “shoulder” in the records does not necessarily indicate impingement, and that furthermore, the treatment Benn received after the accident up until January, 2002 related to the neck area.<sup>41</sup>

### DISCUSSION

The record indicates there is the possibility that Benn had a preexisting shoulder injury, “but aggravation of a preexisting condition is compensable under Delaware law.” *Maier v. Santucci*, 697 A.2d 747 (Del.Supr.1997), citing, *Winder v. Frisby*, 1994 WL 45434 (Del.Super.1994); *Mayer v. Knight*, 1998 WL 109837 (Del.Super.1998), citing, *Maier* (finding that plaintiff was entitled to compensation for “at least that aggravation” of preexisting condition. *Id.* at \*2). In *Maier*, the Supreme Court adopted the Superior Court’s reasoning in *Winder v. Frisby* regarding preexisting injuries. The Court in *Winder*, when considering plaintiff’s motion under Superior Court Rule 59(e), found that it was without merit. The Court explained that new trials are only granted if a verdict is “against the great weight of the evidence,” and noted that plaintiff “severely compromised her own case due to her lack of candor in her discovery responses about prior medical problems” and thus found that the jury’s verdict was reasonable. *Winder*, 1994 WL 45434, at \*1 (Del.Super.1994). At trial, plaintiff requested the Court to instruct the jury “that if they were unable to apportion damages due to a pre-existing injury or pre-existing condition, then the tort-feasor should be held responsible for the whole of plaintiff’s injuries, i.e., both for the pre-existing injuries and the injuries arising out of the accident in question.” The Court declined to do so, and instead “submitted a pre-existing injury instruction that has been regularly used by this Court.” The instruction provides:

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<sup>41</sup> *Id.* at p. 49, ¶7-18.

“If you find that the plaintiff had a condition before the accident between the parties, the plaintiff is entitled to recover damages for any worsening or aggravation of the condition resulting from the accident. This is true even if the condition made the plaintiff more subject to injury or someone else would not have suffered any substantial injury.<sup>42</sup> However, the plaintiff is not entitled to recover for any results that would have normally followed from the condition had there been no accident.” *Winder v. Frisby*, 1994 WL 45434 (Del.Super.1994).

Turning to the facts of this case, I find that in spite of any preexisting shoulder condition, the medical testimony establish by a preponderance that the October 30, 2001 accident contributed to plaintiff’s injuries. Benn concedes that there have been three occasions since June, 2000 where he sustained trauma to his right shoulder. First is the June, 2000 assault where he fell on his right shoulder and complained to his doctor that he was still experiencing mild pain from that fall eight months later. Second is the October, 2001 accident with May. Third is when Benn slipped while walking down the stairs in November, 2001, and grabbed the railing with his right arm so as to avoid falling. The core dispute lies in the extent of injuries suffered by each traumatic event, and specifically which of the three incidents caused the labral tear.

The November, 2001 slip while coming down the stairs was noted in Benn’s physical therapy records. In notations days following the slip, it is clear that Benn’s pain decreased. There was no indication that the physical therapy treatment needed to be changed or altered as a result of the slip, and no new medication was given to Benn as a

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<sup>42</sup> This principle is commonly referred to as the “eggshell skull” doctrine, which has recently been noted by the Superior Court in *Matusky v. Bonsall*, 2003 WL 262489 (Del.Super.2003). In that case, the plaintiff was involved in a car accident and sustained injuries, and a dispute arose as to the nature and extent of plaintiff’s preexisting injuries. The jury awarded plaintiff \$3,424.64, and plaintiff filed a Motion for a new trial or in the alternative, a Motion for Additur pursuant to Rule 59 of the Civil Rules Governing the Superior Court. The Court found that the jury’s verdict of \$3,424.64 was against the great weight of the evidence and that “the proper measure of damages requires compensation in amount of no less than \$65,000.00.” In so concluding, the Court granted plaintiff’s Motion for Additur subject to defendant’s written acceptance, and if defendant disagreed, then a new trial on damages only would be granted without further order of the Court. The Court noted a lack of argument “that any preexisting injuries were not aggravated” by the car accident in that case, and that the defendant ignored “that principle of tort law which mandates that a defendant takes a plaintiff as he finds her or him.”

result. No testimony has been presented to suggest that such a slip could have caused a labral tear. Regarding the June, 2000 assault, it is evident that Benn experienced some sort of ongoing pain, however Dr. Krasner's notations indicate that the pain was "mild" and did not prescribe medication to Benn nor did he feel that physical therapy would be appropriate. Benn did not return to Dr. Krasner with complaints regarding his right shoulder until immediately after the accident in these proceedings.

Dr. Crain performed an arthroscopic procedure and had the opportunity to explore the condition of Benn's labrum, which he found was torn. A torn labrum, Dr. Crain explained, was consistent with Benn's account of the car accident as well as with Dr. Crain's past experience in treating patients involved in similar car accidents. Even after learning of the June, 2000 assault and the November, 2001 slip, Dr. Crain pointed out that if either of these were the cause of the labral tear, Benn would have sought treatment much sooner. The medical records are consistent with this finding. Benn testified feeling sharp pain immediately following the collision, and went to Dr. Krasner only two days later complaining of pain in his upper right neck, back, and shoulder area. It was noted by Dr. Smith that Benn still experienced pain in his upper right shoulder in 2003. Dr. Crain testified that people with labral tears limit their activities and tend to deal with the pain until it gets to be unbearable. This is consistent with Benn's testimony and the notations in the medical records.

Dr. Crain testified that it is not unusual that Benn felt pain in both his upper right shoulder and his trapezius because the rotator cuff, the area that Dr. Crain found was "annoyed and aggravated" during surgery, is under the trapezius, and the labrum is located on the inside of this area. Benn's pain, according to Dr. Crain, is common. This

Court cannot reconcile Dr. Gelman's conclusion that a labral tear could not also cause pain in Benn's trapezius because the rotator cuff is located underneath the trapezius. Dr. Gelman admits basing his conclusion that Benn's surgery in 2005 was unrelated to the collision with May upon the lack of medical records notation for over three years prior to 2005. To the contrary, on five separate occasions such notations were documented. Dr. Gelman's best response to these notations was that any reference made to "shoulder" did not necessarily relate to impingement. However, this fails to explain that impingement was conclusively ruled out as a cause of Benn's pain. On balance I find the weight of the evidence supports Benn's claim regarding the basis of injuries. Dr. Crain spent extensive time treating Benn for his pain and injuries, and maintained during his deposition that the scuffing of the ball of the humeral head on the shoulder socket and labral tear were consistent with his experience in treating similar labral tears resulting from car accidents.

#### CONCLUSION

Accordingly, I award the following amounts: \$19,229.44 for the cost of Benn's medical bills, \$15,000.00 for his pain and suffering, and cost of these proceedings. Judgment is hereby entered for Benn in the amount of \$34,229.44, post-judgment interest at the legal rate, and costs.

SO ORDERED this 9<sup>th</sup> day of March, 2006

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Alex J. Smalls  
Chief Judge