

Held v Pike Co.

2013 NY Slip Op 34148(U)

March 6, 2013

Supreme Court, Erie County

Docket Number: 2010/233

Judge: Patrick H. NeMoyer

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At a Special Term of the Supreme Court, State of New York, County of Erie, City of Buffalo, New York on the 6th day of MARCH, 2013

STATE OF NEW YORK :
SUPREME COURT : COUNTY OF ERIE

JAMES M. HELD and
THERESA M. HELD,

Plaintiffs,

DECISION and ORDER

v.

INDEX NO. 2010/233

THE PIKE COMPANY,
AMTHOR STEEL, INC. and
CATHOLIC HEALTH SYSTEM, INC.,
Defendants.

FILED
2013 MAR -8 AM 10:39
CLERK'S OFFICE

APPEARANCES: JOHN F. MAXWELL, ESQ., and WILLIAM D. MURPHY, ESQ. for
Plaintiffs
JEFFREY D. SCHULMAN, ESQ., for Defendants

Plaintiffs commenced this action to recover damages for injuries sustained by James M. Held (hereinafter plaintiff, the patient, or Mr. Held; the claim of Teresa M. Held, plaintiff's wife, is derivative) as the result of a construction site accident of June 11, 2009. The site is owned by defendant Catholic Health System, Inc. (CHS), which had contracted the work -- the expansion of a hospital emergency room -- to defendant The Pike Company (Pike). Pike subcontracted the steel fabrication and erection work to defendant Amthor Steel, Inc. (Amthor) which in turn subcontracted the erection of the structural steel and decking to plaintiff's employer, Contour Steel, Inc. (Contour).

On the date of the accident, the then 28-year old plaintiff was engaged with Thomas Bannister, a fellow ironworker and co-employee of Contour, in laying steel decking at the roof level of the project. As the accident is described by plaintiff, he had been sitting down on an I-beam but stood up to walk along an I-beam in order to take a measurement. In so doing, plaintiff slipped on ultrasound gel allegedly left on the I-beam by others retained to inspect the structural steel weld at that location. Upon losing his footing, plaintiff initially struck his head

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and face on the I-beam, then rolled off the I-beam but clung briefly to it before losing his grip and falling some 14 to 16 feet to the level below. Plaintiff sustained injuries to his neck, arm, leg and face.

By decision/order granted January 11, 2012, this Court granted plaintiff's motion for summary judgment on liability against the defendants under Labor Law § 240 (1).

Thereafter, on the date scheduled for the commencement of a jury trial on damages, the parties agreed in open court to forego the taking of testimony in the matter and to instead submit the issue of damages to the Court for its determination on papers alone. The parties specifically stipulated to the admission/consideration of various certified medical records of plaintiff; the transcripts of the EBTs of plaintiff and his wife; and certain reports of the parties' respective experts. Such reports included that of the independent medical examination of Michael Landi, M.D., dated July 27, 2011; the supplemental IME report of Dr. Landi, dated January 30, 2013; "A Report of Losses Occasioned by the Disablement of James M. Held", prepared by Kenneth Reagles, PhD.; reports entitled "Future Life Care Costs For James M. Held" and "Economic Loss Validation For James M. Held," both prepared by Larry Lichtenstein, Ph.D.; an affidavit of William Capicotto, M.D., dated January 31, 2013; a December 16, 2012 report of Wilfred Carey, III, M.D., regarding a review of plaintiff's MRI cervical spine films; and the January 22, 2013 report of defendants' vocational consultant, Peter D. Capotosto, M.S., C.R.C. The Court accedes to the parties' stipulation to a trial-by-submission in the interest of judicial economy and with due deference to the power of civil litigants to "chart[] their own procedural course" (*Corsini v Corsini*, 224 AD2d 209, 210 [1st Dept 1996]) even to the extent of their stipulating away their evidentiary, common-law, statutory or constitutional rights (see *Mitchell v New York Hosp.*, 61 NY2d 208, 214 [1984]; *Doe v Marzolf*, 258 AD2d 970 [4th Dept 1999]; see also *Cullen v Naples*, 31 NY2d 818, 820 [1972]).

Upon its review of the following submitted materials, the Court highlights, considers, and

bases its ultimate conclusions on the following established facts or expressed opinions:

EBT of James M. Held -- April 21, 2011:

Plaintiff was born July 15, 1981. (Based on statistical tables, the Court finds that plaintiff now has a remaining life expectancy of 44.5 years and a work-life expectancy of 27 years.) As of April 21, 2011, plaintiff had been married to Teresa for a number of years and the couple had a 3½-year-old son and a 1½-year-old daughter.

In 2006, 2007 and 2008, plaintiff worked approximately 1500 hours per year as an ironworker. His wages, including significant union benefits, totaled \$47 per hour.

The accident occurred on June 11, 2009. Immediately after falling, plaintiff experienced significant pain in his left ankle, left leg and right wrist. He further felt significant pain from four broken or chipped teeth, his left eye was swollen shut, he had trouble breathing, and he experienced intense stomach pain and pain in his chest area. Plaintiff's immediate apprehension over being injured was heightened by the fact that his wife was pregnant with the couple's second child.

After the fall, plaintiff was taken to the Mercy Hospital emergency room (located next to the construction site), where he was placed in a neck brace, an air cast for his left ankle and a hard cast for his right wrist. Plaintiff also received stitches to close a lacerations to his chin and left shin.

Plaintiff immediately thereafter saw his family doctor, Darren Caparaso, who referred plaintiff to Dr. Andrew Matteliano, a physiatrist. Dr. Matteliano first saw plaintiff on June 23, 2009 and continued to see him through at least November 13, 2012. Apparently, Dr. Matteliano also referred plaintiff to an orthopedic surgeon, Dr. William Capicotto. Dr. Capicotto first saw plaintiff on November 9, 2009.

During plaintiff's first visit with Dr. Capicotto, the doctor discussed surgical options with plaintiff. Plaintiff was told, "If I had surgery I would probably never be able to ironwork again,

that tampered me." Plaintiff consequently decided to work as long as he could without surgery -
- "I mean what else am I going to do[?] I have a family to support."

Plaintiff attended physical therapy for about a year after the accident, approximately two
time per week for three hours per session, for rehabilitation of his wrist, ankle and neck.
Plaintiff was given a home exercise program that he continued through his April 2011 EBT.

After the accident, plaintiff also treated with Dr. Skormin, a dentist, for his two broken
teeth and two chipped teeth. As of April 2011, the teeth still caused plaintiff pain and difficulty
in eating. Plaintiff states he can never again eat corn on the cob or chicken wings or bite into
an apple. On occasions, cold weather or food causes pain in plaintiff's mouth, and his jaw can
swell when he lies down.

Additionally, plaintiff was treated by Dr. Paul Paterson of Excelsior Orthopedics for
complaints regarding his right wrist and left ankle. As of April 2011, plaintiff's right thumb joint
still hurt and his grip had been weakened.

During his April 2011 EBT, plaintiff rated his back pain at 7 out of 10. His pain is made
worse by sleeping in certain positions or working. Almost every activity, from playing with his
kids to working on his car, increases his pain. Plaintiff used to enjoy his vocation but now it is
toilsome. Plaintiff has been prescribed tramadol, Lyrica and hydrocodone for his pain but he
nevertheless cannot sleep due to the pain. He has feelings of depression but (as of April 2011)
had not been prescribed medication for depression.

Plaintiff was involved in a motor vehicle accident in 1997 as a 16-year-old; he was a
passenger in his father's vehicle, which was rear-ended. Various muscle issues stemming from
that accident resolved after a short course of physical therapy.

Plaintiff also was involved in a December 13, 2009 motor vehicle accident wherein his
truck was T-boned by another vehicle at a high rate of speed and rolled over two times.
Plaintiff's then two-year-old son was in the vehicle and was taken to the hospital for

observation. After his son was released from the hospital, plaintiff went to the Mercy Ambulatory Center where he was told (based on x-rays) that everything looked okay. Plaintiff did not feel any worse after that accident than he did beforehand.

EBT of James M. Held -- January 29, 2013:

Plaintiff initially returned to work as a union ironworker approximately one year after the June 11, 2009 work accident. He worked for four months before a seasonal layoff. Thereafter, plaintiff returned to work through his union hall, despite his continuing pain, and continued working until January 20, 2012. Plaintiff took hydrocodone every day after work for the pain, although the hydrocodone made him feel like he had a "hangover." Plaintiff could not do certain work-required tasks, such as climbing with his tool belt on. He further did not have the necessary strength in his right wrist and then, over time, his left arm went numb. Plaintiff ultimately decided to stop working in construction and undergo surgery after he dropped his wrench from an elevated work platform.

On February 6, 2012, Dr. Cappicoto replaced discs at levels C3-4 and C4-5 in plaintiff's cervical spine. Post-surgery, plaintiff was confined to a chair for one week. He thereafter went through an eight-week course of intensive physical therapy and continues to do exercises twice a day at home. Plaintiff further undergoes massage therapy one time per week.

Plaintiff has not returned to work since the February 2012 surgery. Since the surgery, the numbness in plaintiff's left arm has dissipated but he still experienced headaches behind his ear. Overall, the pain has decreased a little but nonetheless persists. He takes hydrocodone about twenty times per month for his pain. Plaintiff also now takes Celexa, prescribed by his family doctor, for depression.

That depression worsened in the spring of 2012, post-surgery, when plaintiff became very moody, sad and short-tempered. He felt stuck in the house, and he continually worried about money and his job prospects. Plaintiff's grandfather and father were ironworkers, but

plaintiff now understands that he needs a new career. He would like to go to college, perhaps for construction management or estimating.

Over the summer of 2012, plaintiff and his wife began marriage counseling.

EBT of Theresa Held -- January 29, 2013:

Since the accident, plaintiff has become moody and very irritable. Plaintiff's wife feels that plaintiff is not the same person he was before the accident; she believes that he feels he is less of a man. Plaintiff is less patient with his son than beforehand. Moreover, plaintiff's wife has observed plaintiff interact with the newborn daughter to a far less significant extent than he did with the couple's son at a comparable age.

Plaintiff's wife hears plaintiff complain less since the February 2012 surgery, but she is aware that plaintiff remains in pain and that the pain flares up in bad weather. Plaintiff is still moody. The wife feels that plaintiff's inability to work is a stress upon him and on their marriage. To the wife, plaintiff's status seemed the same both before and after the 2009 motor vehicle accident. Plaintiff's wife acknowledged that the work-related accident had negatively affected the couple's sexual intimacy, which the wife regards as an important aspect of the relationship.

December 19, 2012 report of K.W. Reagles & Associates Vocational Rehabilitation & Economic Consultation Services:

Dr. Reagles opines that plaintiff is precluded from carrying on the work of a journeyman ironworker and his previous work as a construction laborer, carpenter, roofer, sider and/or machine operator. Dr. Reagles notes the following functional limitations: 1) diminished ability to stand, walk, and traverse uneven/rough terrain; 2) incapacity to repetitively lift or carry more than 10 to 20 pounds or otherwise work more than light duty; 3) incapacity to push or pull heavy objects; 4) inability to ascend/descend ladders, stairs, scaffolding, ramps (inclines), poles, etc.; 5) difficulty with balance; 6) unable to repetitively kneel, crouch, crawl, and stoop; and 7)

diminished capacity to repetitively handle, finger and/or feel with his right hand.

It is Dr. Reagles' opinion, based upon the earnings history, that plaintiff's earning capacity in 2009 was \$59,631 per year plus fringe benefits. In Dr. Reagles' opinion, if plaintiff were to return to regular employment (i.e., after retraining, in a job that accommodated his physical limitations) his annual earnings (at the entry level) would range from \$30,000 to \$40,000 plus fringe benefits.

Dr. Reagles also expresses his opinion concerning a "Life Care Plan" detailing the cost of certain future health-related goods and services that will be required by plaintiff. (On January 7, 2013, Dr. Capicotto stated he had reviewed and was in agreement with the contents of Dr. Reagles' Life Care Plan.)

Reports of Larry Lichtenstein, Ph.D. and Economist:

Using a 3.91% per year growth rate in medical expenses, a 3.51% per year growth rate for prescription medication, and a 2.42% per year growth rate in non-medical expenses, Dr. Lichtenstein calculates that the total life care expenses will amount to \$948,347.

Using a 6.2% per year growth rate in medical expenses, a 4.86% per year growth rate in prescription medication, and 4.37% growth rate in non-medical expenses Dr. Lichtenstein calculates the total life care expenses at \$1,571,633.

Dr. Lichtenstein opines that plaintiff's past lost compensation is \$115,567. He opines that if plaintiff is unable to return to the labor force, his future lost compensation will be \$3,845,188. Dr. Lichtenstein alternatively opines that if plaintiff were to return to the work force by 2015, i.e., after suitable retraining, and were to earn \$38,245 annually, his past lost compensation would remain at \$115,567 but his future lost net compensation would amount to \$2,096,691.

Medical Records/Notes of William Capicotto, M.D.:

11/09/09 - initial evaluation - patient diagnosed with a C3-4 disc herniation with left C4 radiculopathy . . . he is a candidate for surgical intervention. Various surgical alternatives have been reviewed including . . . disc replacement at C3-4 and possibly C4-5.

12/15/09 - My concern is that although surgery should give patient a degree of relief of his neck and left upper extremity symptomatology, it might not allow him to return to the vigorous labor he performs as an ironworker.

4/21/10 - Patient has constant neck pain rated at 3/10. He has had improvement. He would like to return to work in a full-duty capacity on 06/07/10.

7/13/10 - Constant neck pain rated at 4/10.

11/02/10 - Constant neck pain rated at 5/10.

12/15/10 - Constant neck pain rated at 6/10.

3/07/11 - Constant neck pain rated at 5/10 . . . Lyrica has been added to his medication regime.

6/07/11 - Constant neck pain rated at 5/10.

9/21/11 - Constant neck pain rated at 5/10. The pain radiates behind patient's left ear, into the left shoulder and down the back of the left arm with numbness and tingling in the left upper extremity. He also notes left-sided occipital headaches.

11/08/11 - Constant neck pain rated at 8/10. Authorization requested for a C3-4 and C4-5 artificial disc replacement.

12/14/11 - Constant neck pain rated at 5/10.

1/17/12 - Constant neck pain rated at 7/10. Assessment: cervical disc herniation with myelopathy. Patient is scheduled for C3-4 and C4-5 total disc replacement on 2/06/12.

2/06/12 - Operative Report - Pre-op and Post-op diagnosis: 1) herniated disc C3-4 with radiculopathy; 2) herniated disc C4-5 with radiculopathy.

2/09/12 - Patient reports that he is improved following his surgery. He notes that his

arm pain has improved as well as his headaches.

4/10/12 - Pain rated at 2/10.

5/10/12 - Pain rated at 3/10.

7/10/12 - Pain rated at 2/10.

9/04/12 - Pain rated at between 2/10 and 3/10. At times, patient finds that certain positioning and repetitive use of his arms causes increased pain.

10/30/12 - Pain rated at 3/10.

Affidavit of William Capicotto, M.D. -- January 31, 2012:

3. I first saw Mr. Held on November 9, 2009 in my office. On that date I reviewed the report of an MRI of Mr. Held's cervical spine of July 22, 2009 and determined that Mr. Held was suffering from traumatic damages to the disc at both the C3-4 and C4-5 levels. At that time, it appeared likely that Mr. Held would require surgical intervention to address the cervical disc herniation.

* * *

8. It is my opinion to a reasonable degree of medical certainty that Mr. Held suffered no injury whatsoever to his cervical spine in the December 13, 2009 motor vehicle accident.

Records of Excelsior Orthopedics:

7/16/09 - Patient has right non-displaced scaploid wrist fracture and left ankle sprain following a work-related injury on 6/11/09.

7/22/09 - Patient is right-hand dominant. It does appear in fact that he has a non-displaced scaploid fracture. He will go back in a cast for another four weeks

9/21/09 - Patient's wrist fracture has healed. He will go into a removable splint and start therapy.

11/03/09 - Patient reports that his thumb feels like it "is jammed." There is thumb pain

and tenderness. Pain and tenderness is present at the CMC joint. Right thumb was placed in a spica cast.

2/03/10 - Patient states that he still experiences soreness in his wrist, with the pain ranging from a 1 to a 6 on a scale of 10. Patient has trouble with pushing up on his wrist and with the cold.

3/30/10 - Patient states that his wrist pain is intermittent.

9/20/10 - Patient states that his wrist is sore occasionally. The pain is a dull ache.

6/04/11 - Patient states since his last visit, his symptoms have remained unchanged.

His current pain level, on a scale from 0 to 10 is a 5

Records of Andrew Matteliano, M.D. Physical Medicine & Rehabilitation:

6/23/09 - Impression: . . . 4) closed head trauma with extensive facial bruising, laceration left mandible . . . 9) post-traumatic headache activity with episodes of dizziness, status post closed head trauma.

7/21/09 - Patient is still having the headaches . . . He is still having concussive symptoms.

8/17/09 - MRI of cervical spine 07/22/09 showing a left posterolateral disc herniation and some pressure against the left C4 nerve root.

9/15/09 - Patient continues with some episodes of dizziness and he is still having the headaches.

10/29/09 - Patient is still getting the post-concussive symptoms with continued headache activity.

11/23/09 - Patient continues with the headache activity and there have been episodes of dizziness but they do resolve quickly.

1/28/10 - Patient presented today for follow-up of severe pain in cervical region that radiated into the left trapezoid and into the left upper extremity . . . He also has complaints of

almost daily headaches, which are still related to the head injury that he received at the time of his accident.

3/04/10 - Pain continues in cervical region radiating into the left trapezoids and affects the left upper extremity . . . However patient still has periods when the ankle will "pop." He also continues to have occasional pain in the left knee.

5/26/10 - Chronic pain in patient's left arm, left shoulder, and the cervical region. He has been progressively improving.

7/21/10 - Chronic pain in patient's cervical region . . . He has returned to work and light duty - is available as an ironworker. He is working 40 hours a week which is impacting on his overall pain levels.

10/21/10 - Patient continues in moderate to severe pain in the cervical region that radiates into the left upper extremity. He has recently been working and his performance requires pushing and pulling that has definitely increased his pain levels and decreased his range of motion in the cervical region and left upper extremity.

1/13/11 - Patient presents today with moderate to severe pain in the cervical region. The pain remain at very light levels of 8 -9/10 He does continue to work and this really impacts on many of his activities. . . . he has a moderate partial permanent disability.

02/02/11 - Patient's pain level remain the same at an 8 -9/10. . . . He has chronic headaches as a result of the cervical pressure on the left C 4 nerve root. He also has herniation in the same area. He does continue to work. The pain impacts on his activities of daily living . . . He continues with tenderness behind the left ear, down the left cervical vertebrate region into the left trapizius and down into the left arm. He had exquisite tenderness in the upper thoracic region as well with multiple trigger points.

4/13/11 - The pain radiates into the patient's left arm and he now has some numbness and tingling and difficulty holding things with the left hand.

8/17/11 - Patient presents today for follow-up of pain in multiple areas from the cervical region, left side, left leg, left knee as well as the left and right cervical spine. His major complaint is that he has begun to develop muscle spasms in the neck on the left side that travel into the left shoulder and affects the left arm; this is a new finding.

10/05/11 - Report of Electro-Diagnostic Consultation Impression: Left median neuropathy at wrist level compatible with carpal tunnel syndrome, neuropraxia.

3/14/12 - One month ago, patient had two discs replaced in the cervical region with an anterior well healed incision. He is very satisfied with the surgery and feels the pain is much less since he has had the disc replacement.

6/14/12 - The patient is seen for treatment of pain . . . He has pain behind the ear on the left side of his neck that extends all the way down into the left trapexius and upper thoracic region. He has limited range of motion, headaches, numbness and tingling down into the upper extremities, depression and anxiety.

7/11/12; 9/11/12 and 11/13/12 - Goal: The goal is to reduce the levels of pain, maintain function and provide the ability to independently carry out activities of daily living.

Independent Medical Evaluation of Michael Landi, M.D. – July 27, 2011:

12/13/09 - Mercy Ambulatory Center - Patient states 2:00 p.m. involved in rollover MVC. Patient has generalized aches and pains, here for evaluation. Has a previous neck injury, states no new neck discomfort . . . Pain currently is 2 out of 10 on pain scale. . . . The patient sustained no obvious injury. Patient has herniated discs in neck from prior injury, no increased pain . . . The patient experienced no loss of consciousness . . . Impression: Myofascial cervical strain. Patient discharged to home in stable condition.

Conclusions: C 3-4 disc herniation/C 4-5 disc herniation . . . consistent with pre-existing degenerative disc disease and not related to the fall of 06/11/09.

Comments: . . . there is no causally related disability or permanency of the cervical

spine.

Independent Medical Evaluation Supplemental Report of Michael Landi, M.D. – January 30, 2013:

After review of additional records, the opinions set forth in the Independent Medical Evaluation of July 27, 2011 are unchanged.

Report of William Carney, III, M.D. – December 16, 2012:

Dr. Carney opines that Mr. Held had a pre-existing condition in his cervical spine prior to his fall. Dr. Carney does not see any findings to suggest acute trauma, and believes that Mr. Held's cervical spine disease represents degenerative changes as described.

Report of Peter D. Capotosto, M.S., C.R.C. – January 22, 2013:

Mr. Capotosto opines that Mr. Held is employable for jobs at the sedentary to (limited) light duty levels of employment, as follows:

The 12/19/12 report from Ken Reagles & Associates lists 14 occupations that probably reflect Mr. Held's earning capacity with a two-year degree in construction management or related field of study . . .

In my opinion Mr. Held can indeed be employable for each of the 14 occupations listed in that report.

Conclusions of Law:

The Court finds that plaintiff sustained various physical and emotional injuries in the fall of June 11, 2009 including but not limited to: a C3-4 disc herniation, C4-5 disc herniation, and C4 radiculopathy; left-side weakness; pain radiating into the left shoulder down to the left hand and fingers; a closed head injury with extensive facial bruising and lacerations; the loss of two teeth and two severely chipped teeth; repeated headaches; episodes of dizziness in response to posttraumatic activity; a fracture of the navicular bone of the right wrist; left knee sprain; left knee, ankle, and leg contusions; a left ankle sprain; pain, loss of motion, spasms, loss of

lordosis and tenderness of the cervical spine; acceleration of normal degenerative changes that take place in the cervical spine and right wrist; and depression and marital difficulties.

As a direct consequence of the June 11, 2009 work-related fall, plaintiff underwent disc replacement surgery at two levels of his cervical spine on February 6, 2012. Further as a result of the fall and surgery, plaintiff will be required to undergo a future spinal fusion surgery at the C3 to C5 levels.

In light of the above findings, the Court awards the following items of damages:

Past Medical Expenses: \$66,988 -- An amount stipulated to by the parties (assuming that the Court found such expenses to be related to the construction accident, which the Court does find).

Future Medical Expenses: \$277,000 -- The Court agrees with defendants that some of the expenses claimed by plaintiff, for such items as counseling or future physical therapy, appear to be speculative. Nevertheless, given plaintiff's 44.5 years of remaining life expectancy, the Court feels that an award in this amount is appropriate.

Past Lost Wages: \$115,567 -- The Court accepts the figure advanced by plaintiff's experts.

Future Lost Wages: \$750,000 -- Plaintiff has a remaining work life expectancy of approximately 28 years. The Court accepts defendants' vocational expert's conclusion that plaintiff can -- with training -- re-enter the labor force but inevitably would do so at a lower wage and fringe benefit level than he enjoyed as an ironworker.

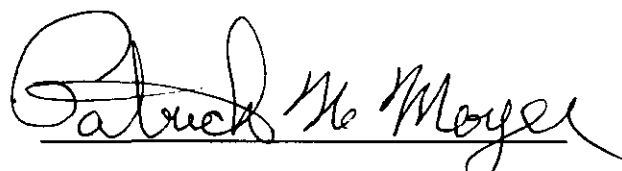
Past Pain and Suffering: \$400,000 -- The medical records support plaintiff's deposition testimony regarding the extent and duration of plaintiff's past pain and suffering, including his loss of enjoyment of life.

Future Pain and Suffering: \$1,200,000 -- Although the disc replacement surgery has

reduced it somewhat, plaintiff's pain has not been eliminated. Given the ongoing pain, the future need for surgery, the obvious loss of recreational and social activities, the limits upon plaintiff's interactions with his very young children, his depression, and the strain on his marriage, and in further light of his life expectancy of 44.5 years, such an award is appropriate.

Spousal Derivative Claim: \$140,000 -- The Court deems this amount appropriate in light of the young age of the children, the loss of plaintiff's child care and other household services, and the diminished sexual intimacy.

SO ORDERED:



HON. PATRICK H. NeMOYER, J.S.C.

GRANTED

MAR 06 2013

BY



KEVIN J. O'CONNOR
COURT CLERK